ANNOTATIONS INCLUDE VOL. 200

NORTH CAROLINA REPORTS

VOL. 44

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1852, TO AUGUST TERM, 1853,
BOTH INCLUSIVE

REPORTED BY
PERRIN BUSBEE

ANNOTATED BY
WALTER CLARK, 1899
(FURTHER ANNOTATIONS ADDED, 1931)

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OF THE

SUPREME COURT OF NORTH CAROLINA

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ATTORNEY-GENERAL:

MAT. W. RANSOM, ESQUIRE.

CASES REPORTED

CASES CITED

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CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1852

THOMAS ROOKS v. JAMES P. MOORE.

1. Turpentine trees are the subject of lease.
2. Where A. let turpentine trees to B., and was by the contract to receive a share of the crop made by him: *Held*, that A. cannot maintain trover for a conversion of the turpentine, before a division.

THIS was an action of trover, brought to recover the value of eight barrels of turpentine. On the trial before his Honor *Judge Caldwell*, at NEW HANOVER Special Court, in June, 1852, the case was as follows: The plaintiff being the owner of a tract of land on which were pine trees cut for the purpose of dipping turpentine, agreed with one Black that he might cultivate the trees and dip the turpentine, and have the boxes for a year, Black promising to pay him therefor one-fourth of the turpentine, and to apply the residue to the satisfaction of a debt for which the plaintiff was bound as his surety. During the year, and after Black had dipped out eight barrels, which were in the woods where they were filled, the defendant caused them to be seized under an execution in his favor against Black, and converted them. The plaintiff contended that, under the agreement, he had such property in the turpentine, as it was gathered, as entitled him to maintain trover for it, Black being a mere laborer for him. His Honor thought otherwise, and instructed the jury that it was a case of renting, in which none of (2) the turpentine was the property of the plaintiff until after a

division; and Black's undertaking to make a certain application of the proceeds, did not alter the case. There was a verdict for the defendant, rule for a new trial discharged, and the plaintiff appealed.

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

PEARSON, J. If Black was a hireling, whose wages were to be paid by an allowance of a certain part of the turpentine made by him, then the whole of the turpentine belonged to the plaintiff, until he delivered over to Black his share as wages.

If Black was a lessee of the trees for one year, and, by way of rent, was to deliver to the plaintiff one-fourth of the turpentine made, then the whole belonged to Black until he delivered over to the plaintiff his share as rent.

The case states, that the "plaintiff agreed with Black that he might cultivate the trees and dip the turpentine, and have the boxes for a year; and Black promised to pay him therefor one-fourth of the turpentine." This is clearly a lease for one year, provided turpentine trees can be leased. That is the question in the case.

The authorities cited in Bacon's Abrid., titled, "Leases and terms for years," leave no doubt on this question. So, under title, "Ejectment," it is said ejectment lies *pro prima tonsura;* that is, if a man has a grant of the first grass that grows on the land every year, he may recover in ejectment; for the first grass, or *prima tonsura,* is the best profit, and, therefore, he that hath it shall be esteemed the proprietor of the land itself—for the after grass, or feeding, is in the nature of commonage. So, ejectment lies *pro herbagia,* because the herbage is the most signal profit of the soil, and the grantee hath a right at all times to enter and take it. But ejectment doth not lie *de pannagio,* "because this is only the masts that fall from trees, which the swine feed on, and not part of the soil, as the herbage is." These positions are settled by many cases there cited.

It may be that the privilege of picking up pine knots, to be burnt into tar, has the same relation to the right of cultivating the
(3) trees for turpentine that *pannagio,* or the privilege of taking the mast that falls, has to the right to take the herbage. However this may be, it is clear that the right to cultivate the trees for turpentine is the "most signal and best part of the land," fit for that purpose, and consequently, he that hath it is esteemed the proprietor of the land, for the time necessary to cultivate and take it away; and the right to bring ejectment implies that it is the subject of lease.

It was said by Mr. Bryan, that the plaintiff and Black were tenants in common. We did not clearly see the ground upon which he took this position; but even if it were so, the plaintiff cannot maintain trover; for to maintain that action between tenants in common, it is necessary to show a destruction of the property, or some act tantamount to a destruction. Here there was a mere conversion by the defendant, claiming under Black.

PER CURIAM. Judgment affirmed.

Cited: Denton v. Strickland, 48 N. C., 63; *Powell v. Hill,* 64 N. C., 171; *Shearin v. Rigsbee,* 97 N. C., 220.

NEHEMIAH TINDELL v. MIAL WALL.

1. The service of an attachment in the hands of a garnishee, creates a lien on the debt or money due by him to the debtor, so that he cannot, by payment to the debtor, subsequent thereto, discharge himself from liability.
2. Therefore, where the garnishee, in his garnishment, admits his indebtedness to the defendant in the attachment, and subsequently thereto his agent pays the debt so admitted to be due by him, the plaintiff is nevertheless entitled to have the debt condemned in the hands of the garnishee to satisfy his demand.
3. Nor is it any defense to the garnishee, that before he was summoned, his agent had notice from a third person not to pay the debt, as the plaintiff had threatened, or was about to sue out an attachment.

THE defendant was summoned as garnishee on 24 December, 1849, under an attachment of the same date, sued out at the instance of the plaintiff against one Henry Adcock, residing in Mississippi, and returnable to the January Term, 1850, of ANSON County Court. The defendant, in his answer, stated in substance: That he was indebted to Adcock in the sum of $150; but that on 8 November preceding, his brother, Edwin Wall, also a resident of Mississippi, being then about leaving for that State, agreed with him to pay Adcock the said debt, on his return there. He further states in his amended (4) answer in the Superior Court, that he did not, from that time, see or hear from his brother until about April, 1850, when he returned to Anson, and brought him his note to Adcock, and informed defendant that he had paid it off in March, 1850, in pursuance of their arrangement the fall before; that the payment to Adcock by his brother was made without any other direction from defendant than that given in Novem-

ber, 1849, and that he was informed by him, and believed that the payment was made by his brother, without any knowledge of the attachment being sued out by the plaintiff, or of the defendant being summoned as garnishee. The defendant further stated that he had been informed by his father, James Mials, that he wrote to Edwin Mials, in Mississippi; that the plaintiff threatened suing out an attachment against Adcock, and not to pay the debt to Adcock; but of this letter the defendant had no information, until summoned under the attachment.

On the trial before *Caldwell, J.*, at Anson Superior Court, on the last circuit, several issues were submitted to the jury, to which they responded by their verdict: (1) That the debt of $150, due from Mial Wall to Adcock, was paid to said Adcock by Edwin Wall, of Mississippi, on 11 March, 1850; (2) that Edwin Wall had no notice from Mial Wall that he had been summoned as garnishee at the instance of the plaintiff in the attachment against Adcock; (3) that said Mial Wall did not, after he was summoned, countermand the payment to Adcock by Edwin Wall, before the payment was made in Mississippi; (4) that Edwin Wall had no notice that plaintiff had sued out the attachment against Adcock before he made the payment as aforesaid; but that he had notice from a third person before he made the payment, that the plaintiff spoke of taking out an attachment; (5) that Mial Wall had sufficient time to countermand the payment of $150 made by Edwin Wall to Adcock, between the service of the garnishment and the payment of the money by Edwin Wall to Adcock. In addition to the finding by the jury, it was admitted by the parties, that the single bill held by Adcock against Mial Wall was negotiable paper in Mississippi, and that it was there paid by Edwin Wall to Adcock, as agent of Mial Wall.

Upon the verdict, his Honor gave judgment for the plaintiff
(5) against Mial Wall for the amount of the plaintiff's debt, on which judgment had been theretofore obtained, and the costs of suit, and the defendant appealed.

Strange for plaintiff.
J. H. Bryan for defendant.

NASH, C. J. The question in this case arises under the garnishment of the defendant. The defendant was indebted to one Adcock, who lived in the State of Mississippi, and Adcock was indebted to the plaintiff, who sued out an attachment against him, and the defendant was summoned as garnishee. In his answer, the defendant admitted his indebtedness to Adcock, but stated that before the attachment issued, he had directed his brother, who was indebted to him, and lived in Mississippi,

to pay Adcock his debt; and that he was informed by his brother that he had paid it over to Adcock on the 2d Monday of March, 1850. Upon the trial of the garnishment, several issues were submitted to the jury, to all of which they responded in their verdict; and find that Edwin Wall, the agent of defendant, paid the money to Adcock on 15 March, 1850, at which time he had no notice from the defendant of his being summoned as a garnishee in the case, and that the defendant had sufficient time, after his being summoned as such garnishee, to have countermanded his authority given to his agent to make such payment. They further find that before the payment was made by the agent of the defendant, he, the agent, had been informed by a third person, that the plaintiff, Tindell, threatened to take out an attachment against the property of the said Adcock, in Anson County. Upon this finding, the court gave judgment for the plaintiff. In this judgment we perceive no error. At the time the defendant was summoned as a garnishee, he was indebted to Adcock in a sum sufficient to discharge his claim against the latter. The attachment issued on 24 December, 1849, and he was summoned the same day. The attachment created a lien upon the debt of money due from the defendant to Adcock, so that the defendant could not, by any payment to Adcock subsequent thereto, discharge himself from his liability to the plaintiff in the attachment. It was his duty to have immediately countermanded the authority (6) given to his agent. He failed to do so, although he had sufficient time to have done it. If he has to pay the money a second time, it is the result of his own negligence. The information which the jury find was given to the agent, that the plaintiff threatened to take out an attachment, was no countermand of the authority given to him to make the payment, and cannot interfere with the plaintiff's right to a judgment condemning the debt for the payment of his judgment.

PER CURIAM. Judgment affirmed.

STATE v. LEVI, A SLAVE.

1. Upon the conviction of a slave, under the 48th section of 111th chapter of Revised Statutes, the owner, and not the hirer, is liable for the costs of the prosecution.

2. The case of the *State v. Mann*, 13 N. C., 263, cited and approved.

THE prisoner was indicted at CASWELL, at the Fall Term, 1851, for burglary, of which, upon his trial, he was acquitted; but was found guilty of grand laceny. In the bill of indictment, he was charged to

be the property of George Williamson, who was duly notified to come forward and defend him. It was proved that said Williamson was his owner, but during that year he had hired him to one John F. Wagstaff, who also had notice to appear and defend the slave. After sentence was pronounced against the slave for the offense of which he was convicted, his Honor, *Judge Ellis,* gave judgment against the said Wagstaff for the costs of the prosecution, from which he appealed to the Supreme Court.

Attorney-General for the State.
Miller for defendant.

BATTLE, J. The authority upon which his Honor proceeded in giving the judgment from which the appeal is taken, is to be found in the 48th section of the 111th chapter of the Revised Statutes. The section provides, that, "when a slave shall be apprehended for any
(7) offense, the punishment whereof may affect life, member, or limb, it shall be the duty of the sheriff, and he is hereby required, to serve the owner of such slave, if known, with notice of the trial ten days previous thereto (which notice shall be proved to the court), in order that the owner may have an opportunity of defending said slave"; and it then goes on to declare, that all costs attending the trial of such slave shall, in case of his conviction, be paid by the owner or owners. His Honor must have supposed that the temporary hirer was the owner, within the meaning of the statute, and in that, we think, he erred. We are not aware of any adjudication upon the point, but upon a proper construction of the act, we think the permanent owner, and not the mere hirer for a year, was the person intended. There can be no doubt that the owner, who is to pay the costs in case the slave be convicted, is the same person upon whom the notice of trial is directed to be served. Upon whom, then, is that to be? Certainly the one who has the greatest interest in the life, member, or limb of the slave who is about to be tried. The very reason given in the statute for ordering a notice to be served, shows that the Legislature desired to act with justice to him whose property might be affected by the result of the trial, and with humanity towards the slave, whose life or limbs might be in jeopardy. Such being the manifest object of the Legislature, it is reasonable to suppose that it intended to notify the person who would most probably attend to the monition, and not one whose interest in the slave would be so slight that he would most likely be unwilling to incur the trouble and expense of a defense. That this is a proper construction of the enactment in question, is more clearly shown by a reference to other sections in the

same chapter, and to the sections 75, 79, and 84 of the 34th chapter of the Revised Statutes. In the 19th and 45th sections, the former of which points out the mode by which the proceeds of the sale of a runaway slave may be recovered, and the latter prescribes that in the county and Superior Courts, a slave shall be entitled to trial by a jury of freeholders, who shall also be slave owners, it is obvious that none but permanent owners were meant, and, therefore, no other word than "owners" was used to describe them. But in the 26th section, where the policy was to make any person who had slaves in his employment liable for their depredations, if they were not well (8) clothed and fed, the words, "master, owner, or possessor," are employed. So, in the enactments relative to trafficking with slaves, and sending slaves to hunt in the woods with a gun in the night, by firelight, the terms used are, respectively, "owner or manager," chapter 34, section 75—"owner, overseer, or employer," same chapter, section 78—and "master or the person in whose service the slave may be," same chapter, section 84. Thus we see, then, when the Legislature intended to embrace, in any enactment, persons other than the absolute owners, having slaves in their service or employment, it used suitable words to designate them, and to distinguish them from such owners. We think, then, that the conclusion is a fair one, that when the term "owners" only is used, it means the absolute owners in contradistinction to the mere hirers or temporary owners.

In coming to this conclusion we have not overlooked the case of *S. v. Mann,* 13 N. C., 263, referred to by the Attorney-General. That case decided, only that one who has a right to the labor of a slave, has also the right to all the means of controlling his conduct, which the owner has; and like the owner, cannot be indicted for a mere battery upon him. That principle no more entitles the hirer to all the rights, and imposes upon him all the responsibilities of the owner, than does the principle which makes a schoolmaster stand, in some respects, *in loco parentis,* make him so stand in all respects.

The judgment against Wagstaff must be reversed, which must be certified to the Superior Court of law for the county of Caswell, in order that that court may proceed to give judgment for the costs of the prosecution of Levi against his owner, George Williamson.

PER CURIAM. Judgment reversed, and ordered accordingly.

(9)

STATE v. ABRAM M. WEAVER.

The 12th section, 34th chapter Revised Statutes, in regard to the offense of taking and conveying a free Negro out of the State, with intent to sell him as a slave, includes only cases in which the taking is by violence; and does not extend to cases where the Negro is induced to go by persuasion, seduction, or deception.

THE defendant was indicted, under the act of Assembly (chapter 34, section 12, Revised Statutes), for taking and conveying a free Negro named Jim Corn, out of the State, with intent to sell him as a slave. The indictment contained several counts, in which the taking and conveying away were differently laid—to be by "violence," by "seduction," by "persuasion," by "deception." On the trial before his Honor, *Judge Ellis,* at SURRY, on the last fall circuit, the evidence for the State was substantially as follows: John Brown testified that in the spring of 1848, the prisoner proposed to join him in a trip to Stokes Court, for the purpose of trading—the prisoner to furnish the wagon, and the witness the horses. They started off to Germanton, he having fish in the wagon, and the prisoner guns. While camped at Robertson's branch, one Robertson came and asked prisoner if the free Negro, Jim Corn, was going with him on a trip over the mountains. Prisoner said, not to his knowledge. Robertson then remarked that he had seen Jim Corn a few hours before, and he said he was going with the prisoner on a trip over the mountains. The prisoner then said there had been some talk about it, but if Corn wanted to go, he should not sleep in the wagon. They, witness and prisoner, went on to Germanton next day. Not being successful in trading, the prisoner proposed to go to Mount Airy, and over the mountains. To this witness assented. Prisoner proposed that they should take Jim Corn with them to wait on them, but witness objected, there being but a one-horse wagon and two of them, and that they would have no use for him. The prisoner finally agreed to pay the expenses of the boy on the road, and witness, on these terms, agreed that he might go. They all went on together with the wagon from Stokes County, through Surry, and out of that county into Virginia. They traveled along the usual public road, and in an open manner. There was no attempt to conceal the boy, Corn. On the road, after they had
(10) passed into Virginia about fifty miles, Corn gave the witness some insolence, when the latter gave him a blow which knocked him down. The prisoner told him not to abuse the boy, that he intended to put him in his pocket before he got back. This was said in a jocular way, and the witness so regarded it. At another time, after

this, when the boy fell behind on the road, prisoner said he was afraid the boy would go back—that he intended to put him in his pocket before he got back. The witness considered this a jocular remark. They went together to Burk's Garden, in Virginia, to the house of one Lowder, with whom the prisoner had some talk, and with whom he rode off, and returned with another man. Suspecting that the prisoner intended to sell the boy, Jim Corn, the witness took his horse from the wagon and returned to North Carolina. He left the prisoner, Corn, and a man named Orfall at Lowder's, in Virginia; had never seen Corn since. He told Levi Stafford of the occurrence soon after he returned. Evidence was also offered of the prisoner's confessions of having sold the boy, Corn, in Virginia, and connecting Corn with the prisoner in traveling together from the county of Stokes, where Corn lived, on to the Virginia line.

The prisoner's counsel contended that the act of Assembly was inoperative, for the reason that it contemplates that a part of the transaction constituting the offense must take place in another state. (2) That actual violence is necessary to be used as a means of taking him from the State, and no such violence was proved. (3) That the taking was from the county of Stokes, and that the county of Surry had no jurisdiction of the offense.

His Honor was of opinion that the statute was sufficient to prohibit the taking of free Negroes from the State, under the circumstances there specified. That although there was no evidence of violence used in taking the Negro from the State, any means equivalent to actual violence, as deception, seduction, and persuasion, would meet the requisitions of the statute. That although the Negro may have been taken from Stokes County, yet if the prisoner passed with him through Surry County, and from thence immediately into the State of Virginia, that would be a sufficient taking in Surry. His Honor instructed the jury, that if the free Negro consented to go, and be sold by the prisoner, this consent would deprive the act of its criminal char- (11) acter, and it would be no offense. But if the prisoner took the free Negro from Surry County into Virginia by practicing a deception upon him—as that he was to go simply on a trip over the mountains, or by similar means, with the intent to sell and dispose of him, he would be guilty. That the taking must be with the intent to sell and dispose of, and that it must be from this State to Virginia. The prisoner's counsel insisted that there was not evidence of an intention to sell the free Negro, entertained by the prisoner before he left this State. His Honor then charged the jury, that if they believed the prisoner sold the Negro, Jim Corn, into slavery, in the State of Vir-

ginia, this fact, and the other circumstances in the case, were evidence to be considered by them on the said question of intention, and from which they might find said intention on the part of the prisoner, whilst in North Carolina.

The jury returned a general verdict of guilty. The prisoner's counsel moved for a new trial, on the ground of error in the instructions as specified; and also moved in arrest of judgment; both of which motions were overruled, and sentence of death being pronounced upon the prisoner, he prayed an appeal to the Supreme Court, which was granted without security, it appearing that he was insolvent, and unable to give bond.

Attorney-General for the State.
J. H. Bryan and Morehead for prisoner.

PEARSON, J. There was no evidence that the free Negro was taken and conveyed out of this State by violence; but his Honor was of opinion, that the statute embraced cases where the object was affected by "deception," "seduction," or "persuasion"—in other words, that the statute embraced cases in which fraud is the means used, as well as cases where force is resorted to.

The original act was passed in 1779. This is the first time a construction has been called for, in reference to the section in respect to free Negroes; whereas, its fellow, the section in respect to slaves, has been very frequently before the Court, and has given rise to much refinement and subtle disquisition. For the purpose of avoiding
(12) this, we pass over several points which have been presented, and confine ourselves to the duty of endeavoring to fix a construction, so far only as is necessary to the decision of the case before us.

The court below erred in extending the statute to cases where fraud is the means used. The statute creates a felony only where a free Negro is, by force, taken and conveyed out of the State, with an intent to sell him as a slave. The 10th section, Revised Statutes, chapter 34, in regard to slaves, and the 12th section, in regard to free Negroes, re-enacting the act of 1779, are expressed in the same words, with these exceptions:

1. The former has the word, "steal"—the latter omits it; why? Because free Negroes are not property, and, therefore, not the subject of larceny.

2. The former has the word, "seduction"—the latter omits it; why? This is the point upon which the construction turns. The former uses the words, "violence or seduction," the latter uses the word, "violence,"

and leaves out "seduction." It cannot, therefore, be construed, as if the word, "seduction," had not been left out, without considering the omission as a mere act of negligence, which would be indecent. It is certain, "seduction," used in the one section to denote means of fraud, as distinguished from force, is not used in the other. Consequently, the two sections do not admit of the same construction.

The idea, then, suggests itself, why should there be a difference? In the language of my Lord Coke, "this is the very lock and key to set open the windows of the statute." The former is for the protection of the owner of a slave, the latter for the protection of the free Negro. The injury to the owner is the same, whether his property be taken away by force or fraud. It is otherwise in regard to a free Negro. As a subject of the State, he has a right to expect protection against force; but if he yield to seduction or persuasion, or allows himself to be beguiled by fraud, and of his own accord goes out of the State, it is his own folly. And although he has the protection of the State, and can bring an action for damages, he has no right to call for protection by the use of the strong arm of the criminal law, when he consents to the act, and does it of his own folly.

The construction of a statute which uses the word "violence," and omits "seduction," which is used in a section immediately preceding, must be strained, if it is made to take in a case of (13) seduction, or persuasion, or deception, or any other term used to denote fraud, as distinguished from force. A parallel case is that of rape. Females are protected against force by making the act felony; but if the object is effected by seduction, persuasion, or deception, it is her own folly—her misfortune.

3. The former uses the words, "take or convey away"; the latter, "take or convey out of this State into another." Why? The former was intended to protect the owner of a slave from any felonious taking or carrying away of his property. The latter was more sparing in the creation of a new felony, because, if a free Negro is taken by force and carried from one part of the State to another, so long as he is left in the State, his remedy by action is deemed a sufficient protection.

4. The latter omits the words, "or with an intent to appropriate to his own use." Why? We suppose, for the reason that it was not considered probable that any one would, by violence, take a free Negro and carry him out of the State with an intent to make him a slave, and keep him in his own employment. The danger apprehended was the intent to sell him as a slave; and the statute is therefore restrictive to the end which was apprehended. This difference is noticed, simply for

the purpose of contrasting the two sections, whereby it will appear that the words are precisely the same, except when it was intended to make a difference.

The statute uses the expression, "or by any other means." What effect is to be given to this? It is used in both sections, and signifies any other means of a like kind, in the sense of "otherwise." There is a clear authority for this construction in regard to statutes concerning the right of property; *a fortiori,* it must be so, in regard to a statute creating a new felony. Dwarris on Statutes, 778, 4 Rep., 3. "Violence" is a general term, and includes all sorts of force. Any other means of a like kind, adds nothing to the meaning, and is surplusage, or a generality, thrown in *ex abundante cautela.* So, the 10th section, having provided against stealing, and taking and conveying away by violence or seduction—that is, by force or fraud—covered the whole ground; and the expression, "by any other means," is mere surplusage.

(14) The idea of taking and conveying away a slave, considered as property, or a horse, or a dog, by seduction, as distinguished from laying hands on them, is intelligible; for they may be tolled or enticed away, and the injury to the owner is the same as if it were done by force. But how a free Negro, who is an intelligent being and a free agent, can be taken and conveyed out of the State unless force is used in taking him, cannot well be conceived. Taking, unless used in the sense applicable to property alone, cannot be applied to a free agent, so as to exclude the idea of force, as the very word imports force; and so, taking and carrying a free Negro out of the State, by seduction or persuasion or deception, are incongruous terms; and hence the omission of the word seduction, in the section concerning free Negroes.

If this section includes fraud, it necessarily extends to all kinds of fraud. Consequently, if one, by a bare falsehood, induces a free Negro to go out of the State, and there is the intent to sell him as a slave, the felony is consummated the instant the Negro crosses the line; for it is not necessary that he should be actually sold as a slave, the intent being the gist of the crime. So, there is not only a new felony created by the statute, but a new species of felony, depending upon the thought and not the deed—a felony, without any overt act. Such a construction would violate all of the analogies of our criminal law, which, to constitute treason or felony, requires some outward, visible act, about which there can be no mistake; and does not allow the life of a citizen to be forfeited, merely for using words, no matter what may be the intent.

It struck his Honor, that a construction including all sorts of fraud, as well as force, was too broad; and hence he was inclined to make an exception, where the free Negro was privy to the intent, and consented

to go and be sold as a slave, under the expectation of sharing the spoils. The necessity for making this exception concedes the whole question of construction. The statute is first to be added to, by inserting the word seduction, and then by adding a proviso, that if the free Negro was privy to, or had reason to believe the intent was to sell him, then, and in that case, it should not be a felony within the meaning and purview of the statute, unless he was taken and conveyed out of the State by violence. The statute contains no such proviso. If it extends to fraud at all, it includes all cases of fraud. The court has no right to make any exception; and yet it is conceded that it could not (15) have been the intention to include a case of fraud, where the free Negro is privy to the intent, and the bait or means of seduction held out to him is, that he should have a share of the spoils. A false promise of this kind is the means of seduction that would most frequently be resorted to; and surely a wretch who would listen to it, has no right to call for protection.

The necessity for making an exception proves that this statute does not include cases of fraud. It could not have been the intention of the framers of the statute to make the life of a prisoner depend upon his being able to prove that the free Negro was privy to, or had notice of, the intent.

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

WILLIAM BARNES v. MATILDA HARRIS AND HENRY NANCE.

1. A plaintiff cannot convert an action founded on contract into a tort, so as to charge a *feme covert* defendant. To do so, the tort complained of must be an actual trespass.

2. Therefore, where the plaintiff hired to the wife of A. a horse, she acting as agent for her husband, and the horse was injured by immoderate driving, and the action was brought against the husband and wife jointly, but abated by his death as to the former: *Held*, that the action does not survive against the wife.

THE plaintiff declared in tort, arising out of a contract of bailment. Plea, general issue. On the trial before *Caldwell, J.*, at Spring Term, 1852, of ROCKINGHAM Superior Court, the case was as follows: The defendant, Matilda Harris, the wife of Jesse Harris, borrowed from plaintiff a horse to drive to Wentworth, distant some fourteen miles, on her husband's business. The horse was injured by the hard driving and

overloading the vehicle in which it was driven. Several witnesses testified to the direct injury done to the plaintiff's horse, and the length of time he was deprived of the use of it. The suit was brought against the said Jesse, as well as the other two defendants, but it was allowed to abate, on his death, as to him.

The only question in the case was as to the liability of the
(16) *feme* defendant; and on this his Honor, the presiding judge, charged that it was the contract of the husband, and that the wife could not be made liable, by electing to sue her in tort. The jury returned a verdict for the defendants accordingly, and judgment being rendered thereon, the plaintiff appealed.

J. H. Bryan for plaintiff.
Miller for defendant.

NASH, C. J. The action was commenced against Jesse Harris and wife, the present defendant, Matilda Harris, and against Henry Nance, the other defendant. Jesse Harris is dead, and the suit abated as to him; and the only question raised by the bill of exceptions is, can it be carried on, or survive against the wife? On the part of the plaintiff, it is admitted that in the contract of bailment, Mrs. Harris was the agent of her husband, and on it she is not liable; but it is sought to subject her by deserting the contract, and suing in tort, upon the ground that a *feme covert* is answerable for her own personal trespasses, and may be sued with her husband, and that if he die pending the action, the suit will not abate as to her. The principle is correct in the abstract, and if the facts set forth in the case amount to such a trespass on her part, then the suit is properly prosecuted against her. All persons are liable for their own tortious acts, unconnected with, or in disaffirmance of, a contract. Thus, though an infant cannot be sued upon his contract, except for necessaries, yet he is liable in damages for an assault and battery, and for his slander; but a person cannot, by changing his form of action, charge him for a breach of contract, as for negligence or immoderate use of a horse. *Jennings v. Rundall,* 8 Term Rep., 335. In that case, the immoderate use of the horse, which was the gravamen of the plaintiff's claim, and which had been hired to the defendant, who was an infant, was strongly urged as being a tortious act, which would sustain the action. It was decided that the plaintiff could not recover, because the cause of action grew out of a contract, for a breach of which no action could be sustained. If this were not the law, the protection thrown around infants, would in many instances be fruitless. A married woman is not personally liable for her contracts

of any kind; but if she commit an actual tort, she is liable, and (17) may be sued jointly with her husband; but it must be an actual tort, as an assault and battery, and not a constructive one, arising from ignorance and negligence. Coke Lit., 180, B. n., 4. It is admitted in this case, that in borrowing the horse from the plaintiff, she was acting as the agent of her husband; and, therefore, the attempt is made to charge her in tort. Two tortious facts are alleged—the one overloading the vehicle, and the other immoderate driving. We understand from the case, that she both loaded and drove the vehicle. Do both or either of these acts amount to such an actual trespass, as to subject her to an action? We are very clearly of opinion they do not. Both the overloading and immoderate driving were acts of negligence or want of skill. In the case of the infant, we have seen that immoderate driving was not such a tortious act, as subjected the defendant to an action of tort. Why should it in a *feme covert?* Neither was answerable upon the contract, and both are answerable for an actual tort. The case discloses no act of the defendant, Matilda, amounting to such a tort. It is not shown that she struck the horse a blow on the ride. If she had beaten him with a club, or cut him with a knife, whereby he was injured, or his owner deprived of his services, she would have been answerable—and for an actual tort. We see no error in the judgment, and it is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Burnett v. Nicholson, 86 N. C., 99; *Morris Plan Co. v. Palmer,* 185 N. C., 117.

ELIZABETH WINSLOW ET AL. v. JESSIE COPELAND, ADMINISTRATOR.

Where, by marriage articles, the power of appointing the estate by will is given to the *feme,* and no disposition of the same is made by the parties, in default of such appointment: *Held,* that a will, made by her before the marriage, will be revoked thereby, under the provisions of the act of 1844-'5, chapter 33, section 10.

THIS was an issue of *devisavit vel non.* The plaintiffs filed their petition in the county court, praying to have a paper-writing, purporting to be the last will and testament of Elizabeth Copeland, the defendant's intestate, admitted to probate. The petition set forth (18) a marriage contract between the defendant and his intestate, then

Elizabeth Newby, dated 27 March, 1848, in which among other things, it was covenanted between the parties, that "she shall from time to time, and at all times, whether she be sole or covert, have the right of making any last will and testament, or an appointment in writing, disposing of the property conveyed," etc. On 4 April following, she executed the paper-writing in question, and the marriage took place two days afterwards; and she died in 1851, her husband surviving, who administered on her estate. The defendants, in their answer, admit the facts as stated in the petition, but insist that the paper-writing cannot be admitted to probate, inasmuch as it was made before the marriage, and was thereby revoked. Upon this state of the pleadings, the case was argued by counsel before his Honor, *Judge Dick,* at NORTHAMPTON, at Fall Term, 1852, who, being of opinion that the marriage revoked the will, refused to admit it to probate; and from this decision the plaintiffs appealed.

Barnes, with whom was *Moore,* for the plaintiffs, argued: (1) The act of 1844 was intended to prevent fraud upon marital rights. This was not a case of that character. (2) The stipulation is express, and the husband cannot be heard to deny the will, and violate the agreement; for, if he succeed, he will be but a trustee for the appointees. The will is protected by the power contained in the agreement. (Sugden on Powers, 194; 15 Law Li., 104.) The articles were, that "she might at any and all times make a will, whether sole or covert." One may waive a right conferred by the law, but when once waived, it cannot be recalled to another's injury. In *Hodsden v. Lloyd,* 2 Br. Ch. R., 535, the will was revoked, because not protected by the power. He referred also to *Duke Marlboro v. Lord Godolphin,* 2 Ves. Sen., 60, and *Hooks v. Lee,* 42 N. C., 83.

Bragg, contra. The will was revoked by the marriage. (Act of Assembly, 1844.) See Stat. Vic., chapter 26 (of which ours is a copy), to be found in Jarman on Wills, 753. Construction of Eng. Statutes as to revocations, 1 Jarman, 114. 1 Will. on Exr., 112. No agreement that a will shall not be revoked will prevent a revocation. Such provision is void, being against an express provision of law. (*Doe*
(19) *v. Staple,* 2 T. R., 684.)

BATTLE, J. The pleadings, which seem to have been carefully and well prepared, according to the mode pointed out in the case of *Whitfield v. Hurst,* 31 N. C., 170, present for decision two questions: First, whether the articles executed by and between Jesse Copeland and Eliza-

beth Newby and their trustee, prior to their intermarriage, conferred upon the *feme* a power to make an appointment of the property therein mentioned, by a will made and published before the marriage? Secondly, if such power were given, did the marriage revoke the will made previously thereto?

We deem it unnecessary to express any opinion upon the first question, because we are entirely satisfied that if the will was properly made, by virtue of a power of appointment conferred by the marriage articles, it was revoked by the subsequent marriage by force of the 10th section of our act of 1844, chapter 33. That section declares, "that every will, made by a man or woman, shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed, would not, in default of such appointment, pass to his or her heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions." By referring to the marriage settlement, which confers the power of appointment in this case, it will be seen that the will in question is not saved from the operation of the act; for, in default of appointment, there is no disposition of the property, either real or personal, and it would of course devolve the real upon her heir and the personal upon her husband as her administrator, if he survived her, or upon her next of kin, if she survived him.

But the counsel for the plaintiff contends, that this case is not affected by the statute, which, he says, was passed for the purpose of protecting the marital rights of the husband; and was not intended to apply where the husband had knowledge of, and consented to, the making of the will under the power. Such does not seem to be the construction placed upon the English Statute, 7 Will. IV, and 1 Vic., chapter 26, section 18, of which ours is a *verbatim* copy. See 1 Jarman on (20) Wills, 114. The English statute was doubtless passed for the purpose of putting an end to the many nice and perplexing questions, which had grown out of a constructive revocation of the will of a *feme* sole by her subsequent marriage, and of a man by his subsequent marriage and the birth of a child. Mr. Jarman, after stating and discussing these various questions, says that no such can arise since the statute has gone into effect, and he concludes by remarking, that "the new rule, though it may sometimes produce inconvenience, has at least the merit of simplicity, and will relieve this branch of the testamentary law from the many perplexing distinctions which grew out of the pre-existing doctrine."

We, therefore, after mature deliberation, cannot doubt that our act, copied as it is literally from the English statute, having the same

difficult and perplexing distinctions arising from the implied revocation of wills to deal with, intended to accomplish the same purpose by the same means. And we cannot hesitate to believe, that whatever slight inconvenience may be occasioned by the new rule, it will be amply compensated by its greater simplicity and certainty. Now, all wills, with a single exception, whether made by a man or woman, shall be revoked *ipso facto,* by his or her subsequent marriage; in consequence of which, the property will devolve upon those to whom the law shall assign it, in case he or she shall die without making a subsequent disposition of it. The exception made by the act, is where the will is made in exercise of a power of appointment, when the property thereby appointed would not devolve, in default of appointment, upon those to whom the law would give it; and, therefore, the statute will not interfere between the objects of the bounty of the grantor of the power, in default of appointment, and those upon whom the will, made under the power, may confer it. The judgment of the court below was correct, and must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Sawyer v. Sawyer, 52 N. C., 137.

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(21)

WILLIAM HOOKS v. WILLIAM T. PERKINS.

1. The recital of the age of an apprentice in the indenture of apprenticeship is conclusive of that fact, in a suit by the master against a third person for harboring the apprentice.
2. Such recital, however, is not conclusive as against the apprentice, when he is prejudiced thereby.
3. The county court may correct a mistake in the recital of the age of an apprentice, but the recital, as thus corrected, cannot have relation back, so as to make a stranger a *tort-feasor,* in having previously thereto taken the apprentice into his service.

THIS was an action on the case, brought to recover from the defendant damages for enticing away and harboring the plaintiff's apprentice, Thomas Artis. Plea, the general issue. On the trial before his Honor, *Judge Battle,* at WAYNE Superior Court of law, on the last fall circuit, the plaintiff produced and read in evidence the record of the county court of Wayne at November Term, 1845—to wit: An order of said court, "that Rufus Artis, aged seven years, and Thomas Artis, aged

eighteen years, be bound to William Hooks, until they arrive at lawful age," etc. He also produced, and read in evidence, the indenture of apprenticeship of Thomas Artis, drawn in the usual form, and reciting the age of said apprentice, as above, and binding him to the plaintiff "until he shall attain the age of twenty-one years." The plaintiff also read in evidence the following order of the said county court, made at February Term, 1849: "It appearing to the court that the apprentice, Thomas Artis, is not twenty-one years old, it is so adjudged by the court, and it is further ordered and adjudged by the court, that the indenture be so corrected and amended, as to state the boy's age at fifteen years, instead of eighteen years." It did not appear, however, that the indenture had been amended in fact, in pursuance of the foregoing order. The plaintiff then offered evidence to show that the defendant had employed the boy, Thomas Artis, in his service, and had refused to deliver him up to the plaintiff on demand, between November Term, 1848, and February Term, 1849, of said county court; and also that defendant appeared at the latter term and assisted the boy in resisting the aforesaid order of that term. Evidence was also produced, tending to show that at November Term, 1845, when the said boy was bound to plaintiff, he was only fifteen years of age, instead of eighteen, as recited in the said order and indenture.

Upon this state of facts, the plaintiff insisted that the time (22) for which the boy, Artis, was bound to serve him did not expire until he was in fact twenty-one years of age, notwithstanding the recital in said indenture; and that the defendant, by taking and detaining said boy, from November Term, 1848, to February Term, 1849, of the court aforesaid, was responsible to him in damages. The defendant contended, that the time for which the said boy was bound expired at November Term, 1848; and that the plaintiff had no right to the service of said boy, between that term and the February Term following, supposing it proved that he was only fifteen years of age at the time he was bound; and consequently that he had done nothing of which the plaintiff had a right to complain.

His Honor was of opinion that the action could not be maintained, and the plaintiff, in submission thereto, suffered judgment of nonsuit, and appealed to the Supreme Court.

McRae filed a written argument for plaintiff.
J. H. Bryan for defendant.

PEARSON, J. The doctrine of estoppel has no application. That only operates between parties and privies, and the estoppel must be mutual.

The defendant is a stranger, and cannot be affected by the proceedings, under which the boy was made an apprentice, except to the extent of their operation in fact. So far as they estop, he can neither take benefit nor be prejudiced.

The question in the case is one of construction, because the plaintiff's right to sue for a harboring between November Term, 1848, and February Term, 1849, depends upon his having a title to the services of the boy during that time; and whether his title determined at November Term, 1848, or not until the boy actually arrived at the age of twenty-one, depends upon the meaning of the order of court and the indenture.

It is set out in both as a fact, that the boy, at the time he was bound out, was eighteen years of age; and he is bound as an apprentice until he arrives at the age of twenty-one. Does this mean until he
(23) arrives at the age of twenty-one in fact? or until he arrives at the age of twenty-one, according to the fact that he is now eighteen, which is agreed on by the contracting parties? There can be no question that the latter was the meaning; for why set out the fact that the boy was then eighteen, unless for the purpose of fixing the time when he would arrive at the age of twenty-one? and in that way express the extent of time for which it was the intention to bind him?—that is, for three years.

But it is asked: Suppose it had been set out that the boy was twelve years of age, then, according to this construction, he was bound for nine years, which would make three years beyond the time of his coming at age—would he be bound to serve the last three years? Certainly not; because the county court had no power to bind him beyond the instant he arrived at the age of twenty-one, and its action would have been void as to the excess. But there is an obvious distinction between the case supposed and our case; in that, there is an excess—in this, there is a deficiency; in other words, in our case the court did not bind out the boy for as long a time as they had power to do. *Non constat,* that for this reason, the master has a right to the services of the boy beyond the time for which he was actually bound. The more rational conclusion is, that as the court had not, by the first indenture, bound out the boy for as long a time as they had power to do, upon the expiration of the first term of service, it was the duty of the court to bind him out again, either to the same or some other master, when it was obviously proper to make further stipulations in favor of the boy, in consideration of the further term of service. The question was no doubt suggested by the idea of the mutuality of estoppels; but we have seen that the doctrine of estoppel has no bearing on the case, and the rights of these parties are not affected by it, one way or the other.

The statute does not require the court to ascertain the age of the boy at the time he is bound out, and to insert it in the order and in the indenture; but it was found in practice that masters, owing to the influence they had over apprentices, and because the latter were not well able to assert their rights, very frequently made them serve after they had arrived at age, because that matter was left indefinite, and depended on proof *dehors*. To prevent this abuse, the county courts, to whose special protection the interests of all persons (24) liable to be bound out as apprentices is confided, very properly and almost universally adopted the practice of agreeing with the intended master beforehand as to the age of the intended apprentice, and having this fact agreed, set out in the order and also in the indenture. The consequence is, in general, most beneficial. It prevents litigation, and prevents oppression; for, in this way, both sides know when the time is out. It would be a matter of regret, if this Court was obliged to make a decision defeating the object of this most commendable practice; and we are glad to be able to give an opinion by which it is supported. If, in point of fact, the county court is mistaken as to the age, and it is set out as being eighteen instead of fifteen, the master, at the expiration of the term of service agreed on, may enter into new indentures, and have the boy bound to him again for the residue of his minority. If it is set out as being twelve instead of fifteen, the apprentice, when he arrives at the age of twenty-one, may give notice to show cause why the indenture should not be canceled, on the ground that the court had exceeded its authority. This would be the most formal and orderly mode of proceeding; but if the apprentice chose to take the responsibility, he might raise the question by refusing to work.

We are not called on to say how far the action of the court at February Term, 1849, was effectual, to entitle the plaintiff to the services of the boy from that date; but we think it evident that nothing which the court did or could have done at that time could have the legal effect, by relation, of entitling the plaintiff to the services of the boy after November, and up to that time; for the term of the first apprenticeship expired by its own limitation at November Term, and a stranger cannot be affected, so as to make him a *tort-feasor* by relation. When the defendant hired the boy, the plaintiff was not his master.

PER CURIAM. Judgment affirmed.

(25)

K. T. MORGAN v. JAMES E. HORNE ET AL.

1. The degree of diligence to which a constable, acting in the capacity of a collecting agent (under the Act of 1818) is held liable, is that which a prudent man would ordinarily exercise, in the management of his own business.

2. He is not bound to the same strict accountability in regard to claims put in his hands for collection, as with respect to process, delivered to him as an officer.

3. Therefore, where a claim was placed in a constable's hands for collection on 1 December, 1851, and the debtor was then out of the county, and did not return till the 14th; and on the 20th a warrant was sued out, on which judgment was obtained on 4 January following, but no execution thereon was issued up to the 9th, on which day the debtor made an assignment of all his property: It was held that these acts did not make the constable liable for negligence, he having had no instructions from the creditor, and no ground to suspect the debtor of inability to pay the debt.

(The cases of *S. v. Holcombe*, 24 N. C., 211; *Governor v. Carraway*, 14 N. C., 436; *Lindsay v. Armfield*, 10 N. C., 548, and *Sherrill v. Shuford*, 32 N. C., 200, cited and approved.)

THIS was an action of debt on the bond of the defendant, Horne, executed by him as constable in January, 1850, with the other defendants as his sureties. The breach assigned was, that he failed to collect a debt due by note to the relator by one Hutchinson; upon oyer of the bond, the defendant pleaded conditions performed and not broken.

On the trial before his Honor, *Judge Caldwell,* at ANSON, on the last fall circuit, the facts of the case were as follows: The relator placed the said note in the hands of Horne, on 1 December, 1850. Hutchinson was then out of the county, but returned about the 14th or 15th of said month. On 20 December, a warrant was sued out by Horne, on which judgment was rendered against Hutchinson on 4 January following; but no execution was issued on said judgment. Hutchinson lived at Wadesborough, and Horne about three miles therefrom. Hutchinson was possessed of property before December, and up to 9 January, 1851, of the value of $2,000 and upwards, and on that day he executed an assignment, covering all his property to secure other creditors. Nothing was known of Hutchinson's design to make the said assignment, until the time he executed it. Upon this state of facts, his Honor charged the jury that the defendant Horne had not used reasonable diligence to collect the plaintiff's debt, and if the facts were believed by them, the plaintiff was entitled to their verdict. The jury found for the plaintiff,

and the defendant moved for a new trial, which, being refused, and judgment rendered on the verdict, he appealed to the Su- (26) preme Court.

No counsel for plaintiff.
Winston, Sen., for defendant.

BATTLE, J. The principal defendant, Horne, by receiving the claim of the relator, became by virtue of the act of 1818 (Revised Statutes, chapter 24, section 7), his collecting agent; and as such, bound to use that degree of vigilance, attention, and care in the endeavor to collect the debt, which a faithful and prudent person, conversant with business of that description would ordinarily use. *S. v. Holcombe,* 24 N. C., 211; *Governor v. Carraway,* 14 N. C., 436. Such is the extent of the obligation of "diligently endeavoring to collect all claims put into his hands for collection," imposed upon him by the statute. When process is delivered to an officer, the rule of diligence is greater. He is bound to execute it with the utmost expedition, or as soon after it comes to his hands as the nature of the case will admit. *Lindsay v. Armfield,* 10 N. C., 548, citing Bac. Abr. Sheriff N. Dalt. Sh., 109. In that case a delay by a sheriff of twenty-three days to levy a writ of *fi. fa.,* unexplained, was held to be culpable neglect, for which he was responsible. If, at the time when the process is put into the hands of the officer, he is told that the defendant is about to leave the county, and that he must execute it immediately, he may be compelled to pay the damage caused by a single day's delay. *Sherrill v. Shuford,* 32 N. C., 200. A constable, acting as a mere collecting agent, is not, as we have seen, (held in ordinary cases to such strict accountability. No certain time, within which he must proceed, has been, or perhaps can be laid down as applicable to all cases. A great variety of circumstances may require the rule to be varied, either extending or shortening the time within which he must act. Where the debtor is about to remove from the county, when he is in embarrassed circumstances, or when it is suspected that he is about to make an assignment of his property, in trust to pay other creditors, and these facts or any of them come to the knowledge of the officer, he ought to proceed forthwith to take the (27) necessary steps to enforce the collection of the claim which he holds. If, on the contrary, the debtor have no intention to leave the country, if he have apparently ample means to pay the debt, and there being no suspicion of his being on the verge of insolvency, the officer cannot reasonably be required (unless particularly instructed to do so) to adopt the most stringent measures which the law allows, to insure

the payment of the debt. Under the state of circumstances last supposed, no faithful and prudent person, conversant with business of that description, would ordinarily feel himself bound to do so. Let us see how the rule applies to this case. The claim was put into the hands of the officer on 1 December, 1850. If he had taken out a warrant the same day, it would have been returnable on or before thirty days thereafter, Sundays excepted; and as the debtor was out of the county at the time, and did not return until the 14th or 15th of the same month, the officer might well, upon serving the warrant, have fixed upon the latest return day as the day of trial. This would have been the 4th or 5th day of January, 1851, the time at which he did in fact obtain judgment. Suppose an execution had been taken out the same day, it would have been returnable three months from its date. Ought he, under the circumstances stated in the case, to have levied upon the debtor's property on or before the expiration of five days, at the peril of having the debt to pay? To say that he ought, would be holding him to a very strict accountability. But, in truth, no process of execution was taken out, and the rule of diligence, therefore, was not that of an officer with process, but of a mere collecting agent. Acting in the latter capacity, the rule applied to him in the court below was more strict than the law permits. The judgment must therefore be set aside and a *venire de novo* ordered.

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

Cited: Warlick v. Barnett, 46 N. C., 541; *Lipscomb v. Cheek,* 61 N. C., 333.

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(28)

DOE EX DEM. G. M. BRAZIER v. B. W. THOMAS.

To authorize a sale of land, by order of the county court, there must have been a levy of the execution issued by the justice; and proof by the officer, that he adopted the levies endorsed on the executions, before issued on the same judgments, and that he considered them as his levies, is insufficient. In such case, the court had no power to grant the order of sale, and its proceeding was a nullity.

(The cases of *Dickson v. Peppers,* 29 N. C., 429, cited and approved.)

THIS was an action of ejectment, tried before his Honor, *Judge Dick,* at CHATHAM, on the last fall circuit.

The lessor of the plaintiff, to support his title, offered in evidence three judgments, rendered by a justice of the peace against one John

Thomas, and executions thereon, of date 6 May, 1848. It appeared that levies of said executions on the land in controversy were made on 7 May, and duly endorsed on the judgments. These executions were returned to August County Court, 1848, at which term the justice's judgments were confirmed, and writs of *venditioni exponas* ordered to issue to the sheriff, and the land was by him publicly sold, and the lessor of the plaintiff became the purchaser; and the sheriff's deed was read in evidence. From an inspection of the judgments, it appeared also, that executions thereon were issued 9 August following; and it did not appear that any levies thereof were made by the officer.

The defendant objected to the title as made out by the lessor of the plaintiff. (1) Because the executions being issued on 6 May, and levied on the 7th, they should have been returned to the May Term of the court, which was held on the second Monday. (2) That as the last executions issued on 9 August, 1848, which was before the second Monday, the time for holding said court, there was an abandonment of the levies made in May, and consequently there was no levy to authorize the county court, at its August Term, to direct a sale.

The plaintiff then proved by one Womack, the constable, that he considered he had made levies of the executions of 9 August, but did not endorse them on the judgments, nor reduce them to writing; but adopted the levies already endorsed on the judgments and executions, as his levies, under the executions last issued. His Honor held, that as the court of Pleas and Quarter Sessions had regularly entered up (29) judgments and granted orders of sale, the court could not properly go behind said judgments, and hold that there were no levies to authorize said judgments; but must respect them as judgments of a competent tribunal, until they were reversed. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, which was refused, and he appealed to the Supreme Court.

No counsel for plaintiff.
Kelly for defendant.

PEARSON, J. Unless there was a case properly constituted before the county court, its judgment was a nullity; and the rule of law announced by his Honor had no application. So, the only question is, was the case properly constituted before the county court? The levy under the executions issued on 6 May was waived by the executions issued on 9 August. These latter executions were not levied. What the officer means by saying, "he adopted the levies already endorsed on the judgments and executions as his, under the last named executions,"

is not intelligible. He did not endorse the levies on the executions, and did not reduce them to writing; so, whatever was his mental operation, which he supposes amounted to an adoption of levies, which had been endorsed on executions that had spent their force, and been waived by taking out later executions, there certainly was no levy within the rule established by *Dickson v. Peppers,* 29 N. C., 429. Consequently the county court had nothing to act on—there was no case before it—and it had no power to render a judgment and grant an order of sale. So, the principle "that this Court cannot go behind a judgment of a competent tribunal until it is reversed," has no application; for there was no judgment, and the proceeding of the county court was void and of no effect.

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

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(30)

JOSEPH J. WILLIAMS AND WIFE V. JOHN R. LANIER ET AL.

1. Where the husband has possession of the wife's land, after issue born, case, in the nature of waste, is the proper remedy for an injury to the inheritance, by cutting timber trees, and should be in the name of the husband and wife jointly.

2. But for an injury to the crop, he must sue alone, and the statute of limitations bars the action after three years.

3. The rule is, where the husband must sue alone, or may join his wife, the statute of limitations bars; but when he must join the wife, the statute does not bar, for it is her action.

(The cases of *Gentry v. Wagstaff*, 14 N. C., 270; *McRee v. Alexander*, 12 N. C., 321; *Allen v. Gentry*, 4 N. C., 411; *Davis v. Cooke*, 10 N. C., 608, cited and approved; and *Caldwell v. Black*, 27 N. C., 463, and *Fagan v. Walker*, 27 N. C., 634, commented on.)

THIS was an action on the case, in the nature of waste. Pleas, general issue and statute of limitations. On the trial before his Honor, *Judge Bailey,* at MARTIN, at the Fall Term, 1850, the case was as follows: The *locus in quo* descended to the *feme* plaintiff, Mrs. Williams, when an infant, and during her minority she intermarried with the other plaintiff, between the years 1830 and 1844; and after the descent of the land, and during her marriage, and after the birth of a child, the defendants, who had no estate in the land, trespassed on it, and cut and carried off for sale a great number of timber trees. The waste was done more than three years before the commencement of the action; and the action

was brought for the injury done to the inheritance, and not for the injury to the estate of the husband. For the plaintiffs, it was contended that they were entitled to recover for the injury to Mrs. Williams' estate, notwithstanding the length of time, and the plea of statute of limitations. His Honor was of opinion against the plaintiffs, and they accordingly submitted to judgment of nonsuit, and appealed to the Supreme Court.

Moore for plaintiffs.
Biggs for defendants.

PEARSON, J. The *feme* plaintiff owned the land in fee simple, and intermarried with the other plaintiff, who took possession, and there was issue born alive. Afterwards, the defendant entered upon the land, and cut many timber trees. The action is case "in the nature of waste," for the injury to the inheritance. The defendant insists— (31) first, case is not the proper action; secondly, the action is barred by the statute of limitations, notwithstanding the coverture.

A reversioner or remainderman could not bring a writ of waste against a stranger, because privity of estate was necessary to support the action. Hence, anciently, if a stranger broke the close of one having the particular estate, and besides injuring him by "treading down his grass," taking away his crop, etc., also committed an injury to the inheritance, by cutting timber trees, tearing down houses, etc., the reversioner or remainderman was allowed to bring a writ of waste against the particular tenant; and he, in trespass *quare clausum,* besides damages for the immediate injury, was allowed to recover damages by way of reimbursement for his liability, on account of the injury to the inheritance. This was found, in many cases, to bear hard on the particular tenant, and the remedy was frequently an inadequate one for the reversioner or remainderman. For these reasons, it has been settled for upwards of a century, that the latter may bring case in the nature of waste, for the injury to the inheritance; and the former, trespass *quare clausum,* for the injury done immediately to him. 1 Chit. Plead., 50, 71; 2 Saund. Rep., 252, B. n., 7.

Upon this principle it is clear, where an injury is done after the death of the wife, the husband, as tenant by the curtesy, may in trespass *quare clausum,* recover for the immediate injury; and the representative of the wife may bring case, "in the nature of waste," for the injury to the inheritance.

On the part of the plaintiffs it is insisted that the principle applies, when the injury is done in the lifetime of the wife, after issue born;

for that, upon the birth of issue, the husband becomes tenant by the curtesy *initiate,* and is seized in his own right of a particular estate for life, which is separated by the act of law, leaving the inheritance as a reversion, of which the husband and wife continue to be seized in right of the wife. This proposition is denied on the part of the defendant; for whom it is insisted that notwithstanding the birth of issue, there is no separation of the estate, and the husband and wife continue to be seized of the whole in right of the wife. So the case turns upon the single question: Has a husband, after issue, any estate in his own right?

(32) Whether the husband has any estate in his own right before the birth of issue, is a question not now presented. But we think it clear, that upon the birth of issue, he becomes, by act of law, entitled in his own right, to a separate estate for his life, and holds the reversion with his wife, in her right.

The authority of my Lord Coke is express. After issue, the husband receives homage and does homage alone, forfeits the land for treason or felony, and may by feoffment or bargain and sale, pass an estate for his own life; "for he is seized of an estate for his own life, in his own right." Coke Lit., 67, A. All the elementary writers concur in treating this matter as settled, and give to the husband's estate a name—*i. e.,* tenant by the curtesy *initiate,* as fully recognized and as familiar as that of tenant by the curtesy. McQueen on Husband and Wife, 27. In fact, by reason of the husband's having this separate estate in his own right, and being also seized with his wife of the inheritance in her right, he has a greater control over the land than after he becomes tenant by the curtesy. He is not punishable for waste, or liable to forfeiture for making a feoffment in fee; and in the latter case, the estate of the wife was discontinued until remedied by statute. On the same ground, the incumbent of a benefice, being seized in his own right of an estate for life, and of the inheritance in right of his church, was not punishable for waste, etc.; and his feoffment in fee created a discontinuance at common law. It is settled in our courts, that the estate of the husband may be sold under execution, or by bargain and sale without joining the wife; and the purchaser takes an estate for the life of the husband, although the wife be living. *Fagan v. Walker,* 27 N. C., 634, decides that if, after issue born, the husband bargains and sells the wife's land in fee, she has seven years after his death to bring her action; because, "the husband has a particular estate in the lands of his wife, and her right of entry does not accrue until his death." "The estate in possession of such a vendee" (the particular estate for the life of the husband),

"and the remainder" (or reversion) "in fee of the wife, form but different parts of one and the same entire estate."

The defendant's counsel, pressed by these authorities, fell back upon a distinction—*i. e.,* although the husband by his act may separate the estate, yet it is not separated by act of law, so long as it continues in him. This distinction is not supported by any authority, and (33) is at variance with the fact that an estate for his life may be passed by bargain and sale, or by sale under an execution. These conveyances operate by act of law, and pass nothing except what rightfully belongs to the bargainor or the debtor, as his own separate estate.

By way of further illustration, if husband dies, the growing crop belongs to his personal representative as emblements. This supposes him to have a separate estate in his own right; for if he held the estate as a whole, with the wife in her right, at his death she takes the land, and, of course, all that is a part of it. A trespasser takes away the growing crop—the husband is the party injured; for it is his crop, and the action of trespass *q. c. f.* should be in his own name. Several old authorities were cited to show that he may join the wife; Cro. Car., 419; Jones, 367; Hob., 189. In *Frosdich v. Sterling,* 2 Mod., 269, it is said these cases warrant no more than that the wife may be joined, not that of necessity she must. But admit the wife may be joined, it proves nothing, because, to exclude the idea of a separate estate, it is necessary to show that the wife must be joined, for if the husband may sue alone, it is on the ground that he has a separate estate in his own right.

The cases in Comyn's Digest, under title, "Baron & Feme," when husband must sue alone—when he may join the wife—when he must join the wife—which are also cited in Bac. Abrid., "Baron & Feme," page 500, evidently conflict; and it is impossible to deduce any principle from them. In *Way and wife v. Bidgood,* 2 Black. Rep., 1236, they are called a "farrago of cases." This is no doubt because of the fact, that at the time most of them were decided, the principle that a reversioner or remainderman might bring "case in the nature of waste," against a stranger for an injury to the inheritance was not established; consequently, where an injury was done directly to the husband by destroying his crop, and also to the inheritance by cutting timber trees, inasmuch as no action of waste could be brought, he was *ex necessitate* allowed, by joining the wife, to recover in trespass *quare clausum fregit,* not only for the immediate injury to him, but also for the injury to the inheritance; in the same way as any particular tenant might (34) recover, not only for the immediate injury, but also for the injury to the inheritance, by way of reimbursement for his liability over.

So that, if the husband sued alone, he recovered damages for the immediate injury. If he joined his wife, besides these damages, he also recovered damages for the injury to the inheritance. But after the principle was established that the reversioner might sue a wrongdoer in case "in the nature of waste," the necessity no longer existed; and the practice of allowing the wife to be joined (which had originated in that necessity) no longer obtained, and the cases in which it had been allowed were considered of doubtful authority. It was said, there was no more reason for allowing the husband by joining his wife to recover in trespass for an injury to his crop, and also for an injury to her inheritance, than there was for allowing a tenant for life to join the reversioner, and so recover for an injury to both in one action; because the husband might sue alone in trespass for the injury to his crop, and join his wife in case for the injury to her inheritance.

Suppose a stranger injures the crop and also the inheritance; the husband brings trespass in the name of himself and wife for both injuries; the husband dies; the action as to the crop must abate, for it belongs to his representative; or the wife dies—then the action as to the injury to the inheritance must abate, for that belongs to the wife's representatives. And if in the one case, the husband is allowed to proceed for his part of the injury, and in the other the wife may proceed for her part, it would be an unheard of mode of splitting up an action, and a novel species of abatement as to a part. Or, suppose the husband dies before suit—then it is clear that his representative and the wife cannot join. The former can bring trespass for the injury to his intestate's crop; what action can the wife bring for the injury to her inheritance? Certainly, it must be case "in the nature of waste." Upon what principle, then, other than that of necessity (which does not now exist) can the husband be allowed, in his lifetime, to join in one action that which, after his death, constitutes two distinct causes of action, belonging to two different persons?

(35) The counsel then assumed the position that in ejectment for the wife's land, she must be joined as one of the lessors; and the effect of it was, to prevent the right of entry from being tolled, under the saving in the statute in favor of *femes covert.* For this he cited *Caldwell and wife v. Black,* 27 N. C., 463; and then very ingeniously deduced the conclusion, that the husband had no estate in his own right. The case cited is an authority for the position, that when the eviction is before the marriage, the wife must be joined, and her right of entry is saved. The reason is, her estate being divested at the time of the marriage, she had but a mere right, and the husband not being seized during coverture, could take no estate in his own right; *Gentry v.*

Wagstaff, 14 N. C., 270; consequently, she must be one of the lessors. The action is to assert her right, and the husband is joined merely because of her incapacity. In such a case the conclusion is a legitimate one, that the husband has no separate estate.

But in our case the husband was seized during coverture; there was issue born alive, and the eviction took place afterwards; the question is, in this case, must the wife be joined? It is true she may be joined, and it is usual to join her; but the conclusion that the husband has no separate estate is not supported, unless she must be joined. The husband can, without joining the wife, make a lease for years, which is valid until his death. This is clear—Bac. Abrid., "Leases and Terms for Years"—consequently, he may bring ejectment without joining the wife. In Bac. Abrid., "Ejectment," it is considered as settled, that although the husband may join the wife, as her contracts relating to her estate are but voidable during the coverture, yet it is not necessary that the husband and wife should join in a lease to try the title to her estate. He alone might make a lease for that purpose, and several cases are cited, in which the husband has maintained ejectment on his own demise.

It was then assumed, that when the eviction is after *seisin* by the husband and birth of issue, the entry is not tolled by seven years' adverse possession, provided the wife is joined; and it was forcibly put that this tends to show that the entry was the right of the wife, because it would be inconsistent to allow the husband to save his own right of entry, by taking shelter under his wife's name. If the husband has an estate in his own right, there is no reason why his entry should not be tolled, and the wife or her heirs have seven years after his death to assert her right. The idea, therefore, that by joining (36) the wife the husband can recover possession at any time during the coverture, notwithstanding an adverse possession of seven years, is inconsistent with the fact of his having a separate estate in his own right, and it is necessary to examine into the correctness of the position assumed as the basis of the argument.

It is obvious that the position conflicts with the reasoning and authorities before cited to show that the husband had an estate in his own right. No authority was cited to support it, and the counsel relied solely on an opinion, *arguendo,* of *Chief Justice Ruffin,* in *Caldwell v. Black,* where it is said, that in case of an eviction during coverture, seven years adverse possession does not toll the entry, because of the coverture of the wife.

It is proper, therefore, to examine the grounds upon which the opinion is based. The cases of *Took v. Glascock,* 1 Saund., 250; *Polyblank*

v. Hawkins, Doug., 329, are relied on as precedents to show that the form of pleading is, "the husband and wife are seized in their *demesne* as of fee, in right of the wife." It will be seen, however, that in both of these cases the wife had a reversion, and not an estate in possession. Of course, the estate is truly described by the words, the husband and wife were seized of the reversion in their *demesne* as of fee. These cases have no bearing on the question, whether the husband has a separate estate, where there is an estate in possession.

The Statute 32, Hen. 8, was passed for the express purpose of enabling the husband and wife to make a lease by matter *in pais,* which should be binding on her after coverture; because she could not, like any other person having a reversion, confirm the lease by joining in its creation. This statute is therefore consistent with the fact of a separate estate in the husband, and cannot be made to bear on the question of ejectment, without going beyond its express object, and requiring the tenant in possession not merely to confess a lease, but to confess a lease with the nine requisites of the statute—*i. e.,* that it was by indenture, etc., etc.

McRee v. Alexander, 12 N. C., 321, passes over the point *sub silentio;* and we are left to conjecture, whether it was because the Court
(37) did not think it an open question, or because it was overlooked. The latter is the most probable, for it certainly was not settled on the side for which it is used, in *Caldwell v. Black,* as all of the authorities cited in the first part of this opinion, are in conflict with it; and the case was submitted by the counsel for the plaintiff without argument. There was no counsel for the defendant, whose business it would have been to support the point.

The other authorities cited support the decision, but conflict with the position assumed, *arguendo; Allen v. Gentry,* 4 N. C., 411; *Davis v. Cooke,* 10 N. C., 608. In both cases the things were taken from the *feme, dum sola.* At the time of the marriage she had no estate, but a right, in which the husband took nothing. So the action was hers—would survive to her—and the husband was a necessary party merely because of her incapacity. She was under disability of infancy, when her cause of action accrued; she married under age; and as she had three years after discoverture to bring her suit, there was no reason why it might not be brought for her at an earlier day. So, in *Caldwell v. Black,* the eviction was *dum sola;* the *feme* was under disability of infancy when the cause of action accrued; she married under age; and at the time of her marriage she had no estate, but a right, and the husband took nothing. It was her right of entry, and her action; and as, under the saving of the statute, she had time to sue, until three

years after discoverture, there was no reason why the action might not be brought for her at an earlier day.

The two cases cited, therefore, are on all-fours with the decision in *Caldwell v. Black,* but oppose the position assumed, *arguendo.* Suppose the wife in possession of the things at the time of her marriage, and they are taken from the possession of the husband; certainly he must sue alone, and could not avoid the statute by joining his wife. So, where the eviction of land takes place after the husband has possession, it is an injury to him, and joining the wife cannot avail him, if his entry was tolled. Or, if it was not, and he died after recovery in ejectment, and before bringing an action for the *mesne* profits, the wife certainly would not be entitled to the profits, because they are in lieu of the crop which the husband would have raised during the coverture, but for the eviction; and his representative would be entitled to them as (38) damages, for the injury done to his intestate.

We have entered somewhat at large into the discussion of this question, because we are aware, that although the distinction between taking things personal before and during coverture, is familiar to the profession, yet they have failed to advert to the fact, that the same distinction exists in regard to an eviction from the wife's land, before and during coverture; and an impression prevails, that in ejectment the wife must be joined, as well when the eviction is during coverture as where it is before coverture; and consequently, that in either case, the right of entry is not tolled during the coverture, and the wife has only three years after discoverture to bring her action; whereas, in fact, although her entry is not tolled, when the eviction is before coverture (she marrying while under age), and she has three years after discoverture in which to sue; yet when the eviction is during coverture, the husband has an estate for his life in his own right; his entry is tolled by seven years adverse possession; and the wife, or her heirs, have seven years after his death to bring their action, because her right of entry did not accrue until his death. Like the case of a reversioner or remainderman, after an ordinary estate for life, who has no right, and is not required to look to it, until the determination of the particular estate. This impression was probably occasioned by *Jones v. Clayton,* 6 N. C., 62, where it is held, that if husband makes bargain and sale in fee and dies, the wife has only three years after his death to bring her action. This case was expressly overruled by *Fagan v. Walker,* in which it is held, that the wife or her heirs in such case have seven years after the death of the husband; for he had an estate in his own right for life, and her right of entry did not accrue until the determina-

tion of his estate. This would have corrected the erroneous impression, but for an unfortunate *dictum* of the learned judge (not called for by the argument, and in fact, inconsistent with it), in which he says that, if after *seisin* and birth of issue, the husband is disseized, the wife will have only three years after his death to assert her claim. This is inconsistent with what he had before decided—*i. e.*, that the husband had an estate for life in his own right. Of course, then, the wife could have no right of action until his estate determined, and had seven
(39) years after his death to bring her suit. The effect of this *dictum* was no doubt increased by the position assumed *arguendo*, by the *Chief Justice*, in *Caldwell v. Black*, which we have considered. When a principle is fixed on, the only way by which to keep the decisions uniform, and to support the pretensions of law to be considered a science, is to carry out the principle to all of its legitimate consequences—*e. g.*, having settled the principle, that, after birth of issue, the husband is a freeholder, and is seized of an estate for life in his own right, it must be carried out so as to include all corollaries.

It was said in the argument, that the idea of two actions for an injury committed at one and the same time, and in fact by the same act—*e. g.*, if apple trees are cut down, an action of trespass by the husband for the loss of the fruit, and of case by husband and wife, for the injury to the inheritance—is incongruous; because there is a supposed identity of person and the husband would receive the damages recovered in both actions. There is no incongruity, nor is it without precedent. A battery is committed on the wife; the husband and wife sue in trespass for the immediate injury to her person—the husband sues alone in case for the loss of society, etc.; yet he gets the damages recovered in both actions. That is the reverse of our case, where the immediate injury being to the possession of the husband, he sues alone in trespass, and the injury to the inheritance is sued for by the husband and wife, in case, "in the nature of waste."

That the statute of limitations does not bar, is a corollary of the conclusion, that case in the nature of waste is the proper action. The rule is, where the wife must be joined, the statute does not bar; for it is her cause of action, and survives to her. Where the husband must sue alone, or may, at his election, join the wife, the statute does bar; for it is his cause of action, and does not survive to the wife.

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

Cited: Dozier v. Gregory, 46 N. C., 105; *Whitted v. Smith*, 47 N. C., 40; *Halford v. Tetherow, ibid.*, 396; *Smith v. Fortescue*, 48 N. C., 65; *Dupre v. Dupre*, 49 N. C., 390; *Burnett v. Thompson*, 51 N. C., 213;

Deans v. Jones, ibid., 231; *Childs v. Baumgardner*, 53 N. C., 297; *Wilson v. Arentz*, 70 N. C., 672; *Day v. Howard*, 73 N. C., 4; *McGlennery v. Miller*, 90 N. C., 216; *Osborne v. Mull*, 91 N. C., 204; *Dills v. Hampton*, 92 N. C., 566; *Dorsey v. Moore*, 100 N. C., 45; *Taylor v. Taylor*, 112 N. C., 138; *Cobb v. Rasberry*, 116 N. C., 139; *Richardson v. Richardson*, 150 N. C., 551.

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G. W. LITTLE v. B. J. DUNLAP ET AL., EXECUTORS OF YOUNG H. ALLEN.

1. If a note be transferred before it is due, the endorsee will hold it freed from any dealings between the maker and payee, had before that time.
2. If transferred after it is due and dishonored, the maker is entitled to the same defenses against the endorsee, as he would have had against the payee.

(The case of *Elliott v. Smitherman*, 19 N. C., 338, cited and approved.)

THIS was an action of debt on a promissory note for $150, executed by the defendant's testator on 11 July, 1849, payable to one Threadgill on demand, and by him endorsed to the plaintiff on 17 June, 1851, who demanded payment thereof on the 25th of the same month. The pleas were *nil debet*—set-off. Upon the trial at ANSON, on the last circuit, before his Honor, *Judge Caldwell*, the defendants offered sets-off against said note, arising after its execution and before it had been endorsed to the plaintiff, insisting that the said note, when endorsed, was dishonored. Of this opinion was his Honor, and allowed evidence of said sets-off to go to the jury. It also appeared that the payee, Threadgill, and the testator of defendants, lived in a mile or two of each other. The jury returned a verdict, allowing said sets-off; and the court having rendered judgment accordingly, the plaintiff appealed.

Strange for plaintiff.
Winston, Sen., for defendants.

NASH, C. J. The action is brought on a promissory note. It was executed by defendant's testator, on 11 July, 1849, and payable on demand. The payee endorsed it to the plaintiff on 17 June, 1851, and demand was made on the 25th of the same month. The note was dishonored at the time of its endorsement, and subject, in the hands of the endorsee, to all the defenses it would have been, if still held by the

endorser. There is no precise time established in law, within which a note payable on demand must be presented for payment, so as to protect an endorsee against the equities which the maker may have upon the payee or endorser. If transferred before dishonored, the endorsee will hold it freed from any dealings between the maker and payee had before that time; if after, he holds it as the payee did, and subject to all his liabilities upon it. When a note is made payable on demand, or
(41) when no time of payment is expressed, it is payable instantly on demand, without any allowance of days of grace; and it must be presented for payment within a reasonable time after the receipt of it—Chit. on Bills, 269—and if not so presented, the note will be dishonored. *Bowler v. Jones,* John. Rep., 203; Chit. on Bills, 127. What is reasonable time depends upon the circumstances of each case. Here the original parties lived in a mile or two of each other, and the note was not endorsed until near two years after its execution. It was then dishonored, and the defendant was entitled as against the plaintiff to the full benefit of his claims against Threadgill, the payee of the note. *Elliott v. Smitherman,* 19 N. C., 338.

In *Winslow and Martin,* 2 Mason, 141, a neglect in demanding a note payable on demand, for seven months, was held an unreasonable delay.

We see no error in the opinion of his Honor below, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Caldwell v. Rodman, 50 N. C., 141; *Capel v. Long,* 84 N. C., 17; *Ervin v. Brooks,* 111 N. C., 359.

DANIEL BAKER v. MATTHEW HALSTEAD & COMPANY.

1. Where a party litigant is denied his right to appeal, or deprived of it by fraud or accident, or inability to comply with the requirements of the law, he may have the writ of *certiorari.*

2. But otherwise, when his failure to appeal or make defense was the result of his own negligence, or where he trusted his interests to an unfaithful agent.

3. Where a judgment was obtained in the county court against B. and L. upon a note which B. had signed in blank for L., for renewal at bank, and which L. had altered by erasure, and filled up, and transferred to H.;

and B. had trusted to L. to employ counsel to enter pleas in bar, who suffered judgment to be taken against both: *Held* that B. was not, under these circumstances, entitled to the writ of *certiorari.*

(The cases of *Kelsey & Brigman v. Jervis*, 30 N. C., 451; *Betts v. Franklin*, 20 N. C., 602, and *S. v. Bill*, 35 N. C., 373, cited and approved.)

THIS was an application on the part of the plaintiff to the Superior Court of Law of CUMBERLAND County, on the last circuit, his Honor, *Judge Caldwell,* presiding, for a writ of *certiorari,* to bring up the record of a suit in which judgment had been obtained against him and one Latta in the County Court of Cumberland, by the defendants, Halstead & Company. The petition set forth the following facts: (42) Latta was a merchant in Fayetteville, and the plaintiff had, on several occasions, endorsed for him in bank there, and living in the country, had several times endorsed for him in blank, with only the amount in figures set out at top—the understanding between them being that Latta should fill up the blanks, and that the notes were only to be used for renewal at bank. The note on which judgment was obtained in the county court, was one of these blank notes (left with Latta to renew one in bank), bearing date 20 May, 1851, and payable eighty-nine days after date. This note was applied to the renewal of the bank debt, and being afterwards taken up by Latta, he, unknown to the plaintiff, altered the figures at the top, set out $407.56, filled it up for the same amount, altered the date to 22 September, and the time of payment to eight months, and passed it to the plaintiff's merchants in New York, in discharge of a debt he owed them. The erasures and alterations were distinct and barefaced; and the petition charges fraud and collusion between Latta and the assignees of the note. Suit was brought by defendants to June County Court, 1852, and the plaintiff being surprised, and intending to employ counsel, saw Latta, who assured him that he had done so, and a full defense should be made. But Latta put in only a dilatory plea; and at September Term the plea was withdrawn, and judgment taken against both defendants, the plaintiff and Latta. The petitioner further states, that the facts of the fraud did not come to his knowledge until after judgment had, and execution issued, he being kept in ignorance thereof by the false instructions given by Latta to his counsel, and by Latta's assurances that a full defense should be made.

Upon this application, his Honor granted the writ as prayed for; and upon its return to the same term of the court, on hearing the petition, with the accompanying affidavits, gave judgment dismissing the *certiorari.* From which judgment the plaintiff prayed for and obtained an appeal.

Strange for plaintiff.
W. Winslow for defendant.

NASH, C. J. The writ of *certiorari* is used in this State mostly as a substitute for an appeal; and when a case is so brought up to a
(43) higher tribunal, the trial is *de novo*. There are very few cases in which a party, dissatisfied with the judgment of an inferior court, may not appeal to a higher one, and thereby entitle himself to have his cause heard again; and when the right of appeal is not given, the writ is used as, or in the place of, a writ of error, to reverse and correct errors of law only. The cases cited by the plaintiff's counsel show that the principles governing the writ of *certiorari* have often been discussed in this Court, and we had hoped set forth so plainly, that no mistake could exist on the subject. We cannot state those principles more plainly than we have done, and therefore will not enter upon a discussion of the reasons upon which they are founded, but content ourselves with simply again stating them. Where the proceedings of an inferior tribunal are not according to the course of the common law, a party, conceiving himself aggrieved by its decision or judgment, is entitled, *ex debito justitiæ,* to a writ of *certiorari* to remove them to a higher tribunal for revision, in a matter of law, as in other cases, on a writ of error. Where, by the law of the State, a party litigant in an inferior tribunal is entitled to an appeal, and this right is denied him, or he is deprived of it by fraud or accident, or inability at the time to comply with the requirements of the law, he may have a writ of *certiorari* to obtain a revision of his case in a Superior Court.

In this case, the petitioner was entitled on the trial in the county court to an appeal from its judgment; a right, of which he was deprived by his own showing, by no default of the court, nor by any fraud, of which in this case he has a right to complain, accident, or inability to comply with the conditions of an appeal. If he is injured, it is his own fault or negligence. He was the endorser in bank for a Mr. Latta. Living at some short distance from the town of Fayetteville, where the notes were to be renewed, he furnished his principal with blank notes. Latta, instead of appropriating the notes to the purpose for which they were intended, transferred the one now in dispute to a creditor of his in New York, the defendant in this proceeding, who brought an action upon it when at maturity against both the maker and the endorser. Upon the writ being served upon him, the petitioner had an interview with Latta, complaining of his conduct, and informed him of
(44) his intention to employ counsel to defend him, "when Latta assured him he had employed counsel, and that a proper defense

should be made." The petitioner, according to his own statement, took no further steps in the case, but trusted his interest to the care of his codefendant, who upon the trial, withdrew his plea and gave the plaintiffs a judgment. Other facts and circumstances are stated in the petition, which are not adverted to, because they do not touch the point upon which the application for the writ is refused. We refuse it, because a proper case for its use is not stated. The case below is one where an appeal lay at the instance of either party; no appeal was asked for; the defendant trusted his interest to an unfaithful agent, and who must have known that he had been unfaithful in that particular transaction, and grossly so. Having lost his right of appeal by his own negligence, in not attending to his own business, he has no right to ask the court for its aid through a writ of *certiorari*. A petition for such a writ must set forth two things—first, a good defense existing at the time when he ought to have pleaded; and secondly, a good excuse for his laches in not pleading or not appealing. *Kelsey & Brigman v. Jervis*, 30 N. C., 451; *Betts v. Franklin*, 20 N. C. 602; *S. v. Bill*, 35 N. C., 373. The judgment of the court below is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Elliott v. Jordan, post, 300; *Hall v. Council*, 48 N. C., 35; *Winborn v. Byrd*, 92 N. C., 7.

Distinguished: Koonce v. Pelletier, 82 N. C., 236.

JAMES HOLMES v. JOSIAH JOHNSON.

Case for malicious prosecution may be maintained where a warrant is sued out on an accusation of larceny, from a justice of the peace, although it is not placed in an officer's hands, nor further proceeded on.

THIS was an action on the case for malicious prosecution, and was one of a series of cases submitted by the parties to arbitration. It was in evidence that the defendant had sued out a warrant from a justice of the peace, charging the plaintiff with a larceny, but the warrant was not placed in the hands of an officer, and was no further proceeded on. On this state of the facts, the arbitrators were of (45) opinion that the action could not be maintained, and for this reason awarded judgment for the defendant. At the last fall term of SAMPSON Superior Court, his Honor, *Judge Caldwell*, presiding, the

plaintiff's counsel moved to set aside the award, but his Honor refused the motion, and gave judgment against the plaintiff, for costs, according to the award; from which judgment the plaintiff appealed.

Strange for plaintiff.
No counsel for defendant.

BATTLE, J. It is stated in an elementary work of high authority, 3 Step., N. P., 2274, that "the foundation of an action for malicious prosecution is the malice of the defendant, either expressed or implied; and whatever engines of the law malice may employ to compass its evil designs against innocent and unoffending persons, whether in the shape of indictment or information, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice be evinced by malicious arrests, or by exhibiting groundless accusations, merely with a view to occasion expense to the party, who is under the necessity of defending himself against them, the action on the case affords an adequate remedy to the party injured." There are three sorts of damages, any of which would be sufficient to support an action for malicious prosecution. First, "the damage to a man's fame, as if the matter whereof be scandalous; second, where a man is put in danger to lose his life, limb, or liberty; third, damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime, of which he is accused." Per *Holt, C. J.,* in *Savile v. Roberts,* 1 Ld. Ray., 374.

The case before us seems to fall directly within the first class of damages, for which Lord Holt says the action will lie. It certainly cannot be contended, that taking out a warrant upon an accusation of larceny, has no tendency to endamage a man's reputation—that the matter whereof he is accused is not scandalous! Yet, if he be not allowed to avail himself of this action, he is entirely without remedy. He
(46) cannot sue for the slanderous words merely because they were spoken in the course of a judicial proceeding; 3 Step. N. P., 2565. His reputation, it must be admitted, may be as much injured where the warrant was only sued out from a justice, and not put into the hands of an officer, as if it had been prosecuted to the utmost extent. Nay, more, for in the latter case the party might have vindicated his character by proving his innocence. Analogous to this is, we think, the case of a bill of indictment preferred and returned *ignoramus; Payne v. Porter,* Cro. Jac., 490; or that of a bill preferred *coram non judice,* 1 Roll. Abr., Action *sur case,* (P.) 112. Both upon

principle and authority, then, we think his Honor in the court below erred in refusing to set aside the award, and in giving judgment for the defendant. For this error, the judgment must be reversed, and the award set aside. This opinion will be certified to the Superior Court of Law of Sampson County, to the end that the plaintiff may proceed in his action.

PER CURIAM. Judgment reversed, and award est aside.

Cited: Shelfer v. Gooding, 47 N. C., 181; *Nissen v. Cramer,* 104 N. C., 577.

THE STATE v. CATHARINE CHRISTIANBURY AND GEORGE HERMON.

1. The offense of conspiracy to cheat and defraud, is not embraced within the exceptions of the act of 1836 (Revised Statutes, chap. 35, sec. 8), limiting the time in which prosecutions for misdemeanors shall commence.
2. The word deceit in the act seems to have been used for cheating by false tokens (which offense may be committed by one person), and is distinct from the offense of conspiracy, the gist whereof consists in the confederation (by two or more) to do the act charged.

(The case of *S. v. Watts,* 32 N. C., 369, cited and approved.)

THE defendants were indicted for a conspiracy. Pleas, not guilty and statute of limitations. On the trial before his Honor, *Judge Manly,* at the Superior Court of Law of ALEXANDER, at Fall Term, 1851, the indictment charged, and the facts in substance were, that in order to defraud James Vincannon out of the collection of a judgment which he had obtained against Catherine Christianbury before a justice of the peace, the defendants agreed that Catharine should sell all her property to George Hermon, and that he should pay her the money for it. To this ceremony, a witness was to be called. It was further (47) agreed, that the money was then to be returned to Hermon, and he was to hold title to the property upon a secret trust for her. Accordingly, a considerable amount of property (more than sufficient to satisfy the judgment) was, in the presence of a witness, transferred between the parties, and the purchase money paid; and this purchase money was refunded, in accordance with the understanding between them, as above stated. This transaction took place about two and a half years before the finding of the bill of indictment. It was contended for the defendants, that these facts did not amount to an indictable offense; and if so,

that it was barred by the statute of limitations. His Honor was, however, of a different opinion, and so instructed the jury, who returned a verdict of guilty; and judgment being pronounced thereon, the defendants appealed to the Supreme Court.

This case was argued at the last Morganton Term by—

Attorney-General for the State.

W. F. Caldwell for the defendants; and after an advisari until the present term, the opinion of the Court was delivered by

NASH, C. J. Whether the facts charged in this indictment amount to an indictable offense or not, we do not feel called on to decide, as there is another point upon which we think his Honor below erred. The acts which are charged in the indictment, as constituting the offense, took place more than two years before the prosecution was commenced. By the act of 1836 (Rev. Stat., chap. 35, sec. 8), it is provided, that "in all trespasses and other misdemeanors, except the offenses of perjury, forgery, malicious mischief, and deceit, the prosecution shall commence within two years after the commission," etc., "and not after," etc. It is our opinion that no one of the exceptions extends to this case. On behalf of the State, it is argued that the facts stated amount to deceit. The indictment is for a conspiracy to commit a fraud upon the prosecutor, or it may be said, to cheat or deceive him. This is a distinct offense from that of cheating or deceiving him. One person alone may be indicted for an indictable offense of this character. To constitute a conspiracy, two or more persons must combine. A husband
(48) and wife cannot be indicted for the latter offense, because, in law, they are but one person. So an indictment for cheating must set forth the means by which it was effected, and the injury sustained by the prosecutor; and the proof must correspond with the allegation; Arch. Crim. Practice, 247. In an indictment for a conspiracy, the unlawful confederation is the gist of the offense; and it is not necessary to allege, or show in evidence, that any injury has been sustained. In the *Commonwealth v. Warren et al.*, 6 Mass. Rep., 74, which was an indictment for a conspiracy to cheat, it is decided by the Court, that the conspiracy is the gist of the offense; and in the case of the *Commonwealth v. Davis*, 9 Mass. Rep., 415, the Court says, "Upon an indictment for a conspiracy to cheat, the gist of the offense is the conspiracy, and the cheating is but aggravation." One person, therefore, may be indicted for cheating, under circumstances which make it a criminal offense; and when it is committed by more than one, they may be indicted for a conspiracy.

The word "deceit" is used in the act we are considering, and we presume it is used, as being the same as cheating by false tokens. Neither Mr. Archbold nor Mr. Russell has any such head as "deceiving"; and all the precedents in the former upon the subject are for cheating. The charge in this indictment is for a conspiracy, and not for cheating the prosecutor, and does not come within the exceptions. It was necessary, then that the indictment or prosecution should have commenced within two years next before the indictment was found or presentment made, unless the offenders come within one or the other of the provisos to the act. It is contended that it does come within the last; that is, that the offense was committed in a secret manner, and that the indictment was found in two years after it was discovered. There is nothing in the case to show that the offense was committed in a secret manner. On the contrary, it states expressly that a witness was called to witness the transaction between the parties; and as it was observed by the Court in the case of *S. v. Watts,* 32 N. C., 374, "there is not a circumstance of concealment, by the offender, more than there is of secrecy in the offense."

As the crime of conspiracy is not embraced in the exceptions (49) contained in the act of 1836, and it is not shown that the defendants were within any of the exceptions, and that the indictment was found after more than two years from the commission of the offense, the time limited in the act is a bar to the prosecution.

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

Cited: S. v. Jackson, 82 N. C., 569; *S. v. Crowell,* 116 N. C., 1056; *S. v. VanPelt,* 136 N. C., 645; *S. v. Diggs,* 181 N. C., 551; *S. v. Wrenn,* 198 N. C., 263.

STATE v. HARRIS MELTON AND ANN BYRD.

1. The act of 1838, chapter 24 (declaring void all marriages between white persons and free Negroes and persons of color), includes only cases where such persons of color are within the third degree.

2. Hence, wherein an indictment for fornication against A. and B. (who had been married), it appeared that one of the defendants was of Indian blood, but of what degree was not proved: *Held,* that there could be no conviction.

3. In the construction of a statute, all other statutes made in *pari materia,* whether referred to or not in that under consideration, will be taken as one system, and so construed.

(The case of *S. v. Bell,* 25 N. C., 509, cited and approved.)

STATE *v.* MELTON AND BYRD.

THIS was an indictment for fornication, tried before his Honor, *Judge Bailey,* at the Fall Term, 1852, of STANLY Superior Court, The defendants pleaded not guilty, and in support of their plea offered evidence of their having been lawfully married, unless, as was insisted by the solicitor for the State, the marriage was void under the act of 1838-39, declaring marriages between white persons and free persons of color void. The controversy was concerning the color of the male defendant—the female being admitted to be white. For the defendants it was insisted, that, unless the defendant, Melton, was within the fourth degree of Negro or African blood, they could not be convicted. For the State, it was insisted that the act was general, prohibiting all mixtures of the white with the colored races, and it made no difference whether the defendant's blood was African or Indian, or in what degree, if there was any sensible taint of either—they were guilty. The court charged for the defendants, but told the jury they might, if they chose, render a special verdict; and the jury accordingly found, "that the defendant, Harris Melton, was of Indian blood, but in what degree they
(50) could not say, and if in case this rendered the marriage void, of which they were ignorant, but prayed the opinion of the court, they found the defendants guilty; and if not, then they found the defendants not guilty." His Honor being of opinion upon the question of law in favor of the defendants, gave judgment accordingly, and the solicitor for the State appealed.

Attorney-General for the State.
Winston for defendants.

NASH, C. J. The indictment in this case is found in the act of 1838, chapter 24, in which it is declared: "It shall not be lawful for any free Negro or person of color to marry a white person; and any marriage hereafter solemnized or contracted between any free Negro or free person of color and a white person, shall be null and void." All persons living together under such circumstances, as man and wife, are guilty of fornication and adultery. It is admitted that Melton is of Indian descent, and that the defendant, Byrd, is a white woman; and that at the finding of the indictment, they were living together as man and wife; and they allege that they were legally married. The legality of the marriage is the only question presented by the case. On the argument here, it was urged with much force that the act did not embrace persons descended from Indian ancestors. Upon this point we do not deem it necessary to express an opinion, because the special verdict states, "that the defendant, Melton, is of Indian blood, but in what

degree they cannot say." This is substantially finding simply that Melton is of Indian blood. To authorize a judgment upon this indictment, the jury should have found within what degree he stood to his Indian ancestor. The act, it is true, is broad; but it cannot be supposed it was the intention of the Legislature to forbid marriages between white persons and persons of Indian blood, howsoever far removed. Every statute must receive a reasonable construction, and its letter is often departed from to carry out the manifest intention of the lawmakers; and to arrive at a proper construction, when the words are doubtful, it is the duty of courts of justice to examine and compare the different parts of the same statute, and with others made (51) *in pari materia.* At the session of the Legislature in 1836, all the acts previously in force were reënacted, and they consequently constitute but one act. *S. v. Bell,* 25 N. C., 509. By the 5th section of 71st chapter of that statute, the Legislature provides: "If any white man or woman, being free, shall intermarry with any Indian, Negro, mustee, or mulatto man or woman, or any person of mixed blood to the third generation, bond or free, he shall, by the judgment of the county court, forfeit $100," etc. The sixth section inflicts a penalty upon any minister of the Gospel or magistrate who shall knowingly marry such persons. By these two sections it is seen that a penalty merely is inflicted for a violation of them. It was soon found that the evil was not remedied. The parties still continued man and wife, and to live together as such. To put an end to this state of things, the act was passed under which this indictment was framed. The marriage itself is declared void, thereby subjecting the parties to the risk of being indicted for fornication and adultery, as long as they continued to cohabit. This act is *in pari materia* with that of 1836; and the Legislature must have intended that the degrees set forth in the latter should govern the criminality of the former. It could not have been intended that the most remote taint of Indian blood on either side should make void the marriage, while it confined the penalty expressed in the act of 1836, to being violated in the third degree. Again: in the 31st chapter of the act of 1836, in section 81, the Legislature declare the evidence of all Negroes, Indians, mulattoes, and persons of mixed blood, within the fourth generation, to be incompetent against a white person. In two cases, then, the Legislature has pointed out the degree within their prohibition shall operate, and when, in 1838, they extended the penalty inflicted in the fifth section of the 71st chapter of the act of 1836, they must have meant that the offense, so punished, should be the same offense—that is, should be a marriage within the degrees specified in the act of 1836. It is a rule in the construction of statutes, that all statutes which relate to the same

subject-matter, although some of them may be expressed, or not referred to, must be taken to be one system, and so construed; 1st Bur., (52) 447; 3 Mass. R., 212; Lord Bacon's 3d Rule, Vol. 6, 382. To enable the court to pronounce a judgment upon the special verdict against the defendant, it ought to have stated within what degree the defendant, Melton, was removed from his Indian ancestor. It does not do so; on the contrary, the jury say they do not know.

There is no error in the judgment of the court below, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Simonton v. Lanier, 71 N. C., 503; *Rhodes v. Lewis,* 80 N. C., 139; *Muller v. Commissioners,* 89 N. C., 172; *S. v. Partlow,* 91 N. C., 550; *Hughes v. Boone,* 102 N. C., 163; *Greene v. Owen,* 125 N. C., 219; *Abernathy v. Commissioners,* 169 N. C., 641; *Alexander v. Lowrance,* 182 N. C., 644; *Corporation Commission v. Interracial Commission,* 198 N. C., 323.

DOE EX DEM. WILLIAM JOHNSON ET UX. v. PETER E. MADDERA.

In ejectment, where the suit abated by the death of the tenant in possession, notice to "the heirs" of such deceased tenant, without naming them, is sufficient to revive the suit against them, under the 7th and 9th sections of Revised Statutes, chapter 2; and upon failure of the heirs to appear and make defense, the plaintiff's lessor is entitled to judgment by default against the casual ejector.

[In England, at common law, on failure of the defendant to confess, at the trial, lease, entry, and ouster, according to his consent rule, the lessor of plaintiff was nonsuited though he might afterwards sign judgment against the casual ejector; but in our practice, where the judgment is entered in the same court where the pleadings are made up and the trial takes place, the lessor is not nonsuited, but has his judgment by default at once against the casual ejector.]

(The case of *Roberson v. Woolard,* 28 N. C., 91, cited and approved.)

THIS was an action of ejectment, originally brought against Peter E. Maddera, returnable to the Fall Term, 1849, of MARTIN Superior Court; at which term the defendant appeared and entered into the common rule and pleaded not guilty. The case was regularly continued from term to term, until Spring Term, 1851, when the death of the defendant was suggested, and it was "ordered that a copy of the declaration and notice issue to the heirs-at-law," etc.; in pursuance whereof, a *scire facias* and copy of declaration were issued "to the heirs-at-law of Peter E.

Maddera," notifying them "to appear at the Fall Term thereafter, and defend the said suit," etc.; and on this the sheriff returned, "There are no heirs of Peter E. Maddera to be found in my county. I understand they reside out of this State." An alias *sci. fa.* was then issued, on which the sheriff made a like return to Spring Term, 1852; at which time it was ordered that publication be made for six weeks, etc., "for the heirs-at-law of Peter E. Maddera," etc. On *scire facias* (53) issued, and returnable to Fall Term, 1852, the sheriff again made a like return, and added, "Of the names of said heirs, I am not informed."

And on the trial before his Honor, *Judge Settle,* at said Fall Term, 1852, it appearing that publication had been made, as ordered, the plaintiff's counsel moved for judgment by default against the casual ejector, and for a writ of possession—offering to prove that the original declaration was served on Peter E. Maddera, and that he, at the service thereof, was in the possession of the premises therein named. This motion was refused by his Honor, and thereupon the plaintiff's counsel moved for judgment by default against the heirs-at-law, and for an order that a writ of possession issue—which was also refused by his Honor. The plaintiff's counsel then moved to submit the case to the jury upon the plea of not guilty, entered by Peter E. Maddera, which, also, his Honor refused to permit, on the ground that the proper parties were not in court; and thereupon the plaintiffs prayed an appeal to the Supreme Court, which was granted.

Biggs for lessors of the plaintiffs.
Moore, contra, argued:

1. The tenant in possession is admitted to defend, only on condition that he confess, at the trial, lease, entry, and ouster. If he refuse to do so, or fail to appear (in which case the confession cannot be made) the plaintiff is nonsuited as to the party let in, but afterwards takes judgment against the casual ejector. (Ad. on Eject., 289.) He is nonsuited because the plea of "not guilty," now part of the record, denies the whole declaration, lease, entry, and ouster, and "for want of proving these requisites," he is nonsuited. (3 Bl. Com., 204; Ad. on Eject., 289; 2 Sel. Pr., 90, 114.)

2. At common law, on the death of defendant, the casual ejector being out of court, the suit abated. 1 Rev. Stat., chap. 2, sec. 7, provides that actions of ejectment shall not abate, but may be revived by "serving on the heirs-at-law or devisees or the guardians of minor heirs and devisees, a copy of declaration and notice; and after such service, the suit

shall stand revived, and shall be proceeded on in the same man-
(54) ner, as if the defendant were living." So that, when the heir is served with notice, he, too, must appear and confess lease, entry, and ouster at the trial, or the plaintiff will be nonsuited, and judgment taken against the casual ejector.

3. There has been no service on the heir. The *sci. fa.* runs against "the heirs-at-law of Peter E. Maddera," without naming them. The return of the sheriff is, that they are not to be found in his county—he is informed they live out of the State, but he does not know their names. Whereupon publication is made for the heirs of Peter E. Maddera, without naming them. Publication is a substituted service of notice, and must be equally as certain as to the individuals, as actual service. If the sheriff had returned service on the heirs by name, it would have been good, and they would have been in court; *Roberson v. Woolard,* 28 N. C., 90). But if the return had been "executed on the heirs," without name, it is clear they would not have been in court, either to defend or make default; (2 Sel. Pr., 173). Nor in any action, where a personal judgment was sought against them, or against property in their possession. (*Roberson v. Woolard, ut. supra.*) How, then, can publication for the heirs, *eo nomine,* which is the substituted service, bring them into court?

There is no instance of such a service being held good at law. It is like a summons "to executors," and a return of "executed on the executors." No service is good, unless the party is brought into court thereby; and such service would not bring into court the heir sued on the bond of his deceased ancestor—nor the heir, on a petition to make real estate assets—nor the heir to show cause why execution should not issue against lands descended.

In *Roberson v. Woolard,* the *Chief Justice* says, "This writ was against the lands descended to the heirs of Jo. Roberson," without saying who they are; and thus leaving it to the sheriff to judge thereof, which is often a difficult point, and on which there is no opportunity for the person to be heard in court."

The heir of land situated in this State is heir according to the *lex loci.* A nonresident cannot know whether he is heir or not.

4. It is not sufficient that the "heir" be apprised by report or advice, that his interest is to be affected by proceedings. Unless he be
(55) brought into court, as the tenant is, he cannot fail to appear, nor, of course, make default (for default is always after appearance).

5. The plaintiff cannot suffer nonsuit, unless the heir refuse to appear, and without nonsuit, he cannot have judgment against the casual ejector; (Bl. Com., 204).

6. There is no distinction in the modes of bringing parties into court in the different actions. All are in by service, and none without service or appearance.

BATTLE, J. The counsel for the lessors of the plaintiff admits in this Court, that his Honor in the court below was correct in refusing his motion for a judgment by default against the heirs-at-law of Peter E. Maddera; and also his motion to be permitted to submit the case to the jury, upon the plea of not guilty, entered by said Maddera in his lifetime. But he contends that he was entitled to enter a judgment by default against the casual ejector, and thereupon to issue a writ of possession, upon proving to the court that the original declaration had been regularly served upon the said Maddera, who was then the tenant in possession.

The counsel on the other side insists, that the suit abated, for the reason that there were no persons brought before the court to defend the action; that the *scire facias,* issued to notify the heirs, was insufficient, because it did not name them; that the several returns of the sheriff were a nullity for the same reason; and also because he had no power to decide who were the heirs-at-law, or whether they lived in or out of the State; and that, in consequence of these defects, the means prescribed in the Revised Statutes, chapter 2, section 7, 8, and 9, were not made effectual by the lessors of the plaintiff to prevent the abatement of the suit.

The objections urged against the sufficiency of the *scire facias* are, we think, fully answered by what was said by the late *Chief Justice Ruffin,* in *Roberson v. Woolard,* 28 N. C., 95. That was, so far as this question is concerned, a *scire facias* against heirs to subject lands descended to them, to the payment of the debts of their ancestor, under the 63d chapter of the Revised Statutes, section 1. The *scire facias* was directed to the "heirs" without naming them, and the (56) *Chief Justice* said, "The precept need not name them, but leave it to the sheriff to summon and return them." The words of that statute, and the one we have under consideration, are so nearly alike, and the purpose in view so much the same, that a construction put upon one, ought to be adopted in the other. If, then, the *scire facias,* required by the act to prevent an abatement, may issue to the "heirs," without naming them, leaving it to the sheriff "to summon and return them," the objection that the sheriff cannot exercise a judicial function in ascertaining and determining who are the heirs, necessarily vanishes. But the other objection still remains, that the sheriff does not mention the names of the heirs in any of his three returns—says they live out

of the State, and adds, in his last return, that he does not know what are their names. Is this a fatal objection? We think not. The act is obviously one for the amendment of the law, and ought to receive a liberal interpretation. By the rules of the common law, if the defendant in an action of ejectment died, the suit abated; in consequence of which, the lessor of the plaintiff was compelled to pay his own costs, and commence a new action. The expense and delay thus incurred were deemed unnecessary and unjust, and the act in question was passed to prevent them. It is contained in the 7th, 8th, and 9th sections of the Revised Statutes, chapter 2. The 7th section declares that the action shall not abate by the death of the defendant—and points out the manner in which it is to be revived against the heirs. The 8th provides for the appointment of a guardian to defend the heirs when they are minors; and the 9th prescribes the mode in which they are to be notified when they reside out of the State—the fact of their non-residence having been previously stated in the return to the sheriff. If the names of the heirs be known to the sheriff, there will be no difficulty on the part of the lessor in complying with the requisitions of the statute, whether the heirs reside in or out of the State. But if they be unknown to the officer, as seems to have been the fact in this case, what is to be the result? Must an abatement necessarily take place, on account of the inability of the party to comply literally with the requirements of the statute? Or, may the sheriff state in his return, that the names
(57) of the heirs are unknown to him, and that they reside out of the State, so that an advertisement may be published in some gazette, notifying them, as "heirs" of the deceased defendant, to come in and be made parties in his stead? In the one case, the delay and expense will be incurred, which it was the object of the statute to prevent; while in the other, the suit will be revived, without the possibility of the heirs being prejudiced by it. For if they come in and defend, the object of the notice will have been accomplished; and if they do not, they will not be subjected to the payment of any costs; and may at any time, unless their entry be tolled, assert their title against the lessor, or any other person in possession of the land. We think the latter is the liberal and proper construction of the act in the case supposed, which is, in truth, the case before us. Assuming the suit to have been revived by the course of proceedings, adopted by the lessor of the plaintiff, another question still remains: Could he, upon the heirs failing to appear, enter judgment against the casual ejector, and have a writ of possession thereon? A slight attention to the rules of the proceeding in the action, satisfies us that he could. In England, when a declaration in ejectment is served upon the tenant in possession, the lessor is entitled to a judgment by de-

fault against the casual ejector, if he fail to appear; and if he appear, he cannot be admitted to defend, unless he enters into the common rule, by which he agrees to confess, at the trial, lease, entry, and ouster. If, when the trial comes on, he refuses to make the stipulated confession, the plaintiff must be nonsuited, because he cannot prove what is pure fiction; but in the end, says Blackstone in his Commentaries, Vol. 3, page 204, judgment will be entered against the casual ejector; for the condition, on which the tenant was admitted to defend, is broken, and therefore the lessor of the plaintiff is put into the same situation as if he had never appeared at all. In our practice, as the judgment is entered in the same court where the pleadings are made up, and the trial takes place, the lessor would not be nonsuited; but he would have judgment at once against the casual ejector—the defendant having forfeited all right to defend, on account of the breach of his condition. Such would have been the result in this case, had the defendant lived to the time of trial, and then refused to confess lease, entry, and ouster. The defendant's counsel admits that in such case the casual (58) ejector would be evoked from the land of spirits, to which he said he had vanished, when the tenant was admitted to defend. If the defendant die, what, in reason and justice, is to prevent the casual ejector from being evoked again, to have judgment rendered against him, upon a default of the heirs to appear and defend? To hold otherwise would be to belie the maxim, *infictione juris semper equitas existit.*

The order from which the appeal is taken, must be reversed, which must be certified to the court below, that it may proceed therein according to law.

PER CURIAM. Judgment reversed.

MALCOM SHAW v. YOUNG H. ALLEN'S EXECUTORS.

1. To take a case out of the statute of limitations, the promise must be certain, or capable of being reduced to certainty, and the claim sued on identified as that in regard to which the promise was made.

2. Hence, where an account was presented to the defendant and he said, "I reckon it is correct, but I have sets-off against it, and would rather settle with the plaintiff myself," and the witness could not say that the account exhibited on the trial was that which was presented to the defendant: *Held*, that this was insufficient.

(The cases of *Peebles v. Mason*, 13 N. C., 367; *Smith v. Leeper*, 32 N. C., 86, and *Moore v. Hyman*, 35 N. C., 272, cited and approved.)

ASSUMPSIT on a mercantile account. Plea, the statute of limitations. On the trial before *Judge Caldwell,* at ANSON, at Fall Term, 1852, the plaintiff, in order to remove the effect of the statute, introduced a witness, who testified that sometime in 1851, he called on the testator of the defendants at plaintiff's request, with an account for goods sold, and said to him, "Here is an account Mr. Shaw wishes you to settle by note"; that said testator looked over it, and said, "I reckon it is correct, but I have sets-off against it, and would rather settle it with the plaintiff myself." The witness thought the account presented was for about $200—was not certain, but he could not say that the amount
(59) exhibited on the trial was the same that he offered to the testator for settlement. The jury rendered a verdict for the plaintiff, subject to the opinion of the court; and the court being of opinion that the evidence was insufficient to repel the statute of limitations, set aside the verdict, and rendered judgment of nonsuit, from which the plaintiff appealed.

Winston, Sen., for plaintiff.
Strange for defendant.

BATTLE, J. The opinion pronounced by his Honor in the court below is fully sustained by the cases of *Smith v. Leeper,* 32 N. C., 86, and *Moore v. Hyman,* 35 N. C., 272, recently decided in this Court.

The principle stated in those cases, and more particularly in the latter is, that "to repel the statute of limitations, there must be a promise to pay the debt sued on, either expressed or implied, and the terms used must have sufficient certainty to give a distinct cause of action, by the aid of the maxim, *id certum est quod certum reddi potest.*" Apply the rule to this case: The words relied upon to prevent the operation of the statute, are neither certain of themselves, nor capable of being reduced to any certainty. The witness could not say that the account sued upon was the same which he presented to the defendant's testator for settlement. He could not even state its amount. He "thought it was about $200—was not certain." There was, therefore, no particular debt which the testator promised to pay, and none which he acknowledged, from which a promise could be implied. *Smith v. Leeper,* though in some respects resembling this, was not liable to this objection, and in that case, it was held that the bar of the statute was repelled. But if the witness had identified the account, and recollected its precise amount, still there was, in the language used by the testator, no promise to pay it, and none to "settle" it in any sense, which can make it available for the plaintiff. The plaintiff demanded a settlement of the account by note; the testator replied, "I reckon the account is correct, but I

have sets-off against it, and would rather settle with the plaintiff myself." He certainly did not expressly promise to pay the debt, or settle it by note, because he urged an objection against doing so. He certainly did not acknowledge the whole account to be due, be- (60) cause he alleged that he had sets-off against it. No promise then to pay the whole can be implied; nor can any promise be implied to pay any particular part, because, supposing the sets-off did not extend to the whole, no one can say to how much they did extend, and what was the balance. *Peebles v. Mason,* 13 N. C., 367. The use of the term "settle" cannot aid the plaintiff, because he did not call on the testator to come to an account with him, but to settle, that is, to pay the account by note; and the testator's reply must be taken to have used the word in the same sense, and in that sense, it is, for reasons above given, valueless to the plaintiff. The judgment was right, and must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: McBride v. Gray, post, 422; *McRae v. Leary,* 46 N. C., 93; *Loftin v. Albridge,* 48 N. C., 328; *Mills v. Taber,* 50 N. C., 412; *Shoe Store Co. v. Wiseman,* 174 N. C., 717.

