NORTH CAROLINA REPORTS

VOLUME 46

This book is an exact photo-reproduction of the volume known as "1 Jones Law" that was published in 1854 and denominated Volume 46 of North Carolina Reports by order of the Supreme Court referred to in preface, 63 N. C. III-IV (1869), and memorandum, 108 N. C. 805 (1891).

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1973

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

REPORTS

OF

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH-CAROLINA,

FROM DECEMBER TERM, 1853, TO AUGUST TERM, 1854,
BOTH INCLUSIVE.

BY HAMILTON C. JONES.

RALEIGH:
SEATON GALES, PRINTER AND PUBLISHER.
1854.

A TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. FREDERICK NASH, Chief Justice.
" RICHMOND M. PEARSON,
" WILLIAM H. BATTLE.

JUDGES OF THE SUPERIOR COURTS.

Hon. Thos. Settle,
" John M. Dick,
" John L. Bailey,
Hon. Mathias E. Manly,
" David F. Caldwell,
" John W. Ellis,
Hon. Romulus M. Saunders.

ATTORNEY GENERAL

MAT. W. RANSOM, Esquire.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1853.

STATE *vs.* JAMES AND DAVID McINTIRE.

Where it appears from the record, and the pardon itself, that the Governor was misinformed, and granted the pardon under the impression that there was a subsisting judgment, when, in fact, there was no judgment, the pardon is void. An appeal to the Supreme Court annuls the judgment, and if that Court decides in favor of the State, it is the duty of the Judge, presiding at the next term, to pass sentence,—this is a new judgment unconnected with that appealed from.

When upon the face of the pardon it appears that the Governor supposed the defendant had been fined as well as imprisoned, and the imprisonment is remitted, provided the fine be first paid, this mistake as to fact renders the pardon void.

The Governor may pardon a portion of the punishment, after it is fixed by judgment. Whether he has power to pardon a portion of the supposed punishment (where it is discretionary) before it is fixed by judgment: Quere?

Though the pardoning power is general, if the punishment be at the discretion of the presiding Judge, it is presumed that the pardoning power will only be exercised in extreme cases.

[STATE v. BOYETT, 10 Ired. 336. HOIT v. ROPER, 6 Ired. Eq. 649, cited and approved.]

THIS was an indictment for an ASSAULT AND BATTERY, tried before SETTLE, Judge, at the Fall Term, 1853, of the New-Hanover Superior Court.

The defendants were convicted and sentenced to imprisonment, but no fine was imposed. An appeal to the Supreme Court was prayed and granted. The Supreme Court held there was error below, but in the interval, and before the decision in the Supreme Court, an application was made to the Governor, and a pardon granted, which is as follows:

"David S. Reid, Governor of the State of North Carolina, to all who shall see these presents, Greeting:

"Whereas, James McIntire and David M. McIntire were, at the Spring Term, 1853, of the Superior Court of New Hanover county, convicted on an indictment for an assault and battery on the body of one William E. Bunting, and James McIntire was sentenced to three months' imprisonment, and David M. McIntire to one months' imprisonment, by said Court; and whereas, it has been made to appear to me, that the case presents a fit subject for the exercise of executive clemency: Now, therefore, in consideration of the premises, and for divers good causes to me thereunto moving, by virtue of the power and authority in me vested by the Constitution of this State, *I do by these presents pardon the said James McIntire and the said David M. McIntire, the offence whereof they stand convicted, remitting so much of said judgment as extends to imprisonment, upon the express condition that they shall first pay the fines and all the costs incident to said judgment,* upon the express stipulation and condition that this pardon shall not extend to any other offence of which either of them may have been guilty.

"Given under my hand, and attested with the Great Seal of the State of North Carolina. Done at the Executive Office, in the city of Raleigh, this, May the 7th, A. D. 1853, and the 77th year of our Independence.

"DAVID S. REID.

"*By the Governor:*

"SAM'L F. ADAMS, Jr., Private Secretary."

The case having been sent back to the Superior Court, the Solicitor for the State prayed judgment upon the defendants, and moved that they be fined. The presiding Judge was of opinion that he had no power to impose a fine, but stated that he would impose a fine, if he had the power to do so, and thereupon discharged the defendants upon the payment of costs, from which judgment the Solicitor for the State appealed.

Attorney General, for the State.
Person, for the defendants.

PEARSON, J. His Honor was of opinion, that, by reason of the pardon, he had no power to impose a fine. We do not concur, and are of opinion that the pardon was inoperative. His Honor should have proceeded to judgment, and had power to imprison as well as fine, one or both at his discretion, the pardon to the contrary notwithstanding.

The pardon recites the conviction and sentence of imprisonment, and then proceeds to "pardon the offence of which they stand convicted, remitting so much of *said judgment* as extends to imprisonment, upon the express condition that they shall *first* pay the *fines* and costs incident to *said judgment*," &c.

This is not a pardon of the offence, but of a portion of the punishment imposed by the judgment, for the general words first used are qualified, and the intention is declared to be only to remit the imprisonment, on condition that the fine and costs are paid.

"The king pardoneth a felony whereof A. stands attainted, and in truth he is not attainted; this is *expressio falsi*, and maketh the pardon void." 3 Coke's Institutes, 238.

"If a man be attainted of felony by judgment, and afterwards the king pardoneth generally the felony, it is nought worth, and the reason thereof is not because by the attain-

der the felony is extinct, but because the king is not truly informed (as he ought to be) of the true state of the case; for peradventure, if he had been informed of the truth, and of all the proceedings, he would not have pardoned." 6 Rep. 13, a.

"It seems to be laid down as a general rule in many books, that whenever it may be reasonably intended, that the king, when he granted a pardon, was not fully apprised, both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is void, as being gained by imposition upon the king. And this is very agreeable to the reason of the law, which seems to have entrusted the king with this high prerogative, upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man cannot possibly make so perfect as to suit every particular case." Hawkins, b. 2, ch. 37, sec. 8.

"It is a general rule that, whenever it may reasonably be presumed the king is deceived, the pardon is void; therefore, any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole, for the king was misinformed." 4 Black. Com. 398.

We think it may reasonably be intended that the Governor was not fully informed of the proceedings in the case of these defendants. We can look only at the record, of which a copy of the pardon is a part, and can take notice of nothing *aliunde*.

There are three grounds, either of which is sufficient to vitiate the pardon: 1st. The judgment is referred to in the pardon as subsisting, whereas, in fact, it was annulled by an appeal to the Supreme Court, and if that Court should decide there was error, and direct a *venire de novo*, the conviction also would be annulled, and the defendants stand as if there had been no trial. If it should decide there was no

error, the Judge presiding at the next term of the Superior Court would proceed to give judgment, and impose fines or imprisonment, or both, in his discretion. This would be a *new judgment*, and have no connection with the judgment that had been annulled by the appeal: this is settled. STATE v. MANUEL, 4 Dev. and Bat. 38. Indeed, the Statute upon this subject sets forth the law as plainly as words can express it: "In criminal cases, the decisions of the Supreme Court shall be certified to the Superior Court, from which the case was transmitted to the Supreme Court, which said Superior Court shall proceed to judgment and sentence, agreeably to the decision of the Supreme Court and the laws of the State." Rev. Stat. chap. 33, sec. 6. As the Governor, at the time he executed the charter of pardon, acted upon the supposition that there was a judgment, it may reasonably be presumed that he was led into error by the suppression of the fact that the defendants had appealed.

If it be said, that the defendants were ignorant of the effect of the appeal, the reply is—no man shall be heard to say that he is ignorant of the law: this is settled. Courts are compelled to act upon this rule, as well in criminal as in civil matters. It lies at the foundation of the administration of justice. There is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial, by conflicting evidence upon the question of ignorance. STATE v. BOYETT, 10 Ired. 336. HOIT v. ROPER, 6 Ired. Eq. 649.

If it be suggested, that the fact of the appeal was immaterial, so far as the action of the Governor was concerned, and would not have influenced him in the premises, the reply is, without undertaking to say how far it would have had an influence on him, it is sufficient to say, it was well calculated to influence him to some extent. Every intendment is made against a party who is guilty of a suppression of a fact.

Had the Governor been put in possession of the fact, that there was an appeal, and consequently that there was no judgment, it is a reasonable presumption that he would either have taken the responsibility of granting an absolute pardon of the offence, as he had a clear right to do, either before or after judgment, or that he would have deferred his action until the Supreme Court disposed of the question, and he should be certified of the sentence that the Judge presiding at the next term of the Superior Court had felt it to be his duty to pronounce. This latter course would have recommended itself by the consideration, that, if the Supreme Court directed a *venire de novo*, the defendant might be acquitted, or, if there was no error, the Judge, who imposed the sentence, might not imprison the defendants, and so the pardon would be unnecessary; or, at all events, if the second Judge should also think it to be his duty, under all the circumstances, to imprison the defendants, he would have the benefit of that additional fact, in aid of the exercise of his own discretion.

And it is an unreasonable presumption, that he would, instead of pursuing one of the two courses above indicated, have attempted to do a thing *in futuro* by a present act, and to remit at that time, by his charter of pardon, a part of a judgment which was not then in *esse*, which might never have an existence, and the existence of which would depend upon certain contingent events, which he had no right to anticipate.

The Governor may pardon an offence after it is committed, but it does not follow that he has power to do so before it is committed: other considerations are then involved; *e. g.* it would be in effect a license to commit crime. So the Governor may pardon a portion of the punishment after it is fixed by judgment, upon the ground that he has power to pardon the whole—the greater includes the less; but it does not follow that he has power to pardon a portion of the supposed

punishment, when it is discretionary, *before it is fixed by judgment*, for other considerations are then involved; *e. g.* it would interfere with the due administration of the law, and be in effect a rod held over the Judge, by giving him to know what the Governor thought his judgment ought to be, or "a solicitation to deal favorably by the defendants;" this the Queen of England cannot rightfully do, and yet she may rightfully pardon the offence entirely, and the charter of pardon is a bar to all further proceedings. The pardoning power, conferred by our constitution, is derived from the laws of England.

We are not at liberty to decide at this time whether the Governor has such a power, because it has not been exercised or claimed in this case. It is sufficient for our purpose, to say, that the power is questionable, and, if so, fairness required that the fact of there being no judgment should have been disclosed when the pardon was applied for; and it is the extreme of unfairness to obtain a pardon upon the supposition that there is a judgment, and make use of it afterwards, when the judgment is about to be rendered. If it had no other effect, it was calculated to influence the discretion of the Judge, or to embarrass him, by letting him know what the Governor thought of the matter. In the language of my Lord COKE, "peradventure, if he had been informed of the truth and of all the proceedings, he would not have pardoned."

2nd. As appears by the transcript sent to this Court, the appeal was taken for the mere purpose of delay, no bill of exceptions being sent, and there being no motion in arrest. If this fact had been made known to the Governor, it was well calculated to influence the exercise of his discretion. The appeal was in fact taken merely to get time to apply for the pardon: this was a perversion of the right of appeal, to a purpose entirely different from that for which it was conferred, and it cannot be supposed that the Governor would give countenance to an attempt to obtain an object by

indirection: the inference is, that he believed the defendants were in jail, and the intent of the pardon was to remit the residue of the imprisonment. The pardon sets out that the judgment was subsisting; it follows that the Governor was not apprised of the appeal, and of course he did not know it was taken for delay.

If it be said the defendants wished to avoid the disgrace of going to jail, and as the law had provided no mode, by which they could be allowed time to apply for the pardon, they were compelled to adopt the contrivance of taking an appeal, as a *dernier resort*, and are, therefore, excusable, the law permits the presiding Judge to postpone the time for carrying the sentence into execution, in order to give time to apply for a pardon, whenever, in his opinion, there are circumstances favorable to the defendants. 4 Black. Com. 392.

But, it is suggested, this provision is of no avail in cases like the present, where the punishment is left to the discretion of the Judge; for, if he thinks there are favorable circumstances, he will himself take them into consideration, and impose a punishment so mild, as to make a pardon unnecessary. This is true; but the fact that the law has made no provision for allowing time to apply for a pardon in such cases, together with the consideration that they do not fall within the principle stated by HAWKINS, in the passage cited above, as being the basis of the pardoning power, and the seeming inconsistency of allowing a discretion confided to the presiding Judge, who hears the whole case upon sworn testimony, to be reviewed by the discretion of the Governor, who acts upon *ex parte* statement, tends to show that it was contemplated that the power would be exercised sparingly, and only in extreme cases; for instance, if new matter should occur after the judgment.

We do not mean to be understood as intimating an opinion, that the Executive has not a general power to pardon; but,

when he is called upon to abate, not the rigor of a punishment fixed by law upon general rules, but the rigor of a high Judicial officer, on the ground that he has not sufficiently tempered his discretion with mercy, it is of the utmost importance that all of the facts should be fully disclosed.

3rd. The pardon was "on condition that the defendants should first pay the fines and all costs incident to said judgment;" it is apparent that the Governor was under the belief that a fine had been imposed upon each of the defendants. By accepting the pardon with this condition on its face, they are fixed with notice that the Governor was misinformed, and could not in fairness avail themselves of an error into which he had fallen. In reference to this, there is another view. Here was a condition precedent, which it was impossible for the defendants to perform, because there was no fine to be paid, and it is common learning, that, in such cases, the deed never takes effect, and is void. "If the condition precedent be impossible, no estate or interest shall grow thereupon." Co. Litt. b 3, ch. 5, sec. 334.

The Governor, as appears upon the face of the pardon, supposed the defendants had each been fined, as well as imprisoned, and intended to remit the imprisonment, provided they in the first place paid the fines, and yet such use has been made of the pardon as to enable them to escape both fine and imprisonment. Every one will say this is not right! and the fact that the law declares a pardon, obtained under such circumstances, to be void, is one among the many instances showing the truth of the maxim, "the common law is the perfection of reason."

This opinion will be certified, to the end that the Superior Court may proceed to judgment and sentence, agreeably to this opinion and the laws of the State.

DAVID N. BUIE *vs.* WILLIAM SHIPMAN.

Where it is admitted, that to bind a defendant, an express promise must be proved: it is not necessary to prove a promise in so many words, but it may be left to a jury, from words previously used, whether the defendant had not given authority to others to assume for him.

THIS is an action of ASSUMPSIT, commenced by warrant before a Justice of the Peace, and by successive appeals came before the Superior Court of Bladen County, Fall Term, 1853, SETTLE, Judge, presiding. The plaintiff declared upon all the counts in assumpsit, and specially. Plea, non assumpsit.

DUNCAN KELLY, a witness for the plaintiff, testified that the plaintiff and defendant, together with John B. Clark Elisha Pearce and himself, had employed one John S. McEwen to teach a reading school at the Brown Marsh School House, in Bladen county, and that they were to pay said teacher three dollars per scholar and board him, for a sixty day's school: That, on the day of the commencement of said school, all of said employers and the teacher assembled at the school house to determine upon the place at which the teacher was to board. The defendant wished the teacher to board part of the time with him: the teacher insisted that he should board all of the time with the plaintiff, on account of his proximity to the school house. After considerable discussion, the defendant started off, saying, "Well, money is an object with me; I had rather Mr. McEwen would board my part out with me, for at the end of the school that much would be paid, but do as you please about it; I must go." After the defendant left, the teacher, the plaintiff, John B. Clark and the witness agreed that the teacher should board all the time with the plaintiff, and that the employers should pay the plaintiff for the board of the teacher, in proportion to the number of scholars each should send to the school.

JOHN B. CLARK testified to the same facts.

JOHN S. MCEWEN testified to the same, with the addition, that he taught the school according to the contract; that he boarded all the time with the plaintiff; that the defendant sent his children to the school, and had paid the tuition therefor; that the defendant's portion of the board to be paid was one dollar and sixty-eight cents; and that all the employers, except the defendant, had respectively paid the plaintiff.

It was admitted by the counsel on both sides, that there must be an express promise on the part of the defendant to make him liable. The defendant's counsel insisted that there was no evidence tending to show an express promise.

His honor, Judge SETTLE, instructed the jury that there was evidence which they might consider in the inquiry whether the defendant had promised to pay a rateable proportion of the teacher's board.

The jury found for the plaintiff, and a rule for a *venire de novo* having been discharged, judgment was rendered for the plaintiff, and the defendant appealed.

McDugald, for plaintiff.
Reid, for defendant.

NASH, C. J. There is no controversy between these parties as to the law governing the action. It is admitted by the plaintiff, that to entitle him to a recovery, he must show the existence of an express promise on the part of the defendant to pay to him his rateable proportion of the board of the teacher; and in the argument here, the defence is put upon the ground that there was no evidence of any such promise, and that the jury ought to have been so instructed. It is entirely an error for the Court to submit to a jury the finding of a fact upon which no evidence has been given: it is doing a great injustice to the parties as well as to the jury.

Their duty is to find the controverted fact upon the *evidence* submitted to them. If there be no evidence, it is the duty of the court so to instruct them; but, if there be any evidence, the Court has no right to take the case from the jury, but is bound to submit it to them, with such instructions as it may require.

No complaint is made, that, in the charge, an error is committed, and our inquiry is confined to the objection pressed here, and appearing, as is alleged, upon the case.

The plaintiff and defendant, with others, had engaged the services of John S. McEwen to teach a school in the neighborhood, giving him so much a scholar and boarding him. When met together, to fix where he was to board, the teacher insisted upon boarding with the plaintiff, as his house was near the school house. After some discussion, the defendant started off, observing, "Well, money is an object with me; I would *rather* Mr. McEwen should board my part out with me, for at the end of the school that much would be paid, *but do as you please about it; I must go.*"

When the terms of a contract are clear and explicit, its exposition is a matter of law; when they are ambiguous and uncertain, and depend upon the meaning and intention, to be gathered from the terms used, it is a matter of fact for the jury. To make a contract an express one, it is not necessary for the party to be bound, to have direct communication with the other party; he may become so bound by an agent, for the act of the agent will establish the privity required in law between the contracting parties. What, then, did the defendant mean in his concluding remarks, was a necessary inquiry by the jury, and the words themselves, together with those which preceded them, constituted the evidence from which the conclusion was to be drawn.

His Honor, who tried the cause below, left the question to the jury, telling them the plaintiff must prove an express agreement on the part of the defendant; otherwise, he could

not recover; and that they would consider all the circumstances, and if from them they were satisfied that the defendant gave his assent to the agreement made by the teacher and the other employers, and the defendant had agreed to pay the plaintiff the amount claimed, then the plaintiff could recover; in other words, that such agreement amounted to an express one. No question was made but that the plaintiff had paid to McEwen, the teacher, the money due from the defendant. We are of opinion there was evidence to go to the jury of an express promise, and that the charge of the Court was free from error.

Judgment affirmed.

DUNCAN McCORMICK *vs.* CHRISTOPHER MONROE.

Where there is an exception in a grant, the ONUS of proof lies upon the party who would take advantage of that exception.

In trespass q. c. f., the plaintiff, not in actual possession, must rely upon his TITLE.

A grant obtained by fraud is voidable, when the land is the subject of entry; when not the subject of entry, it is void.

(WAUGH v. RICHARDSON, 8 Ired. 470, cited and approved.)

THIS is an action of TRESPASS, QUARE CLAUSUM FREGIT, tried before his Honor, Judge SETTLE, at the Fall Term, 1853, of Cumberland Superior Court. Plea: general issue.

The plaintiff declared upon a grant from the State, which includes the *locus in quo*—the grant contained the following exception: "Including two hundred and fifty acres previously granted, which is excepted in this grant." It was admitted that the plaintiff was not in actual possession. The defendant's counsel requested his Honor to charge that the plain-

tiff must prove that the *locus in quo* was within the grant, and without the exception. His Honor reserved the point; and on a verdict being found for the plaintiff, directed a non-suit to be entered, from which the plaintiff appealed.

Reid, Banks and Kelly, for the plaintiff.
W. Winslow, for the defendant.

NASH, C. J. It was well observed by the plaintiff's counsel, that, unless the Court was disposed to over-rule their decision in the case of WAUGH v. RICHARDSON, 8th Ired. 470, there must be a *venire de novo* in this case. We concur with him. The only difference between the two cases, is in the nature of the actions, that of Waugh being an action of ejectment, and this trespass *quare clausum fregit*, —the principles governing the two cases being in some respects the same.

In ejectment, the lessor of the plaintiff must show a legal title to the premises in dispute. In trespass, the plaintiff, not in actual possession, must do the same; and what will prove a sufficient title in the former, except in the case of possession under the act of '77, will prove a good title in the latter. Here it is admitted that the plaintiff is not in the actual possession of any part of the land covered by the grant under which he claims, and must rely, therefore, upon his title. If he has shown a legal title to the land in dispute, that title draws to it the possession, there being no adverse possession. In Waugh's case, the grant to Kay, under which the lessor of the plaintiff claimed, embraced within its marks and boundaries eight thousand, six hundred and ninety-nine acres,—being a surplus of five thousand, six hundred and ninety-nine acres more than was apparently intended to be granted. After describing the land, the grant contains these words, "including within its bounds 5,699 acres of land, which is excepted in this grant." It was

there insisted that the exception was inoperative, being vague and uncertain, in not specifying any particular portion as constituting the quantity reserved, and for that reason could not restrain the general terms of the grant of the land, according to the description in the patent.

The grant to McCormick, in this case, is for five hundred acres, under specified metes and boundaries, after which follows these words, "Including two hundred and fifty acres previously granted," which is excepted in this grant." This exception is liable to the same objection as that contained in the grant to Kay, as being vague and uncertain, with the qualification that, in the patent, it is said to be of land previously granted. But there is nothing in the grant to show to whom the land had been previously granted, nor in what part of the land within the boundaries it was located. It cannot, therefore, so far as this case is concerned, be permitted to restrain the general terms of the grant, in which it is contained, and that, for the purposes of this action, the plaintiff has shown a legal title to all the land within the lines of his grant, and is entitled to maintain his action.

It was further urged in this case, that it was incumbent on the plaintiff to show that the place on which the alleged trespass was committed, was within the boundaries of his grant, and without the boundaries of the 250 acres previously granted. We do not concur in the position. The plaintiff having shown a sufficient legal title to the whole of the land, within the boundaries of his grant, the possession was drawn to it by operation of law, and a trespass being committed on any portion of it, sustains this action.

But again: the plaintiff, having shown a sufficient legal title to the whole of the land covered by his grant, if there be a valid title to any portion of it in another person, it was the duty of the defendant to show it. The grant referred to in the exception may be a good and valid one for aught that appears to us: with that question we have at present

nothing to do. The defendant here is a mere *tort-feasor*, and must answer for his trespass, unless, in a future trial, he can show a previous grant to himself, or to some third person, for the part of the land upon which the trespass was committed,—upon the principle "*id certum est quod certum reddi potest*," whereby the vagueness of the exception will be cured.

There is error in the judgment below, and there must be judgment for the plaintiff.

PEARSON, J. It is decided that an exception of "5699" acres, included within the bounds "of a grant for a large tract of land, which is described by metes and bounds, is void, for vagueness and uncertainty." WAUGH v. RICHARDSON, 8 Ired. 470. That case differs from the case now under consideration, in this: here the exception is "two hundred and fifty acres, *previously granted*." This would point to the means by which the description in the exception may be made sufficiently certain to avoid the objection of vagueness, by aid of the maxim "*id certum est quod certum reddi potest*." It may be done by proving that a part of the 500 acres, included in the plaintiff's grant, had been previously granted, and what part; and if such part covers the *locus in quo*, the defendant is not guilty of the trespass.

So, the only question is, upon whom does the onus lie? Clearly, upon the defendant: he relies upon the exception: it must fall, unless it is supported by proof of these facts; he must, therefore, furnish the proof which is required, to bring it within the operation of the maxim. This is but an instance of the familiar rule that the affirmative must be proved.

"An exception is ever a part of the thing granted." Co. Litt. 47 a. The plaintiff's grant covered the whole; a part was excepted. What part? The defendant says it included the *locus in quo*. The plaintiff says it does not. The de-

fendant, of course, must prove the affirmative. "One makes title under a lease of a mannor, except the tenements late *largients*, he need not aver that the 100 acres of pasture (the *locus in quo*) was not parcel of the exception." FULMENTON v. STEWART, 1 Plow. 103.

One sets up a fine with proclamations as a bar; he need not aver that the plaintiff was not an infant or *feme covert.* STOWEL v. ZOUCH, Id. 361. The Statute of Henry VII. makes a fine a bar to all strangers as well as privies, except infants, &c. So the Statute of Limitations, except "such accounts as concern the trade of merchandize, between merchant and merchant." The plea need not aver that the account is not such as concerns the trade; that averment is to be made in the replication, and the *onus* is on the plaintiff. The proviso as to infants, &c., is in effect an exception: As to this the same remarks are applicable.

Another view of the subject may be taken. Suppose no part of the land had been previously granted: If the *onus* be on the plaintiff he can never recover an acre of it; yet, it is admitted that he is entitled to 250 acres of it.

But it is said the plaintiff is estopped from saying that no part of the land had been previously granted. The reply is, estoppels must be mutual, and bind only parties and privies: the defendant is neither a party or a privy to the grant.

Again: it is said, if in fact no part of the land had been previously granted, the plaintiff has been guilty of a fraud, and his grant covers more land than he paid for: that may be true, and it may be the grant can be avoided by another proceeding; but it is not for that reason void, and the objection cannot be made in an action of ejectment, or of trespass *quare clausum fregit.*

It is settled, that where land is the subject of entry, the grant is voidable; where the land is not the subject of entry, the grant is void, and may be so treated in ejectment or trespass.

Judgment reversed, and judgment for the plaintiff on the verdict.

STATE *vs.* JOSIAH CONE.

Whether the inference against the credit of a female witness, called to prove a rape, arising from her failure to make outcry, is repelled by the other concurring facts, is not a conclusion of law, but a question of fact. HENCE, a Judge has no right to say that such inference is rendered by such concurring facts of little or no weight.

INDICTMENT for a RAPE, tried at Fall Term, 1853, of Johnston Superior Court, before his Honor Judge MANLY.

The female upon whom the violence was alledged to have been committed, was one Martha Cone, the daughter of the prisoner, about 17 years old, delicate in person, uneducated and ignorant, and residing with her father. Her mother had died in her early infancy, and her father had married a second time. She had a brother, Jesse, aged about 19, small in stature for his years. This girl testified, that, on the night in question, the prisoner returned home under the influence of spirits, quarrelled with his wife, and drove her with threats and a drawn knife out of the house, and closed the door against her; that there were left in the house the prisoner, the girl Martha, and her brother Jesse; that her father appeared to be in a great rage: after some time her brother Jesse laid down to sleep on a pallet, and after a little while she proposed to lay down also, when the prisoner approached her with a drawn knife in his hand, put his arm about her, and proposed to have sexual intercourse with her. She refused. He threatened to kill her if she made any resistance or noise, or told any one. She still refused, and after a few moments laid down by the side of her brother.

The prisoner put out the light, and by pressing down her body and confining her arms, succeeded in having his will of her. She stated she made no effort to awaken her brother by outcry or otherwise, because she knew he could afford her no relief, and she was afraid her father would execute his threat of killing her if she did. She stated, also, that, about three years before the trial, before her father's last marriage, she had gone into the neighborhood to visit a factory, and her father came after her, and on their way home, in the night time, he took her out on the road side and forced her to his will. That, on another occasion, since the act relied on by the State (in June last), the prisoner intercepted her on a visit to a neighbor's, and forced her. On the day before she complained to the Justice of the Peace (17th June), he again attempted to force her, but was interrupted by a noise as of some one approaching.

The brother, Jesse, was called for the defence, who stated that his father had come home that night intoxicated; had quarrelled with his wife, driven her away and shut the door upon her; that the witness laid down to sleep, and shortly thereafter his sister, the other witness, laid down beside him, and he did not not see or hear anything 'till next morning.

After other instructions given to the Jury, which are not excepted to, his Honor remarked as follows:

"The making of no outcry by the girl, at the time of the carnal connexion, under ordinary circumstances, is strong evidence to discredit the force; but, when the relation between the parties, and the friendless and ignorant condition of the sufferer accounts for this silence, it should have little or no weight: the rape is alledged to have been committed on a pallet, when the girl was by the side of her brother, (the wife having been driven, a little before, out of the house;) whether failure to waken her brother, or make an outcry for the wife, is sufficiently accounted for, except upon the supposition she was consenting to it, is submitted as a question of fact, to be tried by a scrutiny of all the circumstances."

The jury having rendered a verdict against the prisoner, a Rule for a *venire de novo* was moved for, on account of misdirection of the Court in the above instructions. Rule discharged, and an appeal to this Court.

Attorney General, for the State.
Miller, for defendant.

PEARSON, J. Incest is so detestable, that it is hard to resist the feeling, that one guilty of it ought to be convicted, whether it was done with consent or by violence.

The law makes a distinction, and every individual, however low he may have fallen, has a right to be tried according to law.

His Honor puts in quotation a portion of the charge, and we are to take it as setting out the very words used by him. This relieves us from all difficulty as to the question intended to be made. The quotation embraces two topics, which are put in opposition and treated differently: 1st. The making of no outcry, and the long interval before disclosure. 2nd. The failure to waken her brother or call for her step-mother. The latter "is submitted to the jury *as a question of fact*, to be tried by a scrutiny of all the circumstances." The former is treated as involving a rule of law, about which his Honor thought it to be his duty to instruct the jury. The inference, that he supposed there was this difference, is clear, and we have no idea that he expressed his opinion as to the weight of the evidence, except in conformity to what he believed to be a rule of law, applicable to the first topic.

"Making no outcry, and the long interval before disclosure, under ordinary circumstances, is *strong evidence* to discredit (the witness in regard to) the force." This is stated as a rule of law. It was in favor of the prisoner, and is alluded to, as tending to explain the next proposition. "But, when the relation between the parties, and the friendless

and ignorant condition of the *sufferer* accounts for the silence, *it should have little or no weight.*" This is also stated as a rule of law. It was against the prisoner, and his exception must be sustained, unless there be such a rule.

We are not aware of any such rule of law; in fact, from the nature of things, there cannot be a rule; for, from the varying circumstances of every case of the kind, the matter cannot be reduced to a fixed principle, so as to form a rule, and must be left to the consideration of the jury, as an open question of fact. In this respect, we can see no difference between the matters embraced by the first and second topics. Both, together with the additional circumstances, that the witness (according to her account) had been forced three years before, and had made no outcry or disclosure, ought to have been put on the same footing, and submitted to the jury. It was for the jury to say which was strong evidence, and which was entitled to little or no weight, and to decide whether the witness was a friendless and ignorant sufferer, (as his Honor inadvertently assumed her to be,) or a degraded being, seeking to hide her shame by adding to it it the guilt of perjury, with instructions; that, if, after a careful examination of the case in every aspect, they could not satisfy themselves whether she was entitled to be believed or not, they ought to acquit; for his guilt depended upon the truth of her testimony.

Lord HALE, in his Pleas of the Crown, 1st vol. 633, treats of the evidence upon an indictment for rape, and after stating that much depended upon the testimony of the party ravished, remarks: "Her credibility, and how far forth she is "to be believed, must be left to the jury, and is more or less "credible," according to the circumstances. "If she presently "discover the offence and make pursuit after the offender," "&c., "these and the like circumstances give greater proba- "bility to her testimony." "But, if she conceal the injury "for any considerable time after she had opportunity to

"complain," &c., &c., "these and the like circumstances "carry a strong presumption that her testimony is false or "feigned." He is followed by EAST, with the exception, that the concluding sentence is changed, so as to read, "these and the like circumstances create a strong, but not "a conclusive presumption, that her testimony is feigned." EAST is followed by BLACKSTONE and RUSSELL.

It would seem upon the first blush that these authors intend to lay it down as a rule of law, that circumstances of the former kind give greater probability to the testimony, and those of the latter kind raise a strong presumption of falsehood; but, upon examination, it will be found they make these remarks merely as suggestions for the consideration of juries, and give their opinion, how far they ought to have greater or less weight. There is no doubt a Judge in England would tell the jury, that this or that circumstance gave greater probability to the testimony of a witness, or that it created a strong presumption that it was false. In our Courts it is different; the Statute changes the law in this particular, and a Judge here is not at liberty to give his opinion as to the weight of evidence, unless the weight to which it is entitled is fixed by some rule of law; e. g. that from thirty years adverse possession of land, the jury ought to presume a grant.

This makes it necessary to distinguish between rules of law and mere considerations, that are to be taken into the account by the juries, when weighing the evidence. It is sometimes difficult to draw the distinction. There are instances of a mere matter of evidence growing into a rule of law, by not taking the distinction, and by the recognition of it, as a rule of law, in repeated decisions. The rule, that when goods are stolen, one found immediately thereafter in the possession, who is unable to occount how he came by them, is presumed to have stolen them, is an instance of it. At first, it was a circumstance to be considered by the jury,

now it is a rule of law. We are not disposed to add another to the list of rules made by judicial legislation.

It may not be a matter of regret, that this case is to be tried again. The fact, that a father should, on three several occasions, ravish his own daughter, and attempt it a fourth time, and that the indictment should charge the second offence, making no mention of the others, presents a case fit to be submitted to the dispassionate consideration of a second jury.

There must be a *venire de novo*. Judgment reversed.

JOHN A. MEBANE *v.* THOMAS J. PATRICK.

To raise the presumption of a grant of an easement, from a user twenty years, such user must be adverse and as of right.

APPEAL from the Superior Court of Guilford, at Fall Term, 1853, his Honor Judge SAUNDERS, presiding.

Action on the case of obstructing plaintiff's PRIVATE WAY, in the town of Greensborough. The plaintiff, and those under whom he claimed, had held possession of his lot, which was enclosed up to the border of this alley or way, from the year 1818 up to the time of its obstruction, shortly before the bringing of this action. He had an ice house and stables fronting upon this alley, and he could not, without tearing down his own enclosure, get to them, except through the way in question. The plaintiff purchased and took possession of his lot in 1822, and, about 12 years before suit was brought, had removed his stables to another part of his lot. The plaintiff, and those under whom he claimed, had used this way from 1818 continuously, up to

that date, in passing from one public street to another, and and in passing to and from the ice house and stables, and in driving his stock along the same to be watered at a trough placed therein, and supplied with water from his well. One John Hanner had owned the lot adjoining this pass-way, on the other side from the plaintiff, and a tenant of his, in the year 1830, fenced along this alley for about half its extent in length, leaving it open to the extent claimed by the plaintiff, which was of sufficient width for wagons and carriages to pass. The defendant showed a title for the lot now claimed by him, to John Hanner, and dated in 1828, in which the land is described as including the way in controversy, and adjoining the lot of the plaintiff. Hanner became insane in the year 1831, and remained so till his death. In 1836 this lot was occupied by Dr. Lindsay, who entered under the title of Hanner, and remained in possession for several years. In 1837 he, Lindsay, informed the plaintiff that he intended to close the lane, to which the plaintiff made no reply, but he did not close it, and it remained open until a short time before the bringing of the suit, when the defendant built a fence so as to take it in with the Hanner lot. Upon these facts the Court instructed the jury, that if they were satisfied, from the evidence, that those, under whom the plaintiff claimed, from the year 1818 to 1822, and from 1822 up to 1850, when the defendant obstructed the way, had continuously and without interruption used and enjoyed the way, and the defendant obstructed it to the plaintiff's damage, he was entitled to their verdict. Under which instruction a verdict was rendered for the plaintiff.

Rule for a new trial. Rule discharged, and appeal to this Court.

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

PEARSON, J. His Honor charged, that, if the plaintiff had "continuously, and without interruption, used and enjoyed the way" for more than twenty years, he was entitled to recover. To this the defendant excepts. There is error.

The charge is correct, so far as it goes; but it does not go far enough. There is another and very essential requisite, in order to raise the presumption of a grant. The user must be adverse, and as of right. The attention of the jury was not called to this requisite, and the omission to do so, makes the instruction erroneous. "There must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant, in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to, if there had not been a grant. FELTON v. SIMPSON, 11 Ired. 85. The same doctrine is laid down in a decision at this term, INGRAHAM v. HOUGH. *Vide Post.*

If I make a road across my own land, for my own convenience, and the neighbors use it also, either by my express permission, or as a favor, such as any man is expected to allow to his neighbors, they may use it for fifty years, and no one but myself will have a right to it, because no one but myself has ever asserted a right to it. If you have continuously and without interruption, for more than twenty years, hunted on my land, or fished in a creek running through it, will it enter into the imagination of any one to conceive that you have acquired a right to do so? Certainly not. You never claimed the right, and took the liberty of doing so, merely because you supposed I had no objection.

It is true, there is a presumption, unless there are circumstances to show the contrary, that every man claims a right to do that he is in the habit of doing; but the force of this

presumption, and the circumstances necessary to rebut it, depend very much upon the thing which is done. If a man ponds water upon another's land, the inference is strong that he claims a right to do it. So if he cuts a road across another's wood land: for these are liberties that are not apt to be taken. But, if he cuts across the corner of an old field, or travels along a road which the owner uses himself, the inference of a right is extremely weak, and a very slight circumstance will rebut it.

While the land in question remained uninclosed, the fact that the plaintiff and others passed over it and used it as a road, was scarcely calculated to excite attention. In 1830, when a tenant of Hanner enclosed a part of it, the fact of his living upon the land (unless he did so for his own convenience) tended to show, that a right of way was claimed; but, in 1837, which was before the twenty years had run out, Dr. Lindsay, claiming under Hanner, told the plaintiff that he intended to stop up the lane, and to this the plaintiff said nothing. What did this silence mean? Was it an admission that he set up no right to have the lane kept open, or was it a defiance, and an intimation that he relied confidently on his own right? This was a circumstance, the solution of which ought to have been left to the jury. It had a direct bearing on the character of the plaintiff's user, whether it was by permission or sufferance or as of right.

It is not necessary to decide the other point; but, as the case goes back for another trial, and the point will be presented again, and as it has been discussed and fully considered, we think it proper to give an opinion upon it. Neither the doctrine of prescription at common law, nor the act of 1825 have any saving in regard to the rights of infants, *feme coverts* or person *non compos*. In the Statute of Limitations, there is an express exception in favor of the rights of those who may be infants, &c., at the time the right accrues; but if, at that time, there is no disability,

although the right may on the next day pass to an infant, &c., it is not within the proviso: so that it has grown into a legal adage, "when the Statute begins to run, it continues to run." Such being the law, as to the Statute of Limitations, it follows, it must be so, also, in regard to prescriptions. Here the prescription had begun to run, before the insanity of Hanner, and there was nothing to stop it. Those who ought to have taken an interest in his affiairs are to blame, if, by their neglect, an adverse claim has ripened into a title.

Venire de novo. Judgment reversed.

THOMAS FISHER *vs.* RAIFORD CARROLL, AND OTHERS.

An ISSUE is sent to be tried before a Court of Law for the purpose of aiding this Court in the ascertainment of facts. The Court of Law can take no action upon the finding of the jury; but simply returns the verdict with his notes of the trial to this Court. When taken up for further directions, the Supreme Court will pass upon the regularity of the proceeding of the lower Court from the Judge's statement, and order another trial or not, as it may seem expedient.

An ACTION is ordered to be tried in a Court of Law, where the equity is based upon a disputed legal right, or where the defence set up, involves a legal right. Certain conditions are usually imposed on the parties, But, besides these, the whole course of the trial, is according to the rules governing the Court of Law. That Court may grant a CERTIORARI, or a new trial, order a removal, allow an appeal, &c. When the judgment is finally rendered in the Court of Law, it proceeds no further, but certifies the matter to this Court, for its action upon the same.

(REID v. BARNHART, 1 Jones' Equity, page 1, cited.)

THIS was an action of DEBT, on a note for $768. Plea: Usury. In the cause pending between these parties, on the Equity side of this Court, certain proceedings were directed to be had, in the Superior Court of Law, for the county of

Sampson. See the case reported, 6 Ired. Eq. 485. In pursuance of said order, there was a trial before his Honor Judge SETTLE, at Fall Term, 1853. The jury returned a verdict for the plaintiff. On motion of the defendant, his Honor, being of opinion that the verdict was against all the evidence, set it aside, and granted a new trial. The plaintiff prayed an appeal, which was allowed.

Reid and Winslow, for the plaintiff.
Person, for the defendant.

PEARSON, J. In this Court a preliminary question is raised: Should the transcript from the Superior Court be returned to the Equity side of this Court, and be considered upon a motion, in the case there pending, or should it be returned to the law side, and be considered as a distinct case in that Court?

This question, it is admitted, depends upon the nature of the proceedings, directed to be had, in the Superior Court of Law, by the order in the cause in Equity. If an issue was directed, the return should be made to the Equity side of this Court; if, on the contrary, an action at law was directed, the return should be to the law side.

To decide upon the nature of the proceedings directed, it is necessary, in the first place, to ascertain the difference between an *issue* and an *action*, so as to see in what cases the one is appropriate, according to the course and practice in Equity, and in what the other; for it is a fair inference, that the order intended to direct that proceeding which was appropriate. And, in the second place, to examine the order itself.

First. If, upon the hearing of a cause in equity, a question of fact, upon which the case turns, is left doubtful by conflicting testimony, and the Court, considering the inefficacy of written testimony, and the very defective manner in which

depositions are usually taken, and the many advantages of an examination of the witnesses, in the presence of a jury, is desirous of having the aid of a jury in deciding the question, it has power, under the act of 1836, Rev. Statutes, ch. 32, sec. 4, to direct an issue to be tried by a jury, and, for this purpose, may either cause a jury to be summoned, and try the issue before the Court itself, or may direct the issue to be sent to a Court of law for trial. REID v. BARNHART, (which is reported in the first volume of Jones' Equity, p. 1,) is an instance of the latter.

Owing to the inconvenience and expense of having a jury, and the witnesses, to come to the Court of Equity, it is most usual to send the issue to be tried at law. (Unless some objection is suggested,) the Court of the county where the parties and witnesses reside is selected to try the issue. When an issue is sent to a Court of Law, the Court of Equity does not part with the cause or the control of the issue, but simply calls into requisition the aid of the Court of Law, to act as a substitute for the jury, which might have been summoned to attend and try the issue in the Court of Equity: The consequence is, that, when the jury in the Court of Law return a verdict, that Court, having done all it was requested to do, can take no further action, and returns the verdict of the jury, together with the Judge's notes, (or, as we term it, a statement of the case made by the Judge,) to the Court of Equity, where the cause, coming on for their directions, the Court will examine into all that took place at the trial. If it does not concur with the opinion of the Judge, in his charge to the jury, or, in the reception or rejection of evidence: or, if the jury have found against the weight of the evidence: or, even if it is not entirely satisfied with the sufficiency of the evidence upon which the verdict is returned, it will be set aside, and a new order be made to have the issue tried over again; for the object of the issue is, "to enlighten the conscience of

the Chancellor," (as the English books express it;) that is, to aid him in deciding the question of fact: As *he* is to make the decision, the finding of the jury is, of course, not conclusive upon him: *He* may take the opinion of another jury, or he may decide the question of fact, against the finding of the jury: *He* will allow to it only the influence to which he may think it entitled. The responsibility, however, is upon him, and he must, at last, act on his own judgment, treating the verdict of the jury, as an individual does the opinion of a friend, whom he is at liberty to consult.

When the equity is based on a disputed legal right, but the trial of such right at law, is prevented by some impediment, (*e. g.* where ejectment cannot be brought, because of an outstanding term;) or where the defence set up, in equity, involves a legal right, (*e. g.* bill for partition, as between tenants in common, the defendant sets up a claim in severalty,) a Court of Equity, instead of deciding upon the legal right, may direct an action at law, and retain the cause for further directions, contenting itself with merely removing the impediment, and requiring the parties to make all necessary admissions, for the purpose of having the right determined, according to the course of the Courts of Law, by directing, that the outstanding term, in the instance first put, shall not be insisted upon; and, in the other, that the defendant shall admit an actual ouster. In such cases the Court does not, as in directing an issue, seek the aid of a Court of Law, for its own satisfaction; but it directs an action to be brought, upon the ground that the matter in controversy, being a legal right, ought to be determined by the judgment of a Court of Law. It follows, that the judgment, whether obtained upon a verdict or in any other shape, is conclusive. It also follows, being regularly instituted in a Court of Law, it is subject, exclusively, to the control of that Court. That Court may grant a *certiorari*; order a removal; direct a new trial: bills of exceptions may

be tendered, and an appeal may be taken, in the same manner, as if it was an independent suit, and had been instituted without the intervention of a Court of Equity. After judgment is rendered, the parties can proceed no further at law; but must take a copy of the record into the Court of Equity, and bring the cause on for further directions. By way of illustration, in the examples given above, the plaintiff, if he succeeds, will move for a reference to take an account of the rents and profits; or, will take a decree for partition. The defendant, if he succeeds, will move to dismiss the bill, and to be allowed his costs.

Having pointed out the difference between an issue and action, it remains to be seen, which proceeding was appropriate to the case of these parties. It is apparent, it was the action. There was a legal demand, and the only ground for coming into equity was, that the loss of the note caused an impediment to the trial of a suit at law. It was proper, therefore, to remove the impediment, direct the plaintiff to bring an action at law, and retain the cause for further directions; so that, if the plaintiff obtained a judgment at law, upon the cause coming on, for further directions, he might be required to give an indemnity. In this way, as is said, in the opinion delivered in FISHER v. CARROL, 6 Ired. Eq. 485, the parties will have the benefit of a trial at law, just as if the note had not been lost, and at the same time have the benefit of the relief given in equity. Thereby, preventing a change in the forum, except, so far, as it was necessary for the protection of the defendant.

Upon an examination of the opinion in the cause in equity, it will be seen, that an action at law was directed, and to that end, the defendant was required to accept service of a writ in debt, upon a note for $768, (this instituted a suit in that Court,) and put his defence upon the plea of usury. Other necessary orders were made, and the only ground for doubt about the matter, grows out of the concluding words

of the opinion, which were also used in the interlocutory order, to wit: "The finding of the jury will be certified to this Court."

These are the formal words directing an issue, and are not appropriate when an action is directed.

I confess, at the time I drew the opinion, I had not clearly fixed in my mind, the essential difference between "an action" and an "issue," and somehow or other, the want of form escaped the vigilance of the other two Judges. The best atonement for error, is to admit it fully and correct it as soon as possible.

We feel relieved by the fact, that the Judge of the Superior Court was not misled by it, but proceeded with the trial as if it was an action. He, of course, had a right to grant a new trial, and the appeal was to the law side of this Court.

The appeal must be dismissed, because their was no judgment of the Superior Court. This opinion will be certified to the end that the Superior Court may proceed to try the action, as instituted in that Court.

ALFRED NICHOLS *v.* WILLIAM F. BELL.

Parol evidence may be resorted to, to establish the consideration of a guaranty.

The presumption of slavery does not arise from a complexion, a shade darker than that of a mulatto.

THIS was an action of ASSUMPSIT upon a guaranty, tried before BAILEY, Judge at Fall Term, 1853, of the Superior Court, for Carteret County.

The defendant excepted upon two grounds. First, because the Court permitted the plaintiff to prove the consideration of the guaranty, by parol evidence.

The second ground is sufficiently stated in the opinion of the Court.

A verdict was rendered for the plaintiff. Rule by defendant for a *venire de novo*. Rule discharged, and appeal to the Supreme Court.

J. W. Bryan, for the plaintiff.

No Counsel for the defendant.

NASH, C. J. This action is upon a guaranty, and two questions arose upon the trial below. We will consider them in the order in which the case presents them. The first is, upon the introduction of parol evidence to prove the consideration, upon which the guaranty arose. It was insisted on behalf of the defendant, that the case upon which the action is founded, was within the act 1826, and that the consideration ought to appear upon the face of the instrument. This objection is answered by the cases of MILLER v. IRWIN, 1st Dev. and Bat. 103. COOPER v. CHAMBERS, 4 Dev. 281. ADCOCK v. FLEMING, 2 Dev. & Bat. 223. ASHFORD v. ROBINSON, 8 Ired. 116. 3 Kent's Com. 122. These authorities show that a guaranty is not within the Statute. They also show that where the contract is in parol, evidence may be resorted to, to establish the consideration. The second objection is, that the Court erred in refusing the instructions required. The plaintiff is a man of color; the case states, "that he "was neither black nor white, but that he was of a brown "color, between that of an African and a mulatto, and that "neither of his parents could have been a white person." The plaintiff then proved, that, "in Onslow, where the con- "tract was made, he was reputed to be a free person, was "called and known as free Alfred Nichols." The defendant requested the Court to instruct the jury, that, in the

case of persons of a *shade* of color darker than that of a mulatto, the law presumed they were slaves. The Court *could* not give such instructions. We know of no law or decision, which authorises such presumption. In 1802, in the case GOBU v. GOBU, Taylor Rep. 16, the Court for the first time recognised, as a presumption of law, that a man's right to freedom depended upon his color. It was decided, that, if he was black, he was by law presumed to be a slave. This case was followed by that of SCOTT v. WILLIAMS, 1 Dev. 376, and it has gradually grown up into a principle, which cannot now be controverted. But both these cases confine the presumption to a black color. In the latter case, Judge DANIEL, before whom the case was tried below, in instructing the jury as to the right to freedom of Jane Scott, the mother of defendant, stated to them, if she was of a *black African complexion, they* might presume from that fact that she was a slave; if she was of a *yellow complexion, no presumption* of slavery arose. Judge HALL, in delivering the opinion of this Court, recognised the distinction made below, between a black and yellow complexion. How it was thought possible, that the Judge could give the instructions required we cannot well see. It would have been in direct conflict with the only cases on the subject, contained in our reports. Here the plaintiff is described, as being neither black nor white, but of a brown color, between that of an African and a mulatto. The Court was asked to tell the jury, as a matter of law, that if the plaintiff was a shade darker than a mulatto, he was to be presumed to be a slave. If we had the power, we certainly have not the disposition to extend the principle further, than as recognised in the cases cited. Let the presumption rest upon the African color; that is a decided mark: but to carry it into shades, would lead us into darkness, doubt and uncertainty, for they are as various as the admixture of blood between the races,

and against the rule that presumptions are always in favor of liberty.

Judgment affirmed.

JACOB BYERLY *vs.* DAVID KEPLEY AND AL.

When A agreed to build for B a good saw-mill, B undertaking to cut the mill race, and the mill was worthless, in consequence of a defect in the race below; and, when it appeared that A had undertaken to ascertain the level, and designate the position of the race, and had done it so unskillfully as to produce the defect in question, HELD, that A had a reasonable time to have the error corrected, and he had a right to have such correction made, provided he could show that, as proposed by him, it would remedy the defect.

To recover on the common counts for materials furnished, and work and labor done, it must be shown, that the article was received or used by the defendant, or was in some way beneficial to him.

ACTION of ASSUMPSIT, tried before his Honor Judge SAUNDERS, at Fall Term, 1853, of Davidson Superior Court.

The plaintiff declared on a special contract, and upon the count for work and labor done, &c. The case was, the plaintiff agreed "to build for the defendant a good saw-mill, to find the irons, and to do all the mechanical work, and the defendant to cut the mill-race." The plaintiff took the level of the ground and marked out the position for the mill-race, which was cut by the defendant according to his designation. The race averaged about two feet wide. The frame of the mill was placed partly on a rock and partly on the ground, and propped up with small poles. The plaintiff was not a millwright by trade, but expressed confidence in his ability to build as good a mill as any one, and, to get an opportunity of exhibiting his skill, agreed to undertake this mill below the usual rates. When the work was finished, and

the mill started, it made only a few strokes, when it stopped, in consequence of the water flowing back upon the wheel. Plaintiff said that the wheel was too low, and the race too narrow. Shortly after this, the plaintiff applied to the defendant to have the race cut wider, to which he made no reply. About eighteen months afterwards, he again applied to the defendant to have the race cut wider, to which he replied, that "the plaintiff had marked out the race, and directed how it was to be cut, and if not properly done, the fault was his, and as he had been told the work was worth nothing, he should do nothing more with it." In regard to the quality of the work, the evidence was contradictory. Some time after the work was done, the mill frame on one side sunk several feet. Whether there was any fall in the race, was, also, the subject of contradictory evidence.

His Honor charged the jury, that, according to the agreement, the plaintiff was bound to do the necessary work for a good saw-mill, and the defendant to cut a proper mill-race. But, as the plaintiff had undertaken to mark out the race, and to direct its cutting, if not properly done, the fault was his. Yet, as no time had been named for finishing the work, the law allowed a reasonable time, and, if the plaintiff had committed any error in the first place, he had a right to correct it; and, if the jury believed he had applied to the defendant, in a reasonable time, to widen the race, and he failed to do it, the fault must be on the defendant: That eighteen months would be too late; but the first notice, if made, was in reasonable time. As to the foundation, whether a single or double pillar, as plaintiff had undertaken to secure the frame, he was bound to have done it in a proper way. As to the quality of the work, that was a question for the jury. If they should find the work well done, and such as would have ensured a good saw-mill, the plaintiff would be entitled to their verdict. But, if they should believe that not to have been the case, or if they

should believe the failure to have arisen from the want of proper skill, on the part of the plaintiff, in not having done what he had undertaken to do, in a proper way, as the law required competent skill on the part of all undertaking to do what they contracted to do, then their verdict should be for the defendant.

Verdict for the defendant. Motion for a *venire de novo*. Rule discharged, and appeal to this Court.

Lanier, for plaintiff.
J. H. Bryan, for defendants.

BATTLE, J. The instructions given by his Honor to the jury, that the plaintiff could not recover upon the special contract, unless the saw-mill was built in a good and workmanlike manner, was undoubtedly correct, and we do not understand the counsel to object to it. But the counsel insists, that the plaintiff had, by his contract, nothing to do with the cutting the race to carry off the water below the mill, and that his Honor erred, in stating to the jury, that if it was cut improperly under his direction, he was in fault. It is true, that, by the terms of agreement, it was incumbent upon the defendant to cut such a race as would give proper operation and effect to the building and machinery, which the plaintiff had engaged to put up. It may be, that it was no part of the plaintiff's duty to give any directions in relation to the length, breadth or depth of the race; but, having assumed to do so, and the defendant, by working according to his instructions, having assented to his assumption, he was in fault, if the instructions given were wrong.

Having undertaken, though voluntarily and without compensation, the duty of an engineer for the defendant, he was bound, at least, for such skill as was necessary for the accomplishment of the work. COGGS v. BARNARD, 2d Ld. Raym. 909. BROWN v. RAY, 10 Ired. 72. See, also, Sm.

Lead. Cases, 169. But he had the right, if he found that the race was not cut sufficiently wide, to correct his mistake, and call upon the defendant to make the requisite alterations, and so his Honor held. Upon the defendant's refusing to do this, the plaintiff's right to recover would have been unquestionable, had he proved that what he required to be done, would have removed the only obstacle to the successful operation of the mill. But here his case failed; for, though testimony was offered on both sides, as to the relative height of the water at the wheel, and at the point where it entered the creek from the race, it does not appear from the bill of exceptions, that any was offered to show, that, making the race wider, would have removed the difficulty; the wheel, as the plaintiff admitted, being hung too low. He could not recover upon the special contract, until he showed that he had fulfilled his part of it, and that there was a breach of it, by the defendant.

Failing on his count, on the special contract, the plaintiff's counsel insists, that he is entitled to recover on the common counts, for the materials furnished, and the work and labor done. But, unfortunately for him, the testimony is defective here also. To enable him to recover on these counts, he ought to have shown, that the house and machinery were received or used by the defendant, or were in some way beneficial to him. DOVER v. PLIMMONS, 10 Ired. 23, citing ELLIS v. HAMLIN, 3 Taunt 52, 1 Leigh N. P. 77.

The testimony in this case, so far from showing that the saw-mill had been received or used by the defendant, or was of any value to him, proved rather the contrary, that he said he was told the work was worth nothing, and added that he should do nothing more with it. We think, therefore, that the plaintiff was not entitled to recover upon either of the counts of his declaration, and the judgment must be affirmed.

Judgment affirmed.

JOHN N. INGRAHAM *v.* HEZEKIAH HOUGH.

Where one uses a road over the land of another, for twenty years, as a matter of right and without interruption, the Judge should instruct the jury, that it is their duty to presume a grant of the easement.

If the road is used under a license, or by mere permission of the owner of the land over which it runs, no such presumption arises.

If the owner of the servient tenement erects gates and turns the road during the time, without objection on the part of the owner of the dominant tenement, this is evidence tending to show that the user was by permission, and not as a matter of right.

The fact that the owners are brothers, is some evidence, (though slight,) which may be considered in connection with the other facts.

WILSON v. WILSON, 4 Dev. 154—PUGH v. WHEELER, 2 Dev. & Batt. 50—GERINGER v. SUMMERS, 2 Ired. 229, and FELTON v. SIMPSON, 11 Ired. 84—cited and approved.

Appeal from the Superior Court of Anson County, at Spring Term, 1853, his Honor JUDGE DICK presiding.

THIS was an action on the case for obstructing a PRIVATE WAY. The plaintiff claimed on two grounds: 1st, by prescription, and 2d, by a *user* for twenty years, from which the law presumed a grant.

The facts of the case, as disclosed in the evidence, were as follows:—William Hough, under whom the defendant claimed, was the owner of two tracts of land in the year 1822, and in that year conveyed one of them containing thirty acres to his brother, John Hough, under whom the plaintiff claims. John Hough, soon after this, purchased a house, and settled on the thirty acre tract, and a road for wagons, carts, &c., was opened from this house across the lands of the said William, passing through his yard, into the Allenton road, which was a public highway. Some years after the said way was opened, William Hough erected two gates across it, so as to enclose his yard, and these were kept up by him for many years. John Hough continued to

use the said way up to the time of his death, in 1846, when the said tract of thirty acres was assigned to his widow for dower, and she resided on the same, and used the said way until 1846, when she sold her dower right in the land to the plaintiff, who immediately took possession and resided on the same, and used the road until September, 1850, when the defendant, who had become owner of the William Hough tract, erected a fence upon the same, across the road. He also felled some trees into this road, also on his own land. Shortly after this, the present suit was brought. Since the obstructions were put across the road, the plaintiff had opened a way over his own land into the Allenton road, said way passing for about one hundred yards over the defendant's land. About ten or twelve years ago, in the lifetime of John Hough, William Hough changed a part of the road, so as to turn it out of his yard, through an old field seventy yards from the former location. John Hough and his family used the road, thus changed, up to the time of his death, and his widow and her family used it until she sold to the plaintiff, and the plaintiff used it, until it was obstructed as aforesaid.

The plaintiff's counsel abandoned the claim by prescription, but requested the Court to charge the jury, that the use of the road for twenty years by the plaintiff, and those under whom he claimed, gave him a right to use the road, and that the law presumed a grant.

Secondly. That twenty years use of the road, by the plaintiff and those under whom he claimed, gave him a *prima facie* right, and that there was no evidence to rebut the presumption of a grant.

Thirdly. That putting the gates across the road by William Hough, was no obstruction to defeat the right of John Hough.

The Court refused to give the instruction prayed for, but instructed the jury that there was evidence proper for them

to consider, and if it was sufficient, in their minds, to repel the presumption of a grant, they would find for the defendant—that the fact of William Hough erecting gates across the road, several years after it was opened, and keeping them up for several years, and the additional fact, that William Hough, ten or twelve years ago, turned a part of the road seventy yards from its original location, without objection on the part of John Hough, and the near relationship of the two, were all proper for consideration. That, if they should be of opinion, from all the circumstances, that the two brothers opened the road for their mutual convenience, and that William only gave John a parol license to pass over his land, such license terminated at John's death. But, if the evidence was not sufficient to satisfy them that there was nothing more than a parol license, or special grant to John, then the law would presume a grant, and the plaintiff would be entitled to recover.

Under these instructions, the jury found a verdict for the defendant. Motion for a *venire de novo*, which was refused. Appeal to this Court.

Winston, for plaintiff.
Dargan, for defendant.

BATTLE, J. We are clearly of opinion, that the plaintiff has no just cause of complaint against his Honor, for the instructions which he gave to the jury, or for those which he refused to give them. The first instruction prayed, assumed, that the plaintiff and those under whom he claimed, had used a way over the land of those under whom the defendant claimed, for twenty years and more, and insisted, that from such enjoyment the law presumed a grant of the easement. Supposing that the facts were as assumed, it has been settled in this State, that the legal consequence is not such as contended for by the plaintiff. In the case of

WILSON v. WILSON, 4 Dev. Rep. 154, this Court recognised and sustained the doctrine laid down by Mr. Starkie in his treatise on evidence, (2d vol., pages 669, 670, of the 5th Am. Ed.,) that the enjoymont of an easement like the present, for twenty years, "is not an inference of *mere law*, to be made by the Court, but it is an inference which the Courts advise (or as we should say, instruct) juries to make whenever the presumption stands unrebutted by contrary evidence." This case was referred to, with approbation in the subsequent ones of PUGH v. WHEELER, 2 Dev. and Bat. Rep. 50, and GERINGER v. SUMMERS, 2 Ired. Rep. 229, and its authority cannot now be shaken.

The second instruction asked, impliedly admitted the law to be as stated above, but insisted that there was no evidence to rebut the presumption of a grant arising from the alleged twenty years enjoyment of the easement; and in the third instruction, insisted particularly, that the erection of the gates across the way by William Hough, was no evidence against such presumption. This is the strongest position taken for the plaintiff, and has been defended here with much ability by his counsel, but, unfortunately for him, it cannot be maintained against the force of principle and authority, which may be brought to assail it.

In Gale and Whatley's Law of Easements, ch. 5, sec. 3, (marginal page 121,) it is said, that, "in order that the enjoyment, which is the *quasi* possession of an easement, may confer a right to it by length of time, it must have been open, peaceable, and as of right."

The effect of the enjoyment, being to raise the presumption of a consent on the part of the owner of the servient tenement, it is obvious, that no such inference of consent can be drawn, unless it be shown that he was aware of the user, and being so aware, made no attempt to interfere with its exercise. Still less can such consent be implied, but rather the contrary, where he has contested the right to the

user, or where, in consequence of such opposition, an interruption has taken place. Even supposing these defects of the user not to exist, still the effect of the user would be destroyed, if it were shown that it took place by the express permission of the owner of the servient tenement; for, in such a case, the user would not have been had with the intention of acquiring, or exercising a right. The presumption, however, is, that a party enjoying an easement, acted under a claim of right until the contrary is shown, CAMPBELL v. WILSON, 3 East. 300. The civil law expressed the essential qualities of the user, by the clear and concise rule, that it be *nec vi, nec clam, nec precario.*

"The doctrine of the law of England, as cited by Lord Coke from Bracton, exactly agrees with the civil law. The possession must be long, continuous and peaceable. Long, that is, during the time required by law; continuous, that is, uninterrupted by any lawful impediment; peaceful, because, if it be contentious, and the opposition be on good grounds, the party will be in the same condition, as at the beginning of his enjoyment. There must be *longus usus nec per vim, nec clam, nec precario.*" Co. Litt. 113 b.

That the same doctrine with respect to the qualities of the user prevails in this State, is shown clearly by FELTON v. SIMPSON, 11 Ired. 84, as well as by those of WILSON v. WILSON, PUGH v. WHEELER, and GERINGER v. SUMMERS, to which reference has already been made. In two of these cases, PUGH v. WHEELER, and FELTON v. SIMPSON, the term "uninterrupted" is manifestly used in the sense of continuous and peaceable. With regard to the duration of the user, there is no dispute. For more than twenty years the plaintiff, and those under whom he claimed, what the "Law of Easements" calls the dominant tenement, passed, by a certain way, over the land of those under whom the defendant derived title, into a public road, called the Allenton road. Were there no interruptions to the user of that

easement before the expiration of twenty years, to prevent the presumption of a grant being raised in favor of the plaintiff? We may the better be able to answer this enquiry, if we ascertain, first, what would be an interruption to a right of way. We think we may safely assert, that it would be any act, done by the owner of the servient tenement, which would prevent the full and free enjoyment of the easement, by the owner of the dominant tenement; and we cannot suppose that an act, which, if done in a public highway, would be an indictable offence, could be considered no interruption to the use of a private way. If this be so, and we cannot see how it can be otherwise, it settles the question. No one will contend, that putting a gate across the public road is not an indictable misdemeanor: and it is so indictable, because it obstructs a way, which ought to be, at all times, kept open and free for the passage of all the citizens of the State. The same may be said of the unauthorised act of turning a public road. Both these acts of erecting gates across the way, and afterwards turning it seventy yards from its original location, were done, in this case, by the owner of the servient tenement, before the twenty years user of the easement by the owner of the dominant tenement had expired. As to the erection of the gates, there is no dispute. That the way was turned within the twenty years, (or, at least, is to be so taken as against the plaintiff,) will readily appear, by adverting to the rule, that the burden of proof was upon him. His testimony showed only that the length of enjoyment, before the road was turned, was either nineteen or twenty-one years, and as that at most made the scales of evidence hang even, his proof failed.

We conclude, then, that the facts of erecting the gates, and turning the road, were interruptions to the user of the easement by the plaintiff, and those whose title he held; and that, consequently, they were proper to be submitted to the jury, as tending to rebut the inference of a grant of the

right of way to the plaintiff. The other fact, that John and William Hough, the former owners of the two tenements, were brothers, may of itself have deserved very little consideration by the jury, but we think it was proper in the Court to submit it to them, in connection with the other facts and circumstances of the case. It had *some*, though perhaps *very slight* tendency, to show the true character of the user by John Hough, of the way over and through his brother's land and yard. It was no error, therefore, in his Honor to call the attention of the jury to it.

After refusing the instructions asked, and submitting to the jury the facts relied upon by the defendant to rebut the presumption of a grant, the instructions given to them in relation to an implied license from William to John Hough, followed as a necessary consequence. If there were no grant of the easement, the testimony might well justify the inference of a license to use the way, and in the remarks of his Honor upon that subject, we find no error, which can entitle the plaintiff to another trial.

The judgment must be affirmed.

GEORGE BROOKS *vs.* JOHN KING.

Where the surety to a note in a Bank has a new note, with other sureties, discounted, and, by means of a check, has the proceeds of the latter note applied to the satisfaction of the former: This is a good payment of such note, and the principal in such former note becomes the debtor of such surety, even before the latter note is paid off.

A declaration, commencing and concluding in "CASE," but, in the body of it, setting forth A DEBT, under a penal Statute, SEEMS to be sufficient, without a demand FOR DAMAGES. But, whether so or not, according to

the strict rules of pleading, a defect in this particular is cured by act of Assembly, Rev. Stat. ch. 3, sec. 5.

THIS was an action on the case for the fraudulent removal of a debtor, tried before his Honor Judge SAUNDERS, at Forsythe Superior Court, Fall Term, 1853.

In order to show that the plaintiff was a creditor of the person removed (one Whicker), it was proved, that Whicker had a note in the Bank at Salem, for $5000, with the plaintiff and one Preston as his sureties, which was reduced by payment made by Whicker himself, to $2323 12 cents. As to the one half of that sum, the plaintiff had discounted in the same bank a note for $3200, the nett proceeds of which was placed to his credit, and he checked for $1161 56 cents, which was received by the cashier in payment of the unsatisfied remainder due on the note of $5000, which was surrendered to the plaintiff, receipted in full. The note for $3,200 was not paid until six months after its being discounted, and some time after the date of the writ in this action.

The following is the declaration contained in the record of the case:

"NORTH CAROLINA.

"In the Superior Court of Law, for the county of Forsythe, October Term, A. D. 1853:

"John King was attached, to answer George Brooks, of a plea of Trespass in the case, &c., and therefore the same plaintiff, by his attorneys, James R. McLean and John A. Gilmer, complains, for that, whereas, one Allen Whicker, on the 6th day of November, in the year of our Lord 1850, at the county aforesaid, was indebted to the said plaintiff, in the sum of $1161 56-100, for money by the said plaintiff, before that time, lent and advanced to, paid, laid out and expended for the said Allen Whicker, and at his special instance and request; and being so indebted, the said Allen Whicker,

afterwards, to wit, on the day and year aforesaid, at Forsythe aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay the said sum of money, when the said Allen Whicker should be thereunto afterwards requested; and the said Allen Whicker, being so indebted to the plaintiff, George Brooks, the said defendant, John King, well knowing the premises, on the 23d day of November, 1850, in the county of Forsythe aforesaid, did remove, and aid and assist in removing, the said Allen Whicker from the said county of Forsythe, in which county the said Allen then resided, and in which county he had resided for the space of six months, or more next before, with an intent, by such removal, aiding and assisting to remove the said Allen Whicker, to delay, hinder and defraud the plaintiff, and other creditors, or some of them, in the collection of their debts, the said debt to the said George, plaintiff, still being wholly unpaid and unsatisfied, contrary to the form of the Statute in such case made and provided: by reason of the premises, and by force of the Statute in such case made and provided, the said John King became liable to pay to the said plaintiff, George Brooks, the sum of $1161 56 cents, being the said debt owing as aforesaid, by the said Allen Whicker to the said plaintiff, and thereby, and by force of the said Statute, an action hath accrued to the said plaintiff, George Brooks, to demand and have, of and from the said John King, the said sum of 1161 56 cents, above demanded.

"Nevertheless, the said defendant, John King, not as yet having paid the said sum, or any part thereof, to the said plaintiff, although often requested so to do, but to pay the same hath hitherto wholly refused, and still doth neglect and refuse, to the damage of the said plaintiff $2000, and therefore he brings his suit."

His Honor was of opinion, and so instructed the jury, that the facts above disclosed constituted the plaintiff a creditor of Allen Whicker, to which the defendant excepted.

Verdict for the plaintiff. Rule for a *venire de novo*. Rule discharged, judgment, and appeal to this Court.

Morehead, for plaintiff.
J. H. Bryan, for defendant.

BATTLE, J. The case of HALL v. WHITAKER, 7 Ired. 353, is a direct and complete authority against the defendant's objection, that the plaintiff was not a creditor of Whicker at the time when he was fraudulently removed. There is a slight difference in the facts, but none in the principle, between that case and the present. Where a note is discounted at Bank, the proceeds in money become the property of the person for whose accommodation the discount was made, and he has a right to apply it, as he may think proper. Whether with it, he pays off a judgment, obtained against him as surety, or an unpaid note in bank, to which he is surety; whether he makes the payment in discharge of the judgment or the note, by a check on the bank, or by drawing out the money and paying it over, with his own hands, must be immaterial. In either case, he has, with his own money, paid the debt of his principal, and he thereby becomes, immediately, the creditor of such principal.

The other errors assigned in the bill of exceptions are very properly abandoned in the argument here. But a motion is made to arrest the judgment, upon the ground that the declaration is in debt, instead of trespass on the case, as required by the Statute, 1 Rev. Stat. ch. 50, sec. 9. If the objection to the form of the pleading would have been good, at common law, the defect is remedied, by the comprehensive terms of our act "concerning the amendment of process, pleading and other proceedings at law." 1 Rev. Stat. ch. 3, sec. 5. But we cannot discover any fatal error in the declaration. It commences and concludes, properly, as in trespass on the case, 2 Chit. Plead. 596, and the ap-

parent resemblance it has in any part, to a declaration in debt, is rendered necessary by the Statute, which enacts, that the plaintiff shall recover "his debt." It was not only proper, therefore, but essential, that he should state, what his debt was.

It might have been more technically appropriate to have inserted the words "damages amounting to," so as to make the declaration read, "by reason of the premises, and by "force of the Statute, in such case made and provided, the "said John King became liable to pay, to the said plaintiff "*damages amounting* to the sum of $1161 56-100, being "the said debt" &c., but the omission of those words does not alter the meaning, and we think the declaration is sufficient, without them. But if we be wrong in this, it is clear, that the error alluded to is one of slight "mispleading" or "insufficient pleading," which, after verdict, is cured by our statute of amendments.

The judgment is affirmed.

INTENDANT AND COMMISSIONERS OF THE CITY OF RALEIGH *v.* JOHN SORRELL.

The Intendant of the City of Raleigh is a member of the Board of Commissioners, and has a right to participate in making ordinances for the regulation of the public market, &c.

An ordinance requiring oats to be weighed by the public weigh-master, before being offered for sale, and imposing a penalty for its violation, is not unconstitutional.

APPEAL from the judgment of a Justice of the Peace for a penalty brought by successive appeals to the Superior

Court of Wake County, and tried before his Honor Judge MANLY, at Fall Term 1853, of that Court.

The facts of the case were agreed on by the respective Counsel of the parties, and submitted to the Court for its judgment, and are these: on the morning of the day of 1851, the defendant brought to the market a load of sheaf oats; they had been much wetted by the rain which fell on that day in bringing them to the market, and when they were offered for sale to several persons, they refused to buy them by weight if weighed in their condition at the market balance. The defendant then offered to sell them without weighing, and he was informed that such sale would be contrary to the ordinance of the City, to which he replied, that the ordinance was unconstitutional and void, and soon afterwards, on the same day, such of the oats as were dry he sold within the corporate limits of the City, to one Cooke, by weighing one bundle and counting the remainder, without their being weighed at the market balance. The ordinance under which this penalty is claimed is as follows:

RALEIGH, 19th January, 1850.

"At a meeting of the Intendant and Commissioners, held this evening, the Board passed unanimously the following ordinance concerning the public scales and the duty of the weigh-master:—

"*Be it ordained by the Intendant and Commissioners of the City of Raleigh*, That all Fodder, Oats, Hay and other provender, sold in this market, shall be weighed at the public scales, and the weigh-master shall give a certificate of the weight of the load, and also of the cart or wagon when unloaded, and if any person shall sell or buy any Fodder, Oats, Hay or other provender, without the same being weighed as herein directed, he or they shall be fined the sum of five dollars for each offence, one half to the informant and the

other half to the City, to be recovered by warrant before the Intendant or any Justice of the Peace."

(Signed by the Intendant.)

The act of incorporation of the City of Raleigh, passed in 1803, in the 3rd Section, enacts as follows:—

"*Be it enacted*, That the Commissioners and their successors in office, chosen and qualified agreeably to the directions of this act, shall be and they are hereby incorporated, into a body corporate and politic, by the name of the Commissioners of the City of Raleigh, and by that name to have succession, by the election of freemen, as by this act directed, and a common seal: and they and their successors, by the name aforesaid, shall be able and capable to purchase, &c., and also to sue, &c., and from time to time at all times hereafter, to make such rules, orders, regulations and ordinances as to them shall seem necessary, for repairing the streets, for erecting public pumps and keeping in repair those already erected, for regulating the public market, by appointing a Clerk thereof, or otherwise, to provide for the strict observation of the Sabbath, to appoint a Ranger of the public grounds, to appoint a constable or constables, City watches or patrols, and also to make such other rules and ordinances as to them shall seem meet, for the improvement and good government of the said City, and the said rules, regulations and ordinances, from time to time, to alter, change, amend and discontinue, as to the said Commissioners or a majority of them, shall appear necessary, and shall, also, have full power to enforce a compliance with and observance of such rules and regulations, by laying fines and penalties on those who shall refuse or neglect to conform to them, not exceeding five pounds."

Another act was passed in 1813, Page 24, Private Acts, amending the charter originally granted, which in the 4th Section enacts as follows: "That the Intendant of Police shall have a seat in the Board of Commissioners, and when

present shall preside therein. In his absence, the Board shall appoint a chairman *pro tem.*

On consideration of the facts in the case agreed, his Honor was of opinion, that the plaintiff was entitled to recover, and gave judgment accordingly, and the defendant appealed to this Court.

Moore, for the plaintiff.

E. G. Haywood, for defendant.

NASH, C. J. This action is brought, to recover the penalty of five dollars, imposed by the City authorities, for a violation of an ordinance made by them. The fact of the violation of the ordinance is not denied.

The first objection made by the defendant's Counsel, is an alleged variance between the ordinance, under which the action is brought, and the act of incorporation. A copy from the 3rd Section of that act accompanied the case. The language is "that the Commissioners and their successors in office &c., are hereby incorporated into a body politic" &c. The ordinance is, "at a meeting of the Intendant and Commissioners" &c. The objection is, that the Intendant is not a Commissioner, and, therefore, the ordinance is void, as not being passed by the proper authority. The cases cited by the Counsel at the Bar fully sustain his position. The Commissioners act under a special delegation of authority and their powers must be exercised in strict conformity thereto, and if not so done, their act is void. REX v. CROKE, Cowp. 26. If the Intendant, therefore, had no right, under the act of incorporation, to set with the Commissioners, and act with them, the ordinance is void, because it is not passed by the body, to whom the power is given. Several private acts have been passed by the Legislature, at different times, concerning the City of Raleigh. By the first Section of the act of 1803, Private Acts, Page 13, it

is provided, "That the government of the City of Raleigh, shall be vested in an Intendant and seven Commissioners" &c. This act defines the duties of the Intendant, but assigns him no place among the Commissioners. The omission is supplied by the subsequent act of 1813, Private Acts of 1813, Page 24. By the 4th Section of that act, it is provided, "That the Intendant of Police shall have a seat in the Board of Commissioners, and when present, shall preside therein; *in his absence*, the Board shall appoint a chairman *pro tempore*." By this act then, the Intendant is constituted one of the Commissioners. What caused this difference between the two acts, with respect to the Intendant, we are not informed, but we presume it was induced, by the propriety of giving the Board a permanent head. Whatever it may have been, the latter act clearly makes the Intendant a member of the Board of Commissioners. This objection on the part of the defendant cannot be sustained.

It is further objected, that the act of the defendant, in selling his oats without having them first weighed, by the weigh-master, at the market balance, was not within the Equity of the ordinance.

By an equitable construction, a case not within the letter of an act is sometimes holden to be within its meaning, and sometimes the letter is restrained by an equitable construction. It is *this* Equity of which the defendant seeks to avail himself, for it is not denied, that he is within the letter of the ordinance.

BACON, in the 6th vol. of his Abridgement, Title's Statute, Page 386, gives a good rule by which the Equity of a Statute may be ascertained. It is, "to suppose the lawmaker present, and that you have asked him this question: Did you intend to comprehend this case? Then, you must yourself give such answer, as you imagine he, being an upright and reasonable man, would give."

Taking this to be a sound rule, we need not in this case, go through the mental process recommended, being of opin-

ion that the act complained of is within the letter and spirit of the ordinance. Bacon further states, Page 389, of the same Volume, that a Statute which concerns the public good, ought to be construed liberally.

The ordinance we are considering, is made for the good of the community, within which it has its operation.

The words embrace the act with which the defendant is charged, and unless it be unconstitutional, ought to be enforced.

This brings us to the third and last reason assigned by the defendant's counsel, why the judgment below should be reversed. It is contended, that the act is unconstitutional, because it is against common right, and in restraint of trade.

Justice BLACKSTONE, in treating of rights, after bringing into one view the great charters wrested, at different times, from the sovereign on the throne, observes, that the rights secured by them, may be said to be, "in a peculiar and emphatic manner, the rights of the people of England," 1st vol. 129; and these, he says, may be reduced to three principal or primary articles: The right of personal security; the right of personal liberty; and the right of private property. These constitute what are called *common rights*, because they are common to all, and secured to all by the constitution. We do not perceive that this ordinance violates any of these rights. If it does, then the whole system of inspection laws of flour and tobacco, lumber and other articles, established by our Legislature, is in violation of them, and void. For, the Legislature can no more disregard, in its enactment, what the constitution forbids, than a corporation, its creature, can. The inspection laws require, that the articles to be inspected shall be carried to a particular place, and examined, and measured, and weighed.

Is the ordinance in restraint of trade? We think not. If so, and unsupported by any custom, it is void. Angel & Ames, 332. There is, however, a material difference between

acts in restraint of trade, and those for the regulation of trade; the latter are proper and often necessary. It is said, that it operates in restraint of trade, because it deprives the citizens at large of a privilege which they enjoyed before its passage, that of selling the produce of their farms in Raleigh, when and where they pleased; that it was a tax to be paid to the weigh-master, either by the producer or the consumer. The act of incorporation gives to the Commissioners power to make "such rules, orders, regulations, and "ordinances, as to them shall seem necessary, &c., for regu- "lating the public market, by appointing a clerk, *or other-* "*wise*, and also to make such other rules and ordinances, as "to them shall seem meet for the improvement and good "government of said city." The public market here meant, is the city of Raleigh, and is not confined to any one particular spot within it, and to regulate it, is to establish rules by which those who bring produce, or other articles, to sell therein, shall be governed. If it was deemed proper, by the Commissioners, that all articles enumerated in the ordinance, set forth in this case, should, before being sold, be carried to the public scales, and their weight there ascertained, they had authority to do so. It abridged the defendant of no right which he had previously enjoyed; because, if he sold his oats by weight, as he did, he would have had to have them weighed, and it was a convenience to him to have them weighed in bulk, and, after being weighed, he might sell them in any part of the market, or to whomsoever might be disposed to buy. These views are sustained by the case of NIGHTINGALE, Pet. 11. Pick. 108.

By an ordinance of the city authorities, it was ordained, "that the limits of Fanueil Hall-Market, shall be the lower "floor of the building, &c., and the street on each side "thereof called North Market street and South Market "street;" and, by a subsequent section, it is provided, "that "no inhabitant of the city of Boston, or of any town in the

"vicinity thereof, not offering, &c., shall, at any season of the "year, without the permission of the clerk of Faneuil Hall "market, be suffered to occupy any stand, &c., for the pur- "pose of vending commodities in either of the streets men- "tioned in the first section of this ordinance," &c. The petitioner violated the ordinance. The Court decided, that the ordinance was within the power of the Commissioners; that it did not violate any private rights, nor does it operate "as an improper restraint of trade, but is a wholesome regu- "lation of it." The case of STOKES & GILBERT v. CORPORATION OF NEW YORK, 14th Wendell, 87, is still more in point, deciding, substantially, all the objections raised here. The authorities passed an ordinance, imposing a penalty of five dollars upon any person who should sell any anthracite coal, within the city, without being first weighed by the weigh-masters. The petitioner violated the ordinance. The objections raised by the petitioner's counsel embrace this case. The first was, that the Commissioners had no power, under their charter, or under the constitution, to pass the by-law in question. The Court ruled, that the case was clearly within the power of corporate regulation. These cases abundantly show, that the ordinance in question is constitutional, and that it is a corporate regulation. If this were not so, there is not a municipal corporation in the State, whose ordinances, regulating the mode and manner in which the traffic of a town shall be conducted, are not void.

It is said, further, that the commission to be paid to the weigh-master is a tax. Fees, such as are allowed by the ordinance in this case, are not a tax. In authorising the commissioners to pass such by-laws for the government of the city, as they might think necessary, it authorised the ordinance by which the office of weigh-master was created, and also authorised the payment of a salary, leaving to the Commissioners the power to say how much he should receive

and have. If the traffic is within the city, the buyers, in most cases, will be citizens and voters, and, if the ordinance is oppressive, they have the remedy in their own hands.

Judgment affirmed.

WILLIAM PARRIS *v.* JOSEPH THOMPSON.

Where A. contracts for land and pays for the same, but has the title made to B. with a fraudulent intent to hinder and delay his creditors in the collection of their debts, and afterwards, with the same fraudulent intent on the part of A., by his direction, conveys the land to C., who sells and conveys the same for a chattel: HELD, that this chattel cannot be taken by execution for the debt of A.

(RHEM v. TULL, 13 Ired. 57. PAGE v. GOODMAN, 8 Ired. Eq.—cited and approved.)

THIS was an action of TROVER, tried before SETTLE, Judge, at the Spring Term, 1853, of Alamance Superior Court. The plaintiff bought a mare from one Andrews, conveying to him a tract of land in payment. The defendant, under an execution, levied on the mare, as the property of David Roach, and justified the conversion, by producing judgments and executions in favor of Freeman and Williams, against Roach. The defendant proved that the land which the plaintiff gave for the mare, had been bought and paid for by Roach three years before, and that the deed to the land was made to one Sikes; that Sikes held the deed for two years, but claimed no interest in the land; and that Roach received the rents and profits. Before the sale of the land to Andrews for the mare, Sikes conveyed the land to the plaintiff, in consideration of a note of $50 upon Roach, which note Sikes afterwards surrendered to Roach without

receiving any consideration in return, and at the request of Roach, made a deed to Parris for the land.

Roach and Parris lived together, and after Parris bought the mare, Roach offered to trade her as his own property.

His Honor charged, that if the jury believed the trade for the mare between Andrews and the plaintiff was a fair and *bona fide* transaction, they should find for the plaintiff, and that the creditors of Roach could not follow the mare, as the proceeds of the sale of the land into the hands of the plaintiff; and that the plaintiff's right could not be affected by any fraud in the sale of the land to Sykes, or to Parris, the plaintiff.

Verdict for the plaintiff. Judgment and appeal.

Ruffin and Nash, for the plaintiff.
J. H. Bryan, for the defendant.

PEARSON, J. We concur with his Honor. Suppose there was *bona fides* in the transactions, by which Sikes, with the consent of Roach, conveyed the land to Parris, and took in payment therefor, a note of $50, due by Roach to Parris; then Roach had no further interest in the land: it belonged to Parris, and he became the owner of the mare, for which he gave the land in exchange.

Or, suppose there was *mala fides*, (which is the view of the case as presented to the jury,) and that Roach, when he paid for the land, had the title made to Sikes, for the purpose of defrauding creditors; and afterwards, with the same fraudulent intent, shifted the title into the hands of Parris, and to cover the transfer, concocted the note to serve as the ostensible consideration, paid by Parris, who, in fraud of creditors, held the land on a secret trust for Roach; and that, with his consent, he exchanged the land for the mare and held her on the same secret trust; Roach had no interest which could be sold under executions, either by force of the Statute of Elizabeth, or of the

act of 1812. This is settled. RHEM v. TULL, 13 Ired. 57. PAGE v. GOODMAN, 8 Ired. Eq. 16. It is true, the subject in these cases, was land; but there is no distinction between land and personal property in this particular.

The Statutes above referred to put both species of property on the same footing, and a case like the present does not come within the operation of either.

Judgment affirmed.

STATE *v.* HYMAN AND AUSTIN.

An order, in which the master of a slave consents that A. B. should sell and deliver to said slave, "ardent spirits, whenever he shall apply for the same, during the present year," is void, as being in derogation of the act of Assembly.

THIS was an indictment for selling spirituous liquor to Charles, a slave, the property of William Norfleet, tried before MANLY, Judge, at the Fall Term, 1853, of the Superior Court, for Edgecombe County. The defendants pleaded "not guilty." The proof was, that they had sold spirituous liquor to said slave, under a written order from his master, as follows:

"Messrs. Austin and Hyman have my consent to sell and "deliver to Charles, ardent spirits, whenever he shall apply "for the same during the present year.

"January 11, 1853. WM. NORFLEET."

His Honor, being of opinion, that the selling was unlawful under this order, so charged the jury, who found the defendants guilty.

Motion for a *venire de novo*. Rule discharged, and appeal.

Attorney General, for the State.
Moore, for the defendant.

NASH, C. J. The sole question brought to our notice in this case, is the validity of the order under which the defendants seek to protect themselves. It is a general order, given by the master of the slave, Charles, purporting to authorise him to trade with the defendants, for spirituous liquors, *whenever* he shall apply for the same during the year 1853. It is no way necessary to enquire, how far the order would protect the defendants in a civil suit by the master, against them, for supplying Charles with ardent spirits, during that year; our present business with it, is to ascertain its legality, in reference to the case before us.

His Honor, below, charged the jury, that trading under this order was unlawful. In this direction we entirely concur. The order is *null and void*, is in derogation of the letter and spirit of the act of the General Assembly, and conferred no such authority on the defendants as to justify them against the present prosecution.

There are few subjects of legislation in this State, more interesting to the community at large, than the regulation of the conduct and the protection of our slave population. Constituting our domestics, and admitted to all the privacies of the domestic circle; constituting a large portion of the wealth of the State, and of its individual citizens, it needs be, that they should be guarded well, both as moral agents and as objects of property. With this view was the act passed, under which this indictment is framed. It was intended to guard the interest of the community against the vice and crime, the disorder and insubordination, which would grow out of an unlimited indulgence by our slaves in procuring ardent spirits; to secure the interests of the

owner, in the health and strength and obedience of his slave, and to protect the slave himself, in his moral health, against the allurements held out to him.

The act we are considering, is a police regulation, and should receive from the Court such construction, as will carry out the views of the Legislature, to be gathered from the law itself. The order relied upon here, is not such an one, we are satisfied, as was within the contemplation of the Legislature. If this order be a legal one, let us see to what it directly leads. The license is for one year; if good, it would be equally so for two, three, four, or any indefinite time. Now, if Mr. Norfleet can give Charles a license: then, Mr. A., Mr. B., and Mr. C., and so on through the alphabet, can each give one of their slaves a similar one. And Mr. Norfleet is not confined to his man Charles, but, if he has fifty, each one may be similarly furnished, and so may every negro in the community, by his respective owner or overseer. What would be the probable effect of such a system. It needs no strength of fancy to depict its evils, and would amount to a repeal of the law.

It is, however, said, in argument, that to give to this order the construction we have, is to abridge the rights of the master over the slave. We do not think so: at any rate it is his duty, in exercising his rights, not to infringe those of the community. The argument would equally apply to giving a written order; a verbal one, so far as his rights are concerned, but for the act of the Assembly, would protect the trader. It is further said, that the master of Charles might have printed orders for Charles, for every hour in the day and in the year. If they are all delivered to the slave at the same time, their being on separate pieces of paper would not make them better, than if written, as the one we are consideringis, and, if similar in their terms, would be of no more worth than the paper they are printed on. The act forbids all trafficing with slaves on Sundays; but authorises the

trading in the day time, between the rising and setting of the sun, where it is done for the slave; provided, the slave has a permission in writing from his master, or overseer. The owner cannot, under this law, authorise his slave, by writing or otherwise, to traffic on Sunday, or at night. Now, the order in question, if legal, authorises the defendants to sell to Charles, ardent spirits, both on Sunday and at night. The language is, "*whenever he shall apply for the same.*"

But, again, it is manifest from the wording of the act, that a permission in writing must be given for each distinct act of trading. The act says, that any person may in the day, "buy or traffic with, or receive from any slave any such article, &c., for which he may have a permission in writing from his owner, or manager, *to dispose of the same.*" To authorise the buying from a slave any thing enumerated in the act, the written permission must specify the article, or articles, so by him to be sold. The closing language of the section, is to the same purpose.

We think the act, then, intended, that there should be a permission in writing for each act of trading. This view of the act, is fortified by the opinion of the Court in STATE v. HART, 4th Ired. 249. His Honor, the late Chief Justice, in delivering the opinion of the Court, uses this language, speaking of the act: "The purposes were to remove all doubt, in every case upon the question of fact, whether the owner gave his consent to the *particular* trading, &c."

PEARSON, J. The Statute makes it unlawful to trade with a slave, for any cotton, corn, beef, leather, sheep, &c., &c., with a proviso, that in the day time, Sunday's excepted, it may be lawful to trade with a slave "for any such article, or articles, as aforesaid, for which the slave has a permission in writing from his master to dispose of the same," and "to sell and deliver to the slave any goods, money, &c., (spirituous liquors excepted, unless there be an order for the

same) in exchange for, or payment of the money, or article, or articles, which the slave may have been by the written permission aforesaid authorised to sell."

The object of the Statute is to take from slaves the temptation to steal, which would be held out, if they could dispose of property as easily as they can steal it.

It is apparent from the words of the Statute, that the written permission must specify the article which the slave has, and is permitted to dispose of. This was necessary to effect the object in view, and it was supposed, that if slaves could not dispose of any article without being obliged to tell their masters, what cotton, corn, &c., they had to sell, and the master put it down in writing, there would be but little temptation for them to steal.

The order in this case is void and good for nothing, for two reasons: 1st, because it does not specify the article which the slave was permitted to sell; 2d, because from its generality, it evades the Statute and entirely defeats the object for which it was created. The order being void, it becomes unnecessary to decide the question that was mooted in the argument: Whether a master may not give his slave a written permission, stating that he has five bushels of corn, for instance, which he is at liberty to trade for,—the spirituous liquor is expressed in the permission or order, as one of the articles which his master is willing for him to receive in exchange for his corn? In STATE v. MILLER, 7 Ired. 278, an opinion is expressed in the affirmative, if it be in the day time, Sundays excepted.

I concur that the judgment should be affirmed.

JUSTIN MARTINDALE *vs.* JAMES WHITEHEAD AND D. B. FOGLEMAN.

A carpenter's tools may be seized and sold under an original attachment.

THIS was an action of TRESPASS, tried before BAILEY, Judge, at Spring Term, 1853, of the Superior Court for Wake county.

The facts were agreed on, as follows: The plaintiff, a carpenter, owned a set of tools, with which he carried on his trade, in the county of Chatham. Whilst absent from the county, these tools were seized and sold by the defendant Fogleman, a constable, under an attachment sued out by the defendant Whitehead. The plaintiff did not appear to replevy.

His Honor, being of opinion with the plaintiff, gave judgment for nominal damages and costs. Whereupon the defendant appealed.

Miller, for the plaintiff.
E. G. Haywood, for the defendant.

PEARSON, J. Can an action be maintained for taking under an original attachment, a set of Carpenter's tools, the working tools of the plaintiff, and selling them under a *venditioni exponas*, to satisfy the judgment, the defendant having failed to appear and replevy?

The question is now presented for the first time, so as to call for a decision.

An original attachment is a process given by Statute to compel a defendant to appear. It is a continuation of a "*distringas*," a common law process, and a garnishment according to the custom of London; with the latter, we are at present not concerned.

When a defendant, after being summoned, failed to appear, and attachment issued; if he still neglected to appear,

a writ of "*distringas*," or "distress infinite" issued, commanding the Sheriff to distrain the defendant from time to time and continually afterwards, by taking his goods and the profits of his land, so as to compel him to appear." Here, by the common law, the process ended, in cases of injuries without force; *i. e.* actions of debt &c. The defendant, if he had any substance, being gradually stripped of it, by repeated distresses, until he rendered obedience to the King's writ, and if he had no substance, the law held him incapable of making satisfaction, and therefore, looked upon all further process as nugatory. The goods distrained were forfeited to the King, the plaintiff could take nothing, not having ascertained his debt by judgment—but a statute allows the Court to direct the reasonable costs of the plaintiff to be paid out of the fund—3 Blackstone 280.

Our Statute directs a writ to issue, commanding the officer to attach the estate of the debtor, so as to compel him to appear: if he does so and gives bail, the property is delivered back to him, and the Court goes on in the ordinary way: if he fails to appear after due advertisement. a mode is provided by which the plaintiff may ascertain the amount of his debt, take judgment and have the property sold and applied to its satisfaction, instead of being forfeited to the State; which is a decided improvement upon the common law process.