KITTY ANN ALLEN v. ELKANAH ALLEN.

1. An order of court, obtained on the motion of an attorney on behalf of a person, is presumed to be done at that person's instance, until he takes steps to vacate the proceeding.

2. Hence, an order of the county court for the emancipation of a slave, procured on motion of an attorney, in the name of the owner, was a valid act of emancipation before the act of 1830 (Revised Statutes, chap. 111, sec. 57), notwithstanding the owner's consent does not otherwise appear.

3. Especially is such order valid, when it appears of record that the owner, at a subsequent term entered into bond, agreeably to law (reciting the former proceeding) to keep the Negro from becoming chargeable, etc.

(The cases of *Sampson v. Burgwyn,* 20 N. C., 21; *Bryan v. Wadsworth,* 18 N. C., 388; *Allen v. Peden,* 4 N. C., 442; *Cully v. Jones,* 31 N. C., 168, and *Stringer v. Bircham,* 34 N. C., 41.)

THE action was trespass *vi et armis,* and the defendant pleaded specially, that the plaintiff was a slave. On the trial before his Honor, *Judge Ellis,* at NEW HANOVER, at Spring Term, 1852, the plaintiff offered in evidence a duly certified copy from the minutes of Brunswick County Court, at its July Term, 1808, in words following:

(61) "On motion, in open court, by George Davis, Esq., to emancipate Sam, a Negro man, formerly the property of Thomas Hogg Hooper, Esq., deceased, and a mulatto woman, the property of Elkanah Allen, by the name of Clary; and it being stated to the court that the said slaves have rendered meritorious service to their owners, the said court do therefore order and direct, that the said slaves be emancipated and set free, agreeable to the act of Assembly in such case made and provided; Sam, by the name of Sam Hooper, and Clary, by the name of Clary Beel. And it is further ordered by the court, that upon sufficient security being given agreeable to law, to keep the said persons, Sam and Clary, from becoming an encumbrance upon any county in the State, that the clerk issue a certificate of their emancipation," etc.

The plaintiff also produced on the trial a certified copy of a bond executed by Elkanah Allen and John G. Scull, of record in Brunswick Court, dated 25 April, 1809, and conditioned, "that whereas, the above bounden Elkanah Allen did, on 26 July, present to the Court of Pleas and Quarter Sessions, then sitting, in and for the county of Brunswick aforesaid, a petition praying that Clary, a negro slave therein named—to wit: Clary Beel, should be emancipated and set free, under the name of Clara Beel," etc.; that the said "Elkanah Allen shall well and truly, notwithstanding the emancipation of said slave, Clary, keep her from ever hereafter being chargeable to the county," etc.

It was admitted that Clary, named in the foregoing record, was the property of the said Elkanah Allen named therein, up to the time of her alleged emancipation, and that the plaintiff is a daughter of said Clary. Evidence was offered by the plaintiff showing that the said Clary, from the time of her alleged emancipation to the time of her death, acted as a free person, and was so regarded by the community; and that the plaintiff, the daughter of said Clary, also acted and was reputed to be a free person, until some five or six years prior to the commencement of this suit, when she was seized by the defendant, the grandson of Elkanah Allen, named in the record. The plaintiff then offered to prove that she was born subsequent to the alleged emancipation of her mother, and counter evidence was offered by the defendant as to this fact. His Honor being of opinion that the record exhibited did not show a valid
(62) act of emancipation, on this intimation, the plaintiff submitted to a nonsuit, and prayed an appeal to the Supreme Court, which was granted.

W. Winslow for plaintiff.
Strange for defendant.

BATTLE, J. The only question presented in the bill of exceptions is, whether his Honor was correct in expressing the opinion, after the other proof had been given, that the record of the County Court of Brunswick, at its July sessions, 1808, did not show a valid act of emancipation for Clary, the mother of the plaintiff.

It is not denied by the defendant's counsel, that by the law as it then stood, the application to the court, by the owner for license to liberate his slave, might have been made orally as well as by a petition in writing; *Sampson v. Burgwyn,* 20 N. C., 21; but he contends, upon the authority of *Bryan v. Wadsworth,* 18 N. C., 388, that when the application is by motion, the record ought to show that it was made by the master, or at least by an attorney for him, and in his name; and that when that is not set forth in the record, nothing—neither a bond filed by the master, in which he states that the motion was at his instance, nor any length of acquiescence by him and the public, in the enjoyment of freedom by the slave—will avail to supply the defect. We think the rule contended for by the counsel is too rigid, and is supported by neither reason nor authority.

We admit that no person, nor the Legislature even, can set a slave free without the consent of his owner; *Allen v. Peden,* 4 N. C., 442. The question, then, is restricted to this: Must the master's consent be stated expressly in the record, or may it be inferred or proved *aliunde?* Every court, acting within the scope of its jurisdiction, must be presumed to have acted correctly, until the contrary appears. When one moves a court to do an act on his behalf, he may do so in person or by an attorney of the court. If the motion be made by an attorney, the court may well suppose that he had authority from his client for the purpose; and if it appear afterwards that he was not authorized to move in the matter, the person for whom he assumed to act may apply to the court, and have the proceeding set aside. But if, instead of making such application to have the proceeding vacated, he files in the same court a paper, either expressly or impliedly re- (63) ferring to the act done for him, and saying it was done at his instance; and if in addition to this, he acquiesces and treats as valid the thing done for a long series of years, certainly neither he nor any other person can afterwards question its validity. Such, we think, is substantially the case before us. The record states that "on motion in open court by George Davis, Esq., to emancipate a mulatto woman, the property of Elkanah Allen, by the name of Clary," etc., "the said court do therefore order and direct the said slave to be emancipated and set free," etc., "by the name of Clara Beel; and it is further ordered by the court, that upon sufficient security being given agreeably to law, to

keep the said Clary from becoming an incumbrance upon any county in the State that the clerk issue a certificate of her emancipation." Among the records of the same court, we find a bond executed on 25 April, 1809, by Elkanah Allen and one John G. Scull, the condition of which recites, "That whereas the above bounden Elkanah Allen, did, on 26 July, present to the court," etc., "then sitting for the county of Brunswick, a petition praying that Clary, a Negro slave therein named—to wit, Clary Beel—should be emancipated and set free," etc. Clary Beel was then permitted to act as a free woman, and was treated and regarded as such until her death; and her daughter, the present plaintiff, was treated and regarded in like manner, until 1842 or 1843, when she was seized by the present defendant, a grandson of the former owner. Surely, after such a distinct acknowledgment by the owner, that he applied for and obtained from the court a license to liberate his slave, and had from that time permitted her to go free, and he and all other persons had for more than thirty years treated and regarded her and her daughter as free, every presumption ought to be made in favor of her actual emancipation according to law. *Cully v. Jones,* 31 N. C., 168; *Stringer v. Bircham,* 34 N. C., 41.

The judgment of nonsuit must be set aside, and a *venire de novo* ordered.

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

Cited: Jarman v. Humphrey, 51 N. C., 31.

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MERCER FAIN v. A. T. EDWARDS ET AL.

1. A party may give in evidence declarations made by himself and another in regard to, and accompanying the transfer of personal property between them, for the purpose of showing the nature of the transaction; and *a fortiori* are such declarations admissible to sustain that other person, when he is called on to testify to the transaction, and his credibility is impeached.

2. Where an entry in a book has been adjudged to be admissible in evidence, it is admissible for all purposes, and upon a new trial of the case, the decision of the court below, on inspection, is conclusive as to all objections on account of matters appearing on the face of the entry.

(The cases of *S. v. Isham,* 10 N. C., 185; *S. v. Worley,* 33 N. C., 242, and *S. v. Weaver,* 35 N. C., 491, cited and approved.)

FAIN *v.* EDWARDS ET AL.

THIS was an action of *trover,* brought to recover the value of a mare, and comes up on appeal, after the new trial granted at August Term, 1850. (33 N. C., 305.) On the trial before his Honor, *Judge Battle,* at CHEROKEE, at Fall Term, 1851, upon the plea of not guilty, the case was as follows: The defendant, Edwards, had levied upon and sold the mare in question, at the instance of the other defendant, under a judgment and execution against one Samuel Lowdermilk. For the purpose of proving that the mare, though in the possession of Lowdermilk, when she was levied on and sold, was the property of the plaintiff, he introduced the said Lowdermilk as a witness, who testified that in the year 1848 the plaintiff sent a stallion by him into the State of Georgia, for the purpose of trading him for a tract of land; that failing in that, he left the stallion with one Collins to make a season, and got from him a horse to ride home; that the plaintiff afterwards applied for the stallion, and Collins refused to deliver him up, unless his horse was returned; that plaintiff then called on the witness and demanded that he should pay him for the stallion, and agreed to give him, and did deliver to him, a horse in satisfaction of the claim on account of the stallion; and that the plaintiff then told him to take the horse out to one Jones', who lived in Georgia, and trade him for a race mare which Jones had, and which the plaintiff wanted; that he did so, and gave his note to Jones for $30, the difference in value between the two animals; and upon his return, on 7 January, 1849, the plaintiff agreed to give him credit on his books for that amount; that he delivered the mare to the plaintiff in Murphy, and the plaintiff not having room for her in his stables, sent her to the stables of one (65) Manchester, where she remained all night; that the said mare had the scratches, and the plaintiff the next day delivered her to the witness for the purpose of taking her to his house in the country, and curing her of said disease, and to put her in condition for racing; and that whilst she was thus in his possession, the defendants took her away and sold her.

The defendants insisted that the mare was in truth the property of the witness, Lowdermilk, and introduced testimony for the purpose of impeaching his credibility, and of showing that the transaction between him and the plaintiff was a fraudulent attempt to defeat Lowdermilk's creditors.

In order to sustain the witness, Lowdermilk, the plaintiff then introduced one Rhea, who stated that he was present on a certain occasion, when said Lowdermilk delivered the horse to plaintiff, and heard a conversation between the parties, in which the plaintiff stated that Lowdermilk had taken his stallion to Collins, in Georgia, and had so disposed

of him that plaintiff could not get him back, and he had taken a certain horse from Lowdermilk in lieu of the stallion—all which Lowdermilk assented to; and plaintiff then said to Lowdermilk, that he wished him to take the horse, which was then present, and carry him to Georgia and swap him with Jones for the mare. This conversation was objected to, but admitted by the court. The witness, Rhea, further testified, that he was present at another time, after Lowdermilk's return with the mare, and saw him deliver the mare to the plaintiff, and heard the plaintiff tell Lowdermilk that he must take the mare (which was then present) home with him, and cure her of the scratches and put her in condition for racing. This evidence was also objected to, but admitted by his Honor.

The plaintiff then offered another witness, one Turnbill, who stated that he heard the plaintiff tell Lowdermilk that the mare must be taken to Manchester's stables, as his own were full, and be kept secretly, that he might make a race with one Terry. Manchester was called, and stated that the mare was sent to and kept in his stable one night.

The plaintiff then offered his mercantile books in evidence to show that he had, on 30 March, 1849, given Lowdermilk credit for the
(66) $30, as stated by that witness. The books were proved to be those in which all his accounts as a merchant were kept; but the defendant still objected to their introduction, unless the plaintiff could prove that the entry was actually made at the time is bore date, and before the commencement of the suit; but they were admitted by his Honor. Copies of these entries are sent up with the case.

The plaintiff had a verdict, and from the judgment rendered thereon, the defendant appealed.

The case was argued at Morganton at August Term, by

J. Baxter for plaintiff.
J. W. Woodfin for defendants.

NASH, C. J. His Honor below very properly overruled the objection to the testimony of the witnesses, Rhea and Turnbill. The testimony of Lowdermilk had been admitted without objection, and upon its being attacked by the defendants, the other witnesses were introduced to sustain it. Their evidence was admissible, not only for that purpose, but would have been so, in chief. It was important to the plaintiff to show that, although the mare, the subject of controversy, was in possession of Lowdermilk, at the time it was levied on by the defendant, Edwards, yet that it was his property. He then was clearly at liberty to show how the mare became his property, and for what purpose he had put

the animal into the possession of Lowdermilk; and persons who were present at the transaction and who heard from the parties what that purpose was, surely were competent to prove it. It cannot be necessary to sustain such a position by authority. Equally so was the testimony of Rhea to the conversation between the parties as to the terms of the bailment, as corroborative of the testimony of Lowdermilk, who was his witness to show his title.

The principal objection, however, relied on by the defendants, was the admission of the entry on the books of the plaintiff. This evidence was not offered in chief, but as corroborative of the testimony of Lowdermilk. The latter, at the instance of the plaintiff, as appears by the case, had taken a horse to Georgia, and traded him with one Jones for a race mare, giving to the latter thirty dollars as the difference (67) in value, and upon his return, he stated in his evidence, that the plaintiff, who was a merchant, and with whom he had an account, promised to give him credit on his books for the amount of thirty dollars, as so much money paid on his account. The books were offered to show that in this particular Lowdermilk had stated the truth. This was objected to, and his Honor overruled the objection of the defendant, and admitted the testimony. In this there was no error. It was first objected that the books were not such as were admissible in evidence; and secondly, that the entry could not be read in evidence until it was shown that it was actually made at the time it bore date. It was proved that the books were those in which all the mercantile transactions of the plaintiff were entered, and in which, of course, this entry would be made. The entry was of a character to be made in the ordinary course of business in which the party was engaged, and was against his interest; for it discharged Lowdermilk's debt to the amount of thirty dollars.

It will be borne in mind that the plaintiff's books and the entry therein were not offered in chief, but simply to sustain the evidence of an impeached witness. To answer the second objection of the defendants, and to show this credit and the entry were made by the plaintiff in the regular course of business, extracts or copies of the entries are sent here as a part of the case. With these copies we have nothing to do. Whether the entry was admissible in evidence, was a question of law to be decided by the court who tried the case; and to enable him to do so, an inspection of the book was necessary. And when, in such case, the slightest suspicion of fraud appears upon its face, as that the entry was not made in the regular course of the maker's business, or that it is blotted, or erasures made, or that it appears crowded in, it will be sufficient to cause its rejection. All these, however, are matters of fact, of which the judge below is the trier; and his decision is conclusive,

because he decides the question upon inspection, and he has the original before him. His eyes can guide him to a proper result as well as ours can. We are, in such a case, as much bound by the judgment of the court below upon the facts, as we are by the finding of a jury; *S. v. Isham,* 10 N C., 185; *S. v. Worley,* 33 N. C., 242, and *S. v.*
(68) *Weaver,* 35 N. C., 492.

The last objection remains to be considered; it is, that to entitle the plaintiff to the benefit of the entry, he was bound to prove *aliunde* that it was made *ante litem,* and at the time it bears date. Such is not the rule of law. Where the entry is adjudged by the court to be competent evidence, it is to be presumed to have been truly made, subject to be disapproved by the opposite party or the party objecting. If this were not so, it would be almost impossible for any merchant to prove his accounts, when his clerk or the person making the entries is dead; 1 Starkie on Ev., 300. The rule is founded in reason. The same motive which would induce an individual to make an entry against his interest, would usually induce him to make a true one. A false one would be of no value, and the making it would be frequently more troublesome. The date of the entry is as much embraced in the rule of presumption as any other portion of it; and that, according to the case sent us, was before this action was commenced. We see no error in the judgment of the court below.

PER CURIAM. Judgment affirmed.

DOE EX DEM. OF SAMUEL HARGROVE ET AL. v. ELI P. MILLER.

Where A. demised to B. in writing a tract of land, and excepted thereout a certain lot, one-half whereof previously thereto he had in writing demised to J. S. (and which had been surrendered by J. S.) and the other half he had by parol agreed to lease to J. D., to whom, after the said lease to B., he demised in writing the entire excepted lot: *Held,* that the exception in the lease from A. to B. was a good defense for one claiming under J. D., in ejectment brought by B. for said lot—the validity of the exception not being dependent on the truth or falsity of the recital in the lease to the lessor of the plaintiff.

THIS was an action of ejectment, tried before his Honor, *Judge Caldwell,* at the Superior Court of Law of RANDOLPH County at Fall Term, 1852. The following facts were submitted to his Honor as of a case agreed.

"On 22 January, 1848, Enoch Sawyer executed a written lease to the lessors of the plaintiff for seventy-five acres of land, including the

Sawyer gold mine, in Randolph County, and bounded as fol- (69) lows—viz.: Commencing at the entrance of the still-house road into the ridge road, leading from said Sawyer's dwelling-house a northwest course, running up said road, that is, the ridge road to Garner's line—thence south on said Garner's line to the branch—thence down the branch to the still-house—thence up the still-house road to the beginning, to have and to hold for the term of twenty years." . . . Excepting of the above described 75 acres, the Wilborn and Dougan lot, with cabin near the still-house, containing 1¼ acres. Also one-half of a lot lying southwest of the ridge road, adjoining and opposite to the Sawyer shaft, running to the hollow on each side of the ridge, and down the ridge to a lot now worked by Anthony and Hoover, leased to T. and J. Farlow. Also two-thirds of the lot leased to Anthony and Hoover for nineteen months, adjoining the Farlow lot N. E., and the Davis lot S. W. Also one-half the Davis lot leased to Henly and one-half to Davis for ten years, etc.; which said lease was duly proved and registered in the register's office for said county. The said lease of 22 January, 1848, further provides, as follows: That all or any of the above exceptions, the said King (one of the lessors) has the right and privilege of purchasing or quieting, and when any of their terms expire, they are included in this lease. The Davis lot, embraced in the above exceptions, is included in the boundaries of the said lease of 22 January, 1848.

Previously to the execution of the foregoing lease by Sawyer to the lessors of the plaintiff, he, Sawyer, had executed to Micajah Davis (who had a house and improvements on the same, and was living thereon) a lease in writing for one-half the said Davis lot, which had been handed back by Davis and taken up by Sawyer on account of some difficulty that they had got into, at which time Sawyer made a verbal promise to execute another lease to him for one-half of said lot, which was never done, further than the reservation in the aforesaid lease to the lessors of the plaintiff, to enable him to comply with his promise to said Davis and Henly. That purpose was not known or explained to lessors of plaintiff at the time Sawyer executed to them the lease of 22 January, 1848. Previously to 22 January, 1848, the said Sawyer had made a parol lease to one Thomas Henly for the other half of the Davis lot, and after the execution of the aforesaid lease of 22 Janu- (70) ary—to wit, on 1 March, 1848, executed a lease in writing to him for the same; and on 2 June, 1848, executed a written lease to him for the other half.

The defendant claimed title by various *mense* conveyances from Thomas Henly. Upon the foregoing facts his Honor was of opinion that in law the lessors of the plaintiff were entitled to recover, judgment was

to be entered in their favor, that they recover their term and costs—if of a contrary opinion, judgment of nonsuit. And his Honor being of opinion with the defendant, there was judgment of nonsuit accordingly, and the plaintiffs appealed.

J. H. Bryan for lessors of plaintiff.
Miller for defendant.

BATTLE, J. We concur in the opinion expressed by his Honor upon the case agreed in the court below. The lease executed by Enoch Sawyer to the lessors of the plaintiff on 22 January, 1848, gave them a right to the possession of all the lands contained within the metes and bounds therein set forth, unless certain parts or lots of said land were excepted thereout. The case states expressly, that certain lots were so excepted, among which were, "half the Davis lot leased to Henly, and half to Davis for ten years." The whole lot, then called the Davis lot, was excepted out of, and of course could not pass by, that clause of the lease to the lessors of the plaintiff. But the lease contains another clause—to wit: That when any of the terms embraced in the exceptions expire, they are included in it. The counsel for the lessors contends, that under the operation of this clause, taken in connection with the facts stated in another part of the case, they are entitled to recover. Those facts are, in substance, that Sawyer had previously to 22 January, 1848, made a parol lease to Henly for one-half of the Davis lot, and had promised to make a lease to Davis for the other half, and that after the said 22 January, he, at different times, had executed leases to Henly, embracing the whole lot.

(71) The counsel argues, that the reason assigned for the exception of the Davis lot, out of the lease to the lessors of the plaintiff, did not estop said lessors from showing that the leases recited, as having been made to Henly and Davis, respectively, were leases by parol, and as such were void and of no effect under our act of 1819, 1 Revised Statutes, chapter 50, section 8. We agree with the counsel, that there was no estoppel; but we do not see how that can make any difference. The lot in question was in fact excepted, no matter what reason was assigned for it. The exception was absolute and unconditional, and did not at all depend upon the truth or falsehood of the recital, that leases for ten years had been made respectively to Davis and Henly. The counsel then argues, that the terms of the leases to Davis and Henly, which is different from the *times* of said leases, 2 Black. Com., 144; 4 Bac. Abr., 171, expired by surrender or otherwise; and that by a clause in the lease to the lessors of the plaintiff, above referred to, they

fell into it. We see nothing stated in the case agreed to support the position. The parol lease to Henly certainly did not expire in any way; on the contrary, it was made effectual by the execution of a written lease to him for his half of the Davis lot on 1 March, 1848. There was no lease of any kind to Davis in existence on 22 January, 1848, and therefore there could be none to expire. His written lease was surrendered to Sawyer, the landlord, before the said 22 January, and at the time he had only a promise for a lease; and the case states expressly, that the exception in the lease to the lessors of the plaintiff was made, in order to enable Sawyer "to comply with his promise to Davis and Henly." A lease of Davis's half was on 2 June, 1848, for some cause not stated, and which we deem totally immaterial, made by Sawyer to Henly; and as the defendants claim under him, they were entitled to the whole Davis lot, at the time the suit was commenced. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(72)

JOAB BROOKS v. ROB. W. STINSON ET AL.

Where A. leased land to B. and others for the use of a public school, and the lessees put into the school room certain tables and benches, and before the expiration of the lease took them away: *Held*, that A. had no possession actual or constructive, to enable him to maintain trespass *quare clausum fregit.*

(The cases of *Dobbs v. Gullidge*, 20 N. C., 197, and *Patterson v. Bodenhammer*, 33 N. C., 4, cited and approved.)

TRESPASS *quare clausum fregit,* tried before his Honor, *Judge Caldwell,* at RANDOLPH, at the Special Term in January, 1852.

The trespass complained of and shown in evidence was that the defendants entered a schoolhouse on the plaintiff's land, and carried away a table, benches, and some loose plank. It was in evidence that three of the defendants were school committeemen, duly appointed for district No. 37, in said county; and that the plaintiff had given them leave to have a public district school taught for three months in the said schoolhouse. It further appeared, that the articles taken away had been furnished for the use of the school, and placed in the house before the plaintiff purchased the land; and that said committee, accompanied by the other two defendants, entered the house and carried away the said articles whilst the school was in session, before the expiration of

the three months—to wit, on the last day of the school; and by the permission and consent of the teacher, who was present. His Honor, the presiding judge, charged the jury that if they were satisfied of the facts as above stated, the plaintiff did not have such a possession as would enable him to sustain the action. There was a verdict for the defendants accordingly, and from the judgment rendered thereon the plaintiff appealed.

No counsel for plaintiff.
Miller for defendants.

NASH, C. J. It cannot be necessary to cite an authority to show, that to sustain an action of trespass to land, the plaintiff must have either the actual or constructive possession at the time the act complained of is committed. If it were, the cases of *Dobbs v. Gullidge,* 20 N. C., (73) 197, and *Patterson v. Bodenhammer,* 33 N. C., 4, decided by this Court, the one in 1838, and the other in 1850, are both directly to the point. The plaintiff, Brooks, owned the land, and leased it by parol to three of the defendants for three months, for the use of a public school. A schoolmaster was put in possession by the school committee as their agent, and before the expiration of the lease, the defendants entered the house by the permission of the schoolmaster (who with his scholars were then in it), and took away the articles, as stated in the case. The possession was at that time actually and legally in the committee by their agent, the schoolmaster, and no trespass was committed by the defendants. But again: the articles taken were carried by the committee to the house, and placed in it for the use of the school or schoolmaster, and none of them had been annexed to the realty. They, therefore, during the continuance of the lease, had a legal right to remove them. It is fully established, that a tenant for years may take down erections which are useful and necessary to carry on his trade or manufacture, and which enable him to carry it on with more advantage. Bac. Abr., title, "Ex'rs." letter H.; 2 East., 88. So he may carry away ornamental marble chimney pieces, and wainscot fixed only by screws; *Elwes v. Maw,* 3 East., 38; but he cannot, after he has left the premises, upon the expiration of his lease, return and take them away—if he does, he is a trespasser. We see no error in the charge, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

DEN EX DEM. OF CLAYTON MOORE v. HORACE GHERKIN.

1. It is no valid objection to an award, in an action of ejectment, that the arbitrators assessed no damages against the defendant.
2. Where, in a question of disputed boundary, the arbitrators fix on a line as the dividing line between the parties, their award is a full, certain and final decision of the matter in dispute.

(The case of *Miller v. Melchor*, 35 N. C., 439, cited and approved.)

APPEAL from the Superior Court of Law of MARTIN County, at Fall Term, 1852, his Honor, *Judge Caldwell,* presiding.

The action was ejectment, originally brought in the county court, and there by the parties submitted of record to arbitration. (74) An award was made by the arbitrators and judgment for the plaintiff, and the defendant appealed to the Superior Court. The award was as follows:

"Being appointed, etc., we did, after giving full notice to the parties to attend at this place (Free Union M. H.), on the day above named (7 June, 1852), with their witnesses, which notice they obeyed by appearing at the time and place specified, with their witnesses and papers, and both said they were prepared and ready for a hearing and trial of said suit; and after hearing all the evidence and examining all the papers, we came to the following decision unanimously—viz., that said Moore's land extends to and adjoins the line of the Thomas Pollock patent, which runs from a white oak stump north forty-five degrees east two hundred and eighty-two poles to a red oak on Rose's creek; as per Hayman's and Phillips' survey and the callings of said Gherkin's deed, who claims under the Pollock patent; and therefore we further adjudge that the defendant, Gherkins, pay all the costs of said suit. Given under our hands the days and date above written," etc.

On the trial in the court below, the defendant's counsel moved to set aside the foregoing award. His Honor overruled the motion, and gave judgment against the defendant for the costs, according to the award, and the defendant appealed.

Moore for defendant.
Biggs, contra.

PEARSON, J. The motion to set aside the award is put on three grounds: First, the arbitrators have assessed no damages; second, the award is vague and uncertain; third, it is not final.

These three exceptions are disposed of by *Miller v. Melchor,* 35 N. C., 439. The first is the converse of the first point made in *Miller v. Melchor.* There the exception was, that the arbitrators had assessed actual damages—here the exception is, that no damage is assessed. It is decided by that case, that the matter of damages is in the discretion of the arbitrators. When actual damages have been sustained, they are at liberty to assess them, and consequently when, in their
(75) opinion, no damage has been sustained, they are at liberty to say so; and the omission to find nominal damage (which is a mere form in entering up a judgment according to the course of the court), is not a fatal objection.

The other two exceptions are precisely those made in *Miller v. Melchor;* and as the report of that case does not notice them, or state the facts upon which they arise, it will not be amiss to extract the portion of the opinion delivered in that case, applicable to these exceptions:

"The second exception, that the award is vague and uncertain, is not well founded. It fixes upon a certain line as a dividing line between the parties, and it is plainly to be intended, that the lessor is to be put into possession up to this line. So the court is enabled to give judgment for the entire damages and cost, and to order a writ of possession in favor of the lessor. Herein it is plainly distinguishable from *Duncan v. Duncan,* 23 N. C., 466, which was relied on by the defendant. There the referees said the plaintiff should pay the defendant $1,544, and convey to her three-fourths of the whole amount of land purchased of the executors of Charles Finley, deceased, to be taken off the upper part of said land. The award was uncertain and vague, because it did not show what land had been purchased of the executors of Finley; and it did not fix on any definite line by which the portion allowed was to be taken off the upper part. No judgment could be rendered by which to carry the award into effect, because, to do so, required a conveyance and a decree for a specific performance, which could not be made in ejectment. 3. There is no force in the last objection. The arbitrators, by aid of the surveyor named in the order of reference, had fixed on a line up to which the lessor is entitled to have possession. They have assessed entire damages, and have disposed of the costs. This is, it seems to us, a final and complete disposition of all the matters referred."

In the case before us, the matter in dispute was the location of the dividing line. The arbitrators fix on it by the aid of a survey and title papers, offered in evidence before them, and give its location—
(76) to wit, from a white oak stump north 45 degrees east 282 poles to a red oak on Rose's creek, etc. This settles the matter in

dispute. They then award that the defendant shall pay the cost, and as they say nothing about damages, the presumption is there were none. At all events, it was a matter left to their judgment, and they have made a final and complete disposition of all the matters referred.

PER CURIAM. Judgment affirmed.

Cited: Gaylord v. Gaylord, 48 N. C., 369; *Coe v. Loan Co.,* 197 N. C., 690.

WILLIAM WINSTEAD v. THOMAS J. REID.

In *assumpsit* for work and labor done, the plaintiff can recover nothing on a *quantum meruit*, where a special contract is proved, and it appears that he has, against the consent of the defendant, refused to perform his part of the agreement.

(The cases of *Carter v. McNeely*, 23 N. C., 448, and *Festerman v. Parker*, 32 N. C., 474, cited and approved.)

THIS was an action of *assumpsit* for work and labor done. The defendant pleaded the general issue.

On the trial before his Honor, *Judge Dick,* at CASWELL, on the last Fall Circuit, the evidence was, that the plaintiff, a house carpenter, had agreed to build certain specified additions to the dwelling-house of the defendant, in which he resided with his family, for the sum of $200, and that the plaintiff voluntarily and without any fault of the defendant, abandoned his work when it was about half finished; and although often requested by the defendant to return and finish the work according to the contract, he refused to do so.

The plaintiff's counsel, upon this state of facts, asked the court to instruct the jury that the plaintiff, notwithstanding the special contract, was entitled to recover for so much of the work as he had actually done—the value to be estimated by them with reference to the $200, the price of the whole job. His Honor declined to give this instruction to the jury, but on the contrary charged them that the plaintiff was not entitled to recover. Verdict and judgment for the defendant, and appeal to the Supreme Court.

No counsel appeared for the plaintiff in this Court. (77)
Lanier and Norwood for defendant.

NASH, C. J. In respect to actions on contracts, the rule is, that where a special contract is made, the action for its breach must in general be on the special contract, while it is open and unperformed; and no action *indebitatus assumpsit* for any thing done under it can be brought. The plaintiff in this case undertook to do certain work for the defendant for a specified sum of money, and after the work was half accomplished, abandoned it, and refused to go on with or complete it. The special contract was still open, for the defendant requested the plaintiff to finish his work. The action is upon the *quantum meruit:* the plaintiff merits nothing, and the law will give him nothing. The contract was an entire one and executory, and after performing a part, he wilfully and without a just excuse, and against the will of the defendant, refused to go on with it. The contract being an entire one, performance by the plaintiff was a condition precedent, which must be averred in the declaration, in which case it must be proved, unless the opposite party has discharged him from executing it, either by refusing to let him go on with it, or by disabling himself from performing his part. If the plaintiff does not aver performance on his part, or a readiness to do so, he can recover neither on the special contract nor on a *quantum meruit.* To this point, *Cutler v. Powell,* 6 T. R., 320, is a leading and strong case. There, a sailor hired for a voyage from Kingston to Liverpool for a stipulated price, "provided he proceeded, continued, and did his duty" on board the ship, until his arrival at Liverpool. He died on the voyage. The Court held that wages could not be recovered, either on the contract or on a *quantum meruit;* that the performance of the voyage was a condition precedent, which must be performed before anything could be claimed by the sailor. A stronger case, and one more forcibly illustrating the principle, cannot well be conceived. See the able note to volume 2 Smith's Leading Cases, p. 13, where all the English and American cases are collected and digested. In the note, the American cases are arranged, and the principles to be extracted from them stated. The 5th division is, if there has been an entire executory contract, and the plaintiff
(78) has performed a part of it, and then wilfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing on the special or general *assumpsit.* See 25th page of same volume of Smith. In the case of *Jennings v. Camp,* 13 Johns., 97, the same doctrine is stated by *Justice Spencer,* in declaring the opinion of the Court. See, also, *Carter v. McNeely,* 23 N. C., 448, and *Festerman v. Parker,* 32 N. C., 474. His Honor, the presiding judge, committed no error in refusing the instructions prayed.

PER CURIAM. Judgment affirmed.

Cited: White v. Brown, 47 N. C., 405; *Brewer v. Tyson,* 48 N. C., 184; *Niblett v. Herring,* 49 N. C., 263; *Russell v. Stewart,* 64 N. C., 488; *Pullen v. Green,* 75 N. C., 218; *Jones v. Mial,* 82 N. C., 252; *McMahan v. Miller, ibid.,* 318; *Thigpen v. Leigh,* 93 N. C., 47; *Simpson v. R. R.,* 112 N. C., 708; *Raby v. Cozad,* 164 N. C., 290.

HARRISON AND RESPASS ET AL., v. THOMAS E. PENDER.

1. A judgment in attachment, like judgments at common law, cannot be collaterally impeached by evidence that the plaintiff's cause of action had not accrued at the time his attachment issued.

2. Hence, where A. sued out an attachment against B., on a claim for money paid to his use as his surety—upon a rule against A. by other judgment creditors (in attachment) of B., to show cause why the moneys raised by the sheriff's sale should not be exclusively applied to the satisfaction of their debts: *Held,* that evidence of the fact that the alleged payment by A. as B's surety, had not reached the hands of the creditor at the time the attachment issued, was inadmissible.

(The case of *Skinner v. Moore,* 19 N. C., 138, cited and approved.)

APPEAL from the judgment of his Honor, *Judge Manly,* made at Fall Term, 1852, of WASHINGTON Superior Court of Law, in the following case:

The defendant issued an attachment against William L. Rhodes, as an absconding debtor, on 7 November, 1851. On the 8th of the same month the plaintiffs also issued attachments against the said Rhodes for debts due them; all of which attachments were returnable to November Term, 1851, of Washington County Court; and at May Term following, judgments were obtained, upon which executions issued, and the property attached was sold, and at August Term, the sheriff brought the money, the proceeds of the sales, into court, and asked the advice and direction of the court, to make an application thereof. Returnable to August Term, the plaintiffs served a rule on the defendant to show cause why the money raised should not be applied to theirs instead of his execution. The rule was discharged in the county (79) court, and an appeal taken by plaintiffs to the Superior Court, when, at Fall Term, 1852, the plaintiffs offered to prove, in support of their rule, that the defendant was bound with Charles Latham, as surety of said Rhodes, on a note payable at the Bank of Cape Fear at Washington for $500; that on the morning of the day his attachment issued,

he enclosed the amount of said note to the cashier of the bank, and deposited the letter containing the money in the postoffice at Plymouth; that the mail did not leave Plymouth until the following day; and that the defendant's attachment issued, and was levied on the property whilst the money was lying in the postoffice at Plymouth, thirty-five miles distant from the payee of the note. His Honor, the presiding judge, rejected the evidence, and discharged the rule, and the plaintiffs appealed.

E. W. Jones for plaintiffs.
Heath for defendant.

BATTLE, J. The effect of the testimony offered by the plaintiffs in the rule, was to impeach the validity of the judgment obtained by the defendant, Pender, in his attachment against Rhodes, by showing that when he issued it he was not a creditor of Rhodes. This could not be done collaterally, as has been often decided; and his Honor was, therefore, fully justified in rejecting the testimony. In the case of *Skinner v. Moore,* 19 N. C., 138, one of the points adjudged was, that by our attachment law, a judgment obtained upon a proceeding in an original attachment, is placed upon the same footing with a judgment rendered in a court of record, according to the course of the common law. It cannot be collaterally impeached by evidence or by plea, except by a plea denying the existence of the record; and is conclusive until it be set aside by the same court or reversed upon a writ of error or on appeal, by a superior tribunal. That case is decisive of this; and in it the reasons upon which the principle is established, are so fully and ably explained by the late *Chief Justice Ruffin* as to render superfluous any further comment. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bank v. Spurling, 52 N. C., 398.

(80)

HARRISON AND RESPASS ET AL., v. SAMUEL S. SIMMONS, AGENT OF P. P. LAWRENCE.

Where A. obtained judgment on an attachment against B., upon a rule against him by other judgment creditors of B. in attachment to show cause why the moneys raised by the sheriff's sale should not be applied to their executions, and not his: *Held,* that A's judgment could not be collaterally impeached, by evidence showing that at the time it was finally obtained, the debt had been paid.

HARRISON AND RESPASS ET AL. *v.* SIMMONS, AGENT OF LAWRENCE.

(The cases of *Carter v. Sheriff of Halifax*, 8 N. C., 483; *Governor v. Griffin*, 13 N. C., 352; *Hodges v. Armstrong*, 14 N. C., 253, and *Foster v. Frost*, 15 N. C., 424, cited and approved.)

LIKE the next preceding case, the same plaintiffs *v. Pender,* this was an appeal from the judgment of his Honor, *Judge Manly,* on the last circuit at WASHINGTON, discharging a similar rule, under the following circumstances: The defendant, as the agent of Lawrence, issued his attachment against Rhodes on a note payable to Lawrence as cashier of the branch of the Bank of the State at Tarborough, to which Simmons was surety. At May Term of the county court, 1851, judgment was taken on this attachment, and at the same term the plaintiffs also had judgments on attachments issued by them against said Rhodes. Executions were issued, and the property levied on was sold by the sheriff, who, at August Term, brought the money, the proceeds of sale, into court, and asked the advice and direction of the court as to its application. The plaintiffs had a rule served on the defendant, returnable to the same term of the court, to show cause why the proceeds should not be applied to their executions. The rule was discharged in the county court; and an appeal taken to the Superior Court, where the case coming on to be argued at last Fall Term, the plaintiffs offered to prove, in support of the rule, that before the rendition of final judgment on the defendant's attachment, the surety, Simmons, had paid to said Lawrence the entire amount of the debt upon which his attachment was issued, and which was accepted by Lawrence in satisfaction of the debt. His Honor, the presiding judge, refused to hear the evidence, and discharged the rule; and judgment having been rendered accordingly, the plaintiffs appealed.

E. W. Jones for plaintiffs. (81)
Heath for defendant.

BATTLE, J. This case is the same in principle with that of the same plaintiffs against Pender, and must be decided in the same way. In that case the plaintiffs sought to impeach the validity of Pender's judgment against Rhodes, by proving that at the time when he issued his attachment, he was not a creditor of Rhodes. Here the plaintiffs propose to do the same thing, by showing that before the final judgment was obtained by Peter P. Lawrence, his debt was satisfied by a payment made by the defendant, Simmons, and therefore that Lawrence was not a creditor at the time when he obtained such judgment. But the judgment established the fact conclusively that he was a creditor, and the plaintiffs cannot be permitted in this collateral way to deny it. *Skinner v.*

Moore, 19 N. C., 138. Had Simmons, as the surety of Rhodes, paid the debt to Lawrence after the final judgment had been obtained, then the testimony offered by the plaintiffs would have been admissible; not for the purpose of impeaching the judgment, but to show that it had been paid, which, as Simmons was not a party to the judgment, might have had that effect or not, according to the intention of the parties. *Carter v. Sheriff of Halifax,* 8 N. C., 483; *Governor v. Griffin,* 13 N. C., 352; *Hodges v. Armstrong,* 14 N. C., 253; *Foster v. Frost,* 15 N. C., 424. But as the testimony was offered to prove the payment of the debt before the final judgment, it was inadmissible for that purpose, and was properly rejected. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(82)

SAMUEL DREWRY v. THOMAS S. PHILLIPS.

1. Where A. purchased a slave of B. in the State of Virginia and took therefor a bill of sale, which, though not valid under our statute, was good and sufficient by the laws of that state; and the slave was, at the time of said sale, in the possession of C., as bailee of B., in this State, who afterwards sold the same: *Held,* in a suit by one claiming under A. against the vendee of C., that the *lex loci contractus* determined the sufficiency of the conveyance from B. to A., and that it therefore passed a good title.

2. It would be otherwise, if the defendant were claiming as a creditor, or under a creditor, of B.; in which case the *lex rei sitae* would govern.

(The case of *Moye v. May,* 43 N. C., 131, cited and approved.)

THIS was an action of *trover* for a slave, named Washington. Plea, not guilty.

On the trial before his Honor, *Judge Settle,* at NORTHAMPTON, on the last Fall Circuit, the case was substantially this: In 1843 Thomas Payne conveyed the slave in controversy to one Turner, in trust to secure a debt due by bond, on which John Chambliss and four others were sureties. All these parties then resided in the State of Virginia. In July, 1844, the trustee sold the slave, and Chambliss and his cosureties became the purchasers. The bond recited in the said deed of trust had meanwhile come rightfully into the possession of one W. T. Maclin; and the purchasers at the trustee's sale, instead of paying the price of their bid for the slave, executed their bond to Maclin for the amount, and took up the one on which they were Payne's sureties. The

slave was permitted to remain in Payne's possession, and in July, 1844, he removed to this State, with the slave. In September, 1846, Maclin wrote to Chambliss as follows:

"Dr. Payne and myself have entered into an agreement about the balance due me on the bond you hold against him in my favor, and also in regard to Washington. He will pay you on Monday the balance due yourself and others, on account of purchase of Washington, leaving unpaid only the amount due me, etc.

(Signed) W. T. Maclin."

Payne paid Chambliss and others, purchasers at trustee's sale, and the debt to Maclin was thereby discharged, except as to the amount of $379; for which amount Maclin released Chambliss and his copurchasers from all liability to him, and in consideration therefor, took from four of them a bill of sale, as follows:

"7 September, 1846. Received of William T. Maclin the sum of $379, for the purchase of Negro man, Washington, bought by us from Jo. Turner, trustee, in a deed from Thomas Payne.

J. R. Chambliss, and others."

This bill of sale was executed in Virginia, where all the (83) vendors resided. Payne and Maclin lived in North Carolina at this time; and the slave was in the possession of Payne by the permission of Chambliss and others. Maclin afterwards got possession of the slave—how, it did not appear—and sold him publicly in the State of Virginia, the plaintiff becoming the purchaser and taking a bill of sale. Maclin and plaintiff both lived in Virginia at the time of this sale; and it appeared that by the laws of that State, these several bills of sale were sufficient to pass title to slaves without registration, or a subscribing witness.

The defendant, to support his title, offered in evidence a deed dated September, 1848, made by Payne to the defendant, Phillips, conveying the said slave, in trust to secure the payment of certain debts; and having gotten possession of the slave (how, it did not appear), the defendant sold him publicly in the town of Jackson, Northampton County, in June, 1849. Payne was insolvent when he removed to this State, and continued so.

The defendant objected to the plaintiff's recovery, on the ground of the defect in the bill of sale from Chambliss and others to Maclin, because there was no subscribing witness, and it had not been registered.

His Honor, the presiding judge, overruled the objection, and charged the jury, that if they believed the testimony, these requisites were not necessary by the laws of Virginia, where the contract was made.

There was a verdict for the plaintiff, and judgment having been rendered thereon, the defendant appealed.

Barnes, with whom was *Moore,* for the defendant: The forms of the statute must be complied with, or there must be an actual delivery, to make the sale of a slave valid in this State. The act of '92 applies to sales between vendor and vendee, though no third person is concerned, as creditor or purchaser. (*Caldwell v. Smith,* 20 N. C., 193; *Mushat v. Brevard,* 15 N. C., 73; *Smith and wife v. Yeates,* 12 N. C., 302; *West v. Tilghman,* 31 N. C., 163.)

As a general rule, the *lex loci contractus governs;* but he submitted this falls within the class of excepted cases; and for this referred to Story's Conf. L., 605, and note of Burge on same page, *ibid,* 733; *Morrow v. Alexander,* 24 N. C., 388, and page 393 of opinion.

(84) *Bragg,* for the plaintiff: The sale from Chambliss and others to Maclin was good between the parties, admitting there is no proper bill of sale, and that there was no delivery of the slave. (*S. v. Fuller,* and cases there cited, 27 N. C., 26.) The acts of 1784-'92, relative to the transfer of slaves, were made for the protection of creditors and purchasers from the vendor, and should now be so construed, notwithstanding the preambles which so declared, are omitted in the Revisal.

The facts show there was a sale and actual delivery from Chambliss to Maclin. Payne was Maclin's agent, had possession of the slave when sold, and a sale to one having possession is a sale with delivery. (*Epps v. McLemore,* 14 N. C., 345.)

But if not so, then as the contract of sale was made in Virginia, it will operate by the law of the place where made, and was effectual to pass title. (*Anderson v. Doak,* 32 N. C., 295; *Morrow v. Alexander,* 24 N. C., 388; Story Conf. L., 385.) This will be so, unless where creditors or purchasers of the vendor, at the place where the property is situated, intervene, and their rights come in conflict with the vendee under the foreign law. Story Conf. L., 380, 395.

The defendant is not a creditor, and had he been one, Payne had no such interest as could have been reached by execution. (*Gowing v. Rich,* 23 N. C., 553; *Griffin v. Richardson,* 33 N. C., 439; *Page v. Goodman,* 43 N. C., 16.) His interest could have been reached in equity only.

Nor is the defendant here a *bona fide* purchaser, seeking to avoid a former fraudulent conveyance of his immediate vendor. He is but a wrongdoer, and there is no reason why the *lex domicilii* should not prevail.

BATTLE, J. The case presents the single question, whether the bill of sale from Chambliss and others to Maclin, which the plaintiff claimed was sufficient, as against the defendant, to pass the title of the slave, Washington. The defendant's counsel contend that it was not, because it was neither proved and registered, nor had a subscribing witness, as required by our statute laws. The counsel admit the general rule, that the bill of sale being executed in the State of Virginia where the vendors lived, and where neither a subscribing witness nor probate and registration were necessary, the law of that State must de- (85) termine its validity. Story's Conf. L., section 380, *et seq.; Anderson v. Doak,* 32 N. C., 295. But they insist that where creditors are concerned, the *lex rei sitae* must prevail, it being the paramount duty of every State to take care of the interests of its own citizens; and for this they cite the case of *Oliver v. Towns,* 14 Martin, Louisiana Rep., 93, stated and fully commented upon by Judge Story in his Conf. Laws, section 387, *et seq.* The doctrine established in that case has been very recently recognized in this Court as the law of North Carolina. *Moye v. May,* 43 N. C., 131. We now acknowledge its authority, but do not consider it applicable to the question before us. It is the personal chattel of the vendor who owns it, which will be taken and applied to the payment of his debts, in the country in which it is situated, when it has not been transferred according to the laws of that country; but a sale by a mere bailee of the chattel, is neither within the letter nor the reason of the rule. The case referred to would be in point, were the defendant claiming as a creditor, or under a creditor of Chambliss; but in truth he claims under Payne who had no title—who was only a bailee of Chambliss at the time when he sold to Maclin. Payne's possession being that of a bailee merely, was not adverse to Chambliss—was in law the possession of Chambliss himself—and there was therefore nothing to prevent the full application of the general rule, that the *lex loci contractus* must determine the sufficiency of the bill of sale. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Satterthwaite v. Doughty, post, 314.

WILLIAM BRANCH v. STEPHEN M. HOUSTON.

1. The penalty of one hundred dollars, imposed by the statute (Revised Statutes, chap. 34, sec. 73), to be paid to the owner, for harboring a runaway slave, is not within the jurisdiction of a single magistrate.

2. Where jurisdiction is withheld by law a plea in abatement therefor need not be put in—as a court will, of its own motion, stay its action in such case.

(The cases of *Burroughs v. McNeil*, 22 N. C., 301, and *Jones v. Jones*, 14 N. C., 360, cited and approved.)

(86) THIS was an action of debt for the penalty of one hundred dollars, brought by the plaintiff as the owner of a runaway slave, against the defendant for harboring said slave. It was commenced by warrant before a single magistrate, and carried by appeal to the county court, where the defendant put in pleas in bar, and upon the trial of the issues, a verdict and judgment were rendered against him, and he appealed to the Superior Court, where it was tried at DUPLIN, on the last circuit before *Battle, J.* Upon the trial, the defendant's counsel objected that the magistrate had no jurisdiction of the cause, and that therefore no evidence could be admitted to sustain it, and moved that the plaintiff be nonsuited. For the plaintiff, it was contended that upon a proper construction of the act of Assembly giving the penalty, the single magistrate did have jurisdiction; but if that were not so, the defendant ought to have taken advantage of it by a plea in abatement in the county court, and that he could not, after pleading in bar in that court, and a verdict and judgment therein, raise an objection by way of motion for a nonsuit in the Superior Court.

His Honor, the presiding judge, permitted the evidence to be received, reserving the question, and the plaintiff had a verdict; but his Honor being of opinion that the defendant's objection might be insisted upon in this way, directed the verdict to be set aside, and a judgment of nonsuit to be entered, from which the plaintiff appealed.

D. Reid for plaintiff.
W. Winslow for defendant.

PEARSON, J. A single magistrate had not jurisdiction of the case. The act of 1820 extends the jurisdiction of single magistrates to debts of one hundred dollars, due by bonds, notes, and liquidated accounts. This does not include the penalty of one hundred dollars, imposed by statute, to be paid to the owner, for harboring a runaway slave.

It is insisted, there ought to have been a plea to the jurisdiction, and by pleading over, the objection is waived. There is a rule of pleading,

that "good matter must be brought forward in apt time and due (87) form." There is a rule of law, that jurisdiction cannot be conferred by consent of parties, and as a matter of course, it cannot be conferred by a waiver of one of the parties. In what way are these rules consistent? Obviously, because the first applies to cases in which the court has jurisdiction over the subject, and the objection is on the ground of some privilege or exemption of the defendant, which, if he does not insist upon by plea *in limine,* is considered as waived—*e. g.,* if he is a student of one of the universities in England, or an officer of another court.

The second applies to cases in which the court has no jurisdiction over the subject, and, of course, as the law has not conferred it, the parties cannot do so—in other words, where there is a defect of jurisdiction—*e. g.,* one is warranted before a single magistrate for a trespass in breaking the close, treading down the grass, etc.; there is judgment for the plaintiff, and the defendant appeals, and in the county court, pleads not guilty; there is a verdict and a judgment against him, upon which he appeals to the Superior Court: Can that court act on the case, considering the objection waived, under the rule of pleading? Or, suppose a man indicted for murder in the county court—plea, not guilty—conviction—appeal:—Can the Superior Court shut its eyes to the fact that the case is not properly before it, and go on and try the man and hang him, because he did not, in "proper person," put in a plea to the jurisdiction? Certainly not, for as soon as the court sees that the case is not properly before it, and is *coram non judice,* so that a judgment thereon would be a nullity, it should of its own motion, put a stop to the proceedings, and refuse to aid, countenance, and continue a usurpation of jurisdiction on the part of an inferior tribunal.

A single magistrate has a limited jurisdiction, which, as we have seen, does not extend to debt for a penalty of one hundred dollars by the owner of a runaway slave. There is consequently a defect of jurisdiction, and the exercise of it is a usurpation. The consent of parties, or a waiver, cannot confer a jurisdiction withheld by law; and the instant the court perceives that it is exercising a power not granted, it ought to stay its action. *Burroughs v. McNeil,* 22 N. C., 301; *Green v. Rutherford,* 1 Ves., 471. If a magistrate exceeds his jurisdiction, the judgment is void, and will not justify acts under it. *Jones v. Jones,* (88) 14 N. C., 360.

1. The distinction is this: If there be a defect—*e. g.,* a total want of jurisdiction apparent upon the face of the proceedings, the court will, of its own motion, "stay, quash, or dismiss" the suit. This is necessary, to prevent the court from being forced into an act of usurpation, and

compelled to give a void judgment. For if there be no plea to the jurisdiction, and the "general issue" is not pleaded (without which there cannot be a judgment of nonsuit), unless the court can stay, quash, or dismiss the proceedings, it must, *nolens volens,* go on in an act of ursurpation and give a void judgment, which is against reason. So, *ex necessitate,* the court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding. Tidd, 516, 960.

2. If the allegations bring the case within the jurisdiction, so that the defect is not apparent, and the general issue is pleaded, the proof not sustaining the allegation, there is a fatal variance, which is ground of nonsuit—*e. g.,* declaration *quare clausum fregit,* in the county of Wake—general issue; proof—trespass on land in the county of Johnston: Or, debt for one hundred dollars, due by simple contract; proof—debt of fifty dollars—nonsuit, unless affidavit be made according to the statute.

The want of a jurisdiction in an inferior court is fatal without any plea stating the objection. 1 Chit. Pl., 477. If an inferior court has not jurisdiction, it is ground of nonsuit under the general issue. 1 T. R., 151; 6 East, 583; 1 Chit. Pl., 474.

3. If the subject-matter is within the jurisdiction, and there be any peculiar circumstance excluding the plaintiffs, or exempting the defendant, it must be brought forward by a plea to the jurisdiction. Otherwise, there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction.

It was said in the argument, admit the magistrate had no jurisdiction, the action might have been commenced in the county court, and as it got into that court by appeal, what difference does it make? The reply is, in a few words, the law prescribes the mode by which suits are to be instituted; and to allow a case to be smuggled into court, would be to encourage the inferior courts to usurp power, and do that which
(89) the Superior Courts are bound to prohibit them from doing. 3 Black. Com., 111, Writ of Prohibition.

PER CURIAM. Judgment affirmed.

Cited: Forbes v. Hunter, 46 N. C., 231; *Israel v. Ivey,* 61 N. C., 551; *Walton v. Walton,* 80 N. C., 26; *S. v. Benthal,* 82 N. C., 664; *Novelle v. Dew,* 94 N. C., 43; *Blackwell v. Dibbrell,* 103 N. C., 272; *Beville v. Cox,* 109 N. C., 269; *Hicks v. Beam,* 112 N. C., 644; *Short v. Gill,* 126 N. C., 806.

Distinguished: Hawkins v. Hughes, 87 N. C., 115.

CORPORATION OF ELIZABETH CITY v. W. W. KENEDY.

Ministers of the Gospel residing in an incorporated town are not exempt from performing the duty of patrol, when required to do so by the proper authorities, according to the corporation ordinances.

APPEAL from the Superior Court of Law of PASQUOTANK County, at Fall Term, 1852, his Honor, *Judge Manly,* presiding.

This was an action of debt for a penalty, commenced by warrant before the mayor of Elizabeth City, under the provisions of the act incorporating that town, against the defendant, for refusing to serve as patrol, he having been required so to do by the proper authorities. It was insisted for the defendant that he was exempt from the performance of such duty, because he was a regularly ordained minister of the Gospel of the M. E. Church, South, and was, at the time, in the regular exercise of the duties of his calling. The defendant resided in Elizabeth City, and was a citizen thereof.

It was submitted that if his Honor should be of opinion that defendant was exempt from the performance of the duties of patrol, because of the duties he owed to his church as a minister thereof, judgment should be entered for defendant; if otherwise, for the plaintiff. And his Honor being of opinion that upon the facts stated, defendant was not so exempt, rendered judgment for the plaintiff, whereupon the defendant appealed.

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

NASH, C. J. The defendant is a minister of the Gospel, of the Methodist Church, and a citizen of, and resident within Elizabeth City. Being enrolled by the proper authorities of the town as one of the patrol thereof, he was duly summoned to perform his duty as such. Having refused to do so, the present action is to recover the (90) penalty, by the laws of the corporation, attached to such refusal or neglect. It is admitted by the defendant, that there is no statutory exemption which he can claim, and he puts the defense simply upon the ground, that the duties assigned to him as a patrol were inconsistent with those which he owed to the church of which he is a minister. The question does not fairly arise here; for the case nowhere informs us what the duties are of a minister of any church, which would come in conflict with those of the city police; nor does it state what duty the defendant was called to perform as a minister of the

Gospel, at the time he was summoned. Certainly, if at the time he was to act as one of the patrol, he was under an obligation to perform some special clerical duty, it was necessary to let the court know what that duty was, that they might judge of its pressing necessity, or whether it was a necessity at all. In the present state of the case, we cannot see that there was any conflict of duties, and we are not at liberty to decide abstract questions of law. To call upon the court to say that the defendant is exempt from the performance of any duty to which every other citizen of the town is liable, is to ask the court to make, and not expound the law. Elizabeth City is an incorporated town, vested with full power to pass all laws necessary to its welfare, and the comfort of the citizens—the only restriction being the Constitution of the country, and the general laws of the State. They can pass no ordinance violating either.

Had the defendant applied to the proper authorities of the town for an exemption, no doubt can exist but what one would have been granted, exempting not only him, but every other regular minister of the Gospel residing within the corporate limits. We live in a Christian land, where the ministers of every sect are reverenced, and treated with the respect due to their sacred office; and we live under equal laws, where all are protected, and none entitled to peculiar privileges. Such is the proud distinction of our happy country, such is its moral and religious state, and such the equality it cherishes and loves. There is no error in the judgment below, and it is affirmed.

PER CURIAM. Judgment affirmed.

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(91)

MILLS SMITH v. STARKEY B. SHARPE.

1. The action on the case in the nature of waste, allowed (Revised Statutes, chap. 119, sec. 4) to one tenant in common against his cotenant, is confined to cases where there is a permanent injury done to the property held in common.

2. Hence, where A. and B. were tenants in common of a fishery, to which as a part thereof, was attached a small strip of land on the river bank, in which was a deposit of marl, valuable only to be used on land under cultivation; and B. dug out the marl and carried it away, against the remonstrances of A.—though not injuring the fishery thereby: *Held*, that A. could not, for this, maintain case in the nature of waste against B.

THIS was an action on the case, tried before his Honor, *Judge Manly*, at HERTFORD Superior Court of Law, Fall Term, 1852. Plea, not guilty.

SMITH *v.* SHARPE.

The plaintiff and defendant were tenant in common in equal parts of a place on Chowan River, called the Mount Pleasant Fishery, at which fishing operations were usually conducted in proper season; and they owned a narrow slip of land for one thousand yards up and down the river, "from the brink or brow of the hill, which was high and shelving for some distance from the river down to the water's edge." This land had always been used as part of the fishery, and was not suitable for cultivation. In the said bank of the river there was a bed of marl of fine quality; and in January, 1852, the defendant caused several thousand bushels thereof to be dug out—being the greater part of it—against the wishes and remonstrance of the plaintiff, and had the same carried and spread upon a cultivated field, which he owned in severalty, some short distance from the fishery. The marl was beneficial to land under cultivation, but of no value for other purposes, and it was of considerable value at that locality for the purpose designated, and could now and then be sold by the bushel. The place was not injured for fishing purposes, by the removal of the marl, but on the contrary, improved; yet it was rendered thereby less valuable to the extent of the worth of the marl in its native bed. It did not appear that prior to the defendant's taking the marl, it had ever been used by any proprietor of the fishery; but that the defendant dug up the marl out of its natural position in the bank. The parties owned no land fit for cultivation in common, nor land of any description, except this fishery.

The plaintiff having offered evidence disclosing the above state (92) of facts, it was submitted to his Honor by the defendant's counsel whether the action could be maintained; and his Honor being of opinion with the defendant, the plaintiff, in deference thereto, submitted to a judgment of nonsuit, and appealed.

Bragg, for the plaintiff: The action of waste is given by one tenant in common against his cotenant. (Rev. St., chap. 119, sec. 4.) What is waste?—(Com. Dig., 7, "Waste"—D. 4, p. 655, Bac. Abr., "Waste," 7 Vol., 252-255). Where there has been a partial injury of the freehold, action on the case in nature of waste may be sustained. (*Anders v. Meredith,* 20 N. C., 339; 1 Chit. Pl., 91; Brown on actions at law, 133; *Cubit v. Porter,* 15 C. L. R.; 8 B. and C., 257.)

Smith, for the defendant: An action *ex delicto,* by one tenant in common against his cotenant, lies where the common property has been destroyed or has sustained some damage or injury from the wrongful act of the defendant. Where the land is impaired in value by using it in a fit and proper way, as in working mines, removing deposits of

marl, or cutting trees, whereby defendant receives more than his share of the profits, he is responsible only in some proceeding involving an account. *Martyn v. Knowles,* 8 T. R., 145; *Walling v. Burroughs,* 43 N. C., 60.

NASH, C. J. The plaintiff and defendant owned in common a fishery on Chowan River. It consisted of a narrow strip of land, extending from the brow or brink of the hill or bank which was high, down to the edge of the water. This land was used as a fishery, and was of no value for agricultural purposes. The bank of the river was underlaid with a bed of valuable marl, a large portion of which the defendant dug and carried away, against the wishes and remonstrances of the plaintiff. The plaintiff has brought this action to recover damages for the alleged waste. His Honor below decided that the action could not be sustained, and we concur with him.

It is stated in the case, that as a fishing ground, the land was improved by the digging down of the hill to get at the marl—the facility of getting to the river being thereby increased. There is no
(93) question but that one tenant in common can maintain an action on the case in the nature of waste against a cotenant, when he destroys the thing held in common. This is familiar learning. Was the act complained of waste? We think not. Waste is defined to be a spoil or destruction in houses, gardens, trees, or other corporal hereditaments, to the dishersion of him that hath the remainder or reversion in fee simple. 2 Bl. Com., 281; and it is said that whatever is done which tends to the destruction of the inheritance, or the impairing of its value, is waste. By the common law only single damages were recoverable for waste; but by the Statute of Gloucester, 6 Edw. 1, it is provided, that the tenant committing the waste "shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance"; and if done *sparsim,* or all over a wood, the whole wood shall be recovered.

The English statutes upon this subject have been adopted by our Legislature. Revised Statutes, chapter 119, section 4, reënacts the Statute 15 Edw. 1, giving the action to a tenant in common. The action intended in this latter section is an action to recover damages for a permanent injury to the property held in common. It could not have been the intention of the Legislature to apply the penalties of the Statute of Gloucester to injuries to the freehold, committed by a tenant in common; for the third section which enforces those penalties, and precedes the fourth immediately, is restricted to the tenants specified in the two first sections—to wit, tenant for life or years and guardians.

If this were not so, then the whole relation of the parties as tenants in common of the tract would be changed—a partition effected between them by a way, as we think, not contemplated by the Legislature—and nothing left to the defendant but the right to fish there, stripped of the privilege of landing the seine on the beach, and there curing his fish, without the consent of the plaintiff; a barren right, and of no value. It was the intention of the Legislature to give the action on the case to one tenant in common, whenever a permanent injury is done to the freehold by his cotenant, in which his damages shall be measured by the injuries actually sustained; and it is called an action of waste, simply to point out of what nature and kind the injury complained of must be to authorize the action. It is given as an additional remedy to an action of account, which is an unwieldy one, and has grown nearly out of use. (94)

Apply these principles to the case before us: The plaintiff and defendant are tenants in common of a piscary or fishery; the strip of ground running along the river is necessary to the enjoyment of the right of fishing there—necessary to enable them to land their fish and cure them. Has the defendant done anything to injure the fishery? On the contrary, the act complained of has improved it. It has rendered the approach to the fishery more convenient; and enables the proprietors more readily to take off the proceeds of their labor. But it is said that though this be the fact, yet the value of the land was diminished, if not destroyed by the removal of the marl. With respect to tenancy in common of a chattel, the rule is, if it is destroyed, misused, or spoiled by the cotenant, an action lies for the other. 1 Chit. Pl., 91. But one tenant in common may convert the chattel to its general and profitable use, although it change the form of the substance, without subjecting him to an action by the other. *Pennings v. Ld. Greenville,* 1 Taun., 241. Now apply this principle to these tenants in common of the realty. There is no remainderman or reversioner to be injured, or to bring any action—the whole property in fee simple being in the plaintiff and defendant; the marl lying in the earth is valuable to no one; can it be that the plaintiff, through obstinacy, or any other cause, can deprive the defendant of all benefit to be claimed from it? Or, that by converting the property to its general and profitable use, he commits a wrong to his cotenant, and subjects himself to an action of waste? Suppose A. and B. are tenants in common of a tract of land which is in woods—can neither of them, without the consent of the other, clear a portion of the land, and put it in cultivation, without becoming a *tort feasor?* In the case we are considering, we hold that the plaintiff cannot main-

tain the action, because as a fishery, the land is neither injured in value nor destroyed, but improved. For the value of the marl removed by the defendant, he is, no doubt, bound to account to the plaintiff, but not in this action.

PER CURIAM. Judgment affirmed.

Cited: Darden v. Cowper, 52 N. C., 211.

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(95)

DEN EX DEM. WILLIE J. GILLIAM v. CHARLES S. MOORE AND JOHN FREEMAN.

1. The doctrine of estoppel, as between landlord and tenant, does not apply to the latter, when he has been evicted, and subsequently let into possession by a new and distinct title, under another landlord.

2. Where A. conveyed to B. by deed of mortgage, A. retaining possession of the land, which was afterwards sold under execution for his debt and purchased by C., who entered, and nearly two years subsequent thereto demised the land to A. under a contract for the sale of it: *Held*, in a suit by B. against A., that the latter was not estopped from disputing the title of the former, and that seven years' possession, under color of C's title, was a good defense to the action.

(The cases of *Belfour v. Davis*, 20 N. C., 443; *Jordan v. Marsh*, 31 N. C., 234; *Grandy v. Bailey*, 35 N. C., 221, and *Freeman v. Heath, ibid.*, 498, cited and approved.)

THIS was an action of ejectment brought against Charles S. Moore, as the tenant in possession, who entered into the common rule, and pleaded not guilty; and afterwards John Freeman was admitted to defend as landlord.

On the trial, before his Honor, *Judge Manly,* at BERTIE, on the last circuit, the facts appeared to be as follows: The land in controversy belonged originally to the defendant, Moore, who, on 30 May, 1837, conveyed it by deed of mortgage to the lessor of the plaintiff, for the purpose of securing certain debts therein recited. Moore continued in the possession of the land, and, becoming indebted to the defendant, Freeman, the latter obtained a judgment against him, upon which an execution was issued and levied upon the land, which was sold, and the defendant, Freeman, became the purchaser, and took a deed therefor. Freeman afterwards had a declaration in ejectment served upon Moore, who was still in possession, and upon Moore's failing to appear, obtained judgment by default against the casual ejector. A writ of possession was

then issued, by force of which Moore was turned out in the latter part of December, 1843, and one Holder was let into the possession of the land by Freeman as his tenant, and so remained until 1 January, 1845, when one Mrs. Miller took possession as tenant also of Freeman. In September, 1845, the defendant, Moore, and his son, John A. Moore, entered into the possession of the land, under a contract of purchase from the defendant, Freeman, and so continued until this action was commenced in the month of May, 1851.

It was contended for the lessor of the plaintiff, upon these facts, that Freeman having been admitted to defend his landlord, could urge no defense which was not open to his tenant, Moore; and that (96) Moore was estopped to deny the title which, by his deed of mortgage, he had conveyed to the lessor of the plaintiff, and that consequently his possession was not adverse, so as to bar the lessor's recovery by seven years' possession, under color of title.

The defendants contended that there was no estoppel, and that there had been continued adverse possession and color of title by the tenants of Freeman, for more than seven years—to wit, from December, 1843, until the commencement of the action in May, 1851; and that the plaintiff's lessor was thereby barred of his right of recovery. His Honor, the presiding judge, was of opinion that the defendant, Moore, was not estopped to deny the lessor's title; that his possession, together with that of the other tenants of Freeman, being for more than seven years before the commencement of the action, under the color of Freeman's title, the right of the lessor of the plaintiff was barred. The jury being instructed to that effect, returned a verdict for the defendants, upon which judgment having been rendered, the lessor appealed to the Supreme Court.

W. N. H. Smith for the lessor of the plaintiff, contended:

1. That the defendant, Moore, and the defendant, Freeman also (who coming in to defend as landlord is limited to such defense as could be set up by his tenant), are estopped to deny the title of plaintiff's lessor and his right of recovery. By the execution of his deed, Moore, continuing in possession, became tenant at will to Gilliam, and was in good faith bound to retain and deliver possession to him whenever required to do so. And although eviction by paramount title might excuse him from his obligation to surrender possession, inasmuch as without any fault of his, it had become impossible to do so, yet, when by his repurchase, this impediment was removed, the obligation was renewed, and the estoppel reapplied. (*Wiggins v. Reddick,* 33 N. C., 380; *Grandy v. Bailey,* 35 N. C., 221; *Freeman v. Heath, ibid.,* 498; *Ogle v. Vickers,* 31 Eng. C. L. R., 178.)

2. When Moore reëntered into possession of the premises, and thus resumed the relations that subsisted between himself and Gilliam,
(97) previous to the interruption of Freeman, the law adjudges the possession to follow the better of the two titles thus concentrated in him. There was consequently no adversary possession as against Gilliam, because he was himself in possession, by virtue of the possession of his tenant, Moore.

Bragg, contra, argued:

1. That the possession of Moore and his son, under the contract of sale between them and Freeman, was the possession of Freeman, and enured to his benefit, so as to bar the plaintiff's lessor in seven years. (*Rhodes v. Brown,* 13 N. C., 195.)

2. As to estoppel, he cited *Jordan v. Marsh,* 31 N. C., 234. There was an end of the old possession by Moore, and then a coming in of himself and son, under a new contract of purchase, and therefore no estoppel.

3. Could not Freeman recover of Gilliam upon the title ripened by this possession, especially as he had possession by both the Moores? Why, then, give the plaintiff's lessor possession in this action?

BATTLE, J., after stating the case as above, proceeded: The proposition that the defendant, Freeman, being admitted to defend as landlord, with the defendant, Moore, cannot set up any defense, which is forbidden to Moore, is fully established by *Belfour v. Davis,* 20 N. C., 443, and the other cases referred to by the plaintiff's counsel.

The other proposition contended for by the counsel, that Moore was estopped to deny the title of the plaintiff's lessor is neither supported by reason nor authority. It is, in our estimation, directly opposed by the case of *Jordan v. Marsh,* 31 N. C., 234. That case, as explained in the subsequent one of *Grandy v. Bailey,* 35 N. C., 221, was "where one of the purchasers at sheriff's sale had recovered in ejectment, and no imputation of fraud therein was made, and he was on the eve of taking actual possession under a writ of *habere facias,* when the tenant took a lease from him. The court was of opinion that if the tenant had been actually put out of possession by the sheriff, and had afterwards entered under a new lease, he might have defended such
(98) new possession under the title of his landlord, against a subsequent ejectment by the other purchaser from the sheriff; and therefore it was held that he might take a lease from him who had recovered in the ejectment, without an actual eviction on a writ of possession—the court saying, 'For what end should he be required to go

through the useless form of being put out of possession, merely to be at the trouble of going back again?" In *Grandy v. Bailey,* it is true, that the defendant was not allowed to protect herself under the lease which she had taken from the purchaser at the sheriff's sale; but it was because she was not on the eve of being turned out by the sheriff under a writ of possession, and her delivery of the possession to the agent of the purchaser was deemed by the Court to have been colorable merely, and not a *bona fide* transaction. The change of possession, in the case now before us, is not liable to that objection, because Moore was actually turned out by the sheriff, after the recovery in ejectment by Freeman, and did not regain the possession, under his contract of purchase, until nearly two years afterwards. But the very recent case of *Freeman v. Heath,* 35 N. C., 498, decided at the last Morganton Term, is relied upon by the plaintiff's counsel as an authority against the principle contended for on behalf of the defendants. If the principle of the present case be the same with that of *Jordan v. Marsh,* as we have endeavored to show, then the Court which decided *Freeman v. Heath* did not consider it opposed to that principle; for they refer to *Jordan v. Marsh,* and point out the distinction between the two cases. *Ruffin, C. J.,* in delivering the opinion of the Court, says, "In an action by a purchaser under execution, against the defendant, the latter is only restrained from denying that he had some title, while a lessee is obliged not only not to deny his lessor's title, but also to surrender the possession to him, when required after the expiration of the lease." Now, if that distinction be a sound one, it must exist between all actual lessees and all constructive or *quasi* tenants; such, for instance, as mortgagors in possession, who are only tenants by sufferance to their mortgagees. *Fuller v. Wadsworth,* 24 N. C., 263. And persons coming in under a contract of purchase, who are mere tenants at will to their vendors. *Love v. Edmonston,* 23 N. C., 152. These constructive or *quasi* tenants cannot, while they remain in possession, dispute the title of those under whom they hold, but after their tenancy has ended, (99) and they have been put out of possession by their *quasi* landlords, or by any other person acting under the authority of legal process, they may acquire a new title, under which, if they afterwards regain the possession, they may protect themselves. This doctrine is not impugned by what is said by the Court in the case of *Gwyn v. Wellborn,* 18 N. C., 313, that if a mortgagor is ousted by a stranger, and regains the possession, he regains it still as the tenant of the mortgagee. So he does, if, as in that case, he regains the possession under the former title; but it by no means follows that such is the effect, if he comes in under

a new distinct title. In the latter case we can see no reason why he may not claim adversely to his *quondam* mortgagee; and why the latter may not be barred by such adverse possession, continued for seven years.

There was no error in the judgment below, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Dowd v. Gilchrist, 46 N. C., 355; *Pate v. Turner,* 94 N. C. 47; and in Dis. op., *Pope v. Malthis,* 83 N. C., 175.

N. G. ABRAMS v. WILLIAM SUTTLES.

1. The mutual promises of parties to a special contract are sufficient legal considerations for either to maintain *assumpsit* for the breach of it by the other.

2. The offer by one party to deliver a bond, which the other expresses his intention not to accept, though admitting its sufficiency, is a legal tender, without an exhibition of the writing, or proof of its being executed and prepared.

THIS was an action of *assumpsit* to recover damages for the breach of a contract for the hire of slaves. On the trial before his Honor, *Judge Battle,* at HENDERSON, at Fall Term, 1851, to which county the case having by consent been removed from the county of Macon, the facts appeared to be as follows:

About the beginning of the year 1850, the defendant, who resided in Rutherford County, agreed to hire to the plaintiff, who lived in Macon County, four Negro slaves to work in the plaintiff's gold mines—the slaves to be taken 1 February following, and kept the remainder (100) of the year; for which the plaintiff agreed to pay, monthly, $8 per month for each slave. And to secure the payment thereof, and for the safe keeping and return of the slaves, the plaintiff was to give bond with good and sufficient sureties, residing in the county of Rutherford. H. Abrams, a brother of the plaintiff, testified that on or about 1 February, 1850, he, as agent of the plaintiff, went to the defendant for the purpose of getting the Negroes and giving the necessary security, and that the defendant refused to let him have them, alleging that he intended to work them in the gold mine himself; and, therefore, the witness left him, without tendering him any bond. The

plaintiff then produced a letter from the defendant, written the 27th of the same month, in which he stated he had declined working his hands in the mines, and that the plaintiff might have them, on complying with the terms agreed upon between them. The witness, H. Abrams, then testified that he went again as his brother's agent, in company with one Hinson, to the house of defendant, to get the slaves and give the bond. That he and Hinson, who both resided in Rutherford, offered to be sureties for the plaintiff, and the defendant said they were good; and that Hinson was about to write the bond, when the defendant said they should not have the Negroes, unless they gave a bond according to a form which he read to them, and which bound the plaintiff to pay for the slaves absolutely, if they or either of them should die whilst in plaintiff's employment. The witness and Hinson refused to execute such a bond, and left, without having tendered any bond. Hinson testified substantially to the same facts; and another witness testified to the declaration of the defendant, subsequent to that time, that the reason why he did not let the plaintiff have the Negroes was, that they were unwilling to go with him. The defendant then offered testimony impeaching the character of the last witness, and proving that H. Abrams and Hinson would have been insufficient sureties; and that he had subsequently hired his slaves to one Mills at a less price, reserving to himself the privilege of taking them back, should the plaintiff apply for them, and comply with the terms agreed upon.

The defendant's counsel contended that if the plaintiff's testimony were all taken to be true, he could not recover, because there was no consideration for the contract, and because the plaintiff had failed to prepare and tender such a bond, with good and sufficient (101) sureties residing in the county of Rutherford, as he had agreed to give. His Honor, the presiding judge, charged the jury, that there was a sufficient consideration for the contract, and that if the plaintiff's testimony was true, the defendant, by his conduct, had made it unnecessary for the plaintiff to prepare and tender a bond, and he was entitled to recover. The jury returned a verdict for the plaintiff, and judgment being rendered thereon, the defendant appealed.

This case was argued at the last Morganton Term, by

J. Baxter for plaintiff.
Bynum and J. W. Woodfin for defendant.

NASH, C. J. The case presents two questions. On the part of the defendant, it is urged that there is no consideration to sustain the promise on which the action is founded; and secondly, that there is a

condition precedent which it was incumbent on the plaintiff to prove, before he can maintain his action.

There was a sufficient consideration for the promise made by the defendant. Mutual promises constitute legal considerations. Each is a consideration for the other. The defendant in this case, agreed to hire to the plaintiff four Negro men for a year at a stipulated price, to be paid monthly, and the plaintiff agreed to secure the payment of the hire, by a bond with good and sufficient sureties. Here are mutual promises, which constitute a good consideration for the agreement on each side. The action is for a violation of this contract by the defendant, in refusing to deliver the slaves at the time specified.

The contract sued on was an executory one, and to entitle the plaintiff to maintain his action, something was to be done by him which preceded the obligation on the defendant to perform his part. To secure the payment of the hire, and the safe keeping and return of the slaves, the plaintiff was to give a bond with good and sufficient sureties residing in the county of Rutherford. The delivery of such a bond was a condition precedent, or an act to be performed simultaneously with the delivery of the slaves; in other words, they are concurrent acts. (102) He cannot, therefore, recover in this action, without averring in his declaration, the performance of the act, or that which is equivalent thereto. Thus the plaintiff may aver that he tendered or offered to do the act, and the defendant refused it; *Jones, Assignee, v. Barkley,* Doug., 685; *Terry v. Williams,* 8 Taun., 65; or that the defendant hindered the performance of the condition precedent, by a neglect or default on his part; 1 Term Rep., 645; *Hotham v. East India Company,* 1 T. R., 638; *Heard v. Woodham,* 1 East, 619; or that he discharged him from the performance of it. Doug., 684. In all these cases the declaration will be sufficient. Here, an agent attended on the day appointed, at the defendant's house, and demanded the Negroes, at the same time notifying the defendant that he was ready to give the bond and sureties as required. The defendant refused to deliver them, stating that he intended to work the slaves himself. This we consider equivalent to an averment of performance. It is said, however, that to give that effect to the conduct of the defendant, the plaintiff must show that he had, at the time, such a bond as the contract required, duly executed for delivery. The case in 2d Douglass is an authority to the contrary. The defendant was notified that the plaintiff, or his agent on their behalf, was ready to give such a bond. The defendant refused to let him have the Negroes. This was equivalent to saying, you need not tender your bond—I will not receive it. This certainly was a discharge to the plaintiff of the necessity of making a

formal tender. Where was the necessity of going through the form of offering a bond, when told if he did, he should not have the slaves? As to the second alleged contract, it was never completed.

We concur with his Honor on both the points ruled by him.

PER CURIAM. Judgment affirmed.

Cited: Grandy v. McClees, 47 N. C., 145; *Harris v. Williams,* 48 N. C., 485; *Grandy v. Small,* 50 N. C., 51; *Headman v. Commissioners,* 177 N. C., 263; *Rogers v. Piland,* 178 N. C., 72.

(103)

DEN EX DEM. THOMAS ROACH v. BENJAMIN KNIGHT.

Where testator devised his lands to his wife and added, "If she should have a child by me, for the child to have, at her death, all my land, and in case she should die without an heir, for the land to go to her nearest relation"; and the wife died in the lifetime of the devisor, leaving her father her nearest relation: *Held,* that the limitation over does not depend upon the vesting of the life estate of the wife as a condition precedent, and her father, therefore, takes in preference to the heir of devisor.

(The case of *Simmons v. Gooding,* 40 N. C., 382, cited and approved.)

EJECTMENT, before his Honor, *Judge Manly,* at PASQUOTANK, on the last circuit, upon the following statement of facts, as a case agreed:

"One Stephen Roach died seized and possessed of the land in dispute in fee—having made and published his last will and testament, a copy of which accompanies and is made a part of this case; and the said will has been duly admitted to probate. The lessor of the plaintiff is the brother of the testator, and the heir-at-law to whom the land would have descended, in case of the intestacy of the testator. The defendant is tenant of one Joshua White, whose daughter the testator married, and the said Joshua White is the nearest relation of the testator's wife, and was at the testator's death. The testator's wife died after the making of the will, but before the death of the testator, without issue. If upon these facts the court shall be of opinion that the land descends to the heirs-at-law of the testator, then it is agreed, judgment shall be given for the plaintiff. If, however, the court is of opinion that the land passes under the devise to the nearest relation of the testator's wife, to the person thus designated, and who bore that relation, either at the date of the will, or the death of the testator, then judgment to be given for the defendant, with leave to either party to appeal, without appeal bond."

His Honor, the presiding judge, being of opinion for the lessor of the plaintiff, upon the facts stated, gave judgment accordingly, from which the defendant appealed.

(The clauses of the will in question are sufficiently set out in the opinion delivered by this Court.)

W. N. H. Smith, with whom was Jordan, for defendant argued:

1. The devise over to the wife's nearest relation took effect (104) immediately at the death of testator, notwithstanding the lapse of the particular estate limited to her. 6 Cr. Dig., "Devise," 38; chap. 8, sec. 22, *et seq.; Scatterwood v. Edge,* 1 Salk., 229; *Avelyn v. Ward,* 1 Ves., 420; 1 Pow. Dev., 196, note 8. The same doctrine prevails in this State, when the preceding particular estate never takes effect. *Richmond v. Vanhook,* 38 N. C., 581; *Atkins v. Kron,* 37 N. C., 58; *Simmons v. Gooding,* 40 N. C., 382.

2. The nearest relation of the wife being her father, he therefore took an estate in fee immediately upon the testator's death. *Simmons v. Gooding.*

No counsel in this Court for plaintiff.

PEARSON, J. The will of Stephen Roach contains these clauses: "(2) I give unto my wife, Margaret, all of my lands. (3) It is my wish, that if my wife should have a child by me, for the child to have, at her death, all of my lands. In case she should die, without an heir, for the land to go to her nearest relation." The wife died in the lifetime of the testator, without ever having had a child, leaving her father, under whom the defendant claims her "nearest relation," and he was also "her nearest relation" at the death of the devisor.

The question is, does the land belong to her father, or does it belong to the heirs of the devisor? His Honor was of the latter opinion upon the ground, we suppose, that as she died in the lifetime of the devisor, the devise to her lapsed, and the limitation over was thereby defeated. It is settled to the contrary. *Simmons v. Gooding,* 40 N. C., 382. It is settled law, that when a particular estate is given by will, with a remainder over, whether vested or contingent, the remainder takes effect, notwithstanding the particular estate fails by the death of the person for whom it was intended, upon the death of the devisor"—"unless there be an intention expressed, that the limitation over shall depend on the vesting of the preceding estate as a condition precedent." "Most generally, the limitation over is intended to take effect, whenever the preceding estate is out of the way, without reference to the manner in which it gets out of the way." 2 Williams on Executors, 764. The

limitation over in this case clearly does depend not on the vest- (105) ing of the preceding estate in the tenant for life, as a condition precedent, and consequently cannot be affected by the fact that the life estate lapsed. The judgment below must be reversed and judgment for the defendant on the case agreed.

PER CURIAM. Judgment below reversed, and judgment for the defendant.

Cited: Mebane v. Womack, 55 N. C., 299.

JOHN SATTERWHITE v. JOSEPH M. HICKS.

1. The declarations of a person under whom a party derives title, made before, or simultaneously with, the sale, are admissible in evidence by the other party, to show fraud in the sale.

2. Though, ordinarily, he who alleges fraud must prove it, the rule does not extend to a case where, upon a question of consideration in the sale of a slave, the vendor, vendee, and subscribing witness thereto were brothers-in-law, and the vendor at the time was sued for debt, and insolvent.

3. Whenever, in the trial of a cause a point arises, which it is important to either party to sustain, and there is no evidence offered upon it, it is not only no error in the judge so to inform the jury, but it is his duty.

4. Where, therefore, upon a question of fraud, the plaintiff put in evidence certain bonds having no subscribing witness, to show the consideration for the bill of sale under which he claimed, and it did not appear that the bonds were ever seen by any one before the trial: *Held,* that it was no violation of the act of Assembly (chap. 31, sec. 136), by the judge below, to charge the jury that "the existence of said bonds was unknown to any one, except the parties, until they were produced upon the trial."

(The cases of *Johnson v. Patterson,* 9 N. C., 183; *Guy v. Hall,* 7 N. C., 150; *May v. Gentry,* 20 N. C., 249; *Hawkins v. Alston,* 39 N. C., 137, and *Black v. Wright,* 31 N. C., 447, cited and approved.)

THIS was an action of *detinue* for two slaves, tried before his Honor, *Judge Dick,* on the last circuit at GRANVILLE. Plea, the general issue.

Joseph Satterwhite, the brother-in-law of the plaintiff, conveyed the slaves to him for the alleged price of $1,200. This deed was attested by Thomas Satterwhite, another brother-in-law. The plaintiff proved by the attesting witness, that he was sent for to the house of the plaintiff, where he found Joseph, who said that he was smartly indebted to

John, and was about to sell him the two Negroes in dispute. After the deed was executed, it was proposed by the plaintiff to Joseph
(106) to have a settlement, and the former went to his desk and took out a paper or papers, and asked the latter if he had that little paper he gave him some time ago, who replied that he had not—it was at home; and John then proposed to go to Joseph's house to make the settlement, and the witness, Thomas, was asked to go with them to witness the settlement, but did not go. The plaintiff then gave in evidence four several bonds, executed by Joseph to him at different times, for sums amounting in the whole to $1,578.

At the time of the execution of the bill of sale, Joseph was largely indebted beyond his means to pay, and a writ had issued against him for the collection of one of his debts, which was prosecuted to judgment; upon which an execution was levied on the Negroes in question, and at the sheriff's sale, the defendant bought them and took them into possession. On the part of the defendant, it was alleged that the bill of sale was intended to defraud the creditors of Joseph. That if Joseph owed the plaintiff anything, it was a very small sum, and the bonds offered in evidence were without consideration.

The defendant offered to prove that Joseph, before the execution of the bill of sale, had said he was not embarrassed, and did not owe, of his own debts, more than $250: This evidence was objected to by the plaintiff, but admitted by his Honor. Evidence was also given by the plaintiff, tending to prove that the bonds were given for debts *bona fide* due; and by the defendants, to show that they were given for fictitious demands. His Honor, the presiding judge, was asked by the plaintiff's counsel to charge the jury, that the proof of the execution of the bill of sale, and that the parties thereto said it was made in consideration of Joseph's indebtedness to the plaintiff, and the further proof of the execution of the bonds, did, if the jury believed the evidence, make out a prima facie case for the plaintiff, and put the burden on the defendant to show the transaction to be fraudulent. This instruction his Honor refused, and charged the jury that as the parties to the bill of sale were brothers-in-law, and the bonds without a subscribing witness, and their existence unknown to any one except the parties, until they were produced on the first trial of this case, something more than the mere production and proof of the bonds was necessary to constitute
(107) a prima facie good consideration, as against a purchaser at execution sale. His Honor further charged the jury, that if they were satisfied from all the testimony, that the sale from Joseph Satterwhite to the plaintiff was a *bona fide* transaction, they should find for the plaintiff—otherwise, for the defendant. There was a verdict

for the defendant, and a rule for a new trial, for the admission of improper testimony, and for misdirection; and the rule being discharged, and judgment rendered on the verdict, the plaintiff appealed.

Miller for plaintiff.
Lanier, J. H. Bryan and Gilliam for defendant.

NASH, C. J. The first objection raised in the plaintiff's bill of exceptions is to the reception of the ante-declarations of Joseph Satterwhite. His Honor committed no error in this particular. It is a general principle in the law of evidence, that any fact to be proved against a party ought to be proved in his presence, by the testimony of witnesses duly sworn or qualified to tell the truth. Hearsay, therefore, is not admitted in our courts of justice, because it is but a statement which a witness gives, of what he professes to have heard a third person say. This rule is as old as the common law. To it, however, there are exceptions coeval with it: Such, for instance, of dying declarations, pedigree, and others, stated by writers on the law of evidence. Among the more modern exceptions, is that class of hearsay admissible upon the sole ground that it proceeds from the persons owning the property at the time, and would be evidence against him if he were a party to the suit. His estate or interest in the property, coming to another by any kind of transfer, the successor is said to claim under the former owner, and whatever he may have said concerning his own rights while owner, is evidence against his successor. Phil. Ev., Vol. 1, note—1st part, p. 644. This rule applies equally to real and personal property, whether in possession or in action. Thus, the admissions or declarations of a vendor or holder of personal property, made while so holding it, is evidence of all claiming under him, either mediately or immediately. In *detinue* for
slaves, the declarations of the defendant's vendor, made before (108) the sale, was held admissible. *Walthall v. Johnson,* 2 Call., 275.
In *Johnson v. Patterson,* 9 N. C., 183, declarations of a vendor before the sale were admitted. In *Guy v. Hall,* 7 N. C., 150, the principle is very elaborately discussed. "In this case," the judge remarks, "they offered (that is, the declarations) as coming from a privy in estate, and therefore, in law, as coming from the party himself." This rule extends to choses in action. The admissions or declarations of the assignor of a chose in action, made while he is the holder, are evidence against the assignee, and all persons claiming under him. In *Haddan & Mills,* 4 Car. and P., 480, it appeared that one Rigby had endorsed the bill to Mills when overdue, and it was proposed to give in evidence Rigby's declarations while the owner, to show the want of consideration.

On the part of the defendant, it was objected to. *Chief Justice Tindall* admitted it, observing, "You derive title under this party, and what he said is evidence against you." To the same effect is the opinion of the Court in *May v. Gentry,* 20 N. C., 249. They declare that if the declarations could be received against the persons making them, they are competent against the person who claimed under him by a co-temporaneous or subsequent conveyance. Here the evidence, slight to be sure, but still evidence, was offered to show that Joseph Satterwhite was not indebted to the plaintiff; or, if so, in but a small amount; and the bonds given in evidence were without consideration and fraudulent against the creditors. The declarations were properly received.

The second exception is the refusal of the judge to charge, as required by the plaintiff. It is true that in ordinary cases, he who alleges fraud must prove it. The burthen does lie upon him, but it does not extend to such a case as this—where, by the statement, as made by the plaintiff, fraud attaches to the transaction. Both Joseph and John Satterwhite and the subscribing witness were brothers-in-law; Joseph was indebted beyond his power to pay; a writ had issued against him to recover a debt due from him. Under these circumstances, he sells, or pretends to sell, to the plaintiff the slaves in dispute, and in order to sustain the sale, alleges he was smartly indebted to him, and produces four several bonds bearing different dates, one in 1843, one in 1845, one in
(109) 1847, and one in 1848, amounting in the whole to upwards of $1,400. The bonds were not attested by any witness. In the case of *Hawkins v. Alston,* 39 N. C., 137, the *Chief Justice,* in delivering the opinion of the Court, observes, "It is but an act of common precaution, which any man owes to his own character, when a bond is executed between brothers for so large a sum, under such circumstances, and upon a settlement as alleged for previous dealings running through several years, that the parties should come to their settlement in the presence of disinterested third persons, etc., so as to afford to other creditors the opportunity of investigating," etc. In another part of the same case, the Court says that in such a transaction between near relations, "it is to be expected that they should offer something more than the naked bond of the one to the other, as evidence of the alleged indebtedness." See, also, *Black v. Wright,* 31 N. C., 449; 3 Star. on Ev., 487. His Honor, therefore, committed no error in refusing to charge as required. It was the plaintiff's duty to remove the cloud under which his case rested.

The remaining exception is that, in his charge, his Honor intimated to the jury an opinion upon a matter of fact. We are informed that this objection is founded on that part of the charge, in which the judge

uses this language: "And the bonds without a subscribing witness, and their existence unknown to any one (but the parties) until they were produced on the first trial of this cause." It is objected, that the judge violated the act of Assembly, in stating that the existence of the bonds was unknown, until produced on the trial. It is manifest that his Honor spoke of the case as it appeared before him. Now there was no evidence that the bonds were ever seen, until produced in evidence on the trial of the cause. The expressions used, then, were tantamount to telling the jury that there was no evidence of the fact of their ever having been seen, until the trial. Whenever a point arises on the trial of a cause, which it is important to either party to sustain, and there is no evidence offered upon it, it is not only no error in the judge so to inform the jury, but it is his duty. Situated as the case was, it was very important to the plaintiff to prove that there was a settlement, and that these bonds had an existence before it took place. No settlement was proved. The fact that after the deed was executed, the plaintiff went to his desk and took out some paper or papers, was no evidence that the (110) bonds were the papers. If they were, why were they not exhibited? The fraud attempted is too palpable, and not reconcilable with any pretense of fairness. We concur with his Honor on all the points ruled by him.

PER CURIAM. Judgment affirmed.

Cited: Barnawell v. Threadgill, 56 N. C., 65; *Reicer v. Davis,* 67 N. C., 188; *McCanless v. Reynolds, ibid.,* 269; *McCulloch v. Doak,* 68 N. C., 273; *Tredwell v. Graham,* 88 N. C., 209; *McCanless v. Flinchum,* 89 N. C., 373; *Magee v. Blankenship,* 95 N. C., 563; *Lee v. Williams,* 112 N. C., 513; *Yarborough v. Hughes,* 139 N. C., 210; *Parker v. Fenwick,* 147 N. C., 529; *Byrd v. Spruce Co.,* 170 N. C., 434; *Chandler v. Marshall,* 189 N. C., 303; *Ins. Co. v. R. R.,* 195 N. C., 696.

THOMAS C. HUSSEY v. MARGARET ROUNDTREE.

1. One cannot recover of an infant, who has a guardian, for board and other necessaries, where the charges exceed the child's income.

2. A stepfather, though not bound to support his stepchildren, nor they to render him any service; yet if he maintain them, or they labor for him, in the absence of an express agreement, they will be deemed to have dealt with each other as parent and child, and not as strangers.

(The cases of *Long v. Norcom,* 37 N. C., 354; *Downey v. Bullock,* 42 N. C., 102, and *State ex rel. Britt v. Cook,* 34 N. C., 67, cited and approved.)

HUSSEY *v.* ROUNDTREE.

THE action was *assumpsit* for board and four pair of shoes. Plea, infancy; and replication, that the articles declared for were necessaries.

On the trial before his Honor, *Judge Settle,* at EDGECOMBE, on the last Fall Circuit, it appeared that the defendant was an infant, of seventeen years of age, under the guardianship of Josiah Lawrence, and that her property yielded an annual income of about $107.50. The plaintiff married the mother of the defendant in the summer or fall of 1849, and resided at Rocky Mount, in Edgecombe County, until January, 1850, when he removed to the town of Tarboro, from which time the defendant commenced living with him, and remained with him for the years 1850-'51, during which time the plaintiff furnished her with four pair of shoes; and for her board and these articles he charged $150, which was a reasonable price. It also appeared that the guardian resided in the same town, and knew that the defendant was living at the plaintiff's house with her mother. The defendant moved in genteel and respectable society—dressed neatly and genteelly—was sent to school —and her guardian paid her store bills for clothes. The plaintiff (111) was a man of small means and large family. There was no positive evidence of any special contract between the plaintiff and defendant, or her guardian, in regard to her board or the shoes furnished, and no evidence that the guardian had furnished her with board.

The defendant's counsel contended: (1) That, in the absence of any proof of a special contract, the plaintiff being the stepfather of the defendant (a minor), the law did not imply a contract between them, so as to entitle the plaintiff to recover. (2) That the defendant had not capacity to make a contract, so as to bind her, even for necessaries, as she had a guardian. (3) That the plaintiff could not recover even for necessaries, without the express authority of the guardian, and that authority could extend only to bind the defendant for necessaries to the amount of her income. (4) If from the circumstances the jury could infer authority from the guardian, and thereby raise an implied contract, that could only extend to the amount of the defendant's income.

His Honor, the presiding judge, charged the jury that the guardian stood in the place of the parent, and it was his duty to furnish the defendant with necessaries to the extent of her income, if so much was required; and if her income was not sufficient for that purpose, to have her bound to some useful trade or employment. That if the plaintiff (being her stepfather) without any contract with her or her guardian, furnished her board, he could not recover therefor; but the jury would inquire from the circumstances of the case and the knowledge of the

guardian, whether the latter had not made a special contract with the plaintiff to board the defendant; and if they believed that there was such a special contract, the plaintiff could recover; or, if the guardian had neglected or refused to furnish the defendant with board, then the jury would inquire whether, from the circumstances, there was a special contract between the defendant and plaintiff, and if they so inferred, or if there was no special contract, the law would imply a contract, and the plaintiff was entitled to recover; and in either case, the plaintiff was not restricted to the income of the defendant, but could recover a fair price for the board and other necessaries, though it exceeded the income.

The jury under instruction to this effect, found a verdict for (112) the plaintiff for $158, the amount of his claim, and from the judgment rendered thereon, the defendant appealed to the Supreme Court.

Biggs, for the appellant, relied on the cases of *Long v. Norcom,* 37 N. C., 354; *S. v. Cook,* 34 N. C., 67, and *Sharpe v. Cropsey,* 11 Barb. Sup. Ct. Rep., 227.

No counsel for plaintiff in this Court.

BATTLE, J. The charge of his Honor to the jury is in direct conflict with the opinion of this Court in the case of *S. v. Cook,* 34 N. C., 67. It was there said, that the guardian was bound to furnish his wards with necessaries, but not so as to exceed their income. "The infants had no capacity to incur a debt exceeding their income, even for necessaries. The guardians of 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." See, also, *Long v. Norcom,* 37 N. C., 354, and *Downey v. Bullock,* 42 N. C., 102.

The counsel for the defendant has referred us to the case of *Sharpe v. Cropsey,* 11 Barb. (N. Y.), Rep., 227, where the question presented was identical with the one before us. The Court there says that "the rule seems to be this: The stepfather is not bound to support his stepchildren, nor they to render him any services; but if he maintain them, or they labor for him, they will be deemed to have dealt with each other in the character of parent and child, and not as strangers. There is no obligation on the part of the father to pay for the childrens'

services, nor on the part of the children to remunerate their father for their support." The judgment must be reversed, and a *venire de novo* ordered.

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

Cited: Hyman v. Cain, 48 N. C., 112; *Freeman v. Bridgers,* 49 N. C., 4; *Hudson v. Lutz,* 50 N. C., 219; *Fessenden v. Jones,* 52 N. C., 15; *Dodson v. McAdams,* 96 N. C., 149; *Mull v. Walker,* 100 N. C., 50; *Hicks v. Barnes,* 132 N. C., 149; *Dunn v. Currie,* 141 N. C., 126.

(113)

MARY E. LAWRENCE ET AL., BY THEIR GUARDIAN, V. JAMES R. RAYNER, ADMINISTRATOR OF ALPHEUS LAWRENCE.

1. Where an administrator (of one who died before the passage of the act of 1844, chapter 51) by consent of the heirs of his intestate, sold land belonging to them, and one of the heirs, who were also the next of kin, had been advanced of personalty: *Held,* that in the distribution of the fund arising from the sale of the land, among the next of kin, the said advancement cannot be taken into account—that fund being considered as realty.

2. A court when called on to determine facts upon testimony is, like a jury, bound to take into consideration all that a party may have said at the same time; but it will scrutinize the statement, and if it believes a part of the same to be improbable, or at variance with other established facts, it will reject that part until other proof is offered to sustain it.

THIS was an action of debt upon the bond given by the defendant, Rayner, as administrator of Alpheus Lawrence, deceased. It was brought upon the relation of the infant children of the said decedent by their guardian, and the breach assigned was the nonpayment to the relators, as next of kin, of the amount due them from Rayner, as administrator. Pleas, conditions performed, and not broken. In the progress of the cause, it was referred to the clerk to state an account of the administrator with the estate of his intestate. In the account which accompanied and made part of the report of the clerk, he credited the administrator with $758.63, the principal and interest of certain notes alleged to have been due from the estate of the intestate to the estate of his father, Reuben Lawrence, deceased, of whom the defendant, Rayner, was also administrator. The plaintiffs contended that this credit was erroneous, alleging that the said notes had been paid in full by their father in his lifetime, and that he had a receipt therefor, given by the said Reuben, in the following words—to wit:

"Windsor, 15 May, 1841. Received of Alpheus Lawrence at different times inclusive, the sum of five hundred and forty-nine dollars and forty-six cents, in full for the following notes—viz., one for $125, due 1 January, 1837; one for $95, due 1 January, 1838; one for $75, due 1 January, 1839, and one due 13 February, 1839, for the sum of $180.

Reuben Lawrence."

The genuineness of this receipt and the truth of the payment were contested by the defendant, and the clerk examined several witnesses in relation to the matter, and submitted the testimony (114) with his report.

In the account, the clerk credited the estate with $105.99, as the share to which the intestate was entitled, as one of the three next of kin, from the estate of his father, the said Reuben Lawrence. The balance due from the defendant, Rayner, as administrator of the said Reuben, as appeared upon an account stated by the clerk, was $963.73. This balance arose from the proceeds of real estate, sold by the consent of the family, or some of them (but after the death of Alpheus), in lieu of personal property; and it was admitted that had the personal property all been sold, it would have been entirely exhausted in the payment of debts, and there would have been nothing left to distribute among the next of kin of the said Reuben. The clerk credited the estate of Alpheus with the sum of $105.99 only, for the reason that the said Alpheus had been advanced by his father to a greater amount than either of the other two children. The advancements were altogether of personalty, and made before the act of 1844, chapter 51, the said Reuben having died on 25 February, 1843.

In the account, the clerk credited the administrator with an allowance of commissions at the rate of 5 per cent on $6,935, the amount of his receipts, among which was one for $2,500, the price of a tract of land sold by him; and 2½ per cent on $4,376.10, the amount of his disbursements.

Upon the coming in of the report, the plaintiffs filed the following exceptions:

1. That the clerk admitted incompetent evidence and credited the defendant as administrator of Alpheus Lawrence, with $758.63, for notes due from the said Alpheus to Reuben Lawrence.

2. That the estate of Alpheus Lawrence is credited with $105.99 only, as the distributive share of the said Alpheus, on the estate of Reuben Lawrence, whereas it ought to have been credited with $321.24, the one-third part of the general balance.

3. That the defendant is credited with too much commissions in the account of his intestate's estate.

These exceptions coming on to be argued before his Honor, *Judge Manly,* at BERTIE, on the Fall Circuit, 1852, he overruled them, and confirmed the report in all respects; and from the order the plain-
(115) tiffs were allowed an appeal to the Supreme Court.

Biggs for plaintiffs.
Bragg for defendant.

BATTLE, J., having stated the case as above, proceeded: In examining the testimony taken and reported by the clerk, we have thrown out of view every part of it which was objected to by the defendant's counsel, and yet we think his Honor was fully justified in overruling the first exception.

It was clearly proved by Mr. Phelps, that Alpheus Lawrence admitted to him that his father, Reuben Lawrence, at the time of his death, held notes against him, stating at the same time, however, that he held a receipt against them. The paper purporting to be a receipt, signed by Reuben Lawrence, on 15 May, 1841, which the relators allege to be the receipt alluded to by their father, expressly acknowledges the existence of such notes, then in the possession of the said Reuben. The existence of the notes being thus established, it became the duty of the relators to show they were paid by their father in his lifetime. They contend that they have so done, by the declaration of the said Alpheus, made at the time that he acknowledged that his father held the notes; that he had a receipt against them; and by the production of the receipt itself. They then urge that what their father said in discharge, being said at the same time with the admission with which the defendant seeks to charge him, must be taken as true—at least until its falsity is shown.

A court when called on to determine facts upon testimony, is, like a jury, bound to take into consideration all that a party may have said at the same time, but like a jury, it is at liberty to scrutinize the statement; and if it believes a part of the statement to be improbable, or at variance with other facts clearly established, it may reject such part, or hesitate in acting upon it, until other proof is brought to sustain it. We think that the declaration made by Alpheus Lawrence, that he had paid the notes, and held a receipt against them, stands in this predicament: The receipt purports to have been given at Windsor, on 15 May, 1841; Reuben Lawrence did not die until nearly two years
(116) afterwards; and he and his son lived in the county within four

miles of each other; yet no reason is assigned why the business was transacted in town, or why Alpheus did not call upon his father and take up the notes. Under such circumstances, we think it was incumbent upon the relators to prove the genuineness of the receipt or the payment of the money, by some other independent testimony. This they have not done. On the contrary, what testimony there is in relation to the receipt, increases the suspicion that it is not genuine, and that the money never was paid by Alpheus, in discharge of the notes. The clerk was therefore right in debiting the estate of Alpheus with the whole amount of the principal and interest of the said notes.

The second exception ought to have been sustained. The balance reported in the account of the estate of Reuben Lawrence, the father, was composed of the proceeds of real estate, and though permitted to go into the hands of the administrator, ought to have been considered as real estate, in dividing it among the next of kin, who were the same persons as the heirs-at-law. As real estate, advancements of personalty could not be taken into the account, in the distribution of it. The act of 1844, chapter 51, which provides for bringing advancements of personalty into hotchpot, in the division of realty, did not affect the case, because Reuben Lawrence had died before its passage.

The third exception is sustained to the extent of reducing the commissions on $2,500, the price received for the land, to 2½ per cent. It is overruled for the residue.

The report, after being reformed in the particulars above stated, will be, in all respects, confirmed.

PER CURIAM. Judgment accordingly.

Cited: S. v. Atkinson, 51 N. C., 67.

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(117)

SAMUEL KISSAM v. SAMUEL T. GAYLORD.

1. In a question of boundary, the distance called for by the deed must govern, unless there be some other description less liable to mistake, to control it.

2. As, where the distance called for was two hundred feet, and the premises described as "the Winchell lots": *Held*, that the line must stop at the end of the two hundred feet, though it does not reach the limit of the Winchell lots.

(The case of *Ritter v. Barrett*, 20 N. C., 266, cited and approved, and distinguished from this case.)