It is entirely clear, that under the *distringas*, all of the debtor's property, without any exception, may be seized, and it is equally clear, that the same may be done under an original attachment, which is a substitute for it. So, it is clear, that under a "*fieri facias*" at common law, all of the defendant's goods and chattles may be levied upon and sold.—In this respect, these writs, which are commands of the sovereign, differ from the extra-judicial remedy of distress, by which a landlord is allowed to take the goods found on the

premises, except beasts of the plough, for the sake of husbandry, and things in the actual use of the tenant, for fear it might lead to a breach of the peace. But this saving in regard to the private remedy of landlords, does not extend to writs; under them, the officer may take any thing, a horse out of the plough, or that the defendant is riding, or the axe out of his hand, and he may use force, with the single exception, that he cannot break the outer door of the defendant's dwelling—"for it is his castle."

The act of 1836, Ch. 45, Sec. 7, excepts from the operation of a "*fieri facias*," working tools, arms for muster and other articles. It is insisted, that although the words are confined to a "*fieri facias*," the exemption by implication extends to an original attachment. This is a *non sequitur;* because the Legislature deemed it expedient to favor a citizen who resides among us, and renders obedience to the ordinary process of the law, by exempting from execution the tools with which he earns a livelihood, or the arms with which he musters, it does not follow that the intention was to extend the like favour to one, who leaves the country or persists in his disobedience to the commands of the State, which is shown by his failing to appear.

If in fact he has left the country, wherefore put in the custody of the law his working tools and arms for muster? What objection can there be, to having them sold and applied to the payment of his debts? Or, if he is still in the country, and continues contumacious, with what grace can he ask to have his goods restored to him, or be allowed to bring an action for them?

Judgment for defendants.

PLEASANT BLACK *v.* ALFRED SANDERS.

A deed of gift may be fraudulent, though the donor, at the time of the gift, honestly believed, that she had property sufficient to satisfy all her debts, then existing—when in fact she was mistaken.

If there be an existing debt, and the debtor makes a voluntary conveyance, and afterwards becomes insolvent, so that the creditor must lose his money, unless the property conveyed can be reached; such voluntary conveyance is presumed as a matter of law, to be fraudulent.

The act of 1840, only requires the question of fraud to be submitted to a jury, in cases where property FULLY SUFFICIENT AND AVAILABLE to pay all creditors is retained by the donor.

Twenty-two negroes and two small tracts of land, valued at $7250 retained in such a case, is not SUFFICIENT and AVAILABLE to pay debts amounting to $6848.

(JONES v. YOUNG, 4 D. & B., 353, and HOUSTON v. BOGLE, 10 Ired. 496 cited.)

This was a *scire facias* before Judge SAUNDERS, at the Fall Term 1853, of Rockingham Superior Court.

The plaintiff and one Jane Sanders, mother of the defendant, were co-sureties on a bond of Luther Linder, dated 5th Jan. 1842. Judgment was taken upon this bond and satisfied by the plaintiff, before the year 1845, who thereupon instituted a suit against Jane Sanders for contribution, and recovered judgment at Spring Term of Superior Court 1851, for the sum of $595,28 and costs.

On the 22nd of October 1845, Jane Sanders executed a deed of gift, for certain negroes to the defendant. To subject defendant on account of these negroes to the payment of the judgment, obtained against Jane Sanders, this suit was brought. Prior to the deed of gift, between 1840 and 1845, Jane Sanders executed bonds to the amount of $6848, as principal, and others, amount not stated, as security. At the time of the gift, her circumstances were generally deemed doubtful, and in 1849 her property was entirely exhausted. She left the county on the same week that the plaintiff obtained his judgment, and the defendant disposed of his slaves, in a very short time thereafter.

The defendant further proved, that in October 1845, his mother was in possession of 22 slaves and two small tracts of land, valued altogether at $7250, which property she retained up to 1849, when it was sold, and she became insolvent, and that all the debts which plaintiff read in evidence had been satisfied, except the one due the plaintiff himself.

The Court charged, that if Jane Sanders honestly believed, when she made the deed of gift, that she had property sufficient to satisfy all her debts then owing, but was *in fact mistaken*, and that the deed was not made to defraud creditors, they should find for the defendant.

Under these instructions, the jury found for the defendant. Rule for a *venire de novo*, on account of misdirection.

Rule discharged, judgment for the defendant and appeal.

Morehead for the plaintiff.
Miller and Lanier, for the defendant.

PEARSON, J. His Honor instructed the jury, that if the donor, at the time the deed of gift was executed, *honestly believed*, that she had property sufficient to satisfy all of her debts then owing, but was *in fact mistaken*, and made the deed of gift without an intent to defraud creditors, it was valid. To this the plaintiff excepts. There is error. Apart from the act of 1840, if there be an existing debt, and the debtor makes a voluntary conveyance, and afterwards becomes insolvent, so that the creditor must lose his money, or the donor must give up the property, the latter is required to give way; on the ground, that one must be honest, before he is permitted to be generous. To effect this, such voluntary conveyance is presumed, as a matter of law, to be fraudulent. JONES v. YOUNG 4, Dev. and Battle 353. HOUSTON v. BOGLE, 10 Ird. 496.

The act of 1840 makes an important change in the law, and requires the question of fraud to be submitted to the jury, as an open question of fact, *in those cases*, where, "at

the time of the conveyance, property, *fully sufficient and available*, for the satisfaction of all his then creditors, is retained by the donor." This is made a condition precedent, in order to bring a case within the operation of the act.

His Honor was of opinion, that, if the donor honestly believed she retained property sufficient to satisfy all of her existing debts, although she was in fact mistaken, it would suffice to bring the case within the operation of the act, and make the intent to defraud an open question of fact. In other words, he supposed the act was general in its operation, and did not advert to the fact, that it is expressly restricted to cases, where the debtor retains property, fully sufficient and available, to satisfy all of his existing debts.

We are not called on to say, what proportion the amount of the debts may bear to the amount of property retained; it is sufficient to say, that twenty negroes, and two small tracts of land, valued in all at $7,250, is not property fully sufficient and available to pay debts amounting to $6,848, which was the condition of things in this case. No man would lend money upon such security; he would require property of this description to exceed the debt at least one-third, if not one-half. Should one of the negroes die, the fund is at once insufficient; to say nothing of the accumulation of interest, and the fact that the debtor must have something to live on.

Every important change of the law, by a Statute, gives rise to questions of difficulty, for the wit of man cannot foresee all the consequences; besides that of fixing a rule of proportion, another is suggested by the facts in this case—a part of the indebtments were surety debts, (what part is not stated:) Ought such debts to be taken into the account? They are debts as much as any other sort, and frequently persons are induced to make fraudulent conveyances, when they find themselves embarrassed as surety. On the other hand, if the principal be entirely solvent, it would seem, that

it ought to be considered. This would involve the necessity of taking an account all around. But we cannot anticipate, and will not venture to lay down a rule, except when the decision of the case requires it, and we can have the benefit of a full discussion.

Judgment reversed. *Venire de novo.*

DEN ON THE DEMISE OF WINFIELD S. COPELAND *v.* WARREN SAULS.

An unnaturalized foreigner cannot hold by courtesy such an interest in land as can be sold by a FI FA.

Although, it is true, that where both parties claim title under the same person, each is estopped from denying that such person had title, yet this rule does not prevail where one of the parties can show a better title in HIMSELF.

(PAUL v. WARD, 4 Dev. R. 247. LOVE v. GATES, 4 Dev. and Bat. Rep. 363. NORWOOD v. MORROW, Ibid 442,—cited and approved.)

EJECTMENT tried before his Honor, Judge MANLY, at the Fall Term, 1853, of Northampton Superior Court.

The land in question, it was conceded, had been the property of Ann Eliza Bolton. She intermarried with one John McAuliff, an unnaturalized foreigner, who resided in the county: a deed was exhibited from McAuliff and wife to Mary Eliza Suter, properly authenticated; Mary E. Suter died, and there was a regular sale by the administrator to pay debts, and a deed from him under an order of the County Court, to the lessor of the plaintiff.

The defendant claimed under a sale of McAuliff's interest in this land, by virtue of a *fieri facias*, bearing *test* prior to the date of the deed from McAuliff and wife, to Mary E. Suter.

It was insisted by the plaintiff, that McAuliff, being unnaturalised, could have no interest in the land which could be sold by a *fi fa.*

The defendant contended that the plaintiff, being privy in estate with Mrs. Suter, who had accepted a deed from McAuliff, was estopped to deny his title.

The Court being of opinion, that McAuliff, being an unnaturalised foreigner, could hold no interest in land subject to be sold, and that the plaintiff was not estopped, so instructed the jury, who returned a verdict for the plaintiff.

Rule for a *venire de novo* for error in the instruction of the Court. Rule discharged and appeal to this Court.

Bragg, for plaintiff.

Barnes, for defendant, argued as follows:

In an action of ejectment, lessor of the plaintiff must recover on the strength of his own title.

The judgment and execution, under which the landlord of defendant claimed, were prior in date to the deed from McAuliff and wife, to Mrs. Suter, and transferred the interest of McAuliff in the land to the defendant's landlord. It is argued, that McAuliff, being an unnaturalised foreigner, could have no interest in land which was the subject of execution; and it is admitted that it has been decided (PAUL v. WARD, 4 Dev. 247,) that "an alien cannot take by descent courtesy dower, or other title merely derived from the law.

The lessor of the plaintiff, however, cannot avail himself of this principle of law in the present action. He is privy in estate with Mrs. Suter, who accepted of a deed from McAuliff, claims title under that deed, and is therefore estopped from denying that McAuliff had title to the *locus in quo*. "Where both parties claim title under the same person, it is not competent to either, as such claimant, to deny that such person had title." IVES v. SAWYER, 4 Dev. and Bat. 51. "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." ARMFIELD v. MOORE, 1 Busbee 157. Privies in estate are bound by estoppel. COKE upon Littleton, Butler and Hargrave notes, vol. 2, p. 352. TREVIVAN v. LAWRENCE, Smith's Leading Cases, Law Library, No. 30, page 102 and notes.

When one accepts of a deed, it is an admission that the party making the deed had title to the land conveyed, and while he claims title under that instrument he cannot be heard to allege the contrary. It would be absurd in the extreme, to permit a plaintiff in ejectment to offer in evidence a deed from A. and B. to himself, claim title alone through it, and then, in the face of such claim, deny that A., one of the parties thereto, had a shadow of title. It would be a violation of all principle, and would produce the very consequences which the wholesome doctrine of estoppel as applied in our time is intended to prevent.

BATTLE, J. The defendant's counsel admits that it is a well settled principle, that an alien cannot take land by descent, courtesy, dower or other title, derived merely from the law. 7 Rep. 25. PAUL v. WARD, 4 Dev. 247. BELL, on the property of Hubbard and wife, 151 (67 Law Lib. 114.) The defendant did not, therefore, acquire any interest in the land in controversy, by his purchase under the execution against McAuliff. But his counsel contends, that the plaintiff's lessor claims under the same person, and is, therefore, estopped to deny his title, and that, as the defendant purchased under a *fieri facias*, which bore *teste* prior to the date of the deed from the said McAuliff and wife, to the person under whom the lessor claimed, the latter could not recover. The doctrine contended for, in the ingenious argument of the counsel, is, to a certain extent, undoubtedly true, and is well supported by the cases to which he refers, as authority for it. That doctrine is, that as the lessor of

the plaintiff, in an action of ejectment, is bound to show a good title in himself; the defendant being in possession, may generally show in his defence a better title than that of the lessor, outstanding in a third person. But, if both parties claim title under the same person, it is not competent to either, as such claimants, to deny that such person had title. MURPHY v. BARRETT, 1 Car. Law. Reports 105. IVES v. SAWYER, 4 Dev. and Battle 51. That rule must give way, however, when the party can show a better title in *himself*, as is proved by the cases referred to by the plaintiff's counsel. LOVE v. GATES, 4 Dev. and Bat. 363. NORWOOD v. MORROW, Ibid. 442. BRERETON v. EVANS, Cro. Eliz. 700.

In the present case, the lessor of the plaintiff has shown a perfect title in himself, for the deed from McAuliff and wife, to Mary E. Suter, was sufficient to pass the title of the wife, to her; the same having been acknowledged, and the wife privately examined, as required by law.

It is true, that the execution of the deed by the husband had no effect to pass any interest from him, for the very good reason, that he had none; yet, he was a necessary party to enable his wife to convey her interest. If, then, the lessor, who claimed under Mary E. Suter, had been in possession, he could have defended himself in an action of ejectment, brought by the present defendant, by showing *title in himself*, and we can see no good reason why that title may not be shown to avail him, in the same kind of action, brought by himself.

We have not adverted to the act of 1848, ch. 41, which prohibits the sale of the husband's interest, because the plaintiff's counsel has not relied upon it, and we think his right to recover good, without it.

PER CURIAM. The judgment is affirmed.

JOHN W. ROBERTSON & WIFE *v.* JOHN ROBERTS, EXECUTOR.

A present bequest of a slave or money is not to be postponed till the expiration of a life estate, although connected by the word "also" with a devise of an estate thus postponed, where the effect of such a construction would be an intestacy, as to this property, for the INTERIM.

(SHERILL v. ECHARD, 7 Ird. 161, and HYMAN v. WILLIAMS, 12 Ird. 92. WHITE v. GREEN, 1 Ird. Eq. 45, cited.)

APPEAL from the Superior Court of Rockingham, upon the petition of plaintiffs' for a LEGACY, heard before his Honor Judge SAUNDERS, at Fall Term, 1853.

Sarah Cobblar, the legatee mentioned in the following will, had intermarried with the other plaintiff, John W. Robertson, at the filing of this petition. The only question in the case arises on the construction of the will of John Parish, which is as follows:—

1st. It is my will and desire, that all my just debts be paid by my executor, hereafter named.

2nd. I give and bequeath to my beloved wife Ailsy, all my plantation and tools of every description, household and kitchen furniture of every description, all my stock of horses, cattle, hogs and sheep, and two carriages; also, one negro man named Major, and all my crop of every description, which may be on hand: my will is that Ailsy, my wife, have the above named property, her natural life, which is only lent for that time.

3rd. My will and desire is, that my negro woman named Riah, together with all the household and kitchen furniture, except one bed and furniture, and one chest, to do as she thinks proper with.

4th. After my wife's death, my will is, that Sarah Cobblar, a daughter of Thomas Cobblar, is to have the above named beds, furniture and one chest. I also give and bequeath to the said Sarah Cobblar, seventy-five acres of

land, taking in my dwelling house, orchard and spring. I also give and bequeath to the said Sarah Cobblar, three hundred dollars, or a negro girl worth that money. Now, in case the said Sarah Cobblar should decease without having any children, my will and desire is, that all, except the bed, and furniture, and chest, is to go to Elijah Cobblar's children, and be equally divided among them.

5th. My will and desire is, that, after my wife Ailsy's decease, my wish is, that the balance of my land, together with every thing else, should be sold, and the money arising from the said sale to be equally divided between Elijah Cobblar's children.

I do hereby make and ordain my friend, John Roberts, executor, &c.

The plaintiff prayed that the legacy of $300, or the negro woman, might be paid to him, immediately, by the executor, who is made defendant.

The answer of the executor, after admitting all the allegations of the petition, submitted to the Court, whether he ought to pay over the legacy before the death of Ailsy, the widow.

The cause was set for hearing on the bill, answer and exhibit; and, on the hearing, it was declared as the opinion of his Honor, that the possession of the legacy to the plaintiffs should be postponed until the death of Ailsy Parish, the widow, and a decree was made accordingly, from which the plaintiffs appealed to this Court.

Miller, for the plaintiff.
Morehead, for the defendant.

BATTLE, J. The only question presented on this appeal, is, whether the bequest to the *feme* plaintiff, of "three hundred dollars, or a negro girl worth that money," contained in the will of the defendant's testator, is to be paid immed-

ately, or to be postponed, as to the time of payment, until the death of the widow.

In the Court below, the decree was against the plaintiffs, upon what we conceive to have been an erroneous construction of the will under which they claimed. The terms of the bequest import an immediate gift, and they are to be so construed, unless a contrary intent is apparent from other parts of the will.

The defendant contends, that such contrary intent does appear, from the clauses which immediately precede the one under consideration, for the reason, that the first of those clauses expressly postpones the bequest of the bed, furniture and chest, to the death of the widow; and the second, by a necessary implication, postpones the devise of the seventy acres of land to the same time, the land having, in a previous part of the will, been given to the widow for life, and that the clause in question, commencing with "I also give and bequeath to the said Sarah Cobblar," &c., must, by force of the word *also*, have the same construction. It is true, that, in the cases of SHERRILL v. ECHARD, 7 Ired. 161, and HYMAN v. WILLIAMS, 12 Ired. 92, the construction turned partly upon that word which was explained to mean "in like manner," or "in the same manner." SHERRILL v. ECHARD was shortly this. A testator devised to his wife, during her life or widowhood, all his estate, except what he should by his will otherwise dispose of. He then gave certain property to his children, to be their's at his decease. Then comes this clause: "Also, at the decease of my wife, I give to my son G., my man Stephen, and to my son L., my man Charles. Also, I give and bequeath to my son L. W. all my lands, &c., (on which he had previously given his wife a life estate.) Also, unto my son L. W. I give my two boys Dick and David, with their mother:" *Held*, that these negroes, last mentioned, did not pass immediately to L. W.,

but only in remainder, after the death or marriage of the widow. In HYMAN v. WILLIAMS, the bequest was substantially as follows: "I leave to my wife Charity, one negro man Primus," (and other negroes;) "also, she may take choice of any one of the negro girls belonging to my estate, which I may not give away," &c., "and, at the death of my wife, the negroes which I have loaned to my wife, and their increase, I want to be equally divided between my four grand-children," A, B, C, and D. *Held*, that the wife took a life estate only in the negro girl selected by her, from those not given away. In the opinion delivered in each of these cases, the Court, while laying some stress on the word "also," sought the aid of other dispositions in the will, to fix the construction, and thus, with the definitions "in like manner," and "in the same manner," given to that word, they were enabled to reconcile one part of the will with another, and give a consistent exposition of the whole. But, if the same meaning be attached to the word "also," in the will now before us, a directly contrary effect will be produced. Instead of enabling the expounder to give operation and effect to each and every clause of the will, it will compel a declaration of intestacy as to a life estate in the bequest, which the plaintiffs are now claiming. In no part of the will is any money given to the widow, either expressly by that designation, or by general terms. She cannot take a life estate by implication, in the three hundred dollars, or in the negro girl, which that sum may purchase, because it appears from the case of WHITE v. GREEN, 1 Ired. Eq. 45, and the authorities there cited, that the doctrine, that a gift by will to A, after the death of B, is a gift for life to B, by implication, does not, under any circumstances, apply to personal chattels. If, then, the widow cannot take this bequest for her life, it is certain that no one else can; for, it is manifest, that it cannot form a part of the fund given in the residuary clause.

Any other construction, then, than to hold it to be an immediate bequest to the *feme* plaintiff, will leave it as an undisposed residue during the life of the widow, to be divided among the next of kin. Such could never have been the intention of the testator, and we therefore adopt the only other admissible construction; to wit, that which makes it a present gift to the *feme* plaintiff.

The decree given in the Court below must be *reversed*, and a decree be entered here for the plaintiff.

Decree reversed.

NEIL CHANCY *v.* NANCY BALDWIN, ADM'R.

In an action at law upon a negotiable instrument, alleged to be lost, the loss cannot be proved by the oath of the plaintiff. It is otherwise in equity: the decree provides an indemnity for the defendant.

(COTTON v. BEASLY, 2 Murphy 250. FISHER v. CARROLL, 6 Iredell Eq. 485. McKREA v. MORRISON, 13 Ired 46, cited and approved.)

APPEAL from the Superior Court of Law, of Columbus County, at Spring Term, 1853. His Honor, Judge DICK, presiding.

THIS was an action of DEBT, commenced by warrant before a Justice of the Peace. The plaintiff declared upon a common promisory note, under seal, for $47. Pleas: general issue; payment. Upon the trial, the plaintiff offered to prove the loss of the note, by his own oath, and to swear he had no other means of proving it. The evidence was objected to and rejected. The plaintiff submitted to a non-suit and appealed.

McDugald and Banks, for the plaintiff.
W. Winslow and Strange, for the defendant.

PEARSON, J. The counsel for the plaintiff admit it to be settled, as a general rule, by COTTON v. BEASLY, 2 Murphy 250; FISHER v. CARROLL, 6 Ired. Eq. 485; McKREA v. MORRISON, 13 Ired. 46, that, in actions at law, it is not competent for the plaintiff to prove, by his own oath, the loss of a negotiable instrument; but insist there should be an exception, when the amount is less than fifty dollars, and put the argument on the ground, that, in such cases, Courts of Equity refuse to give relief. Courts of Law never permit their jurisdiction—or "the course of the Court"—to be controlled or influenced by what may or may not be done in other Courts; they act upon general and fixed principles; their judgments are absolute, and cannot be moulded and framed to suit the exigencies of particular cases.

Where there is a right, for which other Courts give no remedy, or an inadequate one, Courts of Equity have been accustomed to assume jurisdiction, "to prevent a failure of justice;" but it is a new idea, that Courts of Law take jurisdiction, because the plaintiff is "without remedy, save in this honorable Court."

The plaintiff says he has a right, and ought to have a remedy. What is his right? Not to be paid in the same way as if he had not lost the note; that would put the consequences of his negligence or misfortune upon the defendant: his right is to have the money paid, provided he will indemnify the defendant. Courts of Law cannot enforce this right, for their judgments are absolute, and they cannot require an indemnity; so, if the plaintiff was allowed to prove the loss of the note by his own oath, and to get judgment, and collect the money, and an endorsee should afterwards sue and recover the money a second time (the payment upon the first judgment is no bar), the defendant would have been forced by the judgment of a court to pay the debt twice, and have no remedy for the wrong: because money paid upon a judgment can never be recovered back

by an action at law. Courts of Law, therefore, cannot give a remedy, without subjecting defendants to the risk of paying the same debt a second time, and being left without any remedy over, which would be manifestly unjust. No Court of justice will put a defendant in such a predicament upon the mere oath of a plaintiff.

On the other hand, Courts of Equity can, by their decree, require an indemnity, and can thus "enforce the right;" for which reason they allow the loss to be proved by the oath of the plaintiff, and unless the execution or contents of the note are denied, will give relief.

But, although this is the general rule, in order to discourage trivial suits, when "the play is not worth the candle," and the institution of the suit indicates a wanton passion for judicial contest, Courts of Equity have adopted a rule, not to take jurisdiction of a money demand for relief against a judgment, if the amount is under fifty dollars, which is the average costs of suits in their Courts.

If the plaintiff can make good his cause of quarrel against this rule of the Court of Equity, well. But he certainly has no ground to complain, because the Courts of Law refuse to aid him, not on account of a rule founded upon convenience and expediency, but for the substantial reason, that they cannot enforce a right.

Judgment affirmed.

STATE vs. HUGH SIMPSON.

Where a defendant is ordered into custody upon a conviction, until he shall pay the fine and costs imposed by the judgment, and is permitted by the Sheriff to escape, this is no discharge of the judgment.

(Case of HAWKINS v. HALL, 3 Ired. Eq. 280,—cited and approved,)

State *v.* Simpson.

A Deputy Sheriff, to whom it is alleged payment of a judgment was made, is a competent witness to disprove the allegation.

(STATE v. FULENWIDER, 4 Ired. 364; HAWKINS v. WALL, 3 Ired. Eq. 280,—cited and approved.)

APPEAL from the Superior Court of Bladen, Fall Term, 1853. His Honor, Judge SETTLE, presiding.

THE defendant was brought into Court by virtue of a CAPIAS, "to show cause why he should not pay the costs and fine of a former indictment." The motion for judgment was resisted upon the ground, that he had been discharged from the same, by having been prayed in custody for the fine and cost, and discharged. The fact as to this point is, that the defendant was ordered into custody, at a former term of the Court, for the fine and costs upon a conviction, and was permitted by the Sheriff, without the authority or consent of the Solicitor, to escape.

The defendant further opposed the motion, upon the ground, he had paid this judgment; and to make good this defence, he showed that there was at one time a surplus of money in the hands of the Sheriff, arising from the sale of a negro under an execution in another case, of greater amount than the sum now demanded: to this it was replied, that the whole of the said surplus had been drawn out of the hands of the Sheriff by the defendant, and one Fitzrandolph, the Sheriff's deputy, who made the sale, was offered as a witness to prove this fact. The competency of this witness was objected to upon the ground of interest, but the objection was overruled by his Honor, and the fact being established by him, as alleged by the State, the Court gave judgment against the defendant, from which he appealed to this Court.

Attorney General, for the State.
McDugald, for the defendant.

NASH, C. J. Upon the authority of the case of HAWKINS v. WALL, 3rd Ird. Eq. 280, we concur with his Honor in his

judgment in this case. There was no payment of the judgment, by operation of law, upon which the defendant was ordered into custody by the Court.

It is well settled, that where a defendant is arrested, upon a *ca sa*, in a civil suit, and is discharged, by the direction, or consent, of the plaintiff, it is in law a discharge of the debt, but where he is discharged by operation of law, as by an insolvent act or act of bankruptcy, or where he dies in prison, or escapes, it is not a discharge of the debt. In the case of HAWKINS, a judgment had been obtained against him, by the defendant WALL, upon which a *capias ad satisfaciendum* had issued, and under which he was arrested, and gave the Sheriff a bond for his appearance in Court. He did appear, and surrendered himself in discharge of his bail, and was not prayed into custody. Subsequently, a *fieri facias* issued against HAWKINS, to collect the judgment. The bill was filed to obtain an injunction, upon the proof of an agreement alleged to have been made between the plaintiff and the defendant, and also upon the ground, that the plaintiff had been discharged from custody, by the act and consent of the creditor, and that, thereby, the debt was discharged.

In the opinion delivered by the late Chief Justice, the doctrine is fully discussed, and the principles governing this case settled—that where a debtor is in custody, upon final process, and escapes, or surrenders himself in open Court, it is no discharge of the debt—and in the latter case it is optionary with the plaintiff, to pray him into custody or not—and if he does not, his rights under the judgment are not touched—and the opinion further decides, that it is in the power of the Court to order the defendant into custody, and if they did so, it would be a new imprisonment under that order: we think that case decisive of the one before us, upon that point. The first judgment against the defendant was not discharged, by his arrest under a *ca sa*, and his escape therefrom, by the act of the Sheriff. The State, by

its agent, the prosecuting officer, did not assent to it. As the judgment was still in force, the Court had a full right to order a new *capias* to issue, and upon the defendant's being brought into Court under it, there was no error in the judgment rendered, of which the defendant has a right to complain.

We do not deem it necessary to consider the question of the power of the Sheriff, to retake a prisoner, under final process, who escapes by his permission. It has no application in this case, as he acted under the precept of a Court of competent authority.

The defendant further insists, that the money due upon the judgment had actually been paid to the Sheriff—and he showed, that a negro of his had been sold by one Fitzrandolph, the deputy of the Sheriff, and that the sale raised more money, by $188, than was necessary to satisfy the execution, and that the money was still in the Sheriff's hands. Fitzrandoph was then called in behalf of the State, to prove that he had paid that surplus to the plaintiff himself. The defendant objected to his competency, on the ground of interest. The objection was overruled. In this we see no error. See YORK v. BLATT, 5th Ma. & Sel. 71—and STATE v. FULENWIDER, 4 Ired. 364—where it is decided, that in an action on a constable's bond, against his sureties, the constable was a competent witness for the relator.

But further, he had no interest in the proceedings; neither he nor his principal, the Sheriff, was a party to the record, nor can the judgment be given in evidence against him, in any further suit by the Sheriff.

Judgment affirmed.

MARY A. RIVES *vs.* GERMAN B. GUTHRIE.

The words of limitation to an action of slander are to be taken as LUNAR and not as CALENDAR MONTHS.

THIS was an action on the case for slanderous words spoken, tried before his Honor Judge SAUNDERS, at Fall Term, 1853, of Chatham Superior Court. Pleas: general issue and Statute of Limitations.

The words complained of, were proved to have been spoken on the 5th day of August, 1851. The writ on the case was issued on the 23rd of January, 1852. The Counsel for the defendant insisted, that the words *six months* on the Statute limiting the time in which this action could be brought, must be construed to mean six *lunar* months. It was agreed by Counsel, that the jury might render their verdict, and if for the plaintiff, and his Honor should be of opinion, that the Statute was a bar, he should set aside the verdict, and enter a judgment of nonsuit. A verdict was rendered for the plaintiff.

Upon consideration of the point reserved, his Honor being of opinion with the defendant, set aside the verdict, and gave judgmentof nonsuit, according to the agreement, from which judgment the plaintiff appealed to this Court.

Winston for the plaintiff.

Manly, with whom was *Miller*, argued as follows:

In our law, is the word month to be taken as lunar or calendar in Statutes and Judicial proceedings?

Our conception of time originates in that of motion, and particularly in those regular and equable motions carried on in the Heavens, the parts which from their perfect similarity to each other are correct measures of the continuous and

successive quantity, called *time*, with which they are conceived to co-exist.

"Month (*in Saxon, Monath*) is from Mona, the moon.—In popular language, four weeks or 28 days are called a month, which consists of one revolution of the moon, or the period from one change or conjunction of the moon with the sun, to another."—Webster's Dictionary.

The Calendar or Almanac month, consisting of 28, 29, 30 or 31 days, is an arbitrary or artificial division of time, made to correspond with the 12 signs of the Zodiac.

This form of civil months, as it now exists, was introduced by Julius Cæsar. Previously to his day, the civil year was divided into 10 months, when July was added in compliment to Cæsar, and August in compliment to Augustus, and the number of days assigned to the months respectively.

The rule of the common law is, without exception, to consider *month* in Statutes and temporal proceedings a lunar month, and for the unanswerable reason given by Blackstone, that such mode of computation is "*uniform*" and not fluctuating as computing by calendar months would make it.

Lord COKE says "a month, mensis, is regularly accounted in law 28 days, and not according to the calendar month, nor according to the solar, unless it be for the account of the lapse in a *quare impedit*." Co. Lit. Lib. 2, ch. 11, sec. 202.

In addition to the authorities heretofore cited, I beg to refer you to 1 Steph. Com., 265—2 Black. Com. 141—Com. Dig. Ann. B. 1, M. & S. 113—Willes' Rep. 585—4 Mod. Rep. 185—1 Strange 446—3 Burrow 1455—Douglass 463 and 446.

The English rule is adopted in Georgia. Dudley's Rep. 107.

Some of the Encyclopedias derive *month* from "*Moneo*," to admonish, because it suggests to the husbandman, without human conventionalism and caprice, seed time and harvest.

NASH, C. J. The case involves the question, not yet decided in this Court, whether, where a Statute makes use

of the words "months," a lunar or a calendar month is meant. The action is for slanderous words. The Statute provides that in all such cases the action must be brought in six months after the words spoken, and not after. The Statute being pleaded, if a lunar month is meant, the action is barred: if a calendar, it is not: and this is the only question before us. Rev. St. Ch. 65 Sec. 3.

In deciding the question, our attention is naturally drawn to the history of the division of time into years, months and weeks. The latter is of Divine institution, being the time employed by the Creator of all things, in the creation of the world, and marked by him, by a command, to keep holy the seventh. The other two divisions are of man's invention. It was early discovered, that they were necessary: observation pointed out, that the apparent course of the sun around the earth occupied a period of a little more than three hundred and sixty-five days. The changes of the moon, which were observed to occur every twenty-eight days, naturally suggested the division of months. Among the old Romans, their first king, Romulus, divided the year into ten months, giving to four of them thirty days, and to the rest thirty-one. It was soon discovered, that this did not answer; there were not days sufficient for the sun to perform his circuit, and he inserted as many days as were necessary to bring it up to the year succeeding. His successor abolished this method, and added two new months, to wit: January and February. Thus the year was made to consist of twelve months, numbering three hundred and fifty days, and to make it agree with the solar period, intercalation—that is, inserting days, was resorted to, and they were intrusted to the Pontifex Maximus, whose duty it was, on the first of every month, to proclaim (*calare*) the month, with the festivals occurring in it, and the time of the new moon. From the verb "calare" originates the word "calendar," which means the division of time into years, months, weeks and

days, and a register of them. Our almanac is an instance of it. In consequence of the mistakes and negligence of the Pontifex Maximus, great confusion ensued in the recurrence of the festivals, which was endeavored to be rectified by Julius Cæsar, by introducing two new months, between November and December, so that the year contained fourteen months. His system continued until 1582, when Gregory 13th introduced what is called the new style, and is still in use under the name of the new, or Gregorian Calendar. The calendar of the Romans had a peculiar arrangement: they gave particular names to three days of the month; the first was called the *calends*. In the four months of March, May, July, and October, the seventh day was called the *nones*, and, in the others, the fifth was called the *nones*; and in the four former, the fifteenth days were called the *ides*, and in the rest, the thirteenth were thus called. A month is the twelfth part of a year, so called from the moon, by whose motion it was regulated, being properly the time in which the moon runs through the Zodiac. A solar month is the time in which the sun runs through one entire sign of the Ecliptic, the mean quantity of which is thirty days, ten hours, twenty minutes, and five seconds, being one-twelfth of the time composing the whole year, the length of the lunar months being now twenty eight days. The Romans used the latter in their computation of time. Co. Litt. 135 b. Thus we have seen the difference between the solar and the lunar months. It is somewhat remarkable, that the computation of time, under the same government, should be different in the different Courts. In the temporal Courts of England, a month is usually considered to mean a lunar month; in the ecclesiastical, solar or calendar. 1st Black. Rep. 450; 1 M. & S. 111; 1 Bing. 307; and, in general, when a Statute speaks of a month, without adding calendar or other words, showing a contrary intention, it shall be construed a lunar month of twenty-eight days. 6

Term. Rep. 224; 3 East 407; 1 Bing. 307. Where a deed speaks of a month, it shall be intended a lunar month, unless it can be gathered from the context that it was intended to be solar; 1 M. & S. 111; Com. Dig. Ann. B. Cro. Ja. 107, and so in all other contracts, (4 Mod. 185; 1 Stra. 448,) unless it be proved that the different departments of trade, which the contract concerns, is, that bargains of that nature are made in reference to solar months, (1 Stra. 652; 1 M. & S. 111,) and so in bills of exchange and promissory notes, the custom of trade has established that a month, mentioned in them, shall be construed a solar month. 1 Br. & B. 187; 2 Bl. Com. 112, *in note*.

The argument before us was marked with great ability, by both the eminent gentlemen on each side who conducted it. On the part of the plaintiff, it was urged that, from the context of the act of Limitations, it was evident that solar or calendar months were intended, and I confess I was at first struck with the force of the suggestion; but, upon a careful examination of the act, my first impression was removed. In the act, in limiting the time within which the different actions shall be brought, they uniformly refer to the solar year. Thus, actions of account, case, detinue, &c., are to be brought within three years next after the cause of action accrued, and actions of trespass *vi et armis*, &c., within one year; and we have seen that, when a Statute uses the term year, that it means a whole year, or the time necessary to complete it, to wit, the three hundred and sixty-five days, and the fractions; and it is said that, as the limitations referred to a solar division of time, to make the act consistent, we must construe the limitation of actions for words spoken, which immediately succeeds that for violence, as referring to solar months. We do not concur in this construction: we are bound to give to words, when used in a Statute, the meaning attached to them at common law, unless the act shows that they were not so intended, and a strong argument

is derived from the fact, that, in limiting the time within which actions for slander are to be brought, the phraseology is altered to months. Why was this done? Another and a familiar mode of expression might have been used, which would have kept up the idea running through the preceding clauses of the same section, as half a year, in which the term year means a solar. The expression *half a year* would have carried with it the idea that the Legislature meant half of that time. But they have used an expression well known to the common law, and it must be presumed that they intended it to be read in that sense.

His second objection was, that the words "six months" must be read in connexion with the popular meaning of the phrase, and it was said that, in this State, few of the mass of the people know anything about lunar months; but they, uniformly, in speaking of months, mean the calendar month. Several English authorities are cited to sustain the position. But it must be borne in mind, that they all recognize the common law rule, that a Statute month is a lunar month, and that in them all, it is not controverted, but that there was *a common understanding*, directing the construction upon this question. The only American case directly in point, is that cited by plaintiff's counsel, to sustain his position, of ALSTON v. ALSTON, 2 So. Car. Const. Rep. 604-8. That case does fully sustain him. We are always gratified when the decisions of our sister States are brought to our notice, upon any legal point before us. Though not authoritative, they are in general safeguards to a correct decision, as being the opinions of men whose position and learning entitle them to the highest respect. When we are not satisfied with the reasons assigned, we feel that we are not trespassing upon any duty, in not accepting it as decisive. We confess we are not satisfied with that opinion. The reasoning in it, (and so it is in the English cases referred to,) is built upon an assumption we cannot make. We can-

not say that there is such a general understanding in this State. By the defendant it is denied. He insists that the common farmers of the country are familiar with the distinction; that every farmer, who owns cattle, knows that the period of gestation is reckoned in lunar months, counting twenty-eight days to the month, and that every midwife knows the same as to the human family. In our Statute of Descents, the seventh rule limits the descent to posthumous children, to their being born within ten months from the death of their parent. It never has been questioned, we believe, that the ten months mentioned in that Statute refers to lunar months, as being the time of gestation. If we are asked, "is the intelligent portion of the people of North Carolina, in general, ignorant of what is meant by a lunar month," we cannot say so. If referred to our belief on the subject, we say, we do not so believe, and that they do know much more about it than they do about "the trial by battle," (referred to in that case.) Popular or general opinion on the question cannot control the common law. In Georgia, a decision has been made, differing from that in South Carolina, Dudley's Rep. 107, and we see that in New York the Legislature has established the solar as the Statute month: This is evidence that that Legislature found it was necessary to alter the common law, and that something more than common belief was required. If Mr. BLACKSTONE was in an error, he erred in company with some of the highest names known to the law. Lord COKE, book 2, ch 11, sec. 302, says, "the month is regularly counted in law 28 days, and not according to the calendar month, unless it be for the account of a lapse in *a quare impedit.*" This we consider the doctrine of the common law, and binding upon the Court, until it shall please the Legislature to alter it. We claim no such power. We think it right and proper, because, in its workings, we see it more in alliance with the rules of

nature, and because it is more uniform in its measurement of time than the calendar month.

Judgment affirmed.

JOHN McRAE *vs.* MATTHEW N. LEARY, EX'R.

To take a debt, claim, or demand, *out of the operation* of the Statute of limitations, there must be a promise, either express or implied, to pay a certain and definite sum, or an amount capable of being reduced to a certainty, by reference to some paper, or by computation, or in some other infallible mode, not depending on the agreement of the parties, or the finding of arbitrators, or a jury.

A judgment for costs under Act of Assembly, Rev. Stat., ch. 4, sec. 9, is a matter of discretion with the Court below, and cannot be revised in this Court.

(PEEBLES v. MASON, 2 Dev. 367. SMALLWOOD v. SMALLWOOD, 2 Dev. and Bat. 330. RAINY v. LINK, 3 Ired. 376. SHERROD v. BENNETT, 8 Iredell 309. SMITH v. LEEPER, 10 Ire. 86. MOORE v. HYMAN, 13 Ired. 272. SHAW v. ALLEN, Bus. 58. McBRIDE v. GRAY, Ibid. 420. HOLMES v. JOHNSON, 11 Ired. 55,—cited and approved.)

THIS is an action of ASSUMPSIT for goods sold and delivered, commenced in the County Court of New Hanover, carried by appeal to the Superior Court, and tried before his Honor Judge SETTLE. Plea: Statute of Limitations. Upon the trial, the plaintiff introduced one Stephen D. Wallace, as a witness, who testified that he was at the time of the sale and delivery of the goods a book-keeper for the plaintiff, and delivered the same to the defendant's testator at various times, from the month of October 1843, to June 1846.

On the trial, the book of the plaintiff was produced, containing the amount, and the said witness further testified, that a few days before the death of the defendant's testa-

tor, which occurred in June 1846, he and the testator were on the slide of the plaintiff's mill, when the testator said to the witness, "my account has been handed in. I owe John McRae a large amount of money, and am afraid he is getting uneasy, but as soon as I finish the building I am now working on, I will call and settle it." The witness did not see the account, or accounts which had been handed the defendant, and therefore could not say that they corresponded with the account stated in the books. The account as appeared by the books was $980, of which 312 72-100 was not barred by the Statute.

The plaintiff's counsel asked the Court to charge the jury, that if they believed the testator, when he used the expression "my account," meant the account which had been handed him by the plaintiff, and said "I will settle it," thereby meant he would pay it, that it was such a promise as would take the case out of the operation of the Statute, with the aid of the maxim, "*Id certum est, quod certum reddi potest*, though no account was present and no amount named.

The Court charged the jury that they would find their verdict from the testimony, and the witness stated that he did not see or know the amount of the account, and if his testimony did not satisfy them, that the defendant in his conversation with the witness, referred to the amount of the account of the plaintiff's books, his testimony would not take the case out of the Statute. The Court farther remarked, that the jury, as honest men, would require testimony to establish a fact before they would find it.

The jury rendered a verdict for the plaintiff for the amount of the account recovered in the County Court, which was the amount not barred by the Statute of Limitations, with interest up to this time. Rule for a new trial: Rule discharged. Plaintiff prayed an appeal to the Supreme Court, which was granted. On motion of the defen-

dant's counsel, the Court gave judgment against the plaintiff for the cost of the appeal from the County Court.

Troy, for the plaintiff.
D. Reid and Winslow, for the defendant.

BATTLE, J. It may now be considered to be a well established principle in this State, that to take a debt, claim, or demand out of the operation of the Statute of Limitations, there must be a promise, either express or implied, to pay a certain and definite sum, or an amount capable of being reduced to a certainty by reference to some paper, or by computation, or in some other infallible mode not depending on the agreement of the parties, or the finding of arbitrators, or a jury. PEEBLES v. Mason, 2 Dev. 367. SMALLWOOD v. SMALLWOO, 2 Dev. and Bat. 330. RAINY v. LINK, 3 Ired. 376. SHERROD v. BENNET, 8 Ired. 309. SMITH v. LEEPER, 10 Iredell 86. MOORE v. HYMAN, 13 Iredell 272. SHAW v. ALLEN, Bus. 58. McBRIDE v. GRAY, Ibid. 420.

This principle seems to have been fully understood, and was correctly applied by his Honor in his charge to the jury. The declarations made by the defendant's testator to the witness Wallace, referred either to the account standing against him on the plaintiff's books, or to the account which he said had been handed in. Whether the reference was to the one or the other, was a question of evidence for the jury, and it was properly submitted to them as each. If the account on the books was referred to, then the promise to settle it was a promise to settle and pay an account which was capable of being reduced to a certainty, and in that case, the jury were told that the bar of the Statute would be repelled. But if the account handed in were meant, then, as that account was not produced and there was no evidence of its amount, there were no means of ascertaining it by computation or otherwise, and the jury were instructed

that there was nothing to prevent the operation of the Statute upon that part of the account, which had been contracted more than three years before the commencement of the suit. The latter part of the charge to which the plaintiff excepts seems to me to be directly within the principle above set forth, and of course must be sustained.

The judgment against the plaintiff for the costs of the appeal was a matter of discretion with the Judge of the Superior Court, (1 Rev. Statute, ch. 4, sec. 9,) and consequently we cannot revise it. See HOLMES v. JOHNSON, 11 Iredell, 55.

The judgment must be affirmed

WHITLEY McKONKEY & CO. *vs.* S. F. GAYLORD.

A witness who has had business correspondence with an individual unknown to him, who has written letters to him, and has received answers in reply, and swears that in this way he has acquired a knowledge of his signature, though not of his general hand writing, is competent to testify to such signature.

The Court has no right to pronounce upon the force and effect of evidence, because it is contained in an affidavit for a continuance, which is admitted by the opposite party to be true.

THIS was an issue of FRAUD under the Statute upon the return of a *ca sa*, tried before his Honor, Judge ELLIS, at Fall Term, 1853, of Washington Superior Court.

Among other specifications, was one for concealing money beyond ten dollars in amount.

It was proved by the plaintiff that a certain amount of money had been received by the defendant shortly before the issuing of the *ca sa*. In order to show that he had

honestly disbursed this amount, the defendant offered a paper in writing, signed by a person living in the city of New York: a witness (Mr. King) was called to prove the signature, and upon the enquiry as to his qualification, he stated, that he had had business correspondence with the signer; that he had written letters to him and had received letters in reply, and in this way had acquired a knowledge of his signature, but not of his general hand writing. The plaintiff objected to the admission of this witness, as not being qualified to prove the signature in question; but his Honor held the witness was competent, and he was accordingly examined.

The following statement was filed by the plaintiff's counsel, in lieu of an affidavit for a continuance, and admitted by defendant:

"Attorney, for the plaintiff, states, that he expects to prove by J. H., an absent witness, that he has frequently seen the defendant with more than ten dollars in his possession: that he has seen him at the card table frequently betting money, in which the rules of the game were cash: that the defendant frequently won and lost considerable sums of money." Endorsed, "admitted to be read by defendant as proof."

In submitting the cause to the jury, the plaintiff's counsel asked his Honor to instruct the jury:

1st. That an admission was contained in the statement filed, that the defendant possessed more than ten dollars beyond what the law allowed, and he thereby concealed as charged in one of the issues.

2nd. That the statement was an admission that he had more money than ten dollars during the pendency of this suit, beyond what the law allowed him.

3rd. That it was an admission, that shortly before the bringing of this suit, or shortly thereafter, or during the pendency of the same, he was possessed of more money than

ten dollars beyond what the law allowed him, and was bound to surrender it up, and that the retaining of it was a concealment.

The Court refused the instructions as prayed for, and told the jury that without undertaking to intimate to them the force and effect of the evidence, it was submitted to them in the language in which it had been written down in the statement, and that they should give it such weight as they thought it entitled to, in showing that the defendant concealed money since the beginning of these proceedings, and the issuing of his notice to the plaintiff. That if they were satisfied that the defendant had in possession, since that time, the money referred to in the statement, or any other, and that he made no disclosure thereof in his schedule, then they should find the fraudulent concealment as charged in the issue.

Verdict for the defendant. Rule for a new trial; rule discharged. Appeal.

No counsel for the plaintiff.
Heath and Smith, for the defendant.

NASH, C. J. There is no error in the ruling of the Court below, or in admitting the testimony objected to: As to the latter, the testimony of Mr. Kelly was clearly competent. The rule, as stated by Mr. STARKIE, in his Treatise on Evidence, 2 vol., p. 372, is, that the witness must either have seen the party write, or have obtained a knowledge of the character of his writing, from a correspondence with him upon matters of business, or from transactions between them, such as having paid bill of exchange for time, for which he has afterwards accounted. The witness testified that he had corresponded with the merchant in New York, whose *signature* was to be proved, by writing to him and receiving letters from him, and in this way he had acquired

a knowledge of his *signature*. The objection was, "the witness had not shewn himself qualified to speak of it." It is within one of the above modes stated, whereby the competent knowledge may be acquired, and the witness professed in that way, he had acquired his knowledge of the signature. The other portion of his testimony might enable the jury to give the whole its proper weight, which was submitted to the jury as belonging solely to them. See DOE *on dem* of MUDD v. SUCKERMAN, 31 E. C. L. R. 406. POPE v. ASKEW, 1st Ired., 16. STATE v. HARRIS, 5th Ired. 287. GORDON v. PRICE, 10th Ired. 385.

His Honor's charge upon the statement made a part of the case, and was correct. That statement was entirely too vague and uncertain, as to the period when the defendant was seen in the possession of the money: Whether, before the writ in the case issued: or before he was arrested under the *ca sa:* or during the pendency of the inquiry under the issues: or when it is simply a statement, that the defendant had been seen gambling, and to possess more than ten dollars. The statement could not aid the jury in coming to any conclusion, as to the time when he was so seen in possession of the money. If such testimony was sufficient to deprive a defendant of the privilege intended by the Legislature, in the act under which the proceedings are had, it would hold out to him a false hope; for it embraces the whole life of the defendant. In every such issue the plaintiff is the *actor*, he charges a fraudulent concealment by the defendant of his property, and he must prove it; he must, in the language of his Honor, "show that the defendant concealed the money since the beginning of these proceedings." No man can be expected to account for every trifling sum of money, which may have been in his possession at an indefinite period of time.

Judgment affirmed.

REUBEN PENDLETON *vs.* WARREN H. DAVIS.

The fact, that a blow was given in the presence of a Court, in session, may be given in evidence, in aggravation of damages, though the act might have also been punished by the Court, as a contempt.

A verdict for $100, as actual damages, and $1,000 as exemplary damages, is good.

(McAulay v. Burkhead, 13 Ired. 28, cited and approved.)

Action of Trespass, Assault and Battery, tried before his Honor Judge Ellis, at the Fall Term, 1853, of Pasquotank Superior Court.

The battery complained of, was a blow inflicted upon the head of the plaintiff with a stick, and was made in the Court. It ensued upon the occurrence of an angry conversation between the parties, and no justification was alleged.

Evidence was offered to show that the defendant was a man of large property, worth from seventy-five to a hundred thousand dollars. This was tendered with a view to the enhancement of damages. The Court was asked by the plaintiff's cousel, to instruct the jury, that the circumstance of the injury's being inflicted in the Court House, during the session of the Court, might be considered in the question of exemplary damages. The reception of the evidence was objected to by the defendant's counsel, but received by the Court; and his Honor also instructed the jury as requested by plaintiff's counsel, that the pecuniary ability of the defendant, as well as the place and attendant circumstances, might be considered by them upon the question of damages, and the defendant's counsel excepted for error in the reception of the evidence, and in the instructions given by the Court.

The verdict was for "$100 actual damages, and $1,000, as exemplary damages."

Judgment and appeal to the Superior Court.

Pool and Smith, for the plaintiff.
Moore, for the defendant.

PEARSON, J. It is admitted, that the jury were at liberty to give exemplary damages. The objections to the charge are met by the case of McAULAY v. BURKHEAD, 13 Ired. Rep. 28: "To enable juries properly to exercise this discretion, it is necessary to put them in possession of all the facts and circumstances connected with the parties, as well as the act;" "a thousand dollars may be a less punishment to one man than a hundred dollars to another."

It is said, that the circumstance, that the blow was given in the presence of the Court, should not have been left to the jury, because the defendant was liable to be fined for that, as a contempt, and if the jury could also take it into consideration, he would be punished twice for the same thing. Upon the same ground, it might be insisted, that a jury could not give exemplary damages when a defendant was liable to an indictment; yet, it is well settled law, that a jury may give exemplary damages in such cases. No doubt the Court, in imposing the fine, would take into consideration the fact, that exemplary damages had been recovered. In several cases the proceedings in indictments have been stayed until it was ascertained what would be the recovery in the civil action.

It was also insisted, that no judgment could be rendered on the verdict, because of its uncertainty. It is not in the usual form, but it is in effect for $1,100, as damages, and the jury go on unnecessarily to disconnect and say $100 is for actual damages, and $1,000 is for exemplary damages. This is surplusage, and comes within the application of the rule, *utile per inutile non vitiatur*. In assumpsit for a liquidated account, the proper finding is, "who assess the plaintiff's damage at $1,100, of which sum $1,000 is principal money, and $100 by way of interest." But a finding, "who

assess the plaintiff's damage to $1,000 for principal money, and $100 for interest," would in fact be assessing the damages at $1,100, and although not formal, would be sufficiently certain.

Judgment affirmed.

JOHN DOZIER *vs.* WILLIAM N. GREGORY.

The husband of a tenant in dower is not liable for mere permissive waste, after the death of his wife, and the surrender of his possession.

The husband of a tenant in dower, who removes a house from the premises, is liable in an action in the nature of waste, even after the death of his wife, though he may have built the house himself.

ACTION on the case, in the nature of WASTE, tried before his Honor Judge SAUNDERS, at the Camden Superior Court, Spring Term, 1853.

The plaintiff showed title to the premises by descent from Malachi Dozier. Dower had been assigned to the widow of his ancestor by metes and bounds, including the building in relation to which this action was brought. The widow of Malachi Dozier, after this assignment, intermarried with the defendant, who took possession of the premises, and continued to occupy them until the death of his wife, which occurred just before the bringing of this suit. The defendant, during his occupancy, removed a small house used as a poultry house, worth about five dollars, which the defendant had placed upon the premises after he came into possession. There was a small house on the land used for the same purpose when the defendant entered.

There was also on the premises a dwelling house, built in 1800, which the defendant occupied during the life of his wife. This had been thoroughly repaired in 1825, except that the shed could not be prevented from leaking. Upon this house the defendant did no repairing during his occu-

pancy, and it was in a worse condition when he gave it up than when he took possession. Many of the window sills, both above and below, were decayed; the floors also were decayed; one window was suffered to remain without glass for some time before, and up to the time of surrendering the possession, through which the rain drove in and contributed to the rotting of the floors, though this was chiefly caused by the leaking of the shed roof. This building would have been much more valuable if it had been repaired in proper time. There were two old kitchens on the premises, which were out of repair at the death of Dozier, upon neither of which was any repairing done by defendant, and they continued from decay to decline in value until he gave up his possession. One of these had become entirely useless, and the roof connecting the other with the dwelling house had been blown down in a storm. The decay in these kitchens had been general, and was produced by natural causes.—There were also on the premises stables and a quarter kitchen, which were in a better state of repair when the defendant surrendered possession than when he took it.

The defendant was married to the widow in 1837, and had possession up to a short period before the bringing of this action. Malachi Dozier died in 1835.

1st. It was contended by the defendant that no action would lie against him, after the death of his wife, for waste done in her lifetime.

2d. That he was not liable for permissive waste.

3d. That he was not liable for waste in removing the house which he had put upon the premises.

The Court instructed the Jury that, notwithstanding the last two objections raised by the defendant, the plaintiff was entitled to recover. The first question raised by the counsel he reserved.

The Jury rendered a verdict for the plaintiff.

Upon consideration of the question reserved, his Honor Judge SAUNDERS gave it as his opinion that the plaintiff

could not recover. The verdict was set aside, and a nonsuit entered. Appeal by the plaintiff.

Poole, Heath and Hines for the plaintiff.
Smith for the defendant.

BATTLE, J. An interesting question has been discussed by the English elementary writers, whether a tenant in dower, or other tenant for life, is liable for mere permissive waste. The argument in favor of the liability is well summed up by Mr. Bell, in his work on the law of the property of Husband and Wife, page 304, as follows: "Whether a dowress is liable for waste permitted by her, has been doubted. A suggestion in one of *Hargrave's* notes to Co. Litt. 57 a. n. 1, whether tenant in dower was liable only for active, and not for permissive waste, gave rise to a discussion in *Roper*, vol. 1, p. 421, to show that she is liable for both; and of this there seems so little room for doubt, as hardly to justify the uncertain state in which that author leaves the question. Previous to the statute of *Gloucester*, 6 Ed. I, ch. 5, a prohibition of waste lay against a tenant in dower or by the curtesy, while it did not lie against tenant for life, or years, or at will, by agreement of party. The distinction in the two cases arose from this: that, in the latter, the tenant comes in by the act of the lessor, who might stipulate beforehand that no waste should be done; whereas, in the former, the tenant comes in by act of law, and without the power of him in the reversion to make any such stipulation. Co. Litt. 546. In the books where this is laid down, no distinction is made between active and permissive waste. Then comes the statute of *Marlbridge*, 52 Hen. 3d, ch. 23, which forbade *fermors* to make waste during their terms, followed by the statute of *Gloucester*, which gave a writ of waste against tenant for life or years, as well as tenant in dower, still without making any dis-

tinction between the two kinds of waste, and omitting mention of tenants at will. *Littleton*, sec. 71, says that tenant at will is not bound to "sustain or repair the house, as tenant for years is tyed;" and in in Co. Litt. 53 a., where the liabilities of tenant by the curtesy, in dower and for life and years, are treated of, instances are given of permissive waste. *Coke*, therefore, puts all these tenants in the same category; and *Rolle*, 816, pl. 36, 37, says "that an action would lie against a lessee for permissive waste. As, therefore, the tenant in dower has always been liable at common law for permissive waste, even while tenants for life or for years were not liable until the statute of *Gloucester* made them so, and as these tenants unquestionably are liable, ever since the statute, for permissive waste, there seems no reason to doubt that the situation of tenant in dower is not better in this respect than that of these tenants; more especially as there is the same principle why she should be liable for permissive as for actual waste. Since the heir cannot enter upon her to make repairs, he may suffer as much damage by her permissive as he would by her actual waste."

The reasons for the contrary opinion are forcibly stated by *Mr. Chitty*, in his General Practice, page 386.— "Tenants for life, unless expressly dispunishable for waste, are liable for any *actual or wilful* waste; as cutting trees, otherwise than for repairs, or altering buildings or land, or destroying hedge-rows. The statute of *Marlbridge* and the statute of *Gloucester* are the only statutes relating to waste. The first enacts, sec. 2, "also *fermors*, during their terms, shall not make waste, sale nor exile of house, woods and men, nor of anything belonging to the tenements that they have to ferm, &c.; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously." The statute of *Gloucester* enacts that "a man shall have a writ of waste in the Chancery against him, that holdeth by law of England (*i. e.* ten-

ant by curtesy,) or otherwise, for term of life or for term of years, or a woman in dower, and he which shall be attainted of waste, shall lose the thing which he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." It is submitted that both these acts only apply to *wilful* or *voluntary* waste, and do not extend to mere permissive waste. Mr. SERGEANT WILLIAMS, in his valuable edition of Saunders—1 Saund. Rep. 323, b. n. 7; 2 Saund. 259. n. 11—*misstates* this enactment, as if it expressly gave an action of waste, or in case against any lessee for life *or years*, guilty of permissive waste, as if he *permit* an house to be out of repair, unless it was ruinous at the time of the lease; (although the act speaks only of forfeiture of the thing that he *wasted*, with treble damages;) and he refers to elementary works as proving that the statute extends to *permissive* as well as *voluntary* waste, and he insists that the statute extends to tenants from year to year, *or even half a year;* but the subsequent editors, in their learned and accurate notes, have questioned the latter opinion, at least as regards tenant from year to year, and and also as regards lessee for years, under a lease not containing any covenant to repair. 1 Saund. Rep. 323, b. note (x,) and 2 Saund. 252, a. note (b.) And it seems questionable whether the statute of Gloucester extends to any case of mere *permissive* waste, and, indeed, whether a tenant for life is liable to any penalty, forfeiture or action for *merely neglecting to repair*, unless he be under express directions or agreement to do so. HEARNE v. BENBOW, 4 Taun. 764; JONES v. HILL, 7 Taun. 392; 2 Eng. C. L. Rep. 149.

It is unnecessary for us to decide this disputed question; but as the material parts of the statutes of Marlbridge and Gloucester are re-enacted in this State, (see Rev. Stat. ch. 119, sec. 1 & 3,) and the action of waste has been held to be in force here, (BALLENTINE v. PAYNER, 2 Hay. 110, BRIGHT v. WILSON, Conf. Rep. 24, and BROWNE v. BLICK, 3 Mur.

511,) we have thought it would not be altogether useless to call the attention of the profession to the subject.

The action of waste, which was founded upon privity of estate, and could only be brought by the owner of the inheritance against his immediate tenant for life or years, is now very seldom used, and has given way to a more easy and general remedy, to wit, an action on the case in the nature of waste. WILLIAMS v. LANIER, Busb. 30; 1 Cruise Dig. 124; 2 Saund. Rep. 252, note 7. The present is an action of the latter kind, in which the plaintiff declares in two counts, the first for permissive, and the second for voluntary waste, against the husband of a tenant in dower after the death of his wife. We are clearly of opinion that the first count cannot be sustained. The liability of the husband (if liable at all for permissive waste,) was incurred by his marriage, and ceased with it. It is well known that his liability for his wife's debts cannot be enforced against him after her death, except as administrator, for assets which he received in that capacity. So for her *devastavit* as executrix or administratrix, whether committed before or during coverture, he is not liable at law after the coverture ceases; though the rule in some cases is different in Equity, where the *devastavit* is committed during coverture. See Bell on Prop. of H. & W., 46 & 47, and the cases there cited, (67 Law Lib.) There is no principle upon which the case of permissive waste can be distinguished from this. In TURNER v. BUCK, 22 Vin. Abr. 523, Lord COWPER says, "that, without some particular circumstance, there is no remedy at Law or Equity for permissive waste, after the death of the particular tenant;" and we say, *a fortiori*, not against the husband of a particular tenant after her death.

The question remains, whether the action can be sustained upon the count for voluntary waste; and we are decidedly of opinion that it can. It is true that it is said in CLIFTON's case, 5 Coke's Rep. 85, "that if a woman, tenant for life,

takes husband who commits waste, and the wife dies, the husband shall not be punished for this waste." But that was an action of waste on the statute of Gloucester, and the reason given for the decision was, "that the husband had not any estate for life in the land, but the wife had the estate for life, and the husband had it only in her right, and so she is not within the said act." The action on the case in the nature of waste differs, in several particulars, from the action of waste. Thus it may be brought by the person in remainder or reversion for life or years, as well as in fee; and it may be brought by the owner of the inheritance against a stranger who commits a trespass upon the land, during the term of the particular tenant. 2 Saund. Rep. 252, n 7—Cru. Dig. 124—WILLIAMS v. LANIER, Busb. 30. In the present case, the heir might have sued the tenant in dower for voluntary waste; so he might have sued a stranger for a trespass, during her life; and it is difficult to conceive of a reason which can put the husband trespasser upon a better footing than a stranger. The removal of a small poultry house, though erected by the husband, was undoubtedly a trespass, and was his own act, for which he alone was responsible, without reference to his occupancy *jure uxoris*. The result is, that as, in our opinion, the action may be sustained upon the second count for voluntary waste, the judgment of *non-suit* must be set aside, and a *venire de novo* granted.

Judgment reversed.

GEORGE M. CARSON, ET. AL. v. WILLIAM J. SMITH.

Where the plaintiff, in ejectment, after recovering in that action, fails to take actual possession of the premises recovered, although the defendant has left them, cannot sustain an action for the mesne profits.

(COBLE v. WILLBURN, 1 Dev. Rep. 388, and POSTON v. HENRY, 11 Ired. R. 302, cited and approved.)

ACTION of TRESPASS Q. C. F., for mesne profits, tried before his Honor Judge ELLIS, at Spring Term, 1853, of McDowell Superior Court.

The facts of the case sufficiently appear from the opinion of the Court.

Bynum and John Baxter, for plaintiffs.
Avery and G. W. Baxter, for defendant.

NASH, C. J. The premises had been recovered by the plaintiffs, in an action of ejectment, against the defendant. The case states that no writ of *habere facias posessionem* had issued upon this judgment, nor had the plaintiffs taken any actual possession of the premises, but the defendant had left it. The cases of COBLE v. WILLBURN, 1 Dev. Rep. 388, and POSTON v. HENRY, 11 Ired. Rep. 302, govern this. The first was an action on a covenant for quiet enjoyment. Jane Willburn had recovered from the plaintiff the land mentioned in the deed of conveyance, and after the recovery, the plaintiff here purchased the land from her; his possession under the first purchase never was actually disturbed. The Supreme Court ruled that Coble could not recover, for the want of an actual eviction. The latter was an action of trespass for mesne profits. On the trial below, it was objected, that the plaintiff did not show that, after the recovery in ejectment, he had entered. His Honor, the late CHIEF JUSTICE, in delivering the opinion of the Court, says: "The Court thinks the objection a good one: a recovery in ejectment (alone) will not support an action for mesne profits; for it is trespass for an injury to the possession, and therefore it is necessary for the plaintiff to show that he had regained the possession, either by being put in upon process, or let in."

In the ruling of the Court below, upon this point, there is error, and the case must go to another jury.

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

THOMAS J. CLIFTON *vs.* JAMES D. NEWSOM.

Where A. contracts to purchase cotton of B., at the price for which it sold at Petersburg on the 25th of April, and A. afterwards refuses to receive a portion of the cotton, and B. sells it at P. on the 9th of August: Held, that the rule of damages was the difference between the market price at P. on the 25th of April and the 9th of August.

THIS was an action of ASSUMPSIT, tried before BAILEY, Judge, at the Spring Term, 1853, of the Superior Court of Law for Franklin County.

The case is stated in the Opinion of the Court.

Miller, for the plaintiff.
Lanier, for the defendant.

NASH, C. J. The plaintiff's right to recover in this case is not denied. The only complaint is as to the ruling of the Court upon the question of damages. His Honor instructed the Jury, "that there was no evidence upon which they could allow the plaintiff more than nominal damages." In this, we think there is error. It is clearly not only within the province of the Court, but it is their duty, where there is no evidence upon a controverted point, so to inform the Jury; and in an action for a breach of contract, if the plaintiff fails to give any evidence to guide the jury in the ascertainment of the amount of damages to which he is entitled, he cannot recover more than will carry his costs.—

But there was evidence in this case, by which a rule was given to the jury to direct their enquiry. By the contract, the defendant agreed to take the whole of the plaintiff's cotton, at the nett price at which a load of the plaintiff's cotton, then on its way to Petersburg, should bring. The defendant was to send for the cotton, but no particular time was specified within which he was to send for it.

This contract was made the last of April or the first of May, 1851. On the 3d of June following, the defendant paid the plaintiff the price agreed upon for six bales of cotton which he had sent for, and then notified him he did not intend to take any of the balance of cotton, for the reason, that the plaintiff had already violated his contract. The load then on its way to Petersburg netted the plaintiff $9. 80 per hundred. By his notice to the plaintiff, the defendant repudiated the contract, and the plaintiff was under no obligation to keep the cotton on hand, but was at liberty to do so if he pleased. If he had done so, he might have sold it in Franklin, where the contract was made, and have recovered from the defendant the difference between the agreed price and what the cotton actually brought. If he had kept it, without selling it, he might have brought an action against the defendant, and he would have been entitled to the agreed price, namely, the nett proceeds of the first load, $9.80 per hundred. Instead of pursuing either of these courses, he sent the balance of the cotton to Petersburg. The Petersburg market, at a certain time, was the one by which the price of the cotton was to be ascertained. according to the contract. It was therefore with propriety, and with a proper attention to the interest of the defendant, that the plaintiff resorted to that market, to do justice between himself and the defendant.

The defendant's refusal to take the remaining twenty-nine bales exonerated the plaintiff from the necessity of keeping them, and the defendant has no right to complain that he

did sell them. If he, whom it concerns to have my part of the contract fulfilled, is the occasion why it is not, it is the same to me as if it was fulfilled. Pow, on Con. 417.

It is urged, however, that, in such a case, the rule of damage is the difference between the agreed price for the article and the market price, when, by the contract, the article is to be delivered, and that it was the duty of the plaintiff to have proved what was the market value in Franklin, where the parties lived. That is, in general, true, but we more than doubt whether its application to this case would have benefitted the defendant. We think there was a propriety in the plaintiff's sending the cotton to Petersburg for sale. That was the market of value, selected by the parties themselves, and in his sale he has acted with a view to the interest of the defendant. It is in evidence, that, soon after the sale of the first load of cotton, it fell in Petersburg. It continued to fall from the 21st of April, when the first load was sold, to August '51, when it rallied. Between these two periods, when the plaintiff might have sold, if so disposed, it was down to seven and a half cents. He did not sell until the 9th of August, '51, when cotton had risen to eight and a quarter cents per pound. We have before stated, that upon the defendant's refusal to take any more of the cotton, if the plaintiff had sold it in Franklin, and the market price there, at that time, had been six cents per pound, and at the same time, in Petersburg, the price was eight and a quarter, or eight dollars and twenty-five cents per 100, would the defendant have been permitted to claim the Petersburg price, or been confined to the home-market? Certainly the latter. The plaintiff, then, has in this case done the defendant no injury, that the case discloses to us.

We are of opinion, that the evidence in the case does furnish a sound rule to guide the jury, to ascertain the amount of the damages, to which the plaintiff was entitled, to wit,

the difference between nine dollars and eighty cents per hundred, and seven dollars and eighty cents, for which the 29 bales netted on the 9th of August, 1851.

There is error. The judgment is reversed, and a *venire de novo* awarded.

DOE ON THE DEMISE OF WILLIAM H. MARSHALL *vs.* MICHAEL N. FISHER.

An entry on the minutes of the County Court, as to a will which has two witnesses, as follows: "The will of R. B. proved by H. S. Executor T. B., qualified" is sufficient to authorise the presumption that the will was duly proven, nothing appearing on the face of the proceedings to forbid such a conclusion.

Where an order has been made for amending a record, such amendment may be made at any time afterwards.

A judgment against an infant, appearing by attorney, is valid, until reversed upon a writ of error.

A variance between the judgment and execution is cured by act of Assembly, 1848.

WHAT are the boundaries of a tract of land, is a question of law, for the decision of the Court; WHERE they are, is a question of fact for the jury.

Where a question of law is left to a jury, and the verdict shows that they decided properly, it is no ground for a VENIRE DE NOVO.

(PHELPS v. HIGDON, Bus. 380; GALLOWAY v. MCKEITHEN, 5 Ired. 12; GREEN v. GALE, 13 Ired. 425; RUTHERFORD v. RABUN, 10 Ired. 144;—cited and approved.

THIS was an action of EJECTMENT, tried before his Honor Judge BAILEY, at Craven Superior Court, Fall Term, 1853.

The land in controversy is embraced within the lines G H J K of the diagram below. The plaintiff offered two grants, one to Roger Bratcher, in 1772, and another to Lydia Guard, in 1771, and insisted that the one to Robert Bratcher covered the land designated by the lines of D C E F, and that to Lydia Guard the land within the lines A B C D.

The plaintiff introduced the will of Roger Bratcher, which was verified by the following protest: "The will of Roger Bratcher, deceased, proved by Henry Sikes. Executor Thos. Bratcher qualified. Ordered, that letters issue." Defendant objected to this evidence upon the ground of the insufficiency of the probate. This objection was overruled, and the will read in evidence.

Evidence was offered to show that the title to the land in question was in the heirs of Matthew Stephens, in the year 1809. He then gave in evidence the record of a petition filed for a partition among the heirs, an order for partition, and a report of the Commissioners appointed for that purpose, which was returned, and confirmed by the Court in September 1811. There was no registration or order for registration made at that time, nor was it made until March Term, 1852. At that Term, an order was made, *nunc pro tunc*, that the record of 1811 be amended, so as to set forth the order for the registration of this proceeding in 1811. The minutes of September Term were not amended, at March Term, 1852, and it was objected by the defendant, that the record of the partition could not be read; that the Court had no right, at March Term, 1852, to make the order *nunc pro tunc*. Objection overruled. During the examination of the testimony in this case, the clerk of the County Court made an entry on the minutes of September, 1811, and the record, as amended, was then offered; but the defendant's counsel still objected, that this entry should have been made at September, 1811, when the report was confirmed. This objection was overruled by the Court, and the evidence received.

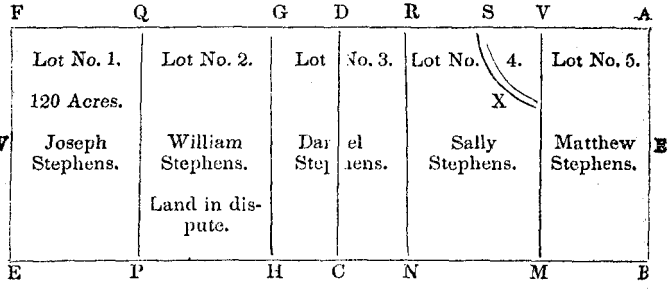
In the division, lot No. 1 was assigned to Joseph Stephens, within the lines Q P E F; lot No. 2 to William Stephens, within the lines G H P Q; lot No. 3 to Daniel Stephens, within the lines R N H G; lot No. 4 to Sally Stephens, within the lines V M N R; and lot No. 5 to Mat-

thew Stephens, within the lines A B M V. It was in evidence, that William Stephens sold No. 2 to Moses Stephens, in 1814. Moses Stephens died intestate, leaving an only son, John Stephens, his heir at law. Moses Stephens had become the administrator of one Elizabeth Stephens, and had executed a bond, as such, in the penal sum of five hundred pounds. After the death of Moses, a suit was brought on this bond, against John Stephens, as heir at law, the plaintifi in that suit alleging that he had assets by descent. The writ was executed on John, while yet an infant; his pleas were entered by an Attorney, who appeared in his behalf, and a judgment rendered against him for the penalty of the bond (without stating the amount), and for six pence damage and costs. Execution issued on this judgment, which was levied on the lands of Moses, which had descended to John, and they were sold under a *venditioni exponas*, by the Sheriff of Craven county, on 6th of May, 1818, to William Holland, Sr. The evidence of this judgment and execution was objected to, on the ground that John, the defendant in that suit, was an infant, but admitted.

The judgment against John Stephens, is in the name of John F. Smith, Chairman of the Court of Pleas and Quarter Sessions, of Craven County, and the judgment recited in the execution, and the *venditioni exponas*, which issued thereon, is in the name of the "Chairman of Craven County Court." The defendant obejected to the judgment and execution, on account of this variance, but the objection was overruled.

Wm. Holland Sr., in 1834, conveyed the land to Wm. Holland, Jr., under whom the plaintiff claims. The plaintiff further introduced a deed from Wm. Holland, Sr., to Wm. Oglesby, dated in 1832, and alleged that the beginning was at S on the lower line of the Lydia Guard patent, running thence up Coleman's Creek to X, where it was crossed by the line V M; then up that line, the dividing line between 4 and 5,

to the letter M; thence up to the letter H; thence to the letter G; and thence to S the first station.



The defendant introduced the same deed from William Holland, Sr., to William Oglesby, dated in 1832, two years before William Holland, Sr., sold to William Holland, Jr., and agreed with the plaintiff that the beginning corner was at S, and ran from that point, as the plaintiff insisted to M: from this point he contended that the next call would extend to P; thence to Q; thence to the first station, covering the land in dispute. The defendant then introduced the will of William Oglesby, and a deed from his Executor, Joseph R. Franklin, to one Isaiah Dennis, for the same land. There was no evidence of any deed from Dennis to the defendant, but there was evidence that he was in possession of the land in dispute, at the time of the service of the declaration. It was agreed by the parties that the line A F was the lower line of the Lydia Guard and Roger Bratcher patent, and that B E was the upper line of those patents; that S was the beginning corner of the land which William Holland, Sr., conveyed to William Oglesby, in 1832, and further agreed that his line ran up to M; that he ran from thence westwardly; but, whether he went to H and stopped, as the plaintiff contended, or went to P, as the defendant contended, was the point in controversy. Taking M as a point, the call in the Oglesby deed, as to this part of the descrip-

tion, is "thence *westerly* with Lydia Guard's patent line, and Roger Bratcher's, so far as the corner of the second lot of the piece of land drawn by Daniel Stephens, in the division of Matthew Stephens, land, being the two pieces drawn by Sally Stephens and William Stephens, and thence along that division line to Lydia Guard's line, thence along her line to the first station."

The defendant asked his Honor to instruct the jury, that they were required by law, in deciding the question, to go from letter M to the letter P. His Honor declined to do so, but left it to the jury, as a question of fact, whether the line stopped at H, or ran on to P.

The jury rendered a verdict for plaintiff. Motion for a *venire de novo*, on the exceptions taken above, and for refusing to instruct as requested.

Motion refused, and appeal to this Court.

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

PEARSON, J. 1st. The defendant excepts, because the will of Bratcher was admitted as evidence, on the ground of the insufficiency of the probate. The minute entered of the probate, is: "The will of Roger Bratcher, proved by Henry Sikes. Executor Thomas Bratcher qualified; ordered, that letters issue." This entry is very informal, but we think it is sufficient, by the aid of the rule *omnia præsumuntur rite esse acta*, to show that the will was duly proven.

Every Court, where the subject matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there be something on the face of the proceedings to show to the contrary. This must be the rule, unless we adopt the conclusion, that the Court is unfit for the business which by law is confided to it. BECKWITH v. LAMB, 13 Ired. 400.

The will is sent as a part of the case. It shows upon its face, that there were two subscribing witnesses, of whom Henry Sikes was one, so we must presume that he was duly sworn, and proved its execution by the testator, and that the other witness and himself subscribed it as witnesses in the presence of the testator. There is nothing to show to the contrary, and the inference is, that the Court knew how to take the probate of a will, and saw that it was properly done. The presumption is strengthened in this case, by the fact, that the property has been enjoyed under it ever since the year 1784. In some cases, it is held, that long enjoyment is, of itself, sufficient proof of an ancient document.

2nd. The defendant excepts, because there was no registration or order for registration at September Term, 1811, when the report of the Commissioners, who were appointed to divide the land of Matthew Stephens, was returned and confirmed. This difficulty was removed by the subsequent proceedings. The power of the Court to amend its record, and the effect of the amendment when made, is settled. PHILIPS v. HIGDON, Busbee 380; GALLOWAY v. MCKEITHEN, 5 Ired. 12.

3rd. The defendant excepts, because there was no judgment against John Stephens; for the judgment is for the penalty of the bond, without stating the amount. The pleadings show that the penalty was $500; the minute of the judgment is, therefore, sufficiently formal, and is aided by the rule, *id certum est.* He also excepts, because the judgment was taken against John Stephens, who was an infant, and appeared by attorney, and he might also have excepted because the judgment, being upon a bond with a condition, there should have been an entry at the foot, that the execution was to be satisfied by the payment of damages and costs. These objections, however, were not open to the defendant, and could only be taken advantage of, by a writ

of error. The judgment, although erroneous, is of full force and effect until it be reversed.

4th. The defendant excepts, because the execution did not correspond with the judgment in this: the one is in the name of John F. Smith, Chairman, &c.; the other omits the name of John F. Smith, and simply says, "which the Chairman," &c. "lately in our said Court recovered," &c. This variance is cured by the act of 1848. GREEN v. COLE, 13 Ird. 425; RUTHERFORD v. RABURN, 10 Ird. 144.

5th. The defendant excepts, because the Court refused to decide whether the line of Oglesby terminated at H or at P, and left that as a question of fact to the jury. What are the boundaries in a tract of land is a matter of construction, and should be decided by the Court. Where the boundaries are, is a question of fact. HURLEY v. MORGAN, 1 Dev. and Bat. 425; TATEM v. PAINE, 4 Hawks, 64.

For this error the defendant would be entitled to a *venire de novo*,, unless th e jury, in finding that the line terminated at H, have decided the question correctly; for, if so, the result is the same as if it had been so decided by the Court, and the error is thus cured by the verdict. STATE v. CRATON, 5 Ired. 163. It is agreed that the deed to Oglesby begins at S and runs to M; it then runs along the line of Lydia Guard's patent line, and Roger Bratcher's patent line, and terminates at H, or runs on to P; then North to the patent lines, and with them to the beginning. From M, the call of the deed is westerly along Lydia Guard's patent line and Roger Bratcher's, *so far as the corner* of the *second* lot, of the piece of land drawn by Daniel Stephens, in the division of Matthew Stephens's land, being the two pieces drawn by Sally Stephens and William Stephens; then along that division line to the patent line of Roger Bratcher; then along that line to the first station.

In running from M westwardly, you come to the corner of lot 2 at H, and the question is, do you stop there, or go on

to P? H is the first corner of lot 2 that you come to; but it is insisted that you must go on to P, the other corner of lot 2, for otherwise the lot drawn by William Stephens will not be included, as the deed requires. Here is a discrepancy, and of course there must be some mistake, and the question is, can the mistake be pointed out by competent evidence so as to explain this discrepancy, and give effect to the deed? We think the mistake is clearly shown to be this: either the parties used the word Daniel, when they meant William, and *vice versa;* or else they supposed lot 2 had been drawn by Daniel, whereas lot 3 had been drawn by him, and lot 2 by William.

The division is referred to in the deed: by reference to it, it appears that the land was divided into five lots, beginning at lot 1, and going East to lots 2, 3 4, 5; and that lot 1 was drawn by Joseph, lot 2 by William, lot 3 by Daniel, lot 4 by Sally, and lot 5 by Matthew. So the mistake is explained upon the face of the division which is referred to by the deed. Again: if H is the terminus, then a line North and then East to the beginning includes two lots or pieces, which corresponds with the deed; but if P is the terminus, then running to the beginning will include *three* lots or pieces, and contradict the deed. Again: the call is along the patent line *so far as the corner* of the second lot. Upon what principle can you pass this corner which you come to first, and go on to the other corner of lot 2? These considerations point out the mistake, and put it beyond all question that H is the terminus. Our conclusion, that Daniel was used by mistake instead of William, and so *vice versa*, and that the mistake does not affect the validity of the deed, is fully supported by the cases, in which it is held that, where the call of the first line was *South*, and of the third line *North*, the one word may, by competent evidence, be shown to have been used instead of the other, as where it is shown by marked lines and natural boundaries, about which

there is less apt to be a mistake than in writing one word for another; and where it was allowed to be shown that a tract of land was situated on the *West* side of a creek, although the deed described it as lying on the *East* side of the creek. HOUSER v. BELTON, 10 Ired. 358.

Judgment affirmed.

AMELIUS G. JORDAN *vs.* RICHARD ROUSE.

Where, in an inquisition of forcible entry, &c., the allegation as contained in the affidavit of the plaintiff in applying for this remedy, and in the precept of the Justice ordering a jury, is for a FORCIBLE ENTRY only, and the proof makes out a case of FORCIBLE DETAINER only, the plaintiff cannot recover.

A party claiming under a Sheriff's deed for land sold for taxes, must show that the taxes were due. AVERY vs. ROSE, 4 Dev. Rep. 549—LOVE vs. GATES, 4 Dev. & Bat. 363—PENTLAND vs. STEWART, Ibid 380—GARRET WHITE, 3 Ired. Eq. Rep. 131, cited.

THIS was an inquisition of FORCIBLE ENTRY and DETAINER, had before David Lawrence, Esquire, a Justice of the Peace for the County of Pitt, and brought up to the Superior Court of that County by *certiorari*, and there tried before his Honor, Judge MANLY, at Fall Term, 1853.

The affidavit of the plaintiff, upon which the proceeding was instituted, is as follows:

STATE OF NORTH CAROLINA, }
PITT COUNTY. } A. G. Jordan maketh oath, before me, Goold Hoyt, one of the Justices of the County aforesaid, that he is the owner of lot No. 4, in the town of Greenville, as by his deed exhibited to me from Marshall Dickinson; and that forcible possession of the same has been taken from him.

Signed, A. G. JORDAN.

Witness GOOLD HOYT, J. P.

The process issued to the Sheriff by this Magistrate commanded him to summon twenty-four men to be at the lot No. 4, &c., "to inquire upon their oaths of a certain entry made with strong hand (as it is said,) into the messuage," &c., "against the form of the statute in such case made and provided."

The jury summoned in obedience to this writ came accordingly, and for their verdict found that the plaintiff was seized in fee, and that the defendant entered, with force and a strong hand, into the premises, and that he still detained them.

The lot in question was unoccupied at the time of the alleged force, and without improvements. It had once been under fence, and stables put on it, and it had been for some years cultivated under the authority of Marshall Dickinson, who claimed to have bought it at Sheriff's sale for taxes, but had taken no deed for the same, and produced no evidence of such purchase or payment of taxes. Such is the statement of Dickinson, plaintiff's witness. The lot, some years before defendant's entry, was occupied by one Kinsaul, by permission of one Selby, who set up a claim under one Evans, but produced no title or authority to dispose of the premises. The plaintiff claimed by deed of bargain and sale, with warranty of title, from Marshall Dickinson, made shortly before the entry of defendant. The force complained of, as proved by plaintiff's witnesses, was the act of going on the unoccupied lot and partly removing a fence, when he was forbid by the plaintiff; and Selby said, in his presence, that he could not be turned out by any force that could be produced; but it does not appear that he replied, but he proceeded with his work, and held the land in question, and still holds it in possession. There was much other matter contained in the record, but this is deemed sufficient to present the points upon which the opinion of this Court proceeded. The plaintiff moved to dismiss the *certiorari*, and the defendant moved to quash the proceedings below.

Upon consideration of the several matters set forth in the record, his Honor gave judgment in favor of the plaintiff, dismissing the petition for a *certiorari*, from which the defendant appealed to this Court.

Biggs, for plaintiff.
Donnell, for defendant.

BATTLE, J. The only act charged against the defendant by the plaintiff, in his complaint to the Justice, was that of a forcible entry, and nothing more than a forcible entry is set forth in the precept of the said Justice to the Sheriff, commanding him to summon a jury to inquire thereof. The record of the proceedings made by the Justice, before whom the cause was tried, states that the defendant traversed the "force alleged." The only issue for trial, therefore, so far as the force was concerned, was what was affirmed on one side and denied on the other, to wit, the *forcible entry*. The only testimony set out in the record, upon which the verdict as to the force could have been found, proved (if it proved anything) that the defendant was not guilty of any forcible entry, but only of a *forcible detainer* after a peaceable entry. Yet the verdict finds both. Upon the clearest principles of law that verdict was wrong, and the Justice ought not to have issued any writ of restitution upon it. For this error alone, which was apparent upon the record, the proceedings ought to have been, upon the motion of the defendant, quashed in the Superior Court, as he could not appeal, and had no other mode of taking advantage of it. SHERRILL v. NATIONS, 1 Ired. Rep. 325.

Without noticing all the errors assigned, we will advert to one which is also fatal to the proceeding had before the Justice. The plaintiff himself showed that he had neither the possession nor the title to the lot in controversy. He claimed under Dickinson, whose testimony (if it were admissible

against defendant, which it certainly was not,) showed that he had no deed from the Sheriff, and there was nothing from which a deed could be presumed. But if he had had a deed, he failed to show that there were any taxes due when the land was sold by the Sheriff, which was certainly necessary, as has often been decided in this Court. AVERY v. ROSE, 4 Dev. 459—LOVE v. GATES, 4 Dev. and Bat. 363—PENTLAND v. STEWART, Ibid 380—GARRET v. WHITE, 3 Ired. Eq. Rep. 131.

The judgment of the Superior Court must be reversed, which must be certified to that Court, so that the proceedings before the Justice may be quashed, and a writ of restitution be issued to the Sheriff, commanding him to put the defendant into possession of the lot from which he was ejected under the precept of such Justice. THE KING v. JONES, 1 Strange Rep. 574—THE KING v. WILSON, 3 Adol. and El. Rep. 817, (3 Eng. C. L. Rep. 229)—2 Chit. Gen. Prac. 241.

Judgment reversed.

JOHN BLAND v. ARNOLD WHITFIELD.

A levy of an execution on Sunday is void.

The return of a levy endorsed upon an execution is neither CONCLUSIVE, nor PRIMA FACIE evidence that there was an actual seizure of the property.

ACTION OF TRESPASS for seizing and selling shingles and cypress timber, tried before his Honor Judge MANLY, at Fall Term, 1853, of Martin Superior Court. Pleas, general issue and justification.

On the 20th of January, 1851, the defendant, in the plaintiff's presence, offered for sale, and struck off to the highest bidder, some shingles and timber belonging to the plaintiff. The defendant, to sustain his plea of justification,

proved that he was a constable, and produced a regular judgment and execution from a Justice of the Peace against the defendant, dated 4th of January, 1851, on which was endorsed, "This execution levied on one pile of shingles and other cuts of timber, and two logs of cypress timber, said to be the property of John Bland, at Henry Everett's mill, by me, as constable. January 5th, 1851. A. Whitfield."— It was proved that 5th of January, 1851, was Sunday. There was no evidence of actual seizure of the property, except what appeared by the endorsement on the execution, and what took place on 20th of January at the sale. Nor was there evidence to the contrary.

His Honor charged the jury that the return of the levy, as endorsed on the execution, was conclusive against the defendant of a seizure of the property on the 5th of January, 1851, and, that day being Sunday, the defendant had no right then to levy, and by doing so he committed a trespass, for which the plaintiff was entitled to recover at least nominal damages.

The jury, under these instructions, found a verdict for nominal damages against the defendant.

Rule for *venire de novo*. Rule discharged. Appeal to this Court by the defendant.

Moore, for the plaintiff.
Biggs, for the defendant.

PEARSON, J. We concur with his Honor in the opinion that the defendant had no right to levy the execution on Sunday, and the levy was consequently void. It is made unlawful and forbidden by two statutes. The act of 1741, Rev. Stat. ch. 118, sec. 1: "No tradesman, &c. or other person whatsoever, shall, upon land or water, do or execute any labor, business or work of their ordinary calling, &c. on the Lord's day, commonly called Sunday." The act of

1777, Rev. Stat. ch. 31, sec. 58: "It shall not be lawful for any sheriff, or other officer, to execute any writ or other process upon a Sunday," &c. Process certainly includes an execution, which is final process, as distinguished from original and mesne process.

But we do not concur in the opinion that the return of the levy endorsed on the execution was *conclusive* against the defendant of a *seizure* of the property on the 5th of January, 1851.

It was admitted, in the argument, that the return was not conclusive; but the counsel insisted that it was *prima facie* evidence, and that, as there was nothing to rebut it, there was no essential difference. That is true; for, in either case, the plaintiff had proved his allegation, and the error, is in not taking the difference between *conclusive* and *prima facie* evidence unrebutted; either would be fatal; and the question is, was it *prima facie* evidence unrebutted, of the fact necessary to support the action?

The declaration alleges, that "the defendant *seized* and sold a pile of shingles and other cuts of timber, and two logs of cypress timber." The plea of justification covers the selling and all that was done, except what took place on the 5th of January, 1851, that day being Sunday. As to this, the defendant must rest upon the general issue, which traverses the allegation that he did, on that day, commit the trespass, by seizing the shingles and timber. In other words, it denies that he did, on that day, take and carry away the shingles and timber, or that he took them into his actual possession by laying his hands on them.

The return of a levy, endorsed on an execution, is *prima facie* evidence in the proceeding of which it forms a part; whether it is also *prima facie* evidence in another and different proceeding or action may be questioned. But suppose it to be so, does "levy," *ex vi termini*, mean a seizing or taking actual possession, by laying hands on the property?

We think not. "Levy," in its legal acceptation, means the act of appropriating—singling out certain property of the debtor, for the satisfaction of an execution, and it is done by making an endorsement to that effect upon the execution.

In regard to land, it may be made in the office, although it may be ten miles distant, and the officer has never seen it. In regard to personal property, it is necessary for the officer to go to it, so as to have it in his power to take it into actual possession if he chooses. It is safest for him to do so, and carry it away, for then he can hold it against all persons, but it is not necessary for him to do it, or for him to touch the property; the levy is perfected by his making the endorsement upon the execution. He may leave the property in the possession of the debtor, and take a forthcoming bond; or he may leave it there without any bond, and the effect of the levy is to give him such an interest and possession in contemplation of law, as will enable him to bring trespass against any one who interferes with it, except another officer. MANGUM v. HAMLET, 8 Ired. 44.

Where an officer has already levied and taken the property into possession, a second officer may make a second levy, by going where the property is and making the endorsement on his execution. In this case, he has no right to touch the property, and the levy gives him a right to it after the first execution is satisfied. So it is not necessary to lay hands on the property in order to perfect a levy. GILKEY v. DICKERSON, 3 Hawks, 293. Supposing the return to be *prima facie* evidence that a levy was made, it remains an open question whether the officer did or did not lay hands on the property, and the plaintiff is driven to the position that, although the levy was void, being made on Sunday, still it had the effect of giving the defendant a constructive possession, or possession in contemplation of law, and that such a possession will support the allegation that the defendant did seize and lay hands on the property.

But there were circumstances tending to rebut this supposed *prima facie* evidence. The property was of a ponderous and bulky nature. The levy says it was "at Henry Everett's mill" on the 5th of January, 1851, and it was there on the day of the sale; so it is a fair inference that the officer did not carry it away; and, if the jury had been instructed that the officer could make the levy without touching the property, they might reasonably have inferred that he sat on his horse and made the endorsement on his execution, and did not take the trouble to dismount and lay hands on any of the shingles, or the cuts of timber, or the cypress logs.

PER CURIAM. Judgment reversed. *Venire de novo.*

HEZEKIAH G. SPRUILL v. THE NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY.

A provision in a policy of insurance excepting from liability the cases of death "by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice," does not embrace the case of the death of a slave, insured, who is killed in an armed and violent resistance of the authority of a patrol.

ACTION OF ASSUMPSIT, tried before his Honor Judge ELLIS, at Fall Term, 1853, of Washington Superior Court, upon the following case agreed, which was submitted for the judgment of the Court:—

The plaintiff owned a negro slave named Harry, and on 13th of September, 1850, the defendants insured his life for five years, at the amount of $500, by a policy of insurance, which contained the following clause: "In case the said slave shall die by means of any invasion, insurrection,

riot, or civil commotion, or of any military or usurped authority, or by the hands of justice, this policy shall be void, null, and of no effect."

During the year 1852, the slave Harry ranaway from the plaintiff, and a reward was offered by advertisement for his restoration. Afterwards, on a night of September of that year, a party of men, being patrols lawfully appointed in Martin County, went to a negro house, in that county, where the slave in question was found. They told him to submit, and he would not be hurt, but this he refused to do, and came to the door armed with a scythe-blade; this he did twice: then re-entered the house, and shut the door. He then opened the door and jumped out, with the blade of the scythe raised in a striking position. One of the patrol, standing in front of the door, about eighteen feet off, without saying anything to him, shot the slave in the right side, of which wound he died in a few minutes.

Upon consideration of the facts, as agreed to by the parties and submitted, his Honor was of opinion against the plaintiff, and gave judgment accordingly; from which judgment the plaintiff appealed to this Court.

Heath, for the plaintiff.
Busbee and Smith, for the defendants.

NASH, C. J. We do not concur in the opinion of his Honor below. The death of the slave Harry does not come within any of the exceptions contained in the policy. It is not pretended that his death was occasioned, either from the want of proper medical aid, or by an invasion of the country. An insurrection is, by Mr. Worcester, in his Dictionary, defined to be a seditious rising against the government, (as in the case of Governor Dorr in Rhode Island); a rebellion; a revolt. Justice Blackstone, in his 4th volume, 147, says, a riot is where three or more persons actually do an

unlawful act, either with or without a common cause. To this Chitty, in his note, says, "the intention with which the parties assemble, or at least act, must be unlawful," and this qualification of Mr. Chitty is recognized by this Court, in the case of STATE v. STALCUP, 1 Ired. 30.

A commotion is defined, by the lexicographer above referred to, to be a tumult; and a tumult to be a promiscuous commotion in a multitude; an irregular violence; a wild commotion. A civil commotion, therefore, requires the wild or irregular action of many persons assembled together. There has not been, within our knowledge, any usurped civil power, and no military power but that recognized by the constitution. To die by the hands of justice is to die by some judicial sentence for the commission of some felony.