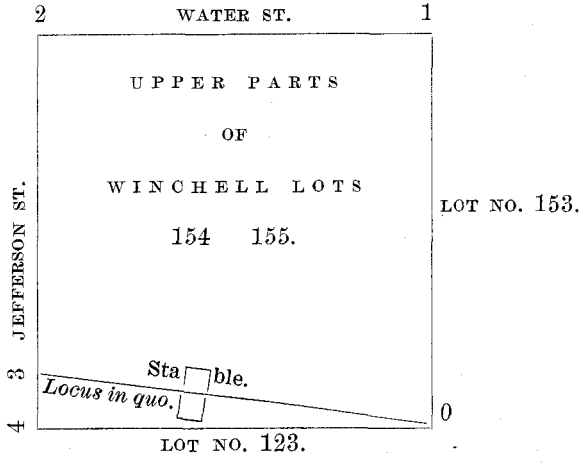
KISSAM *v.* GAYLORD.

TRESPASS *quare clausum fregit,* tried before his Honor, *Judge Manly,* at WASHINGTON, on the last Fall Circuit. Plea, *liberum tenementum.*

The *locus in quo* was a portion of the lots designated in the plan of the town of Plymouth, as Nos. 154 and 155, and is represented in the diagram below, by the triangle, 3, 4, 0. The plaintiff offered in evidence a deed to himself for said lots 154 and 155, and also for lot 123 adjoining on the south; and likewise introduced the deed made by him to the defendant, conveying "two lots of ground in the town of Plymouth, on the south side of Water Street, known as the Winchell lots, numbered in the plan of said town as the upper parts of 154 and 155, upon which is located two storehouses, outhouses and kitchen—the grounds beginning at lot No. 153, thence along Water Street, up the said street to the corner of Jefferson Street; thence up Jefferson Street two hundred feet; thence to the southwest corner of lot No. 153; thence along lot 153 to Water Street, the first station.

It was in evidence that after the sale to the defendant the plaintiff continued to use a small cowpen on the disputed ground for a cow, which opened by a gate into the contiguous street. The trespass complained of was the erection of a stable on a part of the ground in dispute, but whether on any part of the ground covered by the cowpen did not appear.

DIAGRAM.



It was also in evidence, that the lots 154 and 155 were called and known as upper parts of 154 and 155 (the other or lower parts thereof being on the opposite side of Water Street on the margin of the river),

and that they were also generally known as the "Winchell Lots." And it was admitted by both parties, that the southern limit of these upper parts extended to the stable of the defendant, and covered the *locus in quo,* but stopping short of that limit, at the termination of 200 feet, called for in the deed, and thence running eastwardly to the corner of the lots, would leave the defendant a trespasser.

The plaintiff contended, that defendant should stop at the (118) termination of the 200 feet; the defendant, that the general description of the land sold as the upper parts of lots 154 and 155, and as the Winchell lots, would cover the whole; and of this opinion was his Honor, and the jury being instructed to that effect, returned a verdict for the defendant, on which judgment having been rendered, the plaintiff appealed.

E. W. Jones for plaintiff.
Heath for defendant.

PEARSON, J. The only question was as to the construction of the deed from the plaintiff to the defendant. If the deed stops at the end of the distance (200 feet) called for in the second line, and runs thence to the southwest corner of lot 153, the *locus in quo* is not covered by the deed, and the plaintiff is entitled to recover. If the second line is to be extended beyond the distance, to the corner of lot 123, and runs thence to the southwest corner of lot 153, the *locus in quo* is covered by the deed, and the plaintiff is not entitled to recover. His Honor was of opinion that the line ought to be extended, and to this the plaintiff excepts.

There is error. Distance must govern unless there is some other description, less liable to mistake, to control it. So the only question is, what is there in this case to control the distance? It is said the general description, two lots, known as the Winchell lots, and (119) numbered as the upper part of lots 154 and 155, upon which are located two store-houses, out-houses and a kitchen, shows that the deed was not to stop until it reached the corner of the Winchell lot, although the distance does give out a few feet before reaching the corner; and that it could not have been the intention to clip off a little triangle. We were at first inclined to take this view of the question upon the authority of *Ritter v. Barrett,* 20 N. C., 266. But upon further consideration, we are satisfied that the case of *Ritter v. Barrett* is not in point, and that there is nothing to control the distance.

If the deed had stopped after the general description above set out, it would have covered all of the upper part of lots 154 and 155; or,

if a line from the end of the distance to the southwest corner of lot 153 would cut off one of the store-houses or the kitchen, that would show there was some mistake in regard to the distance, because, as to the intention to include both store-houses and the kitchen, there could be no mistake. But such is not the fact; and after the general description, the deed proceeds to give a particular and definite description calling for "corners"—whence a corner is to be run to, and setting out the distance (200 feet) upon the second line alone. Why was this? It is not suggested that 200 feet was the supposed measure of the original line. The original corner is not called for. Then, how is it to be accounted for, that on this line alone, in giving the particular description, the deed says, stop at the end of 200 feet, and then run to the corner of lot 153? It cannot be accounted for, except on the supposition that the line was not to be run quite out to the original corner, but was to stop at an agreed distance, 200 feet.

It will be seen upon a close examination that this case differs entirely from *Ritter v. Barrett.* There, the description in the deed, so far as it went, corresponded precisely with the more minute description in the deed referred to. The distance called for in both was 240 poles, and the only difference was, that the deed in question did not add "to a pine"—

(120) which was a part in the more full description in the deed referred to. In our case, the two hundred feet is not a supposed measurement, which had been passed down through many *mesne* conveyances, and in regard to which the call for a "pine corner" showed there was some mistake; but it is set out in this deed for the first time, by way of giving a more special description of the land intended to be conveyed; and there is no "pine tree," or corner, or anything else to show there was a mistake about it. Why should 200 feet have been fixed on, instead of 150 or 300, unless 200 was the distance agreed on? There must be a *venire de novo.*

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

Cited: Kissam v. Gaylord, 46 N. C., 296; *Gause v. Perkins,* 47 N. C., 226; *Mizzell v. Simmons,* 79 N. C., 188; *Brown v. House,* 118 N. C., 878; *Lumber Co. v. Hutton,* 152 N. C., 542; *S. c.,* 159 N. C., 450; *Lumber Co. v. Lumber Co.,* 169 N. C., 95.

Distinguished: Corn v. McCrary, 48 N. C., 500.

STATE v. JAMES BIRMINGHAM.

1. The plea of *autrefois acquit* is no available defense, unless the facts charged in the second indictment would, if true, have been sufficient to support the first.

2. As,' where the defendant was indicted for retailing spirituous liquor to one J. S., and it appeared that, upon the same facts, under a former indictment for retailing to "some person to the jurors unknown," he had been acquitted, upon the ground that the retailing was to the said J. S., and not to one unknown: *Held*, that the plea of *autrefois acquit* was no bar to the second indictment.

(The case of *S. v. Jesse*, 20 N. C., 95, cited and approved.)

APPEAL from ANSON Superior Court of Law, Spring Term, 1852, his Honor, *Judge Ellis*, presiding.

The defendant was indicted for retailing spirituous liquor to one John Smith. Pleas, not guilty and former acquittal. Upon the trial, the jury returned a special verdict, as follows: "That the defendant was guilty of selling spirituous liquors to John Smith, as charged in the bill of indictment. And they further find that a previous trial had taken place upon the same facts, on an indictment charging the sale to be to a person unknown, and the defendant was acquitted because it appeared that the name of the person was known, and that it was the said John Smith: And if, in law, upon these facts the former acquittal is a bar to this indictment in the opinion of the court, then they find that the defendant was formerly acquitted of this charge, but if the court should be of opinion that, upon these facts, the former acquittal is not a bar to the defendant's conviction on this indictment, then they find (121) that he was not formerly acquitted."

His Honor, the presiding judge, being of opinion in favor of the defendant, rendered judgment accordingly, and the solicitor for the State appealed.

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

NASH, C. J. The defendant pleads that he was heretofore tried and acquitted for the same offense. This is a bar to the indictment, if found to be true, and is founded upon the principle of the common law, that no one shall be brought into jeopardy of his life more than once for the same offense. And hence, says *Justice Blackstone*, it is allowed as a consequence, that when a man is once fairly found not guilty upon any in-

dictment for any offense, before any court having competent jurisdiction of the crime, he may plead it as a bar to any subsequent accusation for the same crime. 4 Bl. Com., 335. In order, however, to the efficacy of the defense, it is necessary the first indictment should be such that he could have been convicted on it. The plea must aver that the person mentioned in the first indictment is the same person as is mentioned in the second. The averment is as follows: "And the said J. S., in fact saith, that he, said J. S., and the said J. S. so indicted and acquitted, as last aforesaid, are one and the same person, and not other and different persons," etc. Arch. Cr. Pl., 89. In an indictment under our statute against retailing spirituous liquors by the small measure, without having a license so to do, it is necessary to set forth the name of the individual to whom the spirits were sold; or that the indictment should aver, it was to some person unknown—as in the case before us. Now, if the precedent in Mr. Archbold is correct, then a plea *autrefois acquit* can never apply to a case where the indictment is framed as the one embraced in this plea is; because there is no one mentioned in it, with whom the trading was, and there can be no identity with the defendant in the second. The case stated that the defendant was acquitted
(122) on the first trial, because it was proved that the person unknown, to whom it was alleged that the spirits were sold, was John Smith. Upon the evidence, the defendant was rightly acquitted under the first indictment, because it did not support the averment. The person was not unknown, but known, and the propriety of that acquittal is not questioned.

Does that verdict protect the defendant under the present charge? The true criterion, by which the question is to be decided, is, whether, the evidence necessary to support the second indictment, would have been sufficient to convict the defendant on the first. What evidence was necessary to sustain the second indictment in this case? That the spirits were sold to John Smith, as charged in the indictment—would that evidence have sustained the first? Certainly not; for the moment it was proved to whom it was sold, as we have already said, the charge in the first indictment was falsified, and the defendant entitled to his discharge. If an indictment charges a burglary, with an intent to commit a larceny, and does not charge an actual larceny, an acquittal on it is no bar to a subsequent indictment for the larceny, because the defendant could not have been convicted of the larceny upon the first. *Rex v. Vandercomb,* 2 Leach, 716; 2 Hale, 245. But an acquittal on an indictment for murder is a bar to a subsequent one for manslaughter; because the prisoner might have been convicted of it upon the first indictment. 2 Hale, 246; Foster, 329. In the case of *Vandercomb,*

above referred to, *Justice Buller,* after reviewing all the cases upon the subject, lays down the rule as before stated: "These cases (he observes) establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. In *S. v. Jesse,* 20 N. C., 95, the above opinion of *Justice Buller* is stated as containing the law upon this subject. We conclude, then, as the defendant could not have been convicted upon the first indictment, under the evidence necessary to support the present one, the plea of *autrefois acquit* was no bar to the latter, and that the State was entitled to judgment upon the special verdict. The judgment below is reversed. This opinion will be certified. (123)

PER CURIAM. Judgment reversed.

Cited: S. v. Revels, post, 201; *S. v. Nash,* 86 N. C., 650; *S. v. Hankins,* 136 N. C., 623; *S. v. Hooker,* 145 N. C., 583; *S. v. Freeman,* 162 N. C., 597; *S. v. Drakeford, ibid.,* 669; *S. v. Crisp,* 188 N. C., 800.

STATE v. WILLIAM HUSSEY.

The wife is not a competent witness against her husband, to prove a battery on her person by him, except in case where a lasting injury is inflicted, or threatened to be inflicted upon her.

THE defendant was tried and convicted before his Honor, *Judge Dick,* at GUILFORD, on the last Fall Circuit, upon an indictment for an assault and battery on Beulah Hussey, his wife.

The wife was sworn as a witness on the trial, and testified to acts of violence on the part of the defendant by kicking her on the leg and striking her on the head and side with his fist, whereby she suffered considerable pain, but no lasting or permanent injury. And she further stated, that she gave the defendant no provocation for his violence.

Two points were made by the defendant's counsel: (1) That the husband had a right to give to the wife moderate chastisement, of which he is the judge; and he is not criminally responsible unless permanent injury is inflicted, or the chastisement is carried to such extent as to threaten permanent injury. (2) That the wife was not a competent witness to prove that she gave no provocation at the time of the alleged battery.

His Honor admitted the evidence, and instructed the jury, that by law the husband had a right to give his wife moderate correction, if it appears to be necessary to enforce obedience to his lawful command, but no right to beat her from mere wantonness and wickedness. In this case, if they believe the witness, the several acts of violence were inflicted without cause, and the defendant was therefore guilty. The jury found the defendant guilty, and judgment having been rendered upon the verdict, he appealed.

Miller and Morehead for defendant, argued:

1. Husband has the right to give his wife moderate correction or chastisement. 2 Black., 444. For extent to which he can carry such correction *vide* writ *de securitate pacis,* which the wife has against
(124) the husband. Fitzherbert's Nat. Br.) Also the writ of *supplicavit,* issuing from a court of chancery. (2 Rop. on Hus. and Wife, 318, 319, 320.)

2. If the wife commit theft, burglary, assault and battery, etc., by the coercion of her husband, or even in his company, she is not guilty of crime, being considered as acting under compulsion, and not of her own will. (4 Black., 29; *Commonwealth v. Neal and wife,* 10 Mass. R., 152; *Rex v. Knight and wife* (notes thereto), 11 E. C. L. R., 335; *Rex v. Squire and wife,* 4 Petersdorf Ab., 107.) This principle does not extend to children or apprentices. They are not excused even when committing crime under the command of the parent or master. (4 Black., 29; 1 Russ on Crimes, 15.) From which it might be inferred that the legal control of the husband over the wife is greater than that of the master over the apprentice or the parent over the child. But take the rule to be as laid down by Blackstone, that the husband has the right "to restrain the wife by domestic chastisement, in the same moderation that a man is allowed to correct his apprentice or children' (Black., 444), how far can the parent, teacher, or master go? See 1 Russell on Crimes, 461. The rule is also laid down with much clearness, *Judge Gaston,* in the case of *S. v. Pendergrass,* 19 N. C., 365, that "unless the jury can clearly infer from the evidence that the chastisement inflicted produced or was calculated to produce lasting injury, it is their duty to acquit."

It is contended, therefore, that the parent, master, or teacher has a right to inflict chastisement on his child, apprentice, or pupil, within the point where lasting injury is begun or threatened, without being answerable in a criminal prosecution, for an assault and battery. Until that point is reached he is the sole judge as well of the reason or necessity

for chastisement, as the extent to which it should be carried. If the rule be the same in the case of husband and wife, there was error in the charge of his Honor. No lasting injury was produced; nor was the punishment inflicted calculated to produce it.

3. The wife cannot be a witness to show provocation, or the want of it. The general rule of law is, the wife cannot be a witness for or against the husband. Greenleaf on Ev., 254, 234. She is not (125) admitted against him in cases of treason. *Ibid.*, sec. 345. There are exceptions to the general rule. Greenl., sec. 343. But see *Sedgwick v. Watkins,* 1 Ves., 49.

It is submitted that to allow the wife to be a witness, either for or against the husband, not only as to the fact of the assault and battery on her person, and the character of the injury inflicted, but also as to the causes or provocations which produced it, however immediate, remote or often recurring, would let in all the evils which the general rule of law was intended to prevent, "impairing thereby, the great principles which protect the sanctities of the marriage relation, and which are essential to the happiness of social life."

4. It is also insisted that here the wife was improperly made the judge of the provocation. She should have been confined to the statement of facts, occurring at the time, and not permitted to give an opinion on her own conduct.

Attorney-General for the State.

NASH, C. J. The case does not call for any expression of opinion upon the abstract question, whether a husband has a right in law to strike his wife. The wife here was received as a witness against her husband, and the question of her competency lying at the threshold of the case, requires first to be decided. It is a general rule that parties are excluded from being witnesses for themselves, and this applies to the relation of husband and wife—neither of them being admissible as a witness either in a civil or criminal case in which the other is a party. This rule has been adopted partly on the ground of identity of interest and partly on principles of public policy, which lie at the basis of civil society. A contrary rule would break down or weaken the great principles which protect the sanctities of the marriage state. The confidence existing between husband and wife should be treasured, and rendered inviolate. To the general rule, however, there are some exceptions allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But this necessity is described by *Lord Mansfield,* in (126)

Bently v. Cooke, 3d Doug., 422—"not to be a general necessity, as when no other witness can be had, but a particular necessity, as when the wife would otherwise be exposed, without remedy, to a personal injury." In *Rex v. The Inhabitants of Cliviger,* 2 T. R., 263, the rule was laid down that the wife was, in every case, incompetent to give evidence tending to criminate her husband; and in *Rex v. All Saints,* 6th Moo. and S., 194, *Lord Ellenborough* remarks, that the rule in that case was laid down somewhat too largely; but in *Rex v. Bathwick,* 2d B. and Ald., 639-47, the rule in *Cliviger's case* was adopted as undoubtedly true, in the case of a direct charge and proceeding against him for any offense not feloniously affecting her. It is not denied that the wife may exhibit articles of the peace against her husband, and that from a particular necessity, no one else can take the necessary oath; but the question here is, can she be admitted to testify against him for an ordinary assault and battery upon her? and by ordinary, is meant a battery which neither threatened her life, nor any great bodily harm. Mr. Greenleaf, 1st Vol., section 343, in enumerating the cases in which a wife may be examined as a witness, states some which are for felonies, or acts leading to felonies, and refers to one for assault and battery on her. For this he refers to *Agire's case,* 1st Strange, 633, where it is reported in about as many words as Mr. Greenleaf has used in stating the principle. Nothing is said of the facts or the nature and extent of the assault and battery, and for it is only cited *Lord Audly's case,* which was for an atrocious felony upon her person. Now it is utterly impossible that the principle can be true, as stated. We know that a slap on the cheek, let it be as light as it may—indeed, any touching of the person of another in a rude or angry manner—is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign. It must be remembered that rules of law are intended to act in all classes of society. In *Sedgwick v. Watkins,* 1st Ves. Sen., 49, which was an application of a wife (127) for a *ne exeat* against her husband, *Lord Thurlow* said she may make application for it, but the question is, by what evidence she can support it; and whether her affidavit can be read to affect her husband? He admits that for security of the peace *ex necessitate rei,* she may make an affidavit against her husband, but cannot be a witness to sustain an indictment, and closes by observing: "I have always taken it to be a rule, that a wife never can be a witness against her husband, except in the case I have alluded to." The rule, as we gather

it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her, and we would say from an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not. In this case, there is no pretense that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary. Her testimony being incompetent, the judgment is reversed, and a *venire do novo* awarded.

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

Cited: S. v. Rhodes, 61 N. C., 455; *S. v. Davidson,* 77 N. C., 523.

TIMOTHY W. WARD & COMPANY v. THOMAS JONES, ADMINISTRATOR.

1. An executor or administrator must have a distinct notice, within a reasonable time, of a creditor's demand for funeral charges, the amount due, and the articles furnished, before he is bound to pay it by suit.

2. Where the account sued on was composed of many items, a part of which were articles furnished for the burial, and the whole was presented to the administrator for payment: *Held*, that the fact of the defendant's having seen the articles purchased, and his having known for what purpose (though he knew not the price charged), and the further fact that he said "he would have paid it if the plaintiff had presented his account right," furnish no evidence of such notice as the law requires.

(The cases of *Parker v. Lewis*, 13 N. C., 21, and *Gregory v. Hooker's Administrator*, 8 N. C., 394, cited and approved.)

THIS was an action of *assumpsit* against the defendant, as the administrator of Wright B. Evans, for goods sold and delivered to the intestate, and for certain articles furnished for the burial of said intestate. It was commenced by a warrant before a single magis- (128) trate, and by successive appeals carried to the Superior Court of MARTIN County, where it was tried on the last Fall Circuit, before his Honor, *Judge Settle*. The account, which was filed, was made out against Wright B. Evans, and contained many small items, amounting in all to $10 8-100, and including the articles said to have been furnished for the intestate's burial, which, however, were in no way distinguished from the other items in the account. The plea was fully administered.

Upon the trial, it appeared that the defendant had received assets to the amount of $5.00, and had disbursed the whole of them in payment

of debts due by bond. The plaintiffs contended that the articles which they had furnished for the burial of the intestate, amounting to $1.60, had precedence over bond debts, in the administration of the assets; that the defendant had notice of their claim for the funeral charges; and therefore they were entitled to recover that amount. The testimony, upon which they relied to prove their claim for funeral charges, and that the defendant had notice of it, was as follows: One Johnson testified that he was the son-in-law of the intestate, and that the morning after his death, he went to the store of the plaintiffs and bought the articles contained in their account, charged as nine yards of bleached, at 12½ cents a yard; one yard of jeans, at 15 cents; thread and buttons, 12½ cents, and one yard of muslin, at 20 cents, which were bought for and used in the burial of the deceased; that the defendant was present and saw him buy the articles, and knew what they were for; but the witness could not say that the defendant knew the price at which the goods were charged. This witness stated further, that some time after the suit had been commenced, he heard the defendant say that he knew that these articles were bought for the burial of his intestate, but that Mr. Ward (one of the plaintiffs) had made out his account wrong; that he had charged the burial expenses with the other account he had against Evans, and that if he had presented his account for the burial expenses right, he would have paid it. A witness named Sherrod testified, that some time before the warrant was brought he, Ward, and the defendant were together, when Ward asked witness if he did
(129) not expect to get his debt for making the coffin of Evans. Witness said he did not know, to which Ward replied, that he should go for his bill, and that he would get, anyhow, that part of his bill which was for burial expenses. The defendant remarked, "It is very doubtful, gentlemen, whether either of you get anything." Sherrod stated further that upon presenting his account for the coffin, at the end of about a year after the defendant had administered, he paid him without objection. Another witness named Cooper stated that before the warrant was sued out, he heard Ward tell the defendant that he had an account against Evans, part of which was for burial expenses; to which the defendant replied, he was willing to pay the burial expenses, and nothing more. Mr. Smithwick, the justice who tried the warrant, in which this whole account was claimed, stated that he heard nothing said about the account or any part of it being for burial expenses.

The defendant contended, that there was no testimony to show that he had notice of what the plaintiffs claimed for burial expenses, and that they therefore could not recover for them. The presiding judge charged the jury that if they believed the witnesses, there was evidence

from which they might find that the defendant had received sufficient notice, and had assets liable to so much of the plaintiff's claim as was for funeral expenses. The jury found a verdict for the plaintiffs and assessed their damages to $1.60, and from the judgment rendered thereon, the defendant appealed.

No counsel for plaintiffs.
Biggs and Moore for defendant.

BATTLE, J., after stating the case as above, proceeded: The expenses necessary for the decent interment of a deceased person, and suitable to the estate which he leaves behind him, are a charge upon the assets in the hands of his executor or administrator, and have a preference over all other debts. 2 Bl. Com., 508. They bind the assets, independent of any promise by the executor or administrator, provided he is notified that they are claimed as a funeral charge, before the assets are exhausted in the payment of other demands. *Parker v. Lewis,* 13 N. C., 21. These principles seem to have been admitted on the (130) trial, and the only question in dispute between the parties was whether the defendant had received a proper notice of the plaintiffs' claim, as a personal charge, before he had fully administered the assets which came to his hands. If the testimony offered furnished any evidence of such notice, his Honor was correct in submitting it to the jury, whose province it was to decide upon its weight; and if they were in error in finding the fact, none but the judge who presided at the trial, could correct it. But if the testimony afforded no evidence of notice, then his Honor erred in permitting the jury to pass upon it, and the error was one which it is our duty to revise and correct. Was there, then, any evidence to show such a notice as the plaintiffs were bound to give to the defendant, of the nature and extent of their demand, before they commenced their suit? We think there was not. What is the object of a notice in such a case? It is undoubtedly to let the opposite party know what is demanded of him, in order that he may pay it, and thus save himself the trouble and expense of a law suit. Was that done here? Certainly not. The defendant was told, indeed, by the plaintiffs that they had some claim against him for the funeral expenses of his intestate, but what was the amount of it, they would not let him know. On the contrary, they included the articles, furnished for the burial of the intestate, in the same account with those sold and delivered to him in his lifetime, and then demanded payment of the whole. Surely, it would be a mockery to hold such conduct of the plaintiffs to be a notice to the executors or administrators, of the nature and

extent of their claim for funeral expenses. If the rule of law were so, then, as was strongly said by *Henderson, C. J.*, in *Parker v. Lewis,* the executor or administrator might, without any default on his part, be subjected to as many actions as there were items of which the funeral bill was composed.

It may be remarked, too, that this is not like the case of a bond due from the intestate, of which when notified in any way, it is the duty of the administrator to seek the creditor, and pay it off. But (131) a claim for funeral expenses is not a debt contracted by the intestate, nor is it a debt contracted by the administrator. It is a charge thrown by necessity upon the assets in the hands of the administrator, and for which he is liable in respect of such assets. Many different persons may have furnished materials for, or rendered services about, the funeral, each of whom will have a separate claim against the estate. In such a case, it seems but reasonable to require, that each shall give to the administrator a distinct notice of his claim, stating its amount and what it is for, before he is allowed to proceed to enforce it against him by suit. If he does this in a reasonable time, his demand will have priority over all others; but if he gives no notice at all, or such a notice only as tends rather to entrap the defendant than to inform him of what he claims, then he deserves nothing, and can recover nothing. See opinion of *Henderson, J.*, in *Gregory v. Hooker's Administrator,* 8 N. C., 394. The judgment must be reversed, and a *venire de novo* awarded.

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

Cited: Cole v. Fair, 46 N. C., 175; *Barbee v. Green,* 86 N. C., 158; *Ray v. Honeycutt,* 119 N. C., 512; *Brown v. Brown,* 199 N. C., 476.

NEIL R. BLUE, ADMINISTRATOR, v. JOHN MCDUFFIE AND MALCOLM LEACH.

1. The 3d section of the act of 1844, chapter 31 (providing for the plaintiff a remedy against the bail of the defendant in judgment), embraces all judgments.

2. It is therefore no defense for the bail, upon *scire facias* to subject him, that no *ca. sa.* had issued against his principal, on a judgment in an action *ex delicto.*

3. Though the caption as well as the preamble of a statute, where the meaning of its provisions are vague, may be called in aid of construction, neither can control its enactments, when they are full and certain.

BLUE, ADMINISTRATOR *v.* MCDUFFIE AND LEACH.

APPEAL from the Superior Court of Law of CUMBERLAND County, at Fall Term, 1852, his Honor, *Judge Caldwell,* presiding.

John C. Davis had obtained a judgment in trespass *vi et armis* against one Gilbert McDuffie; and this was a *scire facias* sued out by his administrator, against the defendants as the bail of said McDuffie, seeking to subject them to the payment of the plaintiff's recovery. The plea was, that no *capias ad satisfaciendum* had been duly sued out; to which plea the plaintiff demurred. His Honor, the presiding (132) judge, was of opinion that because of the broad language of the act of 1844, no *ca. sa.* was necessary, and from his judgment sustaining the demurrer, the defendants appealed.

W. Winslow for defendants.
Banks, contra.

PEARSON, J. This was a *scire facias,* to charge the defendants, as bail, to which the plea is, no *ca. sa.* has been issued against the principal. To this the plaintiff demurs, relying on the act of 1844, chapter 31, section 3.

We concur with his Honor, that "because of the broad language of the statute, no *ca. sa.* was necessary." The first section provides, that hereafter no *ca. sa.* shall be issued upon any judgment, rendered either in court or by a justice of the peace, unless there is an affidavit charging the defendant with fraud. The third section provides, that a plaintiff in any judgment, may proceed by *scire facias* to charge the bail, without having previously issued a *ca. sa.* against the defendant in such judgment. This is certainly broad language, and must include every judgment, unless there be some strong reason for making an exception in regard to one class of judgments.

It is said, judgments in actions *ex delicto* are not within the operation of the statute; and we are referred to the caption of the statute, "An act more effectually to prevent the imprisonment of honest debtors"; and it is insisted, the statute only protects such honest debtors as are within the operation of the act of 1822—viz., debtors by matter *ex contractu.* There is some plausibility in the suggestion, but to authorize a construction, by which to exclude from the operation of the statute more than one-half of all the cases that are included by its words, there should be, not a plausible, but a conclusive argument—a demonstration.

We admit that where the words are vague and the meaning uncertain, the preamble—nay, even the caption—may be called in aid, for the purpose of construction. (In making this concession, we violate the authorities of Dwarris on Statutes.) Are the words of the statute vague,

and the meaning uncertain? If ever a statute did use words full
(133) and certain, so as to include all judgments, the statute under consideration does so. After judgment is rendered against one for a trespass or the other matter *ex delicto,* is not that judgment a debt? He is then a debtor. His administrator would be bound to consider it a debt of record. The stress then is laid upon the word "honest," which is used in the caption of the act; and we are reminded, that is the very word used in the act of 1822, by which honest debtors may give bond for their appearance, and need not remain in jail twenty days before taking the oath for the relief of insolvent debtors. That is so; but can the enacting words of a statute be thus contracted by the words used in the caption? Can the caption be allowed to take out of the operation of the act one-half or nearly so of the cases included by its words?

The act of 1715, by which debtors were allowed to swear out, after remaining in jail twenty days (commonly called the "forty-shilling law"), was construed to include only debtors taken in execution on judgments upon actions *ex contractu.* The act of 1822, by which debtors were allowed to give bond to appear at court and take the oath, was also, by construction, confined to the defendants in judgments on actions *ex contractu.* The act of 1840, amending the act of 1715 was then passed, by which it is provided, that all persons confined in jail upon a *ca. sa.,* issuing on a judgment in an action *ex delicto,* after remaining in jail twenty days, shall be discharged upon taking the insolvent debtor's oath. Thus debtors by judgment on matters *ex delicto,* are by the act of 1840, put on the same footing as debtors by judgment on matters *ex contractu,* by the act of 1715. Then comes the act of 1844, which, by its broad language, includes debtors as well of the one kind as of the other, and completely wipes out the distinction, by including all judgments, except in cases where an affidavit charging fraud is filed. The word "honest" in the caption, on which stress is laid, may as well be referred to the provision that all persons shall have the benefit of the act, and be considered "honest debtors," unless there be an affidavit charging them with fraud, as to the caption of the act of 1822.

There is, from 1715 down to 1844, a decided expression, that
(134) the Legislature, influenced by the feeling of the age, intended to provide that no person should be imprisoned, except for crime or contempt. We do not feel at liberty to stand in the way of, or in anywise resist, this enlightened feeling, and to say, in spite of the broad words used in the statute, a citizen may be imprisoned twenty days, not for crime or contempt, but because he is too poor to pay the costs and damages assessed against him in a court action—in other words,

too poor to pay his debts. Nor can we, by construction, involve the proceeding against bail in all the difficulties presented by the famous case of *Trice v. Turrentine,* which was intended to be avoided in future by the broad words used in the third section of the statute under consideration, simply because it is entitled, "An act more effectually to prevent the imprisonment of honest debtors."

PER CURIAM. Judgment affirmed.

Cited: Musgrove v. Kornegay, 52 N. C., 72; *S. v. Partlow,* 91 N. C., 550; *Randall v. R. R.,* 104 N. C., 413; *S. c.,* 107 N. C., 750; *Kelly v. Fleming,* 113 N. C., 139; *S. v. Patterson,* 134 N. C., 614; *Abernethy v. Commissioners,* 169 N. C., 640; *In re Chisholm's Will,* 176 N. C., 213; *S. v. Bell,* 184 N. C., 707.

WILLIAM A. SPRUILL v. SAMUEL W. DAVENPORT.

Course and distance govern, in questions of boundary, unless controlled by some more certain description.

THIS was an action of trespass *quare clausum fregit;* plea, general issue, tried before his Honor, *Judge Manly,* at WASHINGTON County, on the last Fall Circuit.

The plaintiff claimed under a grant to Nehemiah Spruill, some of the boundaries in which are as follows: "Then north along," etc., "one hundred and fifty poles to Benjamin Spruill's line" (at E.), "then west along his line and Thomas Mackey's line, three hundred poles to Greenland Swamp," etc. The distance of three hundred poles with Benjamin Spruill's line, gave out (at F.) before arriving at Greenland Swamp, the course of which from that point being southwest. It also appeared that one William Mackey had a number of years ago owned a tract of land, part of which extended near to (at 7), but did not touch, the land of Benjamin Spruill; which land of William Mackey, was known by the name of the "Mackey land" many years after he sold it, though there was no evidence to show that it was ever (135) at any time called the Thomas Mackey land. It was admitted that if the line, along Benjamin Spruill's line, ran directly to Greenland Swamp from the point (at F.) where the three hundred poles terminated, the *locus in quo* would not be included. But if, from the termination of the three hundred poles (at F.) on Benjamin Spruill's line, it ran directly to the Mackey land (at 7) and then to Greenland Swamp;

or if it ran with Benjamin Spruill's line up to its nearest approach to the Mackey land, some four hundred poles (to L.), (north of the point where the three hundred poles terminated) and then to the Mackey land (at M.) some twenty poles from (L.) and with the Mackey land south, and then to Greenland Swamp, it would include the *locus in quo*.

The defendant requested his Honor to instruct the jury, that if no such line as Thomas Mackey's ever existed, as called for by the boundaries in the Spruill patent, or if it was no nearer to the point of the termination of the three hundred poles (at F.) than the land known as the Mackey land (at 7), they were bound to run the lines of Nehemiah Spruill's patent from (F.) to the point of the termination of the three hundred poles on Benjamin Spruill's line, directly to Greenland Swamp. His Honor declined giving the instruction prayed for, but told the jury that if they were satisfied that a line of the William Mackey tract was meant in the patent to Nehemiah Spruill, by "Thomas Mackey's line," they were to run from the point of termination of the three hundred poles (at F.) directly to the Mackey land, and from thence to Greenland Swamp. Verdict for the plaintiff, and judgment thereon, and defendant appealed to the Supreme Court.

Moore for defendant, argued:

1. The phrase "along his (B. Spruill's) line and Thomas Mackey's line," means the joint or common line of Spruill and Mackey. The proper meaning of the term being a question for the court, the jury should have been charged that as there was no such joint line, and no line at all of Thomas Mackey, the run was from E., on B. Spruill's line, 300 poles, and thence, as a terminus, to Greenland Swamp.

(136) 2. But if the phrase may embrace two different lines, it must mean two lines united at their extremities; otherwise, if Thomas Mackey's line were five miles off, the run must be to it, from Spruill's line, although it might embrace a dozen distinct tracts of land by such running.

3. It does not appear by anything in the case, but that Thomas Mackey's line ran from F. to Greenland Swamp; so there is no ambiguity in the description made manifest, and of course there is no reason for running to William Mackey's line. Any other Mackey's line would have been equally as certain as William's, and it does not appear but there were many of the name in 1786, who had lines in the neighborhood. (*Mayo v. Blount*, 23 N. C., 283.)

4. The reason why the run is made to lines called for, irrespective of course and distance, is, that they are deemed certain as *termini;*

but when their existence is uncertain, their location cannot be conjectured; because course and distance, vague and uncertain as they may be, and often are, still are more certain and reliable than such guesses.

5. There can be no protection against the extension of lines in this mode. If Thomas Mackey's line can be shown to be intended for William Mackey's line, it can be shown to be Job Jenkins' line. The court will allow no further invasion on the rules of evidence in boundaries. (*Reed v. Schenck,* 13 N. C., 415; *Slade v. Green,* 9 N. C., 218.)

Smith, contra: Parties admit the boundaries of the grant to Nehemiah Spruill from the beginning to F., and it is conceded that wherever located, the line must be extended to Greenland Swamp. If in doing so, the lines touch the Mackey land at any point, they include the *locus in quo;* and this is the case, whether you follow Benjamin Spruill's line round to E., its nearest approach to the Mackey land, or run direct from F. to 7, the nearest point of it. It obviously fulfils the general description of the grant to touch the Mackey land, for it is located between the Benjamin Spruill land and the swamp, as it is placed intermediately between those objects in the calls of the deed.

2. It was known as the Mackey land in general terms, and William Mackey had conveyed it to some one the year before the survey was made, upon which the grant afterwards issued to Nehemiah Spruill. It was not then, though it had been, William Mackey's (137) land. There was no other Mackey land to which the description could apply. It must, therefore, refer to this or be rejected altogether.

3. It is submitted that the location of the lines of the Mackey land were properly submitted to the jury, and being ascertained, they were properly instructed to reach them.

If, however, there be a misdescription, it is one of unnecessary addition, and it was competent for the jury to hear evidence as to where the lines of Mackey ran, and correct, by rejecting as surplusage, the false additions. (*Gilchrist v. McLaughlin,* 29 N. C., 310; *Hauser v. Belton,* 32 N. C., 358.) Nor can the presence of a plat control the calls of a grant. (*Literary Fund v. Clark,* 31 N. C., 58.)

PEARSON, J. The only question was one of boundary. The grant under which the plaintiff claimed, it was agreed, came around to Benjamin Spruill's corner; then the call is, "west along Benjamin Spruill's line, and Thomas Mackey's line, three hundred poles, to Greenland Swamp," along said swamp, etc. Running on the line of Benjamin Spruill, the distance (three hundred poles) gives out before making

Greenland Swamp. At that point, the line of Benjamin Spruill turns north (going right off from Greenland Swamp, which lies to the southwest), and at the distance of some four hundred poles further, comes within about twenty poles of the northeastern corner of a tract of land, which was at one time owned by one William Mackey, and then turns east. At the point aforesaid, at the end of the distance called for (three hundred poles) a straight line west some fifty poles, would strike the southeast corner of the tract of land which was at one time owned by William Mackey. But from the point aforesaid in the end of the distance, in order to strike Greenland Swamp, the course must be southwest. It was agreed, that if the line from the end of the distance was to follow Benjamin Spruill's line north, until it approached William Mackey's line within some twenty poles, and then crossed over to said Mackey's line, and then followed that line to the southeast corner, and then ran directly to Greenland Swamp, the *locus in quo* would be in-
(138) cluded. But if at the end of the distance, the line ran directly to the swamp, the *locus in quo* would not be included.

His Honor instructed the jury, that if they were satisfied that a line of the tract of land which was at one time owned by William Mackey, was the line meant in the call of the grant under which the plaintiff claimed—to wit, "Then with Benjamin Spruill's line and Thomas Mackey's line, three hundred poles, they were to run from that point (the end of the distance) to William Mackey's line, and then to Greenland Swamp," which would include the *locus in quo*. To this the defendant excepts. There is error.

In questions of boundary, course and distance govern, unless there be some more certain description by which one or both may be controlled. In this case, a line from the end of the distance to Greenland Swamp, would not include the *locus in quo;* and the question is, was there any more certain description by which to control the distance and extend the line to the tract of land once owned by William Mackey? No line of Thomas Mackey could be found, and we are at a loss to conceive of any principle by which the line of William Mackey could be substituted, so as to extend the line of the grant beyond the distance called for. It was error to submit the question to the jury, because there was no evidence to support such a conclusion.

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

Cited: Corn v. McCrary, 48 N. C., 500; *Mizell v. Simmons,* 79 N. C., 188; *Baxter v. Wilson,* 95 N. C., 137; *Brown v. House,* 118 N. C., 872; *Lumber Co. v. Hutton,* 152 N. C., 542; *S. c.,* 159 N. C., 450; *Lumber Co. v. Lumber Co.,* 169 N. C., 89.

(139)

M. A. PARKER TO THE USE OF ISAIAH RESPASS v. D. H. LATHAM AND WILLIAM A. LANIER.

1. To render the delivery of a bond effectual, acceptance on the part of the obligee is as necessary as the transfer on the part of the obligor.

2. Where A. and B. executed a bond payable to C. for the purpose of borrowing money on it for the benefit of A., and C. having refused to receive it and advance the money, returned it to A.; and eight days thereafter, A. sent the bond back to C., with an endorsement written thereon to D., "without recourse," etc., requesting C. to sign it (which he did), as he thought D. would advance the money: *Held*, in a suit against B. at the instance of the endorsee, that the bond was void, for want of delivery, by C's refusal to accept it, and that the subsequent endorsement and transfer of it to D. did not bind the defendant—he having given no authority for such new delivery.

(The case of *Marsh v. Brooks*, 33 N. C., 409, cited and approved.)

THIS was an action of debt on a bond, tried before his Honor, *Judge Bailey*, at Spring Term, 1850, of BEAUFORT Superior Court of Law. Pleas, *non est factum*, and that the plaintiff never acquired title to the bond by endorsement. The following is a copy of the bond declared on, and the endorsement:

"One day after date we promise to pay Martha A. Parker, guardian of the minor heirs of James Parker, deceased, the sum of three hundred and forty dollars for value received. Witness our hands and seals—this 26 May, 1848.

William Ellison, (Seal.)
D. H. Latham, (Seal.)
Witness: D. H. Farrow. W. A. Lanier, (Seal.)

On which was endorsed:

"Pay the within to Isaiah Respass, without recourse on me, 3 June, 1848. (Signed) Martha A. Parker."

The plaintiff proved that the signatures and seals appearing upon the writing declared on were those of the defendants, and of William Ellison; and that the writing was left with said Ellison to raise the money mentioned in it; that said Ellison presented the writing to Martha A. Parker, who refused to receive it and to advance the money on it, and she returned the same to him; that said Ellison afterwards wrote the words appearing on the back of it, and sent the paper to Mrs. Parker, telling the messenger that if she would sign it, he thought

that Respass would advance the money, and requested her to sign it, which she did, and returned it to said Ellison; and that said writing afterwards came to the possession of the plaintiff.

His Honor, upon this state of facts, was of opinion with the plaintiff. There was a verdict and judgment accordingly, and the defendants appealed to the Supreme Court.

The case was argued at a former term by *Rodman* and *Shaw* for the defendants, and at this term by *Shaw,* who contended:

1. That by Mrs. Parker's refusal to accept the instrument, it was thereby made void, and void *ab initio,* so that she could not thereafter (140) accept it so as to make it valid. *Butler* and *Butler's case,* 3 Rep., 26; *Wankford v. Wankford,* 1 Salk, 301; *S. v. Pool,* 27 N. C., 105; *Threadgill v. Jennings,* 14 N. C., 384.)

2. After her refusal to receive the instrument, she could not legally endorse it, because she had made it void by her refusal, and because she had no legal authority to change the obligee from her own name to that of Respass. That her act done after her refusal, and without authority under seal from defendants—if held to be a legal endorsement—would, in effect, enable her to change the obligee, and make a new instrument. (*Davenport v. Sleight,* 19 N. C., 381; *Graham v. Holt,* 25 N. C., 300.)

3. A bond is to be regarded, not as a promissory note, but on the same footing as any other deed. *Marsh v. Brooks,* 33 N. C., 409; *Graham v. Holt, supra.*) "The nature of a bond in its inception and before endorsement, is not touched by the statute making bonds negotiable by endorsement." The statute dispenses with none of the formalities requisite to make an instrument a perfect bond. (33 N. C., 409.)

4. But if the rules applicable to promissory notes did apply to endorsed bonds, the plaintiff is not entitled to recover—the bond having been endorsed after it became due and received by the endorsee, after it was due, from one of the supposed makers; because he stands as one suing for it as trustee for the payee, and under authority from him, and is not entitled to the right of an endorsee who took the note in good faith for a valuable consideration. *Vallet v. Parker,* 6 Wend., 615; 9 *ibid.,* 170.) He also cited on this point Chit. Pl., Springfield Ed. (1842), 216-17, 648, 650; *Turner v. Beggarly,* 33 N. C., 331.

J. H. & J. W. Bryan and Donnell for plaintiff.

NASH, C. J. The action is on a sealed instrument called a single bill, not assignable at common law, but made so by statute. A man by the name of Ellison is the principal, and it is admitted that the present de-

fendants were his sureties. The bond is made payable to the plaintiff as a guardian, and intended to raise money for the use of Ellison. It was executed by the defendants and Ellison, and sent by an agent to the plaintiff, who refused to accept it. Subsequently it was sent back to her by Ellison, with the endorsement as it now appears, (141) written by him, with the request to her to sign it, for that Respass, for whose benefit the action was brought, would then advance the money upon it. She did so, and the sole inquiry presented to us, is as to the legal validity of the instrument.

Delivery is an essential part of every deed, and as there is no set form of words or of acts by which it may be done, any words or acts on the part of the obligor or grantor, which show the *animus disponendi,* will be sufficient. As if a deed be sealed and lying on a window, and the grantor say, "there it is; take it as my deed," or, "this will serve"—these are good deliveries. (Shep. Touch., 124; Thomas' Coke, 2 Vol., 276.) It is not pretended that when first presented to Mrs. Parker there was any delivery, for she expressly refused to accept it; and acceptance by the grantee or obligee, is as necessary to a valid delivery as the transfer on the part of the grantor or obligor. *Woodman v. Coolbroth,* 7 Greenl. Rep., 181. But it is agreed that the second delivery was completed by the endorsement of the obligee. Without inquiring whether, under the special circumstances of this case, her endorsement was an acceptance or not, we think it was not such an acceptance as bound these defendants. We have seen that the consent of the maker of a deed is essential to a delivery. If the circumstances go to show that he did not consent, it is not his deed, even though he signed and sealed it, and was bound by a previous contract to deliver it. *Coolbroth's case, supra.* If a man throws a deed on the table, and says nothing, and the other party takes it, this does not amount to a delivery, unless the jury find it was put there with an intent to deliver. Owen, 95; 1 Leon., 140; 1 Touch., 124, n. 28. If a patron draws a presentation in writing and puts his seal to it, and leaves it in his study, and the party for whom it is prepared gets it without the license or privity of the patron, and brings it to the Bishop, and is thereupon instituted and inducted, it is all void. (Yelverton, 7.) Where the first delivery of a deed fails for want of acceptance by the grantee, then a new delivery must be made; otherwise the deed is void. 13 Vin. Abrid., title Deeds, n. 2, p. 27. What are the circumstances of this case? The instrument declared on was signed and sealed by Ellison and the two defendants, for the pur- (142) pose of borrowing money from the plaintiff, Mrs. Parker. She refused to accept it. It was then *functus officio,* and to give it vitality a second or new delivery was necessary. To this second or new delivery

the assent of the defendants was necessary, so as to bind them. There is nothing in the case to show that they did so assent; on the contrary, there is much to show they never did. The bond is dated 26 May, 1848, payable one day after date, and the money was for the use of Ellison, as we understand. On 3 June following, eight days thereafter, it is endorsed to Respass by Mrs. Parker, the obligee. It does not appear that the present defendants knew that the money was not received from her upon the first application. Again, when the instrument was presented to Mrs. Parker the second time, it was not for the purpose of getting the money from her, for she had refused to advance it, but from Respass, who actually did advance it to Ellison—he was, in substance, the obligee. If the present defendants did know that it could not be procured from Mrs. Parker, but that Respass was to advance it, why was not the instrument made payable to the latter? The endorsement gave to Respass no additional security, for it discharged Mrs. Parker from all responsibility. It is obvious that Ellison managed the latter part of the business without consulting the defendants. If he could, without a renewed authority from the defendants, deliver it eight days after the first, why not in eight months? The instrument in its original concoction was not intended by the defendants to be thrown into market to raise funds from any one who would advance them; but from a specified individual, and that person refusing to lend money upon it, it must be shown that the defendants agreed to the new intent, that is, to becoming bound to Respass, which does not appear.

But it is argued on behalf of the plaintiff, that as by our act of Assembly, bonds are made negotiable, that therefore they are transferable by endorsement as bills of exchange and notes of hand, and are governed by the same rules and regulations. That is true; after the endorsement, the laws governing bills of exchange and promissory notes do apply to them. But still the instrument, being a sealed instrument, must possess all the requisites to make it a good deed. If it be deficient in any such property, the endorsement cannot supply the defect; (143) it cannot make that legal which never was so. Upon this point we consider the case of *Marsh v. Brooks,* 33 N. C., 409, full authority. In replying to this particular argument, the Court says the instrument must be a perfect bond for money, before it can be negotiated; and further, although the law of the State makes bonds negotiable, yet their nature in their inception, and before endorsement, is not touched by the statute, and remains as at common law. We think there is error in the judgment below.

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

Cited: Baxter v. Baxter, post, 342; *Dewey v. Cochran,* 49 N. C., 187; *Gregory v. Dozier,* 51 N. C., 5; *Whichard v. Jordan, ibid.,* 56; *Bryan v. Steamer,* 53 N. C., 262; *Parker v. McDowell,* 95 N. C., 222; *Johnson v. Lassiter,* 155 N. C., 51.

Distinguished: Parker v. McDowell, 95 N. C., 219.

WILLIAM B. MARCH v. GEORGE WILSON ET AL.

1. The bail of a person arrested under a writ of *capias ad respondendum,* may maintain an action on the case at common law, against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had the debt sued on to pay.
2. There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words—the criterion of the plaintiff's right of action and the defendant's liability being, that the one should have been damaged, in consequence of the fraud of the other.
3. Nor is it any defense to the action, that the defendant did not know that the plaintiff was the bail of the person removed, and could not, therefore, have intended to defraud him.
4. In such case, the allegation in the declaration that the plaintiff was the bail, is supported by proof of his being special bail—as sheriff, under the act of Assembly.
5. Nor is it ground for arrest of judgment, that the declaration does not aver that a *scire facias* had issued against the plaintiff as bail, before he satisfied the judgment against his principal.

(The cases of *Erwin v. Greenlee,* 18 N. C., 39; *Barker v. Munroe,* 15 N. C., 412, and *Gardiner v. Sherrod,* 9 N. C., 173, cited and approved.)

THIS was an action on the case, tried before his Honor, *Judge Manly,* at Fall Term, 1851, of the Superior Court of Law of SURRY County—the case having been removed to that county from the county of Davie.

The plaintiff, in his declaration, alleges that as sheriff of Davie County, there came to his hands a writ of *capias ad respondendum* against one Henry F. Wilson, sued out at the instance of Braxton Bailey and Thomas M. Young for debt, and returnable to the May Term, 1843, of the County Court of Davie; and that he (144) executed the writ, and "became the bail of said Henry F., to answer said action." That judgment was afterwards obtained by Bailey and Young for the debt against the said Henry—to wit, at the August Term following of the said court; and a writ of *capias ad satisfaciendum*

was thereupon issued against the said Henry F., and returned "not to be found"—the said Henry F. having, in said month of August, absconded and removed from the county and State, and never since returned. And that the plaintiff, by reason of "his being the bail of the said Henry F., as aforesaid, and by the absconding and removal of him, the said Henry F. became and was liable to answer and pay to the said Bailey and Young their said judgment, debt, interest, and cost of suit; and being so liable, they demanded and recovered from him $....., which has not been repaid to him," etc. And the declaration then alleges that the defendants unlawfully and fraudulently aided and assisted the said Henry F. to remove from the said county and State, with intent to evade the payment of the said debt, and to hinder and prevent the plaintiff from arresting and surrendering him, etc.

Plea, general issue.

It appeared in evidence on the trial, that Henry F. Wilson, a resident of Davie County, was indebted to Bailey and Young for $263.28, due by bond; that Bailey and Young commenced their action on the bond by writ issued 11 May, 1843, and returnable to the county court of Davie, which writ was directed and delivered to the plaintiff, who was then sheriff of that county, and by him was executed, without taking bail from the said Henry, and so returned to court. That Bailey and Young, at August County Court, 1843, of said county, obtained judgment on their said bond; and that on 19 August the said Henry absconded from the county of Davie and left the State. Bailey and Young demanded the satisfaction of their said judgment of the plaintiff as special bail for said Henry, and he paid it to them on 13 January, 1845. There was evidence tending to show that the defendants fraudulently aided and assisted the said Henry F. Wilson to remove from the State in August, 1843, to evade the payment of his debts, among them (145) the said debt of Bailey and Young.

The defendants insisted that as they did not know the plaintiff was the bail of the said Henry, they were not liable, and that there was a variance between the declaration and proof; and upon the whole case, asked his Honor to instruct the jury, that the plaintiff could not recover; but his Honor was of opinion that the particular intent to defraud the plaintiff was not necessary; and if the defendants had fraudulently combined to defeat the collection of the debt wherein the plaintiff had become liable as special bail, under the statute, and the plaintiff was thereby injured, he was entitled to recover.

Upon the question of variance—to wit, that the allegation that the plaintiff had become bail, was not supported by proof that he was liable under the statute, by reason of his neglect, his Honor was of opinion

that it was not such a variance as required a withdrawal of the testimony from the jury, or such as would defeat the plaintiff's recovery. Under instructions to this effect, the jury returned a verdict for the plaintiff.

A motion was then made in arrest of judgment, on the ground that it was not sufficiently stated in the declaration, that the plaintiff had paid the money, which was overruled; and judgment having been rendered on the verdict, the defendants appealed.

Miller for defendants.
No counsel for plaintiff in this Court.

BATTLE, J. This is an action on the case at common law against the defendants for fraudulently aiding and assisting one Henry F. Wilson to abscond from the State, whereby the plaintiff, who had become his bail, was compelled to pay the debt for which the said Wilson had been arrested. It is admitted to be a case of the first impression. Neither the industry of counsel nor our own research has enabled us to find one, the circumstances of which are similar to the present. The question, then, is, can the action be sustained? If it be new in the principle, then, though a wrong may have been done by the defendants, from which an injury has resulted to the plaintiff, it will require legislative action to remedy the mischief; but if it be new only in the instance, calling only for the application of a well established (146) principle to a new combination of circumstances, then it may be maintained, as has been well settled, at least ever since the celebrated case of *Pasley v. Freeman,* 3 Term Rep., 51. We will proceed then to inquire whether there is any recognized principle of law, which can be called in to the support of this action.

In the case of *Bailey v. Merrell,* 3 Bulstr. Rep., 95, *Croke, J.,* said that "fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." This principle has been often since recognized by the most eminent judges; and in the application of it to the great variety of frauds, which the wicked heart of man has conceived, no distinction has been made between frauds which consisted mainly in words, and those which have consisted mainly in acts. Without pretending to refer to all the cases on the subject of which the books give us an account, we will bring forward a few leading ones, which seem most apposite to our purpose. In *Pasley v. Freeman,* it was held by the Court of Kings Bench in England, that a false affirmation with regard to the credit of a certain person, made by the defendant, with intent to defraud the plaintiff,

whereby the plaintiff was endamaged, was the ground of an action on the case; and that in such action, it was not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who was. One of the judges, *Grose,* dissented, because, as he said, it was only a false affirmation, and that no case could be produced, where an action had been sustained for a mere falsehood; but the *Chief Justice, Lord Kenyon,* and *Judges Buller and Ashurst* held, that there being fraud in the defendant, and a resulting damage to the plaintiff, he ought to recover. *Langridge v. Levy,* 2 Mees. and Welsb. Rep., 519, is a still stronger case. It was there decided by the Court of Exchequer that the plaintiff might maintain an action against the defendant, for falsely and fraudulently warranting a gun to have been made by Nock, and to be a good, safe, and secure gun, and selling it as such to the plaintiff's father, for the use of himself and his sons, one of whom—to wit, the plaintiff—confiding in the warranty, used the gun, whereupon it burst and wounded him. The judgment was afterwards affirmed in the
(147) Exchequer Chamber (4 Mees. and Welsb., 337), and the principle of it approved and acted upon in *Pilmore v. Hood,* 5 Bing. New Cas., 97. In *Upton v. Vail,* 6 Johns. Rep., 181, which was an action on the case for falsely and deceitfully recommending another as a man of property, whereby he was trusted and the debt lost, the case of *Pasley v. Freeman* was solemnly affirmed; and the Court, per *Kent, C. J.,* said "that case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." Another case in New York may, perhaps, be regarded by some as having carried the principle almost too far. In *Benton v. Pratt,* 2 Wend. Rep., 385, the facts were, that Sedgraves and Wilson, who lived in the town of Allenton, in the State of Pennsylvania, at a distance from the plaintiff, agreed verbally with him, that they would purchase a certain number of hogs from him at the market price, if delivered within a specified time, and if they should not have been previously supplied. While the plaintiff, about the time specified, was on the way to Allenton with the hogs, he fell in with the defendant, who was going to Easton with a drove of the same kind of animals. The defendant, learning the intention of the plaintiff, made such arrangements as to get before him, and then hastened to Allenton, where he offered his hogs to Sedgraves and Wilson. They at first declined, but by the assertions of the defendant, or of his men, made in his presence, that the plaintiff was going to Easton, and had given up his contract with them, they were induced to purchase from the defendant, which

they would not otherwise have done; whereby the plaintiff lost the market, and was put to considerable expense. The declaration alleged that Sedgraves and Wilson would have fulfilled their agreement with the plaintiff, but for the false representations of the defendant. The court decided the action to be maintainable, saying: "There is the assertion, on the part of the defendant, of an unqualified falsehood, with a fraudulent intent, as to a present or existing fact, and a direct, positive, and material injury resulting therefrom to the plaintiff. This is sufficient to maintain the action." And the Court said further, (148) that it was not material whether the plaintiff's contract with Sedgraves and Wilson was binding on them, because the evidence showed that they would actually have fulfilled it, but for the defendant's false and fraudulent representations.

In Massachusetts the same principle prevails as a part of the common law. *Lobdell v. Baker,* 1 Met. Rep., 193, was an action on the case against the defendant for fraudulently procuring a minor to endorse a note, and then selling it to one, from whom the plaintiff, relying on the apparent validity of the endorsement, purchased. A verdict was found for the defendant, and the Court granted a new trial, saying, "that where a party affirms that which he knows to be false, or does not know to be true, to another's loss, and his own gain, he is responsible in damages for the injury occasioned by such falsehood. This is a very just and reasonable principle, well established." Upon the second trial, the jury found for the plaintiff, and the verdict was approved by the Court, who, after saying that on putting in circulation a note bearing an endorsement in blank, does, by necessary implication, affirm the endorser to be a person capable of binding himself by endorsement, added, "If he supposed the endorsement immaterial, and believed the note good without it, he might not be actuated by any motive of gain to himself, or any actual intent to injure another; still the fact remains, that he has made a representation which, to his knowledge, is untrue; then the principle applies, that if one make a representation which is not true, and another, acting on the faith of its being true, is injured by it, he has his remedy against the party so making the false representation." 3 Met. Rep., 469. In our own State, it was held in *Erwin v. Greenlee,* 1 Dev. and Bat., 39, that where the defendant in an execution fraudulently induced the sheriff to sell unsound property, and at the sale fraudulently represented it to be sound, an action on the case might be maintained against him by the purchaser. In all the cases which we have already considered, the fraud consisted principally in words—in false representations. We will now refer to a few where the gravamen of the action was the fraudulent acts of the defendant. *Smith v. Tonstall,*

Carth. Rep., 3, is a case of high authority, having been affirmed in the House of Lords. The facts of it were, that the plaintiff having (149) obtained a judgment against one S., the defendant, procured S. to confess a judgment to himself, when nothing was due to him. This collusive judgment he caused to be satisfied by the sale of goods, on which the plaintiff, by his prior judgment, had acquired a lien; and the defendant having become the purchaser of the goods, carried them to distant parts, whereby the plaintiff lost his opportunity of having them taken, and thereby lost his debt. It was held that he might recover in an action on the case for the fraud. In *Yates v. Joyce,* 11 Johns. Rep., 136, the plaintiff being the assignee of a judgment against one B., which was a lien on the property of B., was about to take out execution and seize a certain lot of land, when the defendant, knowing the existence of the judgment, pulled down and carried away certain buildings, whereby the plaintiff was deprived of the benefit of his judgment. It was decided by the Court that the plaintiff might maintain an action on the case against the defendant for fraudulently removing the property of B., and converting it to his own use, with intent to defeat the judgment of the plaintiff. The Court admitted that the case was one of the first impression, yet they did not hesitate to hold that the plaintiff might recover the damages which he had sustained by the fraudulent acts of the defendant. In *Adams v. Paige,* 7 Pick. Rep., 542, the decision was "that an action on the case for a conspiracy will lie in favor of a creditor against his debtor and a third person, who have procured the property of the debtor to be attached, upon a suit for a fictitious debt, and applied it to the payment of the judgment obtained in such suit, in order to prevent bona fide creditors from obtaining payment out of the property—the plaintiff having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment and the debtor's being insolvent."

In all the cases to which we have referred, and in many others to which we might refer, however different the circumstances, the principle upon which they were decided was the same—to wit, that where there was fraud by the defendant, either in word or deed, resulting in damage to the plaintiff, he might sustain an action on the case for such damage. We are now to consider whether the circumstances of the case before us are such, that the same principle can be applied to (150) them. These circumstances are, that in May, 1843, Bailey and Young, being creditors of Henry F. Wilson, a resident of the county of Davie, issued a writ of *capias ad respondendum,* against him, returnable to the ensuing (May) Term of the county court of that county. The writ was placed in the hands of the plaintiff, who was then

sheriff, and was by him executed on the said Wilson, for whom he, by failing to take bond, became special bail. Wilson, the debtor, to avoid the payment of his debts, afterwards, and before judgment was obtained against him, absconded from the State—the defendants having fraudulently aided and assisted him in so doing; and in consequence thereof, the plaintiff, as the bail of the said Wilson, was compelled to pay the debt to Bailey and Young. Here we find a fraud by the defendant, resulting in damage to the plaintiff. Why may not he recover for it? It is answered by the defendant's counsel, that the damage, though it may have been a consequence of the fraudulent acts of the defendants, was too remote, indefinite, and contingent, to be the groundwork of an action; and for this he cites, and greatly relies upon, the case of *Lamb v. Stone,* 11 Pick. Rep., 527. The question in that case arose upon a motion to arrest the judgment, after a verdict for the plaintiff. The allegations contained in the declaration were, that the plaintiff had a just debt due him from one Thompson; that the latter had property liable to attachment, sufficient to pay this debt; that the defendant took a fraudulent conveyance of this property; that Thompson had absconded from the State; that the plaintiff had not been able to arrest him, to attach his property, or otherwise obtain satisfaction of his debt; and that the acts done by the defendant were done with the intent to defraud the plaintiff, by preventing him from securing or getting satisfaction of his debt. The Court arrested the judgment and assigned several reasons therefor, one of which was that now urged by the defendant's counsel. The Court said that "the injury complained of is too remote, indefinite, and contingent. To maintain an action for the deceit or fraud of another, it is indispensable that the plaintiff should show, not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascer- (151) tained. What damage has the plaintiff sustained, by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in, the property, for he never had acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. Is this an injury for which an action will lie? How can the secret intention of the party be proved? It may be, he would have changed this intention. It may be,

the debtor would have made a bona fide sale of the property to some other person; or that another creditor would have attached it; or that the debtor would have died insolvent, before the plaintiff would have executed his intention. It is, therefore, entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satisfaction from the property of his debtor, or his debtor may return and pay him." In a previous part of the opinion, the Court had said: "If the sale was fraudulent, it might be avoided by the creditors, and the property was liable after, as well as before, the conveyance. The fraud could be established quite as easily in a suit for the chattels themselves, as in the present case. There is no averment that the defendant had concealed the property, removed it out of the Commonwealth, or in any way so disposed of it, that it could not be attached. But even if it were so, and the property could not be come at to be attached specifically, yet it might be attached in the defendant's hands by the trustee process." We have quoted thus largely from the opinion, to show the true ground upon which it was placed, and upon which only it can be sustained. That ground was, that the plaintiff had other effectual remedies against the property of the debtor, of which the fraud of the defendant had not deprived him; and that, consequently, he was not endamaged to the amount of his debt, or to any other certain definite amount. How (152) are the facts in regard to our case? Here the plaintiff, by becoming special bail, as he had a right to do, as was decided in *Barker v. Munroe,* 15 N. C., 412, became in a certain sense the custodian of the debtor's body, of which no person had the right to deprive him; and yet the fraudulent acts of the defendants did deprive him of it, in consequence of which, he had to pay the debt of Bailey and Young. Here is a tort followed by damage. It seems to us that the damage is the clear and necessary consequence of the tort, and that such damage can be clearly defined and ascertained. There is a case in our own reports—to wit, *Gardiner v. Sherrod,* 9 N. C., 173, which we ought not to overlook. That was an action in which the plaintiff declared in two counts, one at common law, and the other under the statute, against the defendant for fraudulently aiding a debtor to escape, by means whereof the plaintiff lost his debt. The first count alleged that one Robert Sherrod was indebted to the plaintiff in a bond for $200; that the defendant fraudulently assisted him to abscond from the county, with the intent to hinder and delay the plaintiff in the collection of his debt, and that, by such fraudulent conduct of the defendant, the debt was lost. Upon the trial, the jury, under the charge of the court, found a verdict for the

plaintiff on the first count only, and upon appeal, this Court held that the action could not be sustained upon the facts stated in that count. They said that the plaintiff did not show how or to what extent he was injured—that it was not alleged that the debtor had any property, or that the plaintiff had arrested, or would have arrested him, had he remained; and that, consequently, it did not appear from his own showing, that he had been damaged. There is an obvious difference between that case and the present. Here the declaration states, and the facts show, that the debtor had been arrested, and that the plaintiff had become his special bail, and as such, responsible for the production of his body. His responsibility did not depend upon the fact of the debtor's having property. It was the same, whether he had property or not. The declaration states, and the testimony shows, that the defendants fraudulently aided and assisted the debtor to abscond, in consequence of which, the plaintiff had the debt to pay to the (153) creditors. We therefore conclude, both from reason and authority, that the plaintiff as the bail of Henry F. Wilson, has a good cause of action against the defendants, for fraudulently assisting the said Wilson to escape; and that the judgment must be affirmed, unless some of the other objections, appearing in the bill of exceptions, can avail to prevent it.

One of these objections is, that the defendants did not know that the plaintiff was the bail of Wilson, and therefore could not intend to defraud him; and that, without such intent, he could not sustain the action. We think it was sufficient to show that the fraudulent act was done with the intention of hindering and delaying Bailey and Young in the collection of their debt. It is no defense to the defendants, that the damage, flowing from their wrongful act, fell upon the bail, instead of the creditors, of the absconding debtor. If one throws a log in the public highway, with the intention to injure a particular individual, and another person passes along and is injured by falling over it, it is common learning that he may sustain an action on the case against the wrong-doer, though there was no intent to injure him. The case of *Erwin v. Greenlee,* above referred to, is another instance of the application of the same principle. There the defendant, Greenlee, could not know who was to be the purchaser, and therefore did not intend to injure any person in particular. So in the noted case of *Scott v. Shepard,* 2 Black. Rep., 892, whether the proper form of action was trespass, as held by the Court, or case, as contended for by *Judge Blackstone,* the *tort-feasor,* certainly did not know who was to be hurt by the lighted squib, which he threw into the market-house, where a large concourse of people were assembled.

Another objection is, that there is a variance between the declaration and proof, as to the manner in which the plaintiff became the bail of the debtor. This, we think, is fully answered by the case of *Barker v. Munroe,* above cited. There *Gaston, J.,* in delivering the opinion of the Court, upon the construction of the statute relating to bail, said: "Upon this statute a construction early obtained, that the sheriff had a right to become thus special bail in every case, and this construction has ever since steadily adhered to and followed out to its necessary con-
(154) sequences." If this be so, and it has been too long and too well settled to be doubted, it can make no difference in the pleading or proof, how the plaintiff became bail.

Still another objection has been urged in this Court, that it ought to have been stated in the declaration, and proved on the trial, that a *scire facias* had issued against the plaintiff as bail. This statement, we think, was unnecessary. It was sufficient to allege that the plaintiff became, and was liable as bail, and that the debtor absconded, whereby he was compelled to pay the debt—without setting forth in detail the legal proceeding against him, by which he was compelled. That he was so compelled to pay, and did pay the debt to Bailey and Young, in consequence of his liability as the bail of the absconding debtor, sufficiently appears in the declaration, which is an answer to the motion in arrest, made in the court below. Upon the whole case, then, we do not find anything in the bill of exceptions, or the record, which entitles the defendants to a reversal, or an arrest of the judgment, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Booe v. Wilson, 46 N. C., 183; *Jones v. Biggs, ibid.,* 367; *Moore v. Rogers,* 48 N. C., 96; *Ledbetter v. Morris, ibid.,* 545; *Smith v. Hays,* 54 N. C., 323; *Griffin v. Lumber Co.,* 140 N. C., 517; *Starnes v. R. R.,* 170 N. C., 225; *Currie v. Malloy,* 185 N. C., 213.

DOE EX DEM. ADEN POWELL v. MARY BRINKLEY.

1. The statute presumption of payment on mortgages, from lapse of time, is payment at the day the debt fell due, and the legal estate revests in the mortgagor without a reconveyance.

2. As, where A. the owner of land, sold to B. and took a mortgage for the payment of the purchase money, and B. entered and continued in posses-

sion for more than thirteen years: *Held*, that the condition of the deed was performed at the day and the legal estate revested in B. by force of the condition.

(The case of *Roberts v. Welch*, 43 N. C., 287, cited and approved.)

EJECTMENT, tried before his Honor, *Judge Manly*, at NEW HANOVER Superior Court of Law, on the last Fall Circuit, in which the plaintiff had a verdict and judgment, and the defendant appealed. The facts of the case are sufficiently set forth in the opinion delivered by this Court.

Strange, for the defendant.
Husted, contra.

PEARSON, J. In 1812, John Walker, Sen., the owner of the (155) land, sold and conveyed it to Hanson Kelly, who, to secure the purchase money, executed a deed to Walker, to be void on condition that the money was paid on or before the expiration of three years. Kelly entered and continued in possession until 1818, when he sold and conveyed to one Tiner, who entered and continued in possession until 1819, when he sold and conveyed to the lessor of the plaintiff, who entered and continued in possession until 1837, when he was evicted by one Campbell who professed to take possession under a claim from John Walker, Jr. (the nephew of John Walker, Sen.). Campbell continued his possession, and, in 1846, John Walker, Jr., executed a deed to him in fee. Campbell died in 1850, having by his will devised the land to the defendant. John Walker, Sen., died in 1813. By a residuary claim in his will, he gives to his executors "all the rest of my property, real and personal, of which I may die possessed, or have claim to," in trust to deliver the same to his nephew, John Walker, Jr., within five years after his death, if his executors, or any two of them, should deem him deserving of it; "and declare the same in writing and file it in the court with my will." Of the exercise of this power of appointment, no evidence was offered.

The defendant insisted that the plaintiff had failed to show title; for that by the deed of Kelly to Jno. Walker, Sr., the legal title vested in him, and was still outstanding in his devisees or heirs. His Honor was of opinion that the lapse of time created a presumption, under the statute, that the debt secured by the deed was paid when it fell due, and that no reconveyance was necessary to pass the legal title back from John Walker, Sen., to Kelly. To this the defendant excepts.

There is no error. The statute (Rev. Stat., chap. 65, sec. 14) provides that the presumption of payment on mortgages shall arise within

ten years after forfeiture or the last payment, on mortgages executed after 1826; and within thirteen years, on mortgages executed before that date (which is our case). Here the mortgagor and those claiming under him had been in possession for more than thirteen years, after the day of forfeiture, and there was a presumption of payment at the
(156) day when the debt fell due. When one is absent and unheard of for more than seven years, there is a presumption of his death; but there is no presumption as to the time of the death, for there is nothing to refer it to one time more than to another.

But when there is a presumption of payment, from lapse of time, it is otherwise; for there is a day fixed, when the payment ought to have been made; and if made recently, there would be no difficulty as to the proof. Hence, the diversity (Best on Presumptions, sections 137, 140-47; Law Li., 188, 191), as there is a presumption of payment at the day. The condition of the deed was performed, and consequently there was no necessity for a reconveyance. The title revested by force of the condition. It is familiar learning, that if the debt secured is paid on the day of forfeiture, the estate is revested without a reconveyance. If a forfeiture takes place at law, the estate becomes absolute, and then a reconveyance is necessary, as it has become an equitable, as distinguished from a legal right to redeem and have back the estate; as is the case when part payment, after the day of forfeiture has been made—for the presumption refers to the day of the last payment. But even in such case, it seems clear, that the same grounds which raise a presumption of the payment of the mortgage debt, and consequently of the satisfaction of the mortgage, must necessarily raise a presumption of a reconveyance of the estate created to secure the debt—which has been satisfied. This doctrine has been fully and ably discussed by the late *Chief Justice Ruffin. Roberts v. Welch,* 43 N. C., 287.

The defendant next insisted that as Campbell took possession in 1837, under color of title, which possession had been continued for more than seven years, her title was thereby perfected. His Honor was of opinion that neither Walker nor Campbell had color of title, until the latter procured a deed from the former, in 1846. To this the defendant excepts. There is no error. We are at a loss to perceive upon what ground the idea of color of title in either Walker or Campbell can be put. Campbell pretended to none in himself, when he entered; but "professed to do so under a claim from Walker." Walker had none, because he failed to connect himself with the mortgage given to John Walker,
(157) Sen., by Kelly, inasmuch as he did not show that the executors had ever conferred the legal title on him, by executing the power of appointment. Besides, if they had done so, the mortgage was satisfied,

and the legal estate revested in Kelly, by force of the statute of presumptions, as the court had decided on the first point. We cannot suppose that it was intended to put the idea of color of title on the ground, that if a man has a deed and makes a conveyance, and afterwards takes possession, he can set up the old deed as color of title.

PER CURIAM. Judgment affirmed.

Cited: Grant v. Burgwyn, 84 N. C., 560; *Walker v. Mebane,* 90 N. C., 260; *Long v. Clegg,* 94 N. C., 763; *Pemberton v. Simmons,* 100 N. C., 320; *Menzel v. Hinton,* 132 N. C., 672.

NEEDHAM ARMFIELD v. DAVID MOORE AND JAMES MOORE.

1. Where a fact has been agreed on or decided in a court of record, neither of the parties thereto shall thereafter be allowed to call it in question, as long as the judgment or decree stands unreversed.
2. As, where A. and B. filed their petition in the county court for a partition of slaves, alleging that they were tenants in common, and after decree made, and report of commissioners confirmed, A. sold his share: *Held,* in a suit between A's vendee and B., for the share of A. so sold, B. is estopped from denying A's title, though it should appear that A. was not, in truth tenant in common, but that the share allotted to him belonged to B. *en auter droit.*
3. And as B. is estopped from asserting title *en auter droit, a fortiori,* is it no defense for him that the disputed title is outstanding in a third person.

THIS was an action of *replevin,* brought to recover two slaves, tried at UNION Superior Court of Law, Spring Term, 1851, before his Honor, *Judge Battle.* The following is the case transmitted to this Court:

"The plaintiff in support of his action, introduced one Leander Harkness, who proved the execution of a bill of sale to him for the slaves in question, from one Jane Moore, bearing date 23 May, 1849; that in a few days thereafter the witness hired the said slaves, together with others from the plaintiff, and took them to Brewer's gold mine, in South Carolina; that he kept possession of said slaves until September, 1849, when, on a certain Sunday, whilst witness was absent at a camp meeting, they suddenly disappeared without his knowledge. A witness named Belk was then called by the plaintiff, who testified that (158) on the same day the said slaves disappeared, he saw them in the possession of the defendant, in a secret place, in Union County,

and that the defendant, David Moore, informed him that they had been stolen from his child in North Carolina; and he had been down in South Carolina and had stolen them back.

The defendants, to justify the taking of the slaves, introduced the minutes of Union County Court, showing that letters of administration on the estate of one Melton Moore had been granted to the defendant, James Moore, at January Term, 1848; and proved that Melton Moore died in October, 1847. They then introduced one Vaughan, who testified that Melton Moore, in November, 1846, intermarried with one Jane Carnes (under whom the plaintiff claimed), in South Carolina, who was one of the daughters of Esther Carnes, of the said State, and that a few days after their marriage, they came into North Carolina to reside. That, in the year 1845, the said Jane and her two sisters were living together—Jane being then about twenty-one years of age, and the other two younger—the youngest about seventeen. That one Thomas K. Cureton, who was the administrator with the will annexed of one Joshua Gordon, hired out the said slaves, with the other slaves which were bequeathed by said Joshua Gordon to the children of Esther Carnes, to the lowest bidder; and that he paid said Jane Carnes for keeping them that year; and that, in 1846, he hired out said slaves to one Robert Carnes. The defendants then introduced one A. Moore, who stated that all the slaves, bequeathed by said Gordon to the children of Esther Carnes, were, in January, 1847, brought by his brother James, who also intermarried with Catharine, the sister of Jane Carnes, into Union County; and that said slaves were in their possession until the death of Melton Moore, in the fall of that year.

The plaintiff, for the purpose of showing that Melton and James Moore acquired no legal title, by virtue of their marital rights, to said property, put in evidence a copy of the will of Joshua Gordon, and of the letter of administration, with said will annexed, to said Cureton by the ordinary of Lancaster District, South Carolina (which
(159) form a part of the case sent up); and he also read in evidence the deposition of said Cureton, to show that as administrator, etc., he had never assented to the said legacies. The plaintiff then introduced Elizabeth Harkness (a sister of Jane Moore), who testified that at the time Melton and James Moore obtained possession of said slaves in South Carolina, they took them clandestinely, and without the knowledge or consent of said Cureton.

The plaintiff then also offered in evidence a copy of the record of the County Court of Union, showing that at January Term of said court, 1848, a petition was filed by James Moore and wife, Catharine, Elizabeth Carnes, by her guardian, the said James, and Jane Moore, alleging that

"they were tenants in common of four slaves, which descended to them from Joshua Gordon, deceased, their grandfather," and praying a partition thereof between them. And it appeared by said record that a petition was regularly ordered by the said court—a report thereof returned by the commissioners appointed to make it, and the same confirmed by the court; and that in the said partition the woman slave in controversy, who afterwards had issue, fell to the lot of the said Jane Moore, who sold to the plaintiff, as above set forth.

For the plaintiff it was contended: (1) That the caption of the slaves in South Carolina by the defendants, was tortious and wrongful, and on that ground the plaintiff was entitled to a verdict. (2) That the defendants were estopped in consequence of the proceedings had in Union County Court from denying the title of Jane Moore. (3) That there was no evidence of the assent either express or implied, of the administrator *cum testamento annexo* of Gordon to the legacies bequeathed to the children of Esther Carnes, and no title therefore vested in Melton Moore during his life. His Honor overruled the first and second grounds taken by the plaintiff; and instructed the jury that from the possession of the Moores in North Carolina, and the length of time that the administrator, with the will annexed, acquiesced in that possession, there was evidence from which they might infer his assent; and if they should be satisfied of such implied assent, they should find for the defendants—otherwise for the plaintiff. There were a verdict and judgment for the defendants, and the plaintiff appealed."

This case was argued at a former term at Morganton by— (160)

Wilson for plaintiff; and by
Osborne and Hutchinson (and Moore, at this term), for defendant.

PEARSON, J. At January Term, 1848, of the Court of Pleas and Quarter Sessions for the county of Union, a petition was filed in the name of James Moore, one of the defendants, and Catharine his wife, Elizabeth Carnes, an infant by her guardian, James Moore, and Jane Moore, setting forth that the said James, Elizabeth, and Jane held in their possession as tenants in common four slaves, "which had descended to the said Jane, Catharine, and Elizabeth from their grandfather, one Joshua Gordon"; that Jane had intermarried in the year 1847 with one Melton Moore, who is since dead, and that Catharine had intermarried with James Moore. The prayer was, that commissioners be appointed to make partition; and such proceedings were thereupon had, that commissioners were appointed, who made partition by which one of the slaves was allotted to Jane Moore, one to James

Moore, and the other two to Elizabeth, with a charge for equality of partition. At July Term, 1848, the report was filed and confirmed, and the parties respectively took possession of the Negroes allotted to them. Afterwards, in May, 1849, Jane Moore sold the Negro woman who had been allotted to her to the plaintiff, Armfield, who kept possession of her until September, 1849, when the defendant, James Moore, aided by his father, the other defendant, David Moore, took the woman and her child out of Armfield's possession, who thereupon brought this action of *replevin*.

At January Term, 1848, of the Court of Pleas and Quarter Sessions, for the county of Union (the same term when the petition for partition was filed), James Moore was appointed the administrator of Melton Moore, his deceased brother. The ground of defense to the action of *replevin* is that James Moore was not in fact entitled to one-third of the slaves, as a tenant in common, at the time of the partition; for that, in truth, that third part belonged to James Moore, as administra-
(161) tor of her deceased husband.

We concur with his Honor, who tried the case below, as to the matter of assent by the executor of Gordon, upon which point he put the case; but the case evidently depends upon the question of estoppel, and in regard to that, we differ from his Honor.

According to my Lord Coke, an estoppel is that which concludes and "shuts a man's mouth from speaking the truth." With this forbidding introduction, a principle is announced, which lies at the foundation of all fair dealing between man and man, and without which, it would be impossible to administer law as a system. The harsh words, which the very learned commentator upon Littleton uses, in giving a definition of this principle, are to be attributed to the fact that before his day "the scholastic learning and subtle disquisition of the Norman lawyers" (in the language of Blackstone), had tortured this principle, so as to make it the means of great injustice; and the object of my Lord Coke was to denounce the abuse, which, he says, had got to be "a very cunning and curious learning," and was "odious"; and thereby restore the principle, and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law. The meaning of which is, that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed; and when parties, by deed or solemn act, *in pais*, agree on a state of facts, and act on it, neither shall ever afterwards be allowed to gainsay a fact so agreed on, or be heard to dispute it: in other words, his mouth is shut, and he shall not say, that is not true which he had before in a

solemn manner asserted to be truth. For instance, one is acquitted upon the trial of an indictment, and is afterwards indicted again for the same offense; he pleads *autrefois acquit*—to wit, the fact has been decided of record—not even the sovereign can be heard to gainsay it, although there be an allegation of proof, subsequently discovered. So, in a civil suit, if a fact be agreed on by the parties, or be found by a verdict, and the court acts thereon and pronounces a judgment or decree, neither party can be afterwards heard to gainsay that fact, so long as the judgment or decree stands unreversed. An allegation of the discovery of important evidence, after the admission or trial, or a suggestion that the party made the admission of record under a mistake (162) as to his rights, cannot be listened to, without upsetting the whole administration of the law as a system, and reducing it to a mere arbitrary and despotic proceeding, by which the court in each case, according to its view of the circumstances, may see fit to decide, in the one way or the other.

So, if parties, by deed or matter *in pais*, agree on a state of facts, and act thereon, neither shall afterwards be heard to say that any of the facts were not true; as if one sells a tract of land to which he has no title, and afterwards acquires title. Coke, 352a. Accordingly, Coke divides estoppels into such as arise by "record," by "writing" (by deed), and by "matter *in pais*." Among the latter, he names partition, when made by consent, and no record is made thereof. But in our case the facts were agreed on and presented to the court in writing, and the same is made a matter of record; and the court acts thereon, by appointing commissioners, whose report is afterwards confirmed, and the parties take possession in severalty, in pursuance thereof. One of the parties, Jane Moore, afterwards sells her slave to the plaintiff, who takes the slave into possession, and thereupon the defendant takes her away from him; and puts his defense on the suggestion, that when the partition was made, he admitted on the record that Jane Moore was a tenant in common, entitled to one-third part of the Negroes; but the admission was contrary to the truth, for that, in fact, he himself was entitled to that third part, as the administrator of his brother, the husband of the said Jane.

If partition, by matter *in pais*, estops, of course, partition, by matter of record, estops. Here we have facts agreed on by the parties; entered on the record; partition and decree in pursuance thereof; possession in severalty, and acts of ownership by the respective parties; and in regard to the slave in controversy, a sale to a third person: And the question is, can the defendant, after his admission of record, and the decree of the court thereon, and the acts of the parties in pursuance thereof, be heard

to say that, in fact, Jane Moore was not a tenant in common? In other words, can he be heard to gainsay what he has said on record?

A court, professing to administer law as a system, ought not to allow one of the parties to the record to deny a fact, upon which the (163) decree (remaining unreversed) was made, and thereby justify the high-handed measures resorted to by the defendants in this case, by way of a short cut, as the means of correcting an alleged mistake in the record. Possibly, if the defendant really acted under a mistake, a court of equity, where the rights of the purchaser can be fully protected, and the sums which may have been paid for equality of partition, properly adjusted and refunded, may have power to correct it. But certainly a court of law, which acts by a direct and absolute judgment for the one side or the other, cannot allow a party to deny an admission which he had made in a court of record.

Coke Lit., 170, and this case is put: Husband and wife, tenants in special tail, have issue a daughter; the wife dies; the husband by a second wife has issue another daughter, and dies; the two daughters enter and make partition. The eldest is concluded from saying that the youngest is not heir, in respect of the privity in their persons; but the issue of the eldest, after her death, may avoid the partition by force of the statute *de donis.* So, if tenant in fee simple has issue two daughters, bastard *eigne* and *mulier puisne,* who enter and make partition, the estoppel binds forever. Hargrave, in a note upon this passage, says, "that in a Coke on Littleton which he had with M. S. notes and references, the annotator observes, 'if two make partition in a court of record, when one of them had no right, he thereby shall gain a moiety by estoppel or conclusion. Bro. Nov. Cas. pt. 306. But otherwise, I conceive, of partition *in pais,* though the book speaketh generally.' "

In our case, the partition was in a court of record, and the authorities are in point, without calling in aid any special circumstance. But there is a special circumstance in our case, making it almost precisely analogous to the two special cases put by Coke. Jane Moore had owned a third part of the slaves; she still claimed it, had a colorable title therefor, and her right was conceded by the partition of record, to which the administrator of her husband was a party, although not noticed as such. Coke Lit., 252, an estoppel must be certain; that is, the fact agreed on, or found by the jury, must be some particular fact, and not a generality, or matter of inference. Here the fact agreed on is (164) certain—to wit, that Jane Moore was entitled, as a tenant in common, to one-third part of the four slaves. This is a full answer to *Knight v. Cole,* 1 Shower's, 151, so far as regards the first resolution, which alone was supposed to favor the view taken of this case

in favor of the defendants. (The second resolution will be referred to again.) The case was this: A. recovered against B. a judgment for £600, and made J. S. and J. D. his executors, and died. B. made C. his executor, and gave a legacy of £5 to J. D., and died. J. D., by deed, acknowledged the receipt of the £5 of C., and thereby released the said legacy and all actions, suits, and demands which he had against C. It was adjudged that nothing was released but the £5, upon the ground that the particular reference to the receipt of the £5 excluded the idea of an intention to release the £600; and so the case was made to turn on a question of construction. Here, there is no room for construction, because the particular fact is stated and set forth as a thing agreed on, upon which the court and the parties act.

Again, at the same page, 252a, Coke says estoppels must be mutual; that is, if one side is bound the other must be. It only includes parties and privies, and does not extend to a stranger; whereupon the defendant, James Moore, says, that in the character of the administrator of his deceased brother, he was a stranger in regard to the petition for partition, and the other proceedings of record in the county court of Union; and therefore in the character of administrator, he ought not to be concluded thereby. This is the only view of the case which has presented any difficulty; but after much consideration, we are of opinion, both upon the reason of the thing and upon authority, that the principle that one shall not be allowed to gainsay what he has admitted of record, and what the court and the parties have acted on, applies; and the defendant is estopped from setting up a title which he had at the time of the filing of the petition, at the time of the division, and at the time the report was filed and confirmed—although such title was held *en auter droit*.

When he filed the petition making the admission, and when the report was filed and confirmed, upon the supposition that Jane Moore had, as a tenant in common, one-third part of the Negroes, he was entitled to one-third part derived from his wife, Elizabeth Carnes, was also entitled to one-third part, and we will suppose that he was entitled (165) also to the other third part derived from his intestate; if any one had injured the property, he could in his own name have recovered damages as owner of two-thirds, without saying anything about having derived title to this third from his wife, and that third from his intestate. If he had sold the Negroes, both of his third parts would have passed, although the bill of sale was signed without any allusion to the mode in which he had derived title. Now, in effect, partition amounts to a mutual transfer of title to different parts; that is, one passes his right to that, to be held in severalty, in consideration of a transfer by the

other to this, to be held in severalty. So each transfers to the other a part of the whole, and the *corpus* is divided. Consequently, according to the record, James Moore has, in solemn form transferred to Jane Moore the Negro woman in controversy, and now seeks to take her back upon an alleged mistake.

Mr. Hargrave, in his note referred to, takes it as settled, that "if partition is made in a court of record, when one of the parties has no right, he shall thereby gain a moiety by estoppel or conclusion." There is no distinction to take this case out of the rule thus announced by the very highest authority among the writers upon the common law.

Again: In *Tharp v. Tharp,* 1 Ray., 235, it is held, if a release relates to a particular subject only, general words in it shall be confined to that subject; but it is added, if the release uses general words only, it shall be taken in a general sense, and most strongly against the releasor; as, when a release is made to A. of all actions, it releases all several actions, as well as all joint actions. "So, if an executor releases all actions, it will extend to all actions which he hath in both rights; for, again, in the second resolution, in *Knight v. Cole,* Shower's, 153, it is said, if an executor makes a deed for all of his goods, such as he holds as executor will not pass, for he has them *en auter droit.* But if he makes a deed for a thing in particular, it passes, and he shall not be afterwards heard to say that he acquired it *en auter droit.* For this is cited, Leon., 65, and several cases in the Year Books.

So, we conclude that the authorities, as well as the reason of (166) the thing, are against the defendants.

But it was said by the defendant's very learned counsel, Mr. Moore, that by looking at the will of Gordon, it appears the legal title is still in his executor, one Cureton, notwithstanding his assent; for that he was to hold the title as trustee for the infant grandchildren, and the title was thus in Cureton as trustee at the time of the partition. If the defendant is estopped from setting up title in himself as administrator of his brother, *a fortiori,* he is estopped from relying upon a title which may be outstanding in the executor of the grandfather of the wife of his brother.

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

Cited: Fanshaw v. Fanshaw, post, 168; *Copeland v. Sauls,* 46 N. C., 72; *Rogers v. Ratcliff,* 48 N. C., 228; *Howerton v. Wimbish,* 55 N. C., 333; *Haughton v. Benbury, ibid.,* 344; *Brantly v. Key,* 58 N. C., 338; *Branch v. Goddin,* 60 N. C., 493; *Gay v. Stancell,* 76 N. C., 373; *Williams v. Cloure,* 91 N. C., 322; *Jones v. Coffey,* 97 N. C., 347; *Brittain v. Mull,* 99 N. C., 491; *McElwee v. Blackwell,* 101 N. C., 196; *Beckett*

v. Nash, ibid., 583; *Jones v. Beaman,* 117 N. C., 264; *Flippin v. Flippin, ibid.,* 377; *Royster v. Wright,* 118 N. C., 155; *Snider v. Ewell,* 132 N. C., 618; *Carter v. White,* 134 N. C., 473; *Allred v. Smith,* 135 N. C., 447; *Lumber Co. v. Price,* 144 N. C., 53; *Supply Co. v. Machin,* 150 N. C., 744; *Buchanan v. Harrington,* 152 N. C., 335; *Gregory v. Pinnix,* 158 N. C., 152; *Owen v. Needham,* 160 N. C., 383; *Weston v. Lumber Co.,* 162 N. C., 192; *Leroy v. Steamboat Co.,* 165 N. C., 114; *Pinnell v. Burroughs,* 168 N. C., 318; *Love v. West,* 169 N. C., 14; *Pinnell v. Burroughs,* 172 N. C., 187; *Baker v. Austin,* 174 N. C., 435; *Trust Co. v. Stone,* 176 N. C., 273; *Hardison v. Everett,* 192 N. C., 374; *Power Co. v. Casualty Co.,* 193 N. C., 621; *Distributing Co. v. Carraway,* 196 N. C., 59; *Bank v. Winder,* 198 N. C., 21.

JOSEPH FANSHAW, BY GUARDIAN, ETC., v. JOHN FANSHAW, ADMINISTRATOR OF DAVIS FANSHAW ET AL.

1. In a suit by one of the next of kin against the administrator and his sureties on his administration bond, for a distributive share of the sales of slaves sold by the administrator, not in his capacity as such, but as a commissioner appointed by court, under a petition for partition, to which the plaintiff was a party: *Held,* that the plaintiff is thereby estopped from saying that the administrator, after the sale, held the proceeds as administrator.
2. Nor can the defendants be held liable, by reason of the administrator's return of his account of sales, wherein he states the same were made by him as administrator—inasmuch as his acts will be referred to his rightful authority (as commissioner).
3. Nor will the fact that the plaintiff was a lunatic at the time the petition for partition was filed, protect him from the estoppel.
4. *Held, also,* that though the administrator had a right to keep the slaves, and sell or hire them if necessary, to pay the debts, yet he was not bound to keep them, there being no debts; and his joining in the petition for partition, with the others, next of kin, was in effect a delivery of the property over to them, and a discharge of his liability therefor.

THIS was an action of debt upon the bond given by the defendant, John Fanshaw, and his sureties, upon taking out letters of administration on the estate of Davis Fanshaw, deceased. The breach assigned was the nonpayment to the guardian of the plaintiff, of the amount due him from the administrator, as one of the next of kin of the said Davis Fanshaw, arising from the sale of certain slaves. Plea, conditions performed and not broken. (167)

Upon the trial the facts were, that Davis Fanshaw died in the county of Currituck, some time before the November Term, 1849, of the county court, of that county; and at that term the defendant, John Fanshaw, administered upon his estate, and gave the bond on which the suit was brought; that the said Davis left six persons as his next of kin, among whom were the plaintiff, Joseph, and the defendant, John Fanshaw. At the same term of the court, a petition was filed by the next of kin, including the said Joseph and John, setting forth that by the death of the said Davis, certain slaves had come to them as tenants in common; that an equal partition could not be made without a sale; and praying that a commissioner might be appointed to sell said slaves, and make report to the ensuing term. The prayer was granted, and by an order of the court the defendant, John Fanshaw, was appointed the commissioner to sell the said slaves at the late dwelling-house of the said Davis, upon a credit of six months, and make report. At the ensuing February and May terms no report was made, but at August Term the entry on the docket was: "Report made and confirmed." At the same November Term, 1849, a petition was preferred by Israel Fanshaw, representing to the court, that the plaintiff, Joseph Fanshaw, was an idiot, and incapable of managing his estate; and praying that such proceedings might be had, that the said Joseph should be declared an idiot, and that a guardian should be appointed for him. The prayer was granted, and a writ issued to the sheriff to summon a jury, which was done; and the jury, on 21 December, 1849, found that "the said Joseph is not an idiot from birth, and is still not of sound mind, and wholly incapable of managing his estate," etc. The verdict was returned to the ensuing February Term, and confirmed; whereupon a guardian was appointed for the said Joseph.

On 21 December, 1849, the defendant, John Fanshaw, as administrator of the said Davis, sold all of his perishable property, and then sold the said slaves and returned the account of sales to the court, in which he kept the sale of the slaves distinct from the other, but with the following caption: "An account of sales of Negroes belonging to
(168) the estate of Davis Fanshaw, deceased, with interest from date—sold this 21 December, 1849, by John Fanshaw, administrator"; and his name was signed at the foot of the account as administrator.

The defendants contended that Joseph Fanshaw being a party to the petition for the sale of the slaves, in order to make partition of them, was estopped to say that they were, at any time after that, held by the defendant, John, as administrator; or that he and his sureties were liable for them on his bond. It was further objected that the finding of the jury of inquisition was contradictory and of no effect.

His Honor was of opinion against the defendants upon the points made, and under his charge the jury found a verdict for the plaintiff, upon which judgment having been rendered, the defendants appealed.

Heath and Jordan for defendants.
W. N. H. Smith, contra.

BATTLE, J., after stating the case as above, proceeded as follows: The only ground of defense taken by the counsel for the defendants in the court below and in this Court is, that the relator was estopped by the petition for partition to which he was a party, from saying that the defendant, John Fanshaw, ever held the slaves afterwards as administrator. That position is fully sustained by the case of *Armfield v. Moore, ante,* 157. The allegation that the relator was a lunatic, and therefore not estopped, can make no difference; because the judgment, until reversed, concludes that fact as well as every other. There is another ground, also, upon which we think the defendants are clearly not liable. The administrator clearly had a right to take the slaves in order to raise the money, either by the hire or sale of them, if necessary to pay debts. But if there were no debts, or if debts existed and the money and the proceeds of the sales of the perishable property were sufficient to pay them, the administrator was not bound to take the slaves and keep them for two years, but might deliver them over immediately to the next of kin. So in effect we think he did, when he joined as one of the next of kin in the petition for the sale of the slaves, in order that partition might be made of them. He was appointed by the court a commissioner to sell them, and to sell them at a particular place, (169) and upon a certain credit, and to make a report thereof to the court. He did sell at the place and upon the terms specified in the order, and the record shows that at August Term, 1850, he made a report which was confirmed by the court. So far he appears to have acted under the authority of the court as a commissioner to make a sale of the slaves; and as such he and his sureties were certainly not liable upon his administration bond for his default. But with his account of sales of the perishable property of his intestate, he returned an account of the sales of the slaves as having been made by him as administrator. Are he and his sureties concluded by that return? We think not. *Yarborough v. Harris,* 14 N. C., 40. As administrator he had no rightful authority to sell the slaves until he had obtained an order of the county court for that purpose (1 Rev. Stat., chap. 46, sec. 11); and it is not pretended that he ever did obtain such an order. The act of the defendant, John Fanshaw, in making sale of the slaves must

then be referred to his rightful authority; and his sureties cannot be made liable on his administration bond, merely because he made a mistake in returning his account of the sales of the slaves, as having been made by him as administrator.

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

PER CURIAM. Judgment reversed.

Cited: Haughton v. Benbury, 55 N. C., 344; *Brittain v. Mull,* 99 N. C., 491; *McElwee v. Blackwell,* 101 N. C., 196; *Bickett v. Nash, ibid.,* 583; *Roper v. Burton,* 107 N. C., 526; *Lumber Co. v. Lumber Co.,* 140 N. C., 443; *Odell v. House,* 144 N. C., 648.

DOE EX DEM. STEPHEN MYERS v. HAMET CRAIG.

1. The taker of the first fee, under a conditional limitation or executory devise, by which a fee is limited after a fee, cannot, by bargain and sale with warranty, bar the taker of the second fee, without assets descended—the taker of the second fee being his heir-at-law.

2. Where the devise was to four sons—A., B., C., and D.—"and if one or more of them die leaving no lawful heir, the property shall belong to those of the four whose names are above written," and A. conveyed in fee with general warranty, and died without issue: *Held*, that this warranty did not bind his brothers (his heirs-at-law), without assets descended.

(The case of *Spruill v. Leary,* 35 N. C., 225, overruled, and that of *Flynn v. Williams,* 23 N. C. 509, distinguished from this.)

(170) EJECTMENT, tried before his Honor, *Judge Ellis,* at Spring Term, 1852, of ANSON Superior Court of Law. The following is the case transmitted to this Court:

"It was proved that Marmaduke Myers died in the year 1831, leaving a last will and testament, bequeathing both real and personal estate to his six sons therein named, including among the real estate the premises in question. The property thus bequeathed was ordered to be equally divided among his six sons, when the youngest should arrive at lawful age. After which followed this limitation: 'And should it please God that any one or more of my six beloved sons, Joshua Ransom, Calvin, Burwell, Thomas, Stephen Carney, and Albert Myers should die, leaving no lawful heir, the property and its increase shall be and belong unto those of the six whose names are written above, that God may let live.' Burwell and Thomas died in the lifetime of their father. All the lands

were divided between the other four sons when the youngest arrived at the age of twenty-one years. The premises in question fell to the lot of Calvin Myers, who conveyed them in the year 1838 to the defendant, by deed of bargain and sale, with general warranty, in these words: And the said Calvin Myers for himself and his heirs, the aforesaid land and every part thereof, against all and singular his heirs, and against the claim or claims of all persons whatsoever, to the said Ransom and his heirs and assigns, shall and will warrant and forever defend. Calvin Myers died in the year 1850, without issue, leaving the plaintiff, Stephen, and another, his brothers, who are the same referred to in the will of Marmaduke Myers, as his heirs-at-law.

The plaintiff claims by virtue of the limitation contained in the will of Marmaduke. The defendant objected to the recovery on the ground that the plaintiff, being one of the heirs-at-law of Calvin Myers, was barred by the warranty of said Calvin in the deed of bargain and sale to him.

The plaintiff argued against the effect of the warranty: (1) because the common-law doctrine of warranty, together with the remedies thereon, are obsolete and not in force here; (2) because this being a conveyance by bargain and sale, under the statute of uses, no greater estate passed than the bargainor had at the time, and the effect of the warranty only extended to the death of the bargainor without (171) issue, when the limitation to the plaintiff and others took effect.

His Honor was of opinion, and so informed the jury, that the covenant contained in the deed was not simply a personal one, but properly a warranty; that of the three modes of taking advantage of a warranty, two—the writ of *warrantia chartæ* and voucher—are not in force here, because of the introduction of more convenient remedies; but that by way of rebutter, whereby the heir was repelled or barred from claiming against the warranty of his ancestor, was still in force, as nothing more convenient had been invented to supplant it.

That the character of the conveyance did not alter the effect of the warranty; for though the bargain and sale did not operate by a transmutation of the possession, and consequently nothing more passed than the bargainor rightfully had, yet neither did a release or confirmation at common law, and the warranty in these was ever held to be of the same nature and force as in a feoffment or fine and recovery; that though the estoppel be limited to the extent of the estate passed, yet the rebutter is not.

That the warranty contained in the deed from Calvin Myers to the defendant is collateral as to the plaintiff, because it descended directly upon him as heir-at-law of Calvin, through whom he could not have

derived title to the land; that all collateral warranties are abolished by statute, except those of a tenant having an estate of inheritance in possession; that in this case Calvin Myers had such an estate, and the warranty by him to the defendant barred the plaintiff who is one of his heirs.

The jury returned a verdict for the defendant. Rule for a new trial, because of erroneous instruction to the jury; rule discharged, and judgment; from which the plaintiff appealed."

Strange for lessor of plaintiff.
No counsel for defendant in this Court.

PEARSON, J. Marmaduke Myers died in 1831, leaving a will, by which he devised his real estate to his six sons, "to be divided equally among them, when the youngest should arrive at full age"; after which, (172) is this clause: "Should it please God that any one or more of my six beloved sons—viz., Joshua, Calvin, Burwell, Thomas, Stephen, and Albert—should die leaving no lawful heir, the land shall belong to those of the six whose names are written above that God may let live." Burwell and Thomas died in the lifetime of the devisor. The land was divided between the other four when the youngest arrived at age. The tract in question fell to the lot of Calvin. He conveyed it in 1838, by deed of bargain and sale with general warranty to the defendant, and died in 1850, without leaving a child, and Stephen Myers, the lessor of the plaintiff, is one of his heirs-at-law. The plaintiff insists that his lessor is entitled under the will of Marmaduke Myers. The defendant insists that as he, Stephen, is one of the heirs-at-law of Calvin Myers (his bargainor), he is barred by the warranty of his brother. His Honor was of opinion that the warranty was a bar. To this the plaintiff excepts. There is error.

This case presents the very question that was presented in *Spruill v. Leary,* 35 N. C., 225 (but was tried before that case was printed); and the question is, can the taker of the first fee, under a conditional limitation or executory devise, by which a fee is limited after a fee, by means of a bargain and sale in fee with warranty, bar the taker of the second fee, without assets descended, the taker of the second fee being his heir-at-law?

Spruill v. Leary decides that the warranty is a bar. The decision is put on *Flynn v. Williams,* 23 N. C., 509, and was filed hastily, upon the idea on the part of a majority of the Court, that *Flynn v. Williams* was on all fours, and directly in point.

In that case, the taker of the second fee died, leaving the taker of the first fee his heir; so, the condition was extinct, or, in other words, both fees fell upon the same person—the first by the will, and the second by descent; and of course he then had an absolute estate, and neither he nor his heir could deny the title of one claiming under his deed.

In *Spruill v. Leary,* the taker of the first fee died, and the condition not having been performed, the estate passed to the taker of the second fee by force of the condition, unless the warranty made by the taker of the first fee be stronger than the condition made by the (173) original donor.

It is clear *Spruill v. Leary* is not sustained by *Flynn v. Williams;* and after much research, no authority has been found to support the "artificial and hard rule, the practical operation of which, at this day (would be), to enable one man to sell another man's land, without compensation."

I am directed by the *Chief Justice* and my brother, *Battle,* to state, that they concur in the reasoning and conclusion set out in the dissenting opinion filed by me in *Spruill v. Leary* (not reported until the next term, by mistake). See 35 N. C., 408; and we deem it unnecessary to elaborate the subject any further.

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

Cited: Motts v. Caldwell, 45 N. C., 291; *Southerland v. Stout,* 68 N. C., 450; *Roane v. Robinson,* 189 N. C., 631.

WILLIAM CARROWAY v. MOSES COX.

1. Where A., in a settlement with B., was allowed a credit of a certain sum, as being the amount due from B. to C.: *Held,* that the law implies such privity of contract between A. and C. as entitles the latter to maintain *assumpsit* against the former for money had and received.

2. In such case, the plaintiff's cause of action is not complete until he gives notice to the defendant that he accepts him as his debtor; but until such notice, the statute of limitations does not commence running against his demand.

(The cases of *Waring v. Richardson,* 33 N. C., 77, and *Buchanan v. Parker,* 27 N. C., 597, and *Lamb v. Trogden,* 22 N. C., 190, cited and approved.)

THIS was an action of *assumpsit,* in which the plaintiff declared upon a special contract, and for money had and received. The writ was

issued in September, 1846. The defendant pleaded the general issue, statute of limitations, and statute of frauds. Upon the trial before his Honor, *Judge Battle,* at WAYNE, on the last Fall Circuit, it appeared in evidence that the defendant had an execution against two men by the name of Westbrook, upon whose land it was levied. At the sale it was agreed between the plaintiff, who had a judgment against the same men, and the defendant, that the latter should purchase the land, and pay the plaintiff's claim. The land was sold, and a man by the name of Monk purchased it, and subsequently sold it to the defendant. (174) Before the sale the Westbrooks had placed in the hands of the defendant $200, with which to make the purchase, with the understanding that they should have the right to redeem. The defendant and the Westbrooks subsequently had a settlement, upon which occasion the amount due to the plaintiff was credited to the defendant, and he agreed to pay it to the plaintiff. The sale of the land took place in the spring of 1843. The money was demanded by the plaintiff in August, 1846, when the defendant refused to pay, upon the ground that he did not purchase the land at the sheriff's sale.

Several points were made by the counsel on each side in the court below, and the jury, under the charge of his Honor the presiding judge, returned a verdict for the plaintiff, it being agreed that his Honor should set aside the verdict and enter judgment of nonsuit, if he should be of opinion against the plaintiff. And his Honor being of opinion that the statute of limitations was a bar to the action, upon either count, and that there was nothing to repel it, entered judgment of nonsuit accordingly, and the defendant appealed.