Let us now test this case by the definitions above stated The slave Harry was owned by the plaintiff, and was, at the time his death occurred, a runaway. The individual who shot him was one of the regular patrol, who were then engaged in discharging their proper duty, in their proper district; and finding the slave there, they endeavored to apprehend him, as it was their duty to do, and in the attempt made by him to escape he was killed. Here was no seditious rising against the government, nor was there any riot. The patrol were there for a lawful purpose; there was no tumult, nor any military or usurped power; nor did Harry die by any judicial judgment or proceedings. The plaintiff's case is not within any of the exceptions or conditions of his policy.

We cannot adopt the ingenious suggestion of the defendants' counsel, that the defendants intended to insure against what is called a natural death, as distinguished from a violent death. It is sufficient to say, such is not the contract.

Judgment reversed, and judgment here, according to the case agreed, for the plaintiff, for the sum of $500, with interest from the 1st of September, 1852.

STATE v. WILLIAM BROWN.

Where the mother of a bastard child is brought before a Magistrate, and refuses to declare on oath the father of such child, but pays the fine and gives bond and security to indemnify the county, she cannot, afterwards, voluntarily institute proceedings against the reputed father, to subject him to the maintainance of the same child.

THIS was a proceeding in BASTARDY, to subject the defendant to the maintainance of a bastard child, begotten of one Julia Duty, tried before his Honor Judge SAUNDERS, at Fall Term, 1853, of Randolph Superior Court.

A warrant had been issued by a Justice of the Peace of the county, on the 11th of March, 1852, against Julia Duty, to compel her to declare on oath the father of her illegitimate child. Upon the return of the warrant, she refused to make such declaration, but paid the fine required by law, and gave security to indemnify the county against the maintainance of the child, which warrant and bond were duly returned to the County Court, and ordered to be filed.

On the 15th of November, 1852, Julia Duty voluntarily applied to another Magistrate, and was permitted to make a declaration on oath, charging the defendant to be the father of the same bastard. Whereupon, the warrant in this case was issued, and the defendant bound to the court. The County Court made an order to quash the proceedings, and the State appealed to the Superior Court. In that Court, his Honor, on consideration of the facts above stated, gave judgment that the proceedings be quashed, and the State appealed to this Court.

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

BATTLE, J. The bastardy act (1 Rev. Stat. ch. 12, sec. 1) declares that, if a single woman be big with child, or be de-

livered of a child, and, upon being taken before two Magistrates for examination upon oath concerning the father, shall refuse to declare him, she shall pay a fine of five dollars, and shall give bond, with sufficient security, payable to the State, conditioned to keep her child from being chargable to the county. But if she declare who the father is, then certain proceedings shall be had against him, for the purpose of compelling him to maintain his bastard child, so that the county may have an indemnity against the charges of such maintainance. The act of 1850, ch. 14, gives the same powers to a single Magistrate as under the former law had been exercised by two.

It is manifest that it was not the object of this enactment to punish the father of a bastard child for having begotten it, but the purpose was solely to prevent its support and maintainance from becoming a county charge. The proceedings under the act are not therefore criminal in their nature, but are mere police regulations, adopted for the purpose above indicated. STATE v. CARROW, 2 Dev. and Bat. 370; STATE v. PATE, Busbee 244. Now this purpose may be as fully and effectually accomplished by the mother's giving bond with sufficient security for the indemnity of the county, as prescribed in the first clause of the act, as by obtaining a similar indemnity by proceeding against the father under the second clause. So soon as the county is secured in either way, from having a charge imposed upon it on account of the bastard child, it follows as a necessary consequence, that the whole object of the act has been accomplished, and no further proceedings can be had. Hence, in this case, after the mother had given and the county had received indemnity, the magistrate had no authority to proceed against the reputed father, and his proceedings were properly quashed, both in the County and Superior Courts.

PER CURIAM. The order appealed from must be affirmed.

CHARLES S. MOORE *vs.* KADER PIERCY.

Where A purchased a horse, to be returned at the end of two days, if he did not answer the description given of him, and the two days elapsed without the horse being returned: HELD, that the contract was absolute, and that A cannot discharge himself from liability by showing that the horse was not as good as represented.

THIS was an action of ASSUMPSIT, tried before Judge ELLIS, at the Fall Term, 1853, of the Superior Court for the County of Chowan.

The plaintiff declared for $25, the sum alleged to be due from defendant, upon an exchange of horses. Plea: *Non assumpsit.*

The defendant agreed to give his own horse and twenty-five dollars for the horse of the plaintiff, provided the latter was a No. 1 farm horse. That he would try him for two days, at the end of which time the horse was to be returned, if he did not suit. The defendant received the horse, worked him, and did not return him. The horse proved to be not as good as represented, but unsound.

The plaintiff's counsel requested his Honor to charge, that the conditional promise to pay $25, became absolute upon the defendant's keeping the horse, after the two days, and that in law such was the contract. That, if he was aware of his defects within two days, and failed to return him, the contract became absolute, and the plaintiff was entitled to recover.

His Honor charged that the jury must determine what the contract was. That, if it was the understanding of the parties, that the twenty-five dollars were to be paid in case the horse was a good work horse and sound, and that the promise was to become unconditional and absolute upon the defendant's keeping the horse beyond that time, then the plaintiff ought to recover. But if the time was given in

order to enable the defendant to determine whether he would make the exchange at all, and the $25 were only payable in case the horse was such as the plaintiff described him to be, and he was defective, then the verdict must be for the defendant.

The verdict was for the defendant. Rule for a *venire de novo*. Rule discharged, and judgment for the defendant, from which the plaintiff appealed.

Smith and Heath, for the plaintiff.
No counsel for the defendant.

BATTLE, J. The plaintiff was, in our opinion, entitled to the instructions which he prayed, and his Honor erred in refusing to give them. These instructions were, so far as the defendant could be affected by them, substantially the same, and were clearly required by the testimony. There was nothing in the case to show that if the defendant kept the plaintiff's horse, beyond the day allowed for trying him, he was not, on account of his proving unsound, to pay the twenty-five dollars, the agreed difference in the value of the two horses. On the contrary, the testimony showed that the plaintiff was to pay for the horse, if he should keep him after the two days trial. His Honor had no right to submit to the jury a view of the case not sustained by the evidence, nor by any fair inferences deducible from it.

But, perhaps, it may be said, that it appeared from the testimony that the plaintiff's horse was unsound, and that he ought not therefore to be permitted to recover more than what he had already received, to wit, the defendant's horse. To this the case of MCENTIRE v. MCENTIRE, recently decided in this Court, and reported in 12 Ired. 300, is a decisive answer. It was then held, after a thorough examination of the subject, that "when the property bargained for is delivered, an action for the *price agreed on* cannot be de-

feated, except in cases where, if the money had been paid, it might be recovered back in an action for money had and received. There must be a total failure of consideration, and not a mere right to damages, although the damages may amount to the whole price."

In no view can the judgment be sustained, and it must be set aside, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

JOHN McBOYLE *vs.* EDGAR HANKS AND JAMES M. WHITE.

The owners of slaves, residing within the limits of an incorporated town, are not exempted from the penalty for the failure of such slaves to work upon the public roads beyond the limits of such town, unless they are expressly exempted in the charter of incorporation, or by a necessary implication.

A provision in an act of corporation of a town, requiring the Commissioners to lay and collect a tax on the inhabitants of such town to repair the streets, is not such a necessary implication.

THIS was an action commenced by warrant before a Justice of the Peace, to recover a penalty, for a failure of the defendants' slaves to work upon a public road, tried before Judge SAUNDERS, at Spring Term, 1853, of the Superior Court for Washington County.

The plaintiff was overseer of a public road leading out of the town of Plymouth. The defendants reside in Plymouth, and own a Steam Saw Mill, situated just on the line, but outside the limits of the town, where the slaves in question worked, but they ate and slept at their master's residence. These slaves were assigned by the County Court to work upon the above mentioned road, and due notice of the time and place of working had been given to the defendants.

The town of Plymouth was incorporated in 1818. By an act of incorporation, the Commissioners of the town are required to "lay off and repair the streets of the town." For this purpose, and for other purposes of town government, the Commisioners of that town annually laid a tax upon the citizens of Plymouth.

It was contended for the defendants, that their slaves resided within the town, and were subject to the act of incorporation, and were obliged to pay taxes for the repairs of the street, that they were not liable to work upon the road in question, lying wholly without the limits of the town.

His Honor was of opinion, that the County Court had the right to assign the defendants' slaves to work on said road, and that the defendants were liable. There was a verdict for the plaintiff.

Rule for a *venire de novo*. Rule discharged; judgment for plaintiff, from which the defendants appealed.

Smith, for plaintiff.
No counsel for defendant.

BATTLE, J. We have no doubt of the correctness of the judgment given by his Honor in the Court below. The defendants' hands were, by the provisions of the 104th chapter of the Revised Statutes, bound to work on the public road, to which they were exempted by the 95th chapter of the act of 1818, by which the Commissioners of the town of Plymouth were incorporated. There is no section or clause of that act, by which they are expressly exempted, and the only question is, whether they are so by a necessary implication. The tax imposed upon the citizens of the town, for the purpose of keeping in repair the streets, which it was made the duty of the Commissioners to lay off, certainly did not exonerate them from paying what are called county taxes—taxes to be applied, under the direction of law, for

the common weal of the country. Now, the performance of labor in working on the public road, is but a tax upon the inhabitants of the county, to be paid in personal service instead of money. We can see, then, no more reason why the defendants should, because of their residence in a town, be exempted from that, than from any other kind of tax, imposed and levied for the benefit of the county at large. Nor can the defendants complain of this, for, as a recompense for this additional burden, they have conferred upon them all the advantages of their location in a town, to which many valuable privileges and immunities are secured by charter. But they cannot claim as a privilege or immunity what is not expressly, or by a necessary implication granted, and among those withheld in this case, is that of exemption from working on the public roads of the county.

The judgment is affirmed.

DOE ON THE DEMISE OF WILLIAM SMITH *v.* PENELOPE SMITH.

A general power to sell, given to a stranger, by a deed of bargain and sale, or covenant to stand seized to uses which also conveys such property to others than such stranger, is void, and a conveyance made under it is also void.

ACTION OF EJECTMENT for a lot in the City of Raleigh, tried before his Honor Judge MANLY, at Fall Term, 1853, of Wake Superior Court.

Clara Thomas, being seized of the premises, made the following deed: "To all people to whom these presents shall come, greeting: Know ye, that I, Clara Thomas, of the City of Raleigh, for and in consideration of the natural

love and affection which I have and do bear towards my two children Frances and Thomas, and for the further consideration of one dollar to me in hand paid, I have, and do by these, give unto my two children Frances and George, my house and lot, part No. 112, whereon I now live, together with all my household, kitchen furniture, and every other species of property I own, of what nature or kind soever: but the property herein conveyed is, however, to be under the control and management of Alexander M. High, for my said children, namely, to rent, lease, sell or otherwise dispose of the same, say all or any part of said lots, houses, or other property hereby conveyed, as to him may seem most advantageous for my said two children, and to make such conveyances for the same as he may deem most advantageous for their promotion and benefit; (here follows the boundaries); together with all the profits and benefits, rents, issues and profits thereof, to them and the said Alexander M. High, as above conveyed. In testimony whereof, I have hereunto set my hand and seal, this 15th of March, 1842."

Alexander M. High, after the death of Clara Thomas, in virtue of his supposed authority under the above deed, sold and conveyed the property to Richard Smith, who conveyed the same by his will to the defendant Penelope. The plaintiffs are the children of Clara Thomas, mentioned in the foregoing deed.

The only point in the case was whether A. M. High had power to sell and convey the land. It was agreed that, if the Court should be of opinion that he had, there should be a non-suit; and if of opinion otherwise, judgment should be rendered for plaintiffs. His Honor gave judgment of nonsuit, and plaintiffs appealed.

Winston and Rogers, for plaintiffs.
Moore and G. W. Haywood, for defendant.

PEARSON, J. Considering the authority given to High, to sell the land and make a conveyance, in the light of a power of attorney, the deed executed by him could have no effect, because it was made after the death of his principal, by which it was revoked. Considering it as a power of appointment, under the doctrine of uses, it is equally imperfect, because it is well settled that an estate cannot be created by means of a general power of appointment given in a covenant "to stand seized" to uses, or in a "deed of bargain and sale;" and the deed of Clara Thomas to her two children, in which the power is contained, must be either the one or the other of these conveyances.

1. Supposing it be a "covenant to stand seized," that conveyance operates by a use being raised on account of a good consideration, and then the legal estate is carried to the person having the use, by force of the statute of uses: a use must first be raised, and that can only be done by a good consideration—natural love, for instance, between the covenantor and the person in whose favor it is to arise. Of course, such a consideration cannot exist where the appointee, or person to have the use, is at the time unknown, and may be any one whom the donee of the power may afterwards appoint: and, although the appointee may happen to be one who is a kinsman of the covenantor, that will not suffice; for the consideratian that will support a deed, when it requires a consideration, must exist at the time it is executed; otherwise the deed is deficient, and the accident of a consideration afterwards cannot give to it any effect. This, however, is beside the question; for the appointee was not a kinsman of the covenantor. Although, as between the donor and her two children, there was a sufficient consideration to support the deed, and to raise the use limited to them, yet a good consideration is personal, and cannot extend, for any purpose, beyond the party, and the use limited to the party. If a parent covenants to stand seized to

the use of a child for life, remainder to the use of a stranger, the remainder is void. The reasons apply with more force to future contingent uses, and with still more to such uses as are to be raised by a general power of appointment, although the power is given to the child: of course, to give such a power to a stranger is out of the question.

2. Suppose it to be a deed of "bargain and sale;" that differs from a "covenant to stand seized" only in this: that one requires a *good*, and the other a *valuable* consideration; and the remarks made above apply, with a slight distinction, growing out of the nature of the two kinds of consideration. And the difference is this: a good consideration, as before remarked, is personal; whereas, a valuable consideration may be paid to the bargainor, for and on account of another. So that, although a covenant to stand seized to the use of a stranger, in consideration of natural love for the child of the covenantee, is void, yet a bargain and sale to B, in consideration of value, paid by a stranger to the bargainor, for and on account of B, raises the use, and the statute carries the legal estate. So if one, in consideration of value paid to him by A, bargains and sells to A for life, remainder to B in fee, it will be intended that A paid the consideration, as well on account of B, as for himself. But the person to whom it is limited must be named, for it cannot be intended that a consideration was paid for and on account of an unknown person. For this reason it is settled that a future contingent use to one unknown, or not in *esse*, cannot be raised by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment, given to the taker of the first estate in the use: and the case is much stronger where the power of appointment is given to a stranger, which is our case. For then the idea that any consideration moved from the unknown appointee to the bargainor is entirely out of the question. And it does not alter the case if, after the ap

pointee is known, he should pay a valuable consideration to the bargainor; for the deed is absolutely void, unless the consideration is paid, or secured to be paid, (which is the same thing,) at the time the deed is executed.

It would be an idle display of learning to pursue this subject further; Sir Edward Sugden, in his treatise on Powers, discusses it fully, and it so clearly appears that, in regard to the question before us, there is no conflict of opinion. So it would seem useless to have said as much as we have, but for the purpose of simplifying the subject, and relieving it from that seeming confusion which is sometimes produced by too much learning. In vol. 1, page 85, he says: "A power in a bargain and sale to lease to any man, although for a valuable consideration to be paid or rendered, is too general, and therefore void." "So such a power in a covenant to stand seized is, for the same reason, void: nor is it any argument in favor of a lease under such a power, that it is granted to some person within the consideration of blood, because, by reason of its generality, the power was void at the time the deed was executed." At page 86: "It seems clear that a power may be raised, in a bargain and sale, to lease to a person from, or in behalf of whom, a consideration moved at the execution of the deed: so a power may be raised in a contract to stand seized, to grant a lease to a person named in the deed, and within the consideration of blood or marriage, although such a lease cannot be granted where a general power is reserved to lease to any man." In such cases, as Lord Chief Baron GILBERT has observed, "no use can arise; for, when the persons are altogether uncertain, and the terms unknown, there can be no consideration. If such cases could be supported, it might, on the same ground, be argued that contingent uses to persons not in *esse* could be raised in a bargain and sale, provided they paid a consideration when born. It is settled that such a general power is void in its creation." Saunders, in his

treatise on Uses and Trusts, vol. 2, page 42, says: "As no use can be limited to arise out of a use, it follows that a use cannot be limited upon the legal estate of the bargainor, so as to be executed by the statute; neither can there be a *scintilla juris*, or possibility of the seizin remaining in the bargainor, after the bargain and sale, to serve a use limited on a future event, because the consideration paid by, or on account of, the bargainee, and which constitutes the foundation of the bargain and sale, appropriates the use exclusively for his benefit. The limitation of the use to the bargainee is a consequence arising from the payment of the money, and beyond that limitation the original consideration and contract do not extend: therefore, if there be a bargain and sale for the use of the bargainee, with a power from him to make leases, a lease made under that power cannot operate as an appointment of the use to the lessee."

The reason why these authors direct their attention almost exclusively to the power to make leases is, because the question was settled at an early day against the power to sell, and has never since been agitated. But the power to make leases was so convenient and almost necessary, according to the condition of things in England, that it found some advocates—among others, Cruise. They, however, were forced to restrict it to leases where a full rent is reserved to be paid to the person having the first estate, and, after its determination, to the taker of the second estate. The admission of the necessity for this qualification yields the question; for, evidently, it is not the amount but the fact of the consideration that forms the basis of the doctrine: for the purpose of raising a use, one dollar is as effectual as one thousand.

If a general power to lease cannot be given to one to whom the first estate is limited, *a fortiori* a general power to sell cannot be given to a stranger. The whole subject is fully discussed in MILDMAY'S case, 1 Rep. 177.

Judgment reversed, and judgment for the plaintiffs, according to the case agreed.

CASWELL COOPER *vs.* JOHN A. PURVIS.

Where parties enter into an express and specific contract, which is neither general nor doubtful, local usage cannot be resorted to in ascertaining its terms.

ACTION of ASSUMPSIT, tried before his Honor Judge MANLY, at Fall Term, 1853, of Edgecombe Superior Court.

The defendant, as administrator of Lewis Purvis, hired out a negro girl at public hiring, in June 1851, for the residue of the year, to the plaintiff. Though not known at the time, it soon became manifest that she was pregnant, and in the Fall she was delivered of a child.

There was proof of a long and well established custom in the county, embracing the place of the transaction, and the residences of the parties, to allow the hirer of a woman in such cases ten dollars.

The evidence of the custom was objected to, as immaterial, but the Court held, that, as there was nothing in the law or in the contract to forbid the operation of the usage in case it was so generally known and acquiesced in as to make it a part of the contract: in case, in other words, the custom was a consideration under which the biddings were conducted, and under which the parties acted, in making their bargain, the testimony was material, and if believed, the plaintiff was entitled to recover.

Verdict for plaintiff, and appeal to this Court.

Singeltary, for plaintiff, argued as follows:

The plaintiff says, that when he hired the negro girl, the administrator promised to pay him ten dollars, if she was

delivered of a child during the term of hire. That, although nothing was said about it at the time, the promise was implied, and was part of the contract, for it was so understood and acted on by all the persons present and bidding, which the administrator knew, and profited by in silence, which was a virtual assent. The plaintiff then offers to show that it was the established custom of the neighborhood for the owner to pay ten dollars in such cases, and to this the defendant objects. As a matter of fact, it is clear enough that what is here offered in evidence, bears directly on the issue. But the defendant says, it is incompetent under the decision of the Court in the case; HAYWOOD v. LONG, 5 Ired. 438. The Court there decide that the owner of a slave hired is not liable to the physician, *because* there is a special contract between the physician and the hirer. But it is intimated that the owner might be held answerable to the hirer, *because* that would carry out the reason of the custom. In the present case, the reason of the custom and its form are together, and no special contract intervenes.

On the former trials of this case, the plaintiff has produced no authority, because, after diligent search through the reports, none could be found. A subsequent reference to the Text Books has supplied the deficiency. *Vide* Starkie 2, 362; it says: "When parties have not entered into any express and specific contract, a presumption, nevertheless, arises, that they meant to contract, and to deal according to the general usage, practice and understanding, if any such exist, in relation to the subject matter." "Where an agreement between parties is general, or doubtful, the custom and usage of the country in which it was made, are frequently evidence of the terms upon which the parties meant to contract; for, in the one case, their silence raises a presumption that they intended to be governed by the usual course of dealings in such cases, prevalent in the neighborhood."

Another ground taken by the defendant is, that the contract was reduced to writing, and nothing said about the matter in dispute. That is, the plaintiff gave his note for the hire. The answer is, that in this the plaintiff did nothing more than fulfil his part of the contract, which was, that he should pay or bind himself to the payment of a certain sum of money.

Biggs, for defendant.

BATTLE, J. We differ with his Honor upon the question raised on the trial, as to the admissibility of proof of the custom or usage relied on by the plaintiff, to imply a contract in his favor. It is directly opposed to the principle laid down by the Court, in the case of JONES v. ALLEN, 5 Ired. Rep. 473. That was an action brought by a physician, against the owner of a slave, for professional services rendered to the slave, while in the possession of a hirer, and at the instance of the hirer. In support of his action, the plaintiff offered to prove, that, in the section of country where the hiring took place, it was the universal custom for the owners, and not the hirers, to pay for medical attendance upon the slaves, but the testimony was rejected. This Court held that the testimony was properly rejected, and said that "no doubt the liability of general and special owners of hired slaves, for the expenses of their maintenance and medicine during sickness, is often and perhaps generally the subject of contract between them. But, without some stipulation on that point, the general rule of law must operate, and cannot be controlled by any understanding to the contrary, in particular neighborhoods.

There was no established general custom on the point; for, if there was, that would be the law: but a mere local usage in a small part of the country cannot change the law, and give the plaintiffs an action against one man, when they

are employed by another. So, in the case before us, it is not contended that the custom is a general one; nor are the terms very generally defined. Whether it extends to hirers by the year, by the half year, by the month or the week, we are not informed. If to the latter, it is very unreasonable, and ought to be abolished by force of the maxim, *malus usus abolendus est.* But the decisive objection to the allowance of such neighborhood customs is the uncertainty in relation to the proof of them, and the great inconvenience of having local laws, in any part of the State, to regulate matters which ought to be the subjects of express contracts. But the counsel of the plaintiff relies, for the support of his action, upon certain passages in Starkie on Evidence, vol. 2, page 258–9, of 1st Am. edition: "Where parties have not entered into any express contract, a presumption nevertheless arises, that they meant to contract, and to deal according to the general usage, practice and understanding, if such exist, in relation to the subject matter." And again: "Where an agreement between parties is general and doubtful, the custom and usage of the country in which it was made, are freqently evidence of the terms upon which the parties meant to contract; for, in the one case, their silence raises a presumption that they meant to be governed by the usual course of dealing in such cases prevalent in the neighborhood." We need not inquire whether Mr. Starkie's doctrine be correct or not; for it is not at all applicable to the case. The parties here did enter into "an express and specific contract," which was neither general nor doubtful, and therefore left nothing to be presumed or inferred.

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

JOHN C. PETTIJOHN *v.* HENRY WILLIAMS.

Where the executor of one tenant in common, authorised to sell a fishery, takes along with him the other tenant, and refers the purchaser to him as one acquainted with the property, and such tenant commits a fraud in his representations of the qualities and condition of the fishery, such executor is personaliy liable for the fraud.

ACTION in the case tried before Judge ELLIS, at Fall Term, 1853, of Chowan Superior Court.

The plaintiff declared for a deceit, by fraudulent misrepresentations in the sale of a small piece of land, on Croatan Sound, used as a landing for seins used in fishing in the adjacent waters of the Sound, and the alleged deceit was, first, in representing that there were only seven stumps in the adjacent scope of waters constituting the fishery, whereas there were two thousand stumps, hangs and obstructions, and the defendants well knew it.

The land had been owned by the defendant Melson, and one Whitley, who fished there in the years 1846, '47, '48, and in 1849. Whitley died, leaving the other defendant, Williams, his executor, who was empowered by the will to make sale of this fishery.

Advertisement had been made to sell the same at auction, at Edenton, but having failed thus to make sale, the defendants went together, on their return home, to the house of plaintiff, in the town of Plymouth, in Martin county, where the representations complained of were made, and a sale to the plaintiff for $3,000 was executed. Upon the point of the deceitful representation, the evidence adduced on the trial was as follows:

One Nixon testified that defendant, Melson, said to the plaintiff, in the presence of the other defendant, that there were in the sein ground but three stumps or not more than five, and that three of them were staked so that it could be

seen where they were, and that eight men could remove all the obstructions in twenty-four hours. That Williams was present at the time, but did not, in his hearing, make any statement about the stumps or obstructions.

One Brown stated, that he heard the defendant Melson say to the plaintiff, in the presence of Williams, that there were but three or four stumps in the sein ground; that they were near the shore, and might be cleared out at an expense of forty dollars; that Williams was present, and made no statement about the number of stumps.

One Fagan testified, that he heard the defendant Williams refer the plaintiff to Melson for information, as to the obstructions in the fishery, and Melson said, in the presence of Williams, that there were but few hangs in the fishing ground and they could be easily removed; that there was a bunch of stumps or hangs in the lower corner, which did not interfere with the sein, unless it drifted out of the usual course, by the force of the winds and tides.

Fagan also stated, that, on the day before this conversation, he heard Williams tell plaintiff that the fishery was clear, or that Melson said it was clear; that Melson had cleared it, but that he, Williams, had no personal knowledge of the condition of the fishery in that respect, but that he had brought Melson with him to tell its condition; that Melson was not then present.

There was evidence on both sides as to the condition of the fishery; but, as the jury found the defendant Melson guilty, it is not thought necessary to enter into a detail of it.

The plaintiff insisted that Melson had made a false representation, and that Williams was bound by it, because Melson acted as his agent in making the misrepsentation, and this, although Williams was ignorant on the subject, and did not know Melson's statements were false.

The Court charged the jury, that, however this might be, had Williams appointed Melson his agent to sell the proper-

ty, there was no such evidence here of agency, and that, if the reference by Williams to Melson, of the plaintiff, for a description and representation of the character of the property, proceeded from an ignorance on his part, of its true condition, and was made in good faith, and he was innocent of any fraudulent collusion with Melson, and knew not that his representations were false, he would not be liable; that his liability depended upon false representations made by himself, or an acquiescence in such as were made by Melson, knowing, at the time, that they were false.

The verdict was in favor of the plaintiff for $1,500, against Melson only, and in favor of Williams.

Plaintiff moved for a *venire de novo*, for error in the instruction of the Court. Motion refused, and appeal to this Court.

Heath and Bragg, for plaintiff.
Smith, for defendant.

PEARSON, J. It is established by the verdict, that the representations made by Melson, in regard to the property, were false, and he knew them to be so: and, that although Williams did not at the time know them to be false, yet, by means of these falsehoods, he and Melson were enabled to sell the property to the plaintiff for greatly more than it was worth: and the point in the case was, after Williams found out that the plaintiff had been cheated, could he retain the part of the spoils that had fallen to his lot, in the division with Melson, without becoming, in contemplation of law, also liable for the fraud that had been practiced—at least to the extent of his rateable part of the damage—so as to make the difference between the two consist in this: that the perpetrator was liable for the whole, the other to the extent of his participation in the spoils?

His Honor misconceived the case, and made it turn upon the point that there was no evidence that Williams had appointed Melson his agent to sell the property: Whereas, there was pregnant proof that he had made him his agent, to assist him in making the sale, by referring to him as one who was well acquainted with the property, and could give all necessary information in regard to it. The witness Fagan swore that he had told him, that he brought Melson with him to tell the condition of the property, and all the witnesses concur in saying that he referred the plaintiff to Melson, who would answer all inquiries, and it is evident, that the plaintiff was induced to rely upon the information thus received, and close the treaty.

It can make no sort of difference, whether he was his agent to do the whole business connected with the sale, or only to do a part of it. If you, having a horse to sell, get one man to ride him up and down the street, to show his parts, and another to act as auctioneer to see who will give the most for him, and another to act as clerk and set down the bid, they are all your agents, as to the parts assigned to them, (they act for you and in your stead, which is the true definition of an agent), although you reserve to yourself the part of receiving the money, and making a bill of sale, and of delivering the article to the purchaser. So, if you advertise a tract of land, and refer persons who may wish to buy, to A B, who is well acquainted with the land, and will go upon it with them and show the boundaries, &c., does it need the authority of decided cases to show that he is your agent, and that if he makes a wilful misrepresentation, and points out land as belonging to the tract, which, in fact, it does not include, and thereby enables you to sell it at an extravagant price, that you can, after notice of the fraud, which he has practiced, insist upon keeping the whole price, and take the benefit of his falsehood, without being guilty of a fraud, as well in law as in morals? Can a

man, lawfully, do that by another which he cannot do himself? Just as soon as you showed a disposition to hold on to your ill-gotten gains, every honest man would exclaim, "you are just as guilty of a fraud as the vile instrument you made use of."

This plain principle of law and common honesty is apparently conceded by his Honor, and the error is in putting the case on a supposed distinction between an agency to sell out and out, and an agency to do some part only of what is necessary to effect a sale. We find no such distinction in the books, and the principle is settled generally, that a vendor is bound for the fraud of his agent, in effecting a sale: in fact, the principle is settled as to all agencies. COMFORT v. FOWKE, Meeson and Welsby, 373. Although the Judges differ in opinion as to the point in the case before them, they all take it as settled law, that a principal is bound for the fraud of his agent. PARK B. says: "I concede that, if one employ another to make a contract, and that agent, though the principal be *perfectly guiltless*, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action." Lord ABINGER, C. B., who dissented, says: "I own it never occurred to me, to doubt, upon principle, or upon the authority of decided cases, that the knowledge of the principal was the knowledge of the agent, and the knowledge of the agent the knowledge of the principal."

There is one case so fully in point with the present, that, although unnecessary, we are tempted to cite it. MAYNARD v. RHODE, 11 Eng. C. L. R. 419. Plaintiff had effected an insurance upon the life of Col. Lyon, of whom the plaintiff was an annuity creditor. In making the insurance, the plaintiff referred the company to Col. Lyon for information as to his health: the Colonel did not make a true statement. The Court say, however hard it may be on the plaintiff, the rules of law must be adhered to: so that,

though entirely innocent, he lost the benefit of the policy, on account of the misrepresentation of the Colonel, to whom he had referred the company for information.

Allusion was made, upon the argument, to the fact, that Williams sold under a power given to him as executor. That does not vary the case. We presume that, in settling with his *cestui que trust*, he will only be charged with the real value of the property; but, be that as it may, he was not at liberty to commit a fraud in law, for his own benefit or for that of others.

It is only necessary to say that the variances pointed out by the plaintiff are immaterial.

The plaintiff is entitled to a *venire de novo*, as to the defendant Williams. He does not ask one as to Melson, who did not appeal.

Judgment reversed.

JOSEPH B. OUTLAW, PROPOUNDER OF THE WILL OF DAVID OUTLAW *v.* GEORGE HURDLE AND OTHERS, CAVEATORS.

According to the practice in this State, a plaintiff may introduce as many witnesses as he deems necessary to establish his case, and if the defendant brings in contradictory witnesses, the plaintiff may call in others to corroborate his first.

The rule of evidence, that a comparison of other writings with the one in contest cannot be allowed to prove hand-writing, is not varied by the fact that such writings are in evidence for other purposes. Writings are not properly submitted to a jury's inspection, but they should be read. As a general rule, all evidence is addressed to the hearing of the jury, and not to their sight.

The dispositive character of a script propounded for probate, can be proved by evidence dehors the paper.

In order to entitle a holograph will to probate, the hand-writing of the deceased should be so generally known as to preclude fabricated wills.

The character of an individual opposing an instrument for probate cannot be considered in determining on the genuineness of the paper.

Outlaw v. Hurdle and others.

THIS was an action of DEVISAVIT VEL NON, tried before his Honor Judge MANLY, at a Special Term of Wake Superior Court, held on the 3d Monday of June, 1853.

The paper writing propounded for probate, as the last will and testament of David Outlaw, is as follows:

"It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. DAVID OUTLAW.

Dec. 20th, 1848."

The plaintiff's counsel produced witnesses, who deposed that the deceased died at the house of the propounder, on the morning of the 21st of March, 1849, about half past five o'clock; that he was buried on the afternoon of the next day; that, about seven o'clock in the evening of that day, the propounder went from the dining room into his wife's apartment, separated from that room by a narrow passage, and spoke to his wife, who went into a part of the room where the bureau stood, out of sight of the witness deposing to the fact, when he heard the sound of the unlocking of the bureau drawer, when she presently returned, and handed to the propounder a small trunk, well known as having been the property of the deceased in his life-time, and to have often been referred to by him as containing his valuable papers and effects, and delivered the same to the propounder, who brought it into the dining room, and placed it on a table between him and the witness; then unlocked and opened it, and taking out a considerable number of bonds, (in large sums, due and payable to the deceased,) wrapped up in a paper cover; upon examining which, the paper-writing, propounded as a will, was found at the bottom, and making a part of the bundle; the bonds being all labelled with the names of the obligors, and the amount of the bonds, but the paper-writing had no endorsement upon it. During a previous part of the day, the propounder had asked the witness, (Spivey,) who assisted him in the examination of

the trunk, whether it would not be proper to have an examination of deceased's papers, and witness replied that it would; and for that purpose he had better send for some of the neighbors; in reply, the propounder asked, "will not you answer?" witness said "yes." This witness was a lawyer, and was consulted by the propounder professionally; but, being an old friend, and having been his client, he charged him nothing. Afterwards, and immediately before propounder went to the trunk, as before stated, witness said to him, now is a good time to attend to that business; upon which propounder rose and went for the trunk. The propounder then called six witnesses, who deposed to being acquainted with the hand-writing of the deceased, by having seen him write, and having corresponded with him, who severally deposed that the said paper-writing, and every part thereof, including the signature, was, in their opinion, in the genuine hand-writing of the deceased, and was written by him.

It was also in evidence, on the part of the propounder, that the deceased, on his arrival at the plaintiff's house, on the 16th of March, gave the little trunk before mentioned to plaintiff's wife for safe-keeping; that he complained of being unwell; continued so until Sunday, when he took his bed, and died, as before stated, on Wednesday morning next after.

The propounder's counsel then stated to the Judge that he wished to reserve the examination of the other witnesses until after the witnesses for the other side were examined, and their case closed, insisting that by law they had a right so to do, and desired his Honor's opinion thereon;—the caveators' counsel insisting that the propounder was bound, in his opening, to examine *all* the witnesses whose testimony was proper and admissible in chief, and could not, after the caveators' case should be closed, offer any testimony except such as should be called for and made admissible in reply thereto.

Upon this question the Court expressed the opinion that the practice in North Carolina had been in accordance with the propounder's views, and declared its intention of following, on this occasion, the established usage.

The propounder's counsel accordingly reserved this evidence, and offered the same, as hereinafter stated, after the close of the defendants' case—to which the caveators, by their counsel, excepted.

The counsel for the caveators produced as a witness one Stephen Moore, of Hillsboro', who deposed that, in the Spring, or early in the Summer, of 1847, at Hillsboro', the deceased applied to him to prepare a will, which he did, and it was executed, and attested by two subscribing witnesses; the testator charging Moore to keep secret both the contents of the will, and the fact of his having made one, and left the will with him for safe-keeping.

By this will, legacies were given to the various members of the Hurdle family, and to a daughter of the propounder; the residue to the caveator George Hurdle; and George Hurdle, and Benjamin Hurdle, another of the caveators, were named executors.

This witness, Moore, further proved that he retained this will in his keeping 'till the Summer of 1848, when the deceased, proposing to make some alterations, a new will was prepared and executed and duly attested. By this will, some additional legacies were given, the legacy to Miss Outlaw increased from one to two thousand dollars, and George Hurdle named sole executor and residuary legatee. This will was left in Moore's keeping until the 4th of December in that year, when the deceased, being about to go from Hillsboro' to the low country, declaring his intention of returning in the Spring, called upon Moore for the will, saying he would take it with him; and it was accordingly delivered to him.

In both of these wills, provision was made for the liberation and support of his slaves; and in the conversations with Moore, upon the occasion of writing them, the deceased stated that the propounder, and one Bagley, and Mrs. Parker would be disappointed in the disposition he was making of his property; but that the propounder was an extravagant man, and property would do him no good.

The caveators produced one Lawrence as a witness, who deposed that the deceased came to Raleigh in the evening of the 19th December, 1848, spent the night at his house, and left the next morning; and by another witness, caveators proved that he met the deceased, about mid-day of the 20th, near to the house of one Clayton Lee, to which he was going, and which is distant from Raleigh, on the road to Louisburg, about fourteen miles.

One Holloway was then called by the caveators, who deposed, that the deceased came to his house, which is about nine miles from Raleigh, on the road to Hillsboro', on the 9th of March, 1849, and remained until the 12th of the same month; on the morning of which last day he said, that he had in his trunk his will, written by Stephen Moore, of Hillsboro'; that he had directed his slaves to be settled, by that will; and that, when he died, George Hurdle would see what to do,—how to settle his slaves,—and would find enough to satisfy him for his trouble; that, rather than the propounder should have his property, he would put it in the fire; that he was going down the country to get a negro he had given away, in order that he might be liberated with the rest of his slaves; and the witness saw in his possession a bundle, out of which he took a five dollar note, and which appeared to witness to contain a considerable sum of money. He said, on cross examination, that he did not see but one bill, so as to know the amount of it, but he thought he saw a good many; but of this he could not be certain.

The deposition of Clayton Lee was then read by the caveators' counsel, to the effect, that the deceased left his house on the morning of the 16th of March, 1849, going, as he said, to the house of the propounder in the County of Franklin, at the distance of 26 miles from the house of witness; that, at one moment, the deceased proposed leaving with him the little trunk before mentioned, in which he said was his little all, and told witness, in the event of his death without returning, to be sure and write to Ben Hurdle, and let him have the trunk.

The caveators then examined thirteen witnesses, who severally deposed to their acquaintance with the hand-writing of the deceased, and that, in their opinion, the paper-writing in question was not in his hand-writing.

The caveators then offered to exhibit to the jury a large number of letters in the hand-writing of the deceased, (and which had been produced, some by the propounder and some by the caveators, on a former trial of this cause, and retained and impounded by order of the Judge who then presided,) for the purpose of showing that the deceased always used the contraction "its," for "it is," as evidence to be considered by the jury in determining whether the said paper was in the hand-writing of the deceased or not.

To which evidence, the counsel for the propounder objected; and the Judge, deeming the evidence inadmissible, refused to receive the same—to which opinion and refusal the caveators, by their counsel, excepted.

The counsel for the propounder then offered that the opposite counsel might use all the letters that were impounded, containing in them the word "its," by reading that portion of them to the jury, or stating to them in which of the letters the word was to be found, and how often found, or might prove it by any witness, who might, for that purpose, inspect the letters, without exhibiting the same to the jury, which proposition the defendants' counsel declined to accept.

The counsel for the caveators read to the jury, for the purpose of showing affection of the deceased for the Hurdles, *twelve* letters, which, on a former trial, had been submitted to the jury, for a comparison of hand-writing, and impounded by order of the Judge, in which letters the word "its" occurred twenty-five times, and the words "it is" did not occur at all; and the counsel for the propounder read seven letters, which had also, on a former trial, been submitted to the jury and impounded, to show affection of deceased for the propounder, in which the word "its" occurred twenty-one times, and one letter which had not been impounded, in which the word "its" occurred once, and the words "it is" also once: all which letters the jury were permitted to examine; but the letters thus put in were not all the letters containing the word "its" which the caveators' counsel proposed to read and submit to the jury; but there were fifteen letters containing the word "its" which were not read.

The counsel for the caveators also offered to put in evidence the inventory of the effects of the deceased, returned by the defendant as administrator *pendente lite*, for the purpose of showing thereby an abstraction by the propounder of money of the deceased; to which the propounder's counsel objected, and the Judge refusing to admit the same, the counsel for the caveators excepted.

The Court thought the letters offered inadmissible, under the rule which excludes manuscripts introduced merely for the purpose of comparison. The offer is in substance a proposition to compare in a certain particular, and the rule seems fully applicable to it.

It was furthermore held, that the principle of exclusion could not be changed by any inquiry into the number of letters, or the sources from which they were drawn, or by consent on a former trial, now withheld. In connection with this point, the Court stated the rule (as understood by it,) to be, that a document cannot be introduced by a party

solely for the purpose of instituting a comparison; but being competent by its contents, (*aliunde*,) and in evidence, it may be compared by the Court and jury; and the reason of the rule seemed to be, not because comparisons in general are improper, for all evidence of hand-writing, except that of an eye-witness to the writing in question, is by comparison, but because to allow a manuscript to be introduced for that purpose, is to give power to the party to impose on the Court and jury by an improper selection. If the specimen be before the Court, and be made admissible by reason of its literary contents, this element of mischief does not pertain to it, and the reason ceasing the rule ceases. In conformity with this opinion, the letters, &c. as stated, were introduced, examined and compared. The plaintiff then examined thirteen other witnesses, who severally deposed to a knowledge of the hand-writing of the deceased, and that the propounded paper, with every part of it, the signature included, was in his proper hand-writing.

The propounder also called and examined more than witnesses, who deposed to having been acquainted with the deceased, and to having heard him, at many times, declare a very high opinion of the propounder as a physician and a gentleman, an affectionate regard for him as a friend, and great pride in him as an Outlaw. Several of these witnesses also stated that the deceased, in these communications, often spoke of him as an extravagant man, who did not know how to take care of money, but if he had even a very large estate, would soon waste it, as the deceased said he had wasted several fortunes already. Some of these witnesses also stated their having heard the deceased speak of the Hurdles as his nearest relations, and as persons for whom he entertained a high opinion and regard as gentlemen and friends, and as industrious, careful, prudent men, who knew how to take care of property; but complained of George for being too much addicted to attending public meetings.

The propounder also proved, by several witnesses, that prior to the Spring of 1848, the deceased had declared a purpose to give his estate to propounder, and, by one witness that, during his last illness at the house of the propounder, he said to the witness, that he had made many wills, but had then arranged his business, or his business was then arranged, (but which expression witness did not recollect,) to his satisfaction. He also proved, by one Fisher, that, on the afternoon of the 12th of March, being the day he left Holloway's, the deceased, being in Raleigh, expressed to him great affection and regard for the propounder and his family; that, although he had nearer relations, they had treated him with greater kindness than any of them; said that he was then going to his house, and expected to make it his home for the residue of his life, except when he was travelling about; that he expected to have something to leave them when he died; it would not be much to anybody, and he did not know that it made much difference what became of it after his death; and, in the same conversation, deceased said the propounder spent money as fast as he got it, and said also that he was a good and honest man.

Many letters of the deceased were read by the propounder, to show the affection of the deceased for him and his family; and others by the eaveators, to show his affection for the Hurdles, particularly George and his family. These letters were also submitted by the parties to the jury, to be compared with the propounded paper; the propounder insisting that, by this comparison, the genuineness of the paper would be made manifest, and the caveators that the contrary would appear thereby; and particularly that its comparison with a letter of deceased, addressed to the propounder, would show that the paper had been copied therefrom, and was a forgery. Of the witnesses examined in the cause, (in number more than eighty,) seventy-eight were acquaintances of the of the deceased in his life-time; but, of these,

only thirty-two spake to a knowledge of his hand-writing: these witnesses generally were from various counties and parts of the State. On this evidence the case was submitted to the jury, and the counsel for the caveators made the following points:

1st. That the paper writing was not upon its face a testamentary paper, and therefore was not entitled to be deemed the will of the deceased.

2d. The paper, not being testamentary on its face, if it could be proved to be a will, there must be, to that purpose, direct and express evidence, that the deceased had adopted or recognized that very paper as his will, and that in this case there was no such evidence.

3d. That it was necessary for the propounder to prove, as a substantial fact, that the hand-writing of the deceased was generally known to his acquaintances, and that, in this case, there was no evidence to establish that fact, within the meaning of the law requiring it.

4th. That, if the jury believed the testimony of Holloway, and Clayton Lee, and that, in what the deceased said to these witnessess, he referred to the will written by Stephen Moore, there was no evidence in the cause from which the jury had a right to find that the deceased had, in his lifetime, placed the propounded paper amongst his valuable effects, as his will, notwithstanding the finding thereof, in the manner stated, and notwithstanding the declaration made by the deceased during his last illness, that he had arranged his affairs, and what he said to Fisher on the 12th of March, and, without such evidence, the jury ought not to find the paper the will of the deceased.

5th. That, under the circumstances of this case, a mere preponderance of evidence or probabilities, in favor of the paper, was not sufficient to authorise a verdict in favor of the propounder.

6th. In reply to remarks of the propounder's counsel, insisting on his client's high character, that his character was not in issue on the record, and that the jury were not at liberty to refer to any such character, real or supposed, in coming to a conclusion on the evidence, but must decide without any reference, in any event, to his character.

And the counsel for the caveators prayed the Judge to instruct the jury accordingly; which instructions the Judge refused to give, as prayed, but instructed the jury as follows:

1 and 2. Upon the first and second points, the Court stated it was indispensable, in order to constitute the instrument a valid will, that it be intended by the deceased to have a posthumous operation. But it was not necessary there should be intrinsic evidence of that intent. If there be nothing in the paper to conflict with the conclusion that it was so intended, it might be left to the jury, as a question of fact, for them to determine; and this question should be judged and decided by the circumstances under which the paper appeared to be kept and found, as well as by its contents: these were submitted to the jury, and they were instructed, that, if they collected from them that the paper was intended by the deceased, as a disposition of his estate, to take effect at the termination of his life, it was sufficient. But, if it was deliberative in its nature only, and intended as a memorandum or project of a will, to be made at some future time, it was insufficient, and the case of the propounder would fail on that point.

3. Upon the third point, the Court instructed the jury it was necessary it should appear that the hand-writing of the deceased was generally known to his acquaintances; but this requisition did not mean that a majority of those who knew him should also know his hand-writing. The power to make a holograph will, in that sense of the phrase, would be a rare qualification. That it was not easy to define, by

terms belonging to our language, what is meant by the word *general*, in connection with the topics character, reputation, knowledge, &c. But it is supposed not to mean what everybody may think or know, or what indeed a majority shall think or know. It means, rather, such opinion and knowledge as is entertained by a considerable number of persons; so considerable in number as to make it common, general, in the popular interpretation of those words. In this sense, the Court was of opinion that there was evidence to be left to the jury on that point, whether the hand-writing was generally known, and evidence from which the jury might infer that it was so known.

4. Upon the fourth point, the Court collated the proofs on both sides, and called the attention of the jury to such as were in conflict with each other, and submitted it as a question of fact, whether the paper propounded had been left by the deceased amongst his valuable effects, deposited there, by him, as and for his will. It was not necessary there should be positive testimony of an eye-witness to the point of deposit; indirect and circumstantial evidence would do, provided it be satisfactory. That, if the paper produced on the trial were deposited by the deceased in the trunk with bonds and obligations for money, it was a deposit among his valuable effects, and that requisition of the statute would be complied with. Whether the proofs directed from both sides upon this point left it satisfactorily established in favor of the propounder: that is to say, whether the jury was then satisfied, from the proofs, that the paper was deposited in the trunk by the deceased, and left there as a will at the time of his death, the jury were called on to decide by weighing the testimony.