J. H. Bryan for defendant.
McRae for plaintiff, submitted a written argument.

NASH, C. J. We think there is error in the judgment below. The declaration contains two counts, the first upon a special contract, the second for money had and received. It is upon the second count that the plaintiff's right to recover is principally contested before us. The case as to that count is simply this. (Here his Honor stated the material facts of the case as above, and proceeded):

Among other pleas, the defendant pleaded the statute of limitations, and, upon this plea, the case has been argued before us, as it affects the second count—the first being out of the way. Two questions are raised: Can the plaintiff maintain his second count for money had and received? and if so, is his claim barred by the statute of limitations? Upon the

first point, it is a general principle, that whenever one man receives money which belongs to another, and which, in natural justice and honesty, he ought to pay over, it may be recovered of him in an action for money had and received to the plaintiff's use. To re- (175) cover in such an action, the plaintiff must show, that in equity and conscience he is entitled to receive it. *Stratton v. Rastall,* 2 T. R., 366. Here the defendant, in making a settlement with the Westbrooks, who were indebted to the plaintiff, agrees to receive what they so owed the plaintiff, as a credit on his account, and settled upon that footing with them. This is precisely the same, in legal contemplation, as if the Westbrooks had put into his hands so much money to pay over to the plaintiff. In equity and good conscience, he was bound to pay it to him for whom it was received. But it is said that there was no privity of contract between the plaintiff and defendant, without which the action cannot be sustained; that when demanded of him, the defendant refused to pay the plaintiff. Privity of contract is essential to maintain this action, and we hold there is in this case such privity; for the law implies it between the person whose money is received, and the person who receives it—and here the implication is strengthened by the previous understanding between the parties. *Camp v. Thompkins,* 9 Con. R., 553. But again: The Westbrooks were debtors to the present plaintiff, and, in substance, placed in the hands of the defendant the money to discharge their debt; and though, before an appropriation of it by the defendant, or notice by the plaintiff that he looked to him for the money, they might have revoked their direction, and taken the money out of his hands, yet the plaintiff, before the Westbrooks had so recalled the money, might maintain an action against the defendant. Brown on Actions, 374; *Poole v. Goodwin,* 4 Ad. and E., 94.

But the main bearing of the defense is upon the statute of limitations. It is necessary, therefore, to ascertain when the plaintiff's cause of action arose. In order to set the statute in motion, the plaintiff must not only have a cause of action, but that cause must be complete. Until the demand made by the plaintiff, his cause of action was not complete; for, until then, the Westbrooks had a right to countermand their order. Br. on Actions, 372. It cannot be that two persons can have two antagonistic claims to the same piece of property. The legal title cannot, in such case, be in both at the same time. One man cannot make another his debtor, without his consent, as by officiously paying his debt (176) for him; neither can a debtor discharge his debt to another, by placing the necessary funds in the hands of a third person, with directions to pay it over to the creditor. Before such effect can follow such

an act, the assent of the creditor is requisite. As soon as he does so assent, the debtor is discharged, and the third person, or agent, becomes the debtor. When, therefore, A. receives money from B., to pay over to C., until C. does an act by which he recognizes the payment to A. as a discharge of the debt due by B., the latter may withdraw his authority to A. to pay the money to C.; but as soon as C. has accepted A. as his debtor for the amount, B's right to countermand his authority is gone, and the cause of action on the part of C. against A. is complete. *Lamb v. Trogden,* 22 N. C., 190. And, further, in the language of Mr. Brown, page 379, if the party ordering the payment be a debtor, and the third party his creditor, the action lies, as there is no objection to it on the ground that the plaintiff is not a party to the consideration; because the debtor may be regarded as the agent of the plaintiff, when he paid the money to the defendant, and therefore the consideration does in fact move from the plaintiff—the debt being the consideration. *Lilly v. Hayes,* 5 Ad. and E., 548; *Walker v. Rostron,* 9 Mees. and Wel., 411.

The plaintiff could not, therefore, maintain this action, until notice of some kind to the defendant, that he accepted him as his debtor, and looked to him for the money. *Waring v. Richardson,* 33 N. C., 77. Until then the defendant was at liberty to return the money to the Westbrooks, upon their request. The plaintiff's right of action was not complete, until such notice was given. The defendant was in no default until then; and then the statute of limitations is put in motion. In this case it did not begin to run, until the demand by the plaintiff, which being made but a short time before the writ issued, it is no bar to the action.

Upon the first count the plaintiff could not recover. It is barred by the statute. But upon the second, the statute is not a bar. See the case of *Buchanan v. Parker,* 27 N. C., 597.

The judgment below is reversed, and judgment for the plaintiff (177) according to the verdict, entered by agreement.

PER CURIAM. Judgment accordingly.

Cited: Weatherly v. Miller, 47 N. C., 168; *Strayhorn v. Webb, ibid.,* 200; *Peacock v. Williams,* 98 N. C., 324.

ELIZA F. JONES v. AMOS JONES ET AL.

1. A widow, who dissents from her husband's will, takes dower as in case of his intestacy; and is, therefore, entitled to have the dwelling-house, improvements, etc., allotted to her in the assignment.

2. And in such case, as in case of intestacy, the jury have a right to assign dower altogether in one tract of land.

3. The jury, in assigning dower, have no right to give the widow the privilege of cutting fire-wood and feeding stock upon land not set off for dower.*

THIS was a petition for dower, filed by the plaintiff in the County Court of Jones County, against the devisees of her husband, Jonas Jones, deceased, from whose will she dissented; and upon appeal to the Superior Court, the case was argued before his Honor, *Judge Caldwell,* at the Spring Term, 1851, upon exceptions taken by the defendants to the report of the jury assigning dower to the petitioner. The exceptions were overruled by his Honor, the presiding judge, and from his judgment, confirming the report of the jury, the defendants appealed. The material facts of the case are sufficiently set forth in the opinion delivered by this Court.

The case was argued at a former term by

J. W. Bryan and the late W. H. Haywood, Jr., for defendants and by J. H. Bryan for petitioner.

PEARSON, J. Jonas Jones died, leaving him surviving his wife and three children, having made and published his last will, by which he devised to his wife a tract of land called the "Fountain Williams Place" for life, and then to his daughter, Frances, in fee; and to his son Amos all the land called and known as the "Home Plantation," (178) including the dwelling-house, etc., and to his other daughter, Susan, the "Cross Roads Plantation," and all the improvements and appurtenances thereunto belonging. These were several and distinct tracts of land, not adjoining. On the Fountain Williams place, there was a house, but it was much out of repair, and had not been inhabited for several years. On the home plantation there was a convenient dwelling-house, etc., in good repair, and the devisor had lived there for many years before his death.

*This case was decided at last June Term; and *Chief Justice Ruffin,* who dissented, retained the papers for the purpose of drawing his opinion, but having afterwards resigned his seat, no opinion was filed by him.—*Reporter.*

The widow dissented from the will, and a jury was summoned to allot her dower. The jury laid off to her as dower more than one-third of the home plantation, including the "dwelling-house, out-houses, and improvements thereunto belonging," and gave her no part of the other tracts of land; but, without assigning it by metes and bounds, gave her the privilege of getting wood and feeding stock on the other woodland. A previous jury had made a report and assignment of dower, which was set aside; and a motion was made to set aside the assignment in question upon several grounds. The county court overruled the objections, and in the Superior Court many of the objections were taken. We consider it only necessary to discuss three of them, as the others were abandoned in this Court; and in regard to them we concur with his Honor, that being merely formal, they came too late, being made for the first time in the Superior Court.

There are three objections going to the merits: 1. Had the jury a right to disregard the provisions of the will, and assign dower on the "home plantation," including the dwelling-house, etc.? Or was the jury obliged to lay off the dower on the land devised to the widow, and make up the deficiency, if any, out of the other lands?

This raises the same question, which we have decided at this term, in *Hunter v. Husted,* in reference to the right of the widow to a slave of the personal estate of John McLeod; and we refer to the opinion delivered in that case, in illustration of our views upon this. The widow claims dower, not as a bounty from her husband, but as a right secured to her by law. She has her election, and may take the provision
(179) intended to be made for her by the will; or may dissent and claim as her dower, one-third of the lands of which her husband died seized, including the dwelling-house, improvements, etc. This right is expressly protected by declaring that all conveyances, made with an intent to defraud the widow of the dower to which she is entitled, shall be void. The 5th section of the 1st chapter, Revised Statutes, declares it to be the duty of the jury "to allot to the petitioner her dower, according to the provisions of this act, deranging in as small a degree as practicable the devises of her husband's will."

The question is, does this clause control and abrogate the express enactment that the jury, in assigning the dower, shall include the dwelling-house and improvements? Does it have the effect of compelling the widow to give up her right to dower, and take, against her will, and notwithstanding her dissent, any land the husband may have intended for her, with a right to have the deficiency in value made up? Can the husband, in the face of an express provision giving her the right to have the dower so laid off as to include the house in which they have lived,

by an implication from this clause, deprive her of this right, and force her to take an old house, which has been considered unfit to live in for several years? Is she, at the discretion of a husband from whose last will the law gives her a right to dissent, to give up the house in which she is living, or to go and repair an old house or make a new one, for the benefit of the person who may be entitled to it after her death?

The statute, taken as a whole, and making each section stand together, cannot, by a proper and natural construction, be made to mean any such thing. As to the effect of "deranging in as small a degree as practicable the devises of the will, and the effect of the act of 1791, which is omitted in the statute of 1836, that is discussed and disposed of in the opinion delivered at this term in *Hunter v. Husted,* to which reference is made. This settles the main and important question in the cause.

2. Had the jury a right to assign dower altogether in one tract, or was it their duty to assign as dower one-third of each of the tracts? This involves the construction of the third section of chapter 71, Revised Statutes, which provides, that in assigning dower, "the (180) jury shall not be restricted to assign a third of every separate and distinct tract, but may assign all of the dower in one tract, having a due regard to the interest of the heirs, as well as the rights of the widow. It is insisted that by the omission of the word "devises," the case of a widow who dissents is not provided for, and stress is put upon the word "heirs." An obvious reply and explanation of this matter is, that the section cited is taken from the act of 1827, which was enacted while the act of 1791 was in force. That act is omitted in the statute of 1836; but the act of 1827 is inserted in its original words, which are explained and made consistent with the other sections of the statute by the third section, which declares it to be the duty of the jury to allot to the petitioner (a widow who dissents) her dower, according to the provisions of this act, deranging in as small a degree, etc.

The 22d section of chapter 71, which gives to a widow who dissents a year's provision, and which was passed at the session of 1827, shows that it was the intention of the Legislature to put a widow, who dissents, upon the same footing in all respects, as if the husband had died intestate.

That part of the assignment of dower, which gives the privilege of fire-wood and feeding stock on the other woodland, is clearly erroneous; but the petitioner has obviated the objection by entering a remittitur as to that part of the report of the jury, and it is thus stricken out as surplusage. In this particular, the judgment of the court below is reversed, and it is affirmed as to the balance.

PER CURIAM. Judgment accordingly.

DOE EX DEM. OF JOHN SMITH v. JOHN BRYAN.

Continued possession of land and acts of ownership, as by clearing, etc., for twenty-three years, will presume a conveyance thereof, so as to enable one thus having acquired title, to maintain ejectment against a stranger who enters—though the former has not had the *possessio pedis* of the particular part of the tract occupied by the latter.

(The case of *Bynum v. Thompson*, 25 N. C., 578, cited and approved.)

(181) THIS was an action of ejectment, tried before his Honor, *Judge Caldwell,* at BLADEN on the last Fall Circuit.

It appeared on the trial, that in 1765 the land in controversy was granted to one Richard Harrison, who died during the Revolution, when one Robert McRee entered thereon, and occupied the same until his death, which took place before the year 1795. Upon the death of Robt. McRee, his son William entered and continued in possession, living thereon, and clearing and cultivating a part thereof, until his death, in the year 1818. The boundaries of the land, and the facts of William McRee's claiming the same, and of clearing and cultivating a part of it, were established in evidence. After his death, the creditors of William McRee instituted proceedings to subject the same to the payment of his debts, and at a sale thereof by the sheriff in 1825, the plaintiff became the purchaser, and on the trial exhibited a judgment, execution, levy, etc., and the deed of the sheriff. It also appeared that the defendant entered upon the said land in the year 1846, and cultivated a part of it, and in 1847 cultivated other parts. It did not appear that the part cultivated by the defendant was the same as that actually cultivated by William McRee in his lifetime; and it was therefore insisted by the defendant, that as McRee had entered and occupied the said land without color of title, his possession was confined to his *possessio pedis;* and, as it did not appear that the defendant had cultivated any part of the *possessio pedis,* the plaintiff could not recover.

His Honor charged the jury, that if William McRee had lived on, and cleared and cultivated the land in question for upwards of twenty years, as testified to by the witness, they ought to presume a conveyance to him; it appearing that said land had been granted, and that William McRee had such an interest in it, as could be sold to pay his debts. There was a verdict for the plaintiff—*venire de novo* moved for, and refused—judgment in accordance with the verdict, and the defendant appealed.

Strange for defendant.
Winston, contra.

NASH, C. J. There is no error in the charge of his Honor, (182) before whom the case was tried below; or none, of which the defendant had a right to complain.

William McRee, under whom the lessor of the plaintiff claimed, had lived on the land for upwards of twenty years, claiming and exercising acts of ownership, up to known and visible boundaries. The land had been granted to one Richard Harrison in 1765, and prior to 1795 was in the possession of Robert McRee, who died before that year, and was succeeded in the possession by his son, William McRee, who continued the possession to his death, in 1818. The land was subsequently sold under due process of law, to satisfy a creditor of William McRee, and the lessor of the plaintiff became the purchaser. The defendant entered on the land without any claim of title, was a mere trespasses, but not upon the part which had been cultivated by the McRees. His Honor instructed the jury, that as the land had been granted, if the McRees had been in possession for twenty years, as testified by the witnesses, they ought to presume a conveyance to him. The deposition of a witness, S. N. Richardson, accompanies the case as part of it. He testifies that William McRee was in possession of the Harrison tract prior to 1795, and that he died in the possession, in the fall of 1818; and that he occupied and exercised acts of ownership upon it up to the time of his death. He states further, that John Harrison gave to his brother, Richard, a strip of the land on the lower side, and that William McRee cleared and cultivated land from the upper part of the slip given to Richard, down to Lyon's line, now Bryan's line; and that he continued to do it (that is, to clear and cultivate from the one line to the other, as we understand it), to the time of his death. The case then discloses a continued possession of the land in dispute, by William McRee to the lines of the Harrison patent for upwards of twenty-three years. This possession did not rest in verbal declarations, but in repeated acts of ownership, by clearing and cultivating to those lines, in several and distinct parts—a possession which, if believed by the jury, justified the judge's charge.

Our attention has been called by the defendant's counsel to the case of *Bynum v. Thompson,* 25 N. C., 578. We do not, upon examination, find that it conflicts with this. In that case, the plaintiff claimed under a grant to one Braswell, which it was alleged covered the *locus in quo,* and *mesne* conveyances from some men by the name of Lane to himself; and then proved that one of the Lanes had been in (183) possession of land within the Braswell patent for sixty years, but failed to prove any conveyance from the patentee to him; and in order to ground a presumption of such conveyance, the plaintiff was permitted

to give in evidence the declarations of the tenants in possession, that they claimed up to the Braswell lines. The defendant claimed under a grant to Dewry and Baker, of a date subsequent to that of the Braswell grant, and *mesne* conveyances. These grants overlapped, and the case states that neither party was in the actual possession of the lap, and the declarations of the Lanes were relied on to show that their possession extended to the Braswell lines. The Court said, those declarations were not competent to prove title, or raise a presumption that Braswell had ever conveyed the land to Lane, because it was making a title by parol. The Court says, "When one enters on land without any conveyance, or other thing to show what he does claim, how can the possession, by any presumption or implication, be extended beyond his occupation *de facto?* To allow him to say he claims to certain boundaries, beyond his occupation, and by construction, to hold his possession to be commensurate with his claim, would be to hold the ouster of the owner without giving him an action therefor." The latter clause is a key to the opinion of the Court; a verbal declaration cannot be an ouster. Where A. and B. are patentees of contiguous tracts of land which overlap, and neither is in the actual occupation of the lappage, the law carries the possession to the elder title; and though each is in possession of other portions of their respective tracts, neither can bring an action against the other, until some act be done upon the disputed part, amounting to a trespass; after such an act done, an action may be brought. But suppose neither A. nor B. be in the actual possession of their respective tracts, and a stranger without any title or right from A., the younger grantee, enters on his land and makes a clearing on it, but not on the lappage—to permit him, by his simple declaration, to extend his possession to the lines of the patent, would be ousting B. without his having it in his power to assert his title. To such a state of facts, we understand the opinion of the Court to extend, in *Bynum v. Thompson.* The case before
(184) us is essentially different. Continued acts of William McRee, by clearing and cultivating the land up to the boundaries of the Harrison patent for upwards of twenty-three years, were proved, during all which time he was exposed to the action of the heirs of Harrison.

There is no error in his Honor's charge, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Potter, post, 464; *Seawell v. Bunch,* 51 N. C., 196; *McMillan v. Turner,* 52 N. C., 437; *Rhodes v. Chandler,* 55 N. C., 4; *Hamilton v. Icard,* 114 N. C., 540; *May v. Manufacturing Co.,* 164 N. C., 266.

DOE EX DEM. JOHN WARD ET AL. v. DAVIDSON HEARNE.

The copy of a will of a person, resident of another State (admitted to probate there), disposing of property within this State, must have been allowed, filed, and recorded by the proper county court here, in order to render it admissible in evidence (according to the act of 1844, chap. 88, sec. 6). Its mere authentication from abroad does not make it competent evidence.

THIS was an action of ejectment, tried before his Honor, *Judge Caldwell,* at Fall Term, 1852, of ANSON Superior Court of Law.

On the trial, the record shows that many questions as to the admissibility of evidence, on the part of the lessors of the plaintiff, were raised by the defendant's counsel, and by consent were reserved by his Honor, and the case allowed to proceed. Among these questions was one as to the admissibility of a copy of the will of one William Thornton, deceased, of the District of Columbia, which was offered by the lessors of the plaintiff, in deducing their title to the land in controversy. It appeared that the copy offered in evidence was certified by an officer of the District of Columbia, styling himself a register of wills, with a seal of office thereto, and also the certificate of the Secretary of State, with the seal of the United States appended, that the said officer was the register of wills in and for the said district.

There was a verdict for the lessors of the plaintiff; but his Honor, upon consideration of the said question reserved, being of opinion that the copy of Thornton's will, so certified, was not admissible in evidence, set aside the verdict, and entered judgment of nonsuit, from which the lessors appealed. (185)

Strange and J. H. Bryan for lessors of plaintiff.
Winston for defendant.

NASH, C. J. Several questions, as to the competency of the evidence offered by the lessors of the plaintiff, were raised on the trial below, one only of which we deem it necessary at this time to notice, as it disposes of the case for the present. The lessors of the plaintiff made title through the last will and testament of William Thornton, deceased, who, at the time of making the same, and to his death, was a citizen of the District of Columbia, where the will was made. A copy of the will was offered in evidence and objected to by the defendant, and the objection sustained by the court. The objection is, that the copy is not so certified as, under the laws of this State, to render it competent evidence. It is not pretended that the will is certified under the act

of Congress, 1790; and our entire attention is drawn to the operation of our own statutes upon the question. The Revised Statutes embrace all the acts of the General Assembly up to that time. The 4th section of the 122d chapter, which is the 15th section of the act of '77, chapter 115, vests in the Court of Pleas and Quarter Sessions the jurisdiction over the probate of wills, and the 8th section directs that all original wills shall remain in the clerk's office among the records of the respective counties for their safety, and for the free inspection of all who may desire it. The 7th section of the 122d chapter directs in what manner a will, made without the State, disposing of lands, or other property of a personal character within it, may be proved. Upon suggestion, the court may order a commission or commissions to issue to such person or persons as it may select, to take the depositions of the witnesses, etc.; upon which the court may proceed to adjudge the said will, etc. This section is obviously intended to apply to wills made by citizens of this State, while absent from it, in which case it might be inconvenient, if not impracticable, to procure the personal attendance of the witnesses, and relates to the probate of the original will in this State, but makes no provision when it cannot be obtained to be brought here.

The act of 1844, chapter 88, supplies this defect. It might, and often would, prove impracticable to procure the original will for pro-
(186) bate here, and that provides for the recording of a copy. It directs that when such a will shall have been, or shall be proved and allowed in some other State or country, and the original cannot be removed from its place of legal deposit into this State for probate, a duly certified copy or exemplification may, under the direction of the proper county court, be allowed and recorded. Still another case remained to be provided for: where a person, not a citizen of this State, makes a will, when beyond it, disposing of property within it. By the 6th section of the act of 1844, provision is made. It provides, "When any will, made by a citizen of any other State or country, shall have been, or shall be, duly proved or allowed in such State or country, according to the laws thereof, a copy or exemplification of such will, duly certified and authenticated, when produced and exhibited before the Court of Pleas and Quarter Sessions of any county of the State, where may be any property of the deceased, shall be by such court allowed, filed, and recorded, etc.; and the like effect be given to said will, as if the original, instead of the said copy, had been produced and allowed in said court." By this section the mode is pointed out, whereby the evidence of such a will must be perpetuated when disposing of property within this State. The copy of the will, when proved, must be produced to the proper Court of Pleas and Quarter Sessions, and it must, upon

the proper authentication, be allowed, filed and recorded. The county court, before whom the copy is exhibited, is the sole judge of its due authentication, and when they allow it it is their judgment that it is authenticated according to law, and if not appealed from, that judgment is final and conclusive upon all other tribunals, until properly reversed; and when so filed, the copy stands in the place of the original for the inspection of all persons; and when recorded, like all other wills, copies from them may be given in evidence—for such would be the effect, if the original had been produced and allowed. The provisions of this statute have not, in this case, been attended to. The copy of the will of Mr. Thornton has not been exhibited and allowed by any county court having jurisdiction thereof in this State; nor has it been allowed, filed, or recorded as the act directs; but we are called on to allow it on evidence upon the certificates annexed. We are not the (187) probate court, nor is the Superior Court of Anson, where the cause was tried. So far as the laws of Maryland may be concerned, the certificates may be all properly made. It is sufficient to say that our law has pointed out in what mode the copy of such a will must be made, to make it evidence here. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Kelly v. Ross, post, 279; *Drake v. Merrill,* 47 N. C., 375; *Ward v. Hearne,* 48 N. C., 327; *Stephens v. French, ibid.,* 361; *Moody v. Johnson,* 112 N. C., 802.

(188) MEMORANDUM.

At the late session of the General Assembly, the Hon. WILLIAM H. BATTLE, of Orange, was elected judge of the Supreme Court, in the place of Hon. THOMAS RUFFIN, Chief Justice, resigned.

At the same session, the Hon. ROMULUS M. SAUNDERS, of Wake, was elected a judge of the Superior Courts of Law and Equity, to fill the vacancy occasioned by the promotion of Judge BATTLE to the Supreme Court bench.

At the same session, MAT. W. RANSOM, Esq., of Warren, was elected Attorney-General of the State, in the place of WILLIAM EATON, Esq., whose commission had expired.

And at the same session, WILLIAM N. H. SMITH, Esq., of Hertford, was reëlected Solicitor of the First Judicial Circuit; WILLIAM LANDER, Esq., of Lincoln, Solicitor of the Sixth Circuit, in place of DANIEL COLEMAN, Esq., whose commission had expired; and AUGUSTUS W. BURTON, Esq., of Cleveland, Solicitor of the Seventh Circuit, in place of HON. BURGESS S. GAITHER, whose commission had expired.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1853

DOE EX DEM. DANIEL SKIPPER v. GEORGE W. LENNON.

The court below has no right to allow an amendment to a declaration in ejectment, by adding a count on the demise of a person who died since the commencement of the action—although he was alive at the date of the demise in the proposed count.

(The case of *Adderton v. Melchor*, 31 N. C., 349, cited and approved.)

THIS was an action of ejectment, brought originally in the County Court of Brunswick County, on the sole demise of Daniel Skipper, and carried by appeal to the Superior Court. On the trial, on the last Spring Circuit, his Honor, *Judge Dick*, presiding, the counsel for the lessor of the plaintiff moved to be allowed to amend the declaration, by adding a demise in the name of Niram Skipper, who, it was admitted, died pending the action, and before the term of the court, but who was alive at the time of bringing the suit, and at the date of the demise. The defendant's counsel resisted the amendment, but the same being allowed by his Honor, the defendant appealed to the Supreme Court.

D. Reid and Troy for defendant, relied on Adderton v. Melchor, 31 N. C., 349; *Long v. Orrell,* 35 N. C., 123; *Taylor v. Taylor,* 3 Marsh. (Ky.) Rep., 19.

Strange, contra.

(190) NASH, C. J. In the case of *Adderton v. Melchor,* 31 N. C., 349, an attempt was made to lay demises in several of the counts, from persons who died before the commencement of the action, though the demises were laid antecedently thereto. The Court would not suffer it to be done. His Honor, *Judge Pearson,* after giving a succinct account of the present form of an action of ejectment, says, that the tenant in possession, when he applies to be made a defendant, is obliged to enter into the common rule, and confess lease, entry, and ouster, but he is not obliged to confess anything that prejudices his rights. But to require him to confess that a lease had been made by a dead man, would be unreasonable. In the case we are considering, an attempt is made to lay a demise in the name of a man confessedly then dead. There is but one count now in the declaration, and the demise in that is laid from Daniel Skipper, the lessor of the plaintiff. After the consent rule was entered into, a motion was made in the court below to add a count laying the demise from Niram Skipper, who was then dead—having died since the commencement of the action, though alive at the date of the demise in the proposed count. His Honor, the presiding judge, permitted the amendment to be made. In this there was error. The action of ejectment, throughout its structure, is a fiction, but a fiction of law which is not to be used to the injury of any one. Where the tenant in possession comes and asks to be made defendant, he is compelled to admit that the lease set forth in the declaration was duly and properly made, which includes everything necessary to render the declaration valid—as that a power of attorney was properly made to authorize the filing of it. All this is proper and in keeping with the nature of the suit. The modern action was invented to avoid the delay and expense of an entry upon the land in dispute by the real claimant, and there actually sealing a lease; and the fiction now supposes such to be the fact. Coming in, as the tenant does, by the consent of the court, in the place of the casual ejector, he has no right to complain that he is compelled to confess that which is confessedly but a fiction. But here he is required to go a step further—not only that the demise was made by a dead man, but that the dead man has executed a power of attorney to authorize the filing of the count. This is extending the fiction beyond all precedent, and a violation of the principles upon which the
(191) action was originally adopted—which were to supersede the necessity of an actual entry, and an actual lease by the lessor. We feel no disposition, if we had the power, to extend it further. We cannot so extend it as to suppose that a dead man could make an entry and lease, and execute a power of attorney authorizing the bringing of the action, which would in fact be the case here, as every count is a separate

declaration, upon a separate and distinct title, and the consent rule is supposed to be entered into as to each count. The attempt in *Adderton's case* and in this is a very ingenious one, but not supported by any authority, and is, we think, contrary to principle. We cannot, therefore, sanction it. It is no answer to the objection, that in the proposed count, the demise is laid at a time when Niram Skipper was alive. This does not remove the difficulty. It is calling on the court to add another fiction to the action.

In the interlocutory order of the court below there was error. This opinion will be certified to the Superior Court of Brunswick.

PER CURIAM. Judgment reversed.

Cited: Elliott v. Newbold, 51 N. C., 10; *McLennon v. McLeod,* 70 N. C., 368.

STATE v. JOSEPH K. GROVES.

Under an indictment for stealing and carrying away a slave (Revised Statutes, chap. 34, sec. 10), the *venue* must be laid, and the prisoner tried, in the county where the original felonious caption took place.

THE prisoner was indicted under the 10th section of 34th chapter of the Revised Statutes, for the offense of stealing and carrying away a woman slave, the property of one Blackwell. The indictment contained several counts, in which the felony was differently alleged to have been committed, as by stealing, violence, seduction, and done with the different intents mentioned in the act.

The indictment was found in the county of Wayne, and there the *venue* was laid; and the case having been removed to the county of Sampson, was tried before his Honor, *Judge Dick, at* Spring Term, 1853, of the Superior Court of Law for the latter county. (192) The case was as follows:

The prisoner was first seen in possession of the slave alleged to have been taken, on the morning of Sunday, 11 January, 1852, in the county of Wayne, and about twenty-five miles from the residence of prisoner in Duplin County—the said slave being in a covered one-horse cart, muffled up in a blanket. The slave had been a runaway for about sixteen months from her master, who resided in the county of Sampson.

It was contended for the prisoner, that unless the original felonious caption of the slave was proved to have taken place in the county of Wayne, of which fact they insisted there was no evidence, there could not

be a conviction. That the offense charged being a felony created by statute—whether the stealing of a slave was grand larceny and might be so charged in an indictment at common law or not—in this case, the *venue* could only be laid in the county where the original felonious caption took place; and his Honor was requested so to charge the jury. But his Honor charged that whether the original felonious caption had taken place in Wayne or not, if the jury believed the prisoner had feloniously possessed himself of the slave in any county in the State, and afterwards had carried her into Wayne County, they might convict.

The jury returned a verdict of guilty, and a rule for a new trial having been discharged, and judgment pronounced against the prisoner, he prayed and obtained an appeal to the Supreme Court.

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

PEARSON, J. His Honor was of opinion that if the prisoner had "feloniously possessed himself" of the slave in another county, and had afterwards carried her into the county of Wayne, he could be convicted in the latter county.

The statute under which the prisoner is indicted has been frequently before this Court, and has been discussed at great length in reference to its construction in many particulars; but this is the first time that a construction has been called for in regard to the *venue,* or county in which the offender may be prosecuted. Its construction being
(193) settled in so many particulars, narrows the question now presented, and renders its decision comparatively easy.

Slavery, or right of property in persons, as it exists in this State, was unknown in England, and consequently no rules had been deduced from the principles of the common law for the protection of that species of property; and it was seen, at a very early day, that the rules applicable to other property would not afford adequate protection to the owners of slaves; for as the slave is an intelligent being and a moral agent, he can be taken from, or induced to leave his master, in many ways that could not be made to bear upon other property.

The law of larceny was found to be adequate for the protection of ordinary goods and chattels; but in the first place, a slave was more valuable, and in the second place, the owner might be deprived of his slave, and it would be impossible to prove whether it was done by stealing, or by violence, or seduction, or in what way. So the law of larceny was not an adequate protection, and the object of the act of 1779 was to create a new species of offense, by making it a capital felony to deprive

the owner of his slave with a felonious intent, without reference to the means by which it was effected. Stealing, violence, and seduction, are given as instances of the means whereby this new felony may be committed; in other words, the statute creates but one offense, although it may be committed in many different ways; and one main purpose was to avoid the necessity of showing in what particular manner the master was deprived of his property. *S. v. Williams,* 31 N. C., 140.

The general rule in regard to *venue* is, the prosecution must be in the county where the offense is committed. As an instance of the strictness of this rule, if a blow be given in one county, and the man dies in another county, the offender cannot be prosecuted at common law in either county; for the offense consists of two acts, and one being done in one county and one in the other, it was not committed in either. In regard to counties, this was remedied by an old statute, but it was not until a few years ago, that one who gave a mortal blow in this State, and dragged his victim over the line into another State, (194) where he died, could be indicted in either State.

It was a stubborn rule of the common law, not only that a man should be tried by his peers, but that he should be tried by his neighbors—viz., those who lived in the vicinage, or near the place where the offense was alleged to have been committed. This rule has been gradually relaxed, and in our State, one charged with a criminal offense has the right of being tried by a jury of freeholders in the county where the offense is committed; although they need not be selected from the vicinage or neighborhood.

There are two exceptions to this rule: (1) where it is provided by statute that the offender may be tried in a county other than the county in which the offense was committed (many statutes in England make this provision); (2) where the offense is of a continuous nature, and may be committed as well in the second county as in the first. Of this simple larceny furnishes an example. For the sake of punishing a thief, if he steals goods in one county, and carries them into another, he may be indicted in the latter county, because he will not be allowed to take advantage of his own wrong; and the law will consider the possession of the owner as continuing, when the goods came to the second county; and he, therefore, in contemplation of law, was taking as well as conveying away the goods every step he made. This is the only instance of "a fiction" on the criminal side of the docket, and its adoption was *ex necessitate* to prevent thieves from being unwhipped of justice.

In this case, it is assumed that the prisoner "had feloniously possessed himself of the slave in another county"; consequently the offense was committed in that county, and the prisoner might, and ought, according

to the rules of the common law, to have been there tried—unless the case here falls under an exception. It certainly does not fall under the first, because we have no statute on the subject; and the question is narrowed down to the single inquiry, does it fall under the second?

If the effect of the act of 1779 is to create a new capital felony, unknown to the common law, without regard to its being done by stealing, violence, seduction, or other means, so as to make it unnecessary (195) for the jury to decide whether it be committed by the one means or the other, it is clear the prosecution must be in the county where the felony is committed; that is, the county where the owner was feloniously deprived of his property, or in the language of his Honor, "Where the prisoner feloniously possessed himself of the slave." In that county the deed was done; and it cannot, as in the case of simple larceny, be considered to have been done over again in another county.

It is said, if the mode by which the felony was committed, was stealing, then, although the statute makes it capital, still the larceny may, in contemplation of law, be considered as done in the second county. Without deciding whether, if a statute makes the stealing of a particular species of property a capital felony, the rule in relation to simple larceny is still applicable, it is sufficient to say the statute under consideration puts the offense, when done by stealing, on the same footing as when done by violence, seduction, or other means. Consequently, to make a distinction, founded on the particular mode by which the felony was effected, would defeat one main purpose of the statute, and make it necessary for the jury to determine in which particular way the slave is taken. This, in most cases, it would be impossible for the jury to do; and if it be necessary for juries to do it, prisoners will be acquitted on the ground of a doubt, or the jury must make a guess. Therefore, no distinction, or separation by reason of the means used, can be allowed, without defeating the object of the statute—unsettling the principles laid down in the cases of *Williams, Martin, Hardin, Haney,* and *Jernigan*—and losing the headway gained towards the settlement of a very important and difficult subject of law in relation to this peculiar species of property.

If the offense, when committed by one of the means pointed out, cannot be prosecuted except in the county where the first caption is made, it follows that the prosecution must be in that county; and so the question is narrowed down to this: if a slave be taken and carried away by violence, with a felonious intent, must the prosecution be in the county where the violence is used? or may it be in any county into which the slave is afterwards carried? Upon this question the authori- (196) ties leave no room for doubt or argument. In *Fulwood's case,*

Cro. Jac., 482, 488, cited in 1 Hale, 660, these points were resolved in reference to 3 H., 7, chapter 2, which makes it a capital felony to take by violence a female heiress, and marry or defile her: First, if a woman be taken forcibly in the county of Middlesex, and married in the county of Surry, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking, make not felony; secondly, but although she be first taken in the county of Middlesex, if the force be continued in the county of Surry, and the jury so find the fact, it is indictable in the county of Surry. In that case, she was seized in the county of Middlesex, her mouth gagged to prevent outcry, forced into a carriage, and thus taken into the county of Surry, and the jury find the force was continued in that county.

In the case now before us, if the original taking was by violence, there is no finding that the violence was continued in the county of Wayne; indeed there was no evidence tending to show it. On the contrary, when seen in that county, the Negro was riding in a covered wagon, very comfortably wrapped up in a blanket.

"Where clergy is ousted on circumstances of aggravation, such circumstances must all be proved to have happened within the county in which the offender is tried; otherwise, the fact of the larceny only being established in that county, he will be entitled to clergy." 2 East., 773—*e. g.*, an indictment for robbery must be in the county where the violence is used, although the offender may be tried in the county into which he carries the goods for simple larceny. So, an indictment for stealing linen from the bleaching grounds, which is made a capital felony by statute, must be in the county where the goods are first taken.

Without reversing former decisions, and putting the matter at large, we feel bound to decide that the prisoner could only be tried in the county where the first caption of the slave took place. It remains for the Legislature, if deemed expedient, to provide that the offender may be prosecuted in any county into which he carries the slave, as has been done by a statute in England, in case of robbery and in case of stealing from the person on railroad cars, or steamboats, or stages, to avoid the necessity of proving in which county the original (197) taking was committed.

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

Cited: S. v. Buchanan, 130 N. C., 661.

STATE v. M. D. WILLIAMS ET AL.

1. The act of 1846, chapter 70, forbidding the removal of fences, etc., does not extend to persons in the rightful posession of the premises—as *quasi*-tenants, occupying the same by the consent of the owner.

2. Hence, where A. had dower of land adjoining the land of B., and one of the lines of said dowerland ran through a field, a part of which was the land of B., and which her husband, during his life, and she, after his death, with the consent of B., had cultivated, and she had the fence on B's part removed to her own land: *Held*, that these circumstances were insufficient to support an indictment under the act of 1846.

(The case of *S. v. Mason*, 35 N. C., 341, cited and approved.)

THIS was an indictment under the act of 1846, chapter 70, for the removal of the fence of one Noah Thompson, tried before his Honor, *Judge Dick*, at Spring Term, 1853, of MONTGOMERY Superior Court of Law. The following is the case sent up to this Court:

"The fence removed was on a tract of land formerly belonging to one Atkins, adjoining the lands of one Green Smith, and which was sold some years ago by the clerk and master in equity under the decree of said court, on the petition of the heirs of said Atkins. At the sale, one Atkins (one of the heirs-at-law), became the purchaser. Before the payment of the purchase money, or obtaining a deed from the clerk and master, he contracted to sell a portion of the land to the said Green Smith, whose land it adjoined, and received from him the price agreed on. Atkins, not being able to pay for the land, transferred his bid to one Mebane, and, by an order of the court, he was substituted as purchaser, for Atkins; and it was agreed between Atkins, Smith, and Mebane, that Mebane should take title for the whole of the land to himself, and convey to Smith the portion which Atkins had contracted to sell to him. Mebane accordingly took the title from the clerk and master, but conveyed no part of it to Smith; but conveyed the whole tract to
(198) Thompson by a deed covering the same, including the *locus in quo*. But Thompson never had any actual possession of the *locus in quo*, except by taking possession of the house on the tract, and cultivating other fields thereon, which were separated from the *locus in quo* by a piece of woods and an old field. Smith, in his lifetime, had cleared this field, which extended partly on his own original tract, and partly on the land he had contracted for with Atkins, and continued to cultivate it for seven or eight years, until his death, which took place in 1850, leaving several children and his widow, Olive Smith, him surviving; and leaving a crop of corn growing on it at his death, which his widow

and family took and housed. In the fall of 1850, Olive Smith sowed this field in wheat, and gathered the same in the summer of 1851. And after the wheat was gathered, her own horses and those of her son-in-law, the defendant, who resided with her and managed her affairs, ran in the field, and continued to do so until the fence was removed.

In February, 1851, the deed from Mebane to Thompson was made, and in the same spring dower was laid off to Mrs. Smith, of the lands of Green Smith, deceased; and the same was on that part of the land adjoining Thompson's, and the line was run through the said field, leaving one part of the field on the Thompson side, and the other part on the widow's dower.

In the fall of 1851, and whilst nothing was growing on the said field, the defendant, Williams, with some others, by the order and direction of Mrs. Smith, removed that part of the fence which surrounded Thompson's portion of the field, and carried it over the line to the Smith land, agreeing among themselves not to let Thompson know it.

Upon these facts the jury, under charge of his Honor, found the defendant guilty, and judgment having been rendered on the verdict, the defendant appealed."

Kelly for defendant, relied on the cases of S. v. Allen, 35 N. C., 36, *and S. v. Mason, ibid.,* 341.

Attorney-General for the State.

NASH, C. J. The defendant is indicted under the act of 1846, (199) chapter 70 (Ire. Dig. Manual, 158), for removing a fence. It is admitted that if the fence in question was in the rightful possession of the defendant, or of those by whose directions he acted, he does not come within the provisions of the law. We hold that the field from which the fence was removed, was not, at that time, in the possession of Thompson, the prosecutor, but of Olive Smith, by whose directions it was removed. The tract of land upon which the fence stood belonged at one time to one Atkins, and adjoined the lands of Green Smith. It was, under a decree of the court of equity, sold, and one of the heirs purchased. He contracted to sell a portion of it, including the *locus in quo,* to Green Smith, and which adjoined the land of the latter, and received a portion of the purchase money; but no conveyance was ever executed. Subsequently Atkins, the purchaser, transferred his bid to one Mebane, who agreed to make title to Smith, but who sold the whole tract to the prosecutor, Thompson. The latter never was in the actual possession of the part of the land from which the fence was removed. Green Smith cleared a portion of the land which he had contracted for, including the field in

question, and cultivated it several years, and at the time of his death, in 1850, had a crop growing on it. After his death the widow, Olive Smith, had her dower land laid off to her—one of the lines running through this field. The fence around this field included a portion of land belonging to Thompson. Mrs. Smith gathered the crop growing on the land at the time of her husband's death. In the fall of 1850, the widow sowed the whole field in wheat, which she reaped in the summer of 1851; and her stock ran in the field up to the time the fence was removed, which was in that fall. The defendant, under the authority of Mrs. Smith, removed the rails from that portion of the field which belonged to Thompson, to that portion belonging to her. Mrs. Olive Smith was in the rightful possession of the whole field; for though she had no written or even express parol lease for that portion of it which belonged to Thompson, yet we must presume that it was with his consent she gathered the crop of 1851, and continued in the possession to the fall of that year. If she was not strictly a tenant, she was in possession lawfully. The act of 1846 was not intended to embrace acts of wilful waste by a tenant; if it had, it would have contained apt
(200) words to include them. *S. v. Mason,* 35 N. C., 341. To subject a person to the penalties of the act of 1846, he must be guilty of trespass, which Williams was not, acting as he did under Olive Smith, the rightful occupant or *quasi*-tenant.

There was error in the opinion of the judge below, and there must be a *venire de novo.*

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

Cited: Bank v. Wright, 48 N. C., 376; *S. v. Watson,* 86 N. C., 626; *S. v. Marsh,* 91 N. C., 632; *S. v. Reynolds,* 95 N. C., 618; *S. v. Jones,* 129 N. C., 509.

STATE v. RAIFORD REVELS.

1. Where the defendant had been indicted for stealing a sheep, charged to be the property of P. P., and acquitted at the trial on the ground that the owner of the property was unknown; and he was afterwards indicted for the same offense, the sheep being charged to be the property of some one to the jurors unknown: ***Held,*** that the plea of former acquittal was no bar to a conviction upon the latter indictment.

2. The law raises no presumption, nor does the court judicially know, that the courthouse of a county is five miles or more from the boundaries of such county.

3. And where the defendant, on his arrest, said that he desired to be carried to the courthouse, which was within five miles from the place, and when so carried there, did not object that it was not the proper courthouse: *Held*, that it was error in the judge below to leave these circumstances to the jury upon the question of *venue*. He should have instructed them that there was no evidence that the offense was committed in the county as charged.

(The cases of *S. v. Birmingham, ante*, 120, and *Cobb v. Fogleman*, 23 N. C., 440, cited and approved.)

THE defendant was indicted and tried before his Honor, *Judge Dick*, at ROBESON, at Spring Term, 1853, for stealing a sheep. Pleas, former acquittal, not guilty.

On the trial it appeared that the defendant had before been indicted for stealing a sheep, charged to be the property of one Peter Prevatt, and on the trial had been acquitted, on the ground that the sheep was not the property of Peter Prevatt. The present indictment charged that the sheep was the property of some one to the jurors unknown. It was admitted that the transaction was the same as the subject of the previous trial, except as to the alleged owner of the property. (201) There was no direct proof that the offense was committed in the county of Robeson; but it was proved to have been committed, if at all, within five miles of Lumberton, and that, when arrested, the defendant desired to be carried to the courthouse for examination; and when brought to Lumberton, did not object that that was not the proper courthouse. The defendant's counsel, among other things, insisted upon the plea of former acquittal, and that there was no proof that the offense was committed in the county of Robeson, and prayed his Honor so to instruct the jury.

His Honor held that the plea of former acquittal would not avail the defendant, and charged the jury that the whole proof against the defendant was circumstantial, and if, upon consideration of all the circumstances, they should be satisfied that he stole the sheep, and stole it within the county of Robeson, they might convict him; but if those circumstances left on their minds doubts, either as to the fact of stealing, or as to the taking in the county of Robeson, they ought to acquit. There was a verdict of guilty, and a rule for a new trial having been discharged, and judgment rendered on the verdict, the defendant appealed to the Supreme Court.

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

BATTLE, J. The first objection, that the defendant had been formerly acquitted upon an indictment for the same offense, was properly overruled, as we decided at last term in the case of *S. v. Birmingham, ante,* 120. The report of that case had not been published at the time of the trial in this, and the defendant's counsel was not probably then aware of its existence.

The second point made for the defendant ought to have been sustained. The case of *Cobb v. Fogleman,* 23 N. C., 440, is directly in his favor; and we both approve of its principle and feel bound by its authority. In that case, a question arose whether the plaintiff knew of the unsoundness of a female slave at the time when he purchased her.

To show that he did, the defendant proved that about a month (202) before the sale, the plaintiff "bought a Negro man, who was then, and had been during the time the defendant owned her, the husband of the woman in question; that the plaintiff owned no other slave except a small boy; that the plaintiff came twice to the house of the defendant to chaffer about the purchase of the woman, before she was taken away; that messages were carried between him and the defendant by the Negro man aforesaid on the subject of the trade, but their import was not shown; that the plaintiff said the reason why he wished to purchase her, was that he owned the husband, and that his daughter did not like to wash for the Negro man; that on one of his visits to the house of the defendant, the plaintiff asked permission to have a conversation with the woman, and had a short interview accordingly, the defendant not being present." The judge who presided at the trial charged that the above stated facts furnished no evidence of the plaintiff's *scienter;* which was approved by this Court. *Gaston, J.,* in delivering the opinion of the Court, said: "We hold that the judge was warranted in instructing the jury, that if the defect in question existed at the time of the purchase, there was no evidence that the purchaser knew, or had been informed of this defect. It was indeed possible that he might have acquired such information in his private conference with the Negro woman, or from communications from her husband. But where the law does not presume the existence of a fact, there must be proof, direct or indirect, before the jury can rightfully find it; and although the boundary between a defect of evidence, and evidence confessedly slight, be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture of a fact, never can amount to legal evidence of it."

Applying the principle of this decision to the present case, the law certainly raises no presumption that the courthouse of a county is

necessarily more than five miles from the boundaries of such county. We know, indeed, as individuals, that in several of the counties the fact is otherwise—as, among others, in New Hanover, Halifax, and Pasquotank. The testimony, then, that the defendant stole the sheep within five miles of Lumberton, was no legal evidence, direct or indirect, that he stole it in Robeson County. But it is said that the Court is bound to take notice of the boundaries of the county, and must, therefore, know judicially that Lumberton, the county seat, is not (203) within five miles of any part of such boundaries. Granting the premises, the conclusion is a clear *non sequitur*. There is no public law, of which we are aware, which declares how far the boundaries of Robeson County are from its courthouse; and unless there be such law, we certainly are not bound to know the fact and give it in charge to the jury. Against such a position, *Deybell's case,* 4 Barn. and Ald. Rep., 243 (6 Eng. Com. L. Rep., 413), is a direct authority. The other fact relied upon, that when the defendant was arrested, he desired to be carried to the courthouse for examination, and when carried to Lumberton did not object to that as being the proper courthouse, adds but little, if anything, to the testimony. It is not stated where the defendant was arrested, and the circumstances stated raise only a possibility or conjecture of the fact sought to be proved, which is not sufficient to establish it legally as a fact. The case manifestly admitted of clear and positive testimony; and we doubt not that the able solicitor, who prosecutes for the State in the circuit where the trial took place, would have given it, had he not overlooked it in the hurry of the trial—an oversight which will sometimes happen to the most vigilant under similar exigencies. The judgment must be reversed, and a *venire de novo* awarded.

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

Cited: Sutton v. Mardre, 47 N. C., 322; *S. v. Allen,* 48 N. C., 264; *S. v. Whit,* 49 N. C., 353; *Jordan v. Lassiter,* 51 N. C., 132; *Wittkowsky v. Wasson,* 71 N. C., 454; *Marsh v. Verble,* 79 N. C., 23; *Ellison v. Rix.* 85 N. C., 81; *S. v. Nash,* 86 N. C., 650; *Boing v. R. R.,* 87 N. C., 362; *S. v. Jones,* 101 N. C., 723; *S. v. Hooker,* 145 N. C., 583; *S. v. Drakeford,* 162 N. C., 669.

Overruled: S. v. Lytle, 117 N. C., 801.

ALLEN McLEAN v. PENELOPE McDANIEL.

The parties to an issue joined upon an interplea in attachment (under the act of Assembly, chapter 6, section 7, Revised Statutes), have each the same right of appeal (under section 14) to the Superior Court, as in actions commenced in the ordinary way.

THIS was originally a suit by attachment, at the instance of the plaintiff, against Bluford McDaniel; and the attachment having been levied on a Negro slave, and returned to the Court of Pleas and Quarter (204) Sessions of Bladen County, the defendant, Penelope McDaniel, interpleaded, claiming the said slave as hers. An issue was accordingly made up and submitted to the jury, who found that the said slave was the property of the defendant, and judgment was rendered accordingly; from which finding and judgment the plaintiff prayed an appeal to the Superior Court, which was allowed.

On the trial, before his Honor, *Judge Dick,* at Spring Term, 1853, of BLADEN Superior Court, the defendant, by her counsel, moved to dismiss the said appeal; and his Honor being of opinion that the finding of the jury in county court was final, according to the act of Assembly, gave judgment dismissing the appeal; from which judgment the plaintiff prayed for and obtained an appeal to the Supreme Court.

Strange for plaintiff.
D. Reid and Banks for defendant.

PEARSON, J. When property is attached under a proceeding against an absent debtor, and a third person lays claim to it, a summary mode of trying the right of property is provided by statute, and it is enacted, "the verdict of the jury in such case shall be conclusive as to the parties then in court, and the court shall give judgment accordingly." Revised Statutes, chapter 6, section 14.

His Honor was of opinion that the effect of this enactment was to deprive both parties of the right of appeal. There is error. No reason can be suggested why the general right of appeal should be taken away in such cases; and it is clear that the clause under consideration was introduced from abundance of caution, so as to leave no room for a doubt that this summary and collateral mode of trying the right of property should have the same conclusive effect as to the parties then in court, as if the question had been presented upon an issue joined in an action commenced in the usual way. And it may have been introduced for the further purpose of declaring expressly that the effect of the judgment

should be confined to the parties then in court, and not be extended so as to include the absent debtor. As the act directed a mode of proceeding unknown to the common law, it was deemed proper to say who were to be bound by it; but in doing so, there is not the slightest (205) intimation of an intention to take away the right of appeal.

The judgment must be reversed, and this opinion will be certified.

PER CURIAM. Judgment reversed.

STATE v. NOEL LOCKLEAR.

1. The wearing or carrying about the person, or keeping in the house by a free Negro any one of the articles prohibited by the act of 1840, chapter 40 (as a rifle, musket, bowie-knife, etc.), is a distinct offense, and should be so charged in the bill of indictment.

2. But where the indictment charged, in the same count, the carrying of a "musket, rifle, and shot-gun," proof of the unlawful carrying of either one of the articles, is sufficient to justify a conviction; and the objection to the indictment cannot be taken advantage of, either at the trial, or upon a motion in arrest of judgment.

(The case of *S. v. Haney*, 19 N. C., 390, cited and approved.)

THE defendant was indicted under the act of Assembly prohibiting free persons of color from wearing or carrying arms about their persons. The indictment charged that he carried about his person a rifle, a musket, and a shot-gun; and the proof was that he carried a shot-gun.

Upon the trial, before his Honor, *Judge Dick*, at ROBESON, on the last Spring Circuit, it was insisted for the defendant that he could not be convicted unless he carried all the arms charged in the bill of indictment; but his Honor being of opinion that he could be convicted upon proof that he carried either of them, so charged the jury; and upon a verdict and judgment accordingly against the defendant, he appealed to the Supreme Court.

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

BATTLE, J. The act of 1840, chapter 30, on which the defendant was indicted, declares, that "if any free Negro, mulatto, or free person of color shall wear, or carry about his or her person, or keep in his or her house any shot-gun, musket, rifle, pistol, sword, dagger, or bowie-knife, unless he or she shall have obtained a license therefor (206)

from the Court of Pleas and Quarter Session of his or her county, within one year next preceding the wearing, keeping, or carrying thereof, he or she shall be guilty of a misdemeanor, and may be indicted therefor." We think it clear that the wearing, carrying about the person, or keeping in the house any of these prohibited articles is a distinct offense, and ought to be so charged in the bill of indictment, and proved on the trial. Whether the charging of two or more of them in the same count is bad for duplicity, so that the defendant might have objected to it on special demurrer, or had it quashed on motion, it is unnecessary for us to decide in this case, as no such demurrer was put in, or motion made. We are of opinion that the objection came too late at the trial; that proof of the unlawful wearing, carrying, or keeping any one of the articles was sufficient to justify the conviction of the defendant as to that one, and that it was unnecessary to prove all, as charged. The objection is equally unavailing on a motion in arrest of judgment, or upon a writ of error. Arch. Crim. Pl., 55; *S. v. Haney,* 19 N. C., 390. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Bishop, 98 N. C., 773; *S. v. Shoemaker,* 101 N. C., 689; *S. v. Van Doran,* 109 N. C., 867; *S. v. Burnett,* 142 N. C., 580; *S. v. Jarrett,* 189 N. C., 519.

ELIJAH FULLER v. JOHN I. MCMILLAN.

Where a rule was obtained against the plaintiff in a suit at law (under the 86th section, 21st chapter, Revised Statutes) to produce on the trial a certain letter written by the plaintiff to the defendant, and alleged by the latter to have been returned to the plaintiff: *Held,* that the plaintiff's affidavit stating that he had not seen the letter since he first sent it—that he had not knowingly destroyed it, and had made diligent search for it and could not find it—was a sufficient cause shown for its nonproduction, and for a discharge of the rule.

THIS was an action of *assumpsit* brought upon a promissory note; and, as appears by the transcript of the record, the following was the case, at CUMBERLAND Superior Court of Law, on the last Spring (207) Circuit, his Honor, *Judge Dick,* presiding.

At Fall Term, 1852, the defendant filed his affidavit (under the 86th section of the 31st chapter, Revised Statutes), stating that a certain letter written to him by the plaintiff, and by him afterwards

returned to the plaintiff or his clerk, was material and necessary to his defense to the action, as containing the terms of the contract declared on by the plaintiff; and accordingly an order was made directing the plaintiff to produce upon the trial the said letter or a copy thereof, or show cause to the contrary. Afterwards, at the same term of the court, the plaintiff filed his affidavit, in which he admitted that he wrote to the defendant the letter in question, but stated that to the best of his recollection, he never saw it after it was mailed; that he had made diligent search for it, intending himself to rely on its contents for the maintaining of his action, but that he could not find it, and that he had preserved no copy of it; and he then stated substantially his recollection of its contents.

Upon consideration of the premises, his Honor was of opinion that the rule against the plaintiff should be made absolute, and accordingly entered judgment of nonsuit, from which the plaintiff appealed to the Supreme Court.

Strange for plaintiff: As to what books and writings are required to be produced by the act of Assembly, according to the ordinary proceedings in chancery, see Adams Eq., 13 to 20. And at page 14, "the admission necessary to compel the production, is that the documents are in the defendant's possession or power. See, also, pages 349, 350, and also note to *Hoyer v. Sydenham,* McNaughten's select cases, 7. He also referred to Daniel Ch. Pr., 1038, and especially at 2049; *Hoyt v. Martin,* 22 N. C., 379; *Smith v. Thomas, ibid.,* 126; *Graham v. Hamilton,* 25 N. C., 381; *McGibbony v. Mills,* 35 N. C., 163; *Branson v. Fentriss, ibid.,* 165; *Scarborough v. Tunnell,* 41 N. C., 103.

No counsel for defendant in this Court.

BATTLE, J. We are of opinion that his Honor erred in directing the judgment of nonsuit. The order under which the plaintiff was required to produce upon the trial the letter in question, was (208) founded upon the 86th section of the 31st chapter of the Revised Statutes. That section declares that courts of law "shall have full power, in the trial of actions before them, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, or shall not satisfactorily account for such failure, it shall

be lawful for such courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, or shall not satisfactorily account for such failure, it shall be lawful for such courts respectively, on motion as aforesaid, to give judgment against him or her by default." Supposing that the court had the power, upon the defendant's affidavit, to make the order requiring the plaintiff to produce the letter in question (and we think it had), the act itself shows that he was not required to perform an impossibility, upon pain of losing his suit. He might fail to comply with the order, and yet if he could give a satisfactory account of the cause of such failure, he was to be excused. We cannot well imagine how a more satisfactory account could have been given than was done in this case. Assuming that the letter came to the hands of the plaintiff, which is not certain, he swears that he has no recollection of having ever seen it since he wrote and dispatched it to the defendant; that he has not knowingly or wilfully destroyed it; that after a most diligent search—a search stimulated by the desire of using it as evidence for himself—he cannot find it; that he does not believe that he has it in his possession, and that he has no copy of it. He then does the best he can, by stating his recollection of its contents. We have no idea that a Court of Chancery would, under such circumstances, have insisted upon the production of the paper (Adam's Eq., 14; 3 Dan. Chan. Pr., 2049); and the power of a Court of Law is expressly limited by that of the Court of Chancery.

(209) The judgment must be reversed, which will be certified to the Superior Court of Law for Cumberland County, to the end that the plaintiff may proceed in his action.

PER CURIAM. Judgment reversed.

Cited: Ward v. Simmons, 46 N. C., 406; *Justice v. Bank,* 83 N. C., 8.

THE STATE v. WRIGHT CASEY ET AL.

Where a bill of indictment for an assault and battery was found in the Superior Court against the defendant, and pending the same after his knowledge thereof, and before his arrest, he procured himself to be indicted for the same offense in the county court, and there voluntarily submitted and was fined: *Held,* that the conviction in the county court was a good defense to the indictment in the Superior Court.

(The case of *S. v. Tisdale,* 19 N. C., 159, cited and approved.)

STATE *v.* CASEY ET AL.

THE defendants were tried at WAYNE, before his Honor, *Judge Manly,* on the last Spring Circuit, upon an indictment for an assault and battery, found by the grand jury at Fall Term, 1852. Their plea was former conviction, to which the solicitor for the State replied, "that the defendants, after the finding of the bill in this court, and after their knowledge thereof, and during the pendency of the same, procured an indictment for the same offense to be found against them in the County Court of Wayne County, at February Term, 1853, and voluntarily submitted upon said indictment, and were fined, and have paid the said fine." It was admitted that the offense charged was committed in Wayne County, and that the county court had jurisdiction thereof, unless the same were taken away by the matters in said replication alleged.

To this replication the defendants demurred; and his Honor gave judgment sustaining the demurrer, from which the solicitor for the State prayed and obtained an appeal to the Supreme Court.

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

BATTLE, J. We cannot distinguish the principle which must govern this case from that which was decided by this Court in *S. v. Tisdale,* 19 N. C., 159. In that case, the defendant pleaded a (210) former conviction for the same offense in the county court. The Attorney-General for the State replied, that before the prosecution commenced in the county court, the present bill was found against the defendant, and that the prosecution had been regularly kept up. To this replication the defendant rejoined that he had no legal notice of the prosecution in the Superior Court, before his conviction in the county court, and to this rejoinder the Attorney-General demurred. The demurrer was overruled and judgment given for the defendant, which was affirmed by this Court.

The only difference between the replication in that case and the present, consists in the allegations in this, that the defendants had knowledge of the bill having been found in the Superior Court, and procured an indictment to be found against them in the county court, and voluntarily submitted thereon, and paid the fine which the court imposed upon them. The replication does not state that the defendants had been arrested upon a *capias* issued from the Superior Court before they were indicted in the county court, and we must take it that the fact was not so. Their knowledge of the bill having been found in the Superior Court cannot then vary the result. As was said in *S. v. Tisdale,* "the defendant had no day in the Superior Court—he having neither

been arraigned nor even arrested on the bill in that court. Until he had a day in court on that indictment, he was not *vexatus* thereby, and stood in relation thereto on the same footing as if he had been put without day by a *nolle prosequi* thereon; in which last case, it is laid down in *McNeill's case,* 10 N. C., 183, that he would be amenable on another indictment in any court having jurisdiction of the offense." How the other allegation, that he procured an indictment to be found against him in the county court and submitted thereon, can alter the case we cannot imagine. Certainly it is no fraud on the law for a man who has violated it to come forward and voluntarily submit to the judgment of a court having full jurisdiction of the offense. The Legislature, by giving a concurrent jurisdiction to the county and Superior Courts over assaults and batteries, assumes that either, and one not more nor less than the other, will fully exercise its powers and perform its duties thereto. But it is said that persons committing (211) aggravated batteries may and often do, by the means resorted to in this case, manage to escape with a lighter punishment in the county court than would have been imposed in the Superior Court. That may be so; and if it is so, it is an evil which it is the province of another department of the government to redress. The judgment must be affirmed.

PER CURIAM. Judgment accordingly.

Cited: S. v. Swepson, 79 N. C., 640; *S. v. Williford,* 91 N. C., 529; *S. v. Roberts,* 98 N. C., 756.

WILLIAM J. McKAY v. DAVID F. FLOWERS.

1. Notes taken by an executor for the sale of slaves, sold to pay debts, are not assets until they are due and collected.
2. As, where an executor, under an order of court, sold slaves on a credit of six months, and having been sued by a creditor, took time to plead under the act, and at the time of plea pleaded, the said notes were not due or any part thereof received: *Held,* that the plea of "no assets" was by these facts sustained.

THIS was an action of debt upon the bond of the defendant's testator, tried before *Dick, J.,* at BRUNSWICK, on the last Spring Circuit, and the issues were submitted to the jury upon the pleas of "no assets—fully administered, generally and specially—debts of higher dignity—former

judgments—no assets, *ultra.*" The defendant had, under an order of the county court, sold the slaves of his testator, and upon the plaintiff's bringing this suit, had taken time, under the act of Assembly, to plead. At the time of putting in his pleas, the notes for the sale of the said slaves were not due, nor any part of them received by him; and the principal question was, whether these notes were assets in his hands. His Honor was of opinion that none of the pleas were sustained by the facts; and there having been a verdict and judgment for the plaintiff, the defendant appealed. The facts of the case are fully stated in the opinion delivered by this Court.

Troy, for defendant, argued: (212)

1. That an executor is not chargeable with choses in action, until he has received the money or been guilty of *laches.* (2 Williams on Ex'rs., 1022-3; *Jenkins et ux. v. Plume,* 1 Salk., 207; *Norden v. Levit,* 2 Lev., 189; Ram. on Assets, 503.)

2. If executor sells personal property on a credit, and takes bonds according to our statute, and is sued and pleads *plene administravit* and no assets—after the sale, and before the bonds are due, he is not guilty of *devastavit,* and the plaintiff cannot recover. (Rev. Stat., chap. 46, sec. 11; *Gregory v. Hooker's Adm'r,* 4 N. C., 215; *Eure v. Eure,* 14 N. C., 206.)

Strange, with whom was D. Reid, contra, argued:

1. That time was too long before the sale of slaves; testator died before or early in October, 1848, and the defendant then, as executor, sold the perishable property in October. The County Court of Brunswick sat on the first Monday in December, when he might have obtained an order for sale of slaves; and had he done so, the sale notes would have been due before defendant pleaded; but he chose to wait till March, 1849.

2. Besides, the act of Assembly gives him nine months in which to plead, and if from any accident he finds that insufficient, the court will grant him longer time.

3. The judge was right in holding that none of the defendant's pleas were sustained; for the only plea to which the evidence applied, was the plea of *plene administravit.* Now that plea denies that the defendant has any assets, or ever had since the death of his intestate, which has not been administered. (2 Saunders Plead. and Evi., 10, 511.)

4. But the act of Assembly (Rev. Stat., chap. 46, sec. 11), authorizes the sale and exempts him from liability thereupon, until the time at which the notes become due, when the fund on *scire facias* shall be bound for judgments previously rendered. But this must be shown by plea (*Gregory v. Hooker's Adm'r,* 4 N. C., 215); otherwise how is the court to know that the sale has been made? and how can the plaintiff know whether he ought to take issue, or admit the defendant's plea, and take his judgment *quando?*

(213) PEARSON, J. In September, 1848, the testator died, leaving the defendant his executor. In October, 1848, the defendant sold perishable property to the amount of six hundred dollars (before he qualified). He proved the will and qualified in December, 1848, and sold land to the amount of six hundred dollars in January, 1849, under a power given by the will. In March, 1849, he obtained an order of the county court to sell the slaves, and made a sale of the slaves on the 31st of that month, upon a credit of six months. The plaintiff commenced his action in May, 1849. The defendant took time to plead under the statute, and in September, 1849, he pleaded, "fully administered generally and specially—no assets—former judgments—debts of higher dignity—and no assets, *ultra*"—and the question was, whether the issue upon his pleas should be found against him, because of the notes which he held for the proceeds of sales of the slaves, which were not due at the time of the plea pleaded; and whether the plaintiff was entitled to more than a judgment *quando.* His Honor was of opinion "that whatever might have been the consequence, if the defendant had pleaded specially the sale of the slaves on credit under the act of Assembly, that none of his pleas were sustained by the facts."

There is error (Revised Statutes, chap. 46, sec. 11), "where the estate of a deceased person shall be so far indebted that the debts cannot be discharged by the money on hand, or by the sale of the perishable commodities," the executor is to obtain an order of the county court and sell the slaves on a credit of six months, taking bond and security; and the money, "when received shall be liable for the satisfaction of judgments previously obtained, and entered up as judgments when assets should come to hand." The executor is required to sell on a credit, and the right of a creditor to charge him with the value of the slaves, as assets in hand, is excluded by the provision that the amount of the sale notes, when received, shall be liable to judgments *quando,* previously entered.

How far a question would be varied, if an executor was guilty of *laches* in not selling the slaves in a reasonable time, is a matter not now

before us; for in this case there was no *laches*—the executor obtained the order of sale at the first court after he qualified, and sold as soon thereafter as he could make advertisement. (214)

We can see no necessity for a "special plea," because the statute evidently intends that the sale notes shall not be considered assets until they are collected, unless the executor or administrator is guilty of *laches* in not collecting; and the issue is tendered by the plea of "no assets in hand, or debts of higher dignity, and no assets *ultra*," whereupon the plaintiff may join issue, or may take a judgment when assets come to hand—which he ought to have done in this case.

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

STATE v. TOM, A SLAVE.

1. The act of 1819 (Revised Statutes, chapter 34, section 60), forbidding "any person" from passing counterfeit bank bills, etc., does not embrace slaves.
2. A statute must mention slaves, to bring them under its penalties.

THE defendant, a slave, was indicted in the County Court of ANSON, at its January Term, 1853, for passing a counterfeit bank note, knowing the same to be counterfeit. To this indictment he demurred, upon the ground that the court did not have jurisdiction of the offense. The demurrer was overruled, and the defendant adjudged to answer over; from which judgment he appealed to the Superior Court, when the case was tried at ANSON on the last Spring Circuit, before his Honor, *Judge Dick*, who affirmed the judgment of the county court, overruling the demurrer; and the defendant appealed to the Supreme Court.

Kelly and Dargan for defendant:

1. County court has no jurisdiction (Rev. Stat., chap. 31, sec. 5, chap. 34, sec. 60.) Offense charged is a felony, and conviction of it primarily implies capital punishment, and necessarily forfeiture of goods. (4 Bl. Com., 78.)

2. If this offense be indictable in the county court, why not the crime of burning bridges (Rev. Stat., chap. 34, sec. 16), and also the first offense in circulating seditious publications among slaves (34th chap. 17th and 18th sections). (215)

3. When a statute makes a new felony, the law implies forfeiture of goods and capital punishment, but the first offense is entitled to benefit of clergy, unless expressly taken away. (1 Russell, 42, *et seq.*)

4. Revised Statutes, chapter 111, sections 42 and 43, point out the offenses of slaves cognizable by county and Superior Court.

5. In legal parlance a slave is not a person, but property, and cannot be embraced within the meaning of the act, 34th chapter, 60th section, Revised Statutes. (*S. v. Manuel,* 20 N. C., 144.)

6. Can it be the proper construction of the act, that the slave is to be fined $5,000, and imprisoned three years? Would the Legislature have the right thus to take the property of the master, and subject him to clothing, jail fees, board, etc.?

Attorney-General for the State.

NASH, C. J. The defendant, a slave, is indicted for passing a counterfeit bank note, knowing it to be counterfeit. The defendant demurred upon the ground of a want of jurisdiction in the Court of Pleas and Quarter Sessions, where the prosecution commenced. The demurrer in the Superior Court, to which the case was carried by appeal, was overruled. In this opinion we do not concur. The indictment is under the 60th section of the 34th chapter of the Revised Statutes, which enacts: "If any person shall directly or indirectly pass, or attempt to pass, to any other person, etc., any false, forged, or counterfeit bill or note, etc., of any bank or corporation within this State, etc., every such person so offending shall be deemed and adjudged guilty of a felony, and upon conviction, etc., shall be punished with a fine to the use of the State, not exceeding $5,000, and be imprisoned not exceeding three years, standing in the pillory, public whipping, etc., all or any of them, at the discretion of the court," etc. The demurrer admits all the facts set forth in the indictment, and the only question we are called on to decide is, whether the statute embraces a slave.

The word person, in its ordinary sense, is sufficiently comprehensive to have that effect. *In rerum natura,* slaves are persons; they are human beings, endowed with intelligence, and with the physical organiza-
(216) tion appertaining to humanity. With us, however, they have another being impressed upon them by the laws. They are a species of property, and are governed by a code of laws different in many respects from that which governs and regulates the conduct of the white man—laws in their general character mild and benevolent, looking as well to their protection as to their restraint. While, therefore, for most civil purposes we regard them as property, at the same time we guard

their lives, limbs and members with the same care that we do those of the white population. In carrying out this humane policy, the courts in putting a construction upon penal statutes, have adopted the principle that slaves are not embraced, unless mentioned. They are not embraced for punishment, but they are for protection. This principle was declared by this Court in the case of the *S. v. Small,* at June Term, 1844,* as clearly sustained by the course of legislation adopted by the Legislature on the subject. In looking over the acts of the General Assembly, we find that in almost every instance when slaves are the object of legislation, they are called either slaves, Negroes, or persons of color, the latter designation being mostly confined to free Negroes. Thus in the act punishing perjury, when committed by a slave, the language is, "if any Negro, bond or free," etc. (Rev. Stat., chap. 111, sec. 52.) At the same session—to wit, 1836, in the 50th section of the 34th chapter, the Legislature provided generally a punishment for the crime of perjury; the language is, "if any person," etc.; and in the 51st section, for subornation of perjury, the same phraseology is used, "if any person," etc. Now both these acts constitute but different chapters of one act. It is obvious that the Legislature recognized the principle that to bring slaves within the sweep of a penal law, they must be mentioned. If this was not the view of the Legislature, where was the necessity of the provision in the 111th chapter? If by "persons" were meant slaves, the crime when perpetrated by one of them, was already provided for by the 34th chapter. When it is said they are embraced for protection, though not named, it is meant that the law protects them from illegal (217) violence. Many other statutes might be enumerated in which slaves are mentioned as slaves, where particular acts are made criminal. Independently, however, of this legislative example of the use of the word "person," the opinion of the Court in the case of *Small* recognizes another principle of construction of such statutes, equally decisive of the question involved in this case, and equally satisfactory. It is the nature of the penalty attached to the crime. Upon conviction, the criminal is to be fined not exceeding $5,000, to be imprisoned not more than three years, pilloried, whipped, etc.—all or any. Now, can it be supposed for a moment that the Legislature had slaves in their contemplation, when they affixed these penalties to the act? The idea is preposterous. Dwarris on Statutes, 692. It is no answer that the presiding judge may whip instead of fine; so he may, and he has by law the power to inflict a fine instead of a whipping; and by the same law he may inflict the whole penalty on the prisoner, which shows, in

*This case was not reported.—REP.

our opinion, that the word person, as used in the act of Assembly under which this indictment is framed, does not extend to slaves.

The offense of the prisoner not being the proper subject of an indictment, neither the county nor the Superior Court had jurisdiction. We are not called on to say whether the act complained of is cognizable by a single magistrate. The judgment of the Superior Court is erroneous. This opinion to be certified.

PER CURIAM. Judgment reversed, and demurrer sustained.

STATE v. WASHINGTON ORRELL.

Where no bill of exceptions, nor statement in the nature thereof, accompanies the record of a case sent to this Court, the judgment below is affirmed as of course—there appearing no error in the record.

(The cases of *S. v. Gallimore*, 29 N. C., 147, and *Walton v. Smith*, 30 N. C., 520, cited and approved.)

THE defendant was convicted of manslaughter, before his Honor, *Judge Settle,* at GUILFORD, on the last Spring Circuit, and from the judgment rendered on the verdict he appealed to the Supreme Court.

No bill of exceptions nor statement of the case accompanies the (218) record sent up.

Attorney-General for the State.
No counsel for defendant in this Court.

NASH, C. J. Every appeal to this Court from a trial at law consists of the record of the case below, properly so-called, and the statement accompanying it which is in the nature of a bill of exceptions, and contains the proceedings of the court below excepted to. And it is the rule in every court of errors, that he who alleges error must show it. The judgment appealed from must stand as correct, until shown to be incorrect. *S. v. Gallimore,* 29 N. C., 147; *Walton v. Smith,* 30 N. C., 520. In the case before us, there is no statement, no bill of exceptions. We have looked into the record, and find no error there. It is obvious the appeal was taken for delay, without any just cause of complaint—certainly an abuse of the right of appeal, but one which the Legislature alone can correct. The judgment of the court below is affirmed, and this opinion will be certified to the Superior Court of Guilford.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Kyle, 47 N. C., 443; *S. v. Edney,* 80 N. C., 361; *S. v. Murray, ibid.,* 365; *Chasteen v. Martin,* 84 N. C., 391; *S. v. Taylor,* 85 N. C., 591; *Mott v. Ramsay,* 90 N. C., 30; *S. v. Powell,* 94 N. C., 923.

STATE v. MEREDITH JACOBS.

Where by a private act of Assembly abolishing jury trials in the County Courts of Richmond County, no provision was made for removing from said court to the Superior Court, cases where free Negroes were charged with unlawfully migrating into this State, the proper course under the act of 1836 (section 8, chapter 1, Revised Statutes), would be to remove the same by writ of *certiorari* to the Superior Court for trial: *Held,* however, that the removal of such case by consent of parties, dispensed with the necessity of a *certiorari,* and gave the court jurisdiction.

(The case of *S. v. Sluder,* 30 N. C., 487, cited and approved.)

THE defendant was arrested upon a warrant sued out by order of the County Court of Richmond County, at its July Term, 1851, and charged as a free person of color with having migrated into this State, and having failed to depart the same within twenty days, (219) after having been duly notified so to do, contrary to the provisions of the act of Assembly (Rev. Stat., chap. 111, sec. 65, 66, 67). The defendant accordingly appeared, and prayed to have an issue made up and submitted to the jury, under the directions of said act; but the court being informed of a private act of Assembly, abolishing jury trials in the County Courts of Richmond County, ordered "that the case be transmitted to the Superior Court for the trial of the issue."

On the trial, at last Spring Term of the Superior Court of said county, the defendant having pleaded the act under which he was arrested unconstitutional, his Honor, *Judge Dick,* presiding, gave judgment (*pro forma*) dismissing the appeal for want of jurisdiction, and the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
Kelly for defendant, argued:

1. The warrant was defective, no person or body corporate or politic being made plaintiff therein—no amount named that was sought to be recovered (Rev. Stat., chap. 62, sec. 7)—that it does not designate the defendant as a free Negro, nor specify his offense—and that it is issued against several jointly. (*Duffy v. Averitt,* 27 N. C., 455.)

2. The act under which the warrant is issued is unconstitutional. (Sections 7 and 8 of Bill of Rights.)

3. The Superior Court had no jurisdiction. (Rev. Stat., chap. 111, sections 65 to 75.)

4. The private act of 1814 abolishing jury trials in the County Court of Richmond, makes no provision for the transfer of causes to the Superior Court. And consent of parties cannot give jurisdiction. (*Burroughs v. McNeill,* 22 N. C., 297.)

BATTLE, J. The only question which seems to us to be open upon the record is, whether the Superior Court had, under the circumstances, jurisdiction of the case; and of that we think there can be no doubt.

(220) The offense with which the defendant was charged was, undoubtedly, in the first instance, cognizable in the county court, according to the plain provisions of the 65th, 66th, and 67th sections of the 111th chapter of the Revised Statutes. When there, the defendant had a right, under the 73d section of the same act, to have one or more issues made up to try such disputed facts as were material to be ascertained. But in the county of Richmond the private act of 1814, chapter 59, prohibited the trying of any issues of fact by jury in the county court, without providing any specific mode by which such issues were in future to be removed to another tribunal for trial. This act was not repealed by the passage of the 111th chapter of the Revised Statutes in 1836. See 1 Rev. Stat., chap. 1, sec. 8. How did these seemingly inconsistent provisions affect the rights of the defendant? That is shown by the principle laid down in the case of *S. v. Sluder,* 30 N. C., 487. That was a case under the bastardy act, in which the defendant had been arrested and bound over to the County Court of Buncombe County. He appeared, and moved to be discharged, upon the ground that the court had no jurisdiction of the case, the act of 1844, chapter 12, having taken away from the county court of that county the power to try jury causes. The court refused the motion, and proceeded to make the usual orders of filiation, when the defendant appealed to the Superior Court, where, on motion of the solicitor, the appeal was dismissed, and a writ of *procedendo* ordered to the county court. The defendant then appealed to this Court; and it was here held that the act which took away from the county court the power to try issues of fact by a jury, did not deprive it of its original jurisdiction over bastardy cases; that if the defendant in such a case thought proper to make up an issue, he might do so, and then either he or the State had a right to remove the cause by a writ of *certiorari* to the Superior Court, for the purpose of having the issue tried there. So, in a case like the present, the original juris-

diction conferred upon the county court by the 111th chapter of the Revised Statutes, is not taken away in the county of Richmond, by the fact that the defendant has a right to have one or more issues made up to be tried by a jury. As soon as they are made up, then the defendant or the State may take them up by a writ of *certiorari,* (221) to be tried in the Superior Court. In the case now before us, the record does not show that either party obtained such a writ, but shows only the following order: "Ordered, that this cause be transferred to the Superior Court for the trial of the issue." From this we are to presume that the transfer was by consent; and being so, we see no necessity for a writ of *certiorari.* The issue could be disposed of nowhere else; and while it pended, no judgment could be given from which an appeal could be taken. Hence either party had a right to remove it to the Superior Court by the writ above referred to, and we can see no good reason why such writ might not be dispensed with, and the cause transferred at once by mutual consent. If this be so, and we think it is, the cause was properly in the Superior Court for the trial of the issue or issues, and it was error to dismiss it for want of jurisdiction. For this error the judgment must be reversed, which will be certified to the Superior Court, to the end that it may proceed to have the issues joined between the State and defendant tried by a jury; and if such issues be found against the defendant, that a writ of *procedendo* may issue from that court to the county court.

The objections made to the proceedings in the cause before it reached the county court, and during its pendency there, are not, as we have said, open upon the record as it comes before us, and we, therefore, give no opinion upon them.

PER CURIAM. Judgment reversed.

Cited: Thompson v. Floyd, 47 N. C., 313; *McArthur v. McEachin,* 64 N. C., 454.

ELI W. MOORE AND COMPANY v. NATHAN THOMSON.

Where the payee of a bond endorsed thereon a payment for the purpose of bringing the amount within a justice's jurisdiction, upon suit brought before the justice: *Held,* to be a fraud upon the law, and a plea in abatement will be sustained.

(The cases of *S. v. Mangum,* 28 N. C., 369; *Fortescue v. Spencer,* 24 N. C., 63, cited and approved.)

MOORE & CO. *v.* THOMSON.

THIS was an action of debt, commenced by warrant before a justice of the peace, for the sum of one hundred dollars, in the name of Eli W. Moore and Company, as plaintiffs and the same was carried by
(222) the appeal of the defendant to the Superior Court. At Fall Term, 1852, the defendant put in a plea in abatement, averring:

"That the note declared on was given for the sum of one hundred and ten dollars and two cents, to Eli W. Moore and Company that the plaintiffs had theretofore brought suit on said note to the—county court—that the same was there dismissed at plaintiffs' costs—and that plaintiffs' attorney, pending said suit, endorsed on the note a credit of $10.02, and thereupon caused this present suit to be instituted by warrant before a justice of the peace—wherefore, because the said endorsement has been made by the attorney aforesaid of the plaintiffs, with the design and intent to change the jurisdiction from the court aforesaid to a justice of the peace, thereby committing a fraud upon the law in such case made and provided, and the legal rights of the defendant, the said defendant prays judgment," etc.

To which plea the plaintiffs demurred: (1) That the same was double, in that an abatement was prayed for want of parties and for want of jurisdiction, and though assigning as cause of abatement the want of parties, does not set forth the names of the parties omitted. (2) For that it is argumentative.

Upon a joinder in demurrer by defendant, the case was argued at MARTIN, on the last Spring Circuit, before his Honor, *Judge Bailey,* who gave judgment overruling the plea, and requiring the defendant to answer over; from which judgment the defendant appealed.

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

PEARSON, J. The plea is not liable to the objection of being argumentative. It is prolix and sets out irrelevant matter; but this is a mere form, and is not assigned as cause of demurrer.

The part of the plea which we suppose was intended to raise the objection that the names of the individuals who compose the firm of Moore and Company are not set out in the warrant, being left blank, must be treated as surplusage, for the whole is thus in effect
(223) blank, and the rule, *utile per inutile,* etc., applies. So, the only question is in reference to the fraud upon the jurisdiction.

The creditor, without the knowledge or consent of the debtor, enters a credit on the note for the purpose of giving jurisdiction; the debtor has never assented to, or ratified this credit, but has always objected to

it. This does not amount to a payment, and the magistrate had consequently no jurisdiction. It is a familiar maxim of law, "No one can make another his debtor without his consent." The converse is equally true. No one can give another a specific article or a sum of money, unless he chooses to accept it; and although in this latter case the acceptance is usually presumed (as it is supposed to be for his benefit), yet there may be reasons why he may not choose to accept (as in our case), and then the presumption is rebutted. Suppose a creditor, whose debt is about being barred by the statute of limitations or the presumption of payment, enters a credit; no effect whatever is given to it, unless the debtor assents to it. It is said this is like the case of a plaintiff who remits a part of his damages to prevent a variance. There is no analogy; for the court allows the *remittitur* as an amendment of the record. *S. v. Mangum,* 28 N. C., 369; *Fortescue v. Spencer,* 24 N. C., 63 both assume that the case now under consideration would be a fraud upon the jurisdiction. Judgment reversed, and judgment that the writ be abated.

PER CURIAM. Judgment reversed.

Cited: Barrett v. Barrett, 50 N. C., 410.

STATE v. STEPHEN WILLIS.

In an indictment for a nuisance in not keeping a ferry in repair, where the only question was as to the present ownership of the land, to which the ferry had always been appurtenant, and evidence was offered tending to show that the defendant had purchased the same: *Held,* it was no error in the court below to charge the jury that if the defendant was the purchaser of the former owner's estate in the land, they might find that he was the proprietor, and therefore guilty.

(The case of *Biggs v. Ferrell,* 34 N. C., 1, cited and approved.)

THE defendant was indicted for a nuisance, in not keeping a ferry and boat in repair. On the trial before *Manly, J.,* at CRAVEN, on the last Spring Circuit, it appeared in evidence that the ferry in question and the adjoining plantation had been owned by Oliver H. (224) Street, as tenant in common with his brother, Stephen, but for two years immediately previous to the finding of the bill of indictment, the said Oliver had been insolvent. After he had become insolvent, the defendant, who was his uncle, removed to the plantation to which the said ferry was appurtenant; and a witness was called who testified that

the defendant told him that Street did not own anything. There was evidence also of general reputed insolvency, and that he, Oliver, had rented before his insolvency, and continued to rent up to the finding of the bill, the moiety of the land and ferry belonging to his brother, Stephen. Oliver continued to occupy in common with the defendant the plantation down to the finding of the bill—he, the said Oliver, superintending the ferry and receiving the tolls. No deed or conveyance for the land was exhibited; nor was there writing or proof of any kind as to the nature of Street's occupancy. The ferry was proved to be a nuisance.

The only question was as to the defendant's ownership and responsibility. And his Honor left it to the jury to decide this question, informing them that if Willis was the purchaser of Street's estate in the land whereof the ferry had always been an appurtenant, in the absence of all proof of its being excepted, and in view of Street's general bankruptcy, they might find that the defendant was the proprietor of his, Street's half of the ferry, and responsible to the public for its sufficiency. The jury returned a verdict of guilty accordingly, and after an ineffectual motion for a new trial, the defendant appealed from the judgment against him to the Supreme Court.

No counsel for defendant in this Court.
Attorney-General for the State.

BATTLE, J. It is stated in the bill of exceptions that the question raised on the trial was, whether the defendant was owner of the ferry which was proved to be a nuisance. It does not seem to have been disputed that there was testimony sufficient to be submitted to the jury, tending to show that the defendant had purchased the interest of his nephew, Oliver H. Street, in the tract of land to which the ferry
(225) was appurtenant. Of that tract of land and the ferry the said Oliver had, up to the time when he became insolvent, been tenant in common with his brother, Stephen Street, and had rented the ferry of his brother, kept it, and received the tolls. It appears that he continued after his insolvency to rent his brother's share of the ferry and to receive the tolls, and the question was, whether, if the jury should find that the defendant had purchased his, Oliver's part of the land, his share in the ferry had passed with it. His Honor held, and so charged the jury, that in the absence of proof that the ferry was excepted, it did pass with the land as appurtenant to it. The charge was, we think, fully supported by the principle recognized by this Court in the case of *Biggs v. Ferrell,* 34 N. C., 1—to wit, that where an individual owns land with a franchise annexed, as a ferry or market, and transfers the land

in fee, or for any less estate, "then the franchise passes as an incident; like rent, which passes with the reversion, as incident thereto."

There was no error in the charge of the court; and this opinion must be certified to the Superior Court of Law for the county of Craven, that it may proceed to judgment according to law.

PER CURIAM. Judgment affirmed.

Cited: Haithcock v. Manufacturing Co., 72 N. C., 414.

LURANA CREDLE v. WILLIAM H. CREDLE.

1. Where a father put his son in possession of land and afterwards treated it as his, but gave him no deed therefor, and by agreement between the father, his son, and son-in-law, the latter conveyed to the son several slaves in exchange for the said land conveyed to him by the father: *Held*, that this was an advancement of the slaves, and not of the land, to the son.

2. Where the widow dissents from her husband's will, advancements by the testator to a child must be brought into hotchpot, in the ascertainment of her share of the personalty.

(The case of *Hunter v. Husted*, 45 N. C., 97, cited and approved.)

THIS was a petition filed by the plaintiff, as widow of Nathaniel Credle, against the defendant, his executor, for an account and settlement of the personal estate. The defendant answered, and the parties proceeded to take testimony; and the following was substantially the case, as it was heard by his Honor, *Judge Settle*, at HYDE, (226) on the last Spring Circuit:

The said Nathaniel Credle died in the year 1850, leaving a will which was duly admitted to probate, and from which the petitioner in due form of law dissented; and the defendant, his son, was qualified as executor. Previously to 1845, the testator had put the defendant in possession of a certain tract of land, and had been accustomed to speak of and treat it as his said son's land—though he executed no deed for the same. Previously, also, to April, 1845, the said testator made an arrangement with one Martin Howard and the defendant, by virtue of which Howard was to convey to the defendant eight slaves, and in consideration therefor, the testator was to execute to him a deed for the said tract of land; and in pursuance of this agreement, on 15 April, 1845, the said exchange was made—Howard taking the testator's deed for the land, and the defendant taking Howard's deed of same date for the slaves.

Thus the principal questions presented to his Honor, upon the proofs and exhibits were, first, whether the said slaves (or the land) were an advancement to the defendant by his father, as contended for by the plaintiff? and if so, whether they were to be brought into hotchpot in favor of the petitioner? For the defendant, it was insisted that the rule requiring advancements to be brought into hotchpot, did not apply to the case of a widow's dissenting from her husband's will; and if it did, the case showed an advancement of the land, and not of the slaves. And of this opinion was his Honor, who gave judgment accordingly, and the plaintiff appealed to the Supreme Court.

Donnel and Shaw for plaintiff.
Rodman for defendant.

NASH, C. J. Advancements are gifts of money or other property made by a parent for the preferment or settlement of a child in life. It is not denied that this case presents an instance of one, and the only contest is, of what did it consist? The Negroes in question belonged to Martin Howard, and the testator had, by parol, given to his son,
(227) the defendant, a tract of land. It was proposed by the testator to Howard, that an exchange should take place between him, Howard, and the defendant; and if he, Howard, would convey the Negroes to the defendant, that he, the testator, would convey to him the land which he had put into the possession of his son. This was accordingly done by the mutual execution of deeds; and the sole question is, was the land an advancement, or were the Negroes? We are of opinion that the latter were. From the whole transaction, we consider the Negroes as having in truth been purchased by the testator, and by him given to the defendant. The land which constituted the consideration for the purchase of the slaves, belonged to the testator; for though he had put the defendant in possession of it, the legal title was still in him. When, therefore, the exchange took place between the defendant and Martin Howard, the defendant paid for the slaves, or, rather, gave in exchange for them the property of his father, the testator—it is true, with his consent and approbation. If before the exchange, the testator had conveyed the land to the defendant, then indeed the case would have been altered, and the consideration for the slaves would have moved from the defendant, as he would have given his own property for them. Whether the testator paid for the slaves in money or land can certainly make no difference in the application of the principle. In *Meadows v. Meadows,* 33 N. C., 148, which involved the question of advancement, his Honor, the late *Chief Justice,* in delivering the opinion of the Court,

observes: "It might be very different if the son did not profess to own the slaves, and not to sell them as his, but only under the authority of the father, and to ask for the assent of the father, as necessary to complete the sale. Then, indeed, it would be substantially the sale of the father, and his gift, not of the slaves, but of the money." Here the first proposition for the exchange was made by the father, and the title to the land to Howard made by him; and the son, the defendant, did not pretend that the land belonged to him. It is, therefore, very plain to us that under the law and the principle recognized in the case of *Meadows,* the Negroes constituted in this case the advancement, and that the advancement is the value of the Negroes, deducting therefrom the seventy-five dollars advanced by the defendant, and constituting a portion of the consideration given for them. (228)

Other questions are presented by the record. The first is as to the effect of a widow's dissent from her husband's will upon her share of his personal estate. This question is settled by the case of *Hunter v. Husted,* 45 N. C., 97. In that case, it is true, the Court were divided in opinion; and upon a review of its principles, we see no cause to depart from it—a majority of the then Court being still on the bench. In deciding this case, there is no diversity of opinion. We adhere to the doctrine then declared, that where a widow dissents from her husband's will, "her share is to be ascertained as if the husband had died intestate"; and of course, advancements made to the children must be brought into hotchpot. The other questions are settled by the same case.

The judgment of the court below was erroneous. It is therefore reversed, and judgment given for the plaintiff.

PER CURIAM. Judgment accordingly.

Cited: Arrington v. Dortch, 77 N. C., 370.

GEORGE GREEN v. JAMES H. ALLEN.

It is the duty of every person owning taxable slaves, if he reside in this State, to enlist them for taxation in the county of his residence (under the act of 1846).

THIS was an action of trespass *vi et armis,* to recover damages for taking the plaintiff's slave—pleas, not guilty and justification. The case was tried before his Honor, *Judge Dick,* at BRUNSWICK, on the last

Spring Circuit, upon the following statement of facts, agreed between the parties:

The plaintiff, residing in Craven County, had hired his slave for two years to one Joseph Green, a resident of the county of Brunswick. While in the possession of Green, the defendant, who is sheriff of Brunswick, distrained said slave for taxes which he alleged were due upon unlisted property. It was admitted that the slave had not been listed (229) in the county of Brunswick, but that he was listed in Craven, where the owner resided. It was contended for the plaintiff, that by the act of 1846-'7, as owner of said slave, he was bound to list him in the county of Craven, where he resided, and not in the county of Brunswick, in which the slave was hired and lived at the time. His Honor, the presiding judge, being of a different opinion, the plaintiff, in deference thereto, submitted to a nonsuit, and appealed to the Supreme Court.

Strange for plaintiff, argued:

1. The act of Assembly (Revised Statutes, chapter 102, section 24) directs that the owners of slaves shall list them in the counties where they reside. If the word "they" means the owners, there is an end of the matter. It cannot mean the slaves, because slaves cannot be said to have any residence. All the relative pronouns used in the section refer to the owners, and no reason is seen why it should not do so in this instance.

2. The act of 1846, chapter 75, section 6, declares that the hirer shall not be liable to list slaves unless the owner resides out of the State.

3. Section 45, chapter 102, Revised Statutes, requires a demand on the owner before the sheriff can distrain for the taxes.

4. Taxes are levied, not on the property as such, but on the owner, for the property he owns; and therefore, the proceeding is against him, and his property is only distrained to compel the performance of the personal duty of paying the taxes.

D. Reid, with whom was *Troy, contra,* insisted that the several acts concerning revenue, reënacted in 1836 (Revised Statutes, chapter 102, sections 24, 25), required the owner or person in possession of the slaves, to list them for taxation in the county in which said slaves resided on 1 April in each year.

The act of 1846 made it the duty of the owner, whether in possession or not on 1 April, to list his taxable slaves, and is silent as to the place of listing. This act repeals the former revenue acts only as to the person to list.

BATTLE, J. There is but a single question presented in this case, and that is, whether under the act of 1846, chapter 67, (230) section 6, the owner of slaves shall enlist them for taxation in the county in which he resides, or in that where the slaves may be hired out during the year in which they are to be enlisted. The question is one of much practical importance, and is not entirely free from doubt. The difficulty has arisen from the fact, the Legislature, in making a partial change in the former revenue law, did not advert to all the provisions of that law, and has thereby left it as a question of construction, instead of plainly expressing whether certain other changes which seem to be rendered necessary by the new act, are to be adopted or not. This difficulty can be cleared up only by taking a view of the former acts, and considering the mischief which the new enactment was intended to remedy. We can then determine, with some degree of certainty, how far we can be justified in putting such a construction upon the act of 1846, as will accomplish the intention of the lawmakers.

The 102d chapter of the Revised Statutes, passed in the year 1836, was a revision and consolidation of all the revenue laws which had been enacted and were in force prior to that time. In the 24th section, after providing for the enlistment by the inhabitants of the several counties in their respective districts, of lands, white polls, free Negroes, and mulattoes, it proceeds as follows: "The number of slaves, male and female, between the ages of twelve and fifty years, which to them belong, or who live in their family, said slaves to be listed in the county where they reside." This section, so far as it relates to slaves, was taken from the acts of 1784 (Revised Code, chapter 195, section 1), and 1822 (Taylor's Rev., chap. 1129, section 10). The manifest meaning of it is, that hired slaves were to be listed for taxation in the county where the slaves resided. The counsel for the plaintiff, indeed, contends that the pronoun "they" refers to the owners or hirers, and not to the slaves, alleging as a reason, that slaves cannot, in a legal sense, be said to have a residence anywhere. Whether the criticism upon the meaning of the word "reside," when used in connection with slaves be in general correct or not, it is certain that it was so used in the act of 1822 above referred to, the language of which is, "that all free males between the ages of twenty-one and forty-five years, and all slaves between the ages of twelve and fifty years, shall pay a poll tax, and all slaves shall (231) be listed in the county wherein they reside." The previous act of 1784 had omitted to specify particularly the county where the slaves were to be listed, requiring only that the inhabitants of the several counties should, in their respective districts, list "the number of slaves, male and female, between the ages of twelve and fifty, which to them

belonged, or who lived in their family." We cannot perceive that the meaning of the two acts is at all changed by their having been brought together and included in the same section of the Revised Statutes. Such, then, was the law in relation to the enlistment of slaves for taxation, at the time when the act of 1846, chapter 67, was passed—to wit, that slaves retained in the service of the owner were to be listed by such owner, and hired slaves by the hirer; and in both cases they were to be listed in the county where the slaves resided. The mischief existing under this arrangement was, that hirers of slaves, having but a temporary interest in them, for that and perhaps other causes, failed to enlist them, and such failure not being discovered by the sheriffs, the State was deprived of much revenue which ought to have been derived from this source. This mischief, it may be presumed, was for many years not seriously felt while slaves were generally hired out to persons in the county in which they were owned; but when they began to be carried to other and perhaps distant counties to labor in mines, and on works of internal improvement, and were frequently removed from one place or county to another, the loss of the State became so great that it attracted the attention of the Legislature, and produced the act now under consideration. The 6th section of this act declares expressly that "in all cases the owner or owners of taxable slaves of this State, and not the hirer, shall enlist them for taxation, whether they be in possession of the owner on the first day of April or not"; providing that when the owner or owners shall reside out of the State, then the slaves shall be enlisted by the hirers. The act is silent as to the county where the slaves shall be given in, and hence the doubt which has caused the present suit. The plaintiff contends that by a necessary construction, they must be enlisted in the county where the owner resides; while the defendant insists that
(232) the place where they are to be enlisted remains as it was before. Arguments of no little weight, from the inconveniences of either construction, may be urged against it. But without attempting to advert particularly to every objection which may be offered to either view, we will state one or two, of such overwhelming force against the latter, that we cannot think that it is in accordance with the intention of the Legislature.

In the first place, then, it would be very difficult, if not impossible, for an owner who had slaves hired out in several different counties in the same year, to enlist them in the respective counties where they were employed, during the time (to wit, the last twenty working days in July) in which that duty must be performed. This difficulty would be still greater where the slaves were hired to a railroad company, to be employed in repairing the road or to act as train hands. The owner

could hardly find out where his slaves were on the first day of April, the time to which the listing must refer. But it is said that the owner may employ an agent to list the slaves for him. The answer to that is, that if generally adopted, it would produce the very mischief which the act of 1846 was intended to remedy—a mischief so great, that Governor Swain, in his message to the Legislature in 1834, stated that in 1830 the whole poll tax, white and black, produced only $28,211, when the tax on slaves alone, had they been properly given in, would have produced about $24,000.

Another objection would be the great difficulty of collecting the tax. The 45th section of the revenue act in the Revised Statutes, which is unaltered by the act of 1846, provides, "that it shall be the duty of the sheriffs to collect the public taxes from each and every individual in their counties respectively, who are liable to pay taxes, whether their names be contained in the list of taxables delivered by the clerks or not; and in all cases where the public taxes shall be demanded of any person, whose name and taxable property are not contained in the list furnished by the clerk, the sheriff shall demand and receive from each and every such person a sum equal to double the amount which he would have been liable to pay, in case a list of his taxable property had been given in due time, and according to law," etc. Now, suppose a slave whose owner resides in a distant county has been omitted to be listed in the county in which he is hired out, how can the sheriff proceed to (233) collect the double tax, without first demanding it of the owner? And in such case, is it not manifest that the costs of making the demand and collecting the tax would often be greater than the tax itself? The Legislature certainly never intended to adopt a plan which would produce such a result. These almost insuperable objections are avoided by adopting the construction contended for by the plaintiff. The owner must know, or can easily ascertain how many slaves he has, either retained in his own service or hired out, for whom he is liable to pay tax, and will be more likely to list them in his own county than in the county or counties where they are hired; and then the sheriff will have very little trouble or expense in collecting the tax due upon them. But it is urged against this construction, that if slaves who are hired out in another county be not listed in the county where their owner resides, the sheriff of the county where the slaves are, cannot know whether they have been listed in the proper county, and the tax will be lost. That may be so; but admitting it, and admitting further that the sheriff of the county where the owner resides may also not find out the omission, the evil, we have reason to suppose, would be much less than it was under the former law, or will be, if the construction contended for by the de-

fendant were adopted. It is upon the conscience of the taxpayers, more than upon the vigilance of the tax collectors, in finding out unlisted property, that the State must mainly rely for raising its revenue. This revenue will be the same to the State, whether it shall come from one county or another; and we confidently believe that much more will be derived from requiring the owners of slaves to enlist them in the counties where such owners reside, than in the counties where the slaves are hired.

We understand that since the act of 1846, this course has generally been pursued, and its good effects are already manifest. In 1830, the whole poll tax paid into the public treasury was, as we have already stated, $28,211. For 1846, just before the act under consideration went into operation, the poll tax was $33,062, an increase in sixteen years of only $4,851, while in 1849, it was $35,010—an increase of nearly
(234) two thousand dollars in three years. We indulge the hope that the increase will be still greater after this decision is known—to wit, that it is the duty of every owner having slaves hired out, who reside in the State, to enlist them for taxation in the county of his residence.

We have said nothing about the power of the county courts to lay a tax upon all taxable slaves employed within their respective counties, because no question in relation to it is raised by the case agreed. The only question before us arises upon the construction of the 6th section of the act of 1846, chapter 67, and upon that we differ from his Honor, and must direct the judgment of nonsuit to be set aside, and judgment to be rendered in favor of the plaintiff for sixpence damages.

PER CURIAM. Nonsuit set aside, and judgment for the plaintiff.

STATE v. WILMINGTON AND MANCHESTER RAILROAD COMPANY.

An indictment charging a railroad company, as the owner of a public ferry, for not keeping up the same, must set forth how the duty of keeping up the ferry and transporting passengers became imposed by their charter.

(The cases of *S. v. Justices of Lenoir*, 11 N. C., 194; *S. v. Commissioners of Halifax*, 15 N. C., 345; *S. v. King*, 25 N. C., 411; *S. v. Patton*, 26 N. C., 16, cited and approved.)

THE defendants were tried and convicted upon the following bill of indictment:

"State of North Carolina, Brunswick County—Superior Court of Law, Spring Term, 1852:

"The jurors for the State, upon their oath present, that the Wilmington and Manchester Railroad Company, being a corporation duly created by the laws of this State, was, on the sixteenth day of October, in the year of our Lord, one thousand eight hundred and fifty-one, and on divers other days and times till the present time, the owner of a common and public ferry, for the use of all the good citizens of the State, in the county of Brunswick, across Brunswick River; and that the (235) said Wilmington and Manchester Railroad Company was wont, and accustomed to convey and transport, for toll and hire, all the good citizens of the State across the said river, at the will and pleasure of the said citizens, and then and there, as said owners and receivers of toll, was by law bound so to do; nevertheless, the said Wilmington and Manchester Railroad Company, on the said sixteenth day of October, at and in the county of Brunswick aforesaid, being then and there duly and lawfully applied to by one Christenberry J. Byrd to be transported across the said river, did wholly refuse and neglect so to transport the said Christenberry J. Byrd, the said Christenberry J. Byrd being then and there able, ready, and willing to pay the ordinary hire and toll for being so transported as aforesaid—in utter disregard of the duty of the said company, in contempt of the laws," etc.

After verdict, the defendants' counsel moved to arrest the judgment, upon the grounds: (1) That it was not charged in the bill of indictment that the said railroad company organized under the charter, and went into enjoyment and exercise of corporate privileges and powers; and secondly, that the location of the ferry is not sufficiently described in said bill of indictment.

His Honor, *Judge Caldwell,* before whom the case was tried, at the Fall Term, 1852, of BRUNSWICK Superior Court, sustained the motion in arrest; from which judgment the solicitor for the State appealed.

Attorney-General for the State.

Banks, with whom was *Wright,* in support of the motion to arrest insisted, that the indictment should aver the organization of the company, under the charter, and that it was at the time a subsisting corporation. (*Attorney-General v. Petersburg and Roanoke Railroad Company,* 28 N. C., 456; ..... on Municipal Corp., 16; Cole on Crim. Jurisprudence, 26.)

2. "The owner of a ferry in Brunswick County" is too indefinite. (Arch. Cr. Pl., 43-45; *S. v. Fore,* 23 N. C., 378.)

3. The indictment should aver how the corporation became bound to keep a common ferry. (*S. v. King,* 25 N. C., 411; *S. v. Patton,* (236) 26 N. C., 16; *S. v. Commissioners of Halifax,* 15 N. C., 345.)

4. The charter does not make the company keepers of a ferry, nor give them power to purchase one; and therefore, as a corporate company, they cannot keep a ferry.

BATTLE, J. It is unnecessary to consider all the objections urged by the defendants against the sufficiency of the bill of indictment, upon their motion to arrest the judgment. We think that it is fatally defective in not setting forth how the duty of keeping a public ferry, and transporting passengers, became imposed upon the defendants. A corporation, being the creature of the law, can acquire only such rights and incur such corresponding liabilities, as may be prescribed in the charter by which it was created. *Head v. Providence Insurance Company,* 2 Cranch's Rep., 127; *The Trustees of Dartmouth College v. Woodward,* 4 Wheat. Rep., 518; *The Bank of the United States v. Dandridge,* 12 Wheat. Rep., 64. A railroad company, for instance, cannot become the owners of a ferry, unless a power authorizing the purchase is expressly or by a necessary implication given to them; and they cannot, therefore, without such power, have the duty imposed upon them of keeping up such ferry. The bill, then, ought to have stated how the defendants, under their charter, became the owners of the public ferry in question, which is an ordinary ferry, and not one necessarily connected with the railroad transportation, and thereby became subjected to the duty of transporting passengers across it. *S. v. Justices of Lenoir,* 11 N. C., 194; *S. v. Commissioners of Halifax,* 15 N. C., 345; *S. v. King,* 25 N. C., 411; *S. v. Patton,* 26 N. C., 16. The indictment being defective in this particular, we must direct the judgment to be arrested, without adverting to the other grounds relied upon by the defendants; and this opinion must be certified as the law directs.

PER CURIAM. Judgment affirmed.

Cited: S. v. Fishblate, 83 N. C., 654.

(237)

WILLIAM BUFFALOW v. JOHN B. HUSSEY, ADMINISTRATOR.

1. A sheriff is not liable as special bail, after he has committed a defendant on *mesne* process, though such defendant be permitted by him to go at large.

2. Where a *scire facias* was issued against a sheriff to charge him as special bail for a person sued at the instance of the plaintiff, and who had been, for want of bail, committed to jail in the sheriff's county, and afterwards discharged as an insolvent by two magistrates: *Held*, that the sheriff was not liable as special bail.

(The case of *Montgomery v. McAlpin*, 23 N. C., 463, cited and approved.)

THIS was a *scire facias* against E. E. Hussey, the intestate of the defendant, to subject him as special bail of one John W. Lewis, to the payment of a judgment against him in the Superior Court of NORTHAMPTON, and the case was submitted to his Honor, *Judge Bailey,* at the Spring Term, 1853, of said court, upon the following facts agreed between the parties:

"On 5 May, 1851, the plaintiff issued his writ returnable to Fall Term, 1851, of the Superior Court of Northampton, against one John W. Lewis, of Duplin County, which came to the hands of E. E. Hussey, sheriff of said county, on 31 July, 1851; and the said Hussey made return of the same as follows:

"'25 September, 1851, executed, and the defendant confined in the jail of my county, for the want of bail.'

"Judgment by default, final for the debt, was taken against Lewis at the return term; and thereupon a *scire facias* to charge the said Hussey as bail of Lewis issued, and was made known to Hussey by the coroner of Duplin County. The said Lewis had been discharged out of the jail of Duplin County by two justices of the peace, as an insolvent debtor—the plaintiff being notified of his application for a discharge.

"The said E. E. Hussey, before pleading to this *scire facias,* died intestate, and the defendant, as his administrator, was made a party in his stead.

"If, upon this state of facts, his Honor is of opinion that the plaintiff is entitled to recover, then there is to be judgment for the plaintiff for the sum of $351, with interest on $300 from 26 April, 1852, and the sum of $7.86 costs formerly recovered, and the costs of (238) this suit; but should his Honor be of opinion that the plaintiff is not entitled to recover, then there is to be judgment for the defendant for his costs," etc.

And his Honor being of opinion that the plaintiff was not entitled to recover, gave judgment for the defendant accordingly, and the plaintiff appealed to the Supreme Court.

Barnes for plaintiff.
Bragg for defendant.

BATTLE, J. The judgment pronounced in the court below, upon the case agreed was, in our opinion, correct. The defendant's intestate as the sheriff of Duplin County was expressly authorized by the 54th section of the 31st chapter of the Revised Statutes, upon arresting the body of Lewis by virtue of the plaintiff's writ, and upon the default of Lewis to give bail, to imprison him in his, the sheriff's own county. After this, the sheriff had no power to take bail from his prisoner, and could not therefore become his special bail, as was decided in the case referred to by the defendant's counsel, of *Montgomery v. McAlpin,* 23 N. C., 463. That case, it is true, differs from the one now before us, in the particular mentioned by the plaintiff's counsel, and that there the defendant in the writ was already in prison under a *capias ad satisfaciendum,* at the instance of another person, which was stated in the sheriff's return. But it will be seen that the court, in the opinion delivered, did not advert to that circumstance. They say that a person who has been arrested, and given bail, may, upon being surrendered by his bail, give other bail according to the provisions of the 4th and 5th sections of the 10th chapter of the Revised Statutes; but if in default of bail on his original arrest, he was committed to jail, he cannot afterwards be permitted by the sheriff to go at large upon bail. In such case, the only mode by which he can be discharged out of custody, is to enter bail to the action in the court to which the writ is returnable, or by obtaining a rule of such court for his discharge, as provided in the 54th section of the 31st chapter, above referred to. "If the sheriff release the prisoner, or permit him to depart from prison, before
(239) such bail is put in as above, or there is a rule of court to discharge him, the sheriff is guilty of an escape," and, of course, he cannot be held liable as special bail. Whether the discharge of the prisoner by the two magistrates of Duplin County, under the circumstances stated in the case agreed, will be a legal defense for the sheriff in an action for an escape, it would be improper for us to decide, as no such question is now before us. It is sufficient for us to say, that the proceeding against him as special bail cannot be sustained.

PER CURIAM. Judgment affirmed.

STATE v. STEPHEN PARISH.

1. Though the examining magistrate, before whom a prisoner charged with felony is brought, does not reduce the examination to writing, as it is his duty to do, yet evidence may be given of such prisoner's confessions at the time.

2. But to render such evidence admissible it must appear that the committing magistrate did not take down the examination in writing, or that the same is lost.

3. Where a magistrate was called to testify to confessions of a prisoner, brought before him on a charge of homicide, and stated that he inquired of the prisoner how the facts were; and the evidence being objected to by prisoner's counsel, the witness stated that the confessions offered were voluntarily made; whereupon the presiding judge allowed them to be given in evidence: *Held*, that the prisoner's counsel was not bound to apprise the solicitor for the State nor the court, of the grounds of his objection, and is not, therefore, precluded from insisting in this Court on the objection, that there was no proof that the prisoner's examination was not reduced to writing.

(Case of *S. v. Irwin*, 2 N. C., 112, cited and approved.)

THE prisoner was indicted for the murder of one Josiah T. Parker. On the trial, before *Saunders, J.*, at CHOWAN, on the last Spring Circuit, a witness named Simpson was introduced to prove certain confessions of the prisoner; and he testified that the prisoner was brought before him and one Welch, justices of the peace of Chowan County, on a warrant for shooting the deceased. "That witness inquired of prisoner how the facts were. This evidence being objected to, witness, in answer to questions put to him, stated that no promise, threat, or inducement of any kind, either of hope or fear, was held out to prisoner, and that he voluntarily made the confession offered. His Honor thereupon admitted the evidence, and the witness proceeded to give the con- (240) fessions and statements of prisoner." It does not appear in the case that the magistrate did not reduce their examination of the prisoner to writing, nor was there any testimony offered in relation to that fact.

(There were several other points made for the prisoner in the court below, and argued also in this Court; but it is deemed unnecessary to state them here, inasmuch as the case in this Court turned upon the single exception above set forth.)

The jury found the prisoner guilty of murder, and judgment of death having been pronounced against him, he appealed to the Supreme Court.

Attorney-General for the State.
Jordan for prisoner.

PEARSON, J. The justice before whom the prisoner was brought on a warrant for shooting the deceased, stated that he inquired of the prisoner how the facts were, and (as we understand the record) was about to relate what the prisoner had said on his examination. "This evidence being objected to, witness, in answer to questions put to him, stated that no promise, threat, or inducement of any kind, either of hope or fear was held out to prisoner, and that he voluntarily made the confessions offered. His Honor thereupon admitted the evidence, and the witness proceeded to give the confessions and statement of prisoner."

For this the prisoner excepts. There is error. It was at one time questioned whether parol evidence of what a prisoner said, upon his examination before the committing magistrate, could be given in evidence by the State under any circumstances, on the ground that it was the duty of the magistrate to put the examination in writing; and the State ought not to take advantage of the neglect of one of its officers. It was decided, however, that the requisition upon the magistrate to reduce the examination to writing was only directory, and there was no reason, notwithstanding his neglect of duty, why the State should not have the benefit of confessions made before him, as well as when they were made before a third person, provided it was proven that the examination had not been taken down in writing; for in the absence of such proof, the presumption was that the magistrate had done his
(241) duty. *S. v. Irwin*, 2 N. C., 112; 1 Leach, 309; Foster, 255, 296; Roscoe's Cr. Ev., 60.

In the case now before us, it was not proven that the examination had not been taken down in writing by the magistrate, as it was his duty to do. The objection, therefore, is fatal, if it is presented by the bill of exceptions.

In reference to this, we have had some difficulty. The evidence was objected to in general terms. The very able and efficient solicitor, taking it for granted that the ground of objection was the want of proof that the confessions were voluntary, immediately removed that ground of objection, and thereupon his Honor admitted the evidence, without adverting to the fact that there was still the ground of objection above referred to. And the question is, was it the duty of the prisoner's counsel to apprise the solicitor for the State, or to inform the court that there was still this ground of objection to the admissibility of the evidence? Or was it the duty of the solicitor for the State, or of the court to call upon the prisoner to state his grounds of objection?

As this requisition was not made upon the prisoner's counsel, we are unable to see any reason why the omission to state the grounds of objection to the evidence, should preclude the prisoner from insisting that

he is entitled to a *venire de novo,* because, after objection on his part, evidence was admitted which the law did not authorize upon the state of facts then before the court.

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

Cited: S. v. Matthews, 66 N. C., 110; *S. v. Cruse,* 74 N. C., 492; *S. v. Secrest,* 80 N. C., 455; *S. v. Johnston,* 82 N. C., 589; *S. v. Kemp,* 87 N. C., 539; *S. v. Suggs,* 89 N. C., 527; *S. v. Pressley,* 90 N. C., 730; *S. v. Cole,* 94 N. C., 964; *S. v. Wilkerson,* 103 N. C., 341.

(242)

DAVID H. STOKER ET UX. v. DAVID KENDALL.

1. The right of the next of kin to letters of administration is not absolute and exclusive, so as to give them a legal claim to demand that the appointment of a third person as administrator should be vacated, to make room for their application.

2. If the next of kin do not apply for letters of administration, or fail to give bond and security as the law requires, and the county court thereupon gives the appointment to some other person, the next of kin have no further right, and the court has no power to revoke or declare void such appointment.

THIS was a contest for letters of administration on the estate of Eliza Coleman, deceased, commenced in the County Court of Stanly, and the following is substantially the case, as presented by the record:

David Kendall, the defendant, gave notice to the plaintiff to come forward and apply for administration on the estate of said intestate, and that he would make application at November Term, 1849, for the same as a creditor or claimant against the said estate, and as assignee (of R. P. Coleman, the brother, and Nency R., sister of the intestate), of the right of administration. At November Sessions, 1849, the plaintiff appeared and applied for letters of administration, which were granted to him by the court, on his giving bond and security according to law. But he failed to give the bond required; and at February sessions following, letters of administration were granted to the defendant, who entered into bond as required by the court, was qualified, and entered upon the administration of the estate of the said intestate. At the May sessions of said county court, the plaintiff and his wife caused notice to issue to defendant to show cause why the letters of administration theretofore issued to him should not be revoked, and letters granted to

them as next of kin of the intestate; and at August Term, 1850, the parties appeared, when the said County Court of Stanly refused to vacate the letters of administration to the defendant, and the plaintiffs appealed to the Superior Court.

And the matter of the plaintiffs' application coming on to be argued before his Honor, *Judge Dick,* at the last Spring Term of the Superior Court, he gave judgment vacating the letters of administration granted to the defendant, and directed a *procedendo* to issue to the county court, to proceed in appointing the plaintiffs as administrators of the (243) said estate; from which judgment the defendant appealed.

Strange for appellant:

1. The next of kin may appoint a person to take out letters of administration in their stead. *Ritchie v. McAuslin,* 2 N. C., 220; *Smith v. Munroe,* 23 N. C., 345; Wms. on Ex's, 283.

2. As to rights of creditors and persons having the beneficial interest; *vide* Wms. on Ex'rs, 290.

3. But Stoker and wife had forfeited their right, by not complying with the terms of the act of Assembly. (Rev. Stat., chap. 46, sec. 2.)

4. As to the cases in which a court may revoke letters. (Wms. on Ex'rs, 377, 391.)

Dargan, contra.

PEARSON, J. The right of the next of kin to be appointed administrator is not absolute and exclusive, so as to give such next of kin a legal claim to demand that the appointment of a third person should be vacated, to make room for their application. If the next of kin do not apply for the appointment, or fail (as in our case), to give bond and security as the law requires, and the county court thereupon gives the appointment to some other person, the next of kin have no further right, and the court has no power to revoke or declare void the appointment previously made.

The object in appointing an administrator, is to have the estate of the intestate taken care of. Since the statute of distributions, it in fact makes but little difference who is appointed administrator, so that he is a fit person, and gives the bond required by law. Prior to that statute, as the administrator had a right to the surplus, after the debts were paid, it was a matter of very considerable consequence to obtain letters of administration; and there were frequently contests about the right. But now it can only affect the right of the creditor to retain; and when

the next of kin are guilty of laches as to the time of making the application or otherwise, the county court may exercise a sound discretion in the premises. The judgment of the Superior Court is reversed. This opinion will be certified.

PER CURIAM. Judgment reversed.

Cited: Jinkins v. Sapp, 48 N. C., 512; *Atkins v. McCormick,* 49 N. C., 275; *Hughes v. Pipkin,* 61 N. C., 6; *Williams v. Neville,* 108 N. C., 563; *Boynton v. Heartt,* 158 N. C., 492.

(244)

STATE (AND SUSANNA ADAMS) v. BRYAN H. PATE, JR.

1. All suits prosecuted in the name of the State are not necessarily criminal suits, as distinguished from civil suits—the true test being, that when the proceeding is by indictment, the suit is criminal, and when by action, or other mode, though in the name of the State, it is a civil suit.

2. Hence, a proceeding in bastardy, being a civil suit, where the defendant made up an issue that he was not the father as charged: *Held*, that the State was entitled to four peremptory challenges (under 37th section, 31st chapter, Revised Statutes).

(The case of *S. v. Floyd,* 35 N. C., 382, cited and approved.)

THIS was a proceeding in bastardy, returned to the Court of Pleas and Quarter Sessions of Wayne County, in which court the defendant pleaded that he was not the father of the child as charged. From thence it was carried upon appeal of the county solicitor to the Superior Court, where it was tried before *Manly, J.,* on the last Spring Circuit.

In selecting a jury, the solicitor for the State claimed the right of making four peremptory challenges, which was overruled by his Honor. On the trial, in order to repel the presumption raised by the examination of the woman before the magistrate, the defendant offered to prove that she had made concerning the matter contradictory statements. To this the solicitor objected, upon the ground that the woman must first be called by the defendant. This objection was also overruled by his Honor; and from a verdict and judgment in favor of the defendant, the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
McRae for defendant.

PEARSON, J. By the Revised Statutes, chapter 31, section 37, "each party in all civil suits" may challenge peremptorily four jurors. So the question is, are proceedings in bastardy "civil suits"?

Suits are either civil or criminal. All criminal suits are prosecuted in the name of the State; but all suits prosecuted in the name of the State are not criminal suits—an action of debt may be prosecuted in the name of the State. The true test is, when the proceeding is by indict-
(245) ment, it is a criminal suit; when by action or other mode, although in the name of the State, it is a civil suit, and should be by the clerks put on the civil, as distinguished from the State docket. By the "Declaration of Rights," no free man shall be put to answer any criminal charge, but by indictment, presentment, or impeachment. By Revised Statutes, chapter 35, section 6, no person can be charged in a criminal proceeding, except upon a bill of indictment. Tested in this way, the present is a "civil suit," although prosecuted in the name of the State, and the plaintiff was entitled to four peremptory challenges. The object of the suit is not to punish the defendant for an act done to the injury of the public, but to indemnify the county of Wayne against a liability for the support of a bastard child, of which the defendant is by law the reputed father. The other question is settled. *S. v. Floyd,* 35 N. C., 382.

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

Cited: S. v. Brown, 46 N. C., 130; *Adams v. Pate,* 47 N. C., 15; *S. v. Thompson,* 48 N. C., 367; *Ward v. Bell,* 52 N. C., 80; *S. v. Waldrop,* 63 N. C., 508; *S. v. McIntosh,* 64 N. C., 607; *S. v. Green,* 71 N. C., 174; *S. v. Hickerson,* 72 N. C., 422; *S. v. Bryan,* 83 N. C., 611; *S. v. Collins,* 85 N. C., 513; *S. v. Wilkie, ibid.,* 514; *S. v. Crouse,* 86 N. C., 617; *S. v. Peeples,* 108 N. C., 769; *S. v. Edwards,* 110 N. C., 512; *S. v. Burton,* 113 N. C., 659; *S. v. Ostwalt,* 118 N. C., 1214; *S. v. Ballard,* 122 N. C., 1030; *S. v. Liles,* 134 N. C., 737.

STATE v. JAMES L. CARDWELL.

1. **An indictment for obstructing a public highway, where the question was whether the same had been used as a public highway or not, and there was a conflict of testimony between the witnesses for the State and the defendant as to that fact; and the judge below charged the jury that "if the evidence offered in the case satisfied them that the road had been used as a public highway for twenty years, they were at liberty to pre-**

sume that the said road had been established as a public highway," and in that case the defendant was guilty; and he declined to charge, as asked for by the defendant, that if the road had been used in no other manner than as described by the defendant's witnesses (not as a public road), the jury were not at liberty to infer its establishment as a public road: *Held*, that such charge was a violation of the act of 1796. (Revised Statutes, chap. 31, sec. 136.)

2. It seems that the establishment of a public highway may be inferred by the jury from the use of it as such for twenty years, although the time and manner of the user is shown to have been under imperfect and irregular proceedings.

THE defendant was indicted for obstructing a public highway. On the trial before his Honor, *Judge Settle*, at ROCKINGHAM, at Spring Term, 1853, the only question was as to whether the road charged in the bill of indictment was a public highway or not—the fact (246) of its obstruction by the defendant not being denied.

The State offered in evidence a record of the County Court of Rockingham, at May Term, 1826, in the following words: "Richard Wall and others—Petition for road—Advertised—ordered that a writ issue to summon a jury—Issued"; and also a record of August Term, 1826, as follows: "Richard Wall and others—Petition for road—writ issued—report returned and confirmed." No petition praying the establishment of such road, nor writ nor report of any jury in the premises was offered in evidence. The records of said August Term and the February Term following showed the appointment, by the court, of overseers over the said road. The prosecutor testified that he thought, though he was not certain of the fact, that he had known the said road once worked upon by an overseer and hands, and that at another time he himself, with his own Negroes, had worked on it, though without any authority from court. That the road had been used as a public road for twenty or twenty-five years, and was so considered in the neighborhood. Another witness testified that he had worked on the road under the overseer appointed in the year 1827, but that he had never known it worked on since that time—though he lived in the neighborhood. Another witness stated that in 1827 he saw a jury, one of whom was the father of the defendant, laying off the road, and he thought the road, as marked off at that time, ran on the same track with the road now obstructed. It was further proved on the part of the State, that the defendant had said, a few years before the finding of the bill, that the road was a public road, and had been as long as he had known it.

The defendant introduced several witnesses, two of whom testified that they were born on the land through which the said road runs, and

had known it well for twenty or twenty-five years, during which time its track had been almost entirely changed; that it never had been used or considered by the neighborhood as a public road, but only as a passway for persons on foot or horseback, except as to one part of it, over which the father of the defendant was in the practice of hauling logs to his mill; that they had never known it worked on, nor heard of its being so, and that for twenty years or more it had been almost impassable for vehicles; and one of the witnesses, a brother of the defendant,
(247) stated that he had repeatedly known his father to change portions of the road as his convenience required him to change his fences—though the fence of the defendant crosses the track of said road as it ran when he first knew it. Other witnesses testified that they lived in the neighborhood of the said road; that they had known it for twenty or twenty-five years; that it never had been reputed a public road, nor worked on as such, so far as they knew or ever heard of; that they had never known it used except by persons on foot or horseback, and that during most of the period it had been almost impassable for wheel vehicles.

The defendant's counsel asked the court to charge the jury: first, that according to the proof, the road had never been established as a public road, in the manner prescribed by act of Assembly, for the reason that no petition praying for the same, nor writ, nor report of the jury had been offered in evidence; second, that if the road had been used in no other manner for twenty or twenty-five years, than as described by the defendant's witnesses, the jury were not at liberty to infer its establishment as a public road; and third, that where the time and manner of the commencement of the user of the road was shown, as in this case, to be under imperfect and irregular proceedings of the county court, the jury were not at liberty to infer its establishment from the user of twenty years.

His Honor charged the jury, that there were two modes known to the law by which public highways could be established. (1) By the mode described by act of Assembly—but that the proceedings of the county court offered in evidence here were defective and insufficient, for the reason that no petition, nor writ nor report was shown. (2) Though the proceedings of the county court were defective, that if the evidence offered in this case satisfied the jury that the road had been used by the public as a highway for the space of twenty years, they were at liberty to presume that the said road had been established as a public highway, and in that case they ought to find the defendant guilty; and his Honor declined to charge the jury that if the road had been used merely as described by the defendant's witnesses, they were not at liberty to pre-

sume its establishment as a public road. And his Honor further declined to charge the jury as prayed for on the third point. There was a verdict of guilty—motion for a new trial overruled—and judgment being rendered on the verdict, the defendant appealed. (248)

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

BATTLE, J. The defendant's counsel prayed the court for special instructions to the jury in three several particulars. The first was given; and of that the defendant has no right to complain. The second was refused; and if the defendant was entitled to it in law, the refusal to give it was error, even though the general charge was of itself unexceptionable, as has been several times decided by this Court. *S. v. O'Neal,* 29 N. C., 251. The use of a road, as a public highway for twenty years, will authorize a jury to presume its dedication to that purpose; and the general charge of the court recognizing that principle is fully sustained by the cases of *Woolard v. McCullough,* 23 N. C., 432; *S. v. Marble,* 26 N. C., 318; *S. v. Hunter,* 27 N. C., 369. But the defendant's witnesses swore that it never had been used or considered in the neighborhood as a public road; that it never had been worked on as such; that its location had been several times changed by the persons over whose lands it ran, and that it had been used only by passengers on foot and horseback, and was nearly impassable for wheel vehicles. If this testimony was true, it rebutted rather than supported the presumption of the road's being a public one. Why, then, did not his Honor so charge the jury? His refusal must have been for the reason, either that the desired instruction was not supported by law, or that it was rendered unnecessary by his general charge. That it was in accordance with law, there can be no doubt; and that it was not rendered unnecessary by the general charge will be made evident by a moment's reflection. That charge, in the terms in which it was given, tended to direct the attention of the jury more to the testimony introduced by the State than to that offered by the defendant; and to leave the impression upon them that the judge thought the State entitled to their verdict. This the defendant had a right to have corrected; and if his instruction had been given, then the views of both parties would have been distinctly (249) presented to the jury, and they would have been compelled to decide between the parties, without the possibility of having been misled by the supposition that the court favored one more than the other. The refusal to give the instruction tended still further to prejudice the jury against the case of the defendant, by leading them to suppose that

it was not sustained in fact, or was against law. This was a palpable violation of the act of 1796 (1 Rev. Stat., chap. 31, sec. 136), which forbids a judge from giving an opinion whether a fact is fully or sufficiently proved, but declares it to be his duty to state, in a full and correct manner, the facts given in evidence, and to declare and explain the law arising thereon. Hence, it is settled, that if there be no testimony sufficient to establish a fact, it is the duty of the judge to say so; but if there be any testimony tending to prove the fact, he must leave its weight to be determined by the jury, while he declares and explains its effect in law. The principles herein stated will be found decided or referred to in the following, among other cases: *Reed v. Shenck,* 13 N. C., 415; *S. v. Moses, ibid.,* 452; *Simpson v. Blount,* 14 N. C., 34; *McRae v. Evans,* 18 N. C., 243; *S. v. Scott,* 19 N. C., 35; *Horney v. Craven,* 26 N. C., 513; *Bynum v. Bynum,* 33 N. C., 632; *Hice v. Woodard,* 34 N. C., 293; *Avery v. Stephenson, ibid.,* 34; *Bailey v. Pool,* 35 N. C., 404.

As the defendant is entitled to a new trial on account of the refusal of the judge to give the second instruction which he prayed, we have not considered particularly the propriety of the third; but we are inclined to think that it is untenable, and that his Honor properly refused to give it.

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

Cited: Melvin v. Easley, 46 N. C., 389; *Askew v. Wynne,* 52 N. C., 24; *S. v. Gilmer,* 97 N. C., 431; *S. v. Melton,* 120 N. C., 597; *Lewis v. Steamship Co.,* 132 N. C., 920.

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(250)

JOHN STRAMBURG v. HENRY HECKMAN.

1. A plea in abatement to the jurisdiction, averring that both the plaintiff and defendant are foreigners, but not averring that the contract sued on was made abroad, is defective and cannot be sustained.

2. This Court will not take notice of the statement of facts, made by the judge below, when no issue is joined in regard thereto.

ASSUMPSIT for work and labor done, commenced by warrant before a justice of the peace, and upon appeal to the Superior Court, the defendant put in a plea in abatement, averring that "the parties to said action are foreigners; that the said Henry Heckman was not at the time of the suing out of the original warrant in this case, is not now,

and has not at any time been, a citizen of any of the United States of America, nor a resident of any of the United States of America, but that he was at the time of the suing out of the said original warrant, and still is, a subject of Victoria, Queen of the United Kingdom of Great Britain and Ireland, a citizen of Nova Scotia, and a citizen of Yarmouth, Nova Scotia; and that the said John Stramburg was not at the time of the suing out of the said original warrant in this case, and is not now, and hath not at any time been a citizen of any of the United States of America, or a resident of any of the United States of America, but that he was at the time of the suing out of the said warrant in this case, and is now, and hath always been, a subject of Victoria, Queen of the United Kingdom of Great Britain and Ireland, a citizen and resident of Bristol, England, and this action is properly cognizable in the courts of Great Britain, and this the said defendant is ready to verify, wherefore he prays judgment," etc. To this plea the plaintiff demurred.

His Honor, *Judge Manly,* before whom the case was tried at NEW HANOVER Superior Court, at its Special Term, in 1852, gave judgment overruling the demurrer, and sustaining the plea; from which the plaintiff prayed an appeal to the Supreme Court, and his Honor disallowing the same, on the ground that the plaintiff sued *in forma pauperis,* the case was brought up to this Court by *certiorari* at last June Term.

D. Reid, in support of the demurrer, argued: (251)

1. That the plea does not deny the defendant's residence in the county of New Hanover, except *arguendo,* and is bad. (*Moseley v. Hunter,* 25 N. C., 543.)

2. The plea does not give a better writ. This Court cannot judicially know that there are courts of common-law jurisdiction in Nova Scotia.

3. Nor does it set out that the cause of action accrued beyond the jurisdiction of the United States. He further argued that foreigners may sue in our courts on contracts made abroad. (Story's Confl. Laws, chap. 14, sections 538, 542, 554; *De la Vego v. Vianna,* 1 Barn. and Adolph., 284.)

Strange, contra: This case presents the questions:

1. Have our courts jurisdiction, where the plaintiff and defendant are aliens, and the contract was made abroad? This question is raised by the plea and demurrer. *Gardner v. Thomas,* 14 John. Rep., 134; *Johnson v. Dalton,* 1 Cow. Rep., 543; *Boutlett v. Wyman,* 14 John.,

260; *Hallett v. Lamothe,* 7 N. C., 279; *Martin v. Hunter's Lessee,* 1 Wheat., 334.) He also cited Acts of Congress, 1790, chap. 50, sec. 6.

2. As to the right of plaintiff to *certiorari,* he cited *Estes v. Hairston,* 12 N. C., 354; *Baker v. Halsted, ante,* 41.

PEARSON, J. We are confined by the record to the single question of the sufficiency of the plea in abatement. It is fatally defective, and does not present the question intended. There is no allegation that the contract was made in a foreign country. For aught that appears upon the face of the record, the contract was made in this State; and the plea presents the question, can one foreigner sue another in the courts of this State, upon a contract for "work and labor done," entered into in this State? The judge in the court below sends up a statement of facts; but there was no issue joined upon the facts, and the statement of his Honor has no bearing on the case, as presented by the record.

The opinion will be certified, and the court below will enter judgment *respondeat ouster.*

PER CURIAM. Judgment reversed.

Cited: Miller v. Black, 47 N. C., 343.

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(252)

STATE v. ALVIN G. THORNTON.

The keeper of a shop for the sale of spirituous liquors, who permits the promiscuous assembling about his shop of persons who cause disturbance by loud noises, quarreling and swearing, and such disturbance being the probable consequence of his conduct, is indictable for keeping a disorderly house.

(The principle of this case distinguished from the case of *S. v. Mathews,* 19 N. C., 424.)

THE defendant was tried upon an indictment for a nuisance, before *Manly, J.,* on the last Spring Circuit, at WAYNE, to which county the case had been removed from the county of Johnston; and the following is the case transmitted to this Court:

"It appeared that the nuisance consisted in the frequent assembling together of persons, white and black, in the day time and the night, on work-days and Sundays, at public and private times, in the town of Smithfield, and drinking and making loud noises by loud talking, cursing, swearing, and quarreling. The disturbances occasionally took place in the shop of the defendant, but more frequently in front of and

around it. It appeared that the defendant sold spirituous liquors in this shop, and persons passed in and out of it. It also appeared that there were two other shops for the sale of spirits in the same part of the town—one of them being opposite.

"Upon the subject of the defendant's responsibility for the nuisance, the court held that if it were caused by persons in his house, or by persons immediately in front of or otherwise adjacent to his house, who had been furnished by him with excess of liquor, and the disturbances were thus the probable and natural consequences of his, defendant's conduct, he was responsible; and instructions to this effect being given, there was a verdict of guilty, upon which judgment having been rendered, the defendant appealed to the Supreme Court."

Attorney-General for the State.
Miller for defendant.

PEARSON, J. There is no error. We concur with the judge in the court below, both in his conclusion and his reasoning.

PER CURIAM. Judgment affirmed.

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(253)

WILLIAM H. WILLARD v. DAVID L. PERKINS.

1. A. bought of B., a distiller, three hundred barrels of rosin, to be delivered "when called for within the week next after the purchase," and paid for the same. Within "the week," B. manufactured and had on hand at his distillery more than the above quantity of rosin, but A. did not call for it within "the week," and afterwards it, with the distillery, was consumed by fire:

2. *Held*, first, that A. was bound to call for the rosin within the time agreed upon.

3. Secondly, that B. was not bound to set apart for A. any particular three hundred barrels.

4. Thirdly, that A., having failed to perform his part of the contract, the rosin remained at his risk, and the loss must be borne by him. And, therefore, he could recover neither the value upon the contract, nor the price, on a count for money had and received.

(The case of *Waldo et al. v. Belcher*, 33 N. C., 609, distinguished from this.)

ASSUMPSIT, in which the plaintiff declared upon a breach of contract by defendant in not delivering three hundred barrels of rosin, for money had and received. Plea, general issue. The case was tried before *Manly*,

J., at the January Special Term of BEAUFORT Superior Court, 1853, upon the following facts agreed between the parties:

The plaintiff purchased from the defendant three hundred barrels of rosin, and took from him the following receipt:

"William H. Willard, Bo't of D. L. Perkins 300 barrels common rosin at 90, $270, in merchantable order, and to be delivered when called for next week—24 January, 1851.

Received payment, D. L. Perkins."

Perkins at the time was a distiller, having a still on the river opposite Washington, in which town the parties resided. At the time the receipt was given, Perkins had not the quantity of rosin on hand. A few days after the expiration of the "next week" (mentioned in the receipt), Perkins's still was accidentally burnt down. There was a demand by the plaintiff, and a refusal by the defendant on or about 1 April, 1851. After the date of the receipt, and before the expiration of the next week, Perkins manufactured a much larger quantity of rosin than three hundred barrels, and the same was on hand at his still, and afterwards, until his still was burnt, when the rosin was burnt with the still. (254) At no time was any part of said rosin set apart for Willard.

His Honor being of opinion that the plaintiff was entitled to recover, instructed the jury accordingly, who found a verdict for the plaintiff; and judgment having been thereon rendered, the defendant appealed to the Supreme Court.

Rodman, for defendant, argued:

1. The plaintiff cannot recover on the special contract, because he has not performed his part of it. (*Brown v. Ray,* 33 N. C., 222.)

2. He cannot recover on the count for money had, because the special contract is still open and unrescinded, and because he is himself in fault.

Donnell contra.

PEARSON, J. The value of the rosin must be a dead loss to one of the parties; and the question is, upon which of the two shall the loss fall? It must fall upon the defendant, although there was no default on his part, because it was in his possession when it was burnt, under the rule, "a loss by the act of God falls upon the owner," unless the plaintiff had, by a breach of the contract on his part, taken the risk upon himself.

If the plaintiff was bound by the terms of the contract to take away the rosin at some time during the "next week," and violated the contract by not doing so, it was his fault that the rosin was left exposed to the fire; and he is not at liberty to put the loss on the defendant by force of the maxim, "no one shall take advantage of his own wrong." So the question turns upon the construction of the contract. Was it the duty of the plaintiff, according to the contract, to take away the rosin at some time during the "next week?" Was that a part of the bargain? Such is the import of the words made use of by the parties, and there is nothing growing out of the nature of the thing to call for a departure from the words. On the contrary, all collateral considerations which the court is at liberty to notice, tend to support that construction. The plaintiff paid the price down. This indicates an intention to take the article which he had paid for, as soon as he could get it. Rosin is of a highly inflammable nature, and no distiller will suffer it to accumulate on his premises longer than he can help it. This affords an inference that, although the defendant not having the article then on (255) hand, would not bind himself to deliver it until the "next week," still he required the plaintiff to take it away at some time during that week. If it was not to be taken away during the next week, how long did the defendant agree to keep it for the plaintiff? For an indefinite time? for one year, or how long? It is said for a reasonable time. It is difficult to say what would be a reasonable time, considering how much it would encumber the yard of the distillery, and add to the danger of fire. But the parties have not left this to conjecture; they have fixed on some time during the next week.

The plaintiff violated his contract in not calling for it in that time, and it was left there at his risk. Had it not been burnt, he could have got it at any time; but he certainly would have been liable to pay the defendant storage for keeping it.

It was said by Mr. Donnell, "that time is not of the essence of a contract." That is a maxim of a court of equity in regard to the payment of money; but it does not extend to other things even in that event, and no court can hold, that the time for the delivery of a large quantity of rosin or of gunpowder at the factory is not, from the nature of things, a very material part of the contract.

It is also said, the rosin was never set apart and identified as the property of the plaintiff. What right or under what obligation was the defendant to set apart the rosin before the plaintiff called for it? Who was to pay for the trouble of moving it? What good would it have done to set it apart, in the absence of the plaintiff, who, of course, would not be bound by it? Our decision is put on the ground, not that the rosin

had become the property of the plaintiff, but by a violation of his contract in not calling for it, it remained there at his risk.

Our attention was called to *Waldo v. Belcher,* 33 N. C., 609, and it is said there, stress is laid on the fact that the corn was not measured and set apart, and consequently did not become the property of the defendant. So its destruction was the loss of the plaintiff. In that case, the question was whether the corn had been the property of the defendant at the date of the contract, and it was held it had not, because (256) it was not measured up and set apart so as to be then capable of being delivered. But there is no intimation that it would have made any difference if, after the date of the contract, the plaintiff had, in the absence of the defendant, gone through the idle ceremony of measuring up the requisite number of bushels, and made proclamation that he set it apart for the defendant.

In that case the corn was burnt before it was the duty of the defendant, according to the contract, to take it away. Here the rosin was burnt after the plaintiff was in default in not taking it away, and while by reason of such default it was left there at his risk: the distinction is obvious.

Having decided that the plaintiff cannot recover upon the count on the special contract, by reason of the breach of the contract on his part, it follows as a matter of course that he cannot recover on the common count for money had and received to his use. The proposition is self-evident, that where there is a special contract, one of the parties cannot fall back on the common counts, while the contract remains open and is not put an end to, either by mutual consent, or by such a breach or default on the side of the other party, as will give to the former a right to treat the contract as a nullity. This proposition is so fully sustained by its good sense that no authority need be cited to support it. The idea that the plaintiff, who, by reason of a breach of the contract on his part, cannot recover upon it, is, for that reason, at liberty to treat it as a nullity and fall back on the common count, cannot be entertained for a moment.

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

Cited: Long v. Spruill, 52 N. C., 97; *Edmondson v. Fort,* 75 N. C., 407; *Austin v. Dawson, ibid.,* 526.

STATE EX REL. WILLIAM HILL AND H. W. WOLFF v. ELISHA BONNER, JACOB L. FULK, AND OTHERS.

1. Where by an act of Assembly, certain persons were appointed commissioners "to select and determine upon a site for a permanent seat of justice for S. County, who shall locate the same as near the center of said county as a suitable location can be obtained, taking into consideration both the extent of territory and population"; and the commissioners had made a selection. Upon an application for a prohibition and *mandamus*, on the general ground that the site selected was not in the center of the county: *Held*, that though, had the commissioners neglected to discharge the duty at all, the court might by *mandamus* have enforced its performance, yet here, the commissioners having acted and exercised their judgment in the selection, and the trust evidently requiring, and the act conferring a discretion, the court cannot interpose by *mandamus* to control the exercise of that discretion.

2. *Held*, also, that the relators, at whose instance this application was made, having no particular or private interest in the controversy, which was entirely of a public nature, were not liable on dismission of the application, to pay costs to the defendants.

(The case of *S. v. King*, 23 N. C., 22, cited and approved.)

THIS was an information, filed by the solicitor of the Sixth Judicial Circuit against the defendants, as commissioners appointed under an act of the General Assembly passed at the session of 1850-'51, to select a site for a permanent seat of justice for the county of Surry, to show cause wherefore writs of prohibition and *mandamus* should not issue against them, prohibiting their further proceedings in the sale of town lots, at a place selected by them, called Dobson, and commanding them to select a site, agreeably to the provision of said act, near the center of said county, having due regard to territory and population.

The defendants admitted service of the rule obtained, and filed their answer to said information. Affidavits were taken by both sides, and the cause tried before *Bailey, J.*, at Spring Term, 1853, of SURRY Superior Court of Law. Upon hearing the affidavits and the arguments of counsel, his Honor was of opinion with the defendants, and accordingly discharged the rule and dismissed the information; from which judgment the plaintiffs prayed and obtained an appeal to the Supreme Court.

Winston and Miller for plaintiffs.
No counsel for defendants in this Court.

(258) NASH, C. J. At the session of the General Assembly in the year 1851, an act was passed to divide the county of Surry, "provided a majority of free white men, entitled to vote for members of the House of Commons, shall vote for the same." By the same act the defendants were appointed commissioners "to select and determine upon a site for a permanent seat of justice for Surry County, who shall locate the same as near the center of said county as a suitable location can be obtained, taking into consideration both the extent of territory and population." The commissioners, in their return, state that they have performed their duty with a strict and conscientious regard to the requirements of the act. These commissioners are the servants of the General Assembly to perform the acts required of them; in their ability and fidelity the Legislature confided; and to their discretion the business was entrusted. With the exercise of that discretion we cannot interfere, as they in their return state their compliance substantially with the act. If the court were to issue its *mandamus,* what would it command? That the commissioners should proceed to select a site for the county town, observing the requirements of the act. We could not tell them whether the proper site is to the east or west of the center line designated in the petition; or whether, if on the one side or the other, it would be the proper place, regard being had to the population of the county. To do so, would be assuming an authority not given to us, but to the defendants, the commissioners. We could make no other fiat than the one already set forth. What other return, then, could the defendants make than the one they have made, if it be the truth? Another *mandamus* might be issued, to which the same return might be made; and in this way the matter might be bandied about from term to term, to the great injury and disturbance of the citizens of the county. If the defendants had neglected or refused to execute the power entrusted to them, we certainly might call upon them to show cause why they had been so negligent; and, upon an insufficient return, might have issued a peremptory *mandamus.* Here, all we could do would be to command them to select the site for the permanent seat of justice for the county, according to the law; which, under their oaths, they say they have done.

(259) It has been suggested, that the proceedings might be sustained as an information in the nature of a *quo warranto.* To this the answer is, that the information filed charges that the statute, under which the defendants are required to act, is unconstitutional. If so, the power conferred upon them is void. It was said that the statute was void, because it submitted to the people of the county of Surry, to say whether it should become a law—thereby enabling a very small por-

tion of the citizens of the State to establish a public law, binding, if at all, upon the whole State; and because it alters the fundamental principles of the government, by converting it from a representative republican government, as established by the Constitution into a pure democracy—calling on the people to do that which the people themselves had said by the Constitution, which was their act, they would not do. At a subsequent session of the Legislature, an act was passed ratifying and confirming what had been done under the original act.* It is not now, therefore, necessary for us to pronounce any opinion upon the constitutional question. But while we decline expressing such opinion, as being unnecessary to the decision of the case, we have no hesitation in saying, that it is only whilst the several departments of the government confine their action within the limits assigned them in the Constitution, and fearlessly and firmly exercise the power there given them on all fit occasions, that our pure and noble Constitution can secure to us the blessings of peace, harmony, and prosperity. The officers of each department are sworn to support the Constitution of the State and are, therefore, on all proper occasions, as much bound to execute the power by it conferred upon them, as they are, not to assume authority by it not conferred.

His Honor below dismissed the petition at the costs of the relators. We concur with him in his judgment, dismissing the proceedings; but not as to the costs. The judgment below dismissing the proceeding is affirmed, but each party is to pay his own costs. This is clearly settled by the case of *S. v. King,* 23 N. C., 22—the matter in dispute being of a public nature, and the relators having no particular or private interest in the controversy, apart from the rest of the citizens of (260) Surry County.

PER CURIAM. Judgment affirmed, but without costs.

Cited: Taylor v. Commissioners, 55 N. C., 145; *Manly v. Raleigh,* 57 N. C., 375; *Herbert v. Sanderson,* 60 N. C., 281; *Brown v. Turner,* 70 N. C., 104; *Blount v. Simmons,* 120 N. C., 20; *Barnes v. Commissioners,* 135 N. C., 38; *Battle v. Rocky Mount,* 156 N. C., 336.

*See Acts of 1852, chap. 22, page of pamphlet Laws, 71.

ELISHA ABRAMS v. ROBERT H. PENDER.

A., a carpenter by trade, enlisted in the army during the war with Mexico, and during his absence at the seat of war, B. sued out an attachment, levied on the carpenter's tools of A. left in the possession of a friend, and had them sold for a debt of A.: *Held*, that whether during a voluntary absence of A. the tools of his trade would or would not have been liable to seizure under execution, yet B. was liable for a wrongful suing out of the attachment, A. not having fraudulently or privately absconded, within the meaning of the law allowing attachments, and there being no probable cause to suppose that he had.

THE plaintiff declared in case upon a count for wrongfully suing out an attachment, and in *trover* for the conversion of his working tools. Upon the plea of general issue, the case was submitted to his Honor, *Judge Bailey*, at EDGECOMBE, on the last circuit, upon the following facts agreed between the parties:

The plaintiff was a carpenter by trade. He enlisted as a soldier to serve in the army during the late war with Mexico; and when he was preparing to leave this country for Mexico, he deposited his tools with one Hart. After the plaintiff had left this country for the seat of war, the defendant sued out an attachment and caused the same to be levied on the said tools, when Hart informed him they were the working tools of the plaintiff, and he therefore objected to the levy, and upon final judgment in said attachment the said tools were sold, after due advertisement—the defendant being present and purchasing a part thereof; and most of the said tools were thus sold.

The value of the tools was $100; and it is agreed that if the court should be of opinion that the plaintiff is entitled to recover, he shall have judgment for that sum; if that he is not entitled to maintain the action, he shall be nonsuited. And his Honor being of opinion with the plaintiff, there was judgment accordingly, and the defendant appealed.

(261) *Moore for defendant.*
Biggs, contra, argued:

1. The plaintiff had not removed out of the county privately, nor absented himself so that the ordinary process could not be served on him (Rev. Stat., chap. 6, sec. 1), and therefore the defendant sued out the attachment wrongfully.

2. As a volunteer in the service of the United States, the plaintiff was exempt from arrest (U. S. Statutes at large, act of 1799, Vol. 1, page

751). And an attachment being in lieu of personal service, was therefore sued out wrongfully. (*Davis v. Garrett,* 25 N. C., 459.)

3. The defendant was notified that these were the working tools of the plaintiff, left with Hart, and therefore cannot be excused for seizing for want of such notice, as in the case of *Henson v. Edwards,* 32 N. C., 43.

PEARSON, J. The plaintiff was entitled to recover upon the count for wrongfully suing out the attachment. A citizen of our State may sue out an original attachment, when the debtor is not an inhabitant of this State, or when, being a citizen of this State, he fraudulently eludes the ordinary process of law.

In the present case, the defendant had no probable cause to support the allegation that the plaintiff was fraudulently eluding the ordinary process of law, or that he had, in the language of the statute, privately removed, or was about to remove himself out of the county, or so absented, absconded, and concealed himself that the ordinary process of law could not be served on him. On the contrary, the plaintiff had enlisted as a soldier, and the fact of his leaving this State for Mexico, was a matter of public notoriety. There was as little cause to charge the plaintiff with a fraudulent evasion of the ordinary process of law, as there is to charge such an intent upon a member of Congress who goes to Washington, or a merchant who goes to New York.

It is asked, what remedy has a creditor when the debtor enlists "during the war," and leaves the State? It may be, that *mesne* process might have been served before the debtor left the State; but it is sufficient for us to say that the want of a remedy is no excuse for the defendant, and does not show probable cause, or justify a proceeding under a statute giving a remedy against a debtor who (262) fraudulently evades the ordinary process of law.

In the argument there was much discussion in reference to the act of Congress which exempts the body of a soldier from arrest during the time of service. The act has no application to the case before us. The exemption from arrest was not intended to be a benefit to the soldier, but was intended to benefit the service; and therefore a *habeas corpus* may be sued out (not by the soldier), but by an officer of the company; and upon his entering common bail, the body of the soldier is to be delivered to the officer. So there is no personal privilege granted to the soldier, and the policy of the public in not having a soldier taken from the ranks, is made consistent with the rights of creditors, by enabling them, upon common bail, to proceed to judgment and execution—*i. e.,* a *fieri facias.*

We lay no stress upon the fact that the goods attached in this case were the "tools of a tradesman." It may be that such tools are only exempted from execution when the debtor remains in the country and submits himself to the ordinary process of law; and does not extend to the case of one who fraudulently evades the service of process. Suffice it to say, a creditor has no right to reach these tools by means of an original attachment, upon a false allegation that his debtor has evaded the ordinary process of law.

PER CURIAM. Judgment affirmed.

Cited: Kirkham v. Coe, 46 N. C., 428; *Wheeler v. Cobb,* 75 N. C., 25; *Fulton v. Roberts,* 113 N. C., 428; *Wright v. Harris,* 160 N. C., 548; *Tyler v. Mahoney,* 168 N. C., 239.

JUDSON, CORNWALL AND COWLES v. THOMAS McLELLAND.

1. The writ of *capias ad satisfaciendum*, as well as the affidavit authorizing it, must correspond with the judgment upon which it is issued.
2. Therefore, where a judgment was obtained against A. and B. jointly, and a *ca. sa.* issued against A. alone: *Held*, that the proceedings were irregular, and the defendant entitled to his discharge.

THE plaintiffs, partners, obtained judgment in an action of debt against the defendant and one Isaac Wells, at December Term, 1848, of New Hanover County Court, and issued execution; upon which
(263) the sheriff returned, at the March Term following, *"nulla bona."* At June Term, 1849, the judgment was amended, *nunc pro tunc,* on motion of the plaintiffs, by striking out the name of Wells; and thereupon Wells, as agent of the plaintiffs, made affidavit, and a *ca. sa.* issued, returnable to the ensuing September Term, against McLelland alone, who entered into bond for his appearance, etc. At September Term, the order to amend the judgment obtained at the court before was rescinded, leaving the judgment as it was originally entered, and on motion the defendant McLelland was discharged for irregularity in the proceedings. From this order, discharging the defendant, the plaintiffs appealed.

The case came on to be tried at the Special Term, 1853, of NEW HANOVER Superior Court, his Honor, *Judge Bailey,* presiding, when the defendant, McLelland, was called out and his default recorded;

whereupon the plaintiffs moved for judgment against him and his securities on the *ca. sa.* bond. To this motion the defendant's counsel objected: (1) Because the affidavit on which the *ca sa. issued,* was made by an incompetent agent. (2) The bond is made payable to Judson, Cornwall and Cowles, and not to the individual members of the firm, by their Christian and surnames. (3) The judgment on which the *ca. sa.* issued was a joint judgment against Thomas McLelland and Isaac Wells and the *ca. sa.* had issued against McLelland alone. His Honor being of opinion with the defendant, refused to allow judgment on the *ca. sa.* bond, and thereupon the plaintiffs appealed to the Supreme Court.

Strange for plaintiffs.
D. Reid for defendant.

NASH, C. J. The third objection to the motion of the plaintiff for judgment on the defendant's bond, we think, is fatal. It is a well settled principle in our courts, if any can be, that a *ca. sa.* must correspond with the judgment; if it does not, and the objection be taken in apt time, it must be set aside. The writ in this case issued against the defendant and one Isaac Wells, and the judgment is a joint one against them both. This judgment was obtained in the county court at its December Term, 1848, and at June Term, 1849, an order was (264) made to strike out of the writ and judgment the name of Wells. At September Term, 1849, the order made at June Term was rescinded. If the court had the power to make the order they did at June Term, then the same power authorized the order made at September Term; if no such power existed in the court in either case, the order of June Term was void, and take it either way, the judgment of December Term remains as it was then made and entered. The *ca. sa,* is defective and void as having issued against one of the defendants only. It is not denied but that such was the law before the act of 1844, chapter 31. But it is said that act has altered the law in this particular. In ascertaining the intention of the Legislature in any legislative act, it is recommended by authors who have written on the subject to ascertain the mischief to be remedied, and the remedy provided. What was the mischief then to be remedied? It was, that a plaintiff in a judgment, as a matter of right, could take out a *capias* at his will and pleasure, whereby much oppression existed. The remedy provided was, depriving the plaintiff of this arbitrary right, and subjecting him to the necessity of moving under the benign spirit of the Constitution. The honest debtor, for there may be such in the view of the Constitution, who has no property, or who has exhausted it in paying off his debts, may now

sleep in peace with no fear of imprisonment before his eyes, unless his creditor is willing to swear, and does make an affidavit in writing, "that he believes (the defendant) the debtor has not property to satisfy the judgment that can be reached by a *fieri facias,* and his property, money, or effects which cannot be reached by a *fieri facias,* or has fraudulently concealed his property, money, or effects, or is about to remove from the State." This is the curb placed on the plaintiff—you shall have your *ca. sa.,* but you shall not use it at your will and pleasure; before you do cause it to issue, you shall take the necessary oath to show that the defendant is not an honest debtor—that, shall not for the future be a conclusion necessarily following an inability on the part of a debtor to pay what he owes. Thus the remedy for the existing evil is provided, and the act does not disturb any other principle of the law as it then existed. The *capias,* then, which issues to enforce a joint judg-
(265) ment must be as broad as the judgment, and embrace all the defendants in it; and the affidavit to authorize the *ca. sa.* must embrace all the defendants. If it does not, then the writ can issue only against the one mentioned in the affidavit; if it does, it violates the act of 1844; if it does not, it violates a principle of the common law, as ancient as the law itself. If there be inconveniences and difficulties in the way of plaintiffs under this construction of the act of 1844, they are created by the act, and can be removed only by the power which gave the act its existence. It is unnecessary to notice the other points made in the case.

We have examined the cases to which our attention was directed by the counsel of the plaintiff. The one before us differs from them, inasmuch as the defendant availed himself of the earliest moment afforded him to make his motion to quash the proceedings. There is no error in the opinion of the court below.

PER CURIAM. Judgment affirmed.

DEN EX DEM. F. A. AND C. W. BROTHERS v. G. W. BROTHERS.

Devise of lands to "P., daughter of B., reserving to B. the use of the land until P. should become ten years of age, then the rents to be applied to educating her, and in case P. dies without lawful heir begotten of her body, then to be sold," etc. P., the daughter, died at four years of age: *Held,* that B., the father, took an estate to his own use until the time when P., would have attained the age of ten.

BROTHERS *v.* BROTHERS.

EJECTMENT, tried before his Honor, *Judge Saunders*, at PASQUOTANK, at Spring Term, 1853, upon the following statement of facts agreed between the parties:

Both the lessors of the plaintiff and the defendant claim title under Miles Brothers, deceased, to whom the land belonged. The lessors of the plaintiff are the children of said Miles, and executors of his will; and the defendant married ....., a daughter of said Miles, who died in the lifetime of her father, leaving a daughter, Pennina, by the defendant. By the will of the said Miles Brothers, who died in 1848, he devised as follows: (266)

"Thirdly, I give and bequeath unto my granddaughter, Pennina Brothers, daughter of George W. Brothers, the tracts of land known as the Reddin tract, and the tract whereon the said George now resides, reserving unto him the use of the said land until the said Pennina shall become ten years of age, and then the rents to be applied to educating her; and in case the said Pennina dies without lawful heir or heirs begotten of her body, I wish the said lands sold, and the proceeds divided among my children."

The said Pennina survived her grandfather two years, and died in 1851, having attained only the age of four years, without issue, brother or sister, or the issue of such. The defendant was in possession of the premises at the time of the issuing and service of the declaration; and the premises are the same as devised above.

The lessors of the plaintiff claim title as the executors of Miles Brothers, by virtue of the above clause of his will; and they claim title under said will, and also as his heirs-at-law. Possession of the premises was demanded by the lessors of the plaintiff, before the institution of this suit, and refused by the defendant.

His Honor upon the foregoing facts, was of opinion with the defendant, and judgment having been rendered accordingly, the lessors of the plaintiff appealed to the Supreme Court.

W. N. H. Smith and Brooks for lessors of plaintiff.
Pool for defendant.

PEARSON, J. The will of Miles Brothers contains this clause: "I give and bequeath unto my granddaughter, Pennina, daughter of George W. Brothers, the tracts of land known as the Reddin tract and the tract whereon said George resides, reserving unto him the use of said land until Pennina shall become ten years of age, then the rents to be applied to educating her; and in case the said Pennina dies without lawful heir

or heirs begotten of her body, I wish the said lands sold, and the proceeds divided among my children."

(267) Pennina survived the testator two years, and died in 1851, at the age of four years. The lessors of the plaintiff are the heirs-at-law of the testator.

If the estate of the defendant was defeated by the death of Pennina without a child, the plaintiff is entitled to recover.

It is clear that the effect of the will was to vest, at the death of the testator, an estate in the defendant, until Pennina arrived at the age of ten years; and subject to this estate, to vest the fee in Pennina, liable to be defeated upon the contingency of her death without a child. The plaintiff insists that the condition is also annexed to the estate of the defendant. It certainly is not so annexed in terms, and according to the natural construction of the sentence, and from the nature of the condition, it seems properly to confine itself to the estate of Pennina. It was only in the event of her death, without a child, that a necessity would arise for making some other disposition of the fee.

It is said, however, that the estate of the father is a mere incident to, or emanation from, the estate of the daughter; and when the principal falls, the incident must fall with it. If the estate of the father had been created by the daughter, then a destruction of her estate would, of course, defeat his—as if one having a defeasible estate makes a lease for years. But such is not our case; for the estate of the father, although carved out of the estate of the daughter, was created by, and owes its existence to, the act of the testator. So it is independent, and stands on its own footing.

It is familiar doctrine, that if a power to make leases is given to one having a defeasible estate, a lease so created is independent of the estate out of which it is carved, and stands on the same footing as if the lease had been inserted in the conveyance creating the power, in the place of the power; so that, although the lease is made by one having a defeasible estate, yet being created by the exercise of a power, which was created by the original grantor, it is not affected by what may become of the defeasible estate. Our case is similar, with the exception in its favor of the fact that the estate of the defendant was created, not by means of a power, but by the direct act of the testator.

PER CURIAM. Judgment affirmed.

Cited: Steadman v. Steadman, 143 N. C., 352.

(268)

REDDIN PETWAY v. MOSES BAKER, EXECUTOR, AND OTHERS.

Devise of testator's whole estate "to remain together as joint stock of my wife and children, and my farm continued under the management of my executor, for their support and education, and that each one, if a son, receive his distributive share when he arrives at the age of twenty-one years," etc. D., one of the sons, died at the age of six years, and the court having held that the widow, on her marrying again, had a right to withdraw from the joint stock, her share (*Armstrong v. Baker*, 41 N. C. Eq., 553), the administrator of D. claimed D's share as demandable at his death, or his aliquot proportion of the income thereafter accruing: *Held*, that he was entitled to neither, the share not being demandable until the time when D. would have attained twenty-one, and the income belonging to the other devisees, exclusive of the widow.

David E. Baker died in 1844, leaving a will in which he bequeathed as follows:

"It is my will and desire that my whole estate, both real and personal, except such as it may be necessary to dispose of to pay my just debts, remain together as joint stock of my beloved wife and children, and my farm continued under the management of my executor for their support and education, and that each one, if a son, receive his distributive share when he arrives at the age of twenty-one years, and if a daughter, when she arrives at the same age or marries—always reserving," etc.

The testator left surviving him his wife, Catherine, since intermarried with the defendant, Armstrong, and four infant children, of whom Moses Baker is guardian, as he is also the executor of said will. One of the children, David C. Baker, died at the age of six years, and the plaintiff, Petway, as his administrator, filed this petition in the County Court of Edgecombe against the said Moses as executor, Armstrong and wife, and the said infant children, alleging that as administrator he was entitled to a settlement with the said executor for his intestate's share of the fund, together with the profits, in the foregoing clause bequeathed.

The children, by their guardian, put in a joint answer, in which they insist that the plaintiff is not entitled to receive the share or any portion thereof bequeathed to David C., but that the same, on his death before the period fixed for distribution in the said clause, goes to the survivors, and should remain in the executor's hands, or if not, that the property should remain as a common fund until the (269) arrival at age of the sons, or such time as they would have arrived at age had they lived, and that David C., having died in 1845,

being then six years of age, the period for the payment of his share had not yet arrived.

The case was carried by appeal to the Superior Court of Edgecombe, where, having been set for hearing upon the petition and answer, and judgment *pro confesso* as to Armstrong and wife, *Bailey, J.*, at the last Spring Term, gave judgment dismissing the petition at the costs of the plaintiff, and he appealed to the Supreme Court.

Moore for plaintiff.
Coningland for defendant.

PEARSON, J. The will of David Baker was before this Court for construction (*Armstrong v. Baker,* 41 N. C., 553), and it was declared that the whole estate was given to his widow and children, subject to the restriction that it should be kept as a common fund, under the management of the executor, for the support and education of the widow and children: That in reference to the widow, if she married, she had a right to withdraw her share from the common fund, except the "town lot." This petition is filed by the administrator of the youngest child, who died at the age of six years. He insists, that by reason of the death of his intestate, he has now a right also to withdraw his share from the common fund, and that, at all events, he has a right to receive a ratable part of the profits of the property.

Assuming the legacy to be vested, the time of enjoyment, or right to receive the property, is postponed until the plaintiff's intestate arrives at the age of twenty-one years. If the intestate had lived, he could not have called for the property until he was of full age; and it is difficult to imagine any ground upon which the personal representative can have a right to call for the property sooner than his intestate if living, could have called for it.

Mr. Moore took the position, that when a legatee is entitled to the interest or income for his own use, unconnected with any other person, although the payment of the principal be postponed until the legatee shall arrive at the age of twenty-one, if the legatee dies, the prin-
(270) cipal will be decreed to be paid immediately to the personal representative; because no other person being concerned in the question, and the reason for making the postponement (which is assumed to be a guard against an improvident expenditure by the legatee, before he arrived at the age of discretion), having ceased, there can be no objection to such immediate payment. The argument in support of the position is an ingenious one, but no authority was cited which sustains it; and without passing on it, it is sufficient to say, in the pres-

ent case, the legatee was not entitled to the interest or income "for his own use, unconnected with any other person." On the contrary, there was an intimate connection between him and his brothers and sisters; and the interest or income of the whole property was to constitute a joint stock, or common fund, to be applied, at the discretion of the executor, for their support and education.

The only question, then, is, inasmuch as one of the children is dead and can no longer receive a part of the common fund, intended for the support and education of himself and his brothers and sisters, has his personal representative a right to demand a ratable part of this common fund? or is the right of the intestate to receive a portion of this common fund for his support and education, extinguished by his death, so as to enure to the benefit of the other brothers and sisters? The only practical bearing of this question is, whether the widow, having taken off her share, can as one of the next of kin of the deceased child, call for a ratable part of the profits of the estate, which was left in the management of the executor, as a joint stock or common fund for the support and education of the children? We think it entirely clear that the widow having married, has no such right. The effect of the death of one of the children puts an end to the necessity of an application of any portion of the common fund for his support and education, and leaves a more ample fund in the hands of the executor, to be applied to the support and education of the surviving children. Such we have no doubt was the intention of the testator, and the right of the personal representative of the deceased child to have a ratable part of the profits, is inconsistent with the idea intended to be conveyed by the testator, when he used the words, "joint stock," and is also inconsistent with the power conferred on the executor to apply the common (271) fund to the support and education of the children, according to his sound discretion. These views are fully sustained by *Paul v. Baker,* which will be reported as a note to this case. Decree in the court below affirmed.*

PER CURIAM. Decree below affirmed.

Cited: Poindexter v. Gibson, 54 N. C., 48.

*The case of *Paul and others v. Baker and others* was removed to the Supreme Court, from the court of equity for Halifax County, at Fall Term, 1850, and the opinion was delivered at the December Term following.

The following are the facts relating to the points decided by this Court:

The will of Richard Smith was admitted to probate at the August Term of Halifax County Court, 1838, and the defendants at the same term qualified as executors. The bill was filed by the complainants, who are legatees under

SABINA WILLIAMS'S LEGATEES AND DEVISEES v. HER HEIRS-AT-LAW AND NEXT OF KIN.

An infant under the age of twenty-one and above the age of eighteen years, has power, by a will duly executed, notwithstanding the acts of 1840, chapter 62, and 1846, chapter 54, to dispose of his personal estate.

(The case of *Tucker v. Tucker*, 27 N. C., 161, cited and approved.)

THIS was an issue of *devisavit vel non,* tried before his Honor, *Judge Saunders,* at Spring Term, 1853, of PASQUOTANK Superior Court of Law. The paper-writing offered for probate as the last will and testament of Sabina Williams, was, on the trial of the issue, proved by the two subscribing witnesses to have been signed and published by the testatrix in their presence, and by them subscribed and attested in her (272) presence a short time previous to her death, which took place in the fall of 1850; and that at the time of executing said writing, the testatrix was of sound and disposing memory. It was further proved, that the said Sabina, at the time of making the will, was of the age of eighteen years and seven months.

It was admitted that the said will was not sufficient to pass real estate by reason of the testatrix not having attained the age of twenty-one years, and the probate was insisted on only as a will of personal estate.

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the will, and next of kin to the testator, against the defendants, for an account and settlement. In their answer, the defendants avow their readiness to settle, but desire a construction upon the following provisions of the will:

"Fourthly. I wish my farm in Florida to be kept up—the Negroes, horses, etc., to remain on the farm, and my children to be educated and supported out of the net proceeds; the balance, if any, to be converted to the payment of my debts.

"Fifthly. The balance of my estate to be equally divided between all my children, each one to draw his part as they may marry, or until my son Lawrence (Richard L.) arrives of age; then for an equal division to take place as above desired, my just debts being first paid."

The questions arising on these points are sufficiently stated in the opinion of the Court, delivered by

PEARSON, J. We have examined the bill and answers, and the will and codicil of the testator, Richard Smith, and upon the questions which the defendants say will enable them as executors to settle the estate, we declare our opinion to be:

First. Is the property in Florida charged with the support and education of the testator's children, as a common fund, without regard to the relative expense of the support and education of each child? We think it is a common fund, and the children are to be supported and educated out of it, without reference to the relative expense of each child. That is a matter within the

For the defendants, it was insisted that by virtue of the act of 1840-'41, the paper-writing not being valid to pass real estate, was also invalid to pass personal estate.

His Honor being of opinion that the testatrix was capable of making a will to pass personal estate, notwithstanding the act of 1840-'41, so instructed the jury; and from a verdict and judgment accordingly, establishing the paper, the defendants appealed to the Supreme Court.

W. N. H. Smith, Brooks and Jordan for defendants.
Pool for plaintiffs.

BATTLE, J. We concur in the opinion pronounced by his Honor in the court below, that the testatrix was, notwithstanding the acts of 1840, chapter 62, and 1846, chapter 54, capable of making a will to pass her personal estate. Since the act of 1811 (Rev. Code, chap. (273) 820-1; Rev. Stat., chap. 122, sec. 14), which declares that "no person shall be capable of disposing of chattels by will, until he or she shall have attained the age of eighteen years," it has not been questioned until now, that a minor who had attained that age, could make a will disposing of his or her personal estate. But it is now insisted that the operation of the acts of 1840 and 1846 has been to take away from infants, over eighteen and under twenty-one years of age, their testamentary capacity over their personal property. The act of 1840, chap-

sound discretion of the executors; and they are at liberty to spend more or less of the fund, upon the education of each child, as may seem to them suitable and beneficial.

Secondly. How long does this charge continue? Does it cease wholly in respect to a child who takes off a share by marriage before the majority of Richard L., or cease only as to the share drawn off? We think, upon the marriage of a child before the majority of Richard L., such child has a right to draw a share out of the common fund (subject, of course, to the payment of the testator's debts), and in that event the charge ceases, both in respect to the child, and the share so drawn out.

Thirdly. Is a child who arrives at full age, but does not marry, and has completed her education, entitled to support, and for what period? We think, as such child is not entitled to draw her share out of the common fund until Richard L. attains his majority, the child is entitled to be supported out of the common fund until Richard L. is of full age, when the division is to take place.

Fourthly. If one child marries before the division, is she entitled to support until the division? We think, upon the marriage of a child, she has a present right to draw her share, and is no longer entitled to support; but in lieu thereof, is entitled to the profits of her share. The costs must be paid by the defendants out of the fund.

PER CURIAM. Decreed accordingly.

ter 62, declares that "no will in writing, made after the fourth day of July, one thousand eight hundred and forty-one, whereby personal estate is bequeathed shall be sufficient to convey or give the same, unless such will be executed with the same formalities as are required in the execution of wills of real estate, according to the provisions of the first section of the said statute"—to wit, the first section of the 122d chapter of the Revised Statutes. Now it is clear from the express words of this act, that it extends only to the formalities required in the execution of wills of personalty; that is, they must "have been written in the testator's lifetime, and signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least," etc., according to the first section of the chap-
(274) ter of the Revised Statutes above referred to. *Tucker v. Tucker,* 27 N. C., 161. It cannot be held, by any rules of construction known to us, to affect the capacity of the testator or testatrix. The other act relied upon—to wit, the act of 1846, chapter 54—declares that "no will in writing, made after the ratification of this act, which shall not be sufficient to convey or give personal estate, shall be good as to any real estate therein devised." It is argued for the defendants, that from these words it is manifest that the Legislature intended to put wills of personalty upon the same footing in every respect with wills of realty; and that what should be good as to the one kind of property should be equally good as to the other, and *vice versa,* what should be ineffectual as to one should be so also as to the other. Hence, they conclude, that as wills made by infants, over eighteen but under twenty-one years of age, cannot "convey or give" real estate, they shall not be good as to any personal estate therein bequeathed. This argument supposes the Legislature to have taken a very strange mode of expressing their meaning—that is, that they have said one thing, and intended not only that, but something almost the reverse of it also. They have said that no will, which is insufficient to pass personal estate, shall be sufficient to pass real estate; but they have not said that no will which cannot convey real estate, shall be insufficient to convey personal estate. To give the act that effect, would be to wrest words from their natural and proper meaning to accomplish the ungracious purpose of taking from a certain class of persons their capacity of disposing by will of a portion of their property. Such a construction we deem altogether inadmissible, and we therefore affirm the judgment, and direct it to be certified to the Superior Court, to the end that a writ of *procedendo* may issue to the county court as the law directs.

PER CURIAM. Judgment affirmed.

(275)

E. C. LINDSAY, CHAIRMAN, v. S. B. DOZIER ET AL.

1. The school tax levied by the county courts under the act of 1844, chapter 36, section 6, is a "county tax."

2. Therefore, where the condition of a sheriff's bond provided for his "collecting all county taxes," and paying them over "to the persons authorized to receive the same": *Held*, notwithstanding the condition did not contain any provision respecting the collection and payment of the school tax, as expressly directed by the said act, that the sheriff and his sureties were liable for the failure to collect and pay over that tax.

(The case of *Bradshaw*, 32 N. C., 229, cited and approved.)

THIS was an action of debt, brought by the plaintiff, as chairman of the board of superintendents of common schools for Currituck County, against the defendant, Dozier, on his bond as sheriff of that county, and his sureties. Upon the plea of conditions performed, the only question presented on the trial before *Saunders, J.*, on the Spring Circuit, at CURRITUCK, was whether the official bond of the defendant, Dozier, contained any condition for his accounting for and paying over to the plaintiff the school tax by him collected in the years 1848-'49. The following is the condition of the bond declared on:

"Now, if the aforesaid Samuel B. Dozier, sheriff, shall well and truly account for and pay over to the county trustee all county taxes by him collected or received, and shall well and truly collect the same as he ought, and pay the same over to the county trustee or any other person entitled to receive the same, and shall well and truly discharge the several duties of sheriff during," etc.

It was submitted to his Honor as of a case agreed, that if he should be of opinion with the defendants, judgment of nonsuit should be entered; if with the plaintiff, he should have judgment for the sum of $1,074.09, the sum reported to be due by the clerk to whom the account had been referred. And his Honor being of opinion with the defendants, there was judgment of nonsuit accordingly, and the plaintiff appealed to the Supreme Court.

W. N. H. Smith and Jordan for plaintiff.
Heath, Pool and Hines for defendants. (276)

NASH, C. J. In the year 1844, the Legislature passed an act for the collection of what is called the Common School Fund. (Ire. Dig. Man., 105.) In the sixth section of the 36th chapter, the court of each county is required to levy a tax for that purpose, and the sheriff is directed to collect it "in the same manner that other county taxes are now levied

for other county purposes." The same section directs that the bond, given by the sheriff to secure the payment of county taxes, "shall contain a condition for the faithful collection and payment of the school taxes to the person authorized to receive the same." In the bond of S. B. Dozier, the sheriff, this condition, it is contended, as set forth in the act, is omitted; and the only question presented to us is, whether the sheriff and his sureties are answerable for this tax collected by the former and not paid over, by force of any condition contained in their bond. We think they are. The sheriff's bond contains the following condition: "Now, if the said Samuel B. Dozier, sheriff, shall well and truly account for and pay over to the county trustee, all county taxes by him collected or received, and shall well and truly collect the same as he ought, and pay the same over to the county trustee, or any other person authorized to receive the same, then," etc. This condition does substantially pursue the direction of the statute. The common school tax is a county tax. By the act of 1844, it was provided, that this fund should be distributed annually among the several counties of the State, in the ratio of their federal population. The fund thus provided was deemed insufficient to carry out the system through the State, and instead of providing by a public tax for the deficiency, the Legislature resorted to the expedient of calling upon each county to render its aid, when it was desirous to avail itself of the public fund. No county is compelled to do so. So far then as the establishment of common schools is intended, the act is a general law; but so far as the aid of each county is required in raising the necessary funds, it is local, and the tax to be raised is a county tax, individual to each county. It is, therefore, in substance a county tax, to be expended in the county for the education of the children within it, and for none others. But the Legislature has left no doubt upon the question. The tax is in the act called a county tax, to be collected as other county taxes. Such is the language of the act. The condition of the bond in question does cover the
(277) tax laid for the use of the common schools in Currituck County.

The case of *Bradshaw,* 32 N. C., 229, to which our attention has been called, confirms the view of the act we have taken. That was an action of debt upon the general bond of the sheriff of Rowan, against him and his sureties. The condition was general as in this case. The Court decided that where a statute requires a bond from an officer for the faithful discharge of his duties, and a new duty is by a subsequent act imposed on the officer, such bond, given subsequently to the latter statute, embraces the new duty, and is a security for its performance, unless the subsequent act requires a separate bond for the performance of the new duty. In this case, the act of 1844 does not require a new

bond to be given by the sheriff for the collection of the common school tax, but that a condition to that effect shall be inserted in the bond to be given.

We are of opinion that the bond declared on does embrace the condition required in the act of 1844, and the plaintiff is entitled to judgment against all the defendants.

Judgment below reversed, and judgment for the plaintiff for the sum of $1,074.09, according to the case agreed.

PER CURIAM. Judgment reversed.

Cited: Williams v. Lindsay, post, 323; *Board of Education v. Bateman,* 102 N. C., 55; *Commissioners v. Sutton,* 120 N. C., 301.

DOE EX DEM. R. R. KELLY v. WOODSON ROSS.

A copy, however authenticated, of a will proved and recorded in another State only, is not evidence of a devise therein contained of lands situate in this State.

(The case of *Ward et al. v. Hearne, ante,* 184, cited and approved.)

THIS was an action of ejectment, in which the plaintiff declared on the several demises of R. R. Kelly, Edmund Deberry, Allen Macfarland, and of a number of the heirs of Duncan McRae. On the trial before *Dick, J.,* at STANLY, on the last Spring Circuit, the case states that the plaintiff offered no paper title; but it appeared that the defendant had been in possession of the land in controversy some twenty-six or seven years; that about ten years after he went into possession, (278) he told a witness that he had been put on the land by Duncan McRae and one Oliver; and that about ten years since, he said he had bought the land of McRae, and had paid a part of the purchase money, but could not pay the balance until McRae made him a title. Another witness proved that in 1833 he heard McRae ask the defendant for more money for the land, and the defendant replied, he would pay him when he got title. The plaintiff further showed that in 1829 McRae conveyed the premises in fee to Edmund Deberry, who conveyed his interest to John Taylor, who died before the date of the demises in the declaration mentioned. Then, to show title in Allen Macfarland, the plaintiff offered in evidence a copy of the will of John Taylor, duly certified as having been admitted to probate in November, 1848, by the judge of the Court of Ordinary of the District of Chesterfield, South

Carolina, and having attached thereto the testimonial of the Governor of that State that the certificate of the said judge of the Court of Ordinary was entitled to all due faith and credit, etc. This evidence was objected to by the defendant, and rejected by his Honor. The plaintiff then introduced one William H. McRae as a witness, who proved that he was one of the heirs of Duncan McRae (but the witness made no demand himself, nor was any made in his behalf), and that he and Kelly went on the land together, before the bringing of this suit, when Kelly demanded the possession of the premises, and the defendant refused to deliver them up, saying, "The land was his own, and nobody else's." To show that Kelly had a right to make the demand, the plaintiff offered in evidence a written assignment, not under seal, from John Taylor to him and one Dumas, of the land in question, which assignment was endorsed on the deed from Deberry to Taylor. This evidence was also objected to and rejected by his Honor. And no other evidence was offered of Kelly's title to the land.

The plaintiff's counsel insisted that the demand made by Kelly was sufficient to terminate Ross's tenancy, and if it were not, his disclaimer of title in any one else and assertion of it in himself, rendered a demand unnecessary.

His Honor charged the jury that the demand proved by plaintiff was not sufficient to change the nature of Ross's possession, and that the lessors of the plaintiff could not recover in this action. There was a verdict and judgment for the defendant accordingly, and the (279) lessors of the plaintiff appealed.

No counsel for lessors of plaintiff.
Strange and Dargan for defendant.

NASH, C. J. The declaration contains four counts on four several demises. It is unnecessary to consider more than the third, on which the whole case at present turns. That count is on the demise of Allan Macfarland. It is to be remarked that the case states that the plaintiff produced no paper title—meaning thereby no complete chain. To sustain his claim under the third count, the plaintiff showed that in 1829 Duncan McRae conveyed the land in dispute to Edmund Deberry, and that he conveyed it to John Taylor; and it was alleged that the latter had, by his last will and testament, devised the land in dispute to the lessor, Macfarland. A paper-writing purporting to be the will of John Taylor, was offered in evidence and rejected by his Honor, and in this opinion he is sustained by the case of *Ward et al. v. Hearne, ante,* 184. In the latter case, the will of Dr. Thornton, of the District of Columbia, where

he lived and died, and where the will was made, was brought forward in evidence. The authentication was substantially the same as in this case. It was certified by the proper officer of the district for taking the probate of wills, styling himself the register of wills, with the seal of his office attached, and also the certificate of the Secretary of State of the United States, under the great seal of the United States, that the certifying officer was the register of wills, in and for the District of Columbia. The paper was rejected because it never had been recorded in this State, according to the provisions of the act of 1844. The paper before us is subject to the same objection. John Taylor lived and died in South Carolina, where his will was made. We have no reason to doubt it was properly made to convey real estate in this State, and we have as little reason to doubt that it is properly proved according to the laws of that state, and properly certified; but the requisite formalities have not been gone through, to make it evidence in (280) our courts of justice under the laws of this State—it never has been recorded here. We therefore concur with his Honor in the rejection of this evidence.

The title to the land, as far as it is set forth in the case, having been traced down to Taylor, is there left; and there is no count on the demise of his heirs. This disposes of the first, second, and fourth counts. The plaintiff has himself shown that he has no title, and from the statement in the case, there is much ground to believe that the title is in Ross, the defendant. We perceive no error committed by the court below, of which the plaintiff has a right to complain.

PER CURIAM. Judgment affirmed.

Cited: Moody v. Johnson, 112 N. C., 802.

MICHAEL SHOFFNER ET AL. v. JOHN S. FOGLEMAN ET AL.

1. By an appeal from the judgment of the county court upon a petition to lay out a public road, the Superior Court acquires full possession of the cause, with power to proceed to a final hearing and judgment.

2. Therefore, when the county court dismissed such a petition, and the petitioners appealed, it was held, that the judge of the Superior Court, being of opinion that the prayer of the petition ought to be granted, properly ordered a jury to lay out the road, instead of awarding a *procedendo* to the county court.

(The cases of *Leath v. Summers,* 25 N. C., 108; *Welch v. Piercey,* 29 N. C., 365, cited and approved.)

SHOFFNER ET AL. *v.* FOGLEMAN ET AL.

THE plaintiffs filed their petition in the County Court of Alamance, praying the court to lay off a public road from Shaddy's Hill, on the Fayetteville road, south of, etc., by Geo. Kimery's, Henry Iseley's, etc., to intersect the Fayetteville road at or near Nelly Eulip's, etc. Advertisement was made according to the act of Assembly; and the defendants appeared and opposed the prayer of the petition. At March Term, 1850, of said court, the petition was ordered to be dismissed, and the plaintiffs appealed to the Superior Court. At May Term, 1850, of the said Superior Court, the following order was made: "This cause coming on to be heard upon the petition and the evidence of the witnesses, and the suggestion of counsel, the parties ask an imparlance, which is (281) granted; and afterwards, by consent of the parties, the opposition to the prayer of the petition is withdrawn, and by consent, it is declared by the court that the public convenience requires a public road to be laid off according to the prayer of the petition"; and it was ordered that a jury be summoned, etc. The jury returned their report to November Term, 1850, which was set aside; and another jury directed to be summoned, whose report, returned to May Term, 1851, was also set aside upon the affidavit of the defendant, Fogleman. And at the same term of the court, it was "ordered that another jury be summoned to lay off a road according to the prayer of the petition and terms of the compromise." Whereupon a writ issued commanding the sheriff to summon a jury "to lay off a public road from Shaddy's Hill, on the Fayetteville road, south of," etc. (according to the prayer of the petition); and the jury having made their report to the Fall Term, 1851, the defendants excepted thereto—first, that the road was not laid off according to the terms of the compromise made by the parties, nor according to act of Assembly—to wit, with the least damage to the enclosures of the lands of Turley Coble, etc.; and secondly, that the jury did not assess damages done to lands of certain owners sufficiently high.

And the case being before *Caldwell, J.*, at Spring Term, 1852, upon a motion to confirm the report of the jury, and testimony being heard on both sides, several objections arising out of the record were taken by the defendants; among others, that it was not competent for the Superior Court to order a jury upon the appeal from the county court, and that a *procedendo* ought to have issued. But his Honor overruled the objections, and from his judgment confirming the report of the jury the defendants appealed to the Supreme Court.

J. H. Bryan for defendants.
P. Busbee, contra.

BATTLE, J. The defendants' counsel objects to the judgment of the Superior Court upon two grounds: First, because that court issued an order to the sheriff of the county, commanding him to summon a jury to lay off the road in question, instead of directing, by (282) a writ of *procedendo,* the county court to issue such order; secondly, because the report of the jury showed that the road had not been laid out according to the provisions of the Revised Statutes, chapter 104, section 4. Neither of these objections is well founded. In the third section of the act above referred to, which gives the right of appeal to any person who may be dissatisfied with the judgment, sentence or decree which the county court may make upon a petition to lay out a public road, it is declared "that the appeal so granted shall be subject to the same rules and regulations as in other cases from the county courts to the Superior Courts; and the said Superior Courts shall proceed to hear and determine the said petition, as shall appear right and expedient." These words are clearly sufficient to give the Superior Courts jurisdiction to hear and determine all questions which may arise in the course of the proceedings on the petition, until the final judgment or decree confirming the report of the jury. If this were not so, two or more appeals from the county to the Superior Court might be necessary before the matter could be finally settled. But if the language of the act above quoted admitted of any doubt, it is completely removed by the proviso which immediately follows: "Provided, nevertheless, that nothing in this act contained shall authorize the Superior Court to interfere in fixing or regulating the rates of ferriage, tolls of bridges, or the distribution of allotments of hands to work under the overseers of the public roads." This exception shows the full power of the Superior Court in all other respects. An order similar to the one here complained of was made by the Superior Court in *Davis v. Hill,* 33 N. C., 9, without objection, though an appeal was taken to this Court from the judgment for costs.

For the second objection, the cases of *Leath v. Summers,* 25 N. C., 108, and *Welch v. Piercy,* 29 N. C., 365, were cited. The first of these cases decides only, that in a petition to turn or change a public road, it must be alleged that the new road is necessary or would be useful to the public. Such an allegation is expressly made in the petition now before us. In *Welch v. Piercy,* it was held that the county court had power to order a jury to lay out a public road, but could not itself lay it out; further, that it has no power, except as to the *termini,* to direct the jury how the road shall run—that being the exclusive province of the (283) jury. The order in our case directs the jury to lay out the road along the very route mentioned in the petition, and the report of the

jury, though more particular in describing the line of the road which they had laid out, shows that they commenced and terminated at the places designated as its *termini,* and that in all other respects they obeyed the injunctions of the order. What were the terms of the compromise made by the plaintiff and defendant, does not appear on the record. Whatever they may have been, it is not shown that they induced the jury to deviate from the general route of the road which they were commanded to lay out.

There being no error in the judgment of the Superior Court, it must be affirmed, which will be certified according to law.

PER CURIAM. Judgment affirmed.

Cited: Russell v. Saunders, 48 N. C., 433; *Purvis v. Robinson,* 49 N. C., 98; *Evans v. Mining Co.,* 50 N. C., 334; *Morehead v. R. R.,* 52 N. C., 501; *Caldwell v. Parks,* 61 N. C., 55; *Warlick v. Lowman,* 104 N. C., 407.

Distinguished: Millsaps v. McLean, 60 N. C., 80.

DEN EX DEM. BENJAMIN LEGGETT ET AL. v. ALLEN BULLOCK.

As between the parties, a mortgage is valid without registration.

THIS was an action of ejectment, upon several demises of Benjamin Leggett and Lembury James, tried before his Honor, *Judge Bailey,* at MARTIN, on the last Spring Circuit.

It was admitted that, on 30 April, 1849, the premises in the declaration mentioned, belonged to one William Bullock; and it was in evidence that on that day, he was indebted to Gambril and Williams to the amount of fifty-six dollars, and Lembury James became his surety for the debt; and to secure the payment thereof, took from him a deed of mortgage of the said premises. The said deed was not registered; and it was in evidence that it was lost; but the plaintiff produced and read a deed, duly proved and registered, which the subscribing witness (to both deeds) stated was substantially a copy of the deed delivered 30 April, 1849. The latter deed was executed and delivered 17 February, 1852, and was given in the stead and place of the former lost one.

(284) The plaintiff then read a deed from William Bullock and Lembury James to Benjamin Leggett, dated and delivered 10 May, 1850. It was further in evidence that the defendant went into

possession of the premises prior to 30 April, 1849, as the tenant at will of William Bullock, his son; that on 8 January, 1850, William Bullock executed and delivered to the defendant a deed of gift for the said premises, and in pursuance of an agreement, made 10 May, 1849, the defendant claimed adversely under said deed. After 10 May, 1850, and before the bringing of this action, the lessor of the plaintiff, Leggett, demanded from the defendant the possession of the premises, which was refused. The date of the demise in the declaration is 21 September, 1851. Upon this state of facts, his Honor, the presiding judge, was of opinion that the plaintiff could not recover, and in submission thereto, the plaintiff submitted to a nonsuit, and from the judgment rendered accordingly, appealed to the Supreme Court.

Biggs for lessor of plaintiff.
No counsel for defendant in this Court.

PEARSON, J. In 1849, William Bullock executed a mortgage to James, one of the lessors, for the land in controversy. This deed was never registered, and is lost. In 1850, Bullock executed a deed for the same land to the defendant, his father, without valuable consideration, which deed was duly registered. The plaintiff read in evidence a deed executed by William Bullock to the lessor, James, in 1852, which purports to be a substitute for the mortgage of 1849, and the subscribing witness swore that it was substantially a copy.

His Honor was of opinion that the plaintiff could not recover, we suppose, on the ground that the mortgage was inoperative for want of registration; and for that reason secondary evidence of its contents was not admissible, and could not, if admissible, have the effect of showing title in the lessor.

The defendant being a volunteer, stands in the place of his donor; so the only question is, does the law require a mortgage to be registered as between the parties? This depends upon the construction of the 1st, 23d, and 24th sections of 37th chapter, Revised Statutes. (285)

The act of 1715, chapter 7, section 1, provides: "No conveyance or bill of sale for land (other than mortgages) shall be" valid, unless proven and registered in twelve months after date. Section 7 provides: "Every mortgage of lands which shall be first registered, shall be deemed the first mortgage, and shall be valid, notwithstanding any former mortgage, unless such prior mortgage shall be registered within fifty days after date."

The act of 1820 provides: "No mortgage or deed of trust for any estate, whether real or personal, shall be good and available in law

against creditors and purchasers for valuable consideration, unless the same shall have been proved and registered in the manner prescribed by law in the case of deeds (other than mortgages) within six months after its execution. But all mortgages, not so proved and registered within the time aforesaid, shall be taken, as against such creditors and purchasers, as utterly null and void."

The act of 1829 provides: "No mortgage or deed of trust shall be valid at law to pass any property, as against creditors and purchasers for valuable consideration, but from the registration of such mortgage or deed of trust."

Many statutes have been passed, giving further time for registering grants, deeds, etc.; but all have an express exception in reference to mortgages and deeds of trust.

The Revised Statutes, chapter 37, by the 1st section, reënacts the 1st section of the act of 1715; by the 23d section, the act of 1820; and by the 24th section, the act of 1829—the 7th section of the act of 1715 being superseded by those two last sections in regard to mortgages.

What is there in this statute that makes it necessary to register a mortgage or deed of trust, as between the parties? The 1st section expressly excludes them from its operation; and the 23d and 24th expressly require registration only as against creditors and purchasers.

That registration of mortgages and deeds of trust was not required, as between the parties by the act of 1715, is settled. *Pike v. Armstead,* 16 N. C., 110. *Taylor, J.,* says: "The first question arises on (286) the act of 1715 relative to mortgages. A mortgage is valid between the parties, although no registration be had, as well from the words of the act, as the uniform construction of it." This construction is certainly not changed by the acts of 1820 and 1829, the operation of which, as has been seen, is restricted to creditors and purchasers.

Again: If, as between the parties, a mortgage must be registered, within what time? The only time with reference to mortgages and deeds of trust is six months from the execution. If this time is fixed on as between the parties, inasmuch as the several statutes extending the time for the registration of deeds exclude mortgages, the consequence is, that as between the parties, mortgages and deeds of trust must be registered in the very same time, as is required as against creditors and purchasers. This would be a strange result, considering the extreme pains taken in the 23d section to confine the effect of a want of registration to creditors and purchasers, by first providing that no mortgage, unless registered, shall be good as to them, and repeating "all mortgages, not so registered, shall be utterly null and void as to creditors and purchasers."

It was supposed by the makers of the act of 1715, that the provision of the 7th section, by which prior mortgages, unless registered in fifty days, are postponed to subsequent mortgages first registered, would cause all mortgagees to use due diligence. But after it was decided that equity would prevent a mortgagee who had registered, from taking advantage of that fact against a prior mortgagee who had not registered, upon proof of notice, this section was found not to answer the purpose. As a remedy, the act of 1820 was passed. That changes the time from fifty days to six months, and provides that a mortgage, not registered within time, shall not be good and available, but shall be null and void as against creditors and purchasers. It was found that mortgagees still would not register at once, but would hold back until nearly the end of the six months, in order to favor the debtor. As a remedy, the act of 1829 was passed, which provides that no mortgage shall be valid, as against creditors and purchasers, but from the time of registration. The result of this is, that no mortgage has any effect, even if registered in six months, except from the time of registration. This produced the requisite degree of diligence, and makes any provision requiring the registration of mortgages, as between the parties, a matter (287) of supererogation; for the mortgagee is now sure to have it registered in due time. This is proven by the fact that while there have been many cases before this Court to decide which mortgage was registered first, the present is the only case in which it has become necessary to decide what is the effect of the mortgage not being registered at all, as between the parties; and even this case is the result of accident, the loss of the deed.

PER CURIAM. Nonsuit set aside, and *venire de novo* awarded.

Cited: Robinson v. Willoughby, 70 N. C., 364; *Moore v. Ragland,* 74 N. C., 347; *Blevins v. Barker,* 75 N. C., 438; *Todd v. Outlaw,* 79 N. C., 238; *Parker v. Banks, ibid.,* 483; *Brem v. Lockhart,* 93 N. C., 191; *Ijames v. Gaither, ibid.,* 358; *Williams v. Jones,* 95 N. C., 506; *Quinnerly v. Quinnerly,* 114 N. C., 148; *Hooker v. Nichols,* 116 N. C., 160; *Bostic v. Young, ibid.,* 770; *Barrett v. Barrett,* 120 N. C., 130; *Piano Co. v. Spruill,* 150 N. C., 169; *McBrayer v. Harrill,* 152 N. C., 713; *Weathersbee v. Goodwin,* 175 N. C., 238; *Motor Co. v. Jackson,* 184 N. C., 331; *Boyd v. Typewriter Co.,* 190 N. C., 799; *Whitehurst v. Garrett,* 196 N. C., 157.

ISAAC P. FREEMAN ET AL. v. JARVIS B. MORRIS, EXECUTOR OF L. MIZZELL ET AL.

1. Where an amendment is moved for, which the judge has power to allow, and he refuses to hear the motion or the evidence to support it, on the ground that he has no power to allow the amendment, such refusal is error in law, which the Supreme Court will correct: *Aliter*, where he declines to exercise the power, on other grounds.

2. Therefore, where an application to amend the entry of a verdict found at a former term, on an issue of *devisavit vel non*, by inserting the tenor of the will, the judge refused to hear evidence in support of the application on the ground that he had not power to allow the amendment: *Held*, that this refusal was error, as the judge had the power which he supposed he had not.

THIS was a rule against the defendants to show cause wherefore the records of the Superior Court of Bertie should not be amended under the following circumstances, upon which the plaintiffs' application was founded:

It appeared that a paper-writing purporting to be the will of one Christiana Freeman was offered for probate by the plaintiffs, at February Sessions, 1842, of the County Court of Bertie, when a *caveat* was entered thereto by some of the defendants, who were the heirs-at-law and next of kin of the deceased; and upon an issue of *devisavit vel non*, there was a verdict establishing the said paper-writing as the last will and testament of the deceased, and the defendants appealed to the

(288) Superior Court, where, at the Spring Term, 1842, there was also a verdict for the plaintiffs. It further appeared that Isaac P. Freeman, one of the plaintiffs, at the next term of the county court was permitted to qualify as executor; but that the said will had never been recorded, and that a diligent and thorough search had been made for the same in the clerks' offices of the county and Superior Courts, and the paper could not be found. And the motion of the plaintiffs was to amend the record of the Superior Court by setting out, in the finding and verdict of the jury upon said issue, the will as found, and that the same be duly certified to the county court; which motion was opposed by the defendants.

In support of the motion, the plaintiffs offered the written affidavit of Isaac P. Freeman, the executor, to prove the contents of the said will, to the end that the record might be made in accordance therewith; which his Honor, *Judge Saunders*, before whom the case was tried, refused to hear, on the ground of the interest of the witness as a legatee under the will. The plaintiffs then offered the affidavits of one of the

subscribing witnesses to said will, and of other persons for the same purpose; and these his Honor also refused to hear, on the ground that the court had not the legal power and authority to allow the amendment of the record in the manner and particulars proposed. The rule was accordingly discharged, and the plaintiffs appealed to the Supreme Court.

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

NASH, C. J. Had his Honor refused to amend the record, because the evidence offered did not satisfy him that he ought to do so, no appeal to this Court could have been sustained; for the reason that it was the exercise of a pure discretion, founded on the evidence into which we should have no right to look. *Dickinson v. Lippitt,* 27 N. C., 560; *Quiett v. Boon, ibid.,* 9. But his Honor does not put his opinion upon the deficiency of testimony, for none was examined before him; but upon the want of power. If the power did exist, then there was error in law upon which this Court must act. That the Superior Court had this power, is made apparent by the terms of the 5th section of the act of 1836, chapter 3. After enumerating a variety of (289) causes in which, after verdict, the judgment shall not be stayed or reversed, it proceeds, or "for any informality in entering a judgment or making up the record thereof, or for any other default or negligence of any clerk." etc. The 6th section provides, that these omissions, imperfections, defects, and variances, "shall be supplied and amended by the court where the judgment shall be given, or by the court into which it shall be removed by appeal or writ of error." That the power resides in every court to amend the entries on its records, so as to make them speak the truth, has been repeatedly declared by this Court. *S. v. King,* 27 N. C., 203; *Jones v. Lewis,* 30 N. C., 70.

The will of Christiana Freeman had been propounded in the Court of Pleas and Quarter Sessions of Bertie County, and upon the judgment rendered upon the verdict, the case was taken by appeal to the Superior Court, where it was tried *de novo,* and a verdict returned by the jury establishing the will. The clerk, in recording the verdict, neglected to spread the will upon his minutes. The object of the present application is to supply this defect of the record, by having the will spread out in the terms of it. This the presiding judge refused to do, because, in his opinion, he had not the power, and refused to hear the evidence by which it was proposed to make the amendment. In this he was mistaken. Whether the evidence proposed could or ought to induce the court to

grant the motion, is a question with which we have nothing to do. *Purcell v. McFarland's Heirs,* 23 N. C., 34; *Dickinson v. Lippitt,* 27 N. C., 560.

The judgment must be reversed, and this opinion must be certified to the Superior Court of Bertie, with directions to proceed upon the motion according to its sound discretion.

PER CURIAM. Judgment reversed.

Cited: Ingram v. McMorris, 47 N. C., 451; *Parsons v. McBride,* 49 N. C., 100; *Stephenson v. Stephenson, ibid.,* 474; *S. v. Brannen,* 53 N. C., 210; *Cox v. Cox, ibid.,* 489; *Clayton v. Glover,* 56 N. C., 371; *Henderson v. Graham,* 84 N. C., 496; *Clemmons v. Field,* 99 N. C., 402; *McArter v. Rhea,* 122 N. C., 618.

(290)

DOE EX DEM. LAMBERT WOODS v. JOSEPH WOODS AND JAMES WOODS, EXECUTORS, ETC.

1. Devise of land to L., "provided the said L. shall pay to my grandson, E., three hundred dollars." E. died in the lifetime of the testator: *Held,* first, that the proviso did not make the devise to L. conditional, but gave a legacy to E. charged upon the land.
2. Secondly, that by the death of E., in the lifetime of the testator, the legacy lapsed, and L. took clear of the charge.

EJECTMENT, tried before *Settle, J.,* at ORANGE, on the last Spring Circuit, upon the following statement of facts, as of a case agreed between the parties:

The tract of land originally belonged to one Joseph Woods, deceased, who devised the same as follows:

"I give to Lambert Woods, my grandson, the tract of land whereon I now live and reside, containing two hundred and twenty-five acres, more or less, provided the said Lambert Woods shall pay to my grandson, Eli Woods, son of John Woods, deceased, the sum of three hundred dollars."

Eli Woods died in the lifetime of the devisor, and Lambert Woods, the lessor of the plaintiff, claims under the foregoing clause of his grandfather's will, and before the commencement of this suit, tendered the three hundred dollars therein mentioned, to the defendants, who

are the executors of Joseph Woods, and in possession of the premises, holding the same for the purposes of the will.

His Honor, the presiding judge, was of opinion that the lessor of the plaintiff was entitled to recover, and after verdict and judgment accordingly, the defendants appealed to the Supreme Court.

Norwood for defendants.
J. H. Bryan for plaintiffs.

NASH, C. J. The question argued at the bar does not arise in this case. It is not on a covenant, but upon a devise, in which the question is generally one of intention. A covenant is a contract under seal, made by the parties, in which they mutually state what is to be performed by each; and it is always important to ascertain from the (291) covenant itself, in what order their several liabilities arise; and where anything is to be done by the plaintiff, before he can call on the defendant, it must be stated in the declaration, and proved as stated. Thus the plaintiff must allege the performance of a condition precedent, or show what is equivalent thereto. But in the construction of a devise, the rule is that the intention of the testator, collected from the paper, is to govern, unless contrary to law. In this case, the testator, Joseph Woods, devises to his grandson, Lambert Woods, a tract of land, "provided, the said Lambert Woods shall pay to my grandson, Eli Woods, son of John Woods, deceased, the sum of three hundred dollars." Eli Woods died in the lifetime of the testator, and, as is admitted, without leaving any issue. The devise to Eli, the grandson of the testator, was a legacy of so much money, charged upon the land devised to Lambert, the lessor of the plaintiff. The word "provided" does not render the devise a conditional one, to be defeated by his noncompliance. If Eli had survived the testator, the legacy to him would immediately, upon the death of the grandfather, have become vested in him, and not at all dependent upon the will or pleasure of Lambert, but would have attached upon the land itself, and could have been recovered of the lessor of the plaintiff. This construction is made manifest by the fact, that there is no devise of the land over to a third person, if Lambert should refuse to pay the three hundred dollars; but it is an absolute devise to him. Upon the death of Eli without issue, in the lifetime of the testator, his legacy lapsed. If, however, its payment were a condition, its performance became impossible by the act of God. It is not intended to say a condition may not be annexed to a devise; it may, but if its performance be rendered impossible by the act of God, it is excused. Thus one devised to his daughter, on condition that she should marry the nephew

of the testator, on or before he attained the age of twenty-one. The nephew died young, and the daughter never refused, nor was ever required to marry him; it was adjudged that the condition was not broken—it having become impossible by the act of God. *Thomas v. Howell,* 1 Salk., 170; 1 Inst., 206. The words there, are much
(292) stronger than in our case. It is impossible to suppose that it was the intention of the testator to deprive his grandson, Lambert, of the bounty intended for him, if it should become impossible for him to pay to Eli his legacy. The estate of Lambert vested immediately upon the death of the grandfather, the devisor, without being subject to any condition whatever, but simply charged with the legacy to Eli.

PER CURIAM. Judgment affirmed.

Cited: Smith v. Gilmer, 64 N. C., 547; *Whitehead v. Thompson,* 79 N. C., 453; *Burleyson v. Whitley,* 97 N. C., 299; *Tilley v. King,* 109 N. C., 463; *Outland v. Outland,* 118 N. C., 140; *Allen v. Allen,* 121 N. C., 333; *Lynch v. Melton,* 150 N. C., 596; *Marsh v. Marsh,* 200 N. C., 749.

W. W. GRIFFIN v. SAMUEL WILLIAMS.

A., having chartered a vessel which he commanded, B. loaded her with a cargo for sale in the West Indies, which he insured and consigned to A., and furnished supplies for the voyage, A. agreeing, out of the proceeds of the sale, to pay B. the cost of the cargo and the bill for supplies, with five per cent thereon, and to retain the residue, if any, as freight: *Held,* that A. had no interest in the cargo, which was liable to seizure under *fi. fa.*

THIS was an action of *trover,* brought to recover the value of a quantity of lumber. Plea, general issue.

On the trial before his Honor, *Judge Saunders,* on the Spring Circuit, at CAMDEN, to which county the case had been removed from the county of PASQUOTANK, the facts were substantially as follows: The plaintiff had a judgment against one Burgess, and an execution was issued thereon, and levied on the lumber in question as the property of Burgess, and the plaintiff purchased at the constable's sale. Burgess was the captain of the schooner Belle, on board of which the lumber was at the time of the levy; and the constable who made the levy testified that at the time he did so, Burgess claimed an interest in the property. Other witnesses were called for the plaintiff, who testified to Burgess's

claiming the lumber as his own; but they further stated that it was usual for all captains of vessels to speak of the cargoes on board, as theirs.

The defendant introduced Captain Burgess, who swore that he (293) chartered the schooner Belle by the month, and being anxious to procure freight for the West Indies, he applied to the defendant, who at first declined loading him, but on a second application, agreed that Burgess should purchase a cargo of lumber on his, Williams' account, and accordingly gave him an order to one Mr. Jarnagan, as follows:

"Dear Sir—Captain Burgess has permission to purchase a load for the West Indies, and draw on me for the amount at ninety days, or four months.

(Signed.) Sam'l Williams."

Burgess made the purchase of Jarnagan accordingly, and Williams furnished the supplies for the vessel, insured the cargo, and consigned it to Burgess, who was to take it to the West Indies and sell it to the best advantage, he agreeing to pay Williams the original cost of the lumber and the bill for supplies, and five per cent on the amount of the cost of the cargo and advancements; and the balance of the proceeds of sales, if any, he was to retain as freight. Burgess further stated that he was not responsible to Williams except as consignee, and that it was usual for owners of West India cargoes to consign to their captains; if the cargo had been lost, and the insurance could not have been collected, it would have been Williams's loss; and that the freight on lumber to the West Indies is generally equal to the cost of the cargo. S. S. Burgess and P. C. Williams, a son of the defendant, testified to the agreement between Williams and Burgess substantially as above; and Jarnagan testified that in the sale of the lumber by him, he knew only Williams as responsible to him, and that he drew on Williams for the amount, and he paid it.

His Honor, the presiding judge, instructed the jury that if they believed the testimony of Captain Burgess and young Mr. Williams, or either of them, Burgess had no interest in the lumber subject to execution, and they should find for the defendant. There was a verdict and judgment accordingly, and the plaintiff appealed to the Supreme Court.

Pool for plaintiff.

Heath, Brooks and W. N. H. Smith for defendant. (294)

BATTLE, J. The cases of *Meyer v. Tharpe,* 5 Taun. Rep., 74; *Smith v. Watson,* Barn. & Cres., 401 (9 Eng. C. L. Rep., 122); *Ex Parte Hamper,* 17 Ves. Jun., 404; *Reid v. Austin,* 17 Mas. Rep., 197, and *Turner v. Bissell,* 14 Pick. Rep., 192, cited by the defendant's counsel (and the authority of which the plaintiff's counsel admit that they cannot dispute), fully support the position that the contract between the defendant and Burgess did not give the latter any interest in the lumber in question. It was not, therefore, liable to be levied on and sold as the property of Burgess under the plaintiff's execution; and he acquired no title by his purchase. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

LANIER DANIEL v. ARNOLD WHITFIELD.

A. put into the hands of B. for collection a claim against C. and D., and a judgment having been obtained thereon, and a *fi. fa.* levied on the property of C., A., B., and C. met at the house of C. on the day appointed for the sale, when C. paid to B. one-half of the debt, who immediately paid it over to A., and it was agreed between B. and C. in the presence of A., that B. should pay the residue of the debt to A., and if it should not be collected out of D., C. would repay it to B.; shortly after C. paid the residue to B. In an action brought by A. against B.: *Held,* that what had taken place at the house of C. was equivalent to a demand by A. for payment from B., and therefore the statute of limitations began to run from that time: *Held, further,* that B., having offered in evidence circumstances tending to raise a presumption of payment to A., was entitled to show in further support of the presumption, that A. and B. lived near each other, and met almost daily, and that from the time B. received the residue of the debt from C., A. was greatly pressed for money, by executions and otherwise.

(The cases of *Fleming v. Straley,* 23 N. C., 305, and *Webb v. Chambers,* 25 N. C., 374, cited and approved.)

THIS case was commenced by warrant against the defendant, who was a constable, and carried by appeal to the Superior Court, where, at Spring Term, 1853, at MARTIN, it was tried before *Bailey, J.* On the trial, it appeared that a note for $6.17, against one Carroway and
(295) Ausborn was placed for collection in the hands of the defendant on 3 February, 1844. That the defendant who gave a receipt for the said note, was constable for the years 1844-'5-'6. That he got judgment thereon a few days after he received it, and took out an execution and had levied the same on the property of Carroway. That on the

day appointed for the sale, which was not more than a month after the defendant had received the claim, the plaintiff and the defendant met at the house of Carroway, when Carroway paid half the debt to the defendant, who paid it over at once to the plaintiff, and when it was agreed between the defendant and Carroway that the defendant should pay the balance of the claim to the plaintiff, and if the defendant did not succeed in getting it out of Ausborn, Carroway would repay the amount to the defendant. A witness who proved this agreement stated that the plaintiff was present and seemed satisfied with it. Ausborn did not pay, and in the course of another month Carroway paid to the defendant the amount as agreed on. The plaintiff produced the receipt of the defendant for the said claim, and showed further that a demand was made on him in March, 1851, when the defendant said that he had paid the money due on the receipt to one Gray Andrews. The said Andrews was introduced, and testified that the defendant had not paid the said money to him. After the said demand—to wit, 29 March, 1851, the warrant in this case was sued out. The defendant proved that after he had received the remaining half of the said debt from Carroway, the plaintiff on one occasion gave his note to him for some ten or twelve dollars; that on another occasion, in 1850, he remarked that he and the defendant had settled fairly; and that on another occasion, in 1850, the defendant's agent called on the plaintiff with nine small claims, amounting to fifty dollars, when the receipt of the defendant was not included in the settlement, nor produced.

The defendant also offered to prove that the plaintiff, defendant, and Carroway, all lived near each other; that they were in the habit of meeting almost daily, and that the plaintiff, from the time the remaining money was paid to the defendant to the issuing of the warrant in this case, was greatly pressed under executions and otherwise for money. This evidence, the case states, was offered, first, to add (296) to the other proof in the cause, to convince the jury that the balance of the money had been paid to the plaintiff; and secondly, to show that between 3 April, 1844, and 29 March, 1845, the plaintiff had called on the defendant for the money, or knew of its misapplication; in either of which cases, as insisted by defendant, the statute of limitations would bar the plaintiff's recovery. The foregoing evidence was objected to, and rejected by his Honor. His Honor then charged the jury that there were two questions in the case: First, as to the statute of limitations, he instructed them that there was no evidence to set the statute in motion, until the demand made in March, 1851; and secondly, as to the payment by the defendant, that the evidence admitted by the court to be given by the defendant authorized them to infer

that the plaintiff had been paid—which evidence, however, could be rebutted by the other proof in the case.

There was a verdict for the plaintiff, and judgment having been rendered thereon, the defendant appealed to the Supreme Court.