5. On the fifth point, the Court instructed the jury, that the requisitions of the law are, that the will shall be wholly in the hand-writing of the testator, established at least by a requisite number of witnesses; that it should have been

placed by him among his valuable effects, and left there with an intent it shall have a posthumous operation; and that the hand-writing is one that is generally known among his acquaintances. That the propounder of the will asserted the affirmative of these requirements, and upon him laid the burthen of establishing them. That there was nothing in the pleading, or in the order of introducing the evidence on the trial, which shifts the burthen from the propounder's to the caveators' shoulders. That, although the evidence was complicated, the issue was a single one, and that the laboring oar of that, in all its stages, was in the hands of the propounder; that it was there in the beginning, and is there throughout; and that, if the propounder had not satisfied them, by a decided preponderance of the testimony in his favor, on all the points necessary to the authenticity and validity of the paper, they were instructed to find against it.

6. Upon the sixth point, in respect to which instruction had been asked by the propounder, the Court remarked in these words: "I have been asked to charge you that, inasmuch as the defence involves the charge of forgery against the propounder, that there is a presumption of innocence in his favor until the contrary appears. Supposing the propounder has failed to satisfy you upon the points necessary to authenticate the paper, it is needless to inquire how, or by whom, or for what purpose it was fabricated, or by whom it was put away among his valuable effects. The propounder having failed to maintain his averments, fails in his case. If the consideration of the case bring you to the alternative that it is a good will if the propounder did not forge it, in such a case, like every other man of undeniably good character, he would be presumed innocent until the contrary appears. But that is not the issue, nor does the case, of necessity, turn on that point. Whether the point bears at all upon the case depends upon the view the jury may take of it, under the instructions given; and, in the event of its be-

ing brought to bear, how much the principle weighs is submitted to the jury to decide."

To which refusal to give the instructions as prayed, and to the instructions as given, the caveators, by their counsel, excepted.

Verdict for the propounder; motion for a new trial; motion refused, and appeal to this Court.

Graham, for the caveators.

Moore, Miller, G. W. Haywood and Winston, for the propounder.

PEARSON, J. This case, as well on account of the amount involved, as by reason of the many points made upon the trial, has excited much interest, and called for a high degree of ability on the part of the Judge who presided. After a very full discussion at our bar, and a due consideration of the whole matter, we are glad to be able to come to the conclusion that there is no error, and to feel satisfied that the case was submitted to the jury as fairly, and in a way as well calculated to enable them to decide upon its merits, as could be done, if it was tried over again twenty times.

1. We conclude with his Honor, that the practice in North Carolina has been, and we think it sustained by good sense, for a party to offer as many witnesses as may be deemed necessary to establish his allegation. If the other party chooses, he may rest the case upon it, or he may call witnesses in his turn, and the first party may call witnesses in reply, and for the purpose of adding to the strength of the evidence upon which he at first rested the case. Lord KENYON, who had as much good sense as any Judge that ever tried a case, somewhere remarks, "it is not worth while to jump until you get to the fence," that is, there is no use in meeting objections until they are presented, or in piling

up proof until it is made necessary by what is done on the other side. After the propounder had examined some witnesses, as to the fact of the hand-writing, if he had proposed to call others to the same fact, his Honor might have put a stop to it, and asked, for what purpose are you doing this? Why consume the time of the Court and jury until you hear from the other side? When the caveators called thirteen witnesses, who opposed the propounder's six witnesses, and swore that they did not believe the script was in the hand-writing of the deceased, it was proper then for him to call his other witnesses as to the hand-writing, and as to the facts and circumstances relevant and bearing on the matters on which the case was to turn, to wit: Was the paper in the hand-writing of the deceased? Did he put it among his valuable papers? And was it found there at his death?

In the present case, the counsel for the propounder, from an abundance of caution, consulted his Honor as to the propriety of not calling *nineteen* witnesses to prove the same fact until the other side was heard from. The course adopted, had the express sanction of the presiding Judge, and this surely removes the ground of exception. In the conduct of a trial, much depends upon the ability of the Judge. It is for him to see that everything is done fairly, and that neither side is taken by surprise. These matters must of course be left to his discretion.

Mr. Graham, in his able and well considered argument, made the suggestion, that counsel should not be allowed in conduct of a trial, to use all the strategy of a General in conducting a campaign. That is true, and the distinction is this: Generals have no Judge to preside over them, and they take whatever course is best calculated to effect the end. But in the conduct of a trial there is a presiding Judge; it is his duty to see "fair play." In the course of the trial much quickness of perception is called

for: but after the trial is over, if he sees that one of the parties has taken the other at a disadvantage, he may grant a new trial. We are confined to questions of law.

2. The caveators had a right to prove, that the deceased always, in writing, contracted the words "it is," so as to make them "its," but they had no right to put the letters of the deceased into the hands of the jury, and as it seems to us, his Honor has committed an error in favor of the caveators in allowing the letters to be looked at by the jury, and in telling them that, as they had a right to look at the letters for one purpose, there was no help for it, they might make a comparison of the hand-writing. This shows that it was wrong to allow the jury to see the letters at all. A jury is to *hear* the evidence, but not to *see* it. If it depends on eye-sight, it is presumed that a Judge can see as well as the jury: as upon a plea of *nul tiel record*, or as the fact of a maim, under the Statute in biting off the ear. STATE v. GERKIN, 1 Ired. 121.

With a few exceptions made by Statute in regard to a jury of view, where water is ponded back by a mill-dam, or a line is disputed, the evidence is to be *heard* by the jury and not to be seen by them. That this is the principle lying at the foundation of trials by jury, will readily be perceived by reflecting that, in ancient times, a jury would be attainted for a false verdict. This of course depended upon the evidence upon which the jury acted in making up their verdict. In regard to such incidents as the jury had *heard*, that could be set down and rehearsed before the grand assize; but in regard to such evidence as the jury might have seen, *setting it down* was out of the question. So, as it seems to us, the presiding Judge was too liberal towards the caveators. Although, it be true, that "all evidence of hand-writing, except the evidence of an eye witness, is by comparison; yet the rule of law requires that the knowledge in regard to the hand-writing, be acquired before, without re-

ference to, and independent of any considerations, that by possibility the pendency of the controversy may have given rise to, one way or the other. At best, an opinion as to the hand-writing of a man must be received by a jury with much caution, and therefore, it is required by law, that such *opinion*, to be fit to be heard, must have been formed under circumstances, when there was no possibility of bias, and with a single eye to the very truth.

3. It is a very grave question, taking all the allegations of the propounder to be true, *is the script testamentary?—a disposition?* In plain English, did the deceased mean to dispose of his property, after his death, by the force and effect of *that very paper?* We think he did. As it embraces *all* his property of every description, it was clear it was not intended as a gift *inter vivos*. There is nothing to show that it was intended as a mere memorandum or direction, by which a lawyer was to draw his will; and as he most unquestionably intended that it should have some effect, it is manifest that his intention was to make a disposition of his property, to take effect after his death, by the force and effect of that paper.

Mr. Graham, with much force, asked, suppose a man had picked up *this little paper* in the street, would it have occurred to him that it was a *will?* We are very much inclined to think that some such an idea would have presented itself to his mind; and if he had been informed of the facts; that it was all in the hand-writing of the deceased; that he put it away among his valuable papers, and it was found there at his death, then, beyond question, any one would say he intended to make that paper his will. It is said the paper must speak for itself; any proof, *aliunde*, is incompetent. That is true, where the question is merely one of construction: but certainly, when the question is, what is the nature and character of the paper?—what was it intended for?—the *res gestæ*, all that was done touching and concerning it,

is competent evidence; for these acts impress upon it its character. COVENTRY v. WILLIAMS, 7 Eng. C. L. Rep. 595. This is settled as well here as in England. CLAYTON v. LIVERMAN, 7 Ired. Rep. 93. Suppose the deceased had requested two witnesses to attest it in his presence, would not that fact be relevant and competent to show what he intended it to be? Or suppose he had asked some friend to take care of the paper for him, would not that fact have a strong tendency to show that he considered it a valuable paper? Would it not be proper to take it into consideration, in order to solve the question what the paper was intended to be? So that, besides the paper itself, we have the facts, as found by the jury, that the deceased did not treat this as a paper such as one would throw into the street; but he treated it as a valuable paper—put it carefully away among his bonds, in his little trunk, and it was there found at his death. It is obvious, therefore, that he intended, by the force and effect of this paper, to dispose of his property after his death. He intended it *to be his will.*

4. The object of the law in requiring that the hand-writing of the deceased should be generally known to his acquaintances was, to guard against perjury; and the meaning is, the hand-writing must be so well known that, if a false paper is propounded, the persons interested in the estate would have no difficulty in getting witnesses who are acquainted with the hand-writing of the deceased, and can expose and defeat any imposition. Without entering into a minute criticism of the words by which this meaning is attempted to be expressed, it is sufficient for us to say such is evidently the meaning; and when thirty-two witnesses swear that they are acquainted with the hand-writing, that is proof enough to bring the case within the meaning and intent of the Statute, and there is no error in leaving it to the jury to infer from such evidence that the hand-writing of the deceased was "*generally* known by his acquaintances." This

point has been decided by the Superior Court of Tennessee their Statute is copied from ours, and we are pleased to be able to adopt the very sensible construction put upon it by them, in TATE v. TATE, 2 Humphries 465, which fully sustains the view taken of it by his Honor in the Court below.

5. We will not attempt to treat this point in any other view than that taken by his Honor. It is enough to say, we agree with him, as well in his reasoning as in his conclusion.

6. This is the only point about which the Court has had much difficulty, and I confess that, but for the very decided opinions of the Chief Justice, and my brother BATTLE, I should say, his Honor went too far, (notwithstanding the very great pains he had taken to impress the jury, that the laboring oar in all the stages of the case was in the hands of the propounder,) in saying to them, "if in the way you look at the case, it is forced upon you to say, did the propounder *forge* this paper or not, there is a presumption of innocence in his favor until the contrary is made to appear." But deferring to their opinion, and being fully satisfied that the case could never again be submitted to a jury under circumstances as well calculated to make the verdict turn upon the merits, I have brought myself to the conclusion, that, although the words of his Honor, taken by themselves, do import a presumption of innocence, such as should influence a jury in a State case, but which should not be permitted to have any bearing whatever in a civil proceeding like that now under consideration, yet upon the whole, taking the charge altogether, a jury of twelve intelligent men could not have failed to have been fully impressed with the knowledge, that, according to law, the burthen of proving all his allegations rested upon the propounder, and it was for him to prove to the satisfaction of the jury that the paper was in the hand-writing of the deceased, that he put it among his valuable papers, and that it was found there at his death. So that they could say upon their oaths, that

according to the charge of the Court, and the evidence which had been offered to them, they were satisfied that the deceased intended *that paper to be his will.*

Judgment affirmed and a *procedendo* ordered.

JOHN A. ANDERSON AND JOHN JENKINS *vs.* GEORGE HOLLOMAN AND DANIEL VALENTINE.

The purchaser, at Sheriff's sale, of an interest resulting to a debtor, under a deed of trust, does not acquire the legal estate by the sheriff's deed.

ACTION of trespass QUARE CLAUSUM FREGIT, tried before his Honor Judge ELLIS, at Fall Term, 1853, of Halifax Superior Court.

The case was, the plaintiffs obtained a judgment, and took out an execution, which was levied on the land of the defendant in the execution, one John Overton. An order of Court was had for a sale of the land levied on; a sale made by the Sheriff, to plaintiffs, and a deed to them in the ordinary form.

Before this levy by the constable, the said Overton had conveyed the same land to a trustee, to secure certain debts of his, due to one Howell, and at the time of the levy and sale, these debts were still unpaid, but no sale had been made by the trustee. His Honor being of opinion that the plaintiffs had no legal title in the premises, the plaintiffs submitted to a non-suit, and appealed.

Barnes, for plaintiffs.
Bragg, for defendants.

PEARSON, J. Possession is necessary to sustain the action. The plaintiff had not actual possession, and the question is, did he have the legal title, which draws to it the possession? The resulting trust of a debtor, who has conveyed land in trust, for the payment of creditors, is in the nature of an equity of redemption, and may be sold at execution sale, under the act of 1812. The plaintiff's title, is that of a purchaser of such an interest or equity of redemption, and the act of 1812 directs the sheriff to set out in his deed, that the land, at the time of the sale, was under mortgage, so the deed of the plaintiff shows upon its face that he is entitled only to the equity of redemption. It is difficult to conceive of any ground upon which he can maintain the position that he has the legal title: clearly, the legal title is in the trustee, and it involves a manifest incongruity to suppose that it is also in the plaintiff. The only way in which he can get the legal title, is to redeem or pay the debts secured in the deed of trust, and call upon the trustee for a conveyance. This he has not done, and consequently he has not the rights of the legal owner.

The plaintiff's counsel relied on DAVIS v. EVANS, 5 Ired. 525. That was ejectment by the purchaser of an equity of redemption, at execution sale, against *the defendant in the execution.* It was held, that the plaintiff could recover, owing to the peculiar relation which, by force of the act of 1812, exists between the parties, giving to the purchaser the right to require the possession to be surrendered by the debtor, who cannot be heard to say to one who has paid his debt, that he had no interest; to this extent, and for the purpose of enabling the purchaser to recover the possession from the debtor, the Court supposes that the purchaser takes a legal interest under the act of 1812, notwithstanding the legal ownership of the trustee; but the fiction is expressly confined to an action of ejectment between the parties, and

cannot be extended to affect any other person, or to support any other action.

Judgment affirmed.

JOHN Q. MORGAN, ADMR. *v.* ALFRED PERKINS.

A contract to sell all the corn in a certain mill-house, at two dollars and a half per barrel, and a payment of part of the money, vest the property in the buyer, so that he can sustain an action of trover for it, even though it was not measured out to him.

ACTION OF TROVER for the conversion of a quantity of corn, the property of the plaintiff, tried before his Honor Judge ELLIS, at Fall Term, 1853, of Currituck Superior Court.

One Wilson was in possession of a mill-house, and in it had a quantity of corn. He sold to the plaintiff's intestate all the corn then in the house for two dollars and a half per barrel, and agreed to let it remain in the house till the purchaser could take it away in his vessel. Plaintiff's intestate paid Wilson, subsequently, thirty-five dollars towards the corn. Wilson afterwards sold and delivered the corn to the defendant, who converted it. A verdict was rendered for the plaintiff, subject to the opinion of the Court. And his Honor being of opinion against the plaintiff, upon the question reserved, the verdict was set aside, and the plaintiff submitted to a nonsuit.

Brooks and Pool, for the plaintiff.
Heath, for the defendant.

BATTLE, J. The principles applicable to this case have so recently been discussed and settled in this Court, that it

will only be necessary for us to refer to them. In WALDO v. BELCHER, 11 Ired. 612, it was held, upon the authority of the cases of WHITE v. WILKS, 5 Taun. 196, AUSTIN v. CRAVEN, 4 Taun. 644, BURK v. DAVIS, 2 M. and Sel. 397, and DEVANE v. FENNEL, 2 Ired. 36, that, if a part only, of a large quantity of goods be sold, and cannot be ascertained without weighing or measuring or other act separating and distinguishing it from the rest, the purchaser cannot obtain a title to the goods until his portion has been set apart. But, say the Court, "when the property is specific, and is in a condition to be identified and delivered, and the intention is proven to be that the property shall *presently pass*, it does pass." ALLMAN v. DAVIS, 2 Ired, 12, where a wagon was sold, but retained by the seller to put bows upon it, is given as an instance of a delivery inferred from the intention of the parties that the title should pass. Another illustration is there given, which is almost identical with the present case: "If one sell all the corn in a certain crib, at $2 60 per barrel, and it is the intention that the corn shall presently pass to the purchaser and become his property, it does pass, although it is necessary afterwards to have the corn measured to ascertain the amount, and fix the sum to be paid: because, supposing the thing to be in a condition to be delivered, the fact that something remains to be done to ascertain the quantity and fix the amount to be paid, only raises the presumption that it was not the intention of the parties that the property should pass until the weighing or measuring was done. But this presumption may be rebutted, and the property does pass, if the jury are satisfied that such was the intention."

In the present case, the fact that the parties, after the contract of purchase was made, agreed upon the quantity, and part of the price was actually paid, in connection with the other circumstances, certainly furnishes sufficient evidence to justify the inference that the parties intended the

property in the corn to pass. That being so, the verdict which was taken, subject to the opinion of the Court whether, upon the evidence, the plaintiff could recover must stand, because the plaintiff's right to recover depends upon the question whether there was any evidence sufficient to justify the jury in finding that the parties intended a delivery of the corn; and we have just said that there was.

The judgment of non-suit must be set aside, and judgment must be entered here for the plaintiff, for the amount of damages assessed by the jury in the Court below.

Judgment reversed.

STATE ON THE RELATION OF W. W. COLE *vs.* JACOB B. FAIR AND OTHERS.

Where a constable has raised money by a sale of property under several executions, not enough, however, to satisfy them, and one of the creditors demands all or none, when he is only entitled to a small part of the sum collected, and the constable to such demand proposes to give him more than his proportion. HELD, that such creditor was not entitled to recover.

HELD, FURTHER, that the constable, under these circumstances, was not bound to show he had the money with him when he proposed such payment.

(WARD v. JONES, Bus. 127, cited and approved.)

ACTION of DEBT on a constable's bond, tried before Judge SAUNDERS, at Fall Term, 1853, of Stokes Superior Court.

The relator put into the hands of Fair, the constable, two notes on Thomas Neal, on the 9th of April, 1852, on which day he sued out warrants, and on the 12th of the same month obtained judgment. On the 30th of that month, the constable sold all the property of Neal, liable to

execution, under the said two executions, and under one in favor of William A. Lash. The sale amounted to $22 10. On the day of the sale, the debt to Lash amounted to $16 17 cents. The relator at this sale bought of the property to the amount of $3, which is included in this statement of $22 10. Lash's debt was placed for collection in the constable's hands, in the fall of 1851: a warrant was taken out on 15th of September in that year, and, on the 20th of the same month, a judgment was obtained by him on the same. Lash's execution was levied on 15th of April, 1852, and that of the relator three days after. Before the bringing of this suit, the relator demanded the money arising from the sale of Neal's property, to be paid to his debt. The constable offered him half, but he refused to take the half, and said he would have all or none.

A verdict was rendered for the plaintiff, subject to the opinion of the Court upon the question whether it was necessary for the defendant to show that, at the time he offered to pay the one-half, that he had the money there ready to produce. And his Honor being of opinion upon this question, with the plaintiff, gave judgment accordingly, from which an appeal was taken to this Court.

No counsel for plaintiff.
Miller, for defendant.

BATTLE, J. Had the defendant Fair been under the necessity of showing, that he had made a tender of the money to the relator, in order to save himself from liability to his action, the cases of MILLS v. HUGGINS, 3 Dev. 58, and THOMAS v. EVANS, 10 East, 101, cited by the counsel, would have been in point, to sustain his Honor. But, in truth, the defendant, as constable, was a mere collecting agent of the relator, and the relator was, under the circumstances, bound to make a demand upon him, before he had a right to sue

him. WHITE v. MILLER, 3 Dev. and Bat. 55. And it seems, from the case of WILLS v. SUGG, 3 Ired. 96, that where the demand was made, if the defendant did not have the money with him, he had a right to a reasonable time within which to get it and pay it over.

But, however that may be, it is certain, that the demand in this case was insufficient to put the defendant in default. The relator demanded all the money, after deducting the costs, and the amount of his own purchase, for which the property was sold. He was entitled to only a very small portion of it; yet, when the defendant said, he would pay him half the amount of the sale, he refused, declaring that "he would have all, or none," and soon afterwards brought suit. It would be clearly unjust, to hold that the defendant had committed any breach of official duty by declining to comply with such an unreasonable demand, and we feel gratified, that neither principle nor authority requires us to do it. The principle of this case is somewhat analogous to that of the notice which we decided in WARD v. JONES, Bus. 127, to be necessary to charge an administrator, with the funeral expenses of his intestate. Such notice must not be, of a few items only, in a large bill, the whole of which is claimed of an administrator. So, in a case like the present, the demand to charge a constable as collecting agent, must not be a peremptory one, for a much larger sum than the relator has a right to claim, accompanied with a declaration, that he will have that or nothing.

The judgment being upon a verdict, which, as the case states, was taken, subject to the opinion of the Court, upon a question of law, must, together with the verdict, be set aside, and a judgment of non suit entered.

Judgment reversed.

NISSEN v. TUCKER.

An order for goods, not accepted, is no payment for property sold; and the owner may recover on the common count.

The doctrine of notice has no application to an order for goods.

THIS was an action of ASSUMPSIT, tried before Judge SAUNDERS, at the Fall Term, 1853, of Forsyth Superior Court.

The plaintiff sold to the defendant a wagon for thirty dollars, receiving an order on one Fries for goods for that amount. Fries declined accepting the order. The defendant afterwards had a settlement with Fries, receiving from him the amount in his hands belonging to himself. The plaintiff declared specially on the order, and also for goods sold and delivered. The jury returned a verdict for the plaintiff, subject to the decision of the Court, as to whether the defendant was entitled to notice, the order being for goods.

No counsel for plaintiff.
Miller, for defendant.

PEARSON, J. We concur with his Honor. The plaintiff under the count for goods sold and delivered, was entitled to recover the price of his wagon. The order on Fries, for the amount *in goods*, which was not accepted, was certainly no payment. The doctrine of notice is taken from the law merchant, and has no application to an order for goods. Such an order is not negotiable, and does not come within the law merchant, which is strictly confined to bills for money. As the defendant himself afterwards received from Fries the amount in his hands, he has not even a pretence for refusing to pay for the wagon.

STATE *v.* CALVIN McQUEEN.

Where a Solicitor for the State, as upon affidavit, asserts upon the authority of A. B. a witness in the cause, who is present, any matter material to the issue, and afterwards A. B. testified differently—Held, that testimony may be received to show the diversity, for the purpose of discrediting A. B.

THIS was an indictment for BURGLARY and HIGHWAY ROBBERY, tried before Judge SETTLE, at the Fall Term, 1853, of the Superior Court of Law for Robeson County.

The point upon which the case turned is sufficiently stated in the opinion of the Court.

Attorney General, for the State.
Kelly, for the defendant.

BATTLE, J. We have considered attentively every error assigned and now relied upon in the defendant's bill of exceptions. One of them we hold to be sufficient to entitle him to a new trial, and as the others are of such a nature that they can be easily removed on the next trial, we have deemed it unnecessary to decide them.

The material part of the second exception, brought to our attention in the argument here, is, that where the cause was called for trial at the Spring Term, 1853, of the Superior Court of Law for the County of Richmond, it was continued as upon affidavit of the Solicitor, who stated in the presence and hearing of the witness McKimmon, that John Blake, who was absent, was a material witness for the State, and would prove that he was one of the company, who agreed to commit the burglary charged; that he started with them on the night it was committed, and was not present at its commission in consequence of his intoxication: this information the Solicitor stated, that he had derived from McKimmon. On his examination, in chief, McKim-

mon having stated, that Blake, who had been subsequently indicted for the same offence, was present, aiding and assisting the prisoner. A witness was offered to prove the abovementioned facts, for the purpose of showing inconsistent statements, and thereby discrediting him. The testimony was rejected, and, as we think, rejected improperly.

There can be no doubt, that a declaration made in the presence and hearing of a witness, and not contradicted by him, is proper to be submitted to the jury, that he acquiesced in and admitted the truth of such declarations, and if at variance with his testimony on the trial, may be used to impeach his credibility. If this proposition requires an authority, the case of RADFORD v. RICE, 2 Dev. & Bat. 39, is a direct adjudication of this Court in support of it. It would seem to be a reasonable modification of this rule, that the declaration must be made at a time and under circumstances, when it is proper for the witness to speak out and contradict the statement, if he does not admit its truth. Hence, if the statement were made by a counsel in the argument of a cause, or a Judge in his charge to the jury, the witness should not perhaps be taken to acquiesce in its truth, by remaining silent; see MOFFIT v. WITHERSPOON, 10 Ired. 185. But this modification of the rule, if admitted at all, could not apply to the case before us. The Solicitor was making a statement of facts as derived from McKimmon, and in his presence, for the purpose of inducing the Court to continue the cause. If that statement were incorrect in any material particular, the witness was not only at liberty, but it was his duty, to correct it, by speaking to the Court either through his Solicitor or otherwise. His silence, under the circumstances, made the statement his own, just as much as if he had spoken it himself. But it is contended here by the Attorney General, that the testimony was properly rejected by the Court, because the preliminary question, as it is called, had not been put to

him. This argument is based upon a misapprehension of the extent of the rule in relation to that question. A witness is never, and ought never, to be asked as to any previous statements he has made directly and immediately material to the issue, when contradictory to what he swore on the trial. Such statements are allowed to be proved at once for the purpose of discrediting him. It is only when testimony is introduced to prove his declarations or acts, tending to show his bias feeling or partiality towards the party introducing him, that the question must first be put to him in relation to such declarations or acts, before the impeaching testimony is allowed to be given. "We hold it to be unfair," says Judge GASTON, in delivering his opinion of the Court, in the STATE v. PATTERSON, 2 Ired. 354; "to attack the credit of a witness, by showing that his answer, extracted by cross-examination, on an enquiry of this character, does not correspond with some statement previously made, without first drawing his attention to such supposed statement, so as to revive his recollection thereof, and afford him an opportunity, if he remembers or admits it, of giving it fully, with such explanations as the circumstances may justify. With respect to the subject-matter of the witness's evidence, he may be presumed to come prepared to testify with a freshened memory and carefully directed attention: but this presumption does not exist as to collateral matters, remotely connected with that subject-matter; and justice to the witness, and, still more, reverence for truth, requires that, before he be subjected to the suspicion of perjury, he shall have a chance of awakening such impressions in respect thereof as may be then dormant in his memory." The distinction and the reason for it, between the cases where it is, and where it is not, necessary to put the preliminary question before introducing the impeaching testimony, is here so clearly stated, that it is unnecessary for us to add anything more, except to say, that it is fully sustained by

the opinion of all the Judges of England, in the QUEEN'S case, 2 Brad. and Bing. 314, (6 Eng. C. L. Rep, 130,) and by the subsequent case in this Court, of EDWARDS v. SULLIVAN, 8 Ired. 302.

The testimony of the witness McKimmon, that Blake was present, aiding and assisting the prisoner in the commission of the burglary, was certainly a part, and a material part, of the account of the transaction, with its attendant circumstances, which it was his duty to give; and if he had previously made declarations himself, or had acquiesced in and admitted declarations inconsistent therewith, made in his presence by others, it was competent for the prisoner to prove them, with the view to discredit him. For the error of the Court below, in rejecting this testimony, the prisoner is entitled to a *venire de novo;* and to that end this opinion must be certified to the Superior Court of Law for the county of Robeson.

Venire de novo.

STATE v. McNAIR.

The delivery of spirituous liquor to a slave, after night-fall, in pursuance of an order from his overseer, for his (the overseer's) own use, is not unlawful.

INDICTMENT tried before MANLY, Judge, at the Fall Term, 1853, of the Superior Court of Edgecombe County.

The proof was, that the spirits were delivered by the defendant to the slave, after night-fall, in consequence of the following order, from the overseer of the negro:

"Mr. McNair:—You will please to send me 5 quarts of whiskey, by boy Jerry. JAMES H. HIGGS."

The price of the liquor was paid by the negro on delivery. The indictment charges that the spirits were not purchased for the owner or employer of the slave, nor by their order.

The Court instructed the jury that, under the circumstances, the trading was unlawful. There was a verdict of guilty. Judgment and appeal.

Attorney General, for the State.
Moore, for the defendant.

NASH, C. J. In the opinion of his Honor below, there is error. The indictment charges the trading to have been with the slave Jerry, for himself, for spirituous liquors—"the said spirituous liquors, then and there, *not being* for the owner or employer of said slave, or by the order of the owner, or of any person having the management of the same." Jerry had an order from Higgs, who was the overseer of Mrs. Gregory, the owner, and under whose management and control the slave was. This order directed the the defendant, to *send* him five quarts of whiskey by Jerry. There was no evidence to show that the order was otherwise intended than it purports on its face. It is not pretended that there was any intent to evade the law. The act under which the indictment is found had no intention to abridge the legitimate use of his slave by the owner; it is still left him; it is not denied he may use him as his agent. The evidence does not support the charge.

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

A. M. BOOE, ADM'R. OF WM. BOOE, *v.* GEORGE WILSON, ET AL

A surety on a constable's bond, upon which there has been a breach, but no judgment, nor payment by him, is not a creditor, so as to entitle him to recover against one for fraudulently removing his principal.

This case distinguished from MARCH v. WILSON, Busb. 143.

THIS was an ACTION ON THE CASE, at common law, for the fraudulent removal of a debtor, tried before his Honor Judge DICK, at Fall Term, 1853, of Surry Superior Court.

The case was: One Henry F. Wilson was a constable for Davie County, in the year 1841, and the plaintiff's intestate was one of his sureties. He (the constable,) had failed to collect and pay over, on claims put into his hands for collection, and amongst others, claims of McRorie and Dusenbury, for which suit was brought by them against Wilson, and plaintiff's intestate as his surety, on the official bond of that year; and, after pending several terms, judgment was rendered against them, and the defendant's intestate paid his part of the same under execution. After the commencement of this suit, but before the judgment was rendered, and before anything had been paid by defendant's intestate, for the failure of the constable, Wilson, namely, on 19th of August, 1843, Henry F. Wilson fraudulently and secretly removed from the county of Davie.

Evidence was offered by the plaintiff, tending to prove that the defendants fraudulently aided Henry F. Wilson to remove; but his Honor, being of opinion that he had not shown a case that entitled him to recover, the plaintiff took a non-suit, and appealed.

No counsel for plaintiff.

Miller, for defendant.

BATTLE, J. It is a matter of regret that this case has been submitted to us without an argument for the plaintiff.

Being, ourselves, unable to perceive any principle upon which his case can be sustained, it would have been a satisfaction to us to hear what his counsel could suggest in his behalf. It is assumed, in the argument for the defendants, that the plaintiff relies mainly, if not altogether, upon the case of MARCH against the same defendant, decided by us twelve months ago, and reported in Busb. 143; and hence that argument has been directed almost entirely to pointing out distinctions between that case and the present. There is one plain distinction which, in sustaining the one, necessarily overthrows the other. In MARCH v. WILSON, the plaintiff, by becoming the bail of Henry F. Wilson, the absconding debtor, acquired a direct interest in keeping him in the county. Had he remained, the plaintiff could not have sustained any damage. The defendants fraudulently assisted in removing him, the direct and necessary consequence of which was, that he was compelled to pay the debt for which he had arrested him. There was a wrong and a consequent damage. This damage was immediate and certain. The action was, therefore, sustained upon well recognized principles. How is it in the present case? Why, at the time when the defendants committed the wrongful act of fraudulently assisting Henry F. Wilson to escape from the county, the plaintiff's intestate had no claim upon him whatever. It is true, he was one of the sureties to his official bond as constable, during the year 1841, of which breaches had been committed, but he had no right at that time to arrest his person, or attach his property. This he could not have done until twelve months afterwards, when he paid money for him as surety. Do the facts show that, if Henry F. Wilson had remained in the county, the plaintiff's intestate would not have suffered loss? Might not Wilson's property have been taken to pay other debts, or have been so disposed of by himself, that the intestate would necessarily have failed to secure his claim in part, if not all? It

is manifest that these questions must be answered unfavorably to the plaintiff, and they show that his case falls within the principles laid down in LAMB v. STONE, 11 Pick. 527, and GARDINER v. SHERROD, 2 Hawks, 173, which are cited and commented upon in MARCH v. WILSON, and distinguished from it. The injury complained of by the plaintiff was too remote, indefinite and contingent, and the amount of damages too uncertain, to give him a cause of action against the defendants. Upon this ground alone, without enquiring into any other, the judgment of non-suit must be affirmed.

Judgment affirmed.

DANIEL FOUST, ADM'R *vs.* IRELAND AND HURDLE.

Where slaves are bequeathed for life, and there is an intestacy as to the remaining interest in them, and one of the next of kin dies during the continuance of the life estate, the administrator of such next of kin may recover the share of his intestate after the death of the life owner.

In giving a construction to the will, the presumption is, that the testator did not mean to die intestate as to any part of his estate, and this presumption may be strengthened by declarations in the will to that effect.

Where a testator bequeaths personal property to his wife, SO LONG AS SHE REMAIN MY WIDOW, and in case she marry, shall QUIT THE PLANTATION and give up the property; but makes no provision for the alternative of not marrying; in such a case, where the widow did not marry, it was HELD, that this bequest might be construed to mean, that the widow should take an absolute estate in the property in case she remained his widow, and this construction would be given where it was fortified by the context of the will.

ACTION of DETINUE, for the recovery of certain slaves, tried before his Honor Judge SETTLE, at Spring Term, 1853, of Alamance Superior Court.

Elizabeth, the daughter of Peter Foust, married one John Clapp, and was living at the death of her father. After the death of her father, but in the life time of her mother, Elizabeth died, leaving her husband and several children, her surviving. The plaintiff Daniel Foust administered on the estate of Elizabeth, and claimed the slaves in question as her property, as one of the next of kin of Peter Foust. The surviving executor of Peter Foust had acquiesced in this claim, and allotted and delivered the slaves to the plaintiff: afterwards they went into the possession of the defendants, and were detained by them at the bringing of this suit. The defendants claimed as purchasers from the children of Elizabeth Clapp, who, at the death of Mary Foust were her next of kin, their mother being then dead, and they insisted that, according to the following will of Peter Foust, their grandmother, Mary, took an absolute estate in the property bequeathed to her, of which these slaves are a part. The plaintiffs contend that, under this will, Mary Foust took only a life interest, and that, as to the interest after her death, there was an intestacy which gave a vested right to the next of kin of Peter Foust immediately, but not to be enjoyed till after the death of Mrs. Foust.

The following is a copy of the will of Peter Foust:

"3d. As touching such worldly property as it has pleased the Lord to bless me with, I bequeath, give, devise and dispose of as follows:

"4th. I give to my daughter Elizabeth Clapp a negro girl named Erry.

"5th. I give to my daughter Sarah Amick a negro girl named Esther.

"6th. I give to my son John Foust the plantation I bought of Joseph Stout, and a hundred acres of land that lie joining Daniel Foust, James Neal, Jacob Moulder and my own, a horse, saddle and bridle, and plow irons, with gears fit to plow.

"7th. I give to my son George Foust the plantation I bought of William Ray, adjoining my own land, Jacob Marshall's and Freeman, a horse, saddle and bridle, plow and gear fit to plow.

"8th. I give to my son Daniel Foust the plantation I bought of Henry Dale, with ten acres more, including the field that lies North of the house I now live in, with a horse, saddle and bridle, plow and gears fit to plow, and three hundred dollars in cash.

"9th. I give and bequeath to my beloved wife, Mary Foust, the plantation I now live on, with all the household and kitchen furniture, with all the horses, cows and stock of every kind, wagon and plantation tools, of every kind, with all the negroes unmentioned, so long as she remain my widow; but, if she marry, she must quit the plantation, and have the half of the household and kitchen furniture, and a negro man, and a negro woman her life time, and they and their offspring, if any, to return to my children, to be equally divided between them, living at that time. I give her a horse, saddle and bridle, two cows: the remainder of the stock and household furniture, and every other property in her hand, to be sold, and the money given to the child she is pregnant with; if a boy, he to have eight hundred dollars. a horse, saddle and bridle, plow and gear fit to plow; if a girl, to have equal to what the other girls have had.

"10th. I give my son Peter Foust the plantation I now live on, when he comes to age, if his mother be living and unmarried, to have the one-half thereof for himself, with a horse, saddle and bridle, plow and gears fit to plow, and the half of the land my father entered, which is to be divided between my brother Daniel and me, that to be joined with this old plantation for him.

"N. B. If my widow should marry as above said, after she makes her choice of the two negroes, the remainder of them must be divided amongst my sons that may be living at that time.

"In witness and testimony whereof, I, Peter Foust, have hereunto set my hand and affixed my seal, the day and year above written."

On the foregoing case agreed, his Honor, *pro forma*, gave judgment for defendants. Appeal.

Ruffin, Moore and Phillips, for plaintiff.
Winston and Nash, for defendants.

PEARSON, J. If there is an intestacy, Mrs. Clapp took an interest transmissible to her personal representatives, and the plaintiff is entitled to recover. Otherwise he is not.

It was agreed upon in the argument, and is undoubtedly true, that as the widow died without marrying, the will must receive one of two constructions. Either there is an intestacy as to all of the property given to her, except the land, or the absolute estate in the personal property is given to her. So the only question is, which of these two is the true construction. In support of the intestacy, it was insisted, that the property is limited to the wife, "so long as she remains my widow," which is at most a life estate, leaving a reversion that is not disposed of, except in the event of marriage; and the failure to make a disposition of it in the event of her death without marrying, was *casus omissus*, in other words, it was forgotten.

There are several objections to this construction:

1st. Every testator is presumed to intend to dispose of all his estate, so as not to die intestate as to any part. This presumption is strengthened in the present case, by the fact, that the will professes on its face to dispose of all the testator's worldly property.

2d. The reversion, which it is alleged was forgotten, is not a small article, or trifling in value, such as is usually covered by a residuary clause, but is a valuable interest, constituting a large part of the estate.

3rd. In the event of her marriage, he gives his wife a part of the property absolutely, and a part for *her life time*, and makes a disposition of the reversion in this part and of the part which is taken from her. This shows that he knew how to give a life estate, and that after such life estate, there was a reversion to be disposed of. If he intended his wife to have only a life estate in the event of her remaining his widow, why did he not say so in so many words, and go on to make the same minute and detailed disposition as he does in the event of her marriage? No answer can be given, except that he forgot it. For the reasons given above, the mind cannot rest satisfied with this answer and naturally seeks for some other solution. It was suggested by Mr. Winston, that the whole will is made consistent and intelligible by considering the words, "so long as she remains my widow," to have been used in the sense of a condition, so as to read, "if" she remain my widow, in opposition to "if she marry," and he argued, that although the words "so long as" and "during" are words of limitation and the words "if" and "provided" are words of condition, yet the difference between a limitation and a condition is sometimes not readily distinguished, and that to suppose words of limitation were used, when it was intended to use words of condition, is not going as far as the Courts do in many cases, for instance, in making "or" mean "and," in order to carry out the intention, and make the will consistent and intelligible. The question is a perplexing one, but after much reflection, we have come to the conclusion, that it was the testator's intention to give the absolute estate in the personal property to his wife, in case she remained his widow. If the property had been limited to her for life, or for her life time, these words could not have been avoided, for they are the words that naturally suggest themselves, and are commonly used when the intention is to give a life estate. The fact, that he does not use these words, but goes out of the

way to get words of less direct signification; that he makes no disposition of the reversion; that in the event of her marriage, he gives her a life estate in the part of the property which she is to lose by her marriage, and disposes of the reversion in the part which she is allowed to retain, except a small part which is given to her absolutely, show almost conclusively, that he did not intend to restrict her to a life estate if she remained his widow.

This conclusion is confirmed, by the further fact, that he provides for all of his children, who are of age, and appear to be settled off, in the world, and also for a son who is under age, and for a child of which his wife was pregnant, and having thus particularly provided a sufficient livelihood for his children, it is highly probable that he should intend to give the rest of his property to his wife, provided she remained his widow; knowing that, in that event, she would give it to their children, as circumstances might afterwards require, or leave it at her death, to be divided among them, according to the Statute of Distributions, taking care to make other dispositions, in the event she disappointed his wishes, and married a second time.

Should it be objected, that, if the words are so construed as to give the widow an absolute estate in the personal property, the same words must give her an absolute estate in the land also, the reply is: the reversion in the land is disposed of: one-half is given to Peter, when he arrives at age, and the reversion in the other half is given to him by implication, either at the death of his wife, if she remains a widow, or at her marriage; whereas, no disposition whatever is made of the reversion in the personal property, if she remains a widow. This difference justifies the distinction, which is made necessary to avoid an intestacy in regard to the personal property, and the fact, that he disposes of the reversion in the land, and does not dispose of the reversion in the personal property, shows, that he intended to

give the latter absolutely, so as to have no reversion, unless his wife married.

Judgment for defendants.

STATE *v.* BUSHROD D. HARRIS.

Whenever there is a reasonable ground to believe that there is a design to destroy life, to rob or committ a felony, a killing to arrest such design is justifiable.

But it is for the jury and not for the prisoner to judge of the reasonableness of such apprehension.

The error committed by a Judge, in eulogising a witness, is not a ground for a VENIRE DE NOVO, if the statement of the case, which is the appellant's bill of exceptions, shows that such witness was unimpeachable.

(STATE v. DAVIS, 4 Dev. 612, and STATE v. MILLER, 1 Dev. and Bat. 500, cited and approved.

THIS was an indictment for MURDER, tried at Person Superior Court, Fall Term, 1853, before his Honor Judge SAUNDERS.

The case sufficiently appears from the opinion of the Court.

Attorney General, for the State.
E. G. Reade and Miller, for the prisoner.

NASH, C. J. The prisoner is indicted for murder. On the trial below, three witnesses were sworn in behalf of the State. The first was a young female, an inmate of the prisoner's family, who stated, that, when she returned home, about twelve o'clock, from a neighbor's, she found there, with the prisoner, a man who was a stranger to her, the deceased. The parties remained together in the porch of the house, until near sunset, when she heard loud and angry

talking. The prisoner accused the deceased of having put counterfeit money on him, and immediately went out and took the horse of the deceased, declaring he would keep him until he gave him good money. The deceased went towards Harris, declaring he would have his horse or take the prisoner's life. Harris ordered him to stop, and not touch the horse, or he would kill him, and called to his son, a small lad, to bring him his gun, which was done, and the deceased returned to the house. Harris loaded his rifle, and called to his wife to take care of his trunk. She answered from the room where it was, and prisoner called to the witness to come to him, which she did.

When the witness went out, she found Harris approaching the house, with the gun in his hands, and in passing, he observed, "I am afraid that man will do me some private harm." He went into the house, and she heard deceased say to him," Stop Harris and let me talk to you," and with these words she heard the gun fire. She went into the house and found the man dead, and Harris standing in the door, between the large and small room.

The second witness was a Mr. Williams, who stated that, on the day after the homicide, he went to the prisoner's house, where the following conversation took place between them.

Witness asked the prisoner, "what does this mean?" Answer, "It's done, and I am sorry for it, but it could not "be helped." Do you know who the man is?" "I do not." "Where did you shoot him?" "I shot him in the body." "What did you do it for?" "For a certain provocation: "it will all be right: it was in self-defence." "Did you see "the man have any weapon?" "I see you, but I don't know "but you may have some weapon. He, the deceased, had "conducted himself, as I will not allow any man to do in "my house, and, as no man should do, in a gentleman's "house. He was loafing about here; and some one robbed my

"father's house, and he might have been the man or one of "them." "You say he was loafing here, and yet you took "his horse, and sent him to Mebane's, and sent word to "Mebane that you would kill a man before sunset." With this the prisoner got angry, and said, "the man had passed "a counterfeit $50 bank bill on him."

Mr. Mebane stated, that just before dark, on the day the homicide took place, the prisoner's boy came to his house on the horse of the deceased, with a message from his master: He sent him back. Soon after the prisoner came on the same horse, and, being asked how he was? answered, "Well in body, but distressed in mind. I have killed a "man and don't know who he is." Witness replied, "that "is a pity, you have done wrong." Prisoner answered. "Damn him, if it was to do over, I would do it again; I be- "lieve I was justified." Witness asked, "Did he threaten "you." "Yes; we had a game of cards, and he put a "counterfeit fifty dollar bill on me. I took his horse, and "told him, if he did not give me good money, I would keep "him. The man then said, he would have his horse, or be the "death of me. I called my son John to bring my rifle. I "loaded it, and told him to come on and see which would "be killed first, and from that I shot him, I believe right "through the heart. I am on his horse now, and am not "going to run. He is a damn fine horse, and paces like a "top." The name of the deceased was Winfree.

His Honor, in opening his charge, stated the law upon the subject of homicide in general, of which there is no complaint. The case then states that the defendant's counsel insisted "that this was a case of justifiable homi- "cide—a killing in defence of life, or of an actual robbing "in the dwelling-house of the prisoner, or, at most, it was but "a case of manslaughter; a killing under sudden passion, "or heat of blood. That the deceased threatened the life "of the prisioner; that he was a stranger and dealer in

"counterfeit money; so that, under the circumstances, the "prisoner believed his life was in danger, or that the de- "ceased would do him some great injury; that, if mistaken "in this, if the prisoner detected him in the act of stealing "from his trunk, being in his dwelling-house, and after "dark, he had the right to kill him. But, even if such was "not the fact, but the prisoner believed such to have been "the intention of the deceased, and acted on that belief, it "would at most have been but manslaughter." His Honor, upon this part of the defence, instructed the jury, "that "whenever there is a reasonable ground to believe there is "a design to destroy life, or to rob, or to commit a felony, "the killing of the assailant will be justifiable. But it is "for the jury and not for the prisoner to judge of the rea- "sonable ground for apprehension, and whatever he may "say, *unless the jury think*, from the testimony, the prisoner "had reasonable grounds for apprehending damage to his "person or property, his defence must fail. Should the "jury believe the prisoner detected the deceased in the act "of robbing his trunk, and thus killed him, they should ac- "quit. So, if they should believe, the prisoner found the "deceased, in such a situation, as clearly to have manifested "such purpose, they should convict him of manslaughter."

In commenting on the testimony, his Honor called the attention of the jury to the female witness, and observed: "It was for the jury to decide, whether or not her testi- "mony had been given in that clear, distinct and intelligi- "ble way, without bias or prejudice, so as to command their "full and entire confidence." He then pronounced upon the witness, a high eulogium as to her appearance, and closed "by observing, "that for *himself* he could but lament, that "she had not received a religious education, so as to have "made her an ornament to her sex, instead of the humble "individual she appeared before them."

The first objection to the charge is, as to the prisoner having reasonable ground to believe, that the deceased intended to take his life, or rob him. The prisoner's counsel contended, that, if the prisoner was mistaken in believing that the deceased intended to kill or rob him; *yet, if he believed* his life was in danger, or he was in danger of being robbed, and acted on that belief, it would at most have been but manslaughter. His Honor laid down the law upon this subject, and stated, whenever there is reasonable ground to believe there is a design to destroy life, to rob or commit a felony, the killing will be justifiable. But it is for the *jury*, and not the prisoner, to judge of the reasonable ground for the apprehension. We see no error in these directions. It is the course which that humane man and excellent Judge, Sir MICHAEL FOSTER, pursued in a case before him. A man was indicted for the murder of his wife. He had in the morning loaded his gun, in the hope of finding some game: being disappointed, he discharged the load, and put the gun in a safe place. During his absence, a servant, without his knowledge, took the gun, loaded it, and went after some game, and while the prisoner was still absent, returned it to the place from which he had taken it, where the prisoner found it, in all appearance, as he had left it. The gun was carried into the room where his wife was. He took it up, touched the trigger, the gun went off and killed his wife. "I did not enquire, says Justice FOSTER, whether the poor man had examined the gun before he carried it home, (where the accident occurred;) but, being of opinion, upon the whole evidence, that he had *reasonable ground* to believe that it was not loaded, *I directed the jury, that, if they were of the same opinion*, to acquit him. Foster 265, 1 Rus. on Cr. 541. In MEAD'S case, Levin's C. C. 164, the same course was pursued. Mead had, the day before the killing, been very badly injured and abused by a party of boatmen, at Scarboro', and was rescued from them by the police.