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

NASH, C. J. We think there was error both in the rejection of the testimony offered by the defendant, and in the ruling of the court upon the statute of limitations. The defendant received the note from the plaintiff for collection in 1844. It was admitted that he had collected it from Carroway, one of the debtors in the note. He averred he had paid the amount to the present plaintiffs, and with other evidence to that point offered to prove that the plaintiff and defendant and Carroway all lived near each other; that they were in the habit of meeting almost daily; and that the plaintiff, from the time the remaining money was paid to the defendant, to the issuing of the warrant in this case, was greatly pressed by executions and otherwise for money. As to the weight of this evidence—whether much or little—the jury were the exclusive judges. We think it was competent and ought to have been submitted to them. A jury is entitled to hear any evidence which has a natural and necessary connection with the subject of inquiry, (297) and from which they would be legally authorized to presume the fact to be as alleged. In *Fleming v. Straley,* 23 N. C., 305, where one of the questions was as to the domicil of the plaintiff at the time the writ was issued, the defendant proved that he had gone from one county to another, as evidence that he had abandoned his first domicil; and the plaintiff was suffered to rebut it by showing that it was not so considered in the father's family, where the plaintiff lived. So where a merchant renders his account to his customer, in order to show the latter's assent to its correctness, he may prove that the latter retained it without objection. *Webb v. Chambers,* 25 N. C., 374. In both these cases the testimony was admitted, because it had a tendency to prove the point in issue—to wit, the domicil in the one case, and the correctness of the account in the other. From the evidence ruled out by his Honor, the jury might have inferred, in connection with the other circumstances in evidence, that the defendant had discharged the plaintiff's claim. The evidence was pertinent to the point in issue.

We think there was error also in the ruling of the court upon the statute of limitations. The defendant lost no time in taking the necessary steps to collect the money due the plaintiff. A judgment was obtained

and levied upon the property of Carroway, one of the defendants. On the day of sale, which was within a month after the note had been put in the hands of the defendant, the parties—that is, the present plaintiff, the defendant, and Carroway—met at the house of the latter, where the sale was to be had. At that time Carroway paid to the defendant one-half of the debt, who immediately paid it to the plaintiff. It was then agreed between Carroway and the present defendant that the latter should pay the balance of the judgment to the plaintiff, and if the defendant should fail to make the money out of Ausborn, the other defendant in the execution, that Carroway should repay it to him. The present plaintiff was present, and by his conduct agreed to the arrangement. By that arrangement, the defendant admitted he had the money in his hands, and it amounted to a demand on the part of the plaintiff. The latter had attended on the day of sale to receive his money—it was in his power to coerce a sale. Suppose a sale had taken place, or Carroway, the defendant in the execution, had paid the officer the (298) whole of the money, and the officer had said to the plaintiff, "I will pay you next week," would it have been necessary for the plaintiff, to entitle himself to a verdict, to have proved any other demand? Certainly not. This arrangement between the parties was, in substance and effect a demand, and set the statute in motion; and seven years having elapsed after it was entered into, and before the action was brought, the plaintiff is barred by it.

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

Cited: Davis v. Stephenson, 149 N. C., 116.

HENRY ELLIOTT v. JOHN P. JORDAN ET AL.

Where A. placed in the hands of a constable a warrant against two defendants, and the same was served, and after several continuances, a trial was had and judgment given against one, and for the other defendant: *Held*, that A. was not entitled to a *recordari*, although he was detained by sickness from attending the first day appointed for the trial, and had no notice of the other proceedings, until too late for an appeal; for if the constable was not his agent, he ought to have attended, or sent an agent, and if his agent, then the neglect of the constable, was in law, his own.

(The case of *Baker v. Halstead, ante,* 41, cited and approved.)

THIS was a petition for a writ of *recordari,* in which the plaintiff alleged that the defendants, Avery and Jordan, owed him a debt of $55,

due by their joint bond; that on 13 February, 1851, he procured a warrant to be issued against the defendants, and placed the same in the hands of one Hasket, a constable, with directions to execute the same and have a trial thereof. That on the back of said warrant the said Hasket endorsed, "Executed—N. M. Hasket, constable"; and the following endorsements also appeared thereon—viz., "22 February, 1851, continued; T. Wilson, J. P." "15 March, 1851, continued until Friday, the 21st instant; W. G. Welch, J. P." "22 March, 1851, continued till Friday, 29th instant; Edwin Brace, J. P." And as appears (299) by another endorsement, the justice of the peace, on 28 March, 1851, gave judgment against the defendant, Avery, for the amount of the debt claimed, and in favor of the defendant, Jordan, for his costs.

The plaintiff further alleged that he had no knowledge of but the first of the said different continuances; that he never applied for the same, nor had notice thereof, and that until it was too late to obtain an appeal to court, or a new trial before the magistrate, he supposed that a judgment had been rendered in his favor against both the defendants.

On return of the writ of *recordari,* the affidavits of the parties, as well as of others, were filed (but deemed unnecessary to state them, etc.); and upon the hearing of the case before *Saunders, J.,* at PERQUIMANS, on the last Spring Circuit, he ordered the same to be placed upon the docket for trial; from which order the defendant, Jordan, prayed and obtained an appeal to the Supreme Court.

Heath for defendants, argued:

1. That the same rules of law apply to *recordaris* as to *certioraris;* the only difference being that the former are directed to courts not of record; the latter, to courts of record.

2. In this case the constable was, or was not the plaintiff's agent. If he was such agent, then the agent has neglected the plaintiff's case; if not his agent, then the plaintiff has neglected his case himself. In either event, the case of *Baker v. Halstead, ante,* 41, is decisive against the plaintiff's petition, and he is remediless, because of neglect of his agent or himself.

W. N. H. Smith, contra.

NASH, C. J. In the order made at Spring Term, 1853, of Perquimans Superior Court, directing this case to be placed on the trial docket, there is error. In the petition, it is stated that the petitioner took out the

warrant and placed it in the hands of the constable. He admits he was notified by the officer of the first appointment for the trial of the cause, when he failed to attend in consequence of being "too unwell." Upon the back of the warrant are three several continuances. Of the first, when the warrant was returned, he had notice; of the (300) others he had none, and was not present at the time the judgment was obtained. The first day appointed for the trial was 22 February, 1851, and after several continuances, judgment was rendered 28 March succeeding. Of all these continuances the petitioner says he was ignorant. By the law, whenever an individual has claims upon others to collect, if within the jurisdiction of a magistrate, he may constitute the constable, into whose hands he puts them, his agent to collect. It then becomes the duty of the constable to discharge all the duties of an agent, and he and his sureties are bound for any negligence or unfaithfulness in the management of the business, and by his acts the plaintiff is bound. If, however, the plaintiff does not choose to appoint the officer his agent, he must attend to the business himself, or have some one to represent him.

In the management of this business, there has been gross negligence in the constable, if he was the agent, in not informing his principal of the obtaining of the judgment in time for an appeal; or, if he was not the agent, then in the plaintiff in not informing himself of the time of trial of the warrant. In either case, the plaintiff has lost his right to the aid of a writ of *recordari*. *Vigilantibus non dormientibus servit lex.* The case of *Baker v. Halstead, ante,* 41, is decisive of this. The judgment below is reversed and the petition dismissed.

PER CURIAM. Judgment reversed.

Cited: Koonce v. Pelletier, 82 N. C., 237.

J. M. A. DRAKE, ADMINISTRATOR, v. WM. COLTRANE, ADMINISTRATOR.

The 4th section of the Revised Statutes, chapter 113, which confers on the claim of a surety, paying the debt for which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid, would have had, applies to any such claim, whether the payment be made before or after the death of the principal.

IT appears from the transcript of the record that the plaintiff had obtained a judgment *quando* against the assets of the defendant's in-

testate; and this was a *scire facias* to renew the same, and sug-
(301) gesting that assets had come to the defendant's hands. The following are the facts agreed between the parties:

Sundry justices' judgments, amounting to $250 and more, were rendered against M. A. Causey, and William Coltrane, the defendant, became surety for the stay of execution. The money was collected from and paid by Coltrane, prior to the death of Causey, which occurred in September, 1840. At November Term, 1840, of Randolph County Court, Coltrane administered on Causey's estate; and on 4 August, 1842, Benjamin Swain, the plaintiff's intestate, obtained a judgment before a justice of the peace against said Causey, for $28.46, which amount, since the death of Causey, Swain had paid as his surety on a judgment obtained before his death. The defendant suggesting a want of assets, the case was returned to court for trial.

Coltrane had assets enough, and no more than enough to satisfy the debt due to himself. If he had a right to retain a preference to Swain's debt, judgment to be rendered for the defendant; if not, for the plaintiff.

His Honor, *Settle, J.*, at RANDOLPH, on the last Spring Circuit, being of opinion for the defendant, gave judgment accordingly; from which judgment the plaintiff appealed to the Supreme Court.

J. H. Bryan for plaintiff.
No counsel for defendant in this Court.

PEARSON, J. Revised Statutes, chapter 113, section 4, when a surety pays the debt of his principal, the claim of the surety against the personal representative of the principal, shall have the same priority against the assets as belonged to the demand of the creditor. In this case, the defendant, as surety of Causey, had paid a judgment rendered against Causey, to which the defendant had become surety for the stay of execution. The defendant clearly had a right to retain by force of the above statute. The fact that the money was paid by the surety before the death of the principal makes no difference. The case falls both within the words of the statute, which are very guarded, and the
(302) evil which it was intended to remedy.

PER CURIAM. Judgment affirmed.

Cited: Howell v. Reams, 73 N. C., 393; *Liverman v. Cahoon,* 156 N. C., 203.

STATE EX REL. DUGALD MCCALL AND OTHERS v. THE JUSTICES OF ANSON.

1. Appeal in this case from the order of the Superior Court, granting a writ of alternative *mandamus*, premature.
2. In a proceeding like this, the writ of alternative *mandamus* is always the first process, as distinguished from a rule.

(*Vide*, same case, 33 N. C., 135.)

THIS is the same case that is reported in 33 N. C., 135, and for a statement of the facts, the reporter refers to the opinion of the Court as there given.

At ANSON, on the last Spring Circuit, his Honor, *Ellis, J.*, awarded alternative writs of *mandamus* to each of the relators, from which order the defendants prayed an appeal to the Supreme Court, which was granted.

Winston for defendants.
Strange for plaintiffs.

BATTLE, J. The appeal is premature, and must be dismissed. When the case was before this Court, at June Term, 1850 (see 33 N. C., 135), it was decided that the judge in the court below erred in discharging the rule which the relators had obtained against the defendants, calling on them to show cause why a writ of *mandamus* should not issue; and the judgment was reversed, and a certificate to that effect sent down, in order that the Superior Court might direct the writ to be issued.

When the case was returned to that court, the defendants were permitted again to show cause why a *mandamus* should not issue, the parties treating it, as if it were an application for a peremptory *mandamus* in the first instance. The rule indeed did call the writ required a peremptory *mandamus,* and the court, as well as the parties, seemed (303) to view it in that light; but the irregularity was cured by the order made by the court, that a writ of alternative *mandamus* should issue. To that, the relators were clearly entitled, as had already been decided in this Court, and no appeal could be properly taken from such order. This is manifest from the consideration that the very same question is now before us as was decided on the former appeal—to wit, whether the relators are entitled to the writ of alternative *mandamus,* which is always the first process, as distinguished from a rule to show cause, in a proceeding of this kind. 3 Black. Com., 111; Tapping on Mandamus,

6; 1 Rev. Stat., chap. 97, sections 3, 4, 5; *Delacy v. Neuse Navigation Company,* 8 N. C., 274. When the return shall be made by the defendants to the writ of alternative *mandamus,* such proceedings may be had that the case may be decided finally upon its merits.

The case being now improperly before us upon the appeal of the defendants, it must be dismissed at their costs, which will be certified to the Superior Court, from which the writ of alternative *mandamus* must issue, as heretofore ordered by that court.

PER CURIAM. Dismissed accordingly.

JOHN EVERETT v. WILLIAM J. SMITH.

1. The sheriff sells the lands of A. for taxes, and makes a deed to the purchaser. If this be inoperative, the deed from A's vendor to him would be good color of title, but if the sheriff's deed be operative and pass title, then the deed of A's vendor could not be set up by A. as color of title.

2. In an action of trespass to land, the defendant can justify upon the ground, that he entered as the servant of one, in whom are the title and right of possession.

(The case of *Johnson v. Farlow,* 35 N. C., 84, cited and approved.)

THIS was an action of trespass, tried before *Battle, J.,* at Spring Term, 1852, of HYDE Superior Court. The defendant drew out his pleas at length, justifying the trespass: (1) As servant of the president and directors of the Literary Board; (2) as servant of the president (304) and directors, etc., and of others, tenants in common of the premises; (3) and (4) under the sheriff of Hyde.

There was a verdict and judgment for the plaintiff, from which the defendant appealed to the Supreme Court. The facts necessary to the understanding of the opinion of the court, appear sufficiently stated therein.

Rodman for defendant, argued:

1. After the lapse of forty-six years, the court would be justified in presuming that the taxes were due, and that the survey and plat were made which are recited in the sheriff's deed to Blount. 2 Phil. Ev., Cowen & Hill's notes, 297, 362, 1292, and cases cited. But if these presumptions will not be made,

2. The sheriff's deed to Blount was color of title.

3. The possession held by Blount was sufficient in its nature and duration to perfect the title to all the land embraced in the deed. *Rhodes v. Brown,* 13 N. C., 195; *Clinton v. Herring,* 5 N. C., 414; *Carson v. Burnett,* 18 N. C., 546; *Tredwell v. Reddick,* 23 N. C., 56; *Williams v. Buchanan, ibid.,* 535; *Murphy v. Grice,* 22 N. C., 199; *Bynum v. Thompson,* 25 N. C., 578.

See, also, the acts of 1798 (2 Laws of N. C., chap. 492, page 856), and 1842, chap. 36, and Rev. Stat., chap. 43, sec. 34.

4. The sheriff's deed to Governor Williams was in all respects regular. *Avery v. Rose,* 15 N. C., 549. Some taxes were necessarily due, and it will not be assumed that the sheriff sold for more than was due.

Donnell, contra.

PEARSON, J. The defendant justifies as the servant of the president and directors of the Literary Fund of North Carolina, in whom he alleges title; he also justifies as sheriff under the act of 1842, and makes the same allegation of title in the president and directors of the Literary Fund.

The question involves the title of the president and directors of the Literary Fund. They claim an undivided moiety, and if their title be good, it supports the plea.

The land is "swamp land," and in 1795 was granted to one (305) Hall (in a grant of 195,000 acres). The plaintiff was in possession under Hall, and was turned out of possession by the defendant.

In 1800 the land was sold for taxes, and was bought by one John Gray Blount, who took the sheriff's deed. In 1801 it was again sold for taxes, and was bought by one Harris, who took the sheriff's deed. The persons claiming under both Blount and Harris, conveyed an undivided moiety to the president and directors of the Literary Fund, in consideration of its being drained by that corporation. These are the only two sources of title to which it is necessary to advert.

If the sheriff's deed to Harris conveyed a good title, the question is settled; if it did not convey a good title, then the defendant falls back on the sheriff's deed to Blount; if that deed conveyed a good title to Blount the question is settled; if it did not convey a good title to Blount, then the question will depend upon whether his title has been ripened by adverse possession under color of title.

To prevent unnecessary discussion, we will suppose that neither the sheriff's deed to Harris or Blount conveyed a good title, and put our decision on the question, was Blount's title ripened by adverse possession under color of title? We think it was.

As to Blount's possession, we pass by the fact that in 1819 one Hastings took possession of a part of the land under a contract of purchase from Blount, and has continued in possession thereof ever since. We also pass by the fact that in 1826 one Smith took possession of another part of the land, as a lessee of Blount, and has continued in possession ever since, because it may be that the possession of Hastings was limited to the part he contracted to purchase, and that of Smith to the part covered by his lease, neither of which extended to the *locus in quo*.

But in 1827, Blount himself took possession of the land and opened a plantation, which he and those claiming under him have been cultivating ever since. It is true the place where Blount first commenced clearing and cultivating was covered by a grant to one Swindle, and that raises a question whether his possession was not confined to the Swindle grant, which does not extend to the *locus in quo;* it is not neces-
(306) sary to decide that point, for, admit it to be so, in 1833 Blount extended his clearing beyond the Swindle grant, and has been cultivating fields outside of it ever since, and there is no ground for saying that the possession which he took in 1833 did not extend to the limits of the sheriff's deed to him, for there is nothing to restrict it and prevent the application of the well settled rule.

As to Blount's color of title, he had the sheriff's deed duly registered. It is objected Blount's estate was sold for taxes and purchased by Harris, and after the sale, the sheriff's deed could not be set up by him as color of title. For this position, *Johnson v. Farlow,* 35 N. C., 84, is relied on. It was there held, that one who conveys all of his estate to another cannot rely on the deed by which he originally acquired the estate as color of title, for that deed is *functus officio,* except as one of the *mesne* conveyances of the purchaser. There the conveyance was made by the man himself, and of course it passed all his estate, and left the deed by which he acquired the estate *functus officio,* here, the conveyance is made by a third person, and his deed may or may not pass the estate; if it does pass the estate, then the party whose estate is so passed, cannot rely upon the deed by which he acquired the land as color of title, for it is *functus officio.* But if it does not pass the estate and is inoperative, wherefore should he not be at liberty to rely on the deed to him as giving a good title; or at all events as giving him a color of title? Suppose a sheriff sells land under a void *fi. fa.,* and the debtor holds on to his possession, why should he not rely on the deed to him as conferring a good title, or at all events as color of title?

In the case under consideration, if the sheriff's deed passed the title to Harris, then the president and directors of the Literary Fund have

the title under his deed. If it was void or for any other cause did not pass the title, there can be no reason why Blount should not rely on his deed at least as being a color of title. So this case is distinguished obviously from *Johnson v. Farlow.* *"Quacumque via:"*—take it either way, the president and directors of the Literary Fund have acquired the title. We think the gentlemen who filled those places are entitled to much credit for their prudence and caution in securing all the outstanding claims so as to acquire a title to an undivided moiety of the large tract of land now in controversy, before they made (307) the outlay necessary to drain this tract of land, and much other vacant land conferred upon them by the act of the General Assembly.

Upon the argument of the case there was some discussion in reference to the pleadings. The entry upon the docket is, the "defendant justifies generally and specially," the counsel for the defendant was therefore required to draw up the pleas at length; we are clearly of opinion that the plea of justification as the servant of the president and directors of the Literary Fund is sustained. It is unnecessary to pass upon the justification as sheriff under the act of 1842. It is due to Judge Battle, from whose decision the defendant appealed, to state that upon the trial below he did not enter into an investigation of the question of title. He says the only question submitted to him, was the construction of the act of 1842, and he put his decision on the ground that the act of 1842 did not apply to the case of one, who, like the plaintiff, was in possession claiming under title, but was confined in its operation (being highly penal) to mere "squatters" or trespassers without any show of title. There may be some force in the view taken by him in reference to the question of construction, and it may also admit of some question how far the act of 1842 is applicable, when the president and directors of the Literary Fund are not seized in severalty, but are seized only as tenants in common with private citizens. We give no opinion upon these questions, and he concurs with the other members of this Court in putting our decision on the ground that the president and directors of the Literary Fund are entitled to an undivided moiety of the land in controversy; and the defendant can well justify in a civil action upon the ground that he committed the trespass complained of as their servant or agent.

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

Cited: Roberts v. Preston, 106 N. C., 421; *Kirkpatrick v. Crutchfield,* 178 N. C., 350.

(308)

THOMAS BOND AND E. H. WILLIS v. JAMES B. HILTON.

1. Tenants in common, and partners, may make a contract with one of their number, concerning the use of the property so held; and its violation gives a good cause of action at law, to those injured.

2. Where the law from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation, and consequent damage, an action on the case, founded on the *tort*, is the proper action.

(The cases of *Anders v. Meredith*, 20 N. C., 339; *Williamson v. Dickens*, 27 N. C., 259; *Ledbetter v. Torney*, 33 N. C., 294, and *Robinson v. Threadgill*, 35 N. C., 39, cited and approved.)

THIS was an action on the case in *tort*, tried before his Honor, *Battle, J.*, at Spring Term, 1852, of the Superior Court for WASHINGTON County. The following are the facts sent up from the court below:

"On the trial, the plaintiffs proved that in the month of December, 1848, they and the defendant were owners of a vessel; the plaintiffs owning three-fourths, the defendant, one-fourth. The plaintiffs also proved that on 26 December, 1850, the said vessel had a cargo on board of her, at the landing in the town of Plymouth, when the defendants specially and expressly undertook, and promised the plaintiffs that he would, as master of the said vessel, with proper diligence, conduct her to the West India Islands, sell the cargo, and on his return account with the plaintiffs. The plaintiffs further showed that in pursuance of said contract, the defendant, on the day it was made, signed bills of lading in the usual form, took charge of the vessel, and left Plymouth. They showed that the defendant carried the vessel to the town of New Bern, N. C. They then proved that a voyage to the West Indies and back usually occupied about two months.

"Plaintiffs contended that the delay, mismanagement, and abandonment of the vessel, were breeches of duty for which the master was liable, in his capacity of master, notwithstanding his part ownership.

"The court intimated an opinion that the facts proved were not sufficient to sustain the action. Upon this the plaintiffs submitted to a nonsuit. A rule *nisi* was obtained—rule discharged, and the plaintiffs appealed to the Supreme Court."

(309) *Rodman, with whom was Moore, for plaintiffs, argued:*

1. The defendant, by his contract to serve as master of the vessel, became liable to be sued in case, for breach of duty. It is no answer

to say that he was a tenant in common of the vessel. The contract created relations paramount to those arising out of the tenancy in common. He might have been sued in *assumpsit,* on the contract. *Ouston v. Ogle,* 13 East., 538; Brown on Actions, 143; or in case, for breach of the duties arising out of the relations created by the contract. *Herrin v. Eaton,* 1 Shep., 193; *Robinson v. Threadgill,* 35 N. C., 39.

2. One tenant in common may sue another for a misuse of the common property. 1 Chit. Pl., 91; *Anders v. Meredith,* 20 N. C., 339; *Oviorne v. Suford,* 9 N. Hamp., 502.

Heath and Hines for defendant.

NASH, C. J. On the part of the defendant it is contended that he, the defendant, and the plaintiffs were tenants in common of the vessel, and therefore this action cannot be maintained for any misuse of it; and secondly, if any can be brought, it must be on the contract and not in *tort.* That an action can be sustained by one tenant in common against another for a misuser of the property is proved by many cases. In *Cubit and Porter,* 15th East. R., 216, *Littledale, J.,* says if two persons are tenants in common of a tract of land on which there is a brick wall, and one refuses to repair and the other pulls it down and sells the materials and builds a better wall, it may be said there is total destruction of the old wall, and an action of trespass will lie. But if he sold the old materials for the purpose of building a new one, an action of trespass will not lie. "Such an act is more properly the subject-matter of an action on the case, because it is in the nature of a partial injury, and not of a total destruction of the subject-matter of the tenancy in common." And *Bailey, J.,* in the same case says, when there has not been a total destruction of the subject-matter of the tenancy in common, "but only a partial injury to it, an action on the case will lie by one tenant against the other." See, also, *Anders v. Meredith* 20 N. C., 339. It may then be safely laid down as a principle governing actions between tenants in common, that when there is a total destruction of the article held in common, an action of *trover* or trespass may be (310) sustained; but where there has been simply an abuse of it whereby its value is impaired, an action on the case may be brought. As to the second point contended for by the defendant, we think it untenable. The plaintiffs have not declared on the contract, but in *tort,* making the neglect of duty on the part of the defendant the gravamen of their claim. Two questions are presented to us: the first, can tenants in common contract with each other concerning the subject-matter of the tenancy? and if so, can they desert the contract and declare in *tort?*

The case of *Ouston v. Ogle,* 13 East., 538, is a direct authority upon the first branch of the inquiry. There the plaintiff declared upon a special agreement in writing, made between himself and the defendant and several others by name, part owners of a ship, whereby they and each and every of them agreed to and with the others and each and every of the others, among other things, that the ship should proceed on a voyage to the West Indies, and should be under the sole management and control of the defendant as husband thereof, etc. To this declaration the defendant demurred and filed special causes; the first was, that the plaintiff and defendant were, with certain other persons, part owners and partners in the ship, and that the action was brought on a partnership account; the fourth was, that by reason of any duty relating to a partnership in the ship, independent of the agreement, the defendant is not liable to an action at law. The court would not suffer Abbott who appeared for the plaintiff to make any argument; the demurrer was overruled, and judgment given for the plaintiff. That case very clearly recognizes the principle that tenants in common and partners may make a contract with one of their number concerning the use of the property so held, and its violation gives a good cause of action at law to those injured. Upon the second branch of the inquiry, we are of opinion the action is properly brought in *tort;* where the law, from a given statement of facts raises an obligation to do a particular act, and there is a breach of that obligation and a consequent damage, an action on the case, founded on the *tort,* is the proper action. In *Govett and Radnige,* 3 East., 70, *Lord Ellenborough* observes, there is no inconvenience in suffering a plaintiff to allege his gravamen as
(311) consisting in a breach of duty arising out of an employment for him, and bringing the action for that breach rather than upon a breach of promise. So *Bailey, J.,* in *Burnett and Lynch,* 5th Barn. and Adol., 609, says, although there be a special contract, a party is not bound to resort to it, but he may declare on the *tort* and say that the defendant has neglected to perform his duty. See Saunders on Pl. and Ev., 338. This doctrine is recognized in this State in the cases of *Williamson v. Dickens,* 25 N. C., 259; *Ledbetter v. Torney,* 33 N. C., 294, and in *Robinson v. Threadgill,* 35 N. C., 39. The plaintiff was entitled to sue in *tort,* and if the evidence showed that there had been a breach of duty on the part of the defendant in performing his contract, the plaintiff would have been entitled to a verdict. This was a matter of inquiry for the jury, under the proper instructions of the court. But his Honor did not submit the question to the jury, but nonsuited the plaintiffs. In this there was error.

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

Cited: Bond v. Hilton, 47 N. C., 150; *Solomon v. Bates,* 118 N. C., 315; *Fisher v. Water Co.,* 128 N. C., 375; *Peanut Co. v. R. R.,* 155 N. C., 165; *Mule Co. v. R. R.,* 160 N. C., 220; *Roberts v. Roberts,* 185 N. C., 570.

DOE EX DEM. SAMUEL MERCER v. TULLY HALSTEAD ET AL.

If at the time, the lessor of the plaintiff purchased and took his conveyance, the defendant was in possession of the premises described in the declaration, claiming them adversely, the plaintiff cannot recover. The lessor of the plaintiff had but a right of entry, which he could not convey, so as to enable his assignee to sue in his own name.

THIS was an action of ejectment, tried at CURRITUCK Superior Court, Spring Term, 1853, before his Honor, *Saunders, J.*

On the trial the plaintiff proved that the land formerly belonged to one Baxter, and that at his decease it passed into the possession of his daughter, Mary. In the year 1828, Mary intermarried with one David Wilson, who had by her a son, Thaddeus Wilson, and about fifteen years since, with his son, removed to the State of Tennessee, leaving his wife in the county of Currituck. After his removal, the said David and Thaddeus, by deed dated 15 February, 1851, sold the land to (312) Samuel Mercer, the lessor of the plaintiff. To estop the defendant, the plaintiff further proved a deed from the said Mary Wilson, dated in 1845, conveying the said land to the defendant, Halstead; and also that David Wilson, the husband, was still living. It was further shown that Halstead, one of the defendants, had been in possession of the land by himself or his tenants, from the year 1845, up to the time of the trial.

The defendants proved that the said Mary filed her bill in equity, at November Term, 1850, in the Court of Equity for Currituck County, for a divorce, alleging the adultery of her husband, and his abandonment of her, and that at Spring Term, 1852, after service by publication, she obtained a decree for divorce and alimony. The defendants insisted that the plaintiff could not recover: first, because he himself was in the adverse possession of the land at the date of the deed to Mercer; second, because the deed to Mercer was to deprive the wife of alimony, and being executed after the filing of her petition, was fraudulent and void. Other points were taken by the defendants, which are unnecessary to state.

The plaintiff contended there was no evidence to go to the jury to affect the validity of the deed to Mercer, and that the court should so charge. This his Honor declined, but charged the jury that it had been conceded in the argument by both the plaintiff and defendants' counsel, if the intent of making the deed to the lessor was to defeat the wife's claim for alimony, and this was known to the lessor, and he participated in it, then it was fraudulent and void; and that such was the law. That the intent with which the deed was made was a question for the jury, and that they were to decide it on the evidence adduced. If they should find the deed to have been made with that intent, and this was known to the lessor, their verdict would be for the defendants; if otherwise, they would find for the plaintiff.

There was a verdict for the defendants, and the plaintiff failing to obtain a new trial, appealed to the Supreme Court.

(313) *Heath and Hines for plaintiff.*
Smith and Pool for defendants.

NASH, C. J. The first objection to the plaintiff's recovery stated in the bill of exceptions is, that the defendant, at the time of the conveyance from David Wilson to the lessor of the plaintiff, was in the adverse possession of the premises claimed in the declaration. This objection is fatal to the action. The lessor derived title under David Wilson by deed, bearing date in 1851. In 1845, Mary Wilson, who was the wife of David Wilson, conveyed the premises to the defendant, who went into possession and cultivated and cleared, and was in possession in 1851, claiming it as his own. Whether the deed to the defendant actually did convey the land to Halstead, is not material to be inquired into. He was in possession under it, claiming adversely to all the world. At the time, then, that David Wilson sold and conveyed the land to the lessor of the plaintiff, he had but a right of entry which he could not convey so as to enable his assignee to sue in his own name. It cannot be necessary to cite authority to show this. Upon this exception the Court affirms the judgment below.

We further say that his Honor committed no error in refusing to instruct the jury as required. There was evidence upon the question of fraud, and it was properly left to the jury for their decision.

PER CURIAM. Judgment affirmed.

Cited: Young v. Griffith, 71 N. C., 336.

(314)

F. B. SATTERTHWAITE v. JOHN J. DOUGHTY.

1. If by the laws of a foreign country, a contract is void, unless it is written on stamped paper, it is void everywhere.

2. This principle is especially applicable to the several states of this confederacy, which, though foreign to each other in some respects, are united for all great national purposes under one government.

3. Therefore, a bond executed and payable in the State of Maryland, which is void under the laws of that State, because the same was not written on stamped paper, is void here also, and cannot be recovered in the courts of this State.

(The cases of *Watson v. Orr*, 14 N. C., 161; *Anderson v. Doak*, 32 N. C., 295, and *Drewry v. Phillips*, *ante*, 81, cited and approved.)

THIS was an action of debt, tried before *Manly, J.*, at the Special Term of BEAUFORT Superior Court, in January, 1853. The plaintiff declared as assignee of two bonds, which were admitted to have been made in Baltimore, in the State of Maryland, by the defendant, who resided in North Carolina, and that they were in Baltimore delivered to the payees, who resided there. It was also proved that the payees being indebted to other citizens of Baltimore, endorsed and delivered these bonds to their creditors as collateral security, and that by these last, the bonds were, without consideration, assigned to the plaintiff, who resides in North Carolina, and sent to him for collection.

The defendant in the court below, contended that one of the bonds was invalid, because it wanted the stamp required by the law of Maryland; and of this opinion was his Honor, whereupon the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

Other points were made in the court below, but as they are not necessary to the understanding the opinion of the Supreme Court, they are omitted.

Rodman for plaintiff:

The courts of this State will not enforce the revenue laws of Maryland. In support of the proposition that they will do so, will be cited Story on Prom. Notes. One only of the authorities he cites sustains him—viz., *Clegg v. Levy*, 3 Camp., 166. The others are all against the proposition. Chit. on Bills, 57; 6 T. R., 425; 4 T. R., 467; *James v. Catherwood*, 3 Dowl. and R'y, 190 (16 Eng. C. L. R., 165); *Wynne v. Jackson*, 2 Russ., 351; *Trust. of Randall v. Van Ransellaer*, 1 Johns., 94. (315)

Donnell, contra.

BATTLE, J. The first objection urged by the defendant against the plaintiff's right to recover is, that by the laws of the State of Maryland, where the bond was executed, it was void because not written upon stamped paper. If upon consideration this objection be found to be valid, it will dispose of the case and make it unnecessary to consider any other question discussed by the counsel.

The act of Maryland upon which the defendant relies, is entitled, "An act imposing duties on promissory notes, bills of exchange, specialties, and other instruments of writing, to aid in paying the debts of the State." It was passed in the year 1844, and in the 1st section imposes certain duties upon every sheet or piece of paper, etc., upon which shall be written or printed any bond, obligation, single bill, or promissory note, etc. In the 8th section it is declared, "that no instrument of writing whatsoever charged by this act, with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court of this State, or admitted in such court to be available for any purpose whatsoever, unless the same shall be stamped or marked as aforesaid," etc. The question is, whether, as the bond was executed in the State of Maryland upon unstamped paper, and could not therefore be made available for any purpose in the courts of that state, it can be enforced in the courts of this State by the obligee or his assignee. In the English cases upon this subject there seems to have been a direct conflict of opinion among judges of great eminence. In *Alvis v. Hodgson,* 7 Term Rep., 241, *Lord Kenyon* held that the plaintiff could not recover upon a written contract made in Jamaica, which by the laws of that island was void for want of a stamp. *Lord Ellenborough* ruled the same way in *Clegg v. Levy,* 3 Camp. N. P. Rep., 166, with regard to an agreement not valid for the same cause by the laws of Surinam. In *Wynne v. Jackson,* 2 Russ. Rep., 351 (3 Eng. Con. Ch., 144), the Vice-Chancellor held the contrary upon certain bills drawn in such form in France, that no re-
(316) covery could be had upon them in the courts of that country. *Lord Chief Justice Abbott* held the same in the case of *James v. Catherwood,* 2 Dowl. and R'y Rep., 190 (16 Com. Law. Rep., 165). The English elementary writers attempt to reconcile these apparently conflicting decisions by making this distinction; if the bill, note, or agreement be drawn or made in a foreign independent state, it may be enforced in England, though requiring a stamp in the country where drawn or made, but not if drawn or made in any part of the British Empire. Chitty on Bills, 57; Byles on Bills, 302 (61 Law Lib., 295). On the other hand, *Story, J.,* both in his commentaries on promissory notes, section 158, and on the conflict of laws, section 260, contends with much force of reasoning that "if by the laws of a foreign country a

contract is void unless it is written on stamp paper, it ought to be held void everywhere; for unless it be good there, it can have no obligation in any other country. It might be different if the contract had been made payable in another country, or if the objection were not to the validity of the contract, but merely to the admissibility of other proof of the contract in the foreign court." In the 261st section of his work on the conflict of laws, a book universally recognized as one of the highest authority, he states the grounds of his opinion, as follows: "The ground of this doctrine as commonly stated, is that every person contracting in a place is understood to submit himself to the law of the place, and silently to assent to its action on the contract. It would be more correct to say that the law of the place of the contract acts upon it independently of any volition of the parties in virtue of the general sovereignty possessed by every nation to regulate all persons, property and transactions within its own territory. And in admitting the law of a foreign country to govern in regard to contracts made there, every nation merely recognizes from a principle of comity the same right to exist in other nations, which it demands and exercises for itself." This course of reasoning commends itself strongly to our judgments, and we think that it is especially applicable to the several states of our confederacy, which, though foreign to each other in some respects, are united for all great national purposes under one government, and ought, therefore, whenever they can, to aid rather than hinder each other in carrying out each its own peculiar policy; and to do this is nothing more than in regard to its revenue laws. In doing this, we shall be supported (317) by the authority of the course pursued by the English courts, towards those provinces of the British Empire which are governed by their own domestic laws. Byles on Bills, *ubi supra.* We have not been referred to, nor have we been able to find any case, decided in our own State, directly upon this point. But our courts have several times recognized the doctrine that "the law of the country where a contract is made, is the rule by which its validity, its meaning, and its consequences are to be determined." *Watson v. Orr,* 14 N. C., 161. This doctrine was supplied in *Anderson v. Doak,* 32 N. C., 295, to the support of a bill of sale for slaves without a subscribing witness, executed in Virginia where no such formality is required. And in *Drewry v. Phillips, ante,* 81, decided at the last term, it was admitted by counsel, that a bill of sale for slaves executed in Virginia where all the parties resided, was good though not attested, nor proved and registered as required by the laws of North Carolina, because by the laws of Virginia no such attestation, proof, and registration were necessary. We can see no reason for a distinction between a formality made requisite to the

validity of a contract by the law of a state in aid of its revenue, and a formality required for any other cause. In every such case, the *lex loci contractus* ought to determine the rights of the parties everywhere. We therefore think that his Honor committed no error in holding that the present action could not be sustained, and the judgment of nonsuit must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Keesler v. Insurance Company, 177 N. C., 397.

(318)

STATE EX REL. A. H. SANDERS v. JOSHUA W. BEAN ET AL.

A surety on an official bond cannot, as relator, bring an action at law against his cosureties for a default of the principal. And the objection is well taken under the plea of general issue.

(The cases of *S. v. Lightfoot,* 24 N. C., 306; *McLaughlin v. Neill,* 25 N. C., 294; *Justices, Etc., v. Bonner,* 14 N. C., 289, cited and approved.)

THIS was an action of debt, brought upon the official bond of the defendant, Bean, a constable. Plea, general issue.

Upon the trial, at MONTGOMERY, on the last Spring Circuit, before his Honor, *Judge Dick,* it appeared that the relator was one of the sureties to the bond sued upon; although the writ had been executed upon the principal and other sureties only. The defendants insisted under such a state of facts, the plaintiff could not recover. The objection was overruled by his Honor, upon the ground that the relator was not sued in this action. There was a verdict for the plaintiff, and the defendants having failed to obtain a new trial, appealed to the Supreme Court.

Kelly and Dargan for defendants.
Strange for plaintiff.

BATTLE, J. It cannot now be denied that the relator, in a suit upon an official bond, made payable to the State or to an officer of the State, is the real plaintiff in the cause. It was so expressly decided in the cases of *S. v. Lightfoot,* 24 N. C., 306, and *McLaughlin v. Neill,* 25 N. C., 294, and we are not at liberty to dispute their authority. That being established, it follows as a necessary consequence that the objection made by the defendants to the recovery in this suit is fatal. If the

suit were against all the obligors in the bond, of whom the relator was one, it would be directly within the principle that a man cannot sue himself, either alone or with others. *Pearson v. Nesbit,* 12 N. C., 315. Can it make any difference that the relator did not include himself in the suit? We think not, because his right to sue depends upon the fact that the bond was in effect delivered to him, or that a contract was made with him, which could not be, as he could not either by himself or with others, deliver the bond to himself, or contract (319) with himself. *Justices v. Bonner,* 14 N. C., 289.

But it is contended by the plaintiff's counsel that the objection was not open to the defendants upon the pleadings, and could not be taken at the trial. We do not see why, as it appeared upon proof of the bond, and was besides expressly admitted that the relator was one of the obligors. The objection could not be taken by a plea in abatement, because the defendants could not give the plaintiff a better writ. It did not appear in the declaration, and therefore no demurrer could be put in. If good at all, it must have been taken on the trial upon the general issue, when it appeared in the evidence. That the relator should not be permitted to sue at law in such a case will appear to be placed not more upon a technical than upon a substantial difficulty, when it is recollected that he is equally liable with the other sureties for the officer's defaults, and that in case of the insolvency or removal from the State of one or two of them, it might be almost impossible at law properly to adjust the loss among the solvent or remaining sureties.

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

Cited: Becton v. Becton, 56 N. C., 423.

Distinguished: McDowell v. Butler, 56 N. C., 313.

JEREMIAH W. SAMPLE v. THOMAS WYNN.

A plaintiff in an action of slander, is entitled to give in evidence, in chief, his general character.

(The case of *McCauley v. Birkhead,* 35 N. C., 29, cited and approved.)

THIS was an action on the case for slander, in charging the plaintiff with bestiality. The pleas upon the record were, general issue, justification, statute of limitations, accord and satisfaction, and confidential communication.

On the trial before *Saunders, J.*, at PERQUIMANS, on the last Spring Circuit, the plaintiff, after the examination of several witnesses, offered to prove a good character for himself; but this testimony being (320) objected to, was ruled out. The defendant offered no evidence.

As to the testimony ruled out, his Honor charged the jury that he had excluded the evidence of character, because all men were presumed to have a good character, until the contrary appeared; that they were to take the plaintiff as a man of good character.

The jury found a verdict for the plaintiff, assessing his damages at fifty dollars; whereupon the plaintiff's counsel moved for a rule to show cause why a new trial should not be granted; the rule was discharged, and the plaintiff appealed.

Heath and Jordan for plaintiff.
W. N. H. Smith and Jones for defendant.

NASH, C. J. Upon the trial of this case, the plaintiff offered evidence to prove that his general character was good. This evidence was ruled out by the court, upon the ground that all men were in law, presumed to have a good character until the contrary appeared. The jury therefore were instructed to consider the plaintiff as a man of good character. That the defendant may show the bad character of the plaintiff in mitigation of damages is not denied, and it is equally undoubted that to rebut such evidence the plaintiff may show his general character to be good; but it is denied that such evidence can be given in chief, because the law presumes every man to have a good character. The question is a vexed one, both in this country and in England. Thus Mr. Starkie, 2d Vol. on Ev., page 216, in an action of slander imputing dishonesty to the plaintiff, who was the defendant's servant, the plaintiff may prove his good character before it is impeached by the defendant, by any evidence. On the next page he lays it down as a general rule that the plaintiff cannot go into such evidence to increase his damages until evidence has been given to impeach it. On page 218, Mr. Starkie says, it has been even held that where the defendant has attempted to impeach the general character of the plaintiff on cross-examination of his witnesses, and has palpably failed, that the plaintiff cannot call witnesses to his good character. The case cited by him is that of *King v. Francis*, 3 Esp. Cases, 116, before *Lord Kenyon*. It was but due to that (321) eminent and able judge, that the dissent of the author should be expressed with great modesty, and so it is. His language is, "It may be doubted whether this is not carrying the general doctrine too far." Mr. Stephens, in his Nisi Prius, 3d Vol., 2578, says that testimony

of the general good character of the plaintiff cannot be given in evidence in the first instance. In Mr. Starkie's treatise on slander the contrary is held, pages 77 and 86. If we turn to the treatises of eminent American jurists, we find that the doctrine is proclaimed as settled. That in actions of slander the plaintiff's general character is in issue, and therefore evidence showing it to be good or bad, and consequently of much or little value, may be offered on either side to affect the amount of damages, 2 Green. Ev., 280. The character of Mr. Greenleaf's treatise on Evidence stands very high, and his doctrine is sustained by the Supreme Court of New York, in *Gilman v. Lowell,* 8 Wendell, 578. "The character of the plaintiff is a proper subject of investigation in ascertaining the amount of damages which he is entitled to recover." We think that in the clash of authority we are at liberty to look to the reasons which support the opposite sides. It is a general rule recognized by all writers, that in civil proceedings, unless character be put directly in issue by the nature of the proceedings, evidence of the general character of neither party is admissible, but when it is so put in issue, it is competent. In what case can the nature of the proceedings bring a case more decidedly under the exception implied in the rule than it does in this? The nature of the crime charged upon the plaintiff is of the most odious character, the preferring of which is calculated to banish the individual charged from the ordinary intercourse of his fellow-man, to brand him with an offense more odious than that which drove Cain into the wilderness, and made him a wanderer upon the face of the earth. The very charge involves his character, and that directly to the full amount of all he holds dear on earth. No case can be imagined in which the necessity and propriety of such evidence is more demanded. The crime charged is detestable, and there is but one witness to the foul deed. In such a case, how can the purest man that lives shield himself from the effects of malice or revenge, if not permitted to resort to such evidence? But in this case the defendant has put on the (322) record a plea of justification. Is not the general character of the plaintiff a matter of important inquiry to the jury in doing justice to the parties? The action of slander is founded on the alleged damage done to the plaintiff, and the malice of the defendant. Where the words spoken are in themselves actionable, the law implies malice; but the amount of damage, to a variety of circumstances, the repetition of the words by the defendant, the time and place and manner of their utterance, all these are legitimate objects of proof on the part of the plaintiff. Why should not his general character aid him? Is the woman of prostituted character entitled to the same measure of damages as one who is pure and upright, and whose character is unstained by crime or suspicion

of crime? Is not the defamation of such, an evidence of deeper and more aggravated malice on the part of the defendant? It is said in answer that the law presumes the character to be good until the contrary be shown. Suppose this case; two actions are brought by two different females against the same defendant for words charging each with incontinence. The one is pure and upright; the other a common prostitute. The defendant, as in this case, pleads the general issue and a justification, and upon the trial offers no evidence. The same jury tries both cases; the evidence of character is not offered, because it is known the court will reject it. What is the jury to do? Why both stand in law before them as persons of good character, and the jury must give to the prostitute the same amount of damages, as to the plaintiff of irreproachable character. Would not common sense and common justice revolt at such a result?

The view taken above, of the rule in question, is fortified by what fell from the Court in *McAulay v. Birkhead,* 35 N. C., 28. It was an action on the case for seduction, in which the Court ruled that it was competent for the plaintiff, the father, to give in evidence the character of his own family, upon the ground that the plaintiff was entitled to ask for damages not merely to the amount of the value of the services of his daughter, but for such an amount as will compensate him, as far as dollars and cents can, for a parent's injury, and to punish the defendant. In conclusion, the Court says, character is not brought
(323) into question except upon the inquiry as to damages. "Evidence of general character is not admissible except in those actions where the jury may in its discretion give exemplary damages." In such cases, to regulate their discretion, juries should be put in possession of all the circumstances connected with the transaction; and among these certainly is the general character and standing of the plaintiff. The action of slander is one in which the jury may give exemplary damages.

I know it is said that hard cases are the quicksands of the law. This is true when particular cases are attempted to be withdrawn from the operation of the law, because they are hard; but it cannot apply in laying down a general rule of evidence, by which all cases coming under its operation, are to be governed. We cannot in this case state the principle more plainly or fully than it is stated in *McAulay's case.* In an action of slander the jury may give exemplary damages, and to regulate their discretion, the plaintiff is entitled to give in evidence, in chief, his general character.

The testimony offered was improperly rejected, and the plaintiff is entitled to a *venire de novo.*

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

STATE EX REL. T. WILLIAMS, CHAIRMAN, ETC., v. E. C. LINDSAY.

By the act of 1844, a right of action accrues to the chairman of the board of superintendents of common schools, against the sheriff, for failing to pay over the school tax on the 1st day of November, in each and every year; and if the chairman neglects to bring such action at that time, he is himself liable to an action, on his official bond.

(*Vide, Lindsay, Chairman, Etc., v. Dozier, ante,* 275.)

THIS was an action of debt, tried before his Honor, *Saunders, J.,* at CURRITUCK, on the last Spring Circuit.

Upon the trial in the court below, the material facts attending which are sufficiently set forth in the opinion delivered by this Court, the plaintiff, on an intimation of his Honor, submitted to a nonsuit; and after a motion for a new trial, which was refused, he appealed to the Supreme Court. (324)

Pool, Smith and Jordan for plaintiffs.
Heath and Hines for defendant.

NASH, C. J. The main question involved in this action is decided in *E. C. Lindsay, Chairman, Etc., v. Dozier and Others* (*ante,* 275). It is there decided that the bond of the sheriff, Dozier, did cover the tax laid for the benefit of the common school fund in the county of Currituck. The present action is brought on the official bond of the defendant, Lindsay, as a former chairman of the board of superintendents of the common schools in Currituck County. The act of 1844, in the 6th section, after pointing out the duty of the sheriff in relation to the common school tax, proceeds: "And for breach of said condition by the sheriff, the chairman of the board of superintendents shall have the same remedies against him and his sureties as are given to the county trustee for collecting the ordinary county taxes; except that his right of action shall arise on the first day of November in each and every year." The defendant, Lindsay, was appointed chairman in February, 1848, and he brought the preceding action against the sheriff, Dozier, and his sureties, the writ bearing test at November Term, 1849. According to the act of 1844, a cause of action against the sheriff for not paying over the tax of the preceding year accrued to him on 1 November, 1848, and he ought then to have brought his action. But he failed to do so under the apprehension that he could not make a recovery on the bond given by Dozier. For this breach of duty, he rendered himself liable to this action. We think, however, that the plaintiffs are entitled

to but nominal damages. In the case against Dozier referred to, Lindsay, the defendant here, has recovered to the use of the county school fund of Currituck, the same sum for which he is sued in this action. Both actions are brought for the benefit of the same fund, and if the sum really due is recovered in the first, it cannot be recovered a second time. As it has suffered, and will suffer no real damage by the failure of the defendant to bring his action at the proper time; the plaintiffs
(325) who sue in behalf of the committee of the common schools are entitled to nominal damages only.

PER CURIAM. Nonsuit set aside, and a *venire de novo* awarded.

DEN EX DEM. HARDY AND BROTHER v. SAMUEL SIMPSON.

1. A debtor, and those who by a fraudulent deed claim under him, after a sale by the sheriff under execution, do not hold possession adversely, so that a purchaser at the sale made by the sheriff, cannot transfer the estate, after he has the sheriff's deed.
2. After one's land has been sold for the payment of his debts, he is looked upon as a tenant at sufferance—a mere occupant, unless he is able to show, that for some cause or other, the sheriff's sale did not pass his estate.

THIS was an action of ejectment, tried before *Saunders, J.*, at Spring Term, 1853, of CHOWAN Superior Court.

The lessors of the plaintiff deduced title from one William R. Skinner, by sheriff's deed, under executions against said Skinner. One Miles Wright had purchased at the sheriff's sale, and had subsequently conveyed to the lessors. For the purpose of estopping the defendant from denying the title of William R. Skinner, the lessors of the plaintiff gave in evidence a certified copy of a deed in trust from William R. Skinner to James C. Skinner, and also a deed from James C. Skinner to the defendant. "The lessors of the plaintiff further proved that at the time of executing the deed from Miles Wright to them, the lands in dispute were in possession of one Abram Bonner, who had been let into possession and held under James C. Skinner for that year; that previously thereto the said William R. Skinner had left the premises, and surrendered them up to James C. Skinner, the trustee, who had taken possession pursuant to the deed to him, and had put the said Bonner in possession as his tenant, and the said Bonner was then in actual possession."

The defendant insisted that the plaintiff could not recover (326) for several reasons, two of which only are material to be noticed here: 1st, because the deed from Miles Wright conveyed no title, for the reason that the lands were then in the adverse possession of Abram Bonner as tenant for James C. Skinner; 2d, because the legal title was in the defendant, Simpson.

His Honor instructed the jury that the plaintiff was entitled to recover, unless the deed in trust was *bona fide* and effectual to transfer the property to James C. Skinner; that the said deed was, from its own provisions, fraudulent and void, unless the presumptions against it were expelled, and that no evidence had been offered to rebut the presumption of fraud.

The jury rendered a verdict for the plaintiff; the defendant moved for a new trial, which being refused, he appealed to the Supreme Court.

Heath for plaintiff.

As to the adverse possession of Bonner, it is submitted that the possession of a fraudulent vendee is not adverse to a purchaser clothed with a creditor's rights, so as to prevent such purchaser from transferring his interest; the deed and the possession both are fraudulent and void, and cannot be set up to defeat the title conveyed by such purchaser. James C. Skinner was such a vendee. Bonner claimed under him, and showed no consideration. He is therefore in the same condition as Skinner, the trustee, and his title and possession cannot be set up as *bona fide,* and for valuable consideration. If it be said the law implies he was to pay a reasonable rent, the answer is, the implication may be good between the parties; as to creditors and purchasers, the consideration is matter of proof. *Claywell v. McGimpsey,* 15 N. C., 89.

W. N. H. Smith, contra.

PEARSON, J. The deed of trust from W. R. to James C. Skinner having been found to be fraudulent, James C. and his tenant, Bonner, stand in the shoes of the debtor, William R. Skinner; and the question is, does the debtor, after a sale by the sheriff under execution, hold possession adversely, so that a purchaser at the sale made by the sheriff, cannot transfer the estate after he has the sheriff's deed? Is the debtor, or those who by a fraudulent deed claim under him, so (327) in the adverse possession that the purchaser at the sheriff's sale acquires a "bare right," which he cannot transfer, because, in the language of the statute of Hen., 8, he has but a "pretense of title"?

Such has never in this State been considered to be the relation of the parties. After a man's land is sold for the payment of his debts, he is looked upon in the light of a tenant at sufferance, a mere occupant, unless he is able to show that for some cause or other the sheriff's sale did not pass his estate; and the purchaser who has the sheriff's deed is looked upon as the owner of the estate, as one who acquires not a mere right, but an estate in possession, which he can sell and dispose of by an ordinary deed without the formality of making an actual entry, as upon one who had committed an abatement, or disseisin, or an intrusion.

The other points need not be discussed; in fact, they are given up.

PER CURIAM. Judgment affirmed.

Cited: Spencer v. Weatherly, 46 N. C., 328; *Credle v. Gibbs,* 65 N. C., 193; *Hamilton v. Buchanan,* 112 N. C., 472.

JOHN A. MEADOWS v. WILLIAM SMITH.

If A. agrees with B. to furnish him a flat boat, of a certain description, by a time and for a price certain, A. has a right to employ another to do the job for him, and if the boat is furnished according to contract, B. is bound to pay for it, however much A. may make by the operation.

THIS was an action of *assumpsit,* tried before *Manly, J.,* at JONES, on the last Spring Circuit. The declaration contained three counts: 1st, for goods sold and delivered; 2d, on a special contract; 3d, for work and labor done.

It appeared in evidence that in January, 1846, the defendant contracted to pay the plaintiff $250 for a flat boat of 250 barrels burden, to be finished by the plaintiff by 1 May, 1846; the boat when finished to be sent for to New Bern by the defendant. It further appeared that the plaintiff had the boat constructed in the shipyard of Messrs.
(328) Howard, Pittman and Company, of New Bern, he paying them $225 for their work; and that at the time of making such contract, the name of the defendant was not known to the builders, they contracting entirely with the plaintiff and receiving their price from him in advance. It was also shown that the boat was finished about 15 April, 1846, and was launched on the last day of that month, all complete; also that it possessed the qualities contracted for. The boat

has remained at the shipyard where it was launched up to the present time, and is now rotten and decayed.

It further appeared in evidence, that the shipbuilders had consented to the use of their names by the plaintiff in a former suit for the price of this boat, brought against the defendant, which resulted in a nonsuit, but they knew nothing more about the suit. And it was shown that the defendant had admitted the receipt of a letter from the plaintiff in August, 1846, asking for a settlement for the flat boat, and that he refused to pay, because, as he alleged, it was not finished in time, according to the contract.

His Honor charged the jury to inquire from the evidence whether a contract, such as that declared on, had been made by the defendant with the plaintiff; whether the place of delivery was the harbor of New Bern, and the time 1 May; and if so, whether the plaintiff had the boat then and there finished, ready to deliver, and failed to do so only in consequence of the nonattendance of the defendant. In such case, the plaintiff was entitled to recover the contract price, with interest from 1 May. The jury were further instructed by his Honor, that no other notice or demand was necessary than such as had appeared in evidence.

There was a verdict for the plaintiff. Rule *nisi* for misdirection; rule discharged, and the defendant appealed to the Supreme Court.

J. H. and J. W. Bryan for defendant.
No counsel for plaintiff in this Court.

PEARSON, J. It could not be told that this case now before us, is the same as that which was before us in June, 1851 (12 Ire., 19), except from the fact, that the names are the same, and the subject of controversy is the price of a flat boat built in New Bern, by (329) Howard, Pittman and Company.

Then the case, as presented by the evidence, was that of an agent, who, in the name of his principal, made a contract with certain shipbuilders for the building of a flat boat of a certain description, and a certain time, for the price of $225. Now, this case, as presented by the evidence, is that of one who agrees to furnish another with a flat boat, of a certain description, by a certain time, for the price of $250; and to enable him to do so, engages certain shipbuilders to build a flat boat for him, at the price of $225, which he pays to them at the time without disclosing to the shipbuilders for whom the flat is intended; and then accordingly build the boat of the proper description, and have it launched, all complete, by the time agreed on. But the defendant for whom the plaintiff had procured the boat to be built, refuses to accept it and pay

to the plaintiff the price agreed on. The right of the plaintiff to recover in the case as now presented, is too clear to talk about; and we can conceive of no other reason which induced the defendant to appeal, unless it was to show how much a law suit can be changed during the progress of its prosecution. We presume that the defendant's reason for not accepting the boat was because he imagined he had been ill treated by the plaintiff, who was to furnish him the boat at $250, and had procured it to be built for $225, and that it was not right for the plaintiff to make $25 by the operation. However this may be, the defendant had agreed to give the plaintiff $250 for a boat of the description agreed on, and as the boat was ready for him, all complete, by the time, he was bound to take it and pay for it according to his contract.

PER CURIAM. Judgment affirmed.

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(330)

STATE v. SAMUEL P. PERRY.

1. The relationship of a juror to the prisoner, whether by consanguinity or marriage, is a good cause of principal challenge on the part of the State, but such relationship must be within the ninth degree.

2. The great-grandmother of the juror and the grandmother of the prisoner were sisters: *Held*, that the juror is within the prescribed degree, and was properly rejected.

3. The jury, after they were empanelled, went, in a body, under the care of the sheriff, a mile and a half into the country for recreation; were kept together, no one was permitted to speak to them, nor were they permitted to speak to any one, and upon returning, they immediately retired to their room: *Held*, there was no improper conduct in this, nor was it a separation of the jury.

4. The court below is the exclusive judge whether the witness understands the obligations of an oath, and has intelligence sufficient to give evidence.

5. It is not the duty of the officer prosecuting for the State, to examine, on a criminal trial, all the witnesses who were present at the perpetration of the act.

6. If it appears that an order for a special *venire* was obtained, and that the jurors attended, it is not necessary that the record should positively show, that the writ was issued by the clerk of the court. It will be presumed that the writ did issue.

7. To constitute a legal jury under the act of 1836, chapter 35, section 17, it is not necessary that any jurors should be summoned under the special *venire*. The prisoner has a right to the full benefit of the order of the court directing a special *venire*, and if the order has not been obeyed, it

would be a good objection to the court's proceeding on the trial; if, however, the prisoner selects his jury, without objection on that ground, it is a waiver of it.

8. It is not necessary to the legal constitution of a grand jury, or their legal transaction of business, that an officer should be appointed to wait upon them. It is convenient and proper that they should have such an officer, and when a constable is appointed, he must take the prescribed oath—but not so with the sheriff, who being a sworn officer of the court, can properly attend on the grand jury without such oath having been administered to him.

(The cases of *S. v. Martin*, 24 N. C., 101, and *S. v. Tilgham*, 33 N. C., 513, cited and approved.)

THIS was an indictment for murder, tried at Spring Term, 1853, of WAKE Superior Court, before his Honor, *Bailey, J.*

The facts in the case are sufficiently set forth in the opinion delivered by the Court.

G. W. Haywood, Miller and P. Busbee for defendant.
Attorney-General for the State.

NASH, C. J. The prisoner, through his counsel, has assigned several reasons to show that he is entitled to a *venire de novo.*

The first is for an alleged error in the court in setting aside a juror, on the challenge of the State, as of being of kin to the prisoner. The great-grandmother of the juror, Ray, was the sister of the (331) grandmother of the prisoner. *Lord Coke* says that relationship is a good cause of principal challenge, "no matter how remote soever, for the law presumeth that one kinsman doth favor another before a stranger." Thomas's Coke, 3 Vol., 518. Mr. Chitty, in the 3d volume of his Criminal Law, lays down the same doctrine, with the exception that the relationship must be within the ninth degree, although it is by marriage; and Mr. Blackstone, 3d Vol., of his Commentaries, 360, declares the rule to be as stated by Mr. Chitty. In this case, the juror, Ray, was within the prescribed degree related to the prisoner. From the grandmother were three degrees, and from the great-grandmother four, making in the whole seven degrees, which was a cause of principal challenge on the part of the State, and the juror was properly rejected.

The second reason assigned, was the alleged improper conduct of the jury. This consisted in the jury's going on Sunday, after they were empanelled, a mile and a half into the country for recreation. It is stated in the bill of exceptions, that they went in a body under the care of the sheriff, and that they were kept together and no one spoke to them, nor did they speak to any one, and upon their return they

immediately retired to their room. It was argued before us, as if this was a separation of the jury. This is not so. A separation of a jury is the departure of one or more jurors from their fellows, or the whole of the jurors departing from each other. But here there was no separation, no departing of any of the members of the jury from their fellows; they kept together in one body during the whole time they were absent from the courtroom after receiving the charge of the judge, and were in the care of the sheriff. The law does require that the jury, after being charged with the prisoner, shall be kept together in one body, but it nowhere directs where they shall be kept. Nothing is more common, than for a jury, in a protracted trial where many days are consumed in its investigation, to retire under the charge of an officer to some private room to procure such refreshments as may be necessary, or to sleep at night. While, therefore, they do keep together, either in a house or in the open air, and hold no converse with any one, their being at the one place or the other, can have no effect upon their
(332) verdict—they have violated no duty. In this case, they went into the open field—it was the Sabbath day—no business was transacting. To require them to remain shut up in the jury room the whole day, would be imposing upon them an unreasonable burthen, no way required by the interest of the prisoner, or subserving the ends of justice; on the contrary, by the slight recreation they did take, they were the better fitted to recommence their arduous and responsible duties on the Monday following. In truth, the reasons addressed to us for a *venire de novo,* would, with much more propriety, have been addressed to the court below for a new trial. Upon the question here involved, the case of *Tilgham,* 33 N. C., 513, is a very strong one. Three different members of the jury several times separated themselves from their brother jurors, when they had retired to their room after the judge's charge. Notes were thrown out by them from the window, and persons were admitted into the room—one a black man to carry them refreshments, and the others children to see their parents, and one held converse with a person not a juror, on the outside of the jury room door. The fifth exception was, "because there was a separation of the jury, and other irregularities practiced by them before they returned their verdict." The case was ably and fully argued on behalf of the prisoner, and all the authorities bearing upon the question brought to the notice of the Court. The exception was overruled, and the Court declare, "We take this position: If the circumstances are such as merely to put suspicion on the verdict, by showing not that there was, but there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion

of the presiding judge," which we have no right to interfere with. It is admitted that this is a strong case, but it is the law, and applies as well when there is such a separation of the jury, as when they, as in this case, kept together and took a walk for recreation. But in the case before us there is not only no evidence of any tampering with the jury, but its impossibility is shown by the fact stated, that no one held intercourse with them, nor they nor any member of their body with any one. There can be no ground even of suspicion of improper conduct in this particular. If the fact be that improper influence (333) was brought to bear upon the jury, as that they were fed at the charge of the prosecutor, or the defendant, or if they be advised and solicited how their verdict ought to be, or if they hear evidence in the jury room which was not offered and heard on the trial, we should not hesitate to direct a trial *de novo,* upon the ground that there had been no trial in contemplation of law.

The third and last ground taken in behalf of the prisoner is, that the court erred in setting aside the daughter of the prisoner as a competent witness to go to the grand jury, upon the ground that it was the duty of the Attorney-General to have before the court every one who was present at the commission of the offense, and that the prisoner was entitled to have all such persons examined before the petit jury. Before the bill of indictment was sent to the grand jury, the witness was brought before the court by the State to ascertain her competency. Upon this examination she was set aside by the court, "because she did not appear to understand the obligations of an oath, and had not intelligence sufficient to give evidence." Of these things the court below was the exclusive judge, nor, indeed, is there any objection on that ground. But still it is insisted under the authority of *Holden's case,* 3 Car. and Payne Rep., 606, that the State was obliged to produce, and put her upon the witness stand. This objection was raised in *Martin's case,* 24 N. C., 101, and the case of *Holden* was relied on. It was duly considered, and the ruling there denied to be law, the Court declaring "it has neither principle nor practice in this State to support it." The ground upon which the court acted is fully sustained in many cases.

Several reasons in arrest of judgment, have been filed in this case. The first is, "that it does not appear from the record that any writ for a special *venire facias* was issued to summon jurors." The record does not, it is true, positively show that any writ was issued by the clerk of the court, but it does show that the order was made and the jurors did attend, for there is no suggestion in the reasons assigned of a want of jurors, nor any such suggestion in the argument. Under the maxim, *omnia presumuntur,* etc., we must presume that the writ

did issue. But to constitute a legal jury under the act of 1836,
(334) chapter 35, section 17, it is not necessary that any juror should be summoned under the special *venire.* The prisoner has a right to the full benefit of the order of the court directing a special *venire,* and if the order has not been obeyed, it would be a good objection to the court's proceeding on the trial; if, however, the prisoner selects his jury without objection on that ground, it is a waiver of it. There was here no want of triers, and they may, for aught disclosed to us, have been summoned *de circumstantibus.*

The second reason assigned is, that it does not appear that any officer was duly sworn, and took the oath prescribed by law for a constable attending on a grand jury. It is admitted that the sheriff waited on the grand jury. He was the person in law upon whom that duty properly devolved. The objection is, that the oath prescribed in the act of Assembly to be taken by a constable when detailed to wait on a grand jury, was not administered to the sheriff. We know of no law requiring it to be done, and there is good reason why it should be administered to the one and not to the other. The sheriff is an officer of the court, and a sworn officer—a constable only becomes so as the officer of the grand jury, upon taking the oath prescribed by the act. But it is no way necessary to the legal constitution of a grand jury, or to their legal transaction of any business coming before them, that any officer should be appointed to wait upon them. It is convenient and proper that they should have such officer, and when a constable is so appointed he must take the prescribed oath. The reasons in arrest of judgment are overruled.

The Court is of opinion that there is no error in the judgment of the Superior Court, and that it was warranted by the record, and directs that this opinion be certified to the Superior Court of Wake, that the judgment may be carried into execution.

PER CURIAM. Judgment affirmed.

Cited: S. v. Ketchey, 70 N. C., 624; *S. v. Haynes,* 71 N. C., 84; *S. v. Baxter,* 82 N. C., 602; *S. v. Potts,* 100 N. C., 461; *McMillan v. School Committee,* 107 N. C., 616; *S. v. Fuller,* 114 N. C., 891; *S. v. Pitt,* 166 N. C., 270; *S. v. Tate,* 169 N. C., 374; *S. v. Merrick,* 172 N. C., 872; *S. v. Phillips,* 178 N. C., 714; *Lanier v. Bryan,* 184 N. C., 238.

(335)

DEN EX DEM. WILLIAM JOHNSON AND WIFE v. BAILEY SWAIN.

1. A plaintiff in ejectment, who pending the action takes possession of the premises, cannot further maintain it; but such fact must be alleged in some proper form, as by plea to that effect, "since the last continuance."

2. A tenant in common can bring ejectment, when there is an actual ouster.

THIS was an action in ejectment, tried at Fall Term, 1852, of WASHINGTON Superior Court. The plaintiff showed title in the right of *feme* lessor (she having intermarried with the other lessor), to one undivided moiety of the premises, as tenant in common with the defendant. The defendant offered to show that the lessors of the plaintiff, since the last term of the court, had entered upon, claiming one moiety of the premises, taken possession of, and had remained until the trial on a portion of the lands sued for, but less than one-half, and were excluded from the remainder by the possession of the defendant. His Honor, *Judge Manly,* rejected the evidence, for the reason that there was no plea on which it could be offered.

The jury returned a verdict for the plaintiff; whereupon the defendant's counsel moved for a new trial, upon the ground that there was error in the directions to the jury, and in refusing to admit the testimony offered by the defendant; which motion was refused. Judgment upon the verdict, and the defendant appealed to the Supreme Court.

Heath for defendant.
W. N. H. Smith and H. A. Gilliam for plaintiff.

PEARSON, J. Admitting it to be true, that a plaintiff in ejectment, who pending the action takes possession of the premises, cannot further maintain it, we fully concur with his Honor that the court can take notice of no fact unless it be alleged in some proper form, so that issue may be taken on it. Here there was no plea, and of course no issue to which the evidence offered was relevant.

But suppose there had been a plea "since the last continuance," the evidence offered would not have supported the allegation put in issue, for there was a part of the premises of which the defendant retained possession, and from which he "excluded the plain- (336) tiff," consequently, as to that part the plaintiff still had a right to maintain his action. A tenant in common can bring ejectment, when there is an actual ouster.

PER CURIAM. Judgment affirmed.

Cited: Moore v. Fuller, 47 N. C., 206; *Thompson v. Redd, ibid.,* 413; *Horton v. White,* 84 N. C., 297; *Davis v. Higgins,* 91 N. C., 383; *Woodley v. Hassell,* 94 N. C., 162; *Puffer v. Lucas,* 101 N. C., 285; *Aldridge v. Loftin,* 104 N. C., 126; *Taylor v. Gooch,* 110 N. C., 390.

W. L. RHODES, TO THE USE OF E. W. JONES, v. JOHN B. CHESSON ET AL.

1. Though by statute, payment of a bond may now be pleaded, and anything agreed to be received in satisfaction will amount to payment, if the agreement be executed, so that the thing becomes at once the property of the obligee, yet it is otherwise of a verbal agreement to deliver at a future day, in which case the rule of the common law, *eo ligamine, quo ligatur*, etc., applies.

2. Where the terms of a verbal agreement are ascertained, its construction, like the construction of a written contract, is matter of law for the court.

(The cases of *Festerman v. Parker,* 32 N. C., 474, and *Young v. Jeffreys,* 20 N. C., 357, cited and approved.)

THIS was an action of debt, originally commenced by warrant, and carried by successive appeals to the Superior Court of WASHINGTON County.

On the trial, before his Honor, *Judge Manly,* at June Term, 1853, the plaintiff exhibited in evidence a bond executed by the defendants, and proved its due execution. To sustain the plea of payment, the defendants introduced one James E. Rhodes, who testified that after the bond became due, and before suit, he had a conversation with the plaintiff, Rhodes, and that the plaintiff stated, that he had borrowed notes of the defendant, J. B. Chesson, and that he was to pay him again in notes, and that the bond now in suit was to be one of them. The amount borrowed of Chesson was proved to be upwards of $200. At the time these notes were borrowed, no note or obligation in writing was given, and the bond now in suit was then due.

His Honor was of opinion that the substance of the agreement thus concluded, was that the plaintiff became indebted to the defendants, upon borrowing the notes in question, to the amount of the notes
(337) less the amount of the one in suit, and the effect therefore was, the extinguishment or payment of said note. Upon this intimation of the opinion of his Honor, the plaintiff submitted to a nonsuit. Rule for a new trial—rule discharged; whereupon the plaintiff appealed to the Supreme Court.

W. N. H. Smith for plaintiff.
Heath and Hines for defendants.

PEARSON, J. The only question is the construction of the contract, and we are to take the terms as stated by the witness. His Honor was of opinion that the legal effect was a payment of the bond sued on. We have come to a different conclusion.

At common law a bond could not be discharged except by an instrument under seal, *eo ligamine quo ligatur.*

The statute of Ann allows the plea of "payment." Payment may be made either in money, or in money's worth; but to amount to a payment, the thing must be done, the money must be paid, or the thing taken as money must be passed so as presently to become the property of the other party. A promise or undertaking to pay either in money or other thing, is not a payment; the contract is executory, whereas payment is executed, a thing done.

When the plaintiff borrowed of the defendant the $200 worth of notes, the contract was, that he was to return the amount so borrowed in notes, and "the bond now sued on was to be one of them." It is not stated what credit was given, whether a month, six months, or a year; but as a matter of course, there was some credit. This is a necessary implication from the nature of the transaction; for why borrow notes, if the plaintiff had at the time other notes, and was then and there ready to repay in such notes? Say the credit was five days, the contract is executory, and the effect of it is, that the defendant relied on the promise of the plaintiff to repay at a future day in other notes, of which the bond now sued on was to be one. No difference is made between the bond and the other notes. If the understanding was that the bond was to be handed over presently as part payment, why is it left on the same footing with the other notes in which the repayment was to be made? The bond was then due, why was it not handed over at (338) the time? or, if the plaintiff did not have it with him, why was it not understood that it should be considered as then paid over, and be handed to the defendant as soon as convenient? According to the terms of the agreement, the bond was put on the same footing with the other notes, and there is no more reason for saying the contract was executed in regard to it, so as to amount to a payment, than there is for saying the same in regard to the other notes.

If there had been any doubt as to the terms of the agreement, it would have been proper to leave the question to the jury, with the necessary instructions; but the evidence as set forth in the record left no question of fact open; and we agree with his Honor that it was his duty

to put a construction on the agreement, the terms being fixed by the evidence. Questions of construction are to be decided by the court; and it makes no difference whether the agreement is written or verbal. *Festerman v. Parker,* 32 N. C., 474; *Young v. Jeffreys,* 20 N. C., 357.

PER CURIAM. Nonsuit set aside and *venire de novo* awarded.

Cited: Jarman v. Ellis, 52 N. C., 78; *Codner v. Bizzell,* 82 N. C., 391; *Miller v. Hahn,* 84 N. C., 227; *Spragins v. White,* 108 N. C., 452.

SOLOMON H. SAMPLE v. JAMES W. BELL.

A slave was hired for a year to A., who agreed that he would not remove the slave out of the county. A. ordered him to a place beyond the county; on his way, he was directed by his owner not to go out of the county unless compelled by force. The slave remained for a fortnight, and then obeyed the order of A.: *Held,* that the conduct of the owner was an unlawful interference with the rights of A., for which he was liable to damages. Whether it amounted to a conversion. *Quere?*

(The case of *Twidy v. Saunderson,* 31 N. C., 5, cited and approved.)

THIS was an action on the case, with a count in *trover;* pleas, general issue, statute of limitations. It was in proof on the part of the plaintiff, that the defendant, living in Washington County, and owning a slave, named Jerry in the beginning of the year 18....., hired Jerry for
(339) that year to one Ray, on the terms, among other things, that he was not to be carried out of Washington County. A few weeks thereafter, Ray hired out Jerry for the residue of the year to the plaintiff, with a like restriction, that he was to remain in the county of Washington, and at the same time made known to him, that the slave had been in like manner hired out by the defendant.

It further appeared that afterwards, and during the year, Jerry and other slaves, who had been hired by the plaintiff, were seen by the defendant in the streets of Plymouth, which is in Washington County, on their way to work at a shingle swamp of the plaintiff, in Martin County, and defendant was told by Ray, who was then present, that plaintiff had applied to him to have the restrictions removed in regard to Jerry, but that he had refused to do so; and thereupon defendant told Jerry, who was not far from him, "that he was not to go out of the county, unless compelled or forced to go out," and did not otherwise interfere with him.

It further appeared that Jerry did not then proceed on to Martin County, but remained in Washington several weeks; he was afterwards put to work in Martin, before the expiration of the year of hire.

It was insisted for the defendant, that the acts done by him did not amount to a conversion of Jerry; also that he had the right to give such directions to Jerry, they being in conformity with the terms of the bailment.

These points were reserved, by consent of parties, by his Honor, *Judge Saunders,* before whom the case was tried, at TYRRELL, on the last Spring Circuit; and it was agreed that if his Honor should be of opinion with the defendant, a nonsuit should be entered. There was a verdict for the plaintiff. Afterwards, his Honor being of opinion that the restriction upon carrying the slave out of the county, was not such a condition, as that its violation by the hirer justified the owner in interfering with the slave, and that the order of the owner as master, and the obedience of the slave, although for a moment, was such an injury to the rights of the plaintiff, as entitled him to damages, though only nominal, gave judgment for the plaintiff. From which judgment the defendant appealed.

Smith for defendant.
Heath, Hines and Gilliam for plaintiff. (340)

BATTLE, J. The terms of the contract, by which the defendant hired his slave, Jerry, to Ray, from whom the plaintiff got him, are not all set forth in the bill of exceptions; but it is stated that one of them was, that the hirer should not carry the slave out of the county of Washington. The question is, whether that stipulation is to be treated as a condition, the breach of which put an end to the contract, and authorized the defendant to retake his slave, or whether it is to be regarded as a mutual, independent covenant or promise, for the breach of which the defendant might sue and recover whatever damages he had thereby sustained. In stating this to be the question, we assume that the conduct of the defendant towards his slave, Jerry, in the streets of Plymouth, was an unlawful interference with the rights of the plaintiff (as we think it was), unless the contract of hiring had been put an end to, by the intention of the plaintiff to take the slave out of the county. We are of the opinion, that the stipulation in question cannot be treated as a condition, because such a construction would make the contract operate very unequally between the parties; as, for instance, if the plaintiff had, the day after the hiring, carried the slave out of the county, and kept him out of it for a week, the defendant could have

retaken him, and yet have claimed the whole amount of the hire for the year. But suppose it were to be taken as a condition to defeat the estate or interest of the plaintiff, the forfeiture had not been incurred at the time of the alleged unlawful interference of the defendant, for at that time the slave had not been carried out of the county.

The true construction of the stipulation, is to consider it a mutual, independent promise, because it went to a part only of the consideration on the other side, and on breach of it, may be paid for in damages. Platt on Cov., 90 (3 L. Lib., 40); 2 Steph. N. P., 1072. In a case which came before this Court, *Twidy v. Saunderson,* 31 N. C., 5, the owners sued the hirer for the breach of a similar stipulation, and recovered substantial damages. Without deciding whether the conduct of the defendant complained of, amounted to a conversion, so as to sus-
(341) tain the count for *trover,* we hold that it was an unauthorized interference with the rights of the plaintiff, and entitled him to recover on the second count for the *tort.* The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: McClees v. Sikes, 46 N. C., 311.

DEN EX DEM. WILLIAM F. BAXTER v. ISAAC BAXTER.

1. If a conveyance of land be made to A. and B., and the deed delivered to A. without the knowledge of B., and he, upon information thereof from A., dissents therefrom, nothing passes to him by the deed, and he cannot maintain ejectment.

2. Whether the whole vests in A., or the deed is inoperative as to a moiety, *Quere?*

(The case of *Respass v. Latham, ante,* 138, cited and approved.)

THIS was an action of ejectment, tried at Spring Term, 1853, of CURRITUCK Superior Court, before *Saunders, J.*

The lessor of the plaintiff showed title under a deed to himself and the defendant, and made the other necessary proof. The defendant offered to show that he, the defendant, paid the purchase money for the land, and that he took the deed in the joint names of himself and the lessor, the lessor knowing nothing of the bargaining for the land, or the taking of the deed, nor of the payment of the money, until these facts were communicated to him by the defendant; also, that when they were

so communicated, the lessor refused to have anything to do with the transaction. Upon exception, this evidence was ruled out. A verdict and judgment were then rendered for the plaintiff, and the defendant appealed to the Supreme Court.

Heath, with whom was Hines, argued:

1. If a deed be to two, and one dissent, the entire interest is in him who assents. 2 Spence's Eq., 351; *Small v. Marwood,* 9 B. and Cress., 307; *Browell v. Reed,* 1 Hare, 435. See, also, *Hawkins v. Kemp,* 3 East., 410; *Cooke v. Crawford,* 13 Sim., 96. Hence the deed vested the entirety in the defendant.

2. Whether this be so or not, still the plaintiff cannot recover, (342) for want of delivery. *Respass v. Latham, ante,* 138: The legal title is in either the grantor or the defendant. The plaintiff dissented, and therefore, to render the deed valid so as to pass any title, there must be another delivery.

Smith, contra.

BATTLE, J. The testimony offered by the defendant to show that when the plaintiff's lessor was informed of the purchase of the land in question, and of the deed therefor taken in joint names of the defendant and himself, he repudiated the transaction, and refused to have anything to do with it, was competent to show that he had disagreed to it, and therefore that as to him the deed had become void. A deed may be delivered to a stranger for the use of the grantee, or bargainee, and as it may be to his advantage, his acceptance of it will be presumed until the contrary appears; but as it may also be to his prejudice, or whether to his prejudice or not, he is not bound to accept it; he may disagree to it, and then it will become inoperative. Preston's Ed. of Shep. Touch., 70 (30 Law Lib., 142); *Respass v. Latham, ante,* 138. Cases in which it would be to the prejudice of a grantee or bargainee to accept the delivery of a deed, may be readily imagined—*e. g.,* he may have a better title by descent, or under another deed, or the land may have been purchased for him without authority at too high a price, or the deed may have conditions inconvenient or burdensome. Surely under circumstances like these, he would be at liberty to disagree to a deed accepted for him by a stranger without his consent. The principle is the same where a deed is made to two persons, and delivered to one without the knowledge of the other. The latter may, upon being informed of it, disagree to it, and the deed as to him will be void. Whether his share will, upon such a disagreement, accrue to the other grantee or will return to the grantor,

it is not necessary for us to decide. Preston's Ed. of Shep. Touch., *ubi supra,* 4 Leon., 207.

If the testimony offered in this case had proved to the satisfaction of the jury what was proposed to be proved by it, the plaintiff's lessor would not have been entitled to recover. It was therefore error
(343) to reject it, and the judgment must be reversed, and a *venire de novo* ordered.

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

Cited: Gaither v. Gibson, 61 N. C., 532.

DOE EX DEM. ENOCH COBB v. JAMES M. HINES.

However untechnical and ungrammatical a deed may be, yet it may be valid, if its words declare sufficiently and legally the party's intention. Therefore, where by a very informal deed, A., "in consideration of good will and affection for his son-in-law, H.," gave him certain slaves, and then followed this clause: "I also appoint H. agent of the following property—to wit" (mentioning certain slaves), "and the following tracts of land" describing them), "to be to use and benefit of my daughter C.." etc., it was held, that the intention to give the land to the daughter being plain, the deed might operate as a covenant to stand seized, either to the use of H. as trustee for C., or to the use of C.; and *quacumque via,* the title had passed from A., and he could not recover in ejectment against H.

(The cases of *Bronson v. Paynter,* 20 N. C., 527; *Armfield v. Walker,* 27 N. C., 580; *Springs v. Hawks, ibid.,* 30; *Davenport v. Wynne,* 28 N. C., 129; *Brooks v. Ratcliff,* 33 N. C., 321, and *Kea v. Robeson,* 40 N. C., 373, cited and approved.)

THIS was an action of ejectment, tried at the Spring Term, 1853, of WAYNE Superior Court, before *Manly, J.* The pleas were, not guilty, statute of limitations.

The lessor of the plaintiff, upon the intermarriage of the defendant with his daughter, Cartha, had executed to him a paper-writing, of which the material words were as follows:

"Know all men by these presents, that I, Enoch Cobb, for the inconsideration of the good will, favor and affection that I bear to rewards my son and law, James M. Hines, I give to the said James M. Hines the following Negroes, etc. In witness whereof I hereunto set my hand and seal, this 23 February, 1839.

(Signed.) E. Cobb. [Seal.]

"I also place and set over and appoint James M. Hines agent of the hereafter named property, to be to use and benefit of my daughter, Cartha, and the lawful heirs of her body to them and their successors—to wit, Patsy, Winny, Elick, little Kedar, Abram, and Smithea, (344) and the following tracts of land [describing them], in witness whereof I hereunto set my hand and seal this 23 February, 1839.

(Signed.) E. Cobb. [Seal.]"

Witness: A. G. Jernigan, Thomas (his + mark) Dail.

In May, 1852, the lessor of the plaintiff demanded of the defendant possession of said land, and upon his refusal to surrender possession of the same, this action was commenced.

Cartha, named in the paper-writing, died some two or three years before the suit was instituted, leaving three children surviving her, and now living. Said paper-writing was duly acknowledged at the November Term, 1840, of Wayne County Court, and has been duly registered.

Upon the case agreed, from which the above is an extract, the court gave *pro forma* judgment for the plaintiff, and the defendant appealed to the Supreme Court.

Moore for defendant:

1. The consideration here is what is commonly called good, being of that blood. It appears on the face of the deed, and is therefore sufficiently declared. 2 Saund. U. and T., 81; 7 Rep., 133; Bedell's case; 2 Wilson Rep., 22; 2 Roll Abr., 782, pl. 3; 2 Shep. Touch, 512.

2. There being no valuable consideration, the words operate as a covenant to stand seized. The words of a deed may be transposed, so as to give it validity, where the intent that it should operate is manifest. *Kea v. Robeson,* 40 N. C., 373; 1 Shep. Touch., 87; *Smith v. Packhurst,* 3 Atk., 136. The words here may be transposed thus: "The hereafter named property [is] to be to the use and benefit of my daughter, Cartha, etc., and I place and set over and appoint J. M. H. agent of the same," or—connecting this part of the deed with the other—"Know all men, etc., that the hereafter named property, of which I place and set over and appoint J. M. H. agent [is] to be to the use of my (345) daughter, etc."

Both bargains and sales and covenants to stand seized, operate to transfer the legal title by virtue of the statute of uses. The only difference between them is in the consideration. Hence a deed may operate to make both kinds of assurance; as, if A. covenant that in consideration that B. is his son, he shall have a certain tract of land for life, and that

C. has paid $100, he shall have it in fee. Burton on Real Prop., sec. 145; 1 Rep., 145; 1 Shep. Touch., 221.

The covenant must be by words *de presenti,* and the words of this deed are such, clearly. Do these words make a covenant? A covenant, "is the agreement or consent of two or more, by deed in writing, whereby one of the parties doth promise to the other that something is done already, or shall be done afterwards." 1 Shep. Touch., chap. 7, p. 160, *et seq.,* and notes 9 and 10; Platt on Cov. (3 L. Lib.). A deed poll may create them as effectually as an indenture. 1 Shep. Touch., 162.

No formal words are necessary to create either a bargain and sale, or a covenant to stand seized. 2 Saund. U. and T., 49, and 79, 80. In the latter, the word covenant is not necessary. *Pordage v. Cole,* 1 Saund. Rep., 319. "Agreed between A. and B. that B. shall pay A. a sum of money for his lands on a particular day"; these words amount to a covenant by A. to convey the lands, and are words of the future. So, if the words had been, "It is hereby witnessed that A. has paid B. $100, and A. is to have a certain tract of land—or a certain tract of land is to be the property of A."; these words make a covenant *de presenti,* and raise a present use which the statute executes. If one at common law assigns a chose, though nothing passes, it is a good covenant; Bac. Abr. Cov., Letter A.; *Siegnoret v. Noguire,* 2 Ld. Ray., p. 1242; *Frontin v. Small,* 2 *ibid.,* p. 1418. *Assignavit* makes the covenant. If A. make a deed to B. in these words, "I have in my custody one writing obligatory, being the property of B., in which, etc., and I will be ready at all times, when required, to redeliver the said writing to the said B."—this is a covenant by force of the words—I will be ready at all times, etc. Roll's Abridg., 519. Covenant that A. shall have a piece of land for five years is a good lease. 1 Shep. Touch., 161,
(346) *et seq.,* and notes 9 and 10. Covenant with one that if he marry my daughter he shall have my land; from the time of marriage he shall have it; 2 Shep. Touch., 512; or, that one shall have my land, it is a good bargain and sale; 2 Shep. Touch., 514, *et seq.* Covenants are to be always taken most strongly against the covenantor, and most in advantage of the covenantee; and according to the intent of the parties. 1 Shep. Touch., 166.

If the words had been: "The hereafter named property in consideration of five dollars is to be to the use and benefit of my daughter and the lawful heirs of her body," the conveyance would have been good as a bargain and sale. Therefore if blood is inserted in lieu, the deed becomes a good covenant to stand seized; 2 Shep. Touch., 511; 1 *ibid.,* 224. See cases cited, 2 Saund. U. and T., 79, 80, and the cases cited in note. See, also, *Bronson v. Paynter,* 20 N. C., 527; *Armfield v. Walker,*

27 N. C., 580; *McAllister v. McAllister,* 34 N. C., 184; *Brooks v. Ratcliff,* 33 N. C., 321; *Davenport v. Wynne,* 28 N. C., 129; 1 Shep. Touch., 82-86, *et seq.,* and note 94 at p. 92; *Parkhurst v. Smith,* Willes Rep., 332.

If the covenant is not with Mrs. Hines, it is with the trustee, her husband, and the consideration of marriage, which extends to him, and of blood which extends to his wife, is sufficient to vest the estate in him, for her use; 2 Shep. Touch., 523. And this makes him both trustee and tenant by the curtesy.

J. H. Bryan and Wright, contra.

BATTLE, J. The deed under which the defendant claims, and by virtue of which he seeks to defeat the recovery of the plaintiff's lessor, is, as must be admitted, very informal. It is untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography, and yet it may be valid, if "there be sufficient words to declare clearly and legally the party's meaning." 2 Black. Com., 298. It is our duty now to inquire whether the words contained in this deed be sufficient to enable us to pronounce what is the party's meaning. It may facilitate our inquiries to recur to fundamental principles, and ascertain what rules have been established by the sages of the law, for the construction of deeds. The three following given by Blackstone in his Commentaries (2 Black. Com., 379), and supported by many authorities both before and since his day, will be sufficient for our purpose. The (347) rules are:

1. "That the construction be favorable and as near the minds and apparent intents of the parties as the rules of law will admit. For the maxims of the law are, that *verba intentioni debent inservire;* and *benigne interpretamur chartas propter simplicitatem laicorum.* And therefore the construction must also be reasonable, and agreeable to the common understanding."

2. "That *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est;* but that, where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui haeret in litera, haeret in cortice.* And another maxim of law is, that *mala grammatica non vitiat chartam;* neither false English nor bad Latin will destroy a deed."

3. "That the construction be upon the entire deed, and not merely upon disjointed parts of it. *Nam ex antecedentibus et consequentibus fit optima interpretatio.* And therefore that every part of it be, if possible, made to take effect, and no word but what may operate in some

shape or other. *Nam verba debent intelligi cum effectu, ut res margis valeat quam pereat.* See *Smith v. Parkhurst,* 3 Atk. Rep., 135; Preston Ed. of Shep. Touch., Vol. 1, p. 87; *Bronson v. Paynter,* 20 N. C., 527; *Armfield v. Walker,* 27 N. C., 58; *Davenport v. Wynne,* 28 N. C., 129; *Kea v. Robeson,* 40 N. C., 373; and *Brooks v. Ratcliff,* 33 N. C., 321.

Now, if we apply these rules and the principles plainly deducible from them, to the deed under consideration, we think that the intention of the parties may easily be ascertained from the words which they have employed. In the first part of the instrument, the donor gives, in language which admits of no doubt, certain slaves to his son-in-law, declaring that he so gives them because of the good will, favor, and affection which he bears towards him. He then proceeds: "I also place and set over and appoint James M. Hines (the defendant, his son-in-law) agent of the hereafter named property, to be to the use and benefit of my daughter, Cartha, and the lawful heirs of her body to them and their successors—to wit," etc., naming certain slaves, and the tract of land now in dispute. The defendant's counsel con-

(348) tends that these words contain, in substance and effect, a covenant by the plaintiff's lessor, to stand seized to the use of his son-in-law, or his daughter, the defendant's wife; that the consideration is either expressed in the deed, by means of the reference to that recited in the first part, or that it is implied from the relationship of the parties apparent in the deed; that the relationship, whether of consanguinity to the daughter, or affinity to the son-in-law, is a good consideration, sufficient to raise an use, and that therefore the deed is effectual to transfer the land either to the daughter or son-in-law; and in either case, the plaintiff's lessor cannot recover. For these positions the counsel cites the following, among other authorities: Bac. Abr., tit. Cov., Letter A; Platt on Cov., 3 (3 Law Library); *Bedell's case,* 7 Rep., 40; 2 Saund. on Uses and Trusts, 81; *Milbourne v. Simpson,* 2 Wils. Rep., 22; 2 Pres. Shep. Touch., 512 (31 Law Lib.). The counsel for the plaintiff's lessor, on the other hand, contends that the words relied upon by the defendant are unmeaning; that no covenant is expressed, and that none can be implied, because it would be repugnant to the idea of an agency in the son-in-law, that no sufficient consideration appears to raise a use either to the daughter or son-in-law, and that the instrument is therefore void and of no effect; and he cites in support of his argument Co. Litt., 49, a., and *Springs v. Hanks,* 27 N. C., 30. We think that it is clear that the plaintiff's lessor intended to give to his daughter and the heirs of her body, or to his son-in-law for the use of his daughter and the heirs of her body, the land and slaves mentioned in the second part of the instrument in question. This ap-

pears plainly from the fact, that having given certain slaves to his son-in-law in the first part of the deed, he commenced the second part with saying: "I also place, etc., James M. Hines agent of the hereafter named property, to be to use and benefit of my daughter Cartha," etc. What could he mean, if he did not intend his daughter to have the use of the property which he proceeds to enumerate? The authorities cited clearly show that no particular words or form of expression are necessary to create a covenant. They show that the relationship of the parties, appearing on the face of the deed, is sufficient to manifest the consideration and raise an use; and that relationship by affinity to a son-in-law is a good consideration; why, then, cannot the (349) deed operate according to the intention of the covenantor? The parties to the deed are certain, the property intended to be conveyed is certain; and yet we are told that because the son-in-law is appointed agent instead of trustee for the daughter, or because he stands between the father and his daughter, the property cannot go to her use. To this objection we give an answer in the grave and emphatic language of *Lord Chief Justice Willes,* in the case of *Smith v. Packhurst,* before referred to: "Another maxim is, that such a construction should be made of the words of a deed, as is most agreeable to the intention of the grantor; the words are not the principal thing in a deed, but the intent and design of the grantor; we have no power indeed to alter the words, or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. These maxims of my Lords, are founded upon the greatest authority, *Coke, Plowden,* and *Lord Chief Justice Hale;* and the law commends the *astutia,* the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner, as shall destroy the intent may show the ingenuity of, but is very ill becoming a judge." An instance of this *astutia* is given by Blackstone, 2 Com., 298, when he says that by the grant of a remainder, a reversion may well pass and *e converso.* In the deed before us the intent of the father to give property to the use of his daughter is plain, and that intent may be effectuated, by construing the word agent to mean trustee, and it may be so construed without doing much violence to its proper meaning; for a trustee is in some sort an agent to manage property for the benefit of another.

We think that we can do this, and we ought to do it, and thus escape the condemnation pronounced upon the judges who exercise their ingenuity in construing words so as to destroy, instead of to give effect to the intention of parties as manifested in their deeds. Whether the

operation of the deed was to vest the legal estate in the defendant in trust for his wife and her heirs or whether she took the legal estate so as to give him a life estate as tenant by curtesy, the lessor of the plaintiff cannot recover.

The judgment in favor of the lessor must therefore be set (350) aside, and judgment of nonsuit be entered according to the case agreed.

PER CURIAM. Judgment accordingly.

Cited: Register v. Rowell, 48 N. C., 315; *Bruce v. Faucett,* 49 N. C., 393; *Barnes v. Haybarger,* 53 N. C., 82; *Royster v. Royster,* 61 N. C., 228; *Bryan v. Eason,* 147 N. C., 292; *Paul v. Paul,* 199 N. C., 524.

ENOCH COBB v. JAMES M. HINES.

No technical words are necessary in a bill of sale or a deed of gift of slaves: *Held,* therefore, that in a deed of gift, words appointing "H. agent" of certain slaves "to the use of C.," constituted a valid gift to H. as trustee for C.

(The cases of *Fortescue v. Satterthwaite,* 23 N. C., 566; *McAllister v. McAllister,* 34 N. C., 184, and *Respass v. Lanier,* 43 N. C., 281, cited and approved.)

THIS was an action of *detinue,* in which the grantor, in the paper-writing forming a portion of the statement of the case immediately preceding this, sought to recover the slaves mentioned in the second part of that paper-writing, and their increase. The parties are substantially the same in both cases, and the reporter refers to the former statement for the facts necessary to the understanding of the opinion in this case.

On the trial, at Spring Term, 1853, of DUPLIN Superior Court, upon a case agreed, *Manly, J.,* gave judgment, *pro forma,* in favor of the plaintiff; whereupon the defendant appealed to the Supreme Court.

Moore for defendant:

The slaves were delivered at the time of the execution and delivery of the deed. The statute requiring all gifts of slaves to be in writing, adds nothing to the words required at common law to make a gift. Those words which before that statute had been sufficient to make a gift accompanied with a delivery, are sufficient now, when in writing and witnessed. A declaration at the time of delivery that the slaves now named

(being the same as those delivered), are to be to the use and benefit of you, or of my daughter, would make a good gift at common law. In *Fortescue v. Satterthwaite,* 23 N. C., 566, the words—I alien, set off and confirm slave A. to B., with a delivery, was held (351) good.

The conveyance is of slaves, and no consideration whatever is necessary; no form is needed, it being sufficient to express an intent, whether by signs or words. An agreement that A. shall have a piece of land for five years, makes a good lease. 1 Shep. Touch., 161, 53. One covenants that his house is B's—this is a gift of the house. Plow. Comm., 308; 1 Shep. Touch., 162, sec. 4, 165. No delivery was necessary, and the deed is good as a conveyance of chattels. 1 Shep. Touch., 224. A bargain and sale may be made of goods, etc.

All estates will commence *in presenti,* unless some other definite time is assigned, or they be postponed indefinitely.

Without such construction the deed is absolutely inoperative, and a mere nullity; whereas it is manifest that a beneficial interest was intended for the daughter. It was not intended that the trustee should hold or manage for the grantor, Cobb; but his agency was intended for the benefit of the daughter and her heirs.

J. H. Bryan and Wright, contra.

BATTLE, J. This case depends upon the construction of the same deed which was before us in the action of ejectment between the same parties, and which we have already decided at the present term.

In that case we held that it was the manifest intention of the plaintiff, to give by the deed in question, the land and slaves therein mentioned, to the defendant in trust for his wife, who was the daughter of the plaintiff; and that the words therein used, though untechnical and informal, were sufficient to convey the land; and the question in this case is, whether they are also sufficient to convey the slaves. The cases of *Fortesque v. Satterthwaite,* 23 N. C., 566; *McAllister v. McAllister,* 34 N. C., 184, and *Respass v. Lanier,* 43 N. C., 281, clearly show that no technical words are necessary in a bill of sale for slaves, and we know of no authority or principle, which makes a distinction in that respect between a bill of sale and a deed of gift. Upon these cases, then, and upon the argument in the ejectment case between the present parties, we rely to support the conclusion to which we have come, (352) that the plaintiff is not entitled to recover. The judgment in his favor must therefore be set aside, and a judgment of nonsuit be entered according to the case agreed.

PER CURIAM. Judgment accordingly.

DEN EX DEM. JOHN BAILEY v. TIMOTHY H. MORGAN ET AL.

1. Where a sheriff sells lands under several executions, and the sale is rightful under one, though unlawful under the others, the purchaser acquires a good title.

2. A sheriff having in his hands several executions against A. levied upon lands and other property for their satisfaction. One of these executions had been assigned to indemnify the sheriff and two others against loss as sureties of A., and it was agreed between the sheriff and his co-sureties, that one of them should bid off the property, if it should sell low, for their common benefit; under this agreement the land was bought: *Held*, that the agreement was not fraudulent, or otherwise unlawful, and did not vitiate the sale.

(The cases of *Seawell v. Bank of Cape Fear*, 14 N. C., 279; *Cherry v. Woolard*, 23 N. C., 438; *Hattan v. Dew*, 7 N. C., 260; *Smith v. Kelly*, *ibid.*, 507; *Blount v. Davis*, 13 N. C., 19, and *Smith v. Greenlee*, *ibid.*, 126, cited and approved.)

THIS was an action of ejectment, tried at Spring Term, 1853, of PASQUOTANK Superior Court, before *Saunders, J.*

On the trial, it was proved that the lessor of the plaintiff was the owner of the land described in the declaration, on 21 November, 1843. That upon sundry judgments, some of which were against the lessor alone, some against him in conjunction with one Joseph Commander and other persons, executions issued to Job Carver, the sheriff of said county, and by virtue of them he sold the interest of the lessor of the plaintiff and said Commander in the said land, at public sale, on the premises, to one John J. Grandy, who afterwards assigned his bid to one Joseph H. Pool; and that the sheriff, by his deed the same day conveyed the premises to said Pool. It was further shown that all the parties to said executions, except three, were residents of Pasquotank County.

It was proved by the said John J. Grandy, that he, the said Carver and one Kinney were cosureties for one Joshua A. Pool, and (353) that to indemnify them, the said Joshua had assigned an execution issued upon a judgment recovered by him against the said Joseph Commander alone, to one Ehringhaus, in trust for said Grandy, Carver, and Kinney, and that said execution, as well as the others, was in the sheriff's hands at the time of said sale. He further proved, that before the sale, it was agreed between himself, the said Carver and Kinney, that if the property which the sheriff was to sell, and which consisted of other property as well as this now in controversy, sold low, he was to bid it off for the joint benefit of himself and the other sureties, and that it was to be left to his judgment what price he should give.

That the property sold low, and he accordingly bid off this in dispute, being the last and highest bidder, and that shortly after, with the consent of said Carver, he assigned his bid to said Joseph H. Pool, upon his paying the execution against said Commander, and directed the sheriff's deed to be made to him; that he did not communicate any of the facts stated above to said Joseph Pool, nor was the latter, as far as witness knows, informed of the arrangement about his bidding off the property.

The defendants deduced title from the said Joseph H. Pool; they also gave in evidence a private act of Assembly, passed in the year 1823, the material contents of which appear in the opinion of the Court.

The plaintiff contended that the sale made by the sheriff was void; (1) because some of the plaintiffs in the executions under which the premises were sold were not residents of the county of Pasquotank, and the private act of 1823 expressly excepts the case where either the plaintiffs or defendants are not residents of the county; (2) because of the combination and arrangement between Grandy and the sheriff, by which the sheriff was interested in the purchase made by Grandy. As to the knowledge of Pool of the arrangement between Grandy and the sheriff, the plaintiff insisted it was a fact to be submitted to the jury. His Honor declined submitting that matter to the jury, and reserving the questions of law, directed a verdict to be entered for the plaintiff, subject to the opinion of the court upon the points reserved. Subsequently, he directed the verdict to be set aside, and a judgment of nonsuit to be entered. The plaintiff moved for a new trial, and failing to obtain it, appealed to the Supreme Court. (354)

Pool for plaintiff.
Heath, Hines and W. N. H. Smith for defendants.

NASH, C. J. The plaintiff rests his right of recovery on two grounds. The first is, that under the private act of 1823, the sale by the sheriff was void because made on the premises; and secondly, it was void because of the agreement entered into between the sheriff and the other parties to it.

By the common law, no place is designated where a sale shall be made of lands, as they were not the subject of sale under execution. The act of 1777 makes them liable, but points out no place of sale, nor time, except the notice directed. The act of 1794 directs at what hours sales under execution shall commence. These were all the statutory provisions on the subject in this State until 1820, when the Legislature directed all sales of land to be at the courthouse of the respective counties. The act of 1821 altered the day of sale, and that of 1822 altered the time,

but not the place, to the Monday of each county court. Thus stood the law under the acts of 1820-'21-'22. The sales were to be made at the courthouse. At their session in 1823, they passed a local act, chapter 45, section 10, whereby several counties, among which was Pasquotank, were withdrawn from the operation of the act of 1822, and expressly repealing the act of 1820 and '21, so far as those counties are concerned as to the place of sale.

This left the sales of land under execution in those counties as at common law. The first proviso of the act of 1823 is the one under which the plaintiff, as to this objection, rests his case. It is in these words: "Provided, that this repeal shall not affect the cases where either of the parties in the execution are not residents in the county so exempted by this act." In other words, the act shall only apply to cases where both the plaintiff and defendant are residents of the county of Pasquotank, and not to those cases where either party is a nonresident. The citizens of Pasquotank did not wish the sale of land under execution in that county to be at the courthouse, but upon the premises.
(355) The Legislature, however, says, as to your own citizens, when they are alone concerned as plaintiffs and defendants, the sale shall be on the premises; but when those who are not residents, either plaintiffs or defendants, the sale shall be at the courthouse. Several executions had issued against the lessor of the plaintiff in this case who was a resident of the county of Pasquotank. In some, he was the sole defendant, in another, he and one Commander were defendants. In the case where the present plaintiff was the sole defendant, the plaintiff was John C. Ehringhaus, cashier; both these parties were residents of the county of Pasquotank, and the execution was in the hands of the sheriff at the time of the sale, and the sale was made under it as well as the others. But it is alleged that in some of the executions Benjamin C. Pritchard and B. F. Jackson and William Jones, who were parties plaintiffs, were not residents of the county of Pasquotank, and therefore the sale is void. In truth, the act of 1823 repeals the acts of 1820-'21, and '22, making the courthouse the proper place of sale, and leaves it, so far as the county of Pasquotank is concerned, as at common law, where the sheriff in good faith shall deem it best for all parties. The act of 1820 first designated the courthouse as the proper place for such sale. The acts of 1821 and '22 only altering the day of sale. *Grandy v. Morris,* 28 N. C., 433. But if it be admitted that under the act of 1823, the sale under the executions in favor of nonresidents is still, in Pasquotank, to be made at the courthouse, it does not affect the question presented to us under these proceedings. Here the sale was made by the

sheriff under all the executions—and if one of them authorized the sale as made, it is valid, and the purchaser acquires a good title. A misrecital in the deed from the sheriff, meeting a wrong execution, does not invalidate the sale, if he had in his possession at the time of sale, one which did authorize him to act. *Seawell v. Bank of Cape Fear,* 14 N. C., 279; *Cherry v. Woolard,* 23 N. C., 438; *Hatton and wife v. Dew,* 7 N. C., 260.

It is further objected by the plaintiff, that the sheriff's deed to Pool conveyed no title to him, as he did not purchase the land at the sale, but it was bid off by one John J. Grandy. The case discloses that Grandy transferred his bid to Pool. This he had a right to do, and the deed was properly made to Joseph H. Pool. *Smith v.* (356) *Kelly,* 7 N. C., 507; *Blount v. Davis,* 13 N. C., 19.

It is further insisted by the plaintiff, that the sale was void by reason of the fraud and combination between the sheriff and Grandy and others. It is very certain that any fraud or combination between a sheriff and a purchaser which affects the sale will vitiate it. There was here no combination to purchase this land. The land with other property of a personal nature, was levied on to satisfy the executions; among them was one in favor of Joshua A. Pool against Commander, which he assigned to the three individuals who entered into the agreement, and who were his sureties, to indemnify and secure them against loss as such sureties. The agreement was, that if the property sold low, Grandy, one of the sureties, should bid it off for the joint benefit of himself and the others. Grandy became the purchaser of the land in question, being the highest bidder, and the land going low, and afterwards assigned his bid to Joseph H. Pool, with the consent of the other sureties, upon his agreeing to pay the execution against Commander. The witness did not communicate to Joseph H. Pool the existence of the arrangement made between the sureties, nor is there any evidence it was communicated to him by any other person before he purchased. We do not, however, in the agreement itself, see anything that was fraudulent. In all public sales, whether made by a private individual as an auctioneer, or by an officer of the law as a sheriff under an execution, the object is to secure to the person whose property is sold, a fair price, and to the creditor satisfaction of his debt. Puffing or by-bidding is a fraud on the vendee, as it has the effect of enhancing the price upon him, and any agreement not to bid, made for the purpose of paralyzing competition, is a fraud on the vendor, and vitiates the sale. *Smith v. Greenlee,* 13 N. C., 126. But the rule does not extend so far as to prevent several individuals from uniting in their biddings from any other cause or

motive. *Judge Henderson,* in *Greenlee's case* above, in commenting upon the principle of persons entering into combinations at public sales, says, the rule is confined to agreements which have such objects in view. There is not the slightest pretense that any such intention was entertained by the parties to this agreement, nor was any such effect produced.

It was not an agreement not to bid against each other, but it was
(357) an agreement made by cosureties that one of their number should purchase property at the sale, with a view to save themselves; that they could do so only by getting the property low; for if they paid as much for it as upon a resale, they could get, they would be precisely where they were, or indeed worse off—what they bid would have to be paid immediately, and it might be some time before they could effect a resale. Nor can the sheriff's being one of the parties to the agreement alter the principle. He was one of the cosureties, and had as much right as any of the others to secure himself, if he could do so without injury to the plaintiff or defendant in the execution. That the parties to the agreement acted in good faith, and with no fraudulent design to make to themselves any unfair advantage in their purchase, when the bid was transferred to Joseph H. Pool, it was a part of his agreement with them, that he should pay off the execution against Commander, so as to free him from any claim they had as the owners of it.

The ground upon which our opinion is placed, renders it unnecessary to notice the refusal of the judge to submit to the jury, the question of *bona fides* in Pool when he purchased the bid.

PER CURIAM. Judgment affirmed.

Cited: Davis v. Keen, 142 N. C., 504; *Manning v. R. R.,* 188 N. C., 664; *Johnson v. Pittman,* 194 N. C., 301; *Weir v. Weir,* 196 N. C., 270.

STATE v. WILLIAM L. GARRETT.

1. When a witness is asked, on cross-examination, whether he has not been convicted and punished for an infamous crime, it seems that he is bound to answer the question.

2. Where, however, such a question was put, and the judge left to the witness to choose whether he would answer, and he refused, *it was held,* that such refusal might be insisted upon by counsel in addressing the jury, as warranting the inference that he was unworthy of credit.

(The cases of *S. v. Patterson,* 24 N. C., 346, and *Bailey v. Poole,* 35 N. C., 404, cited and approved.)

STATE *v.* GARRETT.

THIS was an indictment for murder, tried at Spring Term, 1853, of NORTHAMPTON Superior Court, before *Bailey, J.*

On the trial, a witness for the prisoner, was asked upon his (358) cross-examination by the Attorney-General whether he had not been indicted, convicted, and whipped, in the County Court of Warren, for stealing. The witness was informed by his Honor, that he was not bound to answer the question unless he chose to do so, and he declined to answer. The Attorney-General, in his concluding argument to the jury, insisted, although the prisoner's counsel objected to his right to do so, that the witness was unworthy of belief, because of his refusal to answer the questions propounded to him by the State.

There was a verdict of guilty, and judgment against the prisoner. Rule for a new trial—rule discharged, and the prisoner appealed to the Supreme Court.

Attorney-General for the State.
Moore and Bragg for prisoner.

BATTLE, J. The bill of exceptions presents fairly the point, whether the Attorney-General, after having asked the defendant's witness a question tending to his disparagement or disgrace, and which he on that account refused to answer, had the right, in his argument to the jury, to infer from his silence that the witness was unworthy of credit. There is no subject connected with the examination of witnesses on a *nisi prius* trial, whether civil or criminal, upon which there seems to have been more diversity of opinion and practice in the English courts, than upon the one now under consideration. Judges of great eminence have refused to permit a question tending to degrade a witness to be put to him. Others have permitted the question to be put, but advised the witness that he was not bound to answer it; while most, but not all of them, have held that no inference to the discredit of the witness could be drawn from his refusal to answer. 1 Stark. on Ev., 172, in note; Roscoe's Crim. Ev., 175; *Rose v. Blakemore,* 21 Eng. C. L., 465, and the note thereto. In this State we consider it settled by the case of *S. v. Patterson,* 24 N. C., 346, that such a question may be asked; and the Court in that case were inclined to the opinion, though they did not expressly decide, that when the question tended only to the disparagement or disgrace of the witness, but not to expose him to a criminal prosecution, he was bound to answer it. Whether, supposing him not bound to answer, any inference to his discredit arising from his silence can be urged in argument to the jury, is now for the (359)

first time, so far as we are aware, presented for the decision of this Court. The question is one of much practical importance, and we have considered it with an anxious desire to settle it correctly. The difficulty arose in the outset, from the wish of the court to protect the witness on the one hand, and on the other to protect the party against whom he was called, from unreliable testimony. It is manifest that the only mode by which a complete protection can be afforded to the witness, is to prevent the question from being put at all. If that be not done, and he is protected only so far as not to be compelled to answer the question, his credibility will inevitably suffer some damage by his silence. It will then deserve serious consideration, whether the slight protection still afforded the witness be sufficient to countervail the necessity which every court must feel, of endeavoring to protect the parties to a cause from corrupt or suspicious testimony. It has been decided in this State, as we have already seen, that the witness cannot claim the only complete and effectual protection, of not having the disparaging question put to him, and we are inclined to think with the very eminent judges who decided *S. v. Patterson,* that it follows as a necessary consequence, that the witness is bound to answer. But if that be not so, and it is admitted that the witness may refuse to answer, we yet hold that such refusal is the proper subject of comment to the jury. It seems to us to be something very much like absurdity, to permit the manner, the appearance, and the whole demeanor of a witness under examination, to be discussed and criticised by counsel, and yet deny them the privilege of remarking upon his refusal to answer a proper question, when that refusal may have more effect upon the jury than everything else relating to his mere demeanor. We cannot believe that such is the correct practice. We think that the silence of the witness under such circumstances, is "a fact transpiring in the course of the trial, brought before the jury by one of the parties, and in relation to the question under investigation," and is therefore a proper subject of remark to the jury, both by the counsel and the court. See *Bailey v. Poole,* 35 N. C., 404.

(360) The question put by the Attorney-General to the witness, in the case now before us, could not expose him to a criminal prosecution. The only effect it could have, was to disparage him and destroy his credibility before the jury. And whether he was bound to answer it or not, we think that no error was committed by the court in permitting the Attorney-General to notice his refusal to answer, in the argument to the jury.

The conclusion to which we have come upon this question, renders it unnecessary for us to notice the other matters set forth in the bill of

exceptions. It must be certified to the Superior Court of Law for Northampton County, that there is no error in the record, to the end that the court may proceed to give judgment according to law.

PER CURIAM. Judgment affirmed.

Cited: S. v. March, 46 N. C., 527; *S. v. Murray,* 63 N. C., 32; *S. v. Cherry, ibid.,* 495; *S. v. Lawhorn,* 88 N. C., 634; *S. v. Gay,* 94 N. C., 818; *S. v. Thomas,* 98 N. C., 599; *S. v. Maslin,* 195 N. C., 541.

ANTHONY BENTON v. ROBERTSON SAUNDERS.

1. It makes no difference whether the witness to a bill of sale, for a slave, subscribes his name at the time of the execution of the deed, or subsequently, provided it is done *bona fide,* and before the rights of third parties have attached.

2. The question of *bona fides,* must be submitted to the jury.

(The case of *Hardy v. Simpson,* 35 N. C., 132, cited and approved.)

THIS was an action of *trover* for a slave, and to it the defendant had pleaded not guilty.

At the trial before his Honor, *Settle, J.,* at ROCKINGHAM, during the last Spring Term, it appeared that the plaintiff claimed under a bill of sale, including several other slaves, made to him by one Bayless Lynn, on 23 May, 1840, it being Saturday before Rockingham County Court. The consideration recited therein, was one thousand dollars, but no money passed at that time, the real consideration being debts due by Lynn to the plaintiff, and risks incurred by the plaintiff as surety for Lynn. No settlement of their accounts took place at that time between the parties, nor was any credit given, as for money re- (361) ceived, by the plaintiff to Lynn—the latter, as he testified, trusting to the plaintiff's honor for a proper application of the money. The bill of sale was attested by only one witness, who proved that he had not subscribed his name as a witness until during May Court, 1844. It also appeared that at the time of making the bill of sale, Lynn was indebted to a larger amount than he was worth, and that several suits for debt were then pending against him. It was admitted that after receiving the bill of sale, the plaintiff had paid off debts due by Lynn—in which he himself was interested—to the full value of the slaves conveyed to him.

The defendant claimed by purchase under an execution issuing in a suit by himself against Lynn, upon a bond dated 9 September, 1839, on which judgment was obtained at May Term, in 1840, of Rockingham County Court. Upon that judgment executions had issued regularly up to February Term, 1844. At August Term, 1846, judgment was had on a *scire facias* issued to revive the former judgment, and upon this executions issued regularly up to February Term, 1849. Under the last of these, this slave was sold, and bought by the defendant. The defendant further showed in evidence a deed in trust, made by one Elizabeth Lynn, in 1842, conveying the slaves included in the bill of sale—she then owning a life estate in them—to Bayless Lynn as trustee to sell and pay certain debts; and this deed was executed by the trustee. Elizabeth Lynn died in the year 1845.

The defendant asked the court to charge, that the bill of sale from Lynn to the plaintiff was fraudulent as to all creditors of Lynn: Firstly, for want of a subscribing witness at the time it was made, this defect not being helped by what took place in 1844; secondly, from the testimony offered by the plaintiff, if believed by the jury; thirdly, if they believed that Lynn, being deeply involved, conveyed the Negro away, receiving nothing at the time, and estopping himself from collecting anything at law. He also insisted that if the plaintiff was entitled to recover anything, it was only the value of the Negro at the time of conversation, without interest.

(362) His Honor charged the jury that the bill of sale, as it stood until it was subscribed, although good as between the parties, was void as to creditors; but that, if the jury believed that the plaintiff, before the subscription of the witness, and before the time at which defendant's judgment was taken, had paid debts due by Bayless Lynn, to an amount equal to the consideration recited, and that the contract of 1840 was *bona fide,* the plaintiff would be entitled to recover, and that he was not estopped by the deed in trust executed in 1842. His Honor declined to give the instructions prayed for by the defendant, but told the jury that the circumstances detailed in the evidence were fit for their consideration, and if these showed that the object of the bill of sale was the hindrance of Lynn's creditors, or the securing of any ease to himself, it was fraudulent and void, and then the plaintiff was not entitled to recover. The plaintiff had a verdict and judgment, and the defendant appealed.

J. H. Bryan for plaintiff.
Morehead and Miller for defendant.

BATTLE, J. The main question presented on the bill of exceptions, arises from the refusal of his Honor to give the first instruction prayed by the defendant's counsel. The bill of sale, executed by Bayless Lynn to the plaintiff for the slave in question, on 23 May, 1840, was admitted to be good between the parties to it, but invalid as to the creditors of Lynn, for the want of a subscribing witness. It may, perhaps, be doubted whether it was good between the parties, since the 37th chapter, 19th section, of the Revised Statutes, has omitted the preamble to the act of 1784 (Rev. Code, chap. 225, sec. 7)—see *Bateman v. Bateman,* 5 N. C., 97. But supposing that it was good between the parties, and void as to creditors, was it made good as to the latter by the plaintiff's procuring it to be acknowledged and attested in May, 1844, before the creditors obtained a lien on the slave of the bargainor, and by his having it subsequently proved and registered? The defendant's counsel contends strenuously for the negative. He insists that the deed was fraudulent in its operation against creditors, and was therefore void as to them, and could not be made good by anything which the parties might do afterwards. He insists, also that having been once delivered, and being effectual between the parties, it was incapable (363) of a second delivery; and for these positions, he cites and relies on 2 Thomas' Coke Lit., 235, in note M; Shep. Touch., 60, and the case of *Halcombe v. Ray,* 23 N. C., 340. These authorities may, at first view, seem to support the principles contended for by the counsel, and justify him in his application of them to the present case; but we think that an attentive examination of them will show a marked difference between the cases to which they are applicable, and the one before us. The note in Thomas' Coke states that a deed delivered by an infant cannot be redelivered, after he comes of age, but that the deed of a married woman may be delivered again, after she becomes discovert; and the reason assigned for the distinction is, that the deed of an infant, being only voidable, has had some effect, while that of the *feme covert,* being void, has had none. This explanation is incomplete. It does not state the full grounds of the difference in the operation of the two instruments. The deed of an infant, being voidable only, may be confirmed by him after he comes of age; and if so confirmed, its operation and effect will relate to the time of the original delivery. Were a second delivery required or admissible to give it effect, the bargainee might be injuriously affected thereby, on account of judgments and executions against the infant after he came of age, and before the second delivery. The deed of a married woman, on the other hand, is, because of her incapacity to make it, utterly null and void, and the first effect which it can have must be derived from its delivery after the death of her hus-

band. It is not pretended that there is any analogy between the delivery of the deed of a *feme covert* during and after coverture, and this case; and we cannot see much more in the case of an infant's deed, unless it be that the confirmation of it, after he comes to his majority, may afford some plausibility to the plaintiff's claim, of giving validity to his bill of sale by the attestation subsequently procured for it. The principle recognized by this Court in *Halcombe v. Ray,* affords a stronger argument for the defendant. It was the case of a deed for land, absolute on its face, but intended by the parties to be only
(364) a mortgage. The *Chief Justice, Ruffin,* in delivering the opinion of the Court, declares that such an instrument is fraudulent and void as to creditors, because it was and must have been intended to deceive them. He then expresses a doubt, but does not decide, whether such a deed could be afterwards made good by a *bona fide* purchase of the full interest in the land, and a redelivery of the deed, and ends by deciding that a mere payment of the price on a *bona fide* purchase, could not avail to purge the original fraud, and make the deed good. But this principle cannot be applied to a deed, declared by statute to be invalid for the want of some ceremony, especially when the want of such ceremony must appear on the instrument itself. There is, in the very nature of things, a difference between the two instruments. A deed intended as a mortgage, but absolute in terms, if not expressly designed to defraud third persons, must necessarily have that effect. It is constantly uttering a falsehood, and falsehood under such circumstances is fraud. Very different is a bill of sale for a slave without a subscribing witness. If not fraudulent for other reasons, the omission of such a witness cannot make it so. It carries its own weakness on its face. It can deceive nobody. It cannot hinder, delay, or defraud creditors. The statute does not declare that it is fraudulent, nor that it shall be considered so, but says simply that it shall not be valid; for fear, perhaps, that without an attesting witness, it might be made an instrument of fraud. If fair and *bona fide* in its inception, why not permit a ceremony, not otherwise essential to its existence, but omitted by mistake, to be subsequently supplied, before the rights of creditors have intervened. We can see none, either in the nature of the instrument, or the policy of the law. As to the nature of the instrument, it is not a deed founded in fraud, which can never, as is said in *Halcombe v. Ray,* be purified of its original taint; but is rather a defective or imperfect instrument, which becomes valid as soon as the defect or imperfection is supplied. As to the policy of the law, it certainly can make no difference whether the witness subscribes his name at the time of the execution of the deed, or subsequently, provided it is done *bona fide,* and before the rights of third

persons have attached. The question of *bona fides* must be submitted to the jury, and we think it was fairly so done by his Honor upon this part of the case. (365)

The instructions given upon the other questions of fraud were also correct, being fully supported by the principles declared in the recent case of *Hardy v. Simpson,* 35 N. C., 132, and the cases therein referred to.

The plaintiff was certainly not estopped as against the defendant, by the deed in trust executed by Elizabeth Lynn to him; both because there could be no mutuality in it, and an interest—to wit, the bargainor's life estate passed. But if the plaintiff had been estopped, the defendant would have been estopped also, and then the plaintiff might have recovered upon his legal title as trustee, without adverting to the other grounds of his claim.

The question in relation to damages has been properly abandoned in this Court. The judgment of the court below was correct, and must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Thompson v. Bryan, 46 N. C., 343; *McCormic v. Leggett,* 53 N. C., 427.

DOE EX DEM. GEORGE BOYD v. SAMUEL C. LATHAM.

1. A codicil imports not a revocation, but an addition to, or explanation or alteration of, a prior will in reference to some particular, and assumes that in all other particulars, the will is to be in full force and effect.
2. The rule *ut res magis valeat quam pereat,* and comes in aid of the general presumption, that one who makes a will, intends to dispose of all his property.

THIS was an action of ejectment, tried before *Manly, J.,* at the Spring Term, 1853, of BEAUFORT Superior Court.

The following is the case agreed upon, which, in the court below, judgment was entered for the plaintiff:

"It is admitted that George Boyd, Sr., died seized in fee of the lands described in the declaration in or about 1844, and that the defendant was in possession thereof at the time of the service of the declaration

on him. It is admitted that the lessor of the plaintiff is the only child and heir-at-law of said George Boyd, Sr., and is under age. The annexed paper is a copy of the last will and testament of said George
(366) Boyd, and the land described therein as given to Almarina Boyd is the same land described in the plaintiff's declaration. Before this action was brought, Almarina Boyd conveyed all her estate in said lands to the defendant. The defendant and those under whom he claims, have been in possession of the land ever since the death of George Boyd. If the court is of opinion with the plaintiff, judgment shall be given for him, for six pence damages, and costs. If the court is of opinion with the defendant, judgment shall be given against the plaintiff for costs. The above admissions are made only for the purposes of this suit. Either party may appeal without giving bond."

The will referred to above, which the opinion delivered by this Court renders unnecessary to insert here at length, consisted of eleven items, and two codicils, by which a large estate was disposed of. By the sixth item it disposed of certain mills. By the seventh, the testator devised the land in dispute to Almarina Boyd. The first codicil, which commences, "Codicile, I annul all and every word in the above will of mine, and I insert the following"—changes the former disposition of the mills. The second, beginning, "I have thought proper to make the following alteration to my last will and testament," modifies the body of the will as regards several Negroes therein mentioned by name, and again makes provision about the mills.

The other parts which are material here, will be found in the opinion of the Court. From a judgment for the plaintiff in the court below, the defendant appealed to the Supreme Court.

Rodman for defendant.
Donnell for plaintiff.

PEARSON, J. George Boyd, Sr., died seized and possessed of a considerable estate, and left him surviving a widow and one child, and a good many relatives to whom he makes bequests or devises; among them Almarina Boyd, to whom he devises the land now sued for.

One of two conclusions must be adopted: (1) What are called "the codicils" revoke the will, and Boyd died intestate, except as to the "grist and saw mills and four Negroes," or (2) the codicils have only
(367) the effect of altering the sixth item of the will, which has reference to the grist and saw mill; and the several items by which the four Negroes that he in his last codicil directs to be sold, had been

specifically bequeathed, and leaves the will in full force and effect in regard to all other particulars.

The first is supported by the single fact that Mr. Boyd, in what he calls "codicile," uses these words: "I annul all and every word in the above will of mine."

The second is supported by a great many facts and considerations: (1) In the body of the will these words are interlined in the handwriting of Mr. Boyd, "I annul all the sixth item above stated, or before stated," and at the foot of the will these words are added by him, "all the interlined places in my handwriting to be and remain valid." (2) The sixth item which has reference to the grist and saw mill, is the only one which in terms is altered by the first codicil, and the general words in that codicil, which are relied on to support the proposition that the entire will is thereby revoked, are restricted by the fact of its being called a codicil, which imports not a revocation, but an addition, or explanation, or alteration of a prior will in reference to some particular, and assumes that in all other particulars the will is to be in full force and effect. (3) The first codicil presupposes the continuance of the original will by saying, "I insert" the following, etc. Insert where? Of course, in the original will; and by recognizing it in the provision that the proceeds of the sales of the mills are to be put on interest for the benefit of "my son George Boyd, who I have given the mills in this instrument of writing"—to wit, my will which I have altered, so as to give him the money instead of the mills. (4) The second codicil recognizes the continuance of the will by speaking of those Negroes which "I left to my son," and one which "I left to my wife"; these are to be sold and appropriated to the payment of my debts, and the account of sales to be returned to court by "my executors." What executors, unless the will is still in force? And in the second section of this codicil he says, "Any property that my wife may think proper to give up of hers, such as stock and household furniture, to help to pay my debts, I wish my executor to return the amount of the same to court." What stock or household furniture had the wife, except what she took (368) under the will? (5) The rule, *ut res magis valeat quam pereat,* comes in aid of the general presumption, that one who makes a will intends to dispose of all of his property. (6) There is a special presumption in this case that Mr. Boyd did not intend to die intestate as to all of his property except the mills and four of his Negroes; for, from the whole will, it is apparent that he not only intended to dispose of his entire estate at his death, but he was solicitous to retain the *jus disponendi* even afterwards, and to sell his mills "for $2,000, and no less, on a credit of two years, the money to be well secured, and the sales

returned to court"; if that price could not be had, then "to rent her for not less than $75 per annum, the person who rents to keep her in repair," etc. And he evinces a general wish to retain the control and dominion over his property for eighteen years after his death (when his son would arrive at age), all of which is wholly at variance with the idea of an intention to revoke his will, and die intestate as to the bulk of his estate.

Judgment reversed, and judgment that the defendant recover his cost and go "without day," according to case agreed.

PER CURIAM. Judgment reversed.

Cited: Foil v. Newsome, 138 N. C., 119; *Baker v. Edge,* 174 N. C., 103; *McCullen v. Daughtry,* 190 N. C., 219.

W. H. MANNING v. AUGUSTUS JONES, EXECUTOR, ETC.

A. made a parol contract to purchase of B. a tract of land at an agreed price, and B. further agreed that he would put certain repairs on the premises, before the first of January ensuing. Afterwards, and before that day, B. delivered to A. the deed for the land, renewing the promise to make the repairs. The repairs not being made, A. brought *assumpsit* to recover damages, and on the trial offered to prove the agreement by a witness, when it was objected that the deed was the only legal evidence of the contract between the parties: *Held,* that the proof was admissible, the deed being an execution of one part of the agreement, the other having been left in parol; so that the proof offered was not to add to, alter, or explain the deed.

(The case of *Twidy v. Saunderson,* 31 N. C., 5, cited and approved.)

THIS was an action of *assumpsit,* tried before *Saunders, J.,* at Spring Term, 1853, of the Superior Court for GATES County. The pleas were, general issue, release, accord and satisfaction, statute of limita-
(369) tions, and statute of frauds. Upon the question reserved, which is sufficiently stated in the opinion delivered by this Court, his Honor being of opinion with the defendant, the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

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

NASH, C. J. We think there is error in the judgment of the court below. In the month of August, 1850, Augustus Jones, now dead, and

the plaintiff entered into a parol agreement for the sale by Jones, to the plaintiff of a tract of land at a stipulated price. It was at the same time further agreed, that Jones should repair the plantation and houses, which was to be done before 1 January, 1851, at which time the plaintiff was to be admitted into possession. The deed was executed and delivered in the same month of August, and at the time of its delivery, to a question put by the plaintiff, Jones answered he would have the repairs made by the time specified. Having failed to do so, this action on the case was brought. The evidence to prove this agreement as to repairs was objected to, but received by the court, subject to the objection. The jury having returned a verdict for the plaintiff, it was set aside, upon the ground that the evidence received was inadmissible, and a judgment of nonsuit given against the plaintiff. In this there is error. It is true as a rule of evidence, that where a contract is reduced to writing, parol evidence cannot be received to contradict, add to, or explain it. The error here consists in considering the evidence in this case as offered for either of these purposes. It was offered to set up another and distinct part of the contract, which never was reduced to writing. A contract which was anciliary to the main one, which was the sale and purchase of the land, and so the parties treated it; for although the deed was drawn, signed, and sealed at the time the trade was made, yet it was not delivered until some weeks after, and some months before Jones was bound to deliver it, and at that time the plaintiff asks him if he does not intend to make the repairs as agreed, to which he replies he did. As soon as the deed was delivered to the plaintiff and he received it, the title passed to the latter unclogged with any conditions (370) whatever; but it did not have the effect of discharging Jones from his obligation to put on the premises the agreed repairs. And as that contract was in parol, it might be proved by parol. Its existence added no new covenant to the deed made by Jones, nor did it contradict or explain any one that was contained in it. The action is maintainable upon the contract as to the repairs made at the time the deed was delivered. The principles decided in the case, *Twidy v. Saunderson,* 31 N. C., 5, govern this case. That was an action upon the case to recover the value of a Negro. The plaintiff had hired a Negro to the defendant for a year, and alleged that it was understood and agreed between the parties, that he was not to be carried out of the county. He was carried out and was killed. The defendant contended that the contract of hiring was reduced to writing, and that it contained no such stipulation. To sustain the defense he gave in evidence the note executed by him for the hire of the Negro, in which there was no agreement such as the plaintiff relied on, and he objected to the parol evidence. It was admitted below

and the opinion sustained here, upon the ground that the hire note was not a memorial of the entire agreement, but was simply a part execution of it on the part of the defendant. In one case the deed was but a part execution of the agreement by Jones on his part, leaving a portion of it in parol; and the admission of parol evidence to prove it does not in any respect add to, alter, or explain it.

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

Cited: Daughtry v. Boothe, 49 N. C., 88; *R. R. v. Leach, ibid.,* 344; *Murray v. Davis,* 51 N. C., 343; *Griffith v. Roseborough,* 52 N. C., 524; *Flynt v. Conrad,* 61 N. C., 194; *Woodfin v. Sluder, ibid.,* 203; *Perry v. Hill,* 68 N. C., 420; *Kerchner v. McRae,* 80 N. C., 222; *Braswell v. Pope,* 82 N. C., 57; *Terry v. R. R.,* 91 N. C., 236; *Sherrill v. Hogan,* 92 N. C., 345; *Ray v. Blackwell,* 94 N. C., 13; *Nickelson v. Reves, ibid.,* 563; *Cumming v. Barber,* 99 N. C., 336; *Michael v. Foil,* 100 N. C., 188; *Meekins v. Newberry,* 101 N. C., 19; *Moffitt v. Maness,* 102 N. C., 461; *McGee v. Craven,* 106 N. C., 356; *Barbee v. Barbee,* 108 N. C., 585; *Jones v. Rhea,* 122 N. C., 725; *Quin v. Sexton,* 125 N. C., 452; *Log Co. v. Coffin,* 130 N. C., 436; *Cobb v. Clegg,* 137 N. C., 156; *Evans v. Freeman,* 142 N. C., 65; *Brown v. Hobbs,* 147 N. C., 77; *Wilson v. Scarboro,* 163 N. C., 385; *Buie v. Kennedy,* 164 N. C., 298; *Potato Co. v. Jenette,* 172 N. C., 4; *Sumner v. Lumber Co.,* 175 N. C., 656; *Wells v. Crumpler,* 182 N. C., 365; *Pate v. Gaitley,* 183 N. C., 263; *Henderson v. Forrest,* 184 N. C., 234; *Hite v. Aydlett,* 192 N. C., 170.

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BENJAMIN RUNYON, CASHIER, v. EDWARD W. MONTFORT.

1. An officer of the bank in Washington (Beaufort County), under cover to whom the notice of a protested bill of exchange was sent, proved that on the day after he received it—viz., on 10 April, 1849—he sent it by mail to New Bern, under cover, to the defendant; that he did not know where the defendant resided, and that after learning from a gentleman of Washington, who had married a lady of New Bern, that he did not know, he desisted from further inquiry. It also appeared that in 1845, the defendant purchased a house and lot in New Bern, and that after that time, he spent a portion of each year in that place, going from his home in Onslow about the latter part of June, and returning in October, but that in 1849, he did not leave Onslow until 6 July. With this exception, the defendant had lived from his youth up, on a plantation some two miles distant from Jacksonville, the county seat of Onslow, and that was the postoffice to which his letters and papers were addressed: It further appeared, that during the years the defendant spent the sickly season in New Bern,

several letters postmarked "New York" came to him, and were delivered to persons calling for them in his name, and that there was a tri-weekly mail between New Bern and Washington:

2. *Held*, that this proof failed to show that New Bern was the place of the defendant's residence or business, at which he usually received his letters and papers: *Held further*, that there was not sufficient diligence used by the plaintiff, in giving notice of the dishonor of the bill of exchange, to bind the endorser.

(The case of *Denny v. Palmer*, 27 N. C., 610, cited and approved.)

THIS was an action of *assumpsit*, against the defendant, as endorser of a bill of exchange. Pleas, general issue, payment, and statute of limitations.

The bill in suit had been protested for nonacceptance in the city of New York, and the question before the court below was as to the sufficiency of the notice given to the defendant. Upon this point the facts were as follows: The officer of the bank in Washington, under cover to whom the notice had been sent, proved that on the day after he received it—that is, on 10 April, 1849—he sent it by mail to New Bern, under cover, to the defendant; that he did not know where the defendant resided, and that after finding from a gentleman of Washington, who had married a lady of New Bern, that he did not know, he desisted from further inquiry. The plaintiff further showed by a copy of the deed, that in 1845, the defendant had purchased a house and lot in New Bern. It also appeared that after that time the defendant spent a portion of each year in that place, coming from his home, in Onslow, about the latter part of June, and returning in October; but that in 1849, he did not leave Onslow until 6 July. With this exception, the defendant had lived from his youth up, on a plantation some two (372) miles distant from Jacksonville, the county seat, and this latter was the postoffice to which his letters and papers were addressed. It was also shown that during the years that the defendant spent the sickly season in New Bern, several letters, postmarked "New York," came to him, and were delivered to persons calling for them in his name. It appeared that there was a tri-weekly mail between New Bern and Washington.

It being admitted on the trial at BEAUFORT Superior Court, during the last Spring Term, that upon this state of facts, the liability of the defendant was a question for the court, his Honor, *Judge Manly*, was of opinion with the defendant; whereupon, the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

Rodman for plaintiff, submitted the following brief:

1. Defendant has two places of residence, and two postoffices, to either of which notice would have been sufficient. 1 Am. Lead. Ca., 257.

2. Plaintiff used due diligence in making inquiry. *Harris v. Robinson,* 4 How. U. S. Rep., 336; *Lowery v. Scott,* 24 Wend., 358; *Bank of Utica v. Davidson,* 5 Wend., 587; *Bateman v. Joseph,* 12 East., 433; *Beveridge v. Burgess,* 3 Camp., 262, 5 Wend., 588; 2 Stew. & Port., 428; *Robinson v. Hamilton,* 4 Stew. & Port., 91; *Ransom v. Mock,* 2 Hill N. Y., 587.

3. If after due inquiry, the residence of the endorser cannot be found out, a holder is justified in sending notice to the place where the bill is dated. 6 Smedes & Marsh, 255; 5 B. Munroe, 7; *Denny v. Palmer,* 27 N. C., 610.

Donnell and J. W. Bryan for defendant.

BATTLE, J. It was admitted on the trial, by the counsel of both parties, that the liability of the defendant was a question of law, arising upon the facts established by the proof. Upon these facts two questions are presented: First, whether the defendant had such a residence in New Bern, as made that town a proper place at which to send (373) him a notice of the dishonor of the bill. Secondly, if it were not, whether the plaintiff, being ignorant of the defendant's actual place of residence, used due diligence in endeavoring to ascertain it, before he sent the notice to New Bern. Another question has been raised and argued by the plaintiff's counsel before us—whether, as the bill was drawn and bears date at New Bern, that is not the proper place to which notice should be sent to the endorser? But without deciding whether that question is open to the plaintiff upon the bill of exceptions, we hold that it is settled to the contrary by the opinion of this Court in the case of *Denny v. Palmer,* 27 N. C., 610.

Upon the first question, the proof fails to show that New Bern was the place of the defendant's residence or business, at which he usually received his letters and papers. He was born and raised in the county of Onslow; and at the time when the bill was dishonored, and the notice thereof sent, he was a planter residing within two miles of Jacksonville, the county seat of Onslow, where was kept a postoffice, through which his correspondence passed. It does not appear that the plaintiff knew that he owned a house and lot in New Bern, or that he occupied it any portion of the year, and that for that reason he sent the notice to that town. Indeed, the contrary is to be inferred from the case. But if he did know these facts, he must have known also, that the defendant was not residing there in the month of April, when the notice was sent.

The remaining question must also be decided against the plaintiff. It was his duty, if he was ignorant of the defendant's place of residence, to use due diligence to find it out. The necessity of doing this is so strong, that some delay in giving the notice will be excused on account of it. *Bateman v. Joseph,* 2 Camp. N. P. Rep., 461; S. C. in Banco, 12 East. Rep., 432; *Baldwin v. Richardson,* 1 Barn. and Cres., 245 (8 Eng. C. L. Rep., 66).

These cases will show further, that the only inquiry made in the case before us, as to the defendant's residence, was entirely insufficient. (See Byles on Bills, 222, and *Beveridge v. Burgis,* 3 Camp. Rep., 262.) There was a tri-weekly line of stages between the town of Washington, where the plaintiff resided, and New Bern, to which the notice was sent. There were also several persons residing in Washington, who had formerly resided in New Bern. The plaintiff or his agent, Mr. Hardenburg, might have written to the drawer or some other (374) person at New Bern, or might have made inquiries of the persons who had formerly resided there, and who therefore might have been presumed to have been able to give him the desired information. He did neither of these things, but contented himself with making inquiries of a gentleman, who is not stated to have known anything about the inhabitants of New Bern, except from what he may be supposed to have derived from marrying a lady of that town. This was altogether insufficient, and the cases cited by the plaintiff's counsel, from Wendell's (N. Y.) Reports, and Howard's Report of the Supreme Court of the United States, do not conflict with this conclusion. In *The Bank of Utica v. Davidson,* 5 Wend. Rep., 587, the Court says: "If the holder of a note is ignorant of the place where the endorser resides, and cannot ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient. If no place appear on the face of the note, notice must be sent to the place where, according to the best information to be obtained, the endorser will most probably be found." Hence it was held in that case, that notice sent to a town where the note bore date, where the officers of the bank were told by the person who presented it for discount, the endorser resided, and where in fact he did reside until a few weeks previous to the date of the notes, was sufficient. This is certainly no authority for the very slight inquiry made in this case. The case of *Lowery v. Scott,* 24 Wend. Rep., 358, relates to a notice to the drawer, and has no application to the present. In *Harris v. Robinson,* 4 Howard's Rep., 336, it was decided, that where a note was handed to a notary for protest by a bank, and it did not appear whether the bank or the last endorser was the real holder of the note, and the notary made inquiries of the cashier and others not unlikely to know, respecting

the residence of the prior endorsers, and then sent notice according to the information thus received, it was sufficient to bind such prior endorsers. And the decision in *Lambert v. Ghiselin,* 9 How. Rep., 552, was that it was sufficient proof of due diligence to ascertain the residence of the endorser, before sending him notice of the dishonor of the bill, that the holder inquired from those persons who were most (375) likely to know where the residence of the endorser was. Surely these authorities cannot be called into the aid of the case, where the inquiry was made of one person only, and he having no other means of information than that he had married a lady of the town to which the notice was directed. Why not inquire of the lady herself, or of some one or more of the other persons who had formerly resided in New Bern? Why not write to the drawer or some other person then living in New Bern? Either would have been a much surer mode of obtaining the desired information, than the one adopted. There is no error in the judgment given below, and it must be affirmed.

PER CURIAM. Judgment affirmed.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

MORGANTON

AUGUST TERM, 1853

A. J. PATTON v. WILLIAM MARR.

Where a sheriff returned an execution, endorsed, "Enjoined": *Held*, that the return was sufficient.

(The cases of *Forsyth v. Sykes*, 9 N. C., 54; *Governor v. Bailey*, 10 N. C., 463; *Tagert v. Hill*, 1 N. C., 370, and *Edney v. King*, 39 N. C., 465, cited and approved.)

THE facts of this case are sufficiently set forth in the opinion delivered by the Court.

Baxter for plaintiff.
Gaither for defendant.

NASH, C. J. A *fieri facias* issued from this Court on a judgment at law, at the instance of the present plaintiff against John R. Dyke and others, directed to the present defendant, the sheriff of Cherokee County. It came in due time to his hands, and was returned with the following endorsement: "Enjoined." A judgment *nisi* was taken against the defendant, and he is now called on to show cause why it should not be made absolute. The plaintiff insists that the word endorsed, is no return in law, and our attention is confined to that single question.

It cannot be doubted, that according to the authorities cited by the plaintiff's counsel, the return in this case is informal, and (378)

under the practice in the English Courts would not be sustained; and we admit that the reasons assigned at the bar are very strong to show that the same strictness should be observed here. Neither in England, however, nor here, is there any legislative act directing in what manner a sheriff shall make his return in such a case. In both countries it is a matter of practice adopted by the courts, and such practice, when sanctioned by time, becomes the law of the court. In England, whose judicial history reaches back to a very remote period, a strict adherence to forms is required, from which the courts in this State have, in great measure, departed. From the circumstances under which our judicial system came into existence, it was soon found that such a departure was necessary. The cumbrous forms sanctioned by time there, did not suit the wilderness here, and in consequence, following in the footsteps of those who had gone before them, a system was adopted which, while it recognized the value of placing on record the pleas exhibiting the controversy between the parties, greatly relaxed the rigid adherence to mere matters of form, both in the judicial proceedings of our Superior Courts, and in the acts of our executive officers, in making their returns. Our reports are full of such cases, required alike for the security of suitors and others deriving title under official sales. Thus the act of 1836 (chap. 62, sec. 11), originally passed in the year 1794, provides that when a judgment is obtained before a single magistrate, "he may award an execution against the goods and chattels, lands and tenements, or body of the defendant." By the 16th section, it is directed that all executions issued by a justice of the peace shall be directed to the sheriff, constable, or other officer, and be made returnable in thirty days. In the case of *Forsyth v. Sikes and others,* 9 N. C., 54, it was decided that where a judgment rendered by a justice is endorsed on the warrant, the words entered on the same paper by the magistrate, "execute and sell according to law," is a sufficient execution. The same point was again adjudicated in the case of the *Governor, etc., v. Bailey,* 10 N. C., 463; and upon the same principle, "that the proceedings of magistrates are entitled to a liberal construction, when the exception relates merely to regularity and form." The principle, thus established, has (379) ever since been considered law here. Various other cases upon other points of practice might be cited. Under this principle we are called on to say, whether the return endorsed on the execution by the sheriff is such a one as the law will recognize. We think it is. It sufficiently informs the court why the *fieri facias* was not executed. We must understand that further action upon the execution was stayed by an injunction. We do not concur with the counsel at the bar in his criticism on the word "enjoined." No case has been cited, and we

suspect none can be, in which a sheriff or any officer has employed the word enjoined to express a direction by the plaintiff in an execution or his agent, to stop his proceeding further under it. The return in such a case is "stayed by order of the plaintiff." It is true, the word "enjoined" implies a command to do or not to do a particular thing by one having authority; and it is equally true that the word "enjoined," though not strictly a technical word, has by common usage acquired a technical meaning. Nothing is more common than to say, and to say correctly, after an injunction does issue from a Court of Equity that the party plaintiff in the execution, is enjoined; and a bill for injunction is frequently called a bill to enjoin. And whenever the word "enjoin" is used in legal proceedings, it must be understood that further proceedings upon the execution is stayed by order of a Court of Equity; and in such sense it must be understood as used by the defendant in this case—the same as if he had returned on the *fieri facias*—"stayed by injunction," a return which would have been sufficient. *Tagert v. Hill,* 1 N. C., 370 (Battle's Ed., 283). And yet such a return is open to all the objections urged against the one in this case. It does not state from what source the command issued, whether from the plaintiff in the execution or from a Court of Equity, and if from the latter, what court it is not precise and definite, and not free from uncertainty; yet it is sufficiently certain to enable the court to see that he was restrained from executing the process by a mandate from a court (under the penalty of incurring punishment for a contempt; *Edney v. King,* 39 N. C., 465), of competent authority, and which the sheriff was bound to obey. Nor can there be any doubt that the court would have allowed the sheriff, the defendant, if he had been here, to have amended his return, if necessary, by endorsing it in full upon the precept; and if it be false, the (380) plaintiff has his appropriate remedy under the statute.

Looking, then, to the practice which has obtained in this State in similar cases, and the principle established in those referred to, the Court is of opinion that the endorsement made on the execution is a sufficient return, and that the fact disclosed in it exempts him from the penalty sought to be enforced against him.

PER CURIAM. Rule discharged.

Cited: Kincaid v. Conly, 62 N. C., 275; *Isler v. Kennedy,* 64 N. C., 531; *Stealman v. Greenwood,* 113 N. C., 358; *Campbell v. Smith,* 115 N. C., 499.

WILLIAM PHILLIPSE ET AL. v. LEONARD AND SAMUEL HIGDON.

1. Where a court has power to allow an amendment, the exercise of its discretion cannot be revised by an appellate tribunal. But where a Superior Court allows an amendment without power, the Supreme Court upon appeal will correct the error.

2. A court has not power to allow an amendment, by which the rights of persons not parties will be affected; for example, to amend a *fi. fa.*, so as to make it an *alias*, and give it relation back, and other like cases. Nor has a court power, by allowing an amendment, to defeat or evade the provisions of a statute; for example, to allow the sheriff's return of a levy on land to be amended, by inserting a particular description of the premises, required by statute, the original return being defective, and so of the like cases.

3. The subject of amendments in the pleadings, process and records of courts discussed, and the principles relating thereto, stated and explained.

(The cases of *Quiett v. Boon*, 27 N. C., 9; *Galloway v. McKeithen, ibid.*, 12; *Bender v. Askew*, 14 N. C., 149; *Purcell v. McFarland*, 23 N. C., 34, and *Cape Fear Bank v. Williamson*, 24 N. C., 147, cited and approved.)

THIS was a rule against the defendants to show cause why a constable should not be allowed to amend his return of a levy of a justice's execution on land, returned to the county court, so as to make the description comply with the requirements of the statute. Upon an appeal from the county to the Superior Court, the case was tried before *Ellis, J.*, at HAYWOOD, on the last Spring Circuit, when the following appeared to be the facts shown by the transcript of the record sent up to this Court:

"The levy of the constable was endorsed upon a justice's judg-
(381) ment in the following words: 'Levied this execution upon Leonard Higdon's land, lying on Carny Fork.' It appeared that under this levy, after it had been returned to the county court, and an order of sale obtained, the land was sold by the sheriff, and one John B. Allison became the purchaser, at $115. It appeared, also, that one Chasteen had the legal title previously to that time, and had contracted with the defendant, Leonard, for the sale of it, and that the latter had paid the price agreed on, but had not taken a deed when the said levy was made. On the part of the defendants in the rule, it appeared that Samuel, the son of Leonard, had made a contract with his father for the purchase of his interest in said land, and that in pursuance of this agreement, and by the direction of Leonard, the said Chasteen had, after the sheriff's sale, accordingly made title to the land to Samuel.

"One Coward testified that the lands were as well identified in said levy, as they would be by a strict compliance with the words of the statute; that no other land adjoined them, except that of the State,

known as the 'speculation claim,' covering a large tract of country, and that Leonard Higdon then lived on said land and had no other in the county so far as was then known; that since that time he had seen a deed to him for other lands on Carny Fork, but this was not generally known at the time of the levy. Another witness testified that the land was as well identified in the levy, as it would have been by adopting the words of the statute, and the public generally knew the land in question by the description in the levy. Higdon lived on it at the time, and so far as was generally known, had no other land in the county.

"Another witness testified, that as agent of J. B. Allison, he went to the defendant, Leonard, soon after the sale, and told him he might redeem the land by paying what it sold for, or that Allison would buy from him, by increasing the price to what the land was worth. Said Leonard replied, he had not the money with which to redeem the land, and that he must sell it. And it was then agreed between them, that the land was worth $325, which sum the witness paid to him for said Allison, it including the amount bid at the sale. Thereupon said Leonard surrendered the possession to Allison, who conveyed to the plaintiffs; and his deed was exhibited. (382)

"It also appeared in evidence, that an action of ejectment, by Samuel Higdon, against the plaintiffs, for the premises in question, is now pending in the Superior Court of Haywood County, and has been pending for several years."

The defendants' counsel objected to the amendment, for that the court had not the power to make it—that it could not take cognizance of it upon the case sent up from the county court—and that if it had the power, the evidence did not warrant its exercise here.

His Honor gave judgment making the rule absolute, and the defendants appealed to the Supreme Court.

Gaither and N. W. Woodfin for plaintiffs.
J. Baxter for defendants.

PEARSON, J. Our jurisdiction in regard to amendments in the court below, is confined to the question of power; with its discretion in the exercise of the power, supposing the court below to have it, we have no concern.

The subject may be divided into three classes: (1) Every court has ample power to permit amendments in the process and pleadings of any suit pending before it. *Quiett v. Boon,* 27 N. C., 9. (2) Every court of record has ample power, after a suit is determined, to amend its own record, that is, the journal or memorial of its own proceedings, kept by

the court or its clerk, by inserting what has been omitted, or striking out what may have been erroneously entered; for every court of record is entrusted with the very responsible duty of keeping it faithfully and making it speak the truth, as it imports absolute verity, and cannot be collaterally called in question; and the record, so amended, stands as if it never had been defective. *Galloway v. McKeithen,* 27 N. C., 12. (3) The power of a court to allow amendments, after the determination of a suit in the process or returns made to it by ministerial officers, is much more restricted and qualified, for the reason, among others, that the court is not in such cases presumed to act upon its own knowledge, but upon information derived from others. The case now under (383) consideration falls within this class of amendments; and it may be subdivided into three heads: (1) Where the amendment is for the purpose of correcting a mere oversight of an officer in not making an entry, such as he ought to have made as a matter of course, and as a part of his duty according to law, the court has power to allow the amendment, notwithstanding third persons may be thereby affected—*e. g.,* if a clerk, in sending an execution to another county, omits to affix the seal, or a deputy sheriff, in making a return, signs his own name, but omits to sign the name of the high sheriff. *Bender v. Askew,* 14 N. C., 149; *Purcell v. McFarland,* 23 N. C., 34. (2) Where the amendment is for the purpose of making the process different in substance from what it was when it issued, the court has no power to allow the amendment, if the rights of third persons will be thereby affected—*e. g.,* if a *fieri facias* issues, and a motion is afterwards made to amend it, so as to convert it into an *alias* and give it relation back; or, if a *fi. fa.* does not conform to the judgment, and the object of the amendment is to make it conform. *Cape Fear Bank v. Williamson,* 25 N. C., 147; 4 Maul & Selwyn, 328. This principle applies to the present case because Samuel Higdon alleges that he is a purchaser for value, and is a third person who will be affected by the amendment, the object of which is to make the return of the constable different in substance from what it was when made. We will not put our decision on this ground, however, because the other defendant was a party to the original proceeding, and the case clearly falls under the third head. (3) Where the amendment will evade or defeat the operation of a statute, the court has no power to allow it. This is clear; for no court has the power of nullifying a statute. By way of illustration, the statute requires that a levy should describe land in a particular way, for the purpose of informing the defendant in the execution, and all who may wish to become purchasers, what land the sheriff is to sell. If a levy is not sufficient, and a sale under it is made good by an amendment of the levy, the effect is to

defeat the operation and purposes of the statute, and to allow land to be sold without the safeguards which the Legislature has provided against surprise and fraud. It might happen that a defendant in an execution, who from the levy, "land lying on Carny Creek," (384) was under the impression that some out tract of his was to be sold, might, after the sale, find himself deprived of his "home place," under the power of the court to allow the constable to amend his levy by adding the words, "being the tract of land lying on the forks of the said creek, on which the defendant now resides."

The judgment must be reversed and the rule discharged, and judgment against the plaintiff for costs.

PER CURIAM. Judgment reversed, and the rule discharged.

Cited: Marshall v. Fisher, 46 N. C., 116; *Pigott v. Cheers, ibid.,* 356; *Gibbs v. Brooks, ibid.,* 449; *Campbell v. Barnhill, ibid.,* 558; *Pendleton v. Pendleton,* 47 N. C., 135; *Mayo v. Whitson, ibid.,* 235; *Ingram v. McMorris, ibid.,* 451; *Chasteen v. Phillips,* 49 N. C., 463; *Lane v. R. R.,* 50 N. C., 26; *Camlin v. Barnes, ibid.,* 297; *Kirkland v. Mangum, ibid.,* 314; *Ashe v. Streator,* 53 N. C., 257; *Bennett v. Taylor, ibid.,* 283; *Stancill v. Branch,* 61 N. C., 219; *Simpson v. Simpson,* 64 N. C., 429; *Foster v. Woodfin,* 65 N. C., 30; *Cogdell v. Exum,* 69 N. C., 466; *Williams v. Sharpe,* 70 N. C., 583; *Williams v. Houston,* 71 N. C., 164; *Carleton v. Byers, ibid.,* 332; *Isler v. Murphy, ibid.,* 438; *Bank v. McArthur,* 82 N. C., 107; *Wall v. Covington,* 83 N. C., 144; *Perry v. Adams, ibid.,* 266; *Walton v. Pearson,* 85 N. C., 49; *Henry v. Cannon,* 86 N. C., 24; *McArter v. Rhea,* 122 N. C., 618; *Ricaud v. Alderman,* 132 N. C., 64; *Jefferson v. Bryant,* 161 N. C., 408; *Mann v. Mann,* 176 N. C., 362; *S. v. Lewis,* 177 N. C., 557; *R. R. v. Reid,* 187 N. C., 327; *Oliver v. Highway Commission,* 194 N. C., 385.

PAUL HAGLER v. DAVID SIMPSON.

1. In a deed of bargain and sale, the bargainor covenanted that "he was signed of a good, etc., estate," etc.: *Held,* that the court could not by construction, substitute seized for signed, so as to make the sentence intelligible and operative as a covenant of seizin.

2. The bargainee having been sued in ejectment, and a recovery had against him, voluntarily left the possession, and it not appearing that possession had been taken under the recovery: *Held,* that there was no eviction to sustain an action on a covenant for quiet enjoyment.

HAGLER *v.* SIMPSON.

THIS was an action of covenant, brought upon the deed of bargain and sale, executed by the defendant in 1834, conveying to the plaintiff a tract of land. Pleas, covenants performed, and not broken. The deed contains the following: "And the said David Simpson now, at the time of selling and delivering these presents, is signed of a good, pure, perfect rite, free and clear from all incumbrance whatever, to the said Paul Hagler or assigns forever, and that the said David Simpson doth oblige himself at all times, his heirs, executors, etc., power to warrant and defend the said land and premises from any lawful claim of any person or persons whatever, but to the said Paul Hagler, his heirs," etc.

(385) Upon the trial, before his Honor, *Judge Manly,* at UNION, on the last Spring Circuit, the plaintiff offered in evidence a grant from the State to one Samuel Smith, dated 30 September, 1829, embracing the greater part of the tract of land conveyed by the said deed of the defendant. The plaintiff further showed a deed from said Smith to one Brandon, and the record of a suit in ejectment against the plaintiff on the demise of said Brandon, and a verdict and judgment for the plaintiff's lessor therein, at September Term, 1840. It appeared that Hagler, soon after this recovery, voluntarily abandoned the premises, no writ of possession having ever been issued.

His Honor, the presiding judge, was of opinion that the words of the deed did not express a covenant of seizin, and could not be so construed; and that there was no eviction to warrant a recovery upon the covenant for quiet enjoyment. Instructions to this effect having been given to the jury, the defendant had a verdict, and from the judgment rendered thereon, the plaintiff appealed.

Wilson for plaintiff.
Osborne and Hutchinson for defendant.

PEARSON, J. The defendant, in consideration of one hundred and seventy-five dollars, executed a deed of bargain and sale to the plaintiff for a certain tract of land in fee simple. The deed has these words: "And the said David Simpson now, at the time of selling and delivering of these presents, is signed of a good, pure, perfect rite free and clear from all incumbrance whatever"; and then follows a covenant of quiet enjoyment (or warranty), expressed in intelligible terms. Under this deed, the plaintiff entered. Afterwards, one Brandon recovered of the plaintiff in ejectment, upon a paramount title; and thereupon the plaintiff abandoned the possession and brought this action. It is not stated that Brandon had entered into possession before the commencement of this action.

The question is, does the deed contain a covenant of seizin? This depends upon whether "signed" can be made to be or to mean "seized."

We have a strong impression that "signed" was written instead of "seized," just as "selling" was written instead of "seal- (386) ing," by reason of the ignorance of the draftsman, who was copying from some old deed; and possibly the plaintiff can have relief in another forum, which "acts upon the person and applies itself to the conscience," and does not permit advantage to be taken of mistake or accident. But this Court has no power to change one word of known and definite meaning into another. There are no statutes of "joefail and amendments" in regard to deeds, and we must take them as they were made by the parties.

Wrong spelling does not vitiate, when there is *idem sonans,* and the letters used do not make some other word of known signification. But the difficulty here cannot be removed on the idea of bad spelling; for there is not the *idem sonans,* and the letters (which are written in a plain hand), make the word "signed."

It is true, when a deed cannot take effect in the mode it purports to have been intended to operate, but can take effect as another mode of conveyance, the Court will so construe it, *ut res majis valeat;* but this rule does not bear on the present case. So the conjunction "or" will be read "and," and *vice versa,* when the construction of the sentence and the obvious meaning shows that the intention was to connect and not to put apart the words or sentences.

In the case before us, no aid can be derived from the construction of the sentence, and there is no legitimate mode of ascertaining the meaning, except from the words used—so it is the dry and naked question, has this Court power to change the word "signed" into "seized," when it is called on to construe a deed?

There is no authority, and we can see no ground upon which such a power can be maintained.

The plaintiff further insisted that there was a breach of the covenant of quiet enjoyment. We think there was no evidence of eviction. It is not necessary that the party should be turned out by a writ of possession; it is sufficient if the lessor of the plaintiff, after the judgment, takes possession. There is in this case no evidence that the lessor of the plaintiff took possession after his recovery; and although the plaintiff in this action left the premises soon after the recovery against him in the ejectment, *non constat,* that he would have been disturbed in his possession, had he remained upon the premises.

PER CURIAM. Judgment affirmed. (387)

SARAH KENEDY ET AL. v. CALEB ERWIN ET AL.

Public roads are laid out for the public convenience, and therefore should not be altered, but when the interest of the public requires the alteration.

PETITION to change the public road, leading from Wadesboro to Concord, at the ford on Rocky River, in Union County. The petition set forth that the proposed change would place the ford some fifty or sixty feet above that in use at present, and require a change in the highway on the defendant's land, as it approached the river, of about that distance from its present location; that the ford as thus changed would be more convenient to the public, inasmuch as the bottom of the river would be smoother and the crossing more direct. The petition further stated, that the plaintiff owned a valuable water power a short distance below the present ford, to improve which it was necessary to construct a dam, which would throw the water back on the present ford, and make it too deep for public use; that the change prayed for by the petitioners, would place the highway out of reach of the dam which the petitioner wished to construct, and thus enable her to improve her said water-power, by the erection of valuable machinery there.

The answer denied that the proposed change in the road would be advantageous to the public, or that a crossing could be obtained which would be in any respect as good as that now in use. It was admitted that the plaintiff could not improve her water power, without obstructing the present road; but it was averred in the answer, that the proposed change in the highway would be greatly injurious to the defendant, as it would destroy or greatly impair a site for machinery, which was owned by him, and over which the road, if the alteration was made, would pass.

Upon the hearing of the case before *Ellis, J.*, at UNION, at
(388) the Fall Term, 1852, much testimony was offered to show that the change in the ford would be beneficial to the public, by providing a more safe and convenient crossing of the stream; and also much evidence to establish the contrary. And testimony was also offered to show that the proposed change of the road would be injurious to the defendant, and beneficial to the plaintiff. His Honor being of opinion, from the testimony, that the ford which the petition sought to establish, though as good, would not be better than that now in use, and that the public good did not require the change, held, without deciding the question as to whether the same would be injurious to the defendant, that the court had no power under the act of Assembly and the

Constitution of the State, to grant the prayer of the petition; and from this judgment accordingly, dismissing the same, the petitioners appealed to the Supreme Court.

Hutchinson for petitioners.
Wilson, contra.

NASH, C. J. His Honor who tried the cause below, was of opinion that under the act of Assembly, relied on by the petitioners, he had no power to grant their prayer. In this opinion we concur, as the evidence stood. All public roads are established for the public convenience, and not to subserve private interests; and this principle is especially to be attended to, in altering a public road. If the public interest require the alteration, it will be made, even at any sacrifice of private interest; but such sacrifice will never be required, except upon the ground of the general good. The law never intended that burthen shall be taken from one man's shoulders, to be placed on those of another, when the public was not interested.

The case states that much testimony was introduced to show that the public interest would be subserved by making the alteration proposed; and much to prove it would not. How, then, could the court say that the public good required the alteration asked for—being of opinion that the ford asked for was as good (though not better) than the old one?

If the question had been an original one, concerning the laying out the road, as that where it should cross the stream, in the (389) conflict of testimony the court might be driven to the necessity of deciding upon it, one way or the other; but that is not the case here. Here, the court was required to alter the road for the purpose really of enabling the plaintiff, Kenedy to improve the power of her manufacturing mill, by raising her dam, to the alleged injury of the defendant, by preventing him from erecting any manufacturing mill at all. In the dispute, it is not shown that the public has any interest whatever.

PER CURIAM. Judgment dismissing the petition affirmed.

Cited: Bradshaw v. Lumber Co., 179 N. C., 504.

TOBIAS KESLER, ADMINISTRATOR OF J. W. ROSEMAN, v. EDMUND H. ROSEMAN.

Where the goods of an intestate are converted after his death, his administrator, in an action of *trover* to recover the value, must produce on the trial his letters of administration as evidence of his title.

THIS was an action of *trover* for money, tried before his Honor, *Judge Caldwell,* at ROWAN, on the last Spring Circuit. Plea, general issue. The following is the case as it appears upon the transcript of the record sent to this Court: The plaintiff's intestate being sick and unable to leave home, made a note or bond payable to Tobias Kesler, for the sum of one hundred and fifty dollars, handed the same to the defendant, and requested him to take it to Kesler and get the money of him, and deliver to him the note, and to pay over the amount received of said Kesler to certain named creditors of the intestate. The defendant took the note or bond to receive the money thereon of Kesler, and to pay over the money to said creditors of the intestate, one of whom was one Eddleman. The defendant presented the note or bond for the $150 to Kesler, who could only advance the sum of one hundred dollars thereon, and a credit of fifty dollars was thereupon endorsed on said note and the same delivered to Kesler, and the defendant received from him
(390) the one hundred dollars for the benefit of the intestate. Of this sum, the defendant paid over a portion to the said creditors of the intestate, but refused to pay any to Eddleman, who demanded the same at the house of the intestate whilst he was yet living, but in so low a state of health as to be entirely unconscious. The plaintiff demanded the money of the defendant after the death of the intestate, and the defendant refused to pay it, though he admitted at the time that he had received the money of Kesler.

The plaintiff declared for no particular kind of money, nor was there any proof as to the kind of money received by the defendant of Kesler. The money was not alleged nor proved to have been in a bag, nor to have had any marks to distinguish it from other money.

The defendant insisted that upon this proof the plaintiff could not recover—first, because *trover* would not lie in such a case for money, and the action should have been *assumpsit;* secondly, if *trover* was maintainable in any case for money, it could only be for money in a bag, or having some mark to distinguish it, and it must be for so many Spanish milled dollars, so many bank bills of a particular bank, or the like. And the defendant further insisted, that it was necessary for the plaintiff to produce his letters of administration, to support his chain of title.

His Honor, the presiding judge, was of opinion that it was unnecessary for the plaintiff to exhibit his letters of administration; and he informed the jury that if they believed the testimony, the plaintiff was entitled to recover the balance of the hundred dollars, after deducting the amount paid by defendant to the creditors of the intestate. There was accordingly a verdict for the plaintiff, and after a rule for a new trial was discharged, and judgment rendered on the verdict, the defendant appealed to the Supreme Court.

Craige, Bynum, and Shipp for defendant.
Lander and Guion for plaintiff.

NASH, C. J. Our attention in this case is confined to the error committed by the presiding judge, in deciding that it was not necessary for the plaintiff to produce upon the trial his letters of administration. The error arose from considering what is called the conversion (391) in this case as having taken place in the lifetime of the intestate, J. W. Roseman. The action is in *trover,* and without deciding whether it can be sustained, we think his Honor erred in his ruling upon the question of testimony. At the time that Eddleman made his demand for the portion of the money due to him the intestate was alive, but so low that, in the language of the case, he was entirely unconscious. If the demand, and the refusal to pay Eddleman the money was evidence of a conversion, it was such evidence as to the claim of Eddleman, and might have given him an action against the defendant; but it was no denial of the right of J. W. Roseman. Before the latter or his representative could maintain any action against the defendant, it was necessary to put him in the wrong by making a demand; for he was a bailee. Accordingly, after the death of J. W. Roseman, the plaintiff, his administrator, did demand the money, and the defendant refused payment. From this refusal to pay, the plaintiff's cause of action arose. The conversion in *trover* is the gist of the action, and, in this case, it took place after the death of J. W. Roseman, and his intestate was obliged to declare in his own name, because the cause of action arose to him and not his intestate. When the cause of action arises in the lifetime of a deceased man, the plaintiff, his representative, must declare as such, and in that case must, in his declaration, make profert of his letters testamentary, or of his administration; and they are traversable by the defendant. If the representative declare upon his own possession, he need not make any profert, but in that case, as in any other at law, he must show a legal title to the thing demanded, and his letters constitute a necessary link in the chain.

There was error in the ruling of the court, occasioned, no doubt, by considering the demand made by Eddleman as evidence of the conversion. For this error the judgment must be reversed, and a *venire de novo* awarded.

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

Cited: Mauney v. Ingram, 78 N. C., 99.

(392)

JOSEPH STURGILL v. SAMUEL THOMPSON.

Where one who had appealed from the judgment of a justice of the peace, countermanded the appeal, and at his request, the justice retained the appeal: *Held,* that the judgment was thereby reinstated in full force, and would maintain a suit founded thereon; although the appeal was countermanded, upon an agreement of the opposite party to refer the whole matter to arbitration, which agreement he had violated.

THIS was an action, commenced by a warrant before a justice of the peace, in which the plaintiff declared for a debt due by a former judgment, rendered 28 February, 1851.

It appeared upon the trial before *Ellis, J.,* at the Fall Term, 1852, of ASHE Superior Court of Law, to which court the case had been removed by successive appeals, that the parties were cited to trial on the original warrant, on 4 February, 1851, at which time the justice gave judgment for the defendant. The plaintiff afterwards—to wit, on 13th of the same month—applied to the said justice for a new trial, which he granted. There was no evidence offered, of the defendant's having notice of the application for a new trial, but it appeared that he attended at the day, before the justice, and defended his suit, at which time the justice rendered judgment against the defendant for the plaintiff's debt, and against the plaintiff for the costs. From this judgment the defendant prayed an appeal to the county court, and entered into bond therefor; but before the sitting of the said court, he applied to the justice holding the warrant and appeal, and requested him not to return the papers to court, stating that they (the parties) had agreed to withdraw the appeal, and leave the matter to arbitrators to settle. And the defendant offered to prove that the terms of withdrawing the appeal were, that the arbitrators who had been agreed on, should take the whole matter into hand and settle it, and that, in fact, the judgment as well as the appeal was intended to be withdrawn and referred to said arbitrators. His

Honor refused to admit this testimony; and charged that the withdrawal of the appeal reinstated the judgment, and the action could be sustained. The defendant then asked the court to instruct the jury, that as he had no notice of the proceedings before the magistrate to obtain a new trial, the first judgment was still in force, and therefore the plaintiff could not maintain this action, which instruction his Honor refused, and there was a verdict and judgment for the plaintiff, from which the defendant appealed. (393)

Boyden for plaintiff.
Mitchell for defendant.

BATTLE, J. We have no hesitation in affirming the judgment in this case. It was certainly competent for the magistrate to grant a new trial, and after the defendant appeared at the second trial, and defended the action, it was too late, particularly after a judgment therein against him, to object that he had not any notice of the proceedings to obtain the new trial. The appeal of the defendant from the judgment given by the magistrate against him, vacated it until he withdrew the appeal; but as he had a right to withdraw it before the cause was entered upon the docket of the county court, there was nothing to prevent the judgment from being again in full force. The testimony offered by the defendant, in relation to the agreement between him and the plaintiff to refer the matter to arbitration, may possibly give him a cause of action for the breach of such agreement; but it had no tendency to show that the judgment was not valid and subsisting, or that the plaintiff had no right to proceed on it. The testimony was, therefore, immaterial, and was properly rejected.

PER CURIAM. Judgment affirmed.

J. M. VICKERS v. BENJ. LOGAN AND SAMUEL HAMPTON.

Whether certain supposed facts constitute probable cause for a prosecution, is a question of law, to be decided by the court, and not by the jury. It is the duty of the judge, leaving to the jury to ascertain the existence of the facts, to declare what inference as to probable cause results therefrom; to leave the inference to the discretion of the jury, is error in law.

(The case of *Beale v. Roberson*, 29 N. C., 280, cited and approved.)

THIS was an action on the case for malicious prosecution in suing out a State's warrant charging the plaintiff with a larceny, and was tried upon the plea of general issue before *Ellis, J.*, on the last Spring

(394) Circuit, at RUTHERFORD. After the testimony in the case was closed (which it is deemed unnecessary to insert here), the plaintiff's counsel asked his Honor to charge the jury that there was no probable cause for suing out the said State's warrant against the plaintiff. His Honor "refused to give the instruction prayed for, but defined to the jury what in law constituted probable cause, and submitted the case to them."

There was a verdict for the defendants, and judgment having been rendered thereon, the plaintiff appealed to the Supreme Court.

Shipp and Busbee for plaintiff.
G. W. and J. Baxter for defendants.

BATTLE, J. We may say here what this Court said in the case of *Beale v. Roberson,* 29 N. C., 280, that "this case brings up again the question whether probable cause is matter of law so as to make it the duty of the court to direct the jury, that if they find certain facts upon the evidence, or draw from them certain other references of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court, as a matter of law. Upon that question the opinion of all the Court is in the affirmative, and therefore this judgment must be reversed."

Chief Justice Ruffin, who delivered the opinion of the Court in the case, then goes into an elaborate examination of the question, both upon principle and the authorities in England and in this State, and adds: "It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here."

The case referred to is so apposite to this in every respect, that we cannot do better than to adopt the conclusion as well as the commencement of the opinion pronounced in it: "As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on a former trial in reference to the question of probable cause, further than to remark that few cases perhaps could better illustrate the danger of leaving that question
(395) to the discretion of a jury, whose decision of it is not susceptible of review in another court."

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

Cited: Smith v. Deaver, 49 N. C., 514; *Woodard v. Hancock,* 52 N. C., 386; *Jones v. R. R.,* 125 N. C., 230; *Moore v. Bank,* 140 N. C., 304; *Wilkinson v. Wilkinson,* 159 N. C., 270; *Bowen v. Pollard,* 173 N. C., 132.

SAMUEL J. BRADLEY v. ISAAC MORRIS.

1. In an action for a malicious arrest in a civil suit, probable cause is a question for the court. Malice a matter of fact for the jury, which may be inferred for want of probable cause.

2. In such an action, the jury may give exemplary damages.

(The case of *Gilreath v. Allen*, 32 N. C., 67, cited and approved.)

THIS was an action on the case for a malicious arrest of the plaintiff in a civil suit, at the instance of the defendant. Pleas, not guilty—justification.

Upon the trial before his Honor, *Ellis, J.*, at McDOWELL, on the last Spring Circuit, it appeared that both the plaintiff and the defendant resided in McDowell County near to each other, and that the plaintiff had prepared to remove to the State of Missouri—having sold his property and closed up his business, and that his intention of removing was generally known in the neighborhood and to the defendant. That when the plaintiff had proceeded as far west as the French Broad, in the county of Buncombe, the defendant caused a writ in case at his instance to be issued against him, under which the plaintiff was arrested by the sheriff of Buncombe, and held to bail—the same being for an alleged claim against the plaintiff's father, who was still in McDowell County, and the accusation by the defendant at the time being that the plaintiff had run away. The plaintiff returned to McDowell County, and defended said suit; and the record thereof was exhibited, and showed that the defendant had submitted to a nonsuit in the same, some six months after the return of the writ, and before the commencement of this suit. That whilst the plaintiff was in custody of the sheriff of Buncombe, the defendant proposed to release him, if he would pay him the sum of two hundred dollars. Evidence was then offered to show that the claim against the plaintiff's father, for which said action was alleged to be brought, had been paid off prior to that time, (396) which fact was controverted by evidence on behalf of the defendant; and the plaintiff also introduced evidence to show that the defendant had previously resolved on arresting him, upon his starting on his said journey.

The defendant contended that the plaintiff's father owed him a debt, and that when he issued the writ in question, he believed the plaintiff had run away, and removed his father from the county, and that thereby an action had accrued to him under the statute; and evidence was offered tending to prove this defense; and on the other hand, the plaintiff offered

evidence tending to prove that the defendant knew that the plaintiff's father had not left the county.

His Honor charged the jury, that if they believed the defendant knew he had no cause of action against the plaintiff when he issued his said writ, this would amount to a want of probable cause, and they might hence infer malice; and further charged, that they might give exemplary damages, by way of punishing the defendant.

There was a verdict, giving the plaintiff exemplary damages, and a rule for a new trial, because of error in the charge of the court, as to that point, the defendant's counsel insisting that exemplary damages could not be given in an action for malicious arrest, in a civil case; and the rule being discharged, and judgment rendered on the verdict, the defendant appealed to the Supreme Court.

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

BATTLE, J. The question of probable cause, in an action for a malicious arrest in a civil suit, as well as in an action for a malicious prosecution in a criminal proceeding, is one of law; and his Honor was correct in deciding it as such. He was also undoubtedly correct in holding, that if the jury found that the defendant knew that he had no cause of action against the plaintiff, as the testimony tended to (397) show, there was no probable cause for the arrest. The question of malice in such action is, on the other hand, one of fact for the jury; and his Honor was right in submitting it to them as such, instructing them at the same time, that they might infer it from the want of probable cause. *Mitchell v. Jenkins,* 5 Barn. and Adol. Rep., 588 (27 Eng. Com. L. Rep., 131); *Sutton v. Johnston,* 1 Term Rep., 510; *Bell v. Piercy,* 27 N. C., 83.

The only remaining question is, whether the plaintiff was entitled to recover exemplary damages. In actions for slander, malicious prosecutions, and wanton and malicious trespasses upon the person or property, it has been long settled in this State, that such damages may be given by the jury. In *Gilreath v. Allen,* 32 N. C., 67, which was an action for slander, the principle of all these cases is stated to be that "injuries sustained by a personal insult or an attempt to destroy character, are matters which cannot be regulated by dollars and cents. It is fortunate that while juries endeavor to give ample compensation for the injury actually sustained, they are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. Otherwise, there would be many injuries without adequate remedy." It is said further,

that "as malice must be proved, it is right that the damages should be in proportion to the degree of malice, and should not be restricted to a mere compensation for the injury actually done."

The principle, thus announced, applies as strongly to the case of malicious arrest, as to those to which we have seen it has heretofore been applied; and his Honor therefore committed no error in telling the jury that they might give exemplary damages by way of punishing the defendant.

PER CURIAM. Judgment affirmed.

Cited: Sowers v. Sowers, 87 N. C., 307; *Johnson v. Allen,* 100 N. C., 138; *Morgan v. Stewart,* 144 N. C., 425; *Wilkinson v. Wilkinson,* 159 N. C., 270.

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JOHN POE v. LEWIS HORNE.

A., having sold a horse to B., an infant, and taking his note for the price, and B. having refused to pay, the contract was rescinded, the horse returned, and the note surrendered: *Held,* in an action on the case by A. against B. for an injury to the horse while in B's possession, that the sale was binding upon A., that B. was possessed under it as owner, and not as bailee of A., and consequently the action did not lie.

THIS was an action on the case, in which the plaintiff declared in *tort* for an injury done to his horse whilst in the defendant's possession. Plea, not guilty. Upon the trial before *Caldwell, J.,* at ASHE, at Spring Term, 1853, the case was: The defendant had purchased from the plaintiff the horse in question at the price of eighty dollars, and executed his note for that sum. He kept the horse for a short time, and while in his possession injured him by bad treatment to the value of twenty-five dollars, in the opinion of the witnesses. After the horse was so injured, the plaintiff called on the defendant to pay the note, which the defendant refused, alleging that he was an infant, and that if the plaintiff would not take back the horse, it was all he could get; whereupon the parties rescinded the contract—the plaintiff taking back the horse, and surrendering the note.

It was insisted for the plaintiff that it was a case of bailment, and the contract having been rescinded, it was the same as though the property in the horse had remained in the plaintiff. There was a verdict for the plaintiff, subject to the opinion of his Honor, upon the question whether the action could be maintained; and upon the said question

reserved, his Honor being of opinion against the plaintiff, set aside the verdict, and entered judgment of nonsuit, from which the plaintiff appealed to the Supreme Court.

Mitchell for plaintiff.
Boyden for defendant.

NASH, C. J. The attempt on the part of the plaintiff to convert the original contract between him and the defendant into a bailment, cannot be sustained. It bears no feature of such a transaction, but was a sale out and out of the horse, whereby the absolute title vested in the (399) defendant; for, although the defendant, in consequence of his infancy, was not bound by the contract, the plaintiff was. Finding he was in danger of losing the horse, he consented to the proposition to take him back, and surrender the note. In substance, it was a resale by the defendant to the plaintiff. While the horse was so the property of the defendant, he was injured, and to recover damages for such injury, the action is brought:—it cannot be maintained. There is no error in the opinion of the court, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Morris Plan Co. v. Palmer, 185 N. C., 117.

WILLIAM MORRISON v. SAMUEL P. SMITH, EXECUTOR, ETC.

A fraudulent donee who has become liable to creditors, as executor *de son tort*, of his donor, cannot discharge himself by delivery of the thing given, to one who afterwards obtains letters of administration.

THIS was an action of debt commenced by warrant before a justice of the peace, and afterwards carried by appeal to the Superior Court of Law of WILKES, where, at Fall Term, 1852, it was tried before his Honor, *Caldwell, J.* The pleas were, general issue—*ne unques executor*—fully administered; and the plaintiff replied that the defendant was executor *de son tort.* Upon the trial the facts were as follows: The bond sued on was executed by Abner Webber, deceased, to the firm of Falls and Morrison, of which the plaintiff was surviving partner. Webber died 15 November, 1847, and it appeared that the defendant took possession, some two or three months thereafter, of divers articles of personal property, amounting in value to more than the debt sued on,

and he then removed from the county of Iredell to the county of Wilkes, claiming said property as his own. The defendant then proved that Amelia Webber, who was his daughter, and the widow of the deceased, was, at February Term, 1848 (the first term after his death), appointed administratrix of the said deceased, and that he had delivered to her (before her appointment as administratrix) all the said prop- (400) erty, with the exception of some hogs and tobacco, which were sold by him, after administration granted, as the agent of the administratrix, and the proceeds thereof paid to her. It was further in evidence that the said property was delivered to the administratrix as the defendant's own, and by her accepted as a gift from him, and that she had since that time held it, and still held it as her own. The plaintiff then offered in evidence a deed, executed 21 September, 1847, by the deceased to the defendant, for the property in question, and proved that the said deed was fraudulent as to creditors; and that the defendant took the said property by virtue of said deed, and after holding it a few days, delivered it as above stated to the said Amelia, who afterwards was appointed administratrix.

The defendant's counsel insisted that, notwithstanding the said fraudulent deed, and the acceptance of the property by the administratrix under the circumstances and at the time stated, the same still enured to her as administratrix, and the defendant was not liable to this action; his Honor was asked so to instruct the jury. But his Honor refused to give the instruction, and charged the jury that if they believed the evidence, the delivery of the property by the defendant to his daughter did not purge the wrong, nor enure to her as administratrix; and that the plaintiff was entitled to a verdict. Whereupon the jury returned a verdict for the plaintiff, and judgment having been rendered thereon, the defendant appealed.

Mitchell for plaintiff.
Boyden for defendant.

PEARSON, J. The deed from Webber to the defendant was good between the parties, and against the administratrix of Webber. So she was not liable to creditors in regard to property conveyed by the deed, and *ex necessitate,* a creditor had a right to sue the donee and charge him as executor *de son tort.*

The fact that the defendant delivered the property to his daughter, and that she subsequently was appointed the administratrix of her husband, the fraudulent donor, has no more effect upon the rights of creditors, than if he had delivered the property to any other (401)

third person; because the daughter was not chargeable with the value of the property as assets, by reason of the deed executed by her intestate. It may be that the receipt of the property from her father made her also liable to the action of the creditor, but there is no ground upon which it could defeat a right of action against her father, which had previously accrued.

PER CURIAM. Judgment affirmed.

JOHN DEN AND W. A. BLOUNT ET AL. v. ELI LUNSFORD.

After recovery in ejectment, an action for *mesne* profits may be brought in the name either of the nominal plaintiff, or of his lessor, but it cannot be brought in the name of both.

THIS was an action of trespass for *mesne* profits, after a recovery in ejectment, and was brought in the joint names of John Den and W. A. Blount and others. Plea, general issue. The only question raised on the trial before *Dick, J.*, at the Special Term of the Superior Court of BUNCOMBE, in June last, was whether the lessor and lessee in the ejectment could be joined as plaintiffs in this action; and his Honor being of opinion with the defendant, that they could not, there was judgment of nonsuit accordingly, and the plaintiffs appealed to the Supreme Court.

No counsel for plaintiffs in this Court.
W. W. Avery for defendant.

BATTLE, J. That the lessors of the plaintiff, after a recovery in ejectment, may bring an action of trespass *vi et armis* for the *mesne* profits, either in their own names or in the name of the nominal plaintiff, is too well known to require the citation of any authority for its support. This is the first instance which has come to our knowledge, of an attempt to unite the real and nominal plaintiffs in such action, and we cannot discover any principle upon which it can be maintained. It in-
(402) troduces, without any necessity or convenience, the name of a person as one of the plaintiffs, who has no interest in the recovery, and that is a good cause for a nonsuit, upon the trial, under the general issue. 1 Chit. Pl., 76.

When the lessors do not choose to avail themselves of the privilege, awarded to them by the practice of the court, of using the name of the

nominal plaintiff, in their action to recover the *mesne* profits, but proceed in their own names, there is no reason why they should not conform to the settled rules of pleading. Not having done so in this case, the judgment of nonsuit was right and must be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. STEPHEN GROVES.

1. An indictment for perjury must set out the substance and effect of the testimony, in which the perjury is assigned.

2. Where an indictment charged the defendant with having sworn that A. purchased a gun of B., and his testimony as proved on the trial was that B., in a conversation with A., asked him if he had brought home his gun, to which A. replied "he had forgot it," and said, "I will keep the gun and allow $15 for it on what you owe me," to which B. replied, "Enough said": *Held*, that the proof did not support the charge; for B's answer did not necessarily import an assent to the proposal of A., but was susceptible, under the circumstances, of another interpretation.

(The case of *S. v. Bradley*, 2 N. C., 403, cited and approved.)

THE defendant was tried before his Honor, *Dick, J.*, at Fall Term, 1851, of MACON Superior Court of Law, for the crime of perjury. The indictment charged that in a suit between one McKee and one Hodgins, tried before his Honor, William H. Battle, holding the Superior Court of Law for said county of Macon, at its Spring Term, 1851, the defendant was examined as a witness on behalf of said Hodgins, and that on the trial of said issue, it became a material question whether one Martin Groves had theretofore purchased from the said McKee a certain rifle gun, referred to in the pleadings in said suit; and that the defendant did then and there "depose and swear, among other (403) things, in substance and to the effect following, that is to say, that the said Martin Groves had theretofore purchased from the said Eli McKee a certain rifle gun, referred to in the pleadings in the suit aforesaid; whereas, in truth and in fact, the said Martin Groves had not theretofore purchased from the said Eli McKee a certain rifle gun, referred to in the pleadings," etc. And so the jurors, etc.

On the trial of the indictment, one Thomas J. Roane was called as a witness for the State, and he testified that he was present at the trial of the case in the Superior Court for Macon County, in which Eli McKee was plaintiff and Lewis Hodgins was defendant. That said suit was an action of *trover* to recover the value of a rifle gun; that said Hodgins claimed title to the gun in controversy under one Martin Groves, a son

of the defendant; that on the trial of said suit Hodgins examined the present defendant as a witness, who swore that he went in company "with Martin Groves to the house of the said Eli McKee, when the said McKee asked the said Martin Groves if he had brought him his little gun? to which the said Martin replied: 'No; I forgot it.' Martin then said to McKee: 'bought your large gun at $12; you promised to get it for me by March court; I have come three times after it, and have not got it; I will keep the little gun in lieu of the big gun, and will allow you $15 of what you owe me, for it,' to which Eli McKee replied, 'Enough said.'"

Eli McKee was also examined for the State, and testified substantially as above; and he further testified that the whole statement made by the defendant as recited by the witness Roane, was entirely false. One Noah Wines was also examined, who gave the same account as the other two witnesses, of what the defendant swore on the said trial; and this witness further stated that the defendant, after he had replied to McKee, "enough said," as above stated, in reply to a question asked by McKee's counsel on cross-examination, stated that after McKee had said the words, "enough said," he did request Martin to bring home his little gun. Mrs. McKee was sworn, and testified that she was present when the defendant and his son Martin were at her husband's house;
(404) that she heard all the conversation that took place between her husband and the defendant and his son Martin, and that no such conversation took place in relation to the little gun, as was deposed to by the defendant; but, on the contrary, the last thing her husband said to Martin was a request to bring home his little gun, which Martin promised to do.

The defendant's counsel insisted that there was a fatal variance between the allegation of the bill and the proof, particularly if the testimony of Wines was correct. His Honor was of opinion that if the testimony of the State's witnesses were true there was no variance, and he instructed the jury accordingly. There was a verdict of guilty, and judgment having been rendered thereon, the defendant appealed to the Supreme Court.

Attorney-General for the State.
No counsel for defendant in this Court.

BATTLE, J. In an indictment for perjury, alleged to have been committed in giving parol testimony, it is certainly sufficient to state the substance and effect of what the defendant swore. 2 Russ. on Crimes, 538. And it follows, as a necessary consequence, that the proof will be

sufficient, if it establish the substance and effect of the charge. *Ibid.*, 546; Roscoe Crim. Ev., 814. This the defendant, by his objection, impliedly admits; but he contends that the testimony given as to what he swore to on the trial in which the perjury is assigned to have been committed, varies substantially from that which is set forth in the bill of indictment. The objection is, in our opinion, fully sustained by the facts stated in the bill of exceptions, and the judge ought so to have instructed the jury upon the trial. The charge is, that the defendant swore in positive and direct terms that Martin Groves had purchased a rifle gun from Eli McKee. The testimony of Roane and some other witnesses is, that he swore that when Martin Groves offered to allow McKee $15 for his little gun (the rifle) to be credited on account, which the latter owed him, McKee simply replied, "Enough said." The question is, was this equivalent to an express statement that McKee had sold him the rifle gun? It may be that such was his meaning, and that a jury would be justified in drawing such an inference; (405) but it is clearly susceptible of another interpretation—to wit, that McKee refused Groves' offer to purchase his rifle, and would have nothing further to say about it. And this latter interpretation is rendered the more probable by the testimony of Wines, who states that the defendant said, in addition to what is deposed to by the other witnesses, that McKee, after saying, "enough said," requested Groves to bring home his little gun—which is certainly not very consistent with the idea of a sale. Surely such testimony as this cannot be considered as establishing, in substance and effect, the allegation contained in the bill of indictment, of what the defendant swore. See *S. v. Bradley,* 2 N. C., 403 and 463; and also, *Rex v. Leefe,* 2 Camp. Rep., 134, and the authorities referred to in the note to the latter case. The defendant is entitled to a *venire de novo.*

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

JAMES DICKEY v. ROBERT JOHNSON.

A., being the holder of a single bond, made by B., payable to C., and passed by him to A., without endorsement, upon the representation of B., that he was entitled to a credit thereon, admitted the credit, took a new note for the residue, and surrendered the old one. Afterwards A. brought *assumpsit* against B., to recover the sum allowed as a credit, on the ground that it was not due and had been allowed by mistake: *Held*, that he could not recover, because if any promise of B. was to be implied for its repayment, it was a promise to the legal owner of the first bond.

DICKEY *v.* JOHNSON.

THIS was an action of *assumpsit,* brought to recover back the sum of ninety-four dollars, alleged to have been paid to the defendant, or allowed to him on settlement by mistake. It appeared upon the trial, that the plaintiff purchased of Moses T. Abernathy, Turner T. Abernathy, and Sterling Abernathy a bond made to them by the defendant for $400; and upon an action brought thereon in the name of the obligees (there being no endorsement) to the use of the plaintiff, (406) the same was, at the instance of Moses T. Abernathy, dismissed.

The plaintiff then filed a bill in equity against the defendant and said obligees in the bond, but the name of the plaintiff having been erroneously stated therein as David, the bill was dismissed. A witness was then introduced, who testified that before the suit in equity was dismissed, the defendant told him that the counsel who had the management thereof, as well as said suit at law, had settled the difficulty—that said counsel had said to him that he only sought justice and right, and if he, the defendant, would satisfy him that he was entitled to a credit on the bond of $94, which he had been insisting upon, that the credit should be endorsed accordingly—and this was done; whereupon the defendant executed a new bond payable to the plaintiff for the balance, and took up the old bond. Evidence was offered on both sides in regard to the right of the defendant to the said credit of $94 in his settlement with the plaintiff's counsel. There was no evidence of any express promise to pay the plaintiff anything in the event of a mistake.

His Honor, *Caldwell, J.,* before whom the case was tried, at LINCOLN, on the last Spring Circuit, charged the jury, that if the credit of $94 was obtained on the settlement with plaintiff's counsel, through fraud or mistake, the plaintiff was entitled to their verdict, but by consent of parties, his Honor reserved the question of the plaintiff's right to recover upon the matter of law. There was a verdict for the plaintiff; but his Honor, on consideration of the question of law reserved, being of opinion that the plaintiff's remedy, if he had any, was in a court of equity, set aside the verdict, and entered judgment of nonsuit, from which the plaintiff appealed.

Craige and Hoke for plaintiff.
Guion and Thompson for defendant.

PEARSON, J. The plaintiff never acquired the legal title to the bond. If any promise is implied, it is, of course, to pay the legal owners. This proposition is too plain to admit of discussion.

PER CURIAM. Judgment affirmed.

Cited: Wright v. Harris, 160 N. C., 551.

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DOE EX DEM. DRURY LOVINGGOOD v. JOHN BURGESS.

A grant for vacant land, issued upon the certificate of commissioners authorized by law to act in the premises, cannot, in an action of ejectment, be impeached for fraud, mistake, or any irregularity in the proceedings before the commissioners.

(The cases of *Reynolds v. Flinn*, 2 N. C., 106; *University v. Sawyer*, 3 N. C., 98; *Strother v. Cathey*, 5 N. C., 162; *Stanmire v. Powell*, 35 N. C., 312, cited and approved.)

EJECTMENT for a tract of land situate in Cherokee County, tried before his Honor, *Ellis, J.*, at Spring Term, 1853, of the Superior Court of that county. The lessor of the plaintiff having exhibited a grant from the State for the premises in question, and offered evidence that the defendant was in possession, the defendant thereupon proposed to show that the grant to the plaintiff's lessor, was issued upon a certificate awarded by certain commissioners, appointed by law to issue certificates to actual occupants of land belonging to the State in Cherokee County—that said certificate was procured by a fraud and false oath on the plaintiff's lessor—that the defendant was, under the statute upon the subject, entitled to the certificate of the commissioners—that he had no notice of the proceedings of the board, when the plaintiff's lessor procured his said certificate, and therefore that the whole proceedings of the commissioners were void; that the lands under the act were not subject to entry or grant, unless upon such certificate fairly obtained, and therefore the grant in evidence conveyed no title to the premises in question.

His Honor rejected the evidence, and there was a verdict and judgment for the plaintiff, from which the defendant appealed to the Supreme Court.

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

BATTLE, J. It was decided as early as the year 1794, in the case of *Reynolds v. Flinn*, 2 N. C., 106, and has been adhered to ever since, that a grant, founded on an entry made of vacant land subject to entry, cannot be collaterally impeached for fraud or defects in the entry, or irregularity in any preliminary proceeding. But when the lands are not in fact vacant and unappropriated, or when the law forbids the entry of vacant land in a particular tract of country, a grant (408) for a part of such land is absolutely void; and that may be shown on the trial in an action of ejectment. *University v. Sawyer*, 3 N. C.,

98; *Strother v. Cathey,* 5 N. C., 162. On this distinction, *Stanmire v. Powell,* 35 N. C., 312, was decided. That was the case of a grant issuing in pursuance of a resolution of the General Assembly, passed at its session in 1848, authorizing its location upon "any lands now belonging to the State, for which the State is not bound for title; provided, that this act does not extend to any of the swamp lands in this State." The grant was for a tract of land lying in the Cherokee country, where the lands were, prior to the year 1850, prohibited from entry by the general law; and on that account it was held in an action of ejectment to be void. But by the act of 1850, chapters 23 and 25, grants may, under certain circumstances, be issued for lands lying in the Cherokee country, and as the grant under which the lessor of the plaintiff claims, was issued under the operation of this statute, it cannot be impeached collaterally in the manner proposed by the defendant. His Honor, therefore, properly rejected the testimony which was offered by the defendant, for the purpose of showing that it had been obtained by fraudulent means. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Bevers,* 86 N. C., 588; *Dugger v. McKesson,* 100 N. C., 11; *Brown v. Brown,* 103 N. C., 216; *Gilchrist v. Middleton,* 107 N. C., 680; *Dosh v. Lumber Co.,* 128 N. C., 84; *Holley v. Smith,* 130 N. C., 85; *Board of Education v. Makely,* 139 N. C., 37; *Westfelt v. Adams,* 159 N. C., 419; *Walker v. Parker,* 169 N. C., 154.

V. B. ANDERSON TO THE USE OF J. YANCY V. A. YOUNG ET AL., ADMINISTRATORS.

A justice's judgment on a warrant against an administrator, ascertaining the amount due, and having endorsed thereon a suggestion of the defendant's intention to plead "no assets," according to Revised Statutes, chapter 46, section 25, is not a final judgment, and an action will not lie upon it.

DEBT upon a former judgment, rendered by a justice of the peace. Pleas, general issue—former judgment.

(409) Upon the trial, before *Ellis, J.,* at YANCEY, on the last Spring Circuit, the case was as follows: The plaintiff had obtained a judgment for the amount of his claim against the intestate of the defendants, who, upon the trial before the magistrate, without contesting the claim, made a suggestion of "no assets," which was entered by the

magistrate on the warrant. The magistrate did not return the papers to the county court; and the present action was commenced by warrant upon said judgment, and the plaintiff having obtained a judgment on the same, the defendant appealed to the Superior Court. Upon this state of facts, his Honor, the presiding judge, was of opinion that the action could not be maintained, and in deference to this opinion, the plaintiff submitted to a judgment of nonsuit, and appealed to the Supreme Court.

J. W. Woodfin for plaintiff.
N. W. Woodfin and Gaither for defendants.

NASH, C. J. We concur with his Honor in his opinion, the plaintiff is not entitled to a verdict. By the act of 1836, chapter 56, section 25, it is provided that where an executor or administrator shall be warranted, and shall be desirous to avail himself of a want of assets, he may suggest it to the magistrate, who shall endorse it on the warrant, and return the papers to the next term of the county court, with the judgment, which he is authorized to give. In this case the suggestion was made and endorsed, and a judgment for the amount due by the intestate, given. The magistrate neglected to return the papers to court, and after some time, the warrant issued in the present case upon an alleged former judgment. We agree with his Honor, that no such judgment existed as is set forth in the warrant. A judgment, to authorize the action upon it, must be a final one, ascertaining the rights of the respective parties. In this case it was not final. It merely ascertained the amount due from the intestate, but does not ascertain the liability of the defendants to pay. That was a question which the Legislature has not entrusted to a single magistrate. In truth, it could not be well ascertained before such a tribunal. The questions arising in such an investigation, involving, often, an inquiry into the settlement of the whole estate, to ascertain whether the representative has observed the order di- (410) rected to be observed in its administration, requires the aid and assistance of a jury, and the supervision of a court duly qualified. The judgment given by the magistrate was not a final one, for no execution could issue upon it; and upon it no warrant can be sustained.

PER CURIAM. Judgment affirmed.

STATE v. ISAAC HOUSER.

Indictment for selling spirits to a slave, "the property of one William Michaels." The true name was William H. Michal: *Held*, there was no variance.

(The case of *S. v. Patterson*, 24 N. C., 346, cited and approved.)

THE defendant was indicted for selling spirituous liquor to a slave charged in the bill of indictment as the property of one William Michaels. On the trial, before *Ellis, J.*, at LINCOLN, on the last Spring Circuit, the owner of the slave was introduced as a witness on behalf of the State, and he testified that his name was William H. Michal, and not Michaels; but that some persons frequently called him Michaels, and that he answered to that name and he presumed they knew him as well by that name as by the other. His Honor charged the jury, that if they believed that the owner was as well known by the name of Michaels, as by his true name, Michal, there was no variance, and the defendant was guilty. There was a verdict of guilty, and after an ineffectual motion for a new trial, on the ground of misdirection by his Honor, and judgment against the defendant, he appealed to the Supreme Court.

Attorney-General for the State.
Guion and Thompson for defendant.

PEARSON, J. The only point made is upon the difference between Michal and Michaels. This is settled. *S. v. Patterson,* 24 N. C.,
(411) 346. There, Deadema and Diadema was held to be no variance.

PER CURIAM. Judgment affirmed.

Cited: S. v. Johnston, 51 N. C., 486; *S. v. Hester,* 122 N. C., 1049.

ELLIS SHOEMAKER v. E. M. HALE.

1. A. confessed before a justice of the peace a judgment to B. for $40, and afterwards paid a part of the judgment, which was to be credited thereon by B. The credit was not entered, but B. subsequently caused a levy to be made on the land of A., which was returned to the county court, and order of sale made, under which the land was sold for the whole amount of the judgment. Before this sale, A. brought an action against B. to recover the sum paid, and which B. ought to have endorsed on the judgment.

2. It seems, that A., having had a day in court, when he might have shown the payment, and having failed to do so, is without remedy; but however this may be, this action was brought prematurely, for his cause of action did not accrue until the sale.

THIS was a suit commenced by attachment before a justice of the peace, in which the plaintiff declared, (1) for money had and received to the use of the plaintiff, and (2) for money paid at the request of the defendant. The defendant appeared, and the case was carried by successive appeals to the county and Superior Courts of Macon County, where upon the plea of the general issue at Spring Term, 1853, it was tried before his Honor, *Ellis, J.*

The case was, the plaintiff being indebted to the defendant on a note, in the sum of forty dollars, confessed a judgment therefor; and one Beattie being indebted to the plaintiff, paid the defendant, at his request, a sum of money, with the understanding that it should be paid and credited on said judgment against the plaintiff—who was, however, ignorant of such payment at the time. It further appeared that the defendant owed one Marshburn a sum of money, and by his directions and request the plaintiff instructed said Beattie to pay it for him, and it was paid accordingly.

The said justice's judgment was given in evidence, and it ap- (412) peared that the sum paid by Beattie had not been credited, but that the whole judgment had been collected by a sale of the plaintiff's land. The levy upon the plaintiff's land was made on 4 December; and a judgment was entered up in the county court, and the order of sale obtained on 9 December, 1850. And this action was commenced 3 December, 1850.

It was insisted for the defendant that the plaintiff could not recover: (1) Because the money was received by the defendant as a payment on the judgment he held against the plaintiff, and by the act of receiving it for this purpose, it became his own money, and that the plaintiff had his day in court, when this payment could have been shown by him; (2) because there was no sufficient privity between the parties, inasmuch as Beattie made the payment without the knowledge or consent of the plaintiff, and it was due to him, if to any one. But his Honor being of opinion that the plaintiff having adopted the act which Beattie undertook to perform for him in making the payment, could sustain the action, and so instructed the jury. He further instructed them, that if the defendant failed to apply the sums paid him to the judgment against the plaintiff, and proceeded to collect the whole amount of said judgment, the plaintiff would have a right to recover the sum so paid; and that this suit was not instituted before the cause of action accrued.

There was a verdict for the plaintiff, and from the judgment thereon rendered, the defendant appealed to the Supreme Court.

J. Baxter for defendant.
J. W. Woodfin, contra.

NASH, C. J. The plaintiff has brought his action prematurely. Without entering into the question, whether under the circumstances, an action could be maintained by him against the defendant, we are of opinion that at the time this suit was brought, there was no cause of action.

The case is simply this: The plaintiff owed the defendant a sum of money, amounting to forty dollars, for which he confessed a judgment; upon this judgment he paid the plaintiff, by the hands of one Beattie and another person, the sum of twenty-four dollars or thereabouts; an execution issued on the judgment to collect the whole sum mentioned in it, and was levied on the land of the plaintiff on 4 December,
(413) 1850; and having been returned to the county court succeeding, a judgment condemning the land was rendered on 9 December. This action was commenced on 3 December—one day before the levy. On the sale of the land, the whole amount of the judgment was collected. The payments were made after the judgment was rendered by the magistrate, and were to be credited on it, but were not. At the time, then, when the attachment issued, what cause of action had arisen to the plaintiff? No time was specified within which the credits were to be entered by the defendant, and not until the sale of the land under the execution, and the collection of the whole amount specified in it, was there any breach of duty on the part of the defendant, or any overpayment. If at the time of the sale, the defendant had instructed the sheriff, as it was his duty to have done, that the judgment was subject to be credited with the amount of the payments, and he was to collect only the balance due, certainly no cause of action could have arisen against him. The levy could give no such action; for, after allowing the payments, there was still due to the defendant, upon the judgment upwards of sixteen dollars, and for this amount he had a right to levy and sell. Not until the defendant caused a sale of the land, for the collection of the whole amount called for in the execution, could a cause of action arise to the plaintiff for the recovery of the amount paid by him. Again, a constable cannot sell land under a justice's execution. He may make a levy, but the levy with the papers must be returned to the county court, and that tribunal will not give a judgment condemning the land, until after five days' notice to the defendant in the judgment.

This was no doubt done; and the plaintiff might have appeared and shown to the court, that since the judgment was obtained before the magistrate, he had made the payments claimed by him. He had, therefore, his day in court, and did not choose to avail himself of it, but commenced his action before even a levy was made.

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

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(414)

R. W. ALLISON ET AL., ADMINISTRATORS, v. L. W. NORWOOD.

It is the duty of the county court, in binding out an apprentice, to select as master a person who will, in their judgment, faithfully discharge the duty which he assumes; and the relation of the master to the apprentice is one of personal trust and confidence. Hence, upon the death of the master, no right vests in his personal representative; and hence, also, the master cannot assign the apprentice or his services, because inconsistent with the nature of the trust, and against the policy of the law. Therefore, where the consideration of a promissory note was such an assignment, it was held that the note was void.

(The cases of *Sharp v. Farmer*, 20 N. C., 255; *Goodbread v. Wells*, 19 N. C., 476; *Overman v. Clemmons*, *ibid.*, 185, and *Blythe v. Lovinggood*, 24 N. C., 20, cited and approved.)

THIS was an action of debt upon a promissory note of the defendant for two hundred dollars, due twelve months after date, and dated 4 October, 1838. Pleas, general issue, fraud, want of consideration in the note, consideration against the policy of the law, statute of limitations.

On the trial, before his Honor, *Manly, J.*, at MECKLENBURG, at Fall Term, 1851, a letter of the defendant, dated 11 November, 1843, was exhibited, which promised to pay the note declared on in the next year. There was no evidence of any renewal of this promise until after the death of the plaintiff's intestate and after the institution of this suit. When the sheriff served the writ upon the defendant, he said he would pay the debt, if the sheriff would take Alabama money, and if he would let him go, he would remit the money from Alabama as soon as he reached there, stating at the same time it was a just debt. It appeared that the defendant, soon after the date of the note, and before it fell due, removed to the State of Alabama, and had continued to reside there since. A deposition was then introduced on the part of the defendant, to show that the consideration of the note was an assignment of the unexpired time of the defendant's service as an apprentice. This evidence was

objected to by the plaintiff, on the ground that in said deposition was disclosed the fact that there was an instrument of writing setting forth the consideration of the note, and it was not competent to prove it except by that writing. The objection was overruled by his Honor, and the deposition read, excluding that portion relating to said writing. It appears from the deposition, that the deponent, McKimble, a resi-
(415) dent of Alabama, was, in North Carolina, apprenticed to the plaintiff's intestate, to be taught the carpenter's trade; that at the date of the note sued on, he had eighteen months or two years to serve, and that he was by said intestate, for the amount of said note, assigned and transferred to the defendant, with whom he went to Alabama, and whom he served there the residue of his term of apprenticeship. And the defendant offered in evidence the record of Mecklenburg County Court, showing the deed of indenture of said apprentice to the plaintiff's intestate.

His Honor was of opinion that there was no sufficient promise to relieve the note from the operation of the statute of limitations; that the act of 1848-'49 did not retroact, and was not therefore applicable; and he was also of opinion that the consideration, supposing it to be proved, was against the policy of the law, and therefore illegal; which opinion having been intimated to counsel, the plaintiff in deference thereto, submitted to a judgment of nonsuit, and appealed to the Supreme Court.

Wilson for plaintiffs.
Hutchinson for defendant.

BATTLE, J. There is one ground of objection to the plaintiff's action, which is fatal to it, and which renders it altogether unnecessary for us to consider any other. The consideration for the note sued upon was the assignment by the plaintiff's intestate to the defendant, of the apprentice, Hugh McKimble. The facts of the assignment and the consideration for the note are shown by the deposition of the apprentice himself, and being independent facts, may well be proved by that testimony, no matter what may have been the contents of the written instrument given by the intestate to the defendant. We hold such consideration to be against the policy of the law, and, therefore, the note given upon it void. By the statute contained in the 5th chapter of the Revised Statutes, entitled, "An act concerning apprentices," the several county courts in the State are empowered, and it is made their duty to bind out as apprentices, certain orphan and other children to "some tradesman, merchant, mariner, or other person approved by the court"—

every such male child to be bound until he shall attain the age (416) of twenty-one years, and every female until her age of eighteen years. The statute then goes on to prescribe the manner in which the binding shall be done, the reciprocal duties of the masters and apprentices, and their respective remedies for the violation of such duties. The object sought to be accomplished by the statute is manifest, and it is one of the greatest importance. It is no less than that the orphans shall be comfortably and suitably reared and educated during their minority, and in the meantime be taught some useful trade or employment, in order that when they become of age, they may be able to provide properly for themselves and their families, should they have any, and to perform the duties which may devolve upon them as individuals and citizens. To compensate the masters for what they are required to do for their apprentices, they are intrusted with certain powers over them, and are entitled to their services. The manner in which this relation is created, and the important objects which it has in view, show clearly that it is a personal trust. Indeed, it was so decided in the case of *Goodbread v. Wells,* 19 N. C., 476, where it was held that upon the death of the master, the relation necessarily ceased, and that, consequently, the personal representation of the deceased had no interest in the apprentice. The law, then, will not itself make an assignment of the apprentice; will it permit the master to do so? We cannot see how it can, without taking indirectly from the justices of the county courts the power which it expressly confers, of exercising their judgments in the selection of suitable and proper masters—such as they can approve. See *Davis v. Coburn,* 8 Mass. Rep., 296. If, then, it be against law for a master to assign over to another person an apprentice who has been bound to him by the county court, a contract, founded upon the consideration of such an assignment, must necessarily be illegal and void. *Sharp v. Farmer,* 20 N. C., 255; *Blythe v. Lovinggood,* 24 N. C., 20; *Overman v. Clemmons,* 19 N. C., 185, and *Davis v. Coburn, ubi supra.*

The plaintiff's counsel has referred us to the case of *Nickerson v. Howard,* 19 John. Rep., 113, which appears to be in opposition to the above conclusion. In that case the defendant gave to the plaintiff a promissory note as the price or consideration for the assignment of an apprentice to one E., at his request; and it was held that, (417) in an action on the note, the defendant could not set up as a defense, that the assignment was not valid—that its validity could only be questioned in a suit by E. to recover back the price on a failure of consideration or in a suit or proceeding in behalf of the apprentice. The court seemed inclined to hold further, that, although an indented ap-

prentice is not assignable or transmissible, yet the assignment as between the old and the new master would be valid as a covenant for the services of the apprentice; and if the apprentice continues to serve his new master, there would be no failure of the consideration of the assignment. Now, if the nonassignability of an apprentice was based, like that of a bond at common law, upon an objection of a technical and not a substantial character, we might be disposed to agree with the case cited. But the objection in this State, however it may be in New York, is of the most substantial kind; it is an objection against permitting the power of selecting and approving a fit person to have the charge of an apprentice, to be taken from the justices holding the county court, upon whom it is expressly conferred by statute, and given to an individual, even though that individual may be a master formerly appointed by such justices. The policy of such a statute is too necessary for the accomplishment of the purposes it has in view (and which are highly important both to the apprentice and the State), to permit it to be contravened by a contract made in violation of its provisions; and we are gratified to find ourselves supported in upholding it by so respectable an authority as the Supreme Court of Massachusetts.

PER CURIAM. Judgment affirmed.

Cited: McNeill v. R. R., 135 N. C., 734.

(418)

DOE EX DEM. ELIZABETH C. RICHBURG v. JOHN H. BARTLEY.

Where forfeiture of a lease is incurred by nonpayment of rent, if the lessor receives from the lessee rent subsequently accruing, the forfeiture is thereby waived.

EJECTMENT, tried before *Bailey, J.*, at MADISON, at Fall Term, 1852. The plaintiff offered in evidence a lease for the premises in question, executed by her to the defendant, demising the same for the term of "five years—to wit, commencing with 1 January, 1850, and ending on 1 January, 1855," and in which it was covenanted on the part of the defendant, to pay the plaintiff "one hundred dollars per year, to be paid at the end of each year," and after stipulating to make repairs and certain improvements on the premises, follows this clause: "It is further understood, that if the said Bartley shall fail to comply with the terms herein specified, or shall fail to make the annual payment when due, he shall be liable to an immediate removal."

The declaration was issued in October, 1851, and served on the defendant 4 November following.

It was admitted that the defendant was in possession of the said premises at the time the declaration was served; and further admitted that he did not pay the rent at the end of the year 1850, as he had stipulated to do; but it was in evidence that he paid to plaintiff the rent for 1850 in full, and for 1851 on 28 October, 1851—having during the latter year, made partial payment thereof. The plaintiff also offered evidence tending to show that the defendant had not performed his covenants in respect to repairs and improvements, and counter evidence was offered by the defendant on this point (but it is deemed unnecessary to state the facts here, as the plaintiff's counsel has not in this Court insisted on the same as creating a forfeiture of the defendant's estate). As to the first point, the defendant's counsel in the court below insisted that the plaintiff had not the legal title at the date of the demise in the declaration; that no entry was made by her, and no notice given to the defendant, and if the defendant was liable at all, it was only for a breach of covenant; and further, that the payment of the rent in 1851, for the years 1850 and 1851, was a waiver of the trespass, and the plaintiff could not therefore maintain her action. By consent (419) of parties, this question was reserved by his Honor, and there was a verdict against the defendant; and his Honor afterwards, on consideration of the point reserved, being of opinion against the plaintiff, by agreement of the parties, set aside the verdict and entered a judgment of nonsuit, from which the plaintiff appealed to the Supreme Court.