When the latter were carrying him off, the boatmen called to him, that they would come that night and pull his house down. He lived about a mile from Scarboro', and, in the middle of the night, a great number of persons came about his house, singing songs of menace, and using violent language, indicating they had come with unfriendly intentions. Mead, under an *apprehension, as he alleged*, that his life and property were in danger, fired a pistol, by which Lace, one of the party, was killed. Justice HOLROYD, in charging the jury, instructed them, "if *you* are satisfied there was nothing but the song and no appearance of further violence, if *you* believe that there was no reasonable ground for apprehending further damage," &c. In each case, the existence of reasonable ground of belief was left to the jury. The charge in this case, then, is shown to be sanctioned by the highest authority. Roscoe's Cr. Ev. 646. It is also sanctioned by reason. The *existence* of reasonable ground is a matter of fact, to be determined by the jury. If the person charged with the homicide, is to judge for himself, whether this reasonable ground existed, the most atrocious murders may be committed with impunity.

The prisoner says, he believed his life was in danger. Who can look into his heart? If the *law* allows *him* to judge, who can contradict him. The circumstances are nothing; it is *his belief* that justifies him. The law is not so. It is only from circumstances accompanying the transaction, that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges. The case of the STATE v. SCOTT, 4 Ired. 409, has been brought to our notice, and we have examined it with care. It does not conflict with the views here expressed. The objection was not taken in the Court below, and was not considered in this Court.

The second reason assigned by the prisoner for a *venire de novo*, is, that his Honor violated the act of '96, in express-

ing an opinion as to the degree of credit to be given to the female witness. Upon this point, we can derive no aid from English authorities. In that country, for all time, the Judges have exercised the power, to express to the juries their impressions as to the evidence—a power shamefully and cruelly abused at different periods in the history of that country, and it still exists. The Legislature of '96, aware of the abuses to which this power was exposed, declared, that no Judge, in delivering his charge to the petty jury, should express an opinion, whether a fact is sufficiently or fully found; such matter being the true office and province of the jury. See Rev. Stat. ch. 31, sec. 136. We think this case is within the principle delivered by this Court, in the STATE v. DAVIS, 4 Dev. 612. It never can be error in a Judge, to charge that a fact is established, which is admitted by the parties, or acknowledged by them. In DAVIS'S case, the Judge, who tried the cause below, stated to the jury "that the prosecutor appeared to have given a very fair and candid statement; he seemed to be a creditable man:" this was said in the summing up. Exception was taken, that it violated the act of '96. But this Court decided that there was no error, because the case stated, "the prosecutor and owner, who was a respectable citizen, gave a clear and apparently unimpassioned relation of the circumstances affecting the case." The Court decided that there was no error, because they were facts which were stated in the case, and therefore admitted by the defendant. Here the case, which is in substance the prisoner's bill of exceptions, states, that no exception had been taken to the testimony of the female witness, or the others. This we consider as admitting that she was credible, and her statement true, and it was no error in the Judge, to tell the jury that such was the fact, and if he chose to do it in his own way, the prisoner has no right to complain. It has done him no injury. See also STATE v. MILLER, I Dev. and Bat. 500.

If his Honor had said, in so many words, the evidence of this witness is not controverted at the Bar; it is therefore admitted to be true,—surely, under the authorities cited, there could have been no error. His remarks as to her appearance and demeanor at the bar, her capacity and opportunity to testify in relation to the transaction, were entirely within the scope of his authority, even if her testimony had been controverted. Under the circumstances, this was not called for, but did the prisoner no harm, and could not make that which was true, more true. The expression with which his Honor closed his remarks upon this part of the case, was but the expression of a very natural regret, that the witness did not possess those Christian virtues, so desirable in all, and so especially appropriate and beautiful in the female. We have considered this case, as in all others, particularly of its importance, with an anxious wish to secure to the prisoner every right, guaranteed to him by the law in the judgment below.

This opinion will be certified to the Superior Court of Person, to the end that it may proceed to judgment and sentence, agreeably to this opinion and the law of the State.

Judgment affirmed.

ESTHER WHITE, PROPUNDER OF THE WILL OF THOMAS J. WHITE, AND JAMES CASTEN AND WIFE, CAVEATORS.

Revocation of a will is an act of the mind, demonstrated by some outward and visible sign.

Where the maker of a will throws it upon the fire, with the purpose of destroying and revoking it, and it is burned through in three places, but the writing not interfered with, and is then rescued and preserved against the maker's will, and without his knowledge; held, that this amounts to a revocation.

White v. Casten and Wife.

THIS was an issue of DEVISAVIT VEL NON, as to a script purporting to be the will of Thomas J. White, propounded by Esther White, his widow, and opposed by James Casten and his wife, tried before his Honor Judge ELLIS, at Fall Term, 1853, of Chowan Superior Court.

Upon the facts of the case, which are fully set forth in the opinion of this Court, his Honor below instructed the jury that the acts deposed to amounted to a revocation under the Statute, if done with an intention to revoke.

Verdict for the caveators. Motion for a *venire de novo*. Motion refused and appeal to this Court.

Heath, for the propounders.
Bragg, Brooks and Smith, for the caveators.

NASH, C. J. The question for our consideration arises under the act of the General Assembly concerning the revocation of wills. Rev. Statute, ch. 122, sec. 12. By that "section, it is provided, "that no devise in writing, &c., or "any clause thereof, shall be revocable, otherwise than by "some other will in writing, or by burning, cancelling, tear-"ing, or otherwise obliterating the same, &c." This provision is almost in the exact terms of the Statute of Frauds, in England, passed the 29th of Charles the Second. It was stated at the bar, in the argument here, that the true construction of the 29th of Charles, upon the question raised here, was in England still unsettled, and that there was no adjudication by this Court, which was a direct authority. This is so, and we must endeavor to extract from the conflicting English authorities, and our own cases which have a bearing upon the question, that rule which appears to us most consonant with the Statute and to reason. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation. No act of spoliation or destruction of the instrument will, under the Statute,

revoke it, unless deliberately done, *animo revocandi.* Thus, if a testator, intending to destroy papers of no value, ignorantly and without an intention to do so, throws his will into the fire, and it is consumed, or by accident tears off the seal, it is no revocation. The difficulty lies in ascertaining how far the symbol of revocation must extend. As to the burning, must the will by it be literally destroyed, in whole or in part? or must any portion of it be *actually* destroyed? It is upon this point that the English cases differ. The first case to which our atention was directed, was that of MOLE and WIFE v. THOMAS, 2nd Sr. William Blackstone, Rep. 1043. The case was: Palin, the deceased, being sick in bed, near the fire, ordered his attendant, Mary Wilson, to bring him his will, which she did. He opened it, looked at it, and tore a bit of it almost off, then crumpled it in his hand and threw it on the fire. It fell off, and Mary Wilson took it up and put it in her pocket. Palin did not see her take it up, but had some supicion of the fact, as he asked her what she was at, to which she made little or no reply. The Court ruled, that it was not necessary that the will or the instrument should be literally destroyed, or consumed, *burnt* or torn to pieces. Throwing it on the fire, with an intent to burn, though it is but very slightly singed, and falls off, is sufficient within the Statute. The case does not inform us to what extent the fire had made an impression on the paper: it must have been very slight. The authority of this case is said to be shaken by what fell from the Chief Justice DENMAN, in the case of REID v. HARRIS, 33rd E. C. L. R. 60. In commenting on the case of MOLE and WIFE, he observes: "Doubt might be entertained now, whether the proof there given would be sufficient as to them," meaning burning and tearing. High as this authority is, we are not inclined from the expression of a doubt to set aside the deliberate and united opinions of Chief Justice Dr. GREY, GOULD, BLACKSTONE and NARES. But, in that

very case, both PATTESON and COLERIDGE stated, there must be a partial burning of the instrument itself, and that any partial burning will destroy it entirely. But independently of this, the case of MOLE v. THOMAS is recognised by writers of the highest authority. Mr. POWELL, at page 596 of his Treatise of Devises, says: "Upon this principle, it has been held, that if any of these acts, viz: tearing, burning, &c., be performed in the *slightest* manner, this, joined with a declared intent, will be a good revocation, because the change of intent is the substantive act, the fact done is only the sign or symbol, by which that intent is rendered more obvious." He then cites the case of MOLE v. THOMAS, as his authority. See also 1st Jarman on Wills, 115 to 119; Lovelace on Wills, 347. They both cite the case from Sir Wm. Blackstone, and refer to the case of REED v. HARRIS, as showing that the singeing of the cover of a will is not a burning of the will, but that there must be a partial burning of the will itself. Thus stand the cases in England on this question, and upon the authority of MOLE v. THOMAS, Judge KENT, in the fourth volume of his Commentaries, page 532, says: "Cancelling in the *slightest* degree, with "a declared intent, will be a sufficient revocation, and there- "fore, throwing a will on the fire, with an intent to burn it, "though it be but slightly singed, is sufficient evidence of "the intent to revoke," and for this he cites MOLE'S case. So GREENLEAF, in his first volume on Evidence, 349, states, that when a testator crumpled his will, and threw it on the fire, with an intent to destroy it, though it was saved entire, without his knowledge, would be a revocation, and refers to MOLE'S case to sustain them. See 5th Conn. R. 168, CARD v. GRINMAN. By a large majority of these authorities, it appears that the case in BLACKSTONE is sustained, and approved. The intent with which the act is done by the testator, must continue through the act; otherwise, it will not be a revocation, as where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and after

being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, it was held to be no revocation. Here the intent to revoke was itself revoked before the act was complete. DOE and PERKES, 5th Barn. and Ald. 481. The case of HISE v. FINCHER, 10 Iredell 130, which was referred to, does not govern this. There the testator, who was sick in bed, directed his son to throw his will into the fire: instead of doing so, he, without his father's knowledge, threw another paper in. This was adjudged, and certainly very correctly, to be no revocation. The directions given were accompanied by no act or symbol on the part of the testator, expressive of his intention to revoke: his intention rested only in words.

The principle which we would extract from the cases cited, is, that where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burnt or singed, it is sufficient to revoke the will. Let us now try this case by this principle or rule.

The case states, that the testator threw the will into the fire, with the intent to revoke and destroy it; that, after he had done so, he turned away, when the plaintiff, his wife, took the paper from the fire secretly, and concealed it in her pocket; that the testator, up to his death, thought the will was destroyed, and so frequently expressed himself. The writing was upon a single sheet of paper, which was burnt through in three places, one near either extremity, and in the crease formed by the folding of the paper. It was also singed at the outer edges, and scorched on the outside or back; that this was done when the paper was thrown on the fire. No word or letter of the writing was in any manner destroyed or obliterated by the burning, and the paper itself but little disfigured, and in no wise injured, except as above stated.

It will be at once seen, that this is a stronger case than that of MOLE v. THOMAS. There the script was barely singed; here it is burnt through in three different places, the outside scorched, and the edges of the paper singed. We are therefore clearly of opinion that the will was revoked: there was the present intent to revoke—the act of throwing on the fire with that view, and the symbol impressed upon the script itself. There was no halting in the intention of the testator, between the commencement and the completion of the act; for, to the time of his death, he believed the will was destroyed.

It is seen from the cases cited, and the rule we have laid down, that the much or little of the burning of the script, is not material, and when the reason of requiring the simbol to be impressed on the script is considered, it cannot be important. The symbol is nothing, but the act showing the intention of the testator, and when that appears on the paper, the evidence from the act is complete, and the testator has completed his intention. It would be singular, that, if the slightest burning of a house, on an indictment for arson, should be sufficient to take the life of the incendiary, as it is, that a similar burning should not, in a civil case, be sufficient to revoke a will. The language upon this point, in the act taking away the benefit of clergy, for burning a jail, or other public building, is the same, as in the act we are considering. Rev. Stat. ch. 34, s. 7: "If any person shall wilfully and maliciously *burn*," &c. If any portion of the building is burnt, it is sufficient to bring the case within the Statute.

Judgment affirmed.

WILLIAM A. SPRUILL *vs.* SAMUEL W. DAVENPORT.

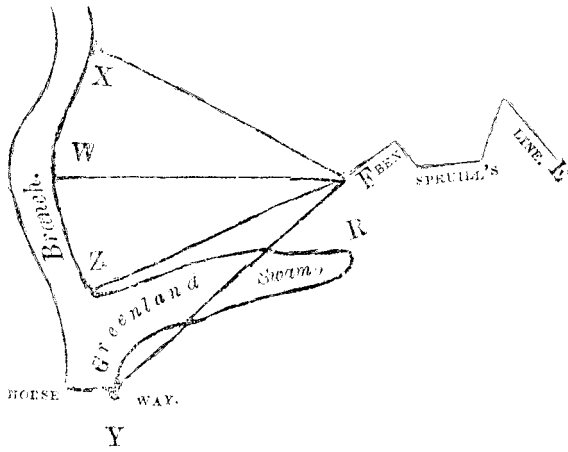
Where a swamp is called for in the description of a tract of land, and the question is left doubtful, which of the three conflicting localities is the proper one, it is error to instruct a jury that they are to seek for the proper locality, by running the course called for, regardless of other considerations.

The call on such a description, for a line running WESTWARDLY, does not necessarily mean a west course.

AFTER the new trial granted in this case, at December Term, 1852, (see Busb. Rep. 134,) it came on to be tried again at Washington Superior Court of Law, on the last circuit, before his Honor Judge ELLIS.

The plaintiff claimed under a grant to Nehemiah Spruill, issued in 1791, the second corner of the boundary of which was admitted to be at E. The call from thence is "westwardly along the said Spruill's line, and Thomas Mackey's line, 300 poles to Greenland Swamp," with various other calls, to the beginning. In submission to the former decision, it was admitted that the three hundred poles gave out at F, and that the line ran thence to Greenland Swamp. The only question then was, what was the location of Greenland Swamp, and how the line in question should be run to reach it. The plaintiff contended that the water-course, marked "the branch," was the Greenland Swamp, called for in the grant, and that the line must run to it from F, by a due West course along F. W., or to the nearest point of it at X, along F. X. The defendant contended that the Greenland Swamp did not extend above the horse-way, but, if it did, it was the North-eastern fork which runs up to R, and is marked Greenland Swamp. Much testimony was offered by each of the parties, tending to show that his was the proper location of the Greenland Swamp. It was admitted, that if the line from F was run to W or X, it would include the *locus in quo*, or a part of it, and the defendant

would be a trespasser, but not, if it were carried to Z, or to the horse-way, or to R. It was admitted further, that the line F X ran 25 degrees North of West, was three-fourths of a mile long; F W due West, and one mile; F Z 23 degrees South of West, and one mile and a quarter; and F Y 38 South of West, and one mile and a half in length. A line from F to R, it is apparent on the plat, was much shorter than either of the others.



His Honor charged the jury that, in running the line of the Nehemiah Spruill grant from F, they were to extend it to Greenland Swamp, by first going due West; but, if they could not find it in that direction, they should seek for its nearest point, regardless of course; and that the line should be thus extended, even though the Swamp should be found as far as a mile or a mile and a half from F, where the three hundred poles gave out.

Under these instructions the jury found a verdict for the plaintiff. A motion was made for a *venire de novo*, for misdirection in the charge, which being refused, and judgment given for the plaintiff, the defendant appealed.

Smith and Heath, for the plaintiff.
Moore, for the defendant.

BATTLE, J. There was, we think, an error in his Honor's charge, which no doubt misled the jury to the prejudice of the defendant, and which therefore entitles him to a new trial. The difficulty in the case was the proper location of the Greenland Swamp, called for in the grant, and at what point the line, extended from F, should reach it. There were three distinct portions of the same swamp, each of which the parties respectively contended, was the Greenland Swamp meant in the call of the grant. Which of them was the true one, was a question of fact for the jury, to be decided by the weight of testimony in its favor. In ascertaining this fact, the remarks of Judge HENDERSON, in pronouncing the opinion of the Court in the case of TATEM v. PAINE, 4 Hawks, 71, with a slight alteration, furnished them with a proper rule to guide them to a correct conclusion. "Where natural objects are called for as the *termini*, and course, and distance, and marked lines are also given, the natural objects are the *termini*, and the course, and distance, and marked lines, can only be resorted to by the jury to ascertain the natural object; they act as pointers to the natural objects. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect; in fact, I believe none. When there is more than one natural object in the neighborhood answering the description; that is, having common qualities, then those pointers or guides may be adverted to, to ascertain where the object called for is, or which is the object designated. They do not, then, contradict or controvert natural boundary; they explain a latent ambiguity, created by their being more than one object which answers the description.

The error in the charge, in the present case, consisted in giving an undue effect to the term "Westwardly." In the call "thence Westwardly along the said Spruill's line," &c., his Honor held, that when the distance of three hundred poles called for in that line, gave out at F, before reaching the Greenland Swamp, the line must be extended, first, due West, to ascertain whether a swamp of that name could be found in that direction. Now, if each of the three parts of the swamp above spoken of were proved to have borne that name, then the part lying directly West of F, was according to the charge, to be taken as the one intended, without any regard to the other circumstances in the case, which, in the estimation of the jury, might otherwise have established another of the three as the object indicated.

The term "Westwardly," with nothing to control it, may perhaps mean West or due West, but it is evident that such is not its precise signification, and hence it is readily controlled by any circumstance, which goes to show that a due West course could not have been intended. BRANDT v. OGDEN, 1 John's, 155. Such is the case here. The call is "Westwardly" along the said Spruill's line." Now, Spruill's line thus called for is not a single straight line running due West, but consists of several lines, as appears by the plat, running sometimes a few degrees to the North, and sometimes a few degrees to the South of a due West course. Its direction at its termination at F, pointing towards those parts of the swamp, the one or the other of which the defendant contends, is the true Greenland Swamp. We can see, then, no more reason why the line should not continue on in the same direction, in which it was going at the termination of the distance, in search of the Swamp, as to turn off in a due West course for that purpose. Under all the circumstances of the case, the proper instruction, as it seems to us, would have been, that the jury should find, if they could, upon the weight of the evidence, taking into

consideration the other calls of the grant, which was the Greenland Swamp designated and known as such at the time when the grant was issued, and that they should find that to be the true *terminus* of the line in question. But, if the testimony should be equally strong, to prove that each of the parts of the swamp contended for by the parties, was called by that name, at the date of the grant, and there should be nothing else to determine the question, then they must run the line to the nearest of those parts; and if only two of them were so called, then to the nearest of the two. See TATEM v. PAINE & SAWYER, before cited, and Chief Justice RUFFIN'S opinion in the case of the LITERARY FUND v. CLARK, 9 Ired. 60.

PER CURIAM. The judgment is reversed, and a *venire de novo* awarded.

JOHN HACKNEY, ADM'R DE BONIS NON *vs.* WILLIAM STEADMAN, ADM'R.

Where an administrator upon the eve of death, deposites the money of the estate, with a surety to his administration bond for safe keeping, with instructions, upon a settlement of the estate, to pay over to his intestate's estate: Held, that the ADMINISTRATOR DE BONIS NON of that estate, after demand and refusal, was entitled to recover the same before any final settlement.

THIS was an action of ASSUMPSIT, tried at Chatham Superior Court, Fall Term, 1852, his Honor Judge DICK, presiding.

The plaintiff declared on a special contract, and upon the general *indebitatus* counts. John S. Guthrie, being very ill, and expecting soon to die, sent for Ramsay, the

defendant's intestate, to his room, and there, after remarking upon the probability of his death being near at hand, delivered to him the sum of $190 in money, and a bond on one Ferrington for $340, telling him that this money and bond belonged to Price's estate; that he, Guthrie, had no place for them, and that as he Ramsay was his surety, as the administrator of Price's estate, he wished him (R.) to take charge of them, and when the estate of Price was settled in his behalf, claim a fee of $50, also a commission of 5 per cent on the estate. Upon this settlement being made, he directed him Ramsay "to pay the balance to Price's heirs. or Price's estate." A demand was made by the plaintiff as the administrator *de bonis non* of Price of the defendant as the administrator of Ramsay, shortly before the bringing of this suit.

The defendant insisted,

1st. That this very money was deposited with Ramsay, as an indemnity against loss, by reason of his being surety for Guthrie, as the administrator of Price, and that until the settlement of that estate he could not be required to pay it over to any one.

2d. That there was a variance between the contract declared on, and the contract established by the facts proved And further, as there was a special contract proven, he could not recover upon the general counts.

3rd. That the administrator had the power to assign the assets of the estate for any purpose however fraudulent, and they could not be recovered from the assignee in a Court of Law.

The Court charged the jury, that if, in their opinion, the money had been identified as that of Price, the plaintiff was entitled to recover. That even if they should believe that it was deposited as an indemnity with Ramsay; yet, if his representative showed no loss or necessity to retain the money, the plaintiff would be entitled to recover.

Verdict for the plaintiff. Rule for a *venire de novo* discharged, and an appeal by the defendant.

Winston and Haughton, for the plaintiff.
No counsel for the defendant.

NASH, C. J. There is no error in the Judge's charge. Guthrie, from whom Ramsay received the money, was the administrator of Lindsay Price, and Ramsay was his surety on his administration bond. It was delivered to the latter expressly, as the property of the estate of Price, and as such, was received by the defendant's intestate. At the time of his death, the estate of Price owed Guthrie, as he declared, fifty dollars, and upon settlement of the estate, it would be further indebted to him such commissions as the Court might allow. Guthrie, however, recognised the whole amount, not as *due* to the estate of Price, but as belonging to it.

The defendant's first objection to the plaintiff's recovery, is, that the money was deposited with Ramsay, as an indemnity against loss, as surety upon Guthrie's official bond. The contract does not so purport, as proved, nor can we believe such was the intention of the parties. Mr. Guthrie could not so understand it, for it would have been a fraud upon the estate of Price. The money belonged to Price's estate, and could not in the hands of either Guthrie or Ramsay be retained as an indemnity against such loss. The direction to pay the money over when the estate was settled, was in part intended to enable Ramsay to retain, at that time, a sufficiency to discharge the fifty dollar claim. In the contract proved, there is nothing like an indemnity. Mr. Guthrie was very ill and did not expect to live, he had in his possession the money in dispute, and a large note due the estate of his intestate. His language leaves no room for doubt as to his meaning: "I have *no*

safe place to keep them" is his declaration; if they are lost, you, as my surety, will have to make them good. "I wish you to take charge of them," *as the proper person* to have possession of them, and it was to secure Ramsay against such loss that they were delivered to him; he was a mere depository.

The second objection is, that the special contract varies from that proved by the witness Harman. We do not think so; substantially they agree, the contract was in parol, and it is not necessary that the declaration should set it out *in hæc verba;* if set forth in substance, it is sufficient. The money was delivered to Ramsay to be paid over to the representative of Price, to whom, after the death of Guthrie, it would belong. But, again, gentlemen of the bar frequently try their cases below, without filing declarations, and we are often called on to do the same, and in such cases, we consider the declaration as framed to meet the evidence. But there is a further answer to the objection. It is insisted that the direction as to the time, when Ramsay was to pay over the money, was a part of the contract. Be it so, then the time has arrived. The plaintiff as administrator of Price cannot settle until he has collected the assets of the intestate, and this money constituted a part of them. If the plaintiff had brought this action upon the administration bond against the defendant, could he, under the circumstances in this case, have resisted a judgment against him? Could he have been heard to say, it is true, this money belongs to the estate of Price, but I received it from Guthrie, under a promise to pay it to you when the estate is settled? Certainly not.

The third objection is, that an administrator, being the legal owner of the personal property of his intestate, may pass the title to another person, however fraudulently, and the assignee cannot be held liable at law. It is a sufficient answer, that the case presents no such question. Guthrie

contemplated no such fraud, he did not pretend to pass the legal title to Ramsay, nor did Ramsay intend to receive such a title; he received it simply as a bailee.

If A is indebted to B in a hundred dollars, and hands it over to C to pay the debt, an action at law accrues to B, who can recover the money from C; this needs no authority.

His Honor was requested to charge the jury, that whether the money was the property of Price's estate, or not, if it was placed in the hands of Ramsay as a guarantee, the plaintiff could not recover. This was refused. If the Court had so instructed the Jury, it would have been an error in law, for there was no evidence of any guarantee.

No error appears in the charge of the Court.

Judgment affirmed.

BONER & CRIST *vs.* MERCHANT'S STEAMBOAT COMPANY.

The rule of law, that common carriers are bound as ensurers for the SAFE DELIVERY of goods, does not extend to the TIME of delivery.

(The case of HARRELL v. OWENS, 1 Dev. and Bat. 273, commented on.)

THIS was an action of ASSUMPSIT against the defendants as common carriers upon the Cape Fear River, for failing to deliver goods: tried at Spring Term, 1853, of Forsythe Superior Court, his Honor Judge SETTLE presiding.

It was proven, on behalf of the plaintiffs, that the goods in question were taken on board the defendants' boat at Wilmington, on the 26th of September, and on the 2d of October, 1850, and that the cargo put on board on the 26th of September did not arrive at Fayetteville until the 14th of October, and that the cargo received by the defen-

dants on the 2d of October did not arrive at that place until the 11th or 12th of November, 1850. The following advertisement was proved to have been published by the defendants, in the Fayetteville Observer, and to have been continued in that paper during the year 1850:

"Merchant's Steamboat Company, Fayetteville and Wilmington,

"Steamer Rowan.
" " Wm. B. Meares.
"Lighter, Odd Fellow.
" " Mike Cronly.
" " Ben Berry.
" " Ready Money.

"This line of Boats is still in successful operation on the Cape Fear River, and continues to offer as many facilities to the shipping public as any other line. Persons patronising this line may rest assured that their goods will be brought up with despatch, and at the very lowest rates of freight.

"From the number and construction of their boats, this company are perhaps prepared to bring more goods to the wharf than any other company. Packages should be marked, "Care of Merchant's Company, Wilmington," and to such agents in Fayetteville as shippers may prefer. All packages not specially marked to an agent in Fayetteville, will be promptly forwarded by the agent of this company, at the usual rates."

Signed by the President of the Company, and their agents at Fayetteville and Wilmington, and dated Feb. 19, 1850. To which advertisement is added the following further notice:

"N. B. The agent at Fayetteville guarantees to shippers by the Merchant's line, that but half rates shall be paid on drayage to warehouses on the wharf."

The defendants offered evidence tending to show, that, in the fall of 1850, there was an unusual drought, and that the water in the Cape Fear River was never known to be lower, except on one occasion, 1845.

One witness testified that he, as agent for the defendants, did business at the wharf at Fayetteville, and that the water was in a low state from the time the plaintiffs' goods were taken on board at Wilmington, to their delivery at Fayetteville; that goods were arriving at Fayetteville during the whole month of October, carried by the defendants' line, and by the proprietors of two other steamboat lines, in small quantities; and that the defendants, during the month of October of that year, also brought goods to the wharf at Fayetteville. This witness and another testified, that, in the latter part of October, they went down the river, (there being a small rise in the same,) and found the Steamer Rowan, on which were the plaintiffs' goods, at White Hall, the head of tide-water. Here the steamer was lightened, and a portion of the cargo, including some of the plaintiffs' goods, put on board the Odd Fellow, whence they were brought to Elizabeth, and stopped by a shoal in the river, and tied up to the shore. When they got down to Elizabeth, they found the boat in the care of the fireman, the captain having gone on a trip to Wilmington, which occupied about one day;—that the Rowan did not have more than her usual load; that there were several more shoals in the Cape Fear between Elizabeth and Fayetteville, among which were the Spring Hill Shoals, three miles below Fayetteville, on which the depth of water, during the latter part of October, was some six or eight inches; that the defendants kept their boat, the Ready Money, constantly running from the steamer and Odd Fellow to the town of Fayetteville, taking up goods; that the Ready Money was a boat of three or four tons burthen, and drew eight inches of water; that, in the latter part of October, the defendants hired an additional

number of hands, above the ordinary crew, and put them on board the lighters, at an additional expense, and that they got their lighters over the shoals by fastening ropes to them and drawing them up with a windlass, while some of the hands waded in the river, and prized them forward with poles. This witness further testified, that, when the swell commenced in the river, as above mentioned, the agent of defendants immediately despatched a messenger by land, and another by the river, to apprise the captain of the steamer of the swell; and that the messenger on the river met the Mike Cronly and the Ben Berry polling up the river with goods on board; that the agent of the Merchant's Company went down to Elizabeth, at the same time, and an effort was made, from 10 o'clock in the forenoon till 9 at night, to get the Odd Fellow over the shoal, which was unsuccessful; that the Merchant's Company brought up as many goods during the dry season as any other company, except the Cape Fear Company, who had put a small steamer on the river called the Chatham, which drew less water than any boat that had ever been on the Cape Fear River. This was used as a tow-boat, and regularly plied between Fayetteville and the Governor Graham, which was likewise tied up at Elizabeth; by this means, this company had succeeded in getting up more goods than the defendants. That the plaintiffs' goods were purchased in Philadelphia, and consigned to the Merchant's Company before the Chatham was put upon the river. This witness testified, that many of the merchants of Fayetteville sent wagons to White Hall that fall, and had their goods hauled from the steamer.

The witnesses also stated, on cross examination, that, had these goods been placed on one of the company's lighters, they might have been brought up, as these could make trips with three or four tons.

Witnesses on behalf of the plaintiffs also swore, that, during the whole month of October, goods were brought every

week by other steamboat companies. One witness testified that he had received goods, during the period in question, from Philadelphia and New York, by the Henrietta Steamboat Company, in ten or fifteen days from the time he left Fayetteville; that he had consigned a portion of his goods to the defendants, which he did not receive until the 12th of November.

His Honor instructed the jury, that nothing but the act of God, or the public enemies of the country, would excuse the defendants in their delay. He illustrated, that the freezing up of the rivers, so that boats could not run, was an act of God, and would excuse: so would a drought, rendering it impossible to navigate the river; but a low state of water, rendering the navigation difficult and expensive, would not, of itself, be a legal excuse. That, if the jury believed that steamboats could come to White Hall, and the defendants could, by means of their lighters, and other lighters that might have been procured, have brought the plaintiffs' goods to Fayetteville within a reasonable time, and failed to do so, they were responsible.

The Court further instructed the jury, that, if they believed, from the evidence, that the defendants were prevented from carrying the plaintiff's goods from Wilmington to Fayetteville, in a reasonable time, by reason of taking on board of their steamers more goods of others than they had the means of conveying, they would be liable.

Verdict for the plaintiffs. Motion for a *venire de novo* refused. Judgment for plaintiffs, and appeal to the Supreme Court by the defendants.

Miller, for plaintiffs.
Winston, for defendants.

PEARSON, J. His Honor instructed the Jury, that nothing but the act of God, or the public enemies of the coun-

try, would excuse the delay of the defendants. To this the defendants excepted. There is error.

Lord HOLT deserved well of his country when he relieved the doctrine of bailment from the burthen of learning under which it was suffering, and reduced it to three plain propositions:

1st. A bailment for the benefit of the bailor alone, where the bailee is only liable for gross neglect; *e. g.* where one requests another to carry a package for him as a favor.

2d. A bailment for the benefit of the bailee alone, where the bailee is liable for slight neglect; *e. g.* where one borrows an article.

3d. A bailment for the benefit of both parties, in which case the bailee is liable for ordinary neglect; *e. g.* where one undertakes to convey goods for hire.

Our case falls within the third divison. The bailment was for the benefit of both parties: one was to have his goods carried; the other was to have his pay for freight; and unless there be something to take it out of the rules, the defendant is liable for ordinary neglect.

It is said that the defendants are common carriers, and in regard to them, the law makes an exception, and holds them liable as insurers, except against the act of God, and the King's enemies. This is so: and the question is, does their liability as insurers extend to the *time* of delivery? or is it confined to the *safe delivery* of the goods? The case before the Court, when Lord HOLT delivered his famous opinion, concerned the *safe delivery* of goods, and nothing was said in regard to the *time* of delivery: so that our question was left open. The reason for making an exception in regard to the safe delivery of goods, in the case of a common carrier, is, that it was a matter of public policy, in order to guard against fraud and conspiracy, by which, through "covin and collusion," the carrier might "contrive to be robbed and divide the spoils." It is evident that the reason for

holding the common carrier liable for the *safe delivery* of goods, has no relevancy or bearing upon the question of his liability as to the *time* of delivery: so there is no rule of policy making an exception in regard to the time of delivery. That falls under the general rule by which, when both parties are benefitted, the bailee is liable for ordinary neglect. PARSONS v. HARDY, 14 Wend. 216. So it is held, that the rule of public policy by which a common carrier is made liable as an insurer, for the safe delivery of goods, does not extend to the case of conveying persons by land or water: for, in regard to them, there is no reason to fear "covin or collusion." So the reason of the rule fails, as it does in regard to the time of delivery.

In the argument, our attention was called to the case of HARRELL v. OWENS, 1 Dev. and Bat. 273. We fully concur with the decision in that case; but the learned Judge, who delivered the opinion of the Court, went out of his way, and, for the sake of illustration, assumed that the rule that common carriers are insurers extended to the time of the delivery. The case before the Court was one of gross neglect: the defendant excuses himself by saying, he did not know the place at which he was to deliver the articles; yet the written agreement, signed by him, named "Mount Pleasant Fishery" as the place of delivery. Of course, it was for him to find out where Mount Pleasant Fishery was located, inasmuch as he had undertaken to deliver the goods at that place.

Our opinion is, that, if there is a special contract, it must be complied with: as, if one undertakes, for certain pay, to pass goods from place to place in 24 hours. But if there be no special contract, then the matter rests upon the general rule of law, where the bailment is for the benefit of both parties, and the bailee is liable for ordinary neglect. How this was according to the evidence, we are not at liberty to say.

Venire de novo. Judgment reversed.

P. H. AND R. H. COHOON *vs.* MORDECAI MORRIS, J. C. B. EHRINGHAUS, W. W. GRIFFIN, AND J. J. GRANDY.

Where a bond is returned to Court, for the appearance of a person, under the act for the relief of insolvent debtors, with A, B, and C. as his sureties, and such person and his sureties are discharged from "all liability on his bond," and a record made of such discharge, and the defendant in the execution gives a new bond for his appearance further at Court, with A and D as his sureties, and the case was then continued for three terms, when a judgment was entered against A, B, and C: HELD, that such judgment was irregular and invalid.

Where an appeal was taken to the Superior Court from the judgment: HELD, that no judgment could be rendered on the bond given by A and D. HELD, also, that no judgment could be given on either bond against A singly, in the Superior Court, though he was on both bonds.

APPEAL from the Superior Court of Pasquotank, at Spring Term, 1853, his Honor Judge SAUNDERS, presiding.

The plaintiff sued out a *capias ad satisfaciendum* against the defendant Morris, returnable to December Term, 1850, of Pasquotank County Court; which was returned with a bond for the defendant's appearance at that term, and the defendant appeared accordingly, and was surrendered by his sureties. He was ordered into custody, but appealed to the Superior Court, and gave bond for his appearance at the next term of the Superior Court: at that term the appeal was dismissed, as having been improvidently granted. A writ of *procedendo* was awarded to the County Court. The *procedendo* came down to the County Court, at June Term, 1851, when the following entry was made in the case, "dismissed by the plaintiff, and judgment against the plaintiff for costs."

Between the term of the Superior Court, at which the *procedendo* was ordered, and at June Term, 1851, of the County Court, the plaintiff sued out another *ca. sa.* against the defendant Morris, upon the same judgment, under which he was again arrested, and gave bond for his appearance at

June Term, 1851, with Ehringhaus, Williams and Grandy as his sureties: at that time the following entry appears in the minutes of the Court: "Defendant and his sureties discharged by the plaintiff from all liability on his bond, for his appearance at this term of this Court. Defendant enters into bond with J. C. B. Ehringhaus and W. W. Griffin, as his sureties for his appearance at the next term of the Court. Case continued." The case was continued thence from term to term until March Term, 1852, when the following entry was made on the record: "The defendant being called, and failing to appear, and J. C. B. Ehringhaus, W. W. Williams, and J. J. Grandy failing to produce the body of Mordecai Morris, the defendant, on motion, judgment against said Morris and his sureties, on his appearance bond, $430 13 cents, to be discharged on the payment of $198 49-100, and $16 37, former costs, from which judgment Morris and his sureties, Ehringhaus, Williams and Grandy, appealed to the Superior Court. At Spring Term, 1853, Morris appeared, and the plaintiff moved for judgment against the appellants, which motion was refused by the Court.

The plaintiff then moved to be allowed to call the defendant, and take judgment against him and his sureties Ehringhaus and Griffin, on the bond given by them, which motion was also refused by the Court.

The plaintiff then moved for judgment against Morris and Ehringhaus, upon the bond given by Morris, Ehringhaus and Griffin, upon the ground that Ehringhaus was upon both the bonds given by Morris for his appearance in the County Court, which motion his Honor also refused.

Judgment against plaintiff for costs. Appeal.

Smith and Jordan, for plaintiff.
Poole, for defendants.

BATTLE, J. It seems to us, that the plaintiff was not entitled to a judgment against the defendants, or any one or

more of them, upon either of the motions which he submitted to the Court, and that his Honor was right in refusing each and all of them. Whether the defendant Morris was ever discharged from arrest, under a *capias ad satisfaciendum* by the plaintiff, so that he could not be taken in execution again, as contended by his counsel, we need not decide. Supposing the arrest on the 14th of May, 1851, proper, and the bond then given with the defendants Williams, Ehringhaus and Griffin, valid, the bond, in connection with the execution, was in the nature of process to compel an appearance to answer at the next term of the County Court. WINSLOW v. ANDERSON, 4 Dev. and Bat., 9. At that term, the proceedings against them were discontinued by the plaintiff himself, and a new bond was taken from the debtor, with other sureties, for his appearance at the next succeeding term. This proceeding, which was in the nature of a new suit, was kept in Court by regular continuances, until March Term, 1852, when the defendant, Morris, being called, and failing to appear, the plaintiff moved for judgment, not against the sureties on the last bond, who were in legal contemplation present in Court and ready to answer the motion, but against the sureties to the bond of May 1851, as to whom the plaintiff had discontinued his suit nine months before, and who were therefore not before the Court, to have a judgment rendered against them. That judgment was therefore irregular, and ought not to have been given. WINSLOW v. ANDERSON, *ubi supra*. From it, the defendants had good reason for an appeal, and the Judge, who presided in the Superior Court, very properly refused to affirm it. The plaintiff then moved for judgment against the principal and sureties to the last bond, and that was also refused, for the very sufficient reason, that the bond, or rather the parties to it, were not before the Court. Certainly the appeal in the first suit or proceeding, did not take up the second suit or proceeding, which was entirely distinct

from it. If the two first motions were properly refused, unquestionably the last was, for no judgment could be given against Ehringhaus, except upon one or the other bond, and we have just declared, that no judgment could be rendered against the obligors to either of them.

The several motions of the plaintiff being refused, the judgment against him for costs was right, and must be affirmed.

Judgment affirmed.

MARGARET HENDERSON AND OTHERS *vs.* BUCKNER HENDERSON AND URBAN HENDERSON, EXECUTORS, AND OTHERS.

The word HEIRS, when applied to the successor to personal property in the contruction of a will, generally is held to mean those who take under the Statute of Distributions, and as such, the widow is generally included; yet, where the contest plainly shows that children only are meant, she will be excluded from the succession.

CORBITT v. CORBITT, decided at this Term, commented on and distinguished from this case.

PETITION heard before his Honor Judge MANLY, at Spring Term, 1853, of Onslow Superior Court, for the recovery of legacies under the will of William Henderson. The only question in the case arose on the construction of the will, of which the following is a copy of the material parts:

After the introductory part, and a request that tombstones may be purchased for his grave, the testator proceeds:

"To Buckner Henderson, I have this day made a deed to all the lands I intend to give him, witness by the abovenamed witness.

"To Urban Henderson, I have this day transferred a deed from Buckner Henderson to me, for a tract of land on the Southwest side of New River, it being all the lands I intend to leave or give him.

"To my wife Margaret Henderson, I lone, during her natural life, the lands on which my dwelling stands, with the lands I purchased of Thomas Jarman, including all my lands, with the exception of the two tracts or parts that I this day have given to Buckner and Urban Henderson, separately, and after her death, I give it to my youngest son, William Henderson, to have and to hold, free from the claims of any person whosoever.

"Also, to my wife Margaret Henderson, I loan, during her natural life, negro woman Molly, and after her death to be sold, and equally divided between all my heirs, excepting Christeney Henderson. My man Peter I want to be hired to such person or persons as he wishes to live with, until my son William Henderson becomes eighteen years of age, and the hire of said Peter, to go to the use of my two youngest children, viz: William and Nancy, and the time my son William arrives at the age of eighteen years old, I then give my man Peter to Nancy Henderson, my youngest daughter, to have and to hold, free from all right or title of any person whosoever.

"To Christeny Henderson, I give one dollar, and the rest of my property, such as the family utensels, household and kitchen furniture, to be sold, and equally divided among all my heirs, after paying for said tomb-stones, with the exception of Christeny Henderson, to whom I have given one dollar, in full of all I intend to give her.

"Witness, &c."

The widow and some of the children are the plaintiffs, and the executors and the remaining children are defendants. The defendants answered, and replication entered. The defendants insisted, among other things, that the plaintiff

Margaret was not entitled to come in with the children, under the word *heirs*. The prayer is for an account and payment of the legacies.

The case was heard on the petition, answers and exhibit, and upon consideration thereof, his Honor made a decree, dismissing the petition; whereupon, the plaintiff prayed and obtained an appeal to the Supreme Court.

J. W. Bryan, for plaintiffs.
No counsel for defendants.

NASH, C. J. The petition is filed for the purpose of recovering a legacy under Wm. Henderson's will. The petitioner, Margaret Henderson, the widow of the testator, claims a child's part of the property disposed of by the residuary clause. The clause of the will, set forth in the petition, is as follows: "And the rest of my property, such as the stock, farming utensels, household and kitchen furniture, to be sold and equally divided among all my *heirs*, after paying for the said tomb-stones, with the exception of Christeny Henderson, to whom I have given one dollar, in full of all I intend to give her."

The petitioner Margaret insists that the word *heirs*, as used by the testator, means distributees, and that the division is to be made under the Statute of Distributions, and she is entitled to one seventh part, as her share. The construction put upon the word "heirs," in the connection in which it stands, with the subject matter of the bequest, is correct.

When it is used to denote succession, it may be understood, as in the case of a legacy to one and his heirs, to mean such person or persons, as would legally succeed to the property, according to its nature and quality. Williams Exr. 727. CORBITT v. CORBITT, decided at this term of the Court. But the main question, and perhaps the only one, is, did the testator mean to confine the succession to his

children, or did he intend it should be under the statute? We are of opinion that, taking the other clauses of the will into consideration, his intention was to confine it to his children; and that the clause in question does not embrace the widow. In the construction of a testamentary paper, the Court is bound to look to the whole will, as it is one act—the ultimate disposition of the maker. In the second disposing clause of the will, is the following bequest: "Also to my wife, Margaret Hendersen, I loan, during her natural life, negro woman Milly, and after her death to be sold and equally divided between all my *heirs*, except Christeny Henderson."

Here the succession, after the death of the widow, is designated, as it is in the clause under which she is now claiming: the word heirs is used in both sections, and must receive the same construction in both, unless there is something apparent in the will to vary it. In the disposition, in the second clause, the testator could not intend to include his wife, for the succession could not take place until after her death. By *heirs*, then, in this clause, he meant his children shall take, except Christeny. The residuary claim begins and closes with the same idea or intent. It begins: "To Christeny Henderson, I give one dollar, and the rest of my property, &c., and it closes with the exception of Christeny.

Who then were in the mind of the testator? Clearly, we think his children, who take as his next of kin, of whom the widow is not one, and not under the Statute of Distributions, which would include her. He had given his wife all he intended her to take. If the word *heirs* had stood by itself, the widow would have been included, but it is controlled by the manifest intention of the testator to confine the succession to his children as such, and not as destitute. The case of CORBITT v. CORBITT, decided at this Term, differs from this. The question there arises under the

will of Joseph Russell, the clause of the will is as follows: "The balance of my property to be kept together to the best advantage, for the purpose of raising and schooling my children, until my son William comes of age, and then to be equally divided between my *lawful heirs*." The Court decided that the widow was entitled to her equal share with the children. The Court say the word heirs is not appropriate to the disposition of personal property; and where used in reference to it, means those who take by law: that is, under the statute of distributions. "This is the rule when there are no other words to give it a different meaning; here," say the Court, "the other words fix that to be the meaning, for it is put in opposition to children." The testator, in the first part of the clause, speaks of *his children;* and when disposing of his property, designates the succession by the word 'heirs.' In this case, there is no such opposition; the word 'heirs' being alone used;—and, from the whole context of the will, we are satisfied that, by the word heirs, the testator meant his children as such, and to confine the succession to them, as his next of kin, and not as distributees under the statute.

There is no error in the opinion of the Court, and the same is affirmed at the cost of the plaintiff.

Judgment affirmed.

WILLIAM H. HARRISS AND OTHERS *vs.* ALLISON LEE.

In an action of trespass against six defendants, where three of them were acquitted by the verdict of the jury, on a motion at a Term subsequent to that of the trial, to have the costs of defendant's witnesses taxed against plaintiff, it was held, that the proportion of the acquitted defendants' in the costs of these witnesses, to wit, one-half, should be taxed against the plaintiff.

The objection that such witnesses did not attend, comes too late as an answer to this motion.

Nor does it make a difference that the pleas of the defendants' were joint in form.

VENABLE v. MARTIN, Car. Law Rep. 515; WEAVER v. CRYER, 1 Dev. 337; STATE v. SMITH, 2 Ired. 402; SATTERWHITE v, CARSON. 3 Ired 549, cited.

THIS was a motion to tax a bill of costs in a suit, which had been tried at a former term of the Court below, and was heard at Fall Term, 1853, of Nash Superior Court. His Honor Judge MANLY presiding.

The former action out of which this motion arose, was tresspass in favor of Allison Lee against N. Harriss, O. Mitchell, J. Stallings, William H. Harriss, J. R. Harriss, and T. Battle, in which the verdict guilty as to three, and damages assessed to $

At the foot of the verdict was this entry, "judgment accordingly." It also appeared that the pleadings in behalf of the defendants were joint, and that certain witnesses were summoned in behalf of the defendants, by a joint subpœna, but no evidence was offered to show that they were sworn or tendered, or were in attendance. After the verdict at the present term, it appeared that the defendants acquitted gave notice through their counsel, that a motion would be made next day for a taxation of the costs in their favor, which motion however was not made.

At this term, a motion was made to have the witnesses, smmoned for them, taxed by the clerk, and that an execution issue in their behalf against the plaintiff for the same. This the Court refused to do, and the applicants appealed.

Moore, for the plaintiffs.
Miller, for the defendant.