J. W. Woodfin for plaintiff.
Gaither for defendant.

BATTLE, J. Whether it was necessary for the lessor of the plaintiff to enter upon the demised premises, or give notice to the defendant before bringing her action of ejectment, it is unnecessary for us to decide; for it is clear that the forfeiture of the lease by the nonpayment of the rent due for the year 1850, was waived by the subsequent acceptance by the lessor from the lessee, of that due for the year following. Arch. Land and Ten., 97-100 (43 Law Lib., 108-111). The declaration was issued on 7 October, 1851, and served on the defendant 4 November following; while, it is stated in the bill of exceptions, that the rent due for the year 1850, though not paid at the end of the year, was afterwards paid in full; and further, that the rent of 1851 was paid on 28 October in that year. Now, we do not attribute any effect to the reception by the lessor of the rent of 1850, because, after it became due, she had a right to

receive it, whether the defendant was to continue her tenant or not; but certainly, after receiving, during the year 1851, the rent or any part of it, which was to become due at the end of that year, she recognized the defendant as her tenant for that year; and thereby waived the forfeiture incurred by the nonpayment of the rent of the preceding year.

The counsel of the plaintiff's lessor has not insisted in this Court that at the time when the action was commenced, there was any breach of covenant, other than the nonpayment of rent, for which she had a right to insist upon a forfeiture. It does not appear from the written contract between the parties, that any particular time, prior to (420) the termination of the lease, was fixed upon for the lessee to complete the repairs; and we cannot say that at the time when the suit was commenced, the lessor had a right to consider the lease as at an end, and to treat the defendant as a trespasser. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Winder v. Martin, 183 N. C., 413; *Sharpe v. R. R.,* 190 N. C., 353.

THOMAS McBRIDE v. CONSTANT GRAY, EXECUTOR GEO. GRAY.

A vague admission of indebtedness, or promise to pay an indefinite sum, will not repel the bar of the statute; *ex. gr.*, a declaration of defendant that he intended to pay plaintiff for his services, no sum being named and no account referred to, or other matter by which the amount might be reduced to certainty.

(The cases of *Sherrod v. Bennet*, 30 N. C., 309; *Smith v. Leeper*, 32 N. C., 86; *Moore v. Hyman*, 35 N. C., 272, and *Shaw v. Allen, ante*, 52, cited and approved.)

ASSUMPSIT, commenced by warrant before a magistrate, in which the plaintiff declared upon a special contract and upon a *quantum meruit* for services rendered in keeping, taking care of, and boarding a helpless old Negro woman, that had once belonged to the father of Mrs. Gray, wife of the defendant's testator. Pleas, *nonassumpsit,* statute of limitations.

The only evidence offered on the trial to take the plaintiff's case out of the statute of limitations, was that the defendant's testator, a year before his death, and within less than three years before the bringing of the action, said that "he intended to pay Thomas (the plaintiff) for keeping the old woman, until he was satisfied." This declaration

was testified to by two witnesses, one of whom stated that at the time he heard defendant's testator say so, the plaintiff and he spoke also of $2 being then paid. His Honor, *Ellis, J.*, before whom the case was tried, at WILKES, at Fall Term, 1852, thought the evidence repelled the bar of the statute, and the jury accordingly found for the plaintiff, and judgment having been rendered upon the verdict, the defendant appealed.

Mitchell for plaintiff.
Boyden for defendant.

(421)

BATTLE, J. The instruction given by his Honor to the jury that the facts proved amounted to a new promise and repelled the operation of the statute of limitations, is opposed by the principle declared by this Court in several recent cases, and cannot therefore be sustained. The case of *Sherrod v. Bennet,* 30 N. C., 309, was an action of *assumpsit* upon a *quantum meruit* for work and labor done by the plaintiff as an overseer or manager of the testator of the defendant. The services were alleged to have been rendered for several years, but were barred by the statute of limitations, unless the testator had acknowledged the debt, or promised to pay it within three years before the commencement of the suit. The testimony offered for that purpose was that of three witnesses, one of whom stated that the testator said to him "that the plaintiff had lived with him a good long while, and he intended he should be paid for his services"; a second stated that just before the plaintiff left the employment of the testator, the latter told the witness "that the plaintiff's wages were not limited, and he intended to make him compensation at his, the testator's death"; and the third testified that the testator told him "that the plaintiff had not been paid for his services, but he intended to pay him, and he hoped at the day of his death the plaintiff would be satisfied." The Court held, after a review of the previous decisions in this State upon the subject, that the declarations of the testator were too vague and indefinite to amount to an express promise to pay the plaintiff's claim, or to such an acknowledgment of it as would justify the interference of an implied promise to pay it. The declarations in this case are equally vague and indefinite, and there is no account rendered, as in *Smith v. Leeper,* 32 N. C., 86, nor anything else by which they can be made more definite and certain. These declarations, then, amount at most but to a promise to pay an indefinite sum, which is said in *Moore v. Hyman,* 35 N. C., 272, to be of "no force, and cannot be aided by the maxim, *'id certum est quod certum reddi potest';* for that maxim only applies to cases where there is a reference to some paper, or where the thing can be made cer-

tain by computation or figures, or in some other infallible mode, not depending on the agreement of the parties, or the findings of (422) arbitrators, or the finding of a jury." See, also, *Shaw v. Allen's Executors, ante,* 58. The judgment must be reversed, and a *venire de novo* awarded.

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

Cited: McRae v. Leary, 46 N. C., 93; *Long v. Jameson, ibid.,* 478; *Faison v. Bowden,* 72 N. C., 407; *Taylor v. Miller,* 113 N. C., 342; *Shoe Store Co. v. Wiseman,* 174 N. C., 717.

EZEKIEL McCALL v. GEORGE CLAYTON.

Articles were purchased for a manufacturing company, of which A. was the agent, who thereupon gave a due bill in this form: "Due E. M., $78—val. rec'd. A. ag't for the M. Co.": *Held,* that A. was not personally liable thereon.

(The cases of *Potts v. Lazarus,* 4 N. C., 180; *Redmond v. Coffin,* 17 N. C., 437; *Oliver v. Dix,* 21 N. C., 158, cited and approved.)

ASSUMPSIT upon the following instrument:

"Davidson's River—Sept.

"$78. Due Ezekiel McCall, seventy-eight dollars for value received.

(Signed.) George Clayton,

Ag't for Davidson's River Mr. Company."

The defendant pleaded *non assumpsit;* and on the trial before his Honor, *Ellis, J.,* at HENDERSON, on the last Spring Circuit, it appeared that the articles of property for which the due bill was given were furnished by the plaintiff to Davidson's River Manufacturing Company, and used by them; but the plaintiff contended that the defendant had become personally liable, acting at the time as the agent of said company. By consent of the parties, a verdict was returned for the plaintiff subject to the opinion of the court upon the question of the plaintiff's right to maintain the action; and his Honor, upon consideration of said question reserved, being of opinion that the defendant was a stranger to the consideration, and simply the agent of the company, and as such not personally liable on the bill, set aside the verdict, and entered a judgment of nonsuit, from which the plaintiff appealed to the Su- (423) preme Court.

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

BATTLE, J. The propriety of the judgment of nonsuit in this case is fully shown by the cases, among others, of *Potts v. Lazarus,* 4 N. C., 180; *Redmond v. Coffin,* 17 N. C., 437, and *Oliver v. Dix,* 21 N. C., 158. The acknowledgment of the debt due to the plaintiff by the defendant was not in his individual, but his representative, capacity; and the law implies a promise to pay by his principal instead of himself. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bryson v. Lucas, 84 N. C., 681; *Rounsaville v. Ins. Co.,* 138 N. C., 195; *Hicks v. Kenan,* 139 N. C., 344.
Distinguished: Davis v. Burnett, 49 N. C., 74.

JOHN M. MARTIN v. GEORGE W. HAYES.

An assignment of a note, to enable the assignee to sue thereon, must be made by the payee, and must be for the whole, and not for a part only of the sum mentioned in the note.

THIS was an action of *assumpsit,* brought on the defendant's assignment of a note under seal. The following are copies of the note and assignment:

"Due Newton and Hayes nine hundred and thirty-seven dollars—six hundred and sixty-three dollars and seven cents to be paid to J. M. Martin when called upon, and the balance to be paid to said Newton and Hayes for value received of them. Witness my hand and seal 5 July, 1851. (Signed.) M. Fain. [Seal.]"

On the back of the said note is the following:

"For value received, I assign to John M. Martin six hundred (424) and sixty-seven dollars and seven cents in this note, with the interest on that amount from 5 July, 1851.

(Signed.) G. W. Hayes."

Upon the pleas of general issue and no assignment to plaintiff, the case was tried before his Honor, *Ellis, J.,* at CHEROKEE, on the last

Spring Circuit. The plaintiff proved, and read in evidence, the bond and the assignment, and insisted on his right to recover the amount assigned to him. The defendant contended that before the plaintiff could recover there should be proof of a demand and nonpayment by Fain, and notice thereof to the defendant. His Honor instructed the jury that if they believed the testimony, the plaintiff was entitled to recover. There was a verdict for the plaintiff accordingly, and judgment having been rendered in pursuance thereof, the defendant appealed to the Supreme Court.

J. Baxter for plaintiff.
Gaither for defendant.

PEARSON, J. In the court below, the defendant insisted that to fix him with liability, it was necessary for the plaintiff to prove a demand on Fain, the obligor, and nonpayment by him. His Honor was of opinion that the defendant was liable without such proof.

We are at a loss to see any ground on which the defendant was liable to pay the amount, even if such demand and nonpayment had been proven. He made no express promise to pay, and we are left to conjecture that his Honor was of opinion that a promise to pay was implied by some principle of the "law Merchant."

According to the "law Merchant," which is incorporated into the common law, a bill of exchange may be assigned by endorsement. This was an exception to the common law maxim, "choses in action cannot be assigned," and was forced upon the courts as soon as England aspired to be a commercial nation. A consequence of the assignment was to make the endorser liable for the amount of the bill, provided it was presented and due notice given of its dishonor. The statute of Ann makes
(425) promissory notes assignable in the same way, as inland bills of exchange were assignable according to the law Merchant; and our statute makes notes under seal for the payment of money, assignable in the same way as inland bills of exchange and promissory notes.

The effect of the assignment is to vest the legal interest in the assignee, and to give him the right to sue in his own name upon the bill, note or bond. As a matter of course, therefore, the assignment must be of the whole bill, note, or bond. An assignment by piece meal of a part to one man, and a part to another, is an idea unknown to the law Merchant, and wholly repugnant to every principle of law and of good sense. If the payee can assign $663.07 of a bill, note, or bond to one man, and keep the balance himself, he may, on the same principle, divide it into smaller parts, and assign portions to fifty different men, all of whom

would acquire a legal title, and have a separate cause of action for their respective parts; so, there might be fifty law suits for different parts of one note. This is against reason, and is, therefore, not law.

The written statement made on the note by the defendant is not an assignment according to the law Merchant for another reason. An assignment can only be made by the payee, or the person having the legal title and right to sue. Newton and Hayes are the payees, and the defendant, in making the statement, does not profess to act for or in the name of the firm.

As there has been no assignment, according to the law Merchant, and a liability to pay is implied only from the fact of an assignment, it follows that the defendant is not liable, and the plaintiff has no cause of action against him. There is no express promise or guaranty, and there is no ground upon which a liability, either absolute or qualified, can be made by implication.

We are aware that there is a general impression among the people, that an assignment of any paper creates a qualified liability, and it is evident from the ground taken by the defendant on the trial below, that he supposed his assignment, according to the law Merchant, imposed upon him a qualified liability—viz., upon due notice of demand and nonpayment. In this, unfortunately for the plaintiff, there was a mistake. The common law, as distinguished from the law Merchant, required an express guaranty. The law Merchant implied a qualified liability from the fact of an assignment according to (426) the custom of merchants. What the plaintiff calls an assignment, among merchants has no legal effect, but is simply an entry or memorandum in writing.

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

Cited: Knight v. R. R., 46 N. C., 359.

STATE v. WILLIAM MELTON, AND STATE v. JESSE MELTON.

A recognizance conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day, to which the holding of the court was changed by a law passed after the taking of the recognizance; the law containing no provision that recognizances should be returned and parties appear on that day. Whether such a provision would have made any difference. *Quere?*

(The case of *Winslow v. Anderson*, 20 N. C., 1, cited and approved.)

STATE *v.* THE MELTONS.

THE defendants, William Melton and Jesse Melton, were indicted for larceny in the Superior Court of Buncombe, and had respectively given their bonds in the usual form to appear and answer the said charge at the Superior Court of said county, on the first Monday after the fourth Monday of March, 1853. At Spring Term, 1853, the indictment was tried and the defendants convicted; who being thereupon called to answer the judgment of the court, failed to appear. Mr. Solicitor Burton moved for judgment *nisi* against each of said defendants and their sureties for the sum of five hundred dollars, the penalty of their appearance bonds; but his Honor, *Ellis, J.*, before whom the matter was moved, being of opinion that, as the act of 1852 changed the time of holding said court to the second Monday, instead of the first, the defendants had not forfeited their recognizances, and he accordingly refused to allow the motion; and the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
(427) *J. W. Woodfin for defendants.*

BATTLE, J. The bond executed by the defendants had a condition by which it was to be discharged, if the defendant, Melton, should appear at the next Superior Court of Law, to be held for the county of Buncombe on the first Monday after the fourth Monday of March, A.D. 1853, and not depart the court without leave. The act of 1852, chapter 44, section 2, changed the time of holding said court to the second Monday after the fourth Monday of March, 1853; but contained no provision directing recognizances to be returned, and the parties to appear, at that time. The defendant, Melton, however, did appear at the term then held, and was tried and convicted upon an indictment for petit larceny, but departed the court without leave; and upon being called to receive judgment, failed to answer. Was his bond forfeited by such failure? We think not, and that his Honor, therefore, properly refused to permit the solicitor for the State to have a judgment entered against him and his sureties, as for a forfeiture of his bond. The case of *Winslow v. Anderson,* 20 N. C., 1, is a direct authority to show that an obligation entered into by a party, stipulating for his appearance at the term of a court to be held on one week, is not broken by a failure to appear at a term held on a different week, though the wrong time was inserted by mistake. The obligors, when called at a time when they had not stipulated to appear, might well say, *non venimus in hoc foedus.* Whether the case would have been different, had the act of 1852, above referred to, contained a clause making all recognizances returnable to

the term as changed, and requiring the parties to appear at such term, it is unnecessary for us to decide. As it is, there is no error in the order from which the appeal was taken, and it must be affirmed. The case of the State against Jesse Melton *et al.*, is similar in all respects to the above, and the order therein appealed must also be affirmed.

PER CURIAM. Judgment accordingly.

Cited: S. v. Houston, 74 N. C., 176.

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(428)

STATE v. WILLIFORD ABERNATHY.

1. Where a statute defines an offense, makes it indictable, and prescribes the punishment, an indictment for it is wholly founded on this statute, although it contains a reference to a former statute, giving a penalty to a common informer, for the same act.
2. Therefore, if the indictment concludes against the statutes, it is fatally defective, and judgment will be arrested after verdict.

(The case of *S. v. Sandy,* 25 N. C., 570, cited and approved.)

THE defendant was indicted and tried before his Honor, *Caldwell, J.*, at CATAWBA, at Fall Term, 1852, for the offense of buying and receiving from a slave ten pounds of iron. The indictment concluded against the form of the statutes; and, after conviction, the defendant's counsel moved in arrest of judgment on account of this defect—insisting that there was but one statute subjecting the defendant to indictment. His Honor sustained the motion in arrest, and the solicitor for the State appealed.

Attorney-General for the State.
No counsel for defendant in this Court.

BATTLE, J. It is too well settled in this State to be questioned, that if an indictment conclude against the form of the statutes, when there is only one statute relating to the offense charged, it is a fatal defect, for which the judgment must be arrested. *S. v. Sandy,* 25 N. C., 570. The defect has been cured in England by the statute 7 Geo., 4, chapter 64, section 20; and it is a question for another department of the government, whether a similar provision ought not to be adopted here.

The appeal in this case was taken, we presume, upon the supposition that the offense charged was founded upon two statutes instead of one—

to wit, the 34th chapter, section 75, of the Revised Statutes, and the act of 1848, chapter 36, section 1.

It is true that the latter statute refers to the former, but is not in any respect indebted to it for the offense which it defines and makes indictable. It is complete in itself, both in defining the misdemeanor and prescribing the punishment; and if the indictment were to set out the statute or statutes upon which it was founded, instead of (429) referring to it or them in general terms, it would clearly be unnecessary to set out any but the act of 1848. This is decisive of the manner in which the indictment ought to conclude.

It is hardly necessary to say that the reference in the latter part of the section of the act of 1848, to the 75th section of the 34th chapter of the Revised Statutes, as to the forfeiture or penalty which is given to a common informer, and the manner in which it is to be recovered, cannot at all affect the form of the indictment. It is obviously a separate and distinct matter, which has nothing to do with the indictable offense, and cannot, therefore, influence the mode of proceeding upon it. The motion in arrest of judgment was properly allowed, and must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Smith, 63 N. C., 237.

THE TOWN COUNCIL OF LINCOLNTON v. DAVID McCARTER.

A town ordinance imposed a penalty upon any licensed retailer, who should on Sunday "open his shop where he retails for the purpose of selling," etc.: *Held,* that the *corpus delicti* under the ordinance is the selling, etc., and that no penalty was incurred by merely opening his shop for the purpose of selling.

THIS was an action of debt, commenced by warrant before a justice of the peace to recover from the defendant a penalty of twenty-five dollars, for violating an ordinance of the town council of Lincolnton, as alleged by the plaintiff.

On the trial before his Honor, *Caldwell, J.,* at LINCOLN, on the last Spring Circuit, the plaintiff's counsel produced a book containing the record of the proceedings of the said council, in which was the following ordinance: "Ordered by the town council of Lincolnton, that any person having license to retail spirituous liquors by the small measure in the town of Lincolnton, who shall keep or open his shop where he retails

for the purpose of selling or giving away spirituous liquors to any person or persons, except it be for medical purposes, shall, for each and every offense of selling or giving spirituous liquors upon the Sabbath day, forfeit and pay a penalty therefor, the sum of (430) twenty-five dollars," etc. The warrant charged that the defendant owes to, and detains from the said town council, etc., "for having sold or given, or opened his shop for that purpose on the Sabbath day—to wit, on 13 June, 1852, at his shop where he retails spirituous liquors in Lincolnton, a quantity of spirituous liquor to E. J. Alexander, it not being for medical purposes," etc. Among the witnesses introduced was Alexander, named in the warrant, who testified that after the publication of said ordinance, the defendant had never sold him any spirits on Sunday, neither had he given him any, nor opened his grocery to him, and he never knew of defendant's violating the ordinance with regard to others. One Williamson swore that he had known the defendant since the publication of the ordinance and before this suit was commenced, to sell spirituous liquor to one person on Sunday, and that the said Alexander got a part of it; and he further stated, he knew that a person, by knocking at the door, might gain admission to the grocery on Sunday.

The defendant insisted that the evidence, if believed, did not amount to a violation of the ordinance, and that he could not be convicted upon the said warrant. (Many points were made upon the trial below and in this Court, which as the case turned on one only in this Court, it is not deemed necessary to state here.)

His Honor, the presiding judge, charged, among other things, that if the defendant had not sold spirituous liquor to E. J. Alexander on Sunday, he was not guilty on that part of the case; but if they believed the testimony of Williamson, the defendant was guilty under the other clause of the ordinance, for opening his grocery doors with a view of selling spirits, and they should find for the plaintiff. There was a verdict for the plaintiff, and judgment having been rendered accordingly, the defendant appealed to the Supreme Court.

Guion for defendant.
Thompson, contra.

BATTLE, J. The bill of exceptions filed by the defendant, presents several distinct objections to the plaintiff's right to recover, of which it is necessary to decide one only—that being clearly in favor of the defendant, and entitling him to a *venire de novo*. The provisions of the ordinance, for the violation of which the warrant (431)

was sued out, seem to have been misapprehended by his Honor in the court below. No penalty is given against a retailer of spirituous liquors in the town of Lincolnton, for merely keeping or opening his shop on the Sabbath day, for the purpose of selling or giving spirituous liquors to any person; but it is given for each act of selling or giving such liquors on that day, for other than medical purposes. The defendant could not, then, be held to have violated the ordinance, until he had kept or opened his shop on the Sabbath day, and had sold to E. J. Alexander a quantity of spirituous liquors, for other than medical purposes. The allegations of the warrant, which stands for the plaintiff's declaration (*Duffy v. Averitt,* 27 N. C., 455), must be substantially proved; but that they were not so as to the defendant's selling or giving a quantity of spirituous liquors to Mr. Alexander, was manifest, and was so stated by his Honor. He ought, then, to have instructed the jury that the plaintiffs had failed to establish their case, and that the defendant was entitled to a verdict. Instead of doing this, he instructed them, that the defendant was guilty under another clause of the ordinance, when, by a proper construction of that clause, it appears not to have denounced against the defendant any penalty whatever. For this error there must be a *venire de novo.*

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

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(432)

STATE v. JOHN ZACHARY.

1. In an indictment against a justice of the peace, for corruption in an act done in virtue of his office, it is not sufficient to charge that the act was done corruptly; the facts must be set out in which the corruption consists.
2. It is a misdemeanor in office, for a justice of the peace to sell or transfer a judgment rendered by himself or by any other justice, if in his possession, *virtute officii*, the law making it his duty to keep and preserve such judgments.

(The case of *Cunningham v. Dillard,* 20 N. C., 485, cited and approved.)

THE defendant was tried upon the following indictment:

"The jurors for the State upon their oath present, that on 4 October, 1845, John Zachary, late of the county of Macon, in the State of North Carolina, was one of the justices of the peace, in and for said county, and has continued to be such from the said 4 October, in the year aforesaid, up to the taking of this inquisition; and the jurors aforesaid,

upon their oath aforesaid, do further present, that the said John Zachary being a justice of the peace as aforesaid, on 4 October, 1845, with force and arms, in the county aforesaid, unlawfully, wilfully, deceitfully, and corruptly did give judgment as a justice of the peace as aforesaid, in favor of one Philip Gallispie, for twenty-two dollars, with interest from 1 September, 1843, against one Baroh Norton, without the knowledge and consent of the said Philip Gallispie and Baroh Norton, and with the intent to injure and defraud the said Baroh Norton; and that the said John Zachary, in furtherance of his said fraudulent intent, wickedly, knowingly, and corruptly bargained and sold the said false judgment for a valuable consideration, to one John Allman, without the knowledge and consent of the said Philip Gallispie, to the great damage of the said Baroh Norton, and against the peace and dignity of the State."

Upon the trial, before *Ellis, J.*, at MACON, on the last Spring Circuit, one Norton was introduced as a witness for the State, and stated that in 1845 he confessed a judgment before the defendant, an acting magistrate for the county of Macon, for the sum of $....., in favor of Philip Gallispie, on a note which he had previously executed to said Gallispie (a copy of which accompanies the case). This judgment he paid off in 1849 to one Barnes, a constable; and that afterwards, in 1850, one Allman applied to him for the payment of another judgment, (433) purporting to have been confessed by the witness before the defendant on the same note (a copy of which accompanies the case). That the said note was affixed to this judgment. He refused to pay it at first, but finally compromised the matter with Allman. That he never executed but one note to Gallispie, and did not confess this latter judgment. That the note was in the possession of the defendant when he confessed the first judgment. Gallispie testified that Norton had never, at any time, executed to him any note except the one in question; that early in the year 1845, he placed the note in the hands of the defendant as a justice of the peace, and told him Norton would call and confess judgment on it; and about eighteen months thereafter he called on the defendant for the judgment, who delivered it to him, and the note was left with the defendant; that this judgment was handed to one Erwin, and finally passed to one Barnes, a constable, from whom the witness received the money in 1849.

The witness never authorized the defendant to sign any other judgment, or to take any other proceedings on the note than here stated. Erwin testified that Gallispie gave to him the first judgment about the time stated, and that he passed it to one McKinnice; and McKin-

nice testified that after receiving it from Erwin, and a regular renewal of the same, and execution, he gave it to Barnes to collect for the plaintiff therein, Gallispie. Barnes testified that he received the first judgment from McKinnice, and the latter judgment rendered on it. That in 1849 he received from the defendant in the judgment, Norton, the full amount of said judgment and costs, for which he gave his receipt at the time. Allman testified that he found the latter judgment with the Gallispie note folded in it among his other judgments and notes; that he had no knowledge of the manner in which he came by it, or from whom he received it; that he never had any dealings with defendant so far as he could recollect; and that he first made known to Norton the fact of his having said judgment about two years before the present trial. Two other witnesses testified that the signatures to both judgments and the body of the instruments were in the handwriting of the defendant.

(434) The defendant's counsel insisted that there was no evidence to show a corrupt intent in rendering the second judgment; but his Honor believing there was evidence showing such intent, charged the jury that if they believed the defendant rendered the second judgment without authority and without the knowledge of Norton, knowing at the time that he had previously rendered a judgment on the same note, and that he did this with the fraudulent and corrupt design to injure said Norton, he would be guilty. There was a verdict of guilty accordingly, and after an ineffectual motion for a new trial, the defendant moved in arrest of judgment, which being overruled, and judgment rendered on the verdict, he appealed to the Supreme Court.

N .W. Woodfin for defendant.
Attorney-General for the State.

NASH, C. J. Every indictment must contain such a statement of facts as to enable the court, before whom it is tried, to see that the law has been violated; and when an evil intent, accompanying an act, is necessary to constitute a crime, the intent must be alleged in the bill of indictment and proved. 6th East., 474. The defendant in this case is a justice of the peace, and he is prosecuted for corruption in the discharge of a judicial duty. The indictment charges that the defendant "unlawfully, wilfully, deceitfully, and corruptly, did give judgment as a justice of the peace as aforesaid, in favor of one Philip Gallispie for $22, with intent, etc., against one Baroh Norton, without the knowledge and consent of the said Gallispie and Baroh Norton, with intent to injure and defraud Baroh Norton." It then alleges and states the manner in

which this intent was carried out—to wit, "that he sold the said false judgment for a valuable consideration to one John Allman," etc. The charge, stripping it of its verbiage, is that the defendant gave the judgment complained of corruptly. It is not sufficient in an indictment against a justice of the peace for an act done in discharge of judicial duty, to allege that the act was corruptly done; it must state in what the corruption consisted. Accordingly, here the indictment charges that the judgment was given without the knowledge or consent of either Gallispie or Norton, and with an intent to defraud the (435) latter, and in pursuance of that intent, sold to one Allman. We are bound to presume, from the charge in the indictment, that there was a cause of action against the defendant, Norton, and that a warrant had been duly issued and served upon him; and that it was in the possession of this defendant, in his official character. Otherwise he could give no judgment legally. Does the giving the judgment in the absence of the parties and without their knowledge, in itself, constitute corruption? Certainly not; because it might have been in good faith, and if so, an indictment cannot be supported. It is the conception, coupled with the act, the law seeks to punish criminally. *Cunningham v. Dillard,* 20 N. C., 485. To further show the corrupt motive of the defendant, the indictment charges that he sold the judgment to one Allman for a valuable consideration. It is certainly a misdemeanor in office for a justice of the peace to sell or transfer a judgment, given by him or any other magistrate. The law makes the magistrate who gives a judgment its custodian. He is bound officially to keep in his possession both the warrant and judgment, and the evidence of the debt—in other words, all these papers are in the custody of the law. It was proper, therefore, that such charge or statement should appear upon the face of the indictment, and in fact, it constituted the gist of the offense said to be perpetrated by the defendant; and the State was bound to prove it. Upon the trial below Allman was introduced as a witness in behalf of the prosecution, and he swore that he found the judgment, with the note in it, among his other judgments and notes; that he had no knowledge how he came by them, or from whom he received them; and that he never had any dealings with the defendant so far as he could recollect. Allman being the only witness to prove this allegation of the indictment, there was in fact no evidence to go to the jury upon either allegation, and they ought to have been so instructed; for whether they believed Allman or not, the State was equally without evidence as to the alleged fact of the sale.

It is but justice to the defendant to state that the papers accompanying the case furnish some evidence that he intended no (436)

fraud in giving the second judgment, which is the one complained of. The two papers containing the warrant, judgment, and execution are exactly alike, one being a copy of the other, and both directed to the same officer, William Lambert.

His Honor below committed an error in submitting to the jury the question of a sale to Allman; and for this error the judgment must be reversed, and a *venire de novo* awarded.

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

Cited: S. v. Ferguson, 67 N. C., 222.

STATE v. GEORGE P. LANGFORD.

1. The Supreme Court, in cases at law, is strictly a Court of errors, and therefore on appeal, can notice only matters of law, appearing on the record proper, or a bill of exceptions or statement in the nature thereof.
2. On the trial of an indictment against a husband for the murder of his wife, it is proper on the part of the State, to ask their daughter, a witness for the prosecution, whether her father and mother did not "quarrel."
3. Where an exception shows or supposes a state of things inconsistent with the statement made up by the judge, it must be disregarded, and the statement taken to be true.
4. Where a record shows that the prisoner was brought to the bar in the custody of the sheriff, and then, setting out the drawing, etc., of the jury and their verdict, contains this entry, "The prisoner is remanded," the presence of the prisoner during the whole trial appears with judicial certainty.

(The cases of *S. v. Gallimore,* 29 N. C., 149; *S. v. Benton,* 19 N. C., 196; *Ring v. King,* 20 N. C., 301; *Bank v. Hunter,* 12 N. C., 100; *NcNeill v. Massey,* 10 N. C., 91; *S. v. Morris,* 10 N. C., 388, and *Paschall v. Williams,* 11 N. C., 292, cited and approved.)

THE prisoner was indicted and tried before his Honor, *Caldwell, J.,* at LINCOLNTON, on the last Spring Circuit, for the murder of his wife, alleged in the bill to have been committed by means of choking, suffocation, and strangling. The following is the case sent to this Court as made out by the presiding judge:

"On the trial it was alleged by the State that the parties had lived very unhappily together. On the part of the State the first witness introduced was a daughter of the prisoner and deceased. The solicitor

for the State asked her, the first question propounded, whether (437) her father and mother quarreled? And thereupon the counsel for the prisoner objected that the witness should be asked what they quarreled about; and the court remarked to the defendant's counsel, they could cross-examine as to the cause of quarrel; and the counsel for the prisoner excepted to the opinion of the court. In the course of the examination, the said witness was examined as to the causes of quarrel between the prisoner and his wife, and she stated, among other things, that her mother was jealous of her father; that unkind feelings had existed between them for thirteen years, insomuch that the parties did not eat at the same table. The counsel for the prisoner also excepted to the charge of the court to the jury, alleging that the court was moved to charge that if the deceased even came to her death by the hands of the prisoner, if it were by breaking her neck, he could not be convicted upon this indictment, which charged that deceased came to her death by suffocation and strangling. It was so argued to the jury by the prisoner's counsel, but the court was not moved so to charge. The court, however, did say to the jury, at the close of the charge, in express terms, that they must be satisfied that the deceased came to her death by suffocation and strangling, and that the prisoner was the perpetrator."

"The counsel also excepted to the charge, because, as they alleged, the testimony was only partially recited, and was misrecited—that the strong points against the prisoner were arrayed against him in an argumentative way, while those in his favor were omitted. The prisoner did not introduce a single witness, but relied upon the State's witnesses and their cross-examination, the examination of all which occupied the greater part of two days; and the court, in summing up did not state the testimony in detail, word for word, but did state the substance of what every witness swore, and presented to the jury the bearing of the testimony on the points to which the witnesses were called; and the court also stated the view insisted on by the State, and the view insisted on by the prisoner's counsel. No exceptions were taken during the charge or at the close of it, upon the subject-matter of this exception, or any other taken to the charge.

"In the next place, the counsel for the prisoner excepts to (438) the charge of the court, for that the testimony of Dr. Williams was misrecited. By defendant, it is alleged that Dr. Williams stated that he only attended upon a *post mortem* examination of the deceased, to ascertain whether the body was in a sound and healthy state at the time deceased came to her death; that he opened her body and found the internal organs healthy; that he opened her neck and found the

windpipe compressed, and externally the impressions of a thumb and three fingers of a left hand; that he concluded she had been choked to death; and did not think her neck was broken; that he did not examine the neck bone, and did not recollect that he examined the back of the neck. Dr. Williams did not state that he only went to the *post mortem* examination to examine whether the body was in a sound and healthy state or not. He stated that he was called there to examine the body—that he did examine it, and found the internal organs healthy—that he examined the neck bone in front, and, to enable him to do so, he cut away the jaw and the flesh, muscles, etc.; that he did not remove the flesh from the back of the neck—and he stated in direct terms that the neck of the deceased had not been broken, and he gave it as his decided opinion that deceased came to her death from suffocation and strangling; and stated at some length the signs of violence on her throat.

"In the next place, the prisoner's counsel excepts to the charge of the court, for that the court stated to the jury, that the prisoner said he feared that the marks upon the legs of the deceased would come in judgment against him, and that he so stated before her clothes were raised above her knees, and before he could have seen the marks, and in this connection, that the court omitted to state one fact as sworn to by Harman and others, that there were scratches below her knees, which they saw before the rails were removed or her clothes raised. On this part of the case, it was proved that when the deceased was found, the body was in a sitting posture in the corner of a fence; that a rail was lying on her shoulders and against her neck; that rails were lying across her legs; that the rails by pressing on her legs had made marks; that her clothes came down and covered one knee and covered the other leg below the knee; that above her knee and so up there were scratches and marks as though made by finger nails or the sharp end of a (439) piece of wood. None of the witnesses, as recollected by the court, said anything about scratches on her legs below the knees. They spoke of marks from the pressure of the rails on the flesh; and it was also in evidence on this part of the case, that shortly after the body was found, and shortly after the prisoner came up to where it was, he expressed to witness his fears that he would be charged about those scratches, saying he did not understand them, and he so expressed himself before the rails were taken off the legs of the deceased, before her clothes were raised, and before her body was touched after found as aforesaid. And on this part of the case, it was also in evidence that after the body was removed, it was examined with a view to ascertain whether the deceased had been ravished; and several of the witnesses testified

that nothing of the kind had taken place. The court stated to the jury, that according to the testimony, if believed, the prisoner did express his fears that the marks upon the thighs of the deceased would be brought up in judgment against him, and that he so expressed himself before the rails were removed from her legs or her clothes raised, and before the body had been touched, and recapitulated the substance of the testimony as herein stated.

"And the counsel for the prisoner also excepts to the charge of the court, for that the court charged that the prisoner had failed to call on any witness as to where he was between 8 and 9 o'clock of the morning of the murder, and that he should have done so; and that the court also charged that the prisoner had told his daughter that he was going to the machine pond to fix up some fencing that a mule had thrown down, and that the court then remarked to the jury in an interrogating and emphatic manner, do you believe that it would have taken the prisoner two hours to fix up a fence that a mule could kick down? That the witness, Susan Langford, had stated that the prisoner was going down to see about, not to fix it; that in this connection the court omitted to state that the prisoner returned home a quarter before 9 o'clock, and had stated to his daughter, the said Susan, that the hogs in the pasture near the machine pond should be turned out, as there was a great many acorns under the oak trees outside. The testimony on this point of the case was, that the prisoner left home on Sunday morning, 10 (440) September, 1852, between 6 and 7, as deposed by said Susan, and others of his children; that his wife, the deceased, had gone the evening before to see her married daughter, with orders from the prisoner to return home early on Sunday morning; that when he left home between 6 and 7 as aforesaid, he told his children that he was going to the machine pond to fix up a fence that had been thrown down by a mule, it being in an opposite direction from where the dead body was found; that he was absent until a quarter to 9 o'clock of said morning, and when he returned he stated to the witness, Susan, that he had been all the time engaged in fixing up the fence at the head of the machine pond that had been thrown down by the mule. He also stated that there were a great many acorns under the trees, and he wanted to turn the hogs out upon them. This is the testimony upon this part of the case, and the court stated it to the jury substantially, without interrogatory or emphasis; and the court did state to the jury what the prisoner said about the acorns and turning out the stock, and that he returned home a quarter to 9 o'clock. Upon this part of the case it also appeared that the tracks of the prisoner were found, shortly after the

murder, not far from the head of said machine pond, going in the direction of the spot where the dead body was found, and returning by a somewhat different route from said spot. That his tracks were so clearly identified, being so well known in the neighborhood, that his counsel admitted they were his tracks. The prisoner offered no evidence as to the fence bing thrown down or put up, or any signs that it had been broken or mended, nor did he offer any evidence that his tracks were found or seen by any one at the place to which he said he went to fix up the fence. And it also appeared in evidence, that on Saturday evening, the day before the murder was committed, the prisoner left home shortly after his wife, who, as before stated, had gone to see her married daughter; that on said evening he was at the house of a Mrs. Polly Gamble, with whom he had been living in a state of adultery for three years; that he told her his wife had gone to see her daughter that evening; that he had ordered her to come home early next morning, and that he would waylay the road and murder her, and if she did
(441) not see him by 8 o'clock next morning, she might know that it was done; and also said, 'Don't you see it in my countenance?' And further said, 'Now, Polly, death before acknowledgment.' And it also appeared that the prisoner on two or three occasions had incited the said Mrs. Gamble to kill his wife; that at one time he offered her fifty dollars; that he had also incited a Negroe in the neighborhood. And it also appeared that the body was found some fifty or a hundred yards from the road the deceased would pass in returning home; that she left her daughter about 8 o'clock Sunday morning, and that the screams of a female voice were heard in the direction where the body was found a little after 8 o'clock. The court told the jury that the tracks of the prisoner had been found going towards the spot where the dead body was found; that he had offered no evidence that the fence at the head of the pond had the appearance of having been broken or repaired; that he had offered no evidence that his tracks were found or seen at the place to which he said he went to mend or put up the fence, though they were well known in the neighborhood, according to the testimony. The court also told the jury that the prisoner had said that he had been at the fence repairing it that morning; that when his declarations were called for by the State the jury were bound to weigh what he said in his favor, but not bound to believe all he said. The court did not charge the jury that the prisoner ought to have called witnesses, or ought to have proved that he was at the fence, or that it had been broken or repaired; nor did the court charge that he ought to have proved that his tracks were seen or found at the said fence. The court only told the jury that the prisoner had offered no evidence touching these points."

The jury found a verdict of guilty; and after an ineffectual motion for a new trial, and judgment rendered on the verdict, the prisoner appealed to the Supreme Court.

Attorney-General for the State.
Guion for prisoner.

NASH, C. J. The court has examined, with great care, the bill of exceptions filed in this case, and also the record, properly so called, anxiously desirous to discharge their duty, both to the State and to the prisoner. Much matter not pertinent to the case was (442) thrown into the argument here. We listened to it patiently and respectfully, willing that the prisoner should have the benefit of every suggestion which could legitimately be taken into consideration by us.

This Court is strictly a court of error, and can only review matters of law. We cannot, therefore, in forming our judgment, go out of the record. To that we are strictly confined. In the case of *S. v. Godwin,* 27 N. C., 401, after a conviction of murder, a motion was made for a new trial upon the ground that the constable, who had charge of the jury, upon their retirement to make up their verdict, left the jury for an hour and a half; and affidavits were laid before the Superior Court and were sent to the Supreme Court. The latter tribunal refused to look into them, upon the ground they were confined to the record; and in the case of *S. v. Gallimore,* 29 N. C., 147, it is ruled that every appeal to this Court consists of the record of the case below and of the statement, which is in the nature of a bill of exceptions. It has, therefore, long been considered the law of this Court, that only those points which were ruled below and presented in the bill of exceptions can be heard here, unless they appear upon the record proper. A due attention to this rule would save much time, and show that we cannot be governed or influenced by the *ore tenus* incidents of the trial. In law, the exceptions of the party aggrieved must appear upon the bill of exceptions, because he is the objector. The statement in this case contains the exceptions of the prisoner. The first is, that the prosecuting officer asked a witness, the daughter of the prisoner, whether her father and mother did not quarrel? The counsel for the prisoner objected to the question, insisting that the witness should be asked what they quarreled about. The court observed that they could cross-examine as to the cause of the quarrel. In this there was no error in law. The question on the part of the State was to show the terms upon which the prisoner and his wife lived, and it was proper that the explanation of the cause of their quarreling should come from the prisoner—the object of a cross-examination being

to bring out everything calculated to explain that which is given
(443) in chief. But the counsel in his argument here insisted that the judge below misunderstood his meaning, and assumed that he intended to admit that they did quarrel, and that he only asked to know what they quarreled about; whereas he meant that the witness should state what was said by the parties, that the jury might decide whether what passed amounted to a quarrel or not. In giving the prisoner the benefit of this construction, we are of opinion there was no error, because the word quarrel is a common English word, with a meaning as well known as fighting, and it is certainly as competent for a witness to be asked if two men upon a particular occasion fought, and what they fought about.

The second exception that the court was required to instruct the jury that if the deceased did come to her death by the hands of the prisoner, if it were by breaking her neck, he could not be convicted upon this indictment, which charged she came to her death by suffocation or strangling. The case states that it was so argued by the counsel to the jury, but that the court was not asked so to charge, but did charge, that the jury must be satisfied beyond a reasonable doubt that the deceased came to her death by strangling or suffocation. The court could not charge as required, for the reason that there was no testimony that the neck was broken, and a judge is never bound to charge upon a hypothetical case. *S. v. Benton,* 19 N. C., 196.

The fourth exception agrees in substance with the statement of the case. It admits that Dr. Williams stated that from his examination he was of opinion the neck was not broken, and the case states that he swore positively it was not broken.

The third, fifth, and sixth exceptions stand upon the same ground, and if sustained, would certainly entitle the prisoner to a *venire de novo.* But they are all negatived by the statement of the case. The only difficulty presented to us as to these exceptions is the manner in which they are presented. Where exceptions are taken to the manner in which the court has put the case before the jury, either upon a point of law or upon the facts, the judge must necessarily be at liberty to state what he did rule, and how he did charge. Justice to all parties requires this; otherwise the case would always be at the mercy of the excepting
(444) party. The statement which accompanies every appeal in a case at law, is not strictly a bill of exceptions, but is considered in the nature of one, so much so that we are not at liberty to look out of it, or consider any exception not taken below and stated in it. *Ring v. King,* 20 N. C., 301; *Bank v. Hunter,* 12 N. C., 100; *S. v. Gallimore,* 29 N. C.,

147. In the case here the judge has made a statement of the evidence as it applied to each exception, and the manner in which he placed it before the jury. In each respect it essentially differs from the facts as alleged in the exceptions third, fifth, and sixth. By which shall we be governed? Certainly by the statement made by the presiding officer, whose duty it is to give a full and fair statement of all that relates to the exceptions, while it is the duty of the excepting counsel to except only to so much of the matter as will subserve his client's case. Taking this principle as our guide, the charge below was in no particular that we can discover, in violation of the duty as a judge, as required by the act of 1796—which requires him to state the facts in a full and correct manner. But in doing this he is not confined to the words of the witness, but may state all the attendant circumstances as they appeared in evidence, and show wherein they are contradictory, and how reconcilable, and draw the attention of the jury to the reasonable inferences that are to be drawn from them. It is only where the exhibition of the testimony is partial and unfair, that the party has a right to complain; and unless such clearly appears to the court, it cannot interfere. *McNeill v. Massey,* 10 N. C., 91; *S. v. Morris, ibid.,* 388; *Paschall v. Williams,* 11 N. C., 292.

We cannot perceive in the case any error committed by the presiding judge, calling upon the Court to disturb the verdict of the jury.

A motion is also submitted in arrest of judgment. The reason assigned is insufficient. From the record it appears that the prisoner was at the bar during the selection of the jury; for it shows at the commencement of the trial, that the prisoner being brought to the bar in the "custody of the sheriff," etc.; after this is the drawing of the jury; and the jury in their verdict say that they find the prisoner at the bar, etc., and after it is this entry: "The prisoner is thereupon remanded to jail." It thus manifestly appears that the prisoner was present (445) at the bar when the jury was drawn, and during the whole time of the trial. The entry, after he was brought into court—"it is therefore ordered that he be again committed to his custody"—that is, the custody of the sheriff, cannot alter the record as to his actual presence. Such an order was right and proper, to make the sheriff responsible for his person, so as to prevent an escape, and supersede the necessity for a fresh order to that effect every time the court should take a recess, which often occurs on the trial of a capital case. It is true the prisoner was in the custody of the law, and the court had a right to so order as that he should be forthcoming to hear his verdict and the judgment.

We are unable, upon examination of the whole case, to perceive any error in the charge of the judge to the jury; and the reason in arrest

of judgment is not valid. And this opinion will be certified to the Superior Court of Lincoln that they may proceed according to law.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Kyle, 47 N. C., 443; *S. v. Chavis,* 80 N. C., 357; *Bank v. Graham,* 82 N..C., 489; *S. v. Leitch, ibid.,* 539; *S. v. Randall,* 88 N. C., 611; *Phipps v. Pierce,* 94 N. C., 515.

R. B. SMITH, TRUSTEE, ETC., v. JESSE CHITWOOD.

1. A. made an assignment by deed of certain slaves to B., upon trust to sell and pay certain debts, and by the deed A. was to retain possession, but not to sell without the consent of B., and upon payment of all the debts by A. the assignment to be void. A. gave notice to B. of his intention to sell one of the slaves, to which B. declared neither his consent nor disagreement, and afterwards A. sold in the absence of B.: *Held,* that the sale passed no title as against B., though it might have been otherwise had B. been present.

2. After the sale, an endorsement was entered upon the deed of the payment of the last debt secured thereby: *Held,* that this was no evidence to support the sale.

(The cases of *Lentz v. Chambers,* 27 N. C., 587; *West v. Tilghman,* 31 N. C., 163, and *Bird v. Benton,* 13 N. C., 179, cited and approved.)

THIS was an action of *trover* for three slaves—plea, not guilty—tried before his Honor, *Ellis, J.,* at Spring Term, 1853, of LINCOLN Superior Court of Law, to which county the case had been removed from Cleveland County.

(446) Upon the trial, the plaintiff exhibited in evidence a deed of trust executed 12 March, 1849, for the slaves in controversy, from one Weathers, for the purpose of securing certain debts therein named; and he then proved a conversion by defendant on 15 February.

The defendant exhibited in evidence, and claimed title under a bill of sale from said Weathers to himself for the said slaves, dated 4 June, 1849, acknowledging as a consideration the sum of $700. And his Honor being of opinion that this bill of sale did not convey title to the defendant, as against that of the plaintiff derived from said deed of trust, the defendant then proposed to show a sale and actual delivery of the slaves by Weathers as the agent of the plaintiff. For which purpose said Weathers was called as a witness, and testified that after he had agreed with the defendant for the purchase money of the slaves, he told him

that he could not convey title to them without the consent of the plaintiff, and for the purpose of obtaining his consent, they went together to the plaintiff; that he spoke to the plaintiff on the subject of selling the slaves to the defendant, when he, the plaintiff, said that he (Weathers) might do as he pleased about the matter, and that he (the plaintiff) "had accepted the deed of trust," or that "it was of no account"—the witness was not positive which expression he used. The witness and the defendant then went off, when the bill of sale referred to was executed.

The defendant contended that the clause in the deed of trust—to wit, "that it is agreed between the parties, etc., that the said Weathers shall keep the said Negroes in his possession, but in no wise trade and sell any of them, without the consent of the said R. B. Smith," constituted Weathers the agent of Smith to sell the slaves; and further, that the plaintiff knew the design of Weathers, and did not object; and that this was such an approval as to make the act his own. And the defendant contended further, that as Weathers had sold other slaves conveyed by his said deed of trust to one Ellis (which fact was proved), this was evidence of a general agency to sell under the trust; and certain payments which were endorsed on the trust, were also relied upon as evidence for the same purpose.

It was also argued by the defendant's counsel, that according (447) to the terms of the deed of trust—to wit, "That if at any time the said Weathers shall pay off and discharge the aforesaid debts, etc., then this indenture shall be void." Weathers, after paying off the debts specified therein, had a right to sell in his own name, and the endorsement of a payment by the plaintiff as trustee to Weathers, of a sum of money received from a sale of property mentioned therein (and the same appeared on the trust), was evidence of such discharge of all the debts named in the trust, as Weathers was to be last paid. Upon this point the plaintiff offered evidence—two of the original notes of Weathers named in the trust canceled—of a part of debts having been paid by one of the sureties therein.

His Honor charged the jury that the bill of sale offered by the defendant from Weathers passed no title to the slaves; for, without expressing any opinion as to the effect of that part of the deed of trust, which rendered the instrument void, when Weathers should pay all the debts mentioned in it, to transfer a title to him without a reconveyance, it was sufficient for the purposes of this case, to say that there was no evidence of a payment of all the debts mentioned in the deed of trust by Weathers—that the endorsement on the deed, of a payment to Weathers by the trustee, was no such evidence.

His Honor further charged there was no evidence of a sale and actual delivery by Weathers as the agent of the plaintiff. And that the conversation testified to by Weathers, furnished no inference of any such agency conferred by the plaintiff on Weathers to sell the slaves for him, but rather amounted to a disclaimer of title. That there was no clause in the deed of trust appointing Weathers an agent to sell; but the one relied on forbid his doing so, unless the plaintiff should consent thereto—leaving the plaintiff at liberty to appoint him or not as he might think proper. That the fact of Weathers having sold other Negroes, named in the trust, to another person, was no evidence of an agency to sell the slaves in controversy; and though the plaintiff knew that Weathers intended to sell to the defendant, and knew of the sale when it was made, and did not object, yet his knowledge would not have the effect to divest him of the title to the slaves; and that upon the evidence the plaintiff was entitled to recover.

There was a verdict accordingly for the plaintiff, and from the judgment rendered thereon, the defendant appealed to the Su-
(448) preme Court.

Craige, Bynum and Shipp for defendant.
Guion and Lander for plaintiff.

BATTLE, J. We approve of the decision of his Honor in the court below upon all the questions raised by the defendant's objections to the plaintiff's recovery; and very much for the reasons assigned by him. The only means by which the defendant could resist the title acquired by the plaintiff under the deed in trust, were to show that Weathers, the grantor in that deed, had acted as the plaintiff's agent in making the sale to him, or that the legal title to the slaves in question had revested in the said grantor, by the payment of all the debts mentioned in the deed in trust at the time the sale was made. None of the circumstances relied upon by the defendant to show the agency of Weathers, were sufficient to be left to the jury for that purpose, and the entry endorsed by the plaintiff on the deed in trust adverted to, for the purpose of proving that the debts therein had been fully paid, was made after the sale by Weathers to the defendant. It did not, therefore, of itself, afford any evidence that the said debts had, at the time of such sale, been fully paid off and discharged; and the other circumstances of the case rather repelled than supported such an inference. But it is contended by the defendant's counsel, that the plaintiff knew of the design of Weathers to sell the slaves and did not object, and that this was such an approval as to make the act his own; and for this proposi-

tion the case of *Lentz v. Chambers,* 27 N. C., 587, is cited and relied upon. Had not the plaintiff expressly declined to give Weathers authority to sell the slaves, and had he been present at the sale, there might be much force in the argument; but we cannot infer an agency from the circumstances deposed to by Weathers, and the absence of the plaintiff at the time of the sale prevents the applicability of the principle established by the cases of *Bird v. Benton,* 13 N. C., 179, and *Lentz v. Chambers,* above referred to. Besides this, the case of *West v. Tilghman,* 31 N. C., 163, is a direct authority to show that his title to the slaves was not divested by what occurred between him and (449) Weathers.

PER CURIAM. Judgment affirmed.

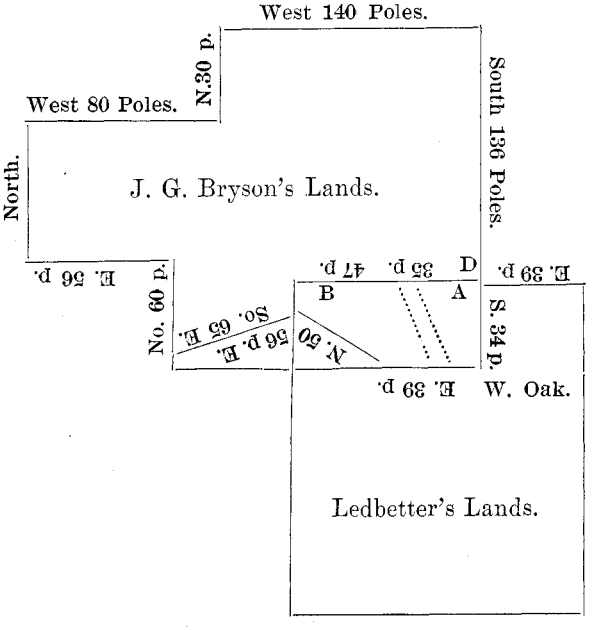
JOSEPH Y. BRYSON v. CHARLES SLAGLE ET AL.

1. If two grants lap, and while neither grantee is settled upon the lapped part, the junior enter upon the lappage and clear, enclose, and cultivate a field upon it for seven years, he will acquire a title to it. But if, at the time he encloses his field, it be with the permission of the elder grantee, upon his agreeing to set his fence back whenever it appears by a survey that it is over the line of the older grant, his possession of the field will not prevent the elder grantee, or one claiming under him, from having his lines run according to the calls of his grant.

2. An agreement made by a junior grantee, in relation to his possession of a part of his land covered by an older grant, with the widow of the elder grantee who continued in possession after the death of her husband, is evidence that she had an interest in the land, and had, therefore, the right to make the agreement; and at all events, the junior grantee, and those claiming under him, are estopped from calling that matter in question.

THIS was a proceeding by the plaintiff to have his land processioned according to the provisions of the 91st chapter of the Revised Statutes, as follows: At March Term, 1849, of the County Court of Henderson, George Orr, the processioner of that county, made a report, wherein he stated, that at the instance of the plaintiff he proceeded on 13 January to procession the lands of the plaintiff (it appearing that due notice had been given to the adjoining proprietors), as follows—to wit: Beginning at a post oak on the side of a hill on the west side of French Broad River, as called for in the grant bearing date 6 December, 1799, No. 740, and granted to James Bryson and John Davis, and runs west eighty poles to a stake (the old corner black oak not found), thence north thirty poles to a stake, thence west one hundred and forty poles to a

stake, thence south, intending to run to a white oak as called for in the grant, and claimed by said plaintiff as being the corner, one hundred and thirty-six poles. At the point D, Charles Slagle, the guardian of the minor heirs of Isaac Ledbetter, deceased, forbade him to
(450) proceed further in running and marking the said line, claiming under a grant from the State to Samuel King, bearing date 17 December, 1799, and by possession with known boundaries under said title, of the part marked A, and by actual possession under the same title, of the part marked B, all which is shown in the annexed plat, whereupon he desisted. The report further set forth that the plaintiff claimed title under the grant above mentioned to James Bryson and John Davis, a conveyance from said Bryson and Davis to William Bryson, Sr., and under the will of the said William Bryson, and regular conveyances from his devisees, and under known and visible boundaries from the date of the grant, to the part designated by the letter A; and to the part designated by the letter B by virtue of an agreement with Isaac Ledbetter, the ancestor of the infant defendants, that if the fence was not on the line, it should be removed at any time to the proper place. Annexed to the report as a part thereof, was the following plat:



This report was confirmed by the court, and thereupon five (451) persons were appointed commissioners to settle the said disputed line or lines, who, together with the said processioner, made their reports to the court at the following June Term, in which they set forth in full what they had done, of which it is only necessary to state that they decided that the plaintiff was entitled to have his south line run to the white oak and his other lines so run as to include the part marked A, but to exclude the part marked B, which was within the enclosed field of the defendants. The testimony of one witness only was set out in the report, which was, that at the time Ledbetter enclosed the field, it was agreed between him and Elizabeth Bryson (who was the widow of William Bryson, and who continued in possession of the land until her death), that he might put his fence there, with the understanding that whenever it appeared by a survey that the fence was over the Bryson line, he would set it back. To these reports the defendants excepted; first, because they were not sufficiently certain and specific; secondly, because the commissioners rejected and refused to hear and consider competent evidence material for the defendants to establish their title to the *locus in quo;* thirdly, because they disregarded a continued adverse possession of more than seven years of the *locus in quo* by the defendants, under color of title, and under known and visible boundaries.

The exceptions were all overruled, and a judgment given for the plaintiff, from which the defendants appealed to the Superior Court, in which, at Spring Term, 1852, before his Honor, *Manly, J.,* the judgment of the county court was affirmed, and the defendants appealed to the Supreme Court.

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

PEARSON, J. Had the defendants a right to stop the plaintiff, when, in running the south line, they came to the line of the grant under which the defendants claimed? Or the plaintiff a right to cross that line and go on to the white oak, which was a corner of the grant under which he claimed? The plaintiff's grant is dated on the 6th, and the defendants' on 17 December, 1799. The grants lap. The defend- ants insist that their title to the lappage has ripened and become (452) the better title, by reason of an adverse possession for more than seven years; and they prove that their ancestor, Isaac Ledbetter, enclosed a field within the lappage, and cultivated it for more than seven years,

and insist that the possession of this part gave possession of the whole, inasmuch as the plaintiff had no possession wthin the lappage.

The position of the defendants is sustained by a well settled rule of law, and the only question is, does the proof offered by the plaintiff prevent the application of this rule, by showing that Ledbetter had no possession outside of his fence, or that his possession was not adverse? A witness called by the plaintiff testified that at the time Ledbetter enclosed the field, it was agreed between him and Elizabeth Bryson, the widow of William Bryson, under whom the plaintiff claims, that he might put his fence there, with the understanding that whenever it appeared by a survey that the fence was over the Bryson line, he would set it back.

The field enclosed by the fence was in the southeast part of the Bryson grant; the white oak is the southwest corner. So, admitting that the defendants had acquired the title by adverse possession under color, of the land enclosed by the fence, it remains a question whether they had acquired title to all the lands within the lappage, outside of the fence. The commissioners were of opinion that the defendants had acquired title to the land enclosed by the fence, and after going to the white oak, ran the plaintiff's line so as to exclude the field. With this decision the defendants have no right to complain; for it might have been urged with much force on the part of the plaintiff, that the possession of the field was not adverse, by reason of the agreement in regard to the location of the fence, which screened the ancestor of the defendants from any liability to an action, either of trespass or ejectment, until the Bryson line was ascertained by a survey, and put him on the footing of one who enters and holds by the consent of the owner, and is termed a tenant at will, as distinguished from a trespasser, not liable to an action until the relation is put an end to, and consequently not at liberty to set up his possession as adverse. It would be monstrous if one (453) who enters by my consent could, after being permitted to continue in possession more than seven years, turn upon me, and say, "I have now the better title by reason of my possession, and will disregard the agreement under which you permitted me to take possession."

As the commissioners have allowed the defendants the benefit of the possession, so as to give them the field, and the plaintiff does not complain, yet we will not put our decision upon that point, because obviously, the plaintiff had a right to run to the white oak, either upon the ground that the possession of the field was not adverse by reason of the agreement, or upon the ground that by the terms of the agreement, Ledbetter, the ancestor of the defendants, disclaimed all

right to any land outside of his fence, the legal effect of the agreement being, Ledbetter sets up no claim outside of his fence, but thinks that he has a right to put the fence at a certain place; to which Elizabeth Bryson consents, with the express understanding that Ledbetter would set back his fence, whenever it appears by a survey that it is over the line of the Bryson grant.

We are of opinion with the judge below, that supposing the defendants to have acquired title to the land enclosed by the fence, the agreement certainly rebutted the idea of any possession by construction outside of the fence. Consequently the plaintiff had a right to cross the line of the defendant's grant, and go to the white oak, and the defendants had no right to stop the processioner at the line of their grant—which is the matter in controversy:

Our difficulty in coming to a conclusion, grew out of the fact that it did not appear affirmatively that Elizabeth Bryson, who made the agreement in reference to the fence, had an estate in the land, by which she was authorized to make the agreement. She was the widow of William Bryson, who was the owner of the land, and she continued to live upon it for many years after his death, and up to the time of her own death. This, we think, is affirmative evidence of the fact that she had a life estate, either under her husband's will or as dower. But we are of opinion that Ledbetter, the defendants' ancestor, having made the agreement with her as the owner of the estate, or at all events as one having a right to act for the owner, those claiming under Ledbetter are estopped, and cannot even call that matter in question. (454)

The exception that the commissioners rejected competent evidence offered by the defendants is not presented, because it is not stated what the evidence was. So this Court has no means of deciding upon its competency or materiality. The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

CYNTHIA KIRBY v. HAWKINS KIRBY ET AL.

Upon the trial of an issue of *devisavit vel non*, an attesting witness is competent to prove the propounded, paper, as a will of real estate, although he is named executor, and has not renounced. An acknowledgment made by the supposed testator in 1848, of the paper-writing, dated in 1830, as his will, is competent evidence to prove the execution thereof, as a will of personalty.

(The case of *Tucker v. Tucker*, 27 N. C., 161, cited and approved.)

THIS was an issue of *devisavit vel non,* upon a paper-writing dated 27 February, 1830, purporting to be the last will of John Kirby, and to convey both real and personal estate, and attested by James Kirby, Nancy Stanly, and Thomas Isbell, as subscribing witnesses.

Upon the trial, before *Bailey, J.,* at CALDWELL, at Fall Term, 1852, the plaintiff introduced James Kirby and Nancy Stanly as subscribing witnesses, who testified to the execution of the paper-writing by the deceased, and that they made their marks as witnesses in his presence; and that Thomas Isbell wrote his name as a subscribing witness at the same time, in the presence of the deceased. The plaintiff then proposed to introduce as a witness Thomas Isbell, who is named as one of the executors in said paper-writing, and this testimony was objected to by the defendants. The plaintiff insisted that he was a good witness as to the devise of realty; but the witness not having renounced his trust as executor, his Honor rejected the evidence. The plaintiff then (455) introduced one Abram Sudderth, and told him to look at the paper-writing propounded, and also to look at another paper which purported to be the last will of the deceased, and bearing date 20 October, 1849. The witness stated that he had seen the first paper some fourteen years after its date; that he was requested by the deceased to examine it, and tell him if it was a good will; that he told him he thought it was, and the deceased then said it was his will; that the deceased talked with him about it several times, and on 20 October, 1849, requested him to write the last mentioned paper (a copy of which accompanies the case), that his wife, Mrs. Sudderth, and one Theodore Sudderth, witnessed the same; that he was requested by deceased to copy the old paper and make the same dispositions of the property, real and personal, in the new one, except to add the names of Negroes born after the date of the first paper; and to substitute himself as one of the executors in the last paper; that he wrote the paper as he was thus told, and after the death of the deceased, he found both papers among his valuable papers.

The defendants objected that the paper offered was not the last will of the deceased, and introduced several witnesses for the purpose of showing that one of the subscribing witnesses, James Kirby, was a man of bad moral character, and that he and the other witness, Nancy Stanly, had sworn falsely and corruptly upon the trial, and that the paper could not be proven by the testimony of Abram Sudderth, who heard the testator say, in 1844, that it was his will. The defendants called Mrs. Sudderth and Theodore Sudderth, who testified to the due execution of the paper dated in October, 1849, as his last will and testament. And the defendants further objected that the paper propounded could not

be proven by witnesses who only made a mark or cross—that they must subscribe their names, which meant write their names.

His Honor charged the jury that the paper-writing was offered as a will of personal property, as well as a devise of land; that the law now required that every will made since the act of 1840-'41, whether of personal or real estate, should be attested by two witnesses; that a will of personalty must be executed with the same formalities as are required in the execution of wills of real estate; that if they believed the witnesses James Kirby and Nancy Stanly, although they only (456) made their mark, they should find that the paper-writing was the last will of John Kirby, but if they did not believe either, they should find against it; and if they believed one of them and not the other, they should find the paper to be a will as to the personal, but not as to the real estate; that it was competent for the plaintiff to show by one witness that it was the will of the deceased as to personal property, whether he was a subscribing witness or not, but if they did not believe either James Kirby or Nancy Stanly, then the declaration made by the deceased to Abram Sudderth in 1844 would be insufficient. And his Honor was of opinion that the last paper might be admitted to probate; that is, if the husband renounced as executor, and released all his interest in the will, his wife and Theodore Sudderth, if believed, would be competent to prove the will both as to personalty and realty. But his Honor thought, and so charged, that as the wills were the same in the disposition of the property, and no change except as to one executor, that the last will did not of itself in law revoke the first.

The jury found for the defendants, and there was a rule for a new trial on account of the rejection of proper testimony and for misdirection; which rule having been discharged and judgment rendered on the verdict, the plaintiff appealed to the Supreme Court.

Bynum, Guion, T. R. Caldwell and Mitchell for plaintiff.
Avery and Gaither for defendants.

BATTLE, J. The case of *Tucker v. Tucker,* 27 N. C., 161, decides that the executor to a will which contains devises of real estate, as well as bequests of personalty, may, if he has no interest in the devise of the real estate, attest the paper-writing as a subscribing witness, and may prove it as a will of realty. As between the devisee and heir he can have no interest in the event of issue of *devisavit vel non,* when the scrip is propounded as a will of lands; and he is competent to testify upon the trial of such issue, though he may not have renounced his executorship.

The witness, Thomas Isbell, was, then, competent for the purpose
(457) for which he was offered, of proving the paper-writing of 1830 as a will of realty, and the court erred in rejecting him as such.

We think the court erred also in instructing the jury that the testimony of Abram Sudderth was insufficient to prove that paper-writing as a will of personalty. It is true that the declarations of the testator, made to him in 1849, did not amount to a republication of the will at that time; but it certainly was pertinent, and if believed, strong testimony to show that the testator had made and published it as his testament at the time it bore date. Our conclusion then is, that the plaintiff is entitled to have another trial of the issue which was found against her.

This conclusion renders it unnecessary for us to notice the questions relating to the paper-writing alleged to have been executed by the testator as his will in the year 1849. Those questions are not very explicitly stated in the bill of exceptions, and we are not sure that we understand them. Indeed, it is suggested that a mistake was inadvertently committed, in stating that his Honor "thought, and so charged, that as the wills were the same in the disposition of the property, and no change except as to one executor, the last will did not of itself in law revoke the first." This, however, is not now a matter of much consequence, as upon the next trial the last paper will no doubt be again offered, and its legal operation and effect upon the one now in contest be properly explained and declared by the court.

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

DOE EX DEM. URIAH GLENN v. JOHN PETERS.

A term for years in land, is liable to levy and sale by a constable under a justice's execution.

(The cases of *Wall v. Hinson*, 23 N. C., 276, and *Burnett v. Thompson*, 35 N. C., 379, cited and approved.)

EJECTMENT for a tract of land situated in Rowan, and tried before *Manly, J.*, at Fall Term, 1851, upon the following statement of facts as of a case agreed:

(458) "Both parties claimed title under one Williams, who held a leasehold interest for ten years to the premises in dispute. The lessor of the plaintiff claimed title by virtue of a justice's judgment and a constable's levy, which are returned to the county court where the judgment of the justice was affirmed, and an order of sale issued to

the sheriff. At the sheriff's sale the lessor of the plaintiff became the purchaser, and received a deed from the sheriff. The defendant claimed under a justice's judgment, a constable's levy and sale prior in point of time to the sale to the lessor of the plaintiff, but these proceedings were not returned to court. The only point intended to be raised in the case is, whether a constable can sell a leasehold interest in land (for ten years) without an order of court; and should his Honor be of opinion that he can, then a verdict of not guilty is to be entered for the defendant; if, on the other hand, he be of opinion that he cannot, then a verdict is to be entered for the lessor of the plaintiff."

And his Honor, upon consideration of the case, being of opinion that a levy and sale of such leasehold interest was good without the returning of the levy to court and obtaining an order therefrom to sell, instructed the jury accordingly, who returned a verdict for the defendant, and from the judgment rendered thereon the lessor of the plaintiff appealed to the Supreme Court.

Boyden for plaintiff.
Craige for defendant.

PEARSON, J. A term for years is a chattel real, constitutes a part of the personal estate, passes by succession to the executor or administrator, and is assets for the payment of debts. Termors are not considered the owners of the soil, or entitled to the privileges or distinction of freeholders, but have merely the right to occupy and take the profits. A term for years does not come within the operation of the English statute of enrollment, or of our statute concerning registration. *Wall v. Hinson,* 22 N. C., 276; *Burnett v. Thompson,* 35 N. C., 379.

A term for years was liable at common law to be levied on and sold under a *fieri facias* as a chattel. Bingham on Judgments, 3 Law Library, 46; *Taylor v. Cole,* 3 T. R., 292.

So, the only question is, has the common law been changed, (459) and is there any statute requiring terms for years, to be returned to court and the sale to be made by the sheriffs under a *venditioni exponas,* as in the case of land. The only statute relied on is statute 1777—making lands and tenements liable for the payment of debts, under a *fieri facias.*

We can see no principle of construction by which a statute, the professed object of which is to subject a new species of property to sale under execution, can incidentally be made to have the effect of elevating a chattel into land, so as to make it necessary to sell the former, with all the solemnity required in regard to the latter. The statute contains no

intimation of an intention to make this change. It is true that a term for years is an estate in land, and it is capable of supporting a vested remainder; but still it is a chattel, liable to be sold under the common law *fieri facias,* and treated in every respect as a part of the personal estate.

It was said in the argument, that much injustice might sometimes be done, if a long and valuable lease for years could be sold by a constable, with as little ceremony as a cow or horse. The suggestion addressed to the lawmakers would have much force in it, and, as is said in *Burnett v. Thompson,* in reference to registration, it may be well in this way to call the attention of the Legislature to the subject. But we are confined to the question of construction, and have nothing to do with the matter of expediency.

There is no difference between a term of ten years and a term of one year, except that the statute of frauds requires the former to be in writing; consequently a construction of the act of 1777, which would require long terms to be sold as land, would also require short terms to be sold in the same way; and it would frequently happen that the lease would expire before there could be a levy returned to court, notice to the defendant, *venditioni exponas,* forty days' advertisement, sale by the high sheriff, sheriff's deed, a writ of possession after an action of ejectment. The mode of selling land, therefore, is wholly inapplicable to many leases. As no distinction can be made, the construction contended for is inadmissible.

This is the first time that the question of selling leases has been presented. It is to be accounted for, no doubt, by the fact that the system of leasing has not been generally adopted in this State. The few (460) leases that have been made, have been, generally, for one, two, or three years, at rack rent, that is, a rent equal to the annual value of the land; and as the purchaser, as assignee, is bound for the rent, and performance of covenants, it has seldom been thought worth while to offer them for sale under execution.

Long leases at a nominal rent, when a fine or price is paid at their creation, with the privilege of removal, are almost unknown.

This state of things furnishes a strong argument against the construction of the act of 1777, contended for, because it shows that the subject has not heretofore been deemed of any great importance; and there was no sufficient reason or mischief to call for a change of the common law, by which leases were to be elevated and put on a footing with freehold estates. Consequently, they have been permitted to continue to occupy the place of chattels, and to be transferred and applied to the payment of debts, like any other part of the personal estate.

The matter of construction is put beyond all question by the fact, that terms for years are excluded from the operation of the word "land," used in two other important statutes. We have seen that terms for years need not be registered. The act of 1715, Revised Statutes, chapter 37, provides that "no conveyance or bill of sale for land shall be good, etc., unless proven and registered within two years after the date of the deed."

The statute 32 H. VIII permits lands and tenements to be devised. It has never been suggested that terms for years came within the operation of this statute; on the contrary, they have been permitted to pass, as at common law, to the executor, and by his assent, after the payment of debts, to pass to the legatee like other personal estate.

PER CURIAM. Judgment affirmed.

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(461)

DOE EX DEM. BROWN'S HEIRS v. POTTER'S HEIRS.

1. If one be in possession of lands under known and visible boundaries, and at any time before the presumption of a grant has arisen under the statute, another procure a patent for such lands, or a part thereof, the patent interrupts the presumption, and the subsequent possession, though with the former, of the length of time required by the statute, will not raise the presumption of a grant for the land covered by the patent.

2. Where two grants lap upon each other, so that both cover in part the same land, the possession of the lappage is in law in him who has the better title, unless there be by the party claiming under the other, an actual possession, or *possessio pedis*, thereon.

(The cases of *Carson v. Mills & Burnett*, 18 N. C., 546, and *Smith v. Bryan*, *ante*, 180, cited and approved.)

THIS was an action of ejectment, tried before his Honor, *Caldwell, J.*, at ASHE Superior Court of law, at Spring Term, 1853.

The lessors of the plaintiff offered in evidence a grant to their ancestor for fifty acres of land, issued in 1834, and proved that the defendants were in possession of about one acre of it, and had been so in possession for six or eight years. The defendants claimed title under one John Potter to the tract adjoining, and which covered nearly the whole of the Brown grant, and they proved that the said John, and those claiming under him, had been in the continuous possession, within known and visible boundaries, for upwards of thirty years, and claiming the same up to said boundaries. And it also appeared that the marked lines and corners (with the exception of two lines) of said tract of land, when blocked, counted upwards of forty acres; and that the said John

Potter lived on said land before the year 1815, claiming the said boundaries as circumscribing the same, and that he continued to live thereon many years. That when he left, it was occupied by those claiming under him, down to the present defendants. It further appeared, that the mother and sister of the said John lived on said land, and had a small improvement thereon, between two and three years, and the said improvement was then abandoned. That at one time the said John lived in a house on the north end of the tract, and at another there was a house occupied on another part thereof (not within the boundaries of the Brown grant); and that fields on different parts of the same had been cultivated and worn out. Brown, the grantee, died in 1835,
(462) leaving the lessors of the plaintiff his heirs, who were all under twenty-one years of age when this ejectment was brought.

His Honor, the presiding judge, charged the jury, that if they believed from the evidence that the defendants and those under whom they claimed, had been in the possession of the tract of land in question for thirty years, claiming and cultivating it as deposed to, and claiming the boundaries around it, they ought to presume a grant for the same; and that the taking out of the grant by the ancestor of the lessors of the plaintiff—there being no actual possession taken under it—would not prevent the operation of the presumption.

There was a verdict for the defendants, and a new trial having been moved for and refused, and judgment rendered on the verdict, the lessors of the plaintiff appealed to the Supreme Court.

Mitchell for plaintiff.
Boyden and Craige for defendants.

NASH, C. J. There is error in the charge. A grant issued in 1834 to the father of the lessors of the plaintiff, which includes the *locus in quo*. The defendants claim that their father had been in possession of a tract of land under known and visible boundaries, and which also included the *locus in quo*, for upwards of thirty years, and insisted that the law presumed a grant to have issued. John Potter and his heirs lived on the upper part of the tract claimed by him, but *possessio pedis* upon any part of the lappage, until within about eight years before the action was brought; but this did not ripen their title, as the lessors of the plaintiff were under age. The action was brought in 1846, and the trial was had at Spring Term, 1853, of Ashe Superior Court. The plaintiffs have had no other possession under their grant, than that which the law draws to the title. Giving to the possession of the defendants the benefit of a thirty years' continuance, up to Spring Term, 1853, it will have

commenced in 1823; and in 1834, when Brown took out his grant, not more than eleven years had elapsed, and to 1846, eighteen; and giving to the possession of Potter the full benefit of the time designated by the marks on the line trees, say forty years, before the com- (463) mencement of the action, then but twenty-one years, or at most but twenty-eight, had elapsed when the grant under which the lessors of the plaintiff claim title issued, and that possession was not accompanied by any color of title, and the State had a right to issue the grant she did. The court, however, instructed the jury, that if the defendants had been in possession thirty years, before the commencement of this suit, claiming and cultivating it as deposed to, and claiming to the boundaries, they ought to presume a grant for the same; that the taking out the grant by Brown—there being no actual possession—would not prevent the operation of the presumption. In the latter part of the proposition, there is error; for if it be true that the issuing of the grant to Brown, in 1834, did not stop the running of the presumption, as to the land not covered by it, still it certainly must have that effect as to all the land that was covered by it; for at that time the title to the land was in the State, no sufficient length of possession having elapsed to raise the presumption of a grant; and the case, in that respect, presented, at the trial, the ordinary one of the lappage of two grants, neither party being in the actual possession of the lappage. The title to the *locus in quo,* at the time the action was brought, was in the lessors of the plaintiff, and drew to it the possession; which possession was not disturbed, until the taking of the possession of the small portion mentioned in the case. His Honor, therefore, erred in stating to the jury that the grant to Brown did not interrupt the presumption of a grant to Potter. It did interrupt it, as to all the land covered by it.

It is urged by the defendants' counsel, that the possession of Potter, in the north part of the tract, drew with it the possession of all the land within the boundaries to which he claimed. This would be true, if he had the legal title at the time, and there was no actual adverse possession in another person. Up to 1834, he had acquired no title, and after that time, his possession ripened his title only to that portion of the land within his boundaries, not covered by the grant to Brown. This doctrine is fully recognized and established by the case of *Carson v. Mills & Burnett,* 18 N. C., 546. It is there determined, if a part of a tract of land be covered by two titles, and he who has the better title be in possession of another part of it, he has in law the possession of the whole, unless the person holding under the other title has (464) the actual possession of the interference; but if the holder of the better title is not in the actual possession of any part of the land, and

the owner of the other title is in possession outside the interference, the latter has not in law possession of the interference. In *Smith v. Bryan, ante,* 180, the same doctrine is declared. At the time, then, when Brown obtained his grant the possession of Potter and those claiming under him, had not ripened into a valid title; and although the latter were in possession of the land within the boundaries to which they claimed, yet as they had no *possessio pedis* in the lappage, the better title being in the lessors of the plaintiff, the legal possession of the *locus in quo* was in them; and the defendants having within a few years before the bringing of the action, taken possession within the lappage, the lessors of the plaintiff were entitled to a verdict, and the jury ought to have been so instructed.

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

Cited: Kitchen v. Wilson, 80 N. C., 197; *Hamilton v. Icard,* 114 N. C., 539.

DOE EX DEM. THOMAS MORRIS v. JONATHAN STATON.

1. The 51st section of Revised Statutes, chapter 31, is a remedial enactment, and shall receive a liberal construction.
2. Therefore, when A. leased to B., and B. put C. in possession as tenant at will, it was held that C. was, within the true meaning of that section, the tenant of A., and in an action of ejectment by A., bound to give the bond thereby required, before being permitted to become a defendant to the action.

THIS was an action of ejectment. The lessor of the plaintiff, at the appearance term, on the return of the declaration, filed an affidavit, under the act of Assembly, that "the defendant entered into the possession of the premises in dispute, under his tenant, as tenant at will, and that before the commencement of this suit, possession had been demanded from the defendant, who refused to surrender it"; and he ob-
(465) jected to the defendant's being allowed to plead until he had given bond with surety according to the act, to pay the lessor all such costs and damages as he should recover.

His Honor, *Bailey, J.,* before whom the case was tried, at RUTHERFORD, at Fall Term, 1852, being of opinion that the statute did not apply to such case, allowed the defendant to plead by giving the usual bail bond; from which order the lessors of the plaintiff appealed to the Supreme Court.

MORRIS *v.* STATON.

G. W. Baxter for plaintiff.
Shipp for defendant.

NASH, C. J. The declaration was served upon the tenant in possession with the customary notice from the plaintiff. On the return of the writ, the lessor of the plaintiff filed an affidavit, under the act of 1836 (chapter 31, section 51), in which he stated, that the tenant in possession entered into possession of "the premises, under his tenant, as a tenant at will." The affidavit sets forth a demand and refusal to surrender. Objection was then made to Staton's being allowed to defend the suit, until he had entered into bond with security, "to pay the lessor all such costs and damages as shall be recovered in said suit."—as required by the act of 1836. We think his Honor, the presiding judge, erred in overruling the objection.

The act of 1836 is a remedial statute, and ought to receive from the courts such a construction as will remedy the existing evil. This case is not strictly within the words of the act, but it is certainly within its meaning. One of the objects of the statute is to save a landlord the necessity of going to a trial, when his tenant holds over vexatiously; and when the trouble and expense of an ejectment may be very disproportionate to the value of the possession sued for. See the opinion of *Chief Justice Abbot,* in the case of *Phillips v. Roe,* 5 B. & A., 768, in commenting on the statute of 1 Geo., 4, chapter 87. In an ordinary action of ejectment, a tenant upon whom notice has been served, has a right to be made defendant, upon giving bond and security for the costs; and the lessor of the plaintiff is driven to his action of trespass to recover his *mesne* profits. The object of the act of 1836 is twofold: the one as stated in the case of *Phillips,* above referred to— (466) the other to supersede the necessity of two actions. By the letter of the law, its operation is confined to the case of a landlord and his immediate tenant. In this view it would but partially meet the mischief intended to be remedied. A tenant, for instance, with the intention to escape its application to himself, would have nothing to do but to put another person in possession, before the expiration of his lease. Not being himself in possession, no action of ejectment could be brought against him; and his lessee not being the tenant of the landlord, the latter would be driven to his action, unaided by the act of 1836; and after a recovery of the possession, would have to resort to another action for his *mesne* profits, and find but a man of straw to deal with. It may be said this is the result of every case, where an insolvent person takes possession of land belonging to another. That is true; but the relation of landlord and tenant has ever been regarded by the law as one of

peculiar interest—as contributing to the prosperity of agriculture, the great civil interest in every State. Thus the common law, to secure to the landlord a regular return and remuneration for the tenant's occupation, provided the summary remedy by distress, to which was subject any personal property found on the land; at the same time it exempted from its operation the beasts of the plough, and all implements employed in husbandry by the tenant—the object of the law being to protect both in their relations to each other. The action of distress for rent never has been in force in this State, and the statute of 1836 gives the landlord a remedy against his tenant holding over, which, if not so expeditious, is more just and reasonable. Nor has the tenant any right to complain. He makes his contract with a knowledge of the law, and every attempt to evade it, by putting another person in possession of the premises, as his lessee, is a fraud upon the law, and should be discountenanced. If we should sanction, by our opinion, the construction of the act contended for by the defendant, we should strip the act of its efficacy, by adhering to the letter. This opinion will be certified to the Superior Court of Rutherford County.

PER CURIAM. Judgment reversed.

(467)

DEN EX DEM. GEORGE BLACK ET AL. v. ELIZABETH LINDSAY.

1. Though the possession of one tenant in common is, in law, the possession of all, yet if one have sole possession for twenty years, without any acknowledgment on his part of title in his cotenants, and without any demand or claim on their parts to rent, profits, or possession, they being under no disability; the law raises a presumption that such sole possession is rightful, and will protect it.

2. Therefore, where under such circumstances, the tenants who had been out of possession brought ejectment, it was held, that their entry was tolled, and they could not recover.

(The cases of *Thomas and wife v. Garvan*, 15 N. C., 223, and *Cloud v. Webb, ibid.*, 290, cited and approved.)

THIS was an action of ejectment, tried before his Honor, *Dick, J.*, at the Special Term of BUNCOMBE Superior Court of Law, in June, 1853. Upon the trial, it appeared in evidence that the land described in the plaintiff's declaration was in the year 1800 in the possession of one Thomas, who continued his possession until the year 1805, when one John Duncan entered, and continued in possession thereof, claiming the

premises as his own until his death in 1809, and leaving a will in which he devised the same in fee to Jane Duncan, his wife, who continued to occupy and live upon the land, claiming it as her own, from the death of her said husband until her death in 1826 or 1827. The lessors of the plaintiff, Mrs. Black and Mrs. Addington, and the defendant, are the children and heirs-at-law of the said John and Jane Duncan; and soon after the death of the former the defendant, by and with the consent of her mother, entered on the land, and was residing thereon at the time of bringing this ejectment. There was no evidence that the defendant recognized any person as landlord of the said premises, after the death of her mother.

Upon this state of facts the defendant's counsel insisted that the plaintiff's lessors could not recover; but his Honor instructed the jury, that if the defendant entered into the possession of the land during the life of her mother by her permission, and as her tenant, and continued thereon as such until her death in 1826 or 1827, and without abandoning the same still continued thereon until this ejectment was brought, her possession, until an actual or presumed ouster of her cotenants, would enure to the benefit of all of the heirs-at-law of her mother, and there being more than thirty years continued possession of the land, the law presumed a grant to the heirs-at-law of Jane Duncan. And his Honor further charged the jury, that in the absence of any claim (468) against the defendant for rent or demand by the lessors to be let into possession with her, or any actual ouster of them by the defendant, who, from the first supposed state of facts would be presumed to hold the possession for all the tenants in common, the law would presume an ouster of the lessors of plaintiff at the expiration of twenty years from the death of Mrs. Duncan, her mother, when her possession would become adverse to them—since which time there had not sufficient time elapsed to bar the recovery of the plaintiff's lessors.

Under which instructions the jury found for the lessors of the plaintiff, and judgment having been rendered on the verdict, the defendant appealed to the Supreme Court.

J. W. and N. W. Woodfin for defendant.
J. Baxter, contra.

NASH, C. J. The possession of one tenant in common is, in law, the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to

such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. *Thomas et ux. v. Garvan,* 15 N. C., 223, and *Cloud v. Webb, ibid.,* 290. Possession, then, for twenty years under the above circumstances, will amount to a disseisin or ouster of the cotenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession—as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession. It was said at the bar, that the law cannot give a right and take it away at the same moment. This objection is more specious than sound. A tenant in common out of possession, can, at any time, take possession with him in sole possession; or, if (469) the latter will not permit him so to do, and keeps him out, it will be a disseisin, and give a right of action. But if he suffer the sole possession to run on without entry or demand for twenty years, the law says to him, by your negligence you have lost your right of entry, without which you cannot support an action of ejectment. At any time, then, during the twenty years, the tenant out of possession had a right, and might have enforced it by an action. The title of the lessors of the plaintiff, and of the defendant united in Mrs. Jane Duncan, their mother, who died in 1826 or 1827. Before that time, the defendant went into sole possession of the premises in question under her who was seized in fee, and continued in such possession up to the time this action was brought, without any demand of payment or rent by the lessors of the plaintiff, or to be let into possession. The action was brough in October, 1849. The defendant's sole possession, from the death of her mother, had then continued twenty-three years; the lessors of the plaintiff had lost their right of entry, and could not maintain their action; and the jury ought to have been so instructed. The act of 1715 has no application to the case.

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

Cited: Covington v. Stewart, 77 N. C., 150; *Pope v. Mathis,* 83 N. C., 169; *Page v. Branch,* 97 N. C., 100; *Dobbins v. Dobbins,* 141 N. C., 216; *Rhea v. Craig, ibid.,* 611; *Lester v. Harward,* 173 N. C., 84; *Battle v. Mercer,* 187 N. C., 448; *Crews v. Crews,* 192 N. C., 686.

FIDELIO SLUDER v. WILLIAM BARNES.

After judgment in the county court, the defendant obtained a *certiorari*, on the ground that the county court had no jurisdiction of the cause. On the return of the writ, the defendant pleaded to the jurisdiction of the Superior Court, because the county court had no jurisdiction: *Held*, that the plea was bad; the proper course being to apply for leave to put in a plea to the jurisdiction of the county court.

THE defendant, Barnes, had issued an attachment against the plaintiff, Sluder, for the sum of one hundred dollars, due by bond at interest, and the same was made returnable before a justice of the peace; but was by the justice returned to the County Court of Buncombe County; and after due advertisement, according to the order of said court, a judgment by default final was entered up against the plaintiff, (470) according to the specialty sued on, and condemning a tract of land which had been levied on to the satisfaction of defendant's debt; and an order of sale was accordingly issued thereupon.

At Fall Term, 1849, of the Superior Court of Buncombe, Sluder filed his petition, praying for a writ of false judgment and *certiorari*, to have the proceedings in said county court brought up to the Superior Court, and also a writ of *supersedeas* issued to the sheriff, commanding him to desist from selling the land under the *venditioni exponas* in his hands, and alleging, among other things, divers irrgularities in the said proceedings by attachment—that the same was improperly and corruptly procured to be issued—that he owed the defendant nothing—and that the county court had no jurisdiction of the cause, the same not having been made returnable thereto. The writs prayed for were granted by his Honor, *Ellis, J.*, then presiding, and upon the record being sent up to the Superior Court, at a subsequent term, his Honor, *Battle, J.*, on motion of the defendant, directed the case to be placed upon the trial docket; and at Spring Term, 1853, the defendant filed the following plea in abatement:

"And the said William Barnes, in his own proper person, comes and defends, etc., and says that this court has no jurisdiction of this suit, because the County Court of Pleas and Quarter Sessions, of said county, to which the same was returned, had no jurisdiction as to the cause in this form, nor pleas of debt in any form, and because the process was not returnable to said county court, and that the said county court ought not to have assumed jurisdiction of said cause, by entering the judgment in that court, and this court should not take or exercise jurisdiction in this case, because the process is not returnable to this honorable

court, or otherwise properly constituted a suit in this court: Wherefore, he prays that the said suit or writ of the said Fidelio Sluder may be quashed and abated," etc.

To the foregoing plea the plaintiff demurred, and his Honor, *Dick, J.*, before whom the same was argued, at the Special Term of said court, in June last, gave judgment sustaining the demurrer and requiring the defendant to answer over; from which judgment the defend-
(471) ant appealed.

N. W. Woodfin and Bynum for defendant.
J. W. Woodfin and J. Baxter, contra.

PEARSON, J. It is not a little singular, that after this case was taken to the Superior Court, upon the petition of the defendant, and was transferred to the trial docket, upon his motion, he should then file a plea to the jurisdiction of the Superior Court, and insist that "that court should not take or exercise jurisdiction." It may be well for him that the plea cannot be sustained; for possibly in that event, the proper order would have been a *procedendo* to the county court.

But the plea cannot be sustained; and the judgment of *respondeat ouster* must be affirmed. The defendant will thus have an opportunity of pleading in chief, and putting the case upon its merits.

Instead of a plea to the jurisdiction of the Superior Court, the defendant ought to have put in a plea to the jurisdiction of the county court; whereas, he merely refers to the want of jurisdiction in the latter, by way of argument, to sustain the plea to the jurisdiction of the former.

By way of explanation: A *certiorari* answers the purpose of an appeal from the county to the Superior Court. Suppose the defendant appears to an action in the county court, and pleads to the jurisdiction, and there is an appeal to the Superior Court—upon what does the trial take place in that court? So, here, although the defendant did not appear to the action, and for that reason could not appeal, and had to bring the case up by *certiorari*, yet it stands in the Superior Court, as if it had been brought up by appeal, and the proper course was for the defendant, when he got into that court, to move for leave to put in his pleas, on the ground that he had no opportunity of doing so in the county court. His motion would have been allowed in the same way as, after an appeal, defendants are allowed to add or to change pleas. The issue would then have been upon the want of jurisdiction in the county court, and the defendant would not have been involved in the dilemma
(472) suggested above.

PER CURIAM. Judgment affirmed.

WILLIAM PLUMMER v. CLAUDIUS B. WHEELER.

A., against whom a justice had given judgment in favor of B., prayed an appeal to the Superior Court, but the justice being of opinion that an appeal would not lie to that court, entered the appeal to the county court; afterwards, at the instance of B., and without the knowledge of A., he changed the entry so as to make the appeal returnable to the Superior Court, and returned the proceedings accordingly. In the Superior Court the appeal was dismissed, and afterwards, on the application of A. for a *recordari* to bring up the case to that court, *it was held*, that A. had, under the act of 1850, chapter 1, a right to an appeal to either court; that the Superior Court ought not to have dismissed it, and that A. was entitled to the writ, notwithstanding the judgment of dismission.

(The case of *Bond v. McNider*, 25 N. C., 440, cited and approved.)

THE defendant had obtained a writ of *recordari* to have brought up to the Superior Court of Rowan the record of a warrant and judgment against him, rendered by a justice of the peace; and this was an application by him, on the return of the writ, at Fall Term, 1852, of said court, to have the cause placed upon the docket.

It appeared that the plaintiff obtained a judgment before a justice of the peace against the defendant, who prayed an appeal to the Superior Court. The justice who gave the judgment, thinking the defendant could not, by law, appeal to the Superior Court, endorsed upon the papers an appeal to the county court. This endorsement was afterwards altered by the magistrate at the instance of the defendant, and in the absence of the plaintiff, and the appeal entered to the Superior Court. The papers were thereupon returned to the Superior Court, and on motion of the plaintiff, the appeal was there dismissed. The writ of *recordari* was then obtained.

His Honor, *Ellis, J.*, before whom the motion was made, or- (473)
dered the cause to be transferred to the trial docket; from which order the plaintiff appealed to the Supreme Court.

Craige for plaintiff.
Boyden for defendant.

BATTLE, J. The statute of 1850, chapter 1, enacts that "if either of the parties to a trial before a justice of the peace shall be dissatisfied with the judgment given thereon he may appeal, either to the next term of the Court of Pleas and Quarter Sessions of his county, or to the next term of the Superior Court, at the option of the party: provided, sufficient security be given, as now prescribed by law." The plaintiff

in the *recordari* had, by virtue of the statute, an undoubted right to appeal to the Superior Court of Law from the judgment given against him by the justice on 16 August, 1851. Of this right the justice had no authority to deprive him; but he did, under a mistake of the law, attempt to deprive him of it, by entering upon the judgment an appeal to the county court. Whether, upon discovering his mistake, the justice had the power, in the absence and without the consent of the other party, to change the direction of the appeal, by striking out the word "county," and inserting the word "Superior," so as to carry the appeal to the latter court, it is unnecessary to decide. The act of the justice, certainly, we think, vacated the appeal to the county court; because, after the word "county" was erased, there was nothing in the papers to show that the county court could entertain it; and had the magistrate returned it there, the county court would have been compelled to dismiss it. After the erasure, the appeal was either properly to the Superior Court, or it was made void by the act of the magistrate. If it were properly to the Superior Court, then that court ought not to have dismissed it; but, having done so, the appellant was entitled to the writ of *recordari,* as the only remedy then open to him; and in such case, it is not pretended, as indeed it could not be, that the judgment or dismission would be a bar to this remedy. *Bond v. McNider,* 25 N. C., 440. If the act of the justice in erasing the word "county," and inserting "Superior," vacated the appeal altogether, it proceeded from a mistake of that officer, and could not prejudice the appellant; for, though done at his
(474) instance, he certainly did not intend to withdraw, or in any way deprive himself of his appeal. In such case, we think, he would also be entitled to the benefit of a writ of *recordari;* so that, whether upon the return of the appeal to the Superior Court, that court rightfully or wrongfully dismissed it, the appellant became entitled to this writ, in order that he might avail himself of the right which the law gave him, of having his case tried and determined in the Superior Court. There was no error in the order appealed from, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Rollins v. Henry, 84 N. C., 570; *Grimes v. Andrews,* 170 N. C., 520.

WILLIAM J. PLUMMER v. N. S. A. CHAFFIN.

BATTLE, J. The facts in this case are, in all respects, similar to those in *Plummer v. Wheeler,* and it must receive the same determination. The order from which the appeal is taken, must be affirmed, and a certificate to that effect transmitted to the court below, as the law directs.

PER CURIAM. Judgment accordingly.

(475)

MARY PINNER v. NANCY PINNER ET AL., HEIRS-AT-LAW OF WILLIAM PINNER.

On a petition for dower, the heir-at-law produced a deed from the husband, dated thirteen years before his intermarriage with the petitioner, and by a subscribing witness proved a delivery of the deed a short time before the husband's death, and his declaration that the deed had been delivered many years before: *Held,* that this declaration was no evidence of any previous delivery, as against the petitioner.

(The case of *Bynum v. Bynum,* 33 N. C., 632, cited and approved.)

THIS was a petition for dower, filed against the defendants, heirs-at-law of one William Pinner, in which the petitioner alleges that she is the widow of said William, and that he died intestate and seized of certain lands in Buncombe, of which she is entitled to her dower.

The defendants deny that the petitioner was ever lawfully married to the deceased, and further deny that the deceased died seized and possessed of the lands in question; and the defendant, Nancy, claims to hold the same in her absolute right, and as a *bona fide* purchaser for valuable consideration, and she exhibits with her answer, a deed to her from the deceased, her father, bearing date 1827, some twelve or thirteen years before the alleged marriage of the petitioner, and covering the premises in question.

Upon the issues of fact joined, the case was tried before his Honor, *Dick, J.,* at BUNCOMBE, on the last Spring Circuit. Of the many witnesses examined before the jury (and whose testimony relating to the occupation and assumed ownership of the land, the reporter deems it unnecessary to state here), one Lanning was called by the defendant, who stated that about a month before the death of William Pinner, he sent for the witness, who found him at the house occupied by Nancy and Jane (defendants); that either Jane or Nancy produced the said deed to the latter, before referred to, and the deceased then stated, that

he had made a deed to Nancy, for the land, many years ago; that some of the witnesses were dead, and some of them removed out of the State, and the balance of them were near relations, and that he wished to acknowledge the deed before the witness, which he did, and the witness having attested it, handed it back to Nancy or Jane.

(476) His Honor charged the jury, that if they believed from the testimony that the deed was executed and delivered by William Pinner to his daughter, Nancy, at the time it bears date, without any fraudulent intent, the title passed to Nancy, and the defendants were entitled to a verdict; but if they believed that the deed had not been delivered to Nancy until the time Lanning witnessed it, it would only take effect from the time of delivery, and in that view of the case it was proper for them to inquire whether the delivery was not made with an intent to defraud the petitioner of her dower—in which event, they should find for the plaintiff.

The jury found a verdict for the defendants, and from the judgment rendered thereon, the plaintiff appealed to the Supreme Court.

N. W. Woodfin, Bynum and M. Erwin for petitioner.
J. W. Woodfin, contra.

NASH, C. J. Upon the trial of the issues in this case, it became important to ascertain the time when the deed under which Nancy Pinner claimed the premises was delivered. The plaintiff alleged that it was made and delivered after her intermarriage with William, the father of the defendant, a short time before his death, and therefore was void as to her, as made to defraud her of her right of dower. On the part of the defendant, it was insisted that the deed was made and delivered some years before the marriage. The marriage of William Pinner with the plaintiff was solemnized in 1840 or 1841, and the deed from him to the defendant bore date in 1827. None of the subscribing witnesses were called on the trial, and the plaintiff called one Lanning, who testified that about a month before his death, William Pinner sent for him, and upon going to the house where he lived, he found there with him, the defendant and her sister, when the deed was produced; and that Pinner stated that some of the witnesses were dead, some removed, and some were family relations, and he wished to acknowledge the deed before him, which he did, and he attested it; and that Pinner at the same time declared that he had made the deed to Nancy for the land many

(477) years ago. The court instructed the jury, that if they believed from the evidence the deed was executed and delivered to Nancy, at the time it bore date, without any fraudulent intent, the title passed

to Nancy. In this instruction there is error. The instruction was in general principle correct, but it did not bring to the notice of the jury the point in actual dispute at the time. The only testimony upon which the defendant, Nancy, relied to show that the deed was delivered at the time it bore date, was the declaration of William Pinner, which was incompetent on that point. The declarations of Pinner before Lanning, as to his acknowledgment of the deed, were competent, as showing a present delivery, for it was part of the *res gestæ* then taking place, but it was no evidence of what had taken place at any time before. The plaintiff did not claim under him, but under the law, and he was endeavoring to deprive her of her rights. So far, then, the declarations of Pinner were incompetent to give the deed an operation before his then acknowledgment. The error in this case consisted in his Honor's omitting in his charge to draw the attention of the jury to that portion of the testimony of Lanning which was competent and to that which was incompetent; and the charge was well calculated to mislead them, and from it they were justified in considering all the declarations of Pinner as evidence in the case. To this difference, it is true, the attention of the court was not drawn by the counsel, and in general it is not error in law to refrain from charging on a point as to which instructions are not asked; yet when the judge does charge, care must be taken that it is not in itself erroneous, or calculated to mislead the jury (*Bynum v. Bynum,* 33 N. C., 632); or as to a point upon which there was no evidence. Such care was not taken here. In fact there was no evidence as against the plaintiff of any delivery, but that witnessed by Lanning; and so the jury ought to have been instructed.

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

Cited: Love v. McClure, 99 N. C., 297; *Brown v. Morisey,* 126 N. C., 773.

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MARTIN ICEHOUR v. THOMAS MARTIN.

Two subpœnas are served upon a witness, requiring his attendance on the same day at different places distant from each other. He is not bound to obey the writ which may have been first served, but may make his election between them.

THIS was a *scire facias* against the defendant to enforce the forfeiture imposed by the act of Assembly for his nonattendance as a witness. It appeared that the defendant was summoned as a witness for the plaintiff

in a suit pending in the Superior Court of Mecklenburg County; and he was also summoned to attend as a witness in a suit pending in the County Court of Surry County, and which was for trial the same week with that of the Superior Court of Mecklenburg. The subpœna from Mecklenburg was first served on the defendant. He attended as a witness under subpœna at Surry, and could not attend both courts the same week. The only question was, did his attendance at Surry excuse his nonattendance at Mecklenburg?

His Honor, *Bailey, J.*, before whom the case was tried, at MECKLENBURG, at Spring Term, 1852, was of opinion with the defendant, and having given judgment accordingly, the plaintiff appealed to the Supreme Court.

Wilson for plaintiff.
Boyden for defendant.

PEARSON, J. The defendant was under subpœna to attend as a witness at two places on the same day. To do so was impossible. He attended at one of the places, and shows this as cause for not attending at the other.

The plaintiff says, "My subpœna was first served, and, therefore, I had the best claim to your attendance." The question is, does the fact that the subpœna in the plaintiff's case was first served, give him a paramount right, so as to entitle him to enforce the penalty of forty dollars given by statute, notwithstanding the cause shown?

The statute under which the plaintiff claims the penalty, makes no provision for such a case, and it remains to be seen whether there is any principle of the common law which sustains the plaintiff's
(479) right to enforce the penalty. The plaintiff says, by the principle of the common law, if A. agrees for a consideration to sell to B. a lot of cotton, and afterwards sells it to C., B. may maintain an action against A. for a breach of contract. Granted; but the principle does not apply to our case for two reasons: First, the defendant made no contract to attend as a witness. The obligation to attend was imposed on him by his sovereign, and this is not a question of damages for breach of contract, but one of forfeiture and penalty for not obeying a command of the State. Second, suppose the legal effect of the service of the subpœna to be a *quasi* contract—the common law gives no penalty for the breach of a contract, and the remedy at common law is not by *scire facias,* for a penalty, but an action on the case for damages.

There being no statute, we are not able to see any principle by which the defendant was obliged to obey the subpœna first served, when by doing

so, he must necessarily disobey a subpœna afterwards served. We therefore can see no reason why a witness in such a case may not make his election at which place to attend. Suppose one under subpœna in a civil suit happens to witness a capital felony, and is bound by recognizance to attend at the trial—is he obliged to obey the subpœna or forfeit his recognizance?

The inconvenience presented by this case has so seldom occurred, that no provision for it has been made by the Legislature. It is the power of this Court to declare what the law is, but it has no power to make law.

In the case of the Governor, Secretary of State, judges, solicitors for the State, etc., whose duty requires them to be at particular places at particular times, provision is made for taking their testimony by deposition. The position of these officers before the statute was similar to that of a witness subpœnaed to attend at two places on the same day. It is true the former were under a general obligation to be at certain places at certain times, whereas the latter was only under a special obligation; but the principle is the same. The Legislature has provided for the one case because of the general inconvenience; whether it be necessary to provide for a case like the present, which may not happen again in five years, is a matter for the consideration of the General (480) Assembly. All we can do is to say, the case has not been provided for by statute, and the common law does not give the plaintiff a right to enforce the penalty.

PER CURIAM. Judgment affirmed.

JOHN M. LEDFORD v. LEWIS VANDYKE ET AL.

1. A guardian settled with his ward after his arrival at full age, and gave him a bond with surety for the sum found due. The ward afterwards erased the name of the surety from the bond, and for this erasure, the bond, in a trial against the guardian, was held to be void. The ward then sued on the guardian bond, to recover the amount for which the first named bond had been taken, and also on account of a mistake in the settlement.

2. *Quere*, as to whether he was entitled to recover on account of the mistake?—but held, that clearly he could not recover on the first ground.

(The case of *S. v. Cordon*, 30 N. C., 179, cited and approved.)

THIS was an action of debt, brought on the relation of the plaintiff, upon the bond of the defendant, as his guardian. Pleas, accord and satisfaction and payment.

Upon the trial, at MACON, at Fall Term, 1852, before his Honor, *Bailey, J.*, the case was: The plaintiff, of whom the defendant, Vandyke, had been guardian, some three months after his arrival at full age, came to a settlement with said Vandyke; which settlement was made by a mutual friend of the parties, upon their joint admissions and the returns of the guardian, when it was ascertained and agreed by them, that the said Vandyke owed the plaintiff $304.83, and for this amount gave to the plaintiff his single bill with one Gray as surety, payable one day after the date of the same, but under a parol agreement that in consideration of the security given, the plaintiff should wait for the money twelve months. The plaintiff, subsequently thereto, for a consideration of two dollars and fifty cents received from Gray, erased his name from the note, and thereupon brought suit on the same against Vandyke, and by reason of said erasement, failed to recover.

(481) The present suit being referred for an account, it was ascertained and by the parties admitted, that in the settlement made between the plaintiff and Vandyke, above mentioned, there was a mistake against the plaintiff, in the computation of interest, of $5.15, and which was not embraced in his said single bill to the plaintiff. Gray, the surety, was solvent, but Vandyke, at the time said suit was brought on his note, was insolvent, and yet remains so.

His Honor charged the jury that if the single bill of Vandyke, with Gray as surety, was given by them, and received by the plaintiff in full satisfaction of what was then due by Vandyke as guardian, the plaintiff could not recover the amount thereof, but was entitled only to the sum of $5.15, with interest; under which instruction the jury returned a verdict for the plaintiff, for the sum of $.....; and judgment having been rendered on the verdict, and the plaintiff being dissatisfied therewith, appealed to the Supreme Court.

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

PEARSON, J. That the plaintiff could not recover the $304.83, the amount of damages for which a note with security had been received in satisfaction, is settled. *S. v. Cordon,* 30 N. C., 179. Whether he had a right to recover the $5.15, is a question not now presented.

PER CURIAM. Judgment affirmed.

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MEMORANDUM.

Owing to the death of the Reporter immediately after the adjournment of the Supreme Court at Morganton, and before the cases of that, and the June Term previous, were fully prepared for the press, the undersigned, with the consent and advice of those members of the Court with whom he could immediately communicate, continued the publication. In this labor he has been kindly assisted by several gentlemen of the profession, to whom he takes this occasion to return the thanks of the family of the late Reporter, as well as his own.

The appearance of these numbers has, on account of the reason before alluded to, together with some unavoidable delay in the printing, been retarded, though it is hoped with no real inconvenience to the profession.

QUENTIN BUSBEE.

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