BATTLE, J. The plaintiffs in this motion base their application to the Court upon the 84th section of the 31st chapter of Revised Statutes, which enacts as follows: "When

several persons are made defendants to any action of trespass, assault and battery, false imprisonment, or ejectment, and any one or more of them shall upon the trial thereof be acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit in like manner, as if a verdict had been given against the plaintiff or plaintiffs, and acquitted all the defendants; unless the Judge, before whom such cause shall be tried, shall, immediately after the trial thereof, in open Court, certify upon the record, under his hand, that there was a reasonable cause for making such person or persons, defendant or defendants to such action or plaint." By the express terms of this enactment, the applicants were entitled to have the attendance of their witnesses taxed as costs against the plaintiff in the action, upon the failure of the Judge to certify, that they were properly made defendants, if the costs of the attendance of such witnesses, or any part of it, were paid for by them, or were a proper charge against them. Why was it not? The witnesses were summoned by all the defendants by a joint subpœna, and if they attended, they had a right to demand pay for such attendance, and (as this motion comes up) we are to take it that they were paid by all, each paying his proportional part. No objection is made to the three acquitted defendants moving in this matter, and we think they are entitled to have half the costs of the witnesses in question taxed against the plaintiff in the action. The objection that the pleas were joint, is untenable, for the general issue in such actions, though put in jointly for all the defendants, is in its nature several. WEAVER v. CRYER, 1 Dev. Rep. 337; STATE v. SMITH, 2 Ired. Rep. 402. It is equally untenable for the plaintiff in the action to object that the convicted defendants were bound to pay all the witnesses. With that he had, directly, nothing to do. It was a matter between the defendants themselves, who were bound jointly and severally to pay for the attendance of

those whose services they needed. He became indeed *incidentally* interested in the question, by its appearing from the verdict that he had unnecessarily and improperly made some of the defendants parties to his suit. He thus became bound to repay them what they had expended in their defence. That liability the law fixed upon him, and it was unnecessary for the acquitted defendants to press the motion, of which they gave notice at the trial term.

The remaining objection, that it did not appear that the witnesses were sworn, or tendered, oreven were in attendance, comes too late. The plaintiff on the action ought to have been active in the matter himself, by moving, at the trial term, to have the tickets of such witnesses rejected in the taxation of the costs against him. VENABLE v. MARTIN, 1 Car. Law Rep. 515.

The order from which the appeal was taken must be reversed, as being erroneous in part, which must be certified to the Superior Court of Nash County, to the end that that Court may direct half the costs of the witnesses in question to be taxed against the plaintiff in the action and execution to issue therefor, and the plaintiff must pay the costs of this Court. SATTERWHITE v. CARSON, 3d Ired. Rep. 549.

Judgment reversed.

DEM ON THE DEMISE OF MILLY JOHNSON *vs.* WM. WATTS.

Where both plaintiff and defendant derived title under a person once in possession, claiming the fee in the tract of land in dispute, neither is at liberty to show that such title is not still a good and subsisting one, unless one can show that he has acquired another and a better title from some other person.

MURPHY v. BARNETT, 1 Car. L. R. 105; IVES v. SAWYER, 4 Dev. and Bat. 51; GILLIAM v. BIRD, 8 Ired. 280; LOVE v. GATES, 4 Dev. and Bat. 363, and COPELAND v. SAULS, in this number cited.

THIS was an action of EJECTMENT, tried at Fall Term, 1853, of Martin Superior Court, before his Honor Judge MANLY. It was originally brought by William Johnson and wife against Peter E. Maddera, the tenant in possession. During the pendency of the suit, Maddera died, and the defendant Watts filed an affidavit as landlord, and was admitted to defend in place of Maddera. The plaintiff produced a deed from Joseph Biggs to William Mackey, dated in 1814, conveying in fee simple the lot in dispute, and proved that Mackey was in the actual possession of the lot until his death in 1818; that the plaintiff Milly Johnson was the only child and heir at law of Mackey, and was under age. After the death of Mackey, the lot was rented out by the guardian of Milly, and occupied under such renting until her marriage with Thomas Pollard, in 1825. After this marriage with Pollard, he kept possession until Maddera went into possession, and he continued the same until the bringing of this suit. At the time of the intermarriage of plaintiff Milly, with Thomas Pollard, she was under age: Pollard died in 1848, and shortly thereafter, she intermarried with William Johnson, who is since dead.

The plaintiff then introduced a bond, dated 11th of January, 1828, executed by Thomas Pollard and George Pollard, payable to Peter E. Maddera, in the sum of four hundred dollars, reciting that, "Whereas, the above bounden Thomas Pollard hath bargained and sold to the said Peter E. Maddera, lot number 39, in the town of Williamston, for the sum of one hundred dollars, and is unable at present to make a legal title to the premises, in consequence of the wife of the said Thomas Pollard now being under age, and not eligible to convey real estate: now, should the said Thomas Pollard, when his wife comes of age, make and convey a legal title to the above named premises," &c.

And she insisted that Maddera, and consequently the defendant Watts, was estopped to deny her title.

The defendant produced a deed from Abner Cherry to Joseph Biggs, dated in 1810, for the lot in question, which did not convey a fee simple, because the word "heirs" was not used in the conveying part thereof, and it was proved that Joseph Biggs died in 1844. He also produced a deed for the lot in dispute from Thomas Pollard to Maddera, dated in November, 1828, and a deed of trust from Maddera to John Watts, dated in 1849, conveying the same to secure the payment of debts due him.

The Court ruled that the defendant was not estopped to deny the title of the plaintiff; in submission to which opinion the plaintiff took a non-suit, and appealed to this Court.

Biggs, for plaintiff.
Moore, for defendant.

BATTLE, J. We cannot distinguish this from the ordinary case of two parties claiming under the same person, in which neither can deny the title of him under whom they both claim. MURPHY v. BARNETT, 1 Car. Law Repos. 105. IVES v. SAWYER, 4 Dev. and Bat. 51. GILLIAM v. BIRD, 8 Ired. 280. Maddera, under whom the defendant Watts claims, certainly derived title from Pollard, the first husband of the plaintiff's lessor, who was the heir at law of William Mackey. Maddera could not then deny the title of Mackey. The termination of Maddera's title by the death of Pollard could make no difference, because it does not appear that he ever claimed under any other title than that derived from Pollard. When sued in ejectment, therefore, by the plaintiff's lessor, he could not deny her title, as is clearly shown by the above recited case of IVES v. SAWYER. Indeed, the only difference between that case and the present is, that the wife did not join ineffectually in the

conveyance of her husband. The defendant, in a case like the present, can defend himself only by showing that he has a better title in himself than that of the plaintiff's lessor, derived, either from the person from whom they both claim, or from some other person who had such better title. LOVE v. GATES, 4. Dev. and Bat. 363, and COPELAND v. SAULS, decided at the present term. It is not a case strictly of estoppel, but one founded in justice and convenience.

Nor is the present a case of landlord and tenant, as the defendant's counsel has contended, where the landlord's title has expired, but depends upon the just and convenient principle above stated. As both parties derived title under William Mackey, who was once in possession claiming the fee, neither is at liberty to show that such title is still a good and subsisting one. Unless the defendant can show that he has in himself the outstanding title of Cherry's heirs, the the lessor of the plaintiff must recover. The judgment of non-suit must be set aside, and a *venire de novo* awarded.

Jugment reversed.

WILLIAM FORBES *v.* TIMOTHY HUNTER.*

In an action for a penalty for failing to work upon a public road, the defendant *cannot* object to the jurisdiction of the County Court, except by plea in abatement.

The power to exempt hands from working on the public road is restricted to a Court consisting of seven justices.

BRANCH *v.* HOUSTON, Bus. 85; STATE v. WALL, 2 Ired. 267; STATE v. POWELL, 2 Ired. 275, cited and approved.

*This case was decided at the June Term of '53, but was omitted from the Report of that Term.

Forbes *v.* Hunter.

THIS was an action of DEBT for a penalty, tried before SAUNDERS, Judge, at the Spring Term, 1853, of Pasquotank Superior Court. The sum demanded in the writ was $150.

The following facts were agreed upon, and submitted to the Court for its judgment, to wit: The plaintiff was overseer of a road, duly appointed, and the defendant, who was the owner of several slaves, resided within his district.— These slaves were regularly summoned to work upon the road upon a certain day, and the defendant was duly notified thereof. Only three of the slaves attended, and for the failure of the remainder, this action was brought.

It was agreed that all the slaves summoned were liable to work upon the road, unless exempted by a certain order of the County Court of Pasquotank. The agreement referred to, and was accompanied by, a transcript of an order of the County Court of Pasquotank, exempting all the slaves of the defendant from working on the road in question, except three; from which record it appears that only three magistrates were present when the order was made.

Upon this state of facts, the Court gave judgment in favor of the plaintiff for the amount agreed on, from which judgment the defendant appealed to this Court.

Jordan and Pool, for the plaintiff.
Heath and Brooks, for the defendant.

BATTLE, J. The case agreed seems to have been intended to present but a single question for the opinion of the Court: which is, whether all the defendant's hands, except three, had been properly exempted by the County Court from working on the public road. But the defendant's counsel now raises another question, whether the County Court, in which this suit commenced, had jurisdiction of it; insisting that it had not; and that neither the consent of

parties, nor a waiver of the objection, could confer such jurisdiction; and that the Court, the instant it perceived that it was exercising a power not granted, ought to have stayed its action, and given judgment against the plaintiff. For this last objection, the case of BRANCH v. HOUSTON, Bus. 85, is cited and relied on; but it will be readily perceived that the principle of that case does not apply to the present. Supposing that the 10th and 11th sections of the 104th chapter of the Revised Statutes made it necessary for the plaintiff to commence his action against the defendant for ninety dollars, as a penalty for failing to send his hands to work on the public road, by a warrant before a single magistrate, (which we do not admit,) yet the defendant could not object to the jurisdiction of the County Court, except by plea in abatement, as is expressly provided in the 40th and 41st sections of the 31st chap. of the Revised Statutes. In truth, we think the County Court had jurisdiction of the cause, the suit being for a penalty of more than sixty dollars. And the 10th and 11th sections of the 104th chapter of the Revised Statutes, above referred to, must be confined to warrants before a single magistrate for penalties less than that sum.

The other question is clearly against the defendant. The power to exempt hands from working on the public roads is, by the express provisions of the 12th section of the above mentioned 104th chapter, restricted to a Court consisting of seven Justices. The authority being special, three Justices only could not exercise it, and as the record shows that only three were present, their orders to exempt the defendant's hands were void. STATE v. WALL, 2 Ired. 267, 272, and STATE v. POWELL, Ibid. 275.

The judgment must be affirmed.

DOE ON THE DEMISE OF THE COMMISSIONERS OF BEAUFORT *vs.* THOMAS DUNCAN.

It is error in the Court, to submit a material fact, in a cause to the jury, without any evidence to support it.

Whether the doctrine of alluvion applies to any case, when a water boundary is not called for, though the course and distance called for have been coterminous? QUERE.

ACTION of EJECTMENT, for a portion of land lying in the town of Beaufort, tried before his Honor Judge MANLY, at Spring Term, 1853, of Carteret Superior Court.

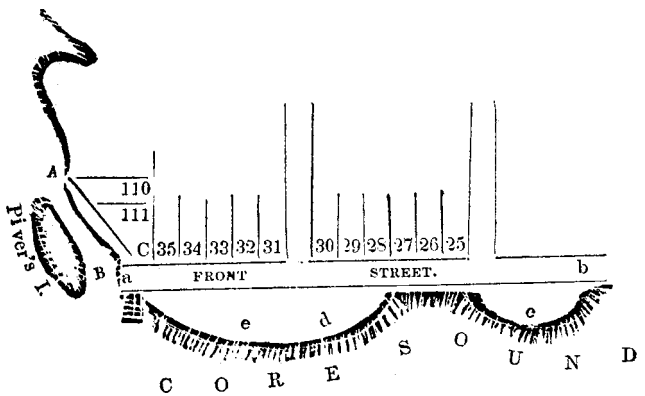
By various grants, deeds and acts of Assembly, it was made to appear, that a body of land, extending along Core Sound and the Thoroughfare, as delineated in the diagram below, was and had been for many years in the Commissioners of the town of Beaufort, as a body corporate, and that the lessors of the plaintiff were, at the bringing of this action, corporators duly appointed, in and by regular succession, under the laws regulating the corporation. The defendant gave in evidence a deed from one James Davis to Benjamin T. Howland, and from Benjamin T. Howland to himself, bearing date on 4th day of June, 1832, conveying to him "the lot of land in the town of Beaufort, known and distinguished in the plan of the said town as number 111."

The defendant offered in evidence an ordinance of the Commissioners of the town of Beaufort, dated May 1816, that Jonathan Price should survey the town of Beaufort, and make a plat thereof. Also, he offered in evidence a private act of Assembly, entitled "an act to confirm an accurate survey of the town of Beaufort, in the county of Carteret, and for other purposes," which act recites that, "whereas, disputes have arisen concerning the true lines of the streets and lots of the town of Beaufort, in consequence of which the inhabitants have employed Jonathan Price to

survey and make an accurate plan of the said town: Be it therefore enacted, and that the lines and plan of the town of Beaufort, as surveyed and established by Jonathan Price, shall hereafter be considered in all cases as the lines and plan of said town of Beaufort."

The defendant then offered the plan or map of the town made by Mr. Price, and which was proven and registered in the Register's Office, and filed in that office, whereof the sketch below delineates a sufficient portion to present the question upon which the opinion of the Court proceeds.

It appears from that map, that lot number one hundred



and eleven (111), as represented in the map referred to, does not reach the thoroughfare, but that there is a small gore of land (which is that in controversy), between his Western line and the water. The scales and measurement of lot No. 111, were 50 feet on Front street, 175 on the line of lot 110, and 132 feet, with the line of lot No. 35.

The defendant proved by James Davis, that, in the year 1817, he was the owner of lot 111, and that the water then encroached upon his lot, and that he then drove down piling along what he conceived to be his Western line, to keep it out, and filled it in. That he had been informed by old

citizens of Beaufort, that the channel between Piver's island and the land in controversy, used to be dry at low tides, and that a log was put across the same, for persons to walk over, and that the dogs used to cross the same in going to hunt on the island, and that, in his day, a pilot-boat could not turn about in the channel; but that, at this time, the channel was between fifty and a hundred yards wide, with a sufficient depth of water to admit vessels and steamboats of the largest size to navigate.

Defendant also proved, by one Joel H. Davis, who is the son of the foregoing witness, that he lived with his father on the lot No. 111; that his father built a house on it, and that the ordinary high water would come up to the edge of the piazza of the house on this lot; and that, West of the house, there was a dry sand shoal for fifty yards; that a storm had cut open the channel, and that the same gave away and cut away the shore, and that the water ebbed fifty feet West of his father's piling.

He also proved by one Whitehurst, that he first knew the land in controversy, in 1811, and that there is more land there now than was in 1811. The possession of the defendant, of lot 111, had been continuous in him, and those under whom he claimed, since 1817. He insisted that this survey by Price, and its recognition by the act of Assembly, with the subsequent deeds, amounted to evidence of title in him, and that it, with the testimony of the witnesses, showed that the line was co-termining with the water mark, and that the strip in question, being by gradual accretion, belonged to him.

It was insisted, on the part of the plaintiff, that the lessors of the plaintiff were not only entitled to recover the premises in dispute, but that their title included all the land between the high water and low water mark; that the deed of the defendant, not calling for the water or land, he was confined to the mathematical line, and that this was a question of law.

The Court was of opinion, and instructed the jury, that where the land in the town of Beaufort was bounded by the water of the harbor, the margin made by the ordinary high tide was the *true boundary;* the space alternately covered and left bare by the flux and reflux of the tides, not being the subject of entry in North Carolina. He further instructed them, that, in relation to the subject of a water boundary, they were to fix the boundary on the land West of and adjacent to lot 111, at the time it was laid off and sold; and if the water boundary was identical with the mathematical boundary of the lot called for in the plan of the town, then additions made to the land by gradual accretions, through the action of the winds and tides, belong to the lot and owner of it. Under these and other instructions, not excepted to, the jury found a verdict for the defendant.

The lessors of plaintiff moved for a rule, etc., which was granted and discharged, and plaintiff appealed.

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

BATTLE, J. It cannot be doubted, we think, that the defendant claimed under the lessors of the plaintiff. His lot is described in his own title deeds, to be "that lot of land situated in the old town of Beaufort, and distinguished in the plan of said town, by No. 111, (except forty-two feet on the North part,)" &c., and it does not appear that the lot had ever been claimed, otherwise than under the Commissioners to whom the two hundred acres of land upon which the old town was, had been conveyed, for the purpose of being laid off into lots, and sold. The defendant then was estopped to deny their title, and the only question was, whether the Western limit of his lot was the mathematical line from C to A? Or was the line of high water mark, between the main land and Piver's island? The defendant

contends for the latter line, as his true boundary, alleging, that, when the lot was originally laid off and sold, his Western line, though not calling for the thoroughfare, was in fact co-terminous with the high water mark of it, and he was, therefore, according to a well settled principle of law, entitled to the gradual accretion or alluvion made by the recession of the water. Were the allegations supported by the proof, an interesting question would arise, whether the doctrine of alluvion applies to any case where a water boundary is not called for, though the course and distance, called for, may have been co-terminous with it? We do not feel at liberty to decide the question, because we are clearly of opinion that the evidence given on the part of the defendant, does not raise it. That evidence consists of the map of the survey of the town of Beaufort, made by Jonathan Price, in the year 1816, and the testimony of James Davis, a former owner of the lot, and his son Joel H. Davis. Price's map shows that the water of the thoroughfare, between the main land and Piver's island, was, in the year 1816, nearly fifty feet West of the mathematical line from C to A. That line, then, was at that time, so far as the map proves anything, the Western boundary of the defendant's lot, No. 111. The testimony of the Messrs. Davis is not very explicit, but supposing it to be established that, in the year 1817, the earliest time to which it seems to refer, the water of the thoroughfare encroached upon the land, so as to come up to and be co-terminous with the line from C to A, it certainly could not have the extraordinary effect of attaching to the lot in question the right of alluvion, which it had never had before. That proposition was not even contended for in argument.

The charge of his Honor applied to the condition of the Western boundary, as it existed when the lot was laid off and sold, and we are unable to find in the bill of exceptions the slightest proof that, at any time prior to the year 1817

the mathematical line, from C to A, was co-terminous with the water mark, high or low, of the thoroughfare. His Honor ought, therefore, to have instructed the jury, that there was no evidence on which to raise the question of alluvion in favor of the defendants, and that, consequently, he was to be confined to the mathematical line, from C to A, as his Western boundary. For this error of the Court, in submitting a material fact in the cause to the jury, without any evidence to support it, the judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire de novo*.

DOE ON THE DEMISE OF THE COMMISSIONERS OF BEAUFORT *vs.* THOMAS DUNCAN, ET. AL.

An ordinance of a town, not under the seal of the corporation, and not expressing a consideration, and not delivered to the parties claiming under it, does not amount to a conveyance, nor color of title.

THIS was an action of EJECTMENT, tried before his Honor Judge MANLY, at Spring Term, 1853, of Carteret Superior Court.

The subject matter of this action is the strip of land lying between Front street, in the town of Beaufort, and the water of the harbor south of that street, and designated by the letters a, b, c, d, e. (See the diagram in the preceding case.)

The leading facts of the case are set forth in the case of DOE ON DEM OF THE COMMISSIONERS OF BEAUFCRT v. THOS. DUNCAN, decided at this term. The defendants, Duncan and Thomas, had had more than seven years possession of the sections lying across Front street, opposite the second lots, which are those marked in the diagram at 111 and 25.

The other defendants are the owners of the lots between 111 and 25, but they did not have seven years possession of the land in question opposite their lots.

The defendants insisted upon certain defects in the title of the lessors of the plaintiff, which they pointed out in the bill of exceptions; but, as this Court has put the case on the ground of *estoppel*, it is not necessary to state them.

They further contended that by the ordinance of 1782, (which see recited in the Opinion of the Court, following,) the sections in question were conveyed to the defendants; at all events, it was a color of title, and the defendants, Duncan and Thomas, had acquired title under it by their adverse possession. This case was submitted upon the facts as here stated, agreed upon by the counsel upon both sides; and, upon consideration thereof, his Honor gave judgment for the defendants, Duncan and Thomas, and against the other defendants; from which plaintiffs appealed.

J. W. Bryan, for plaintiff.
Donnell, for defendants.

BATTLE, J. In the case of the same lessors of the plaintiff against Thomas Duncan alone, decided at the present term, we have shown that the owners of lots in the town of Beaufort, who do not set up title to them in another manner, must claim under the commissioners; the lessors of the plaintiff, therefore, are estopped to deny their title. Neither of the defendants, in this case, pretends that he has acquired title otherwise than from the lessors of the plaintiff, and the only question will be, whether either of them has acquired a good title from them.

The defendants contend that they have acquired such title by force of the ordinance passed by the commissioners of Beaufort in 1782, or by the force of that ordinance coupled with an adverse possession for seven years, of the small parcels or strips of land mentioned in it.

The ordinance is in the following words: "Ordered that, for the future, whatever small strips of land are to be found between the outward lines of Front Street and the water, shall be the property of the person owning the front lot on the opposite side of the street."

It is very certain that this ordinance could not operate as a deed to pass the title, *proprio vigore*, for the want, among other things, of the seal of the grantors, and of a consideration from the grantees, even supposing them to be properly designated. But the counsel for the defendants contends that the ordinance operated at least as color of title; so that seven years adverse possession under it would perfect their title. To constitute color of title, there must be some written document of title *professing* to pass the land, and one not so obviously defective that it could not have misled a man of ordinary capacity. DOBSON v. MURPHY, 1 Dev. and Bat. Rep. 586; TATE v. SOUTHARD, 3 Hawks Rep. 119.

Viewing the ordinance in the light of a conveyance, we think it so obviously defective, that it could not have misled a man of ordinary capacity. Besides the want of a seal and a consideration above mentioned, it is altogether informal and does not appear ever to have been delivered to the pretended donees. The last is a decisive and fatal objection, without adverting to any others, because delivery is essential to give effect to any instrument of conveyance *inter vivos*, and must, in the very nature of things, be as necessary where the instrument is to operate only as color of title, as when it is to convey a complete title. This disposes of the defence set up by the defendant Thomas. But the counsel for the defendant, Duncan, contends for him, that the evidence, though not color of title, had the effect at least of extending the boundaries of his lot, number 111, to the water, and that then the deed from Howland to him, and his possessions for seven years under it, gave him a

good title to the parcel of land which he claimed. This makes it necessary to consider whether the ordinance had any effect, and if it did, what it was. It was certainly intended to have some effect, and if there is any which it can have, the law will, to that extent, sustain it. We have decided, that it cannot operate as a conveyance *inter vivos*, either perfect or defective. It cannot, therefore, convey even an incorporeal hereditament, as, for instance, the easement of a right of way over the small strips of land mentioned in it. The only other effect it could have, would be to give a license to the owners of lots on Front street, to use those strips of land for such purposes as they might think necessary. Supposing, then, it was a license, it could not pass as such under Howland's deed to Duncan, so as to give him anything like a property in the land, or an easement on the land, but it remained as it was before, a mere license to use the land, without being liable to be sued as a trespasser, until it should be revoked. The deed of Howland, under which the defendant Duncan claimed, conveyed nothing, therefore, upon which his seven years possession could operate to give him title. As a license, it was revoked by the repeal of the ordinance in 1847, and the defendant was notified in writing to surrender the possession before the suit was commenced. The defence set up by the defendant Duncan thus fails also; which entitles the lessors of the plaintiff to have the judgment in favor of the defendants Thomas and Duncan reversed, and a new trial granted. In discussing and deciding the cause, we have not found it necessary to consider particularly the arguments of the learned counsel in relation to the nature and rights of a seaport town, nor whether such town or an individual citizen of it has a right, without a grant, under legislative authority, to erect wharfs into the sea, as an incident to the ownership of the soil adjacent to shore, to wit: the soil on which the sea ebbs and flows, between high and low

water mark. It may be well for those who are interested in the question, to satisfy themselves in relation to it before incurring the expense of costly works, to which, at last, they may have no title. They will find the subject fully and ably treated of in the recent work of Woolrych, on the Law of Waters, (68 vol. of the Law Library.)

Venire de novo awarded. Judgment reversed.

MARK D. HATHAWAY ET. AL. *vs.* JOHN M. HINTON.

An overseer of a public road is civilly liable for SPECIAL damages, for injuries arising from the road's being out of repair.

ACTION on the case to recover damages for an injury to a stage coach and horses, occasioned by the breaking down of a bridge, which defendant was bound to repair, tried before his Honor Judge ELLIS, at Fall Term, 1853, of Pasquotank Superior Court.

The defendant was the overseer of a public road, leading from Elizabeth City to Norfolk, in Virginia, and was duly notified of his appointment. The bridge in question was a part of the public road, and had been recognized as such for three years, and had been taken in charge by the previous overseers of the road, and repaired from time to time, by the hands under them. This bridge was supported by three sills: it was old and decayed, and the middle sill had been broken for a considerable time before the occurrence complained of, and a pole put by the side of it; the covering was old and much worn. The defendant had had his attention called to the condition of the bridge, by one of his neighbors, a few days before, and said he was going to have

it repaired on the next day, but failed to take any measures towards repairing it. This was the state of the bridge, as proved by two witnesses, Ghirkin and Richardson. While in this condition, the plaintiff's coach and horses were passing over it, when one of the side sills, which was decayed, broke, the bridge sank down, and the horses, becoming affrighted, broke from the stage and ran off; one of them was injured, and for a while unable to work. There was a damage to the coach and harness, and for these injuries to the horses, coach and harness, the plaintiff claimed damages. The defendant insisted that he was entitled to fifteen days time after the sill broke to repair the bridge, or at least to three days after the accident occurred, and he showed that within that time he did put the bridge in good and sufficient repair. The Court charged the jury that as overseer of the road, the defendant was bound to use such reasonable diligence in keeping it in repair, as a prudent man would use in transacting his own business; that the bridge was a part of his road, and he was required to make an examination of its condition from time to time, and make all needful repairs; that upon hearing of any sudden injury thereto, he was allowed three days, within which to summon his hands, but was not required to make the repair himself.

Verdict for the defendant. Rule for *a venire de novo* for misdirection in the Court. Rule discharged, judgment and appeal.

Smith, for plaintiff.
Heath and Pool, for defendant.

BATTLE, J. The general liability of an overseer for any peculiar and special damages, sustained by an individual in consequence of the failure of such overseer to keep his road in repair, seems not to have been questioned on the trial. The contrary proposition has been suggested in the

argument here, but we think without sufficient grounds for its support. The State, as the sovereign power, undoubtedly has the right to command the services of each and every one of her citizens, in whatever employments she may deem necessary for the promotion of her safety, or her welfare, for which he may be physically or morally qualified. In many of her offices, or places of trust, or profit, the distinction conferred, or the emolument received, are found to be amply sufficient to secure the risk of responsibility however great, and the performance of labors however arduous. But there are other offices and places essentially necessary, in her economy, and police, in which the duty to be discharged is more useful to the public than profitable to the incumbent, where the State is compelled to resort to coercive measures, and by fines and penalties to enforce their fulfilment,—such, as in procuring the attendance of jurors to assist in the administration of justice, and such also is the case in securing the oversight of her citizens, in making and keeping in repair her public roads and bridges.

By the 8th section, 104th chapter, of the Revised Statutes, power is conferred upon the County Courts of the several counties of the State to appoint overseers of the highways, each of whom shall serve, as such, under a penalty of forty dollars, and shall be deemed and held liable for any neglect in working on the roads, until he shall have made it appear to their satisfaction that he has done the duties of an overseer, as by law directed, with *provisoes*, that he shall not be responsible until ten days after he shall have received notice of his appointment, and that he shall not be compelled to serve more than one year in three. By other sections of the act, other duties connected with his road are imposed upon him under certain penalties for failing to perform them, and then, by the 20th section, it is enacted as follows: "Every overseer of roads, who shall neglect or refuse to do his duty, as by this act directed, or who shall not keep the

roads and bridges clear and in repair, for, and during the space of fifteen days, unless hindered by extreme bad weather, shall forfeit for each and every such offence the sum of four dollars, over and above such damages as may be sustained." In addition to the penalties imposed by this act, the 40th section of the 34th chapter of the Revised Statutes subjects the overseer to an indictment for failing to perform, or violating his duty, and in connection, to such fine as the Court in its discretion shall think proper to impose. Now, it is manifest, that the 20th section of the act above referred to was passed under the supposition by the Legislature, that the overseer was liable to individuals for any damage they might sustain, by his failure to keep his road in good and sufficient repair. The State intended to enforce obedience to her commands, by imposing fines and penalties for neglect of duty; leaving it to such individual to recover, according to the established principles of law, such *special* damages as he might sustain by such neglect. See DUNN v. STONE, 2 Car. Law Rep. 261. That he ought to recover in such a case, will appear obviously just, when it is recollected that a loss has been incurred, and the contest is, whether it shall fall on the traveler, who is an innocent person, or the overseer, who is a guilty one.

Supposing, then, the general liability of an overseer of the public road, to be established, the defendant contends, that he was not guilty of any negligence, in this case, for which he can be held responsible, and while his counsel admits that the Court erred in submitting the question of negligence to the jury, he insists that the plaintiff cannot complain of the error, because it was corrected by the proper finding of the jury. There can be no doubt the Judge ought to have decided the question himself, as has often been ruled by this Court. BILES v. HOLMES, 11 Ired. Rep. 16; HEATHCOCK v. PENNINGTON, Ibid. 641; AVERA v. SEXTON, 13 Ired. Rep. 247, and it is equally well settled,

that if the error be corrected by the finding of the jury, no advantage can be taken of it by the opposite party. SMITH v. SHEPARD, 1 Dev. Rep. 461. Did the jury then decide the question of negligence correctly? In certain views, in which the testimony required it should be submitted to them, we think they did not; and if there was any state of facts which, if found by the jury, would have made out a case of negligence, the plaintiffs would be entitled to a *venire de novo*. AVERA v. SEXTON, *ubi supra*. If the account of the condition of the bridge, given by the witnesses Gherkin and Richardson, was true, the defendant was culpably negligent in not having repaired it sooner. It was old, much worn, and the middle one of the only three sills, which supported it, was either broken or so much sunk that a pine pole had been put in to supply its place. Surely, it was neglect in the overseer to permit such a bridge to remain so long in such a condition; thereby imperilling the lives and property of those who, in the pursuit of business or pleasure, were compelled to cross it.

But it is said, on behalf of the defendant, that he is not liable, unless he suffered his bridge to remain out of repair for fifteen days; and that, at all events, he was not liable, until after three days had been allowed him upon being informed that the middle sill or pole was broken, to summon his hands to repair it. The act is undoubtedly penal, and must be construed strictly, so far as the liability to an indictment, and the penalty of four dollars, is concerned. Whether it is so with respect to the liability to individuals, for special damages, may admit of some doubt. That liability is at common law, and we understand it to be referred to in the statute, as existing at common law. The question then, is, whether it is restricted by the statute, or whether the neglect for fifteen days is confined to a proceeding by indictment or for the penalty. It is unnecessary to decide the question in this case, because the testimony shows that

the neglect, whatever it was, must have existed for more than fifteen days before the plaintiff sustained their injury.

In the case of sudden obstruction thrown in or across a road, as, for instance, a tree blown in or across it, by a tempest, we have no reason to doubt the correctness of his Honor's opinion, that three days would be allowed the overseer, within which to summon his hands to assist in clearing it away.

In conclusion, we hold that the plaintiffs are entitled to a *venire de novo*, because there was one or more views of the testimony, which the jury might have taken, and which, if they did take, it was the duty of the Judge to have told them, that there was, in law, such a neglect by the overseer, in repairing the bridge, which formed a part of his road, as to make him liable for the special damages, sustained by the plaintiffs.

Judgment reversed. *Venire de novo.*

GENERAL ORDER,

AT DECEMBER TERM, 1853.

The following shall be Rules of Practice in this Court:

I. Unless exception to the competency of evidence contained in a deposition, be made before the hearing of any cause, the whole shall be deemed competent, so far as it may be deemed relevant.

II. If any one will except to the competency of such evidence, he shall specify the matter and cause of exception, and furnish the opposite counsel with the same, who shall, in writing, either admit the exceptions, and the excepted matter shall be expunged, or shall deny the sufficiency of the causes of exception, and thereupon the excepted matter shall be referred to some member of the Bar, whose decision, unless appealed from, shall be conclusive, and he shall expunge the excepted matter, allowed as such. The costs of the reference shall be taxed against the party failing, and shall not be costs in the cause.

III. If there be no opposite counsel present, the exceptions shall be filed with the clerk, and deemed served.

IV. Upon a petition to rehear any order or decree hereafter filed, there shall be taxed against the petitioner, should he fail in obtaining a reversal or modification of such order, full costs, including a Solicitor's fee, and five dollars for the fee of the Clerk.

It is ordered, that the causes be called on the third day of the term; beginning with the first Circuit, (Equity and Law;) then the second Circuit, and so on; and the Clerk will docket the causes according to this arrangement.

MEMORANDUM.

HAMILTON C. JONES, Esq., of Rowan, was appointed Reporter at this Term, in the place of PERRIN BUSBEE, Esq., deceased.

CASES IN LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1854.

THE STATE v. DICKERSON S. PEACE.

Where the deceased had been cut with a knife into the coats of the stomach, was very weak from the loss of blood, and said THAT HE MUST DIE, and did die, two days afterwards, of the wound he had received, his account, in a conversation of short duration, as to the manner in which the conflict began, and was continued between him and the prisoner, was admissible as DYING DECLARATIONS, although the witness could not say whether the opinion expressed by the deceased, "that he must die," was before or after the narration of the facts: there being no evidence that, during the time of this conversation, the condition of the deceased was materially changed.

The Court will never give instructions upon a state of facts that is not presented by the evidence.

To bring a case within the operation of the rule, FALSUM IN UNO, FALSUM IN OMNIBUS, the oath must be corruptly false in regard to a matter material to the issue.

It is not error in the Court to refuse to tell the jury that they are judges of the law as well as of the facts.

THIS was an indictment for murder, tried before his Honor Judge MANLY, at the Spring Term, 1854, of Granville Superior Court.

The first question in the case was on the admissibility of the dying declarations of the deceased.

The Physician, Dr. Young, stated that he got to the patient between the hours of nine and ten o'clock in the forenoon; that he had been cut with a sharp instrument across the stomach, (the cut ranging downwards.) He thought that some, at least, of the coats of the stomach had been cut. He was unable to stand, was weak from the loss of blood, and appeared much alarm-

ed. He died of this wound on the second day afterwards. Another witness, Margaret Hart, proved that the blow was given about nine o'clock; that she arrived there shortly afterwards, and found the deceased lying on the floor, cut across the stomach and very weak. She sat down, and at his request adjusted the pillow under his head. *He said he must die, and frequently uttered short prayers to God, to have mercy on his soul and body.* She was proceeding to tell how the deceased said the conflict took place, when objection was made, and the witness cross-examined to this point. She stated, upon this examination, that *she did not remember whether the declarations about the manner of the death-blow were before or after he said he must die*, but it was all in one conversation of short duration, and while she was squatted down by the deceased, after having fixed the pillow under his head. The Court decided that the declarations were admissible.

Declarations of the deceased, as proved by Margaret Hart.

The deceased, in the conversation above considered, said "that Dickerson began a quarrel with him at the breakfast table, and finally struck him across the table; that upon being ordered to go away, he went out into the yard and there continued abusive language; that he (the deceased) also went into the yard, and thereupon Dickerson drew his knife and came at him; that he took up a mop-broom and tried to defend himself, backing towards the persimmon tree; in using the broom, the mop fell from the handle and the stick came down upon the ground, and as he was bent over, the prisoner cut him with the knife; after he was cut, he struck the prisoner two or three blows with the handle."

The case states further that this witness was subjected to a lengthy cross-examination, in the course of which she stated that "she did not know how far it was from the house to the persimmon tree, because she had not measured it, and could not tell whether it was a quarter of a mile or less."

Instructions asked for by Prisoner's Counsel.

1st. With regard to the character of Margaret Hart, "that character was *a unit*, and if it were bad in one particular, it was bad in all."

2nd. That the jury were judges of the Law as well as of facts, in cases of this sort.

3rd. "That if they believed the deceased was pressing upon and striking at the prisoner with the mop-handle, and upon striking at him the stick went down upon the ground, and while the deceased was bent over it, the prisoner struck the fatal blow with the knife; that this was at most *a case of manslaughter.*"

Instructions given by the Court.

In summing up by the Court, the jury were instructed that the weight of a witness's testimony depended upon the character of the witness, and varied according to the consistency of the testimony with itself and other testimony, and to the intelligence, ingenuousness, and general character of the witness apparent on the trial.

After explaining the general principles of homicide and the distinctions between the various grades of the offence, his Honor proceeded as follows: "If you are satisfied there was a pre-determination on the part of the prisoner to kill the deceased, and there has been a killing in pursuance of such determination, (and the legal presumption is, that it was in pursuance of the previous intent, unless the contrary appear) it will be a case of murder, *no matter how the affray commenced or proceeded.* It is not necessary that the previous intent should be harbored for any particular length of time; it is sufficient, if it be deliberately formed and executed. This is killing on an *express* malice. If the deceased went out into the yard after the difficulty in the house, as he had a perfect right to do, and was there set upon by

the prisoner, and did no more than was necessary to defend himself, whether with the mop-stick or otherwise, the killing by his assailant is murder; and this, though there was no previous intent to kill. It is a killing upon an implied malice—a killing without legal provocation.

"But, on the other hand, if the deceased was the assailant after going out into the yard, or offered fight to the prisoner, and they did fight together, and the prisoner, under the sudden impulse of passion, aroused by the assault or fight, drew his knife and killed the other, it is a case of manslaughter, and not of murder.

"These hypotheses furnish to the jury the distinctions between murder and manslaughter. The one is upon a previous intent, or without provocation of a legal character. The other is killing in the heat of passion reasonably excited. What constitutes reasonable excitement of passion has been much discussed.—These discussions have settled no principles applicable to this case further than I have indicated, that is, a fight by mutual consent and the sudden seizure of a deadly weapon, and infliction of a deadly wound, or an assault with the mop-stick and the use of the knife, upon the impulse of passion excited by such assault. In either such case, the passion will be *reasonably* excited and the homicide will be extenuated from murder to manslaughter.

"While it was not considered as of any practical importance on the present occasion, yet as the Court dissents from the position of the prisoner's Counsel, *that the jury are judges of the Law*, it becomes its duty so to declare. According to our constitution and laws, juries are the ultimate arbiters of human rights: they hear the *facts* from the *witnesses*, the *law* from the Court, and applying the one to the other, decide upon these rights, and will have no right to reject the facts *as found* by them testified to by the witnesses, and to substitute a hypothetical state of facts; and so they have no right to reject the law, as propounded by the Court, and substitute law of their own: these principles have governed the action of our Courts and

juries for a long time past, and it is not believed that any alteration of them has been made by the recent legislation of the State."

There was other evidence not deemed material to be stated according to the view taken of the case by this Court.

There was a verdict of "*guilty of murder*" and judgment. Upon a rule for a *venire de novo*, the following exceptions were made:

1st. That the declarations of the deceased ought not to have been admitted as dying declarations.

2nd. That the particular instructions asked for were not given as asked for.

3d. Because they were not informed that if they believed that Margaret Hart had sworn corruptly false in respect of her knowledge of the distance of the persimmon tree from the house, her testimony ought to be altogether rejected.

4th. Because of error in the instructions, that the jury were not judges of law. Exceptions over-ruled and rule discharged, and appeal to this Court.

Attorney General for State.
A. W. Venable and *E. G. Reade* for defendant.

PEARSON, J. It is the duty of the presiding Judge to find the facts necessary to present a question of evidence. He hears the testimony; his decision in regard to the facts is not the subject of review. Consequently, the conclusion to which he arrives in regard to the facts, from the evidence heard by him, should be set out in the bill of exceptions, or statement of the case, and not the evidence. In some cases there is not much difference between the evidence and the facts; in others, there is much difficulty in saying, from the evidence, what are the facts.

Taking the testimony of Margaret Hart to constitute the facts in regard to the question of evidence, there can be no doubt that the declarations of the deceased come fully within the rule

under which death-bed declarations are admissible. Indeed, we understand from the argument here, that the only objection was, because the witness did not remember whether the declarations about the manner of his death-blow were before or after he said he should die. It was all in one conversation of short duration; from the detail given of it, it could not have exceeded ten minutes, and there is no suggestion that there was any material change in the condition of the deceased, or that he became suddenly worse. So it made no kind of difference, whether what he said in regard to his condition, was before or after he made the statement. In either case, he was manifestly under the fear of impending death.

There was no error in refusing to give the instructions asked for, because there was no evidence tending to prove the facts upon which the request was based, and the Court should never give instructions upon a state of facts that is not presented by the evidence in the case. The evidence was, "that when the deceased went out into the yard, the prisoner drew his knife, and came at him; that he took up a mop-broom, and tried to defend himself, backing towards the persimmon tree, &c.; the mop fell from the handle, and as the deceased bent down over it, the prisoner gave the fatal cut with the knife." This evidence by no means supports the fact "that the deceased was *pressing upon and striking at the prisoner.*"

His Honor was not bound to give instructions upon a mere hypothetical case, although, in the course of his charge, he did in effect make the hypothesis, and give the instructions asked for.

To bring a case within the operation of the rule, "*falsum in uno, falsum in omnibus,*" as expounded in STATE v. JIM, 1 Dev. 509, the oath must be wilfully and corru tly false, in regard to a matter material to the issue. So that the jury would feel bound to convict the witness if he was then on his trial for perjury. Although the distance from the house to the persimmon tree might have been a matter, in regard to which the

counsel desired to have correct information, or about which he felt at liberty, upon cross-examination, to test the accuracy of the judgment of the witness, yet, the fact was collateral, and was not material to the issue, within the meaning of the rule. So that, however much the conduct of the witness, in saying that she did not know the distance, because she had not measured it, and her flippancy in saying, that she could not tell whether it was a quarter of a mile or less, were calculated to prejudice her in the opinion of the jury, it was not a matter that called for the exclusion of her testimony; and it was properly left to the jury, as affecting her credit, and not her competency.

"*Ad questiones facti non respondent judices; ad questiones legis non respondent juratores.*" "Although the jury, if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do; for, if they do mistake the law, they run into the danger of an attaint." Coke Litt. 228. "The jury may render a special verdict when they doubt the matter of law, and therefore choose to leave it to the determination of the Court, though they have an unquestionable right of determining upon all the circumstances, an finding a general verdict, if they think proper so to *hazard a breach of their oaths*; and if their verdict be notoriously wrong, they may be punished, and their verdict set aside at the suit of the king, though not at the suit of the prisoner."—4 Blackstone's Com. 361.

We concur with his Honor in the opinion he expressed as to the right of a jury to disregard the instruction of the Judge upon a matter of law. It is true, when the issue is one of fact, it involves a question of law, and in order to render a general verdict, the jury must make the application of the law to the facts. This puts it in the power of the jury to find a verdict in opposition to the charge of the Court, as to the law involved in the issue; and the jury may, in a criminal case, by an abuse of this power, find a verdict of "not guilty," the effect of which is an absolute acquittal, under the rule that no one shall be

twice put in jeopardy, &c.; but because they have the *power*, it by no means follows that they have the right to do so. They, in like manner, have the power to disregard the facts as they believe them to be from the evidence; and the effect of the verdict of "not guilty" is the same; but in either case it is a violation of their duty as jurors. Indeed, the case is not as strong where they find against the facts established by the evidence, as where they find against the law given them in charge; for the jurors are presumed to be men of good sense, and it is a part of their duty to pass on the credibility of witnesses. But they are not presumed to be "men learned in the law," and it is no part of their duty to pass upon the correctness of the Judge's opinion as to the law; for that, an appeal to a higher tribunal is provided, and such an assumption on the part of the jury necessarily defeats the due and orderly administration of justice. Accordingly, juries have seldom been guilty of such a breach of duty, except in times of high political excitement.

We had considered this question "at rest," and that there had been an acquiescence and concurrence of opinion as to the correctness of this doctrine among the profession, "time whereof the memory of man runneth not to the contrary." But two instances, before the present, have occurred in this State, where a different doctrine was contended for, within the recollection of either member of this Court. One, before the act of 1844, in the times of the excitement about nullification, upon an indictment of the editors of a newspaper for a libel. The other, since that time, under very peculiar circumstances.

One of the counsel for the prisoner informed us that he entertained a different opinion upon the subject; and although he was compelled to admit that the general impression of the profession, and the practice of our Courts, had been to the contrary, yet he believed that, upon principle and authority, particularly since the act of 1844, juries not only had the power, but the right, to decide the matter of law involved in the issue; and he called our attention to a very elaborate opinion in STATE v.

CROTEAU, in 1849, by the Supreme Court of Vermont, 23 Verm. R. 14, in which it is so held.

We listened attentively to his learned and ingenious argument, but it failed to remove from our minds a deep conviction that such cannot be the law. By the ancient law, jurors were at liberty to find the facts from their own personal knowledge. Now, it is conceded on all hands, that they must find the facts from the evidence only; and it is to us equally clear that they must take the law from the Court only. The evidence is the means provided by which they are to know the facts: the instruction of the Court, that, by which they are to know the law.

While preparing this opinion, I met with one with which HARGRAVE, in his notes to COKE, favored the profession. It is so learned and convincing that I will content myself by adopting it as a part of this opinion.

"In respect to my own ideas on this subject, they are at present to this effect.

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact: such a verdict necessarily involving both. In this I have the authority of LITTLETON himself, who hereafter writes, that if *the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.*"—Post. sec. 368, and fol. 228.

But, on the other hand, I think it seems clear, that questions of law generally and more properly, belong to the Judge; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice: this appears from various considerations.

I. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are determined by the Judges, and only issues of fact are tried by a jury—Ante. 71 b.

II. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury, for in that case the law is reserved for the decision of the Court from which the issue of fact comes, and the jury is either discharged, or at the utmost only ascertains the damages.—Ante. 72 a. Doug. Rep. 127, 213; Buller's Nisi Prius, 2d edit. 313.

III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the Judge, who presides at the trial, to inform them what the law is; and as a check to the Judge in the discharge of this duty, either party may, under the Statute of Westminster, the 2d, c. 31, make his exception in writing, to the Judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See Post, 2d Inst. 426; Trials per Pais, 8th ed. 222, 466; Case of Fabrigas and Mostyn, in xi State Trials; Case of Monrey and others v. Leach, 3 Burr. 1742; Buller's Law of Nisi Prius, 2d ed. 313.

IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the Judges of the Court, from which the issue comes. Formerly, indeed, it was doubted whether, in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Downman's case, 9, Co. 11, b, and the rule now holds both in criminal and civil cases, without exception. See Post 227; 6 Staunf. Pl. c. 165 a; Major Oneby's case, 2d Lord Raymond 1494.

V. Whilst attaints, which still subsist in law, were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprised of it by the Judges; because, if they mistook the law, they were in danger of an attaint. Post 228 a; Hob. 227; Vaugh. 144; 2 Hal. Hist. Pl. C. 310; Gilb. Com. Pl., 2d ed. 128.

VI. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to control the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staunf. Pl. C. 165 a; Plowd. 114 a. b. 4 Co. 42 b; Hal. Hist. Pl. C. v. 1, p. 471, 476, 477 and v. 2, p. 302.

VII. The Courts have long exercised the power of granting new trials in civil cases, where the jury find against that which the judge trying the cause, or the Court at large, holds to be law, or where the jury find a general verdict, and the Court conceives that, on account of difficulty of law. there ought to be a special one. KING v. POOLE, Cas. B. R. temp., Hardwicke 26. Though, too, in criminal and penal cases, the Judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis punitur aut vexatur pro eodem delicto*, or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shows that on that account an exception is made to a general rule. 4 Black. 8th ed. 361; 2 L. Raym. 1585, 2 Stra. 899; 4 Co. 40 a, and Wingate's Maxims 695. But see 6 T. R., 638, where the rule laid down is, that in crimes above misdemeanor, there can be no new trial at all, but that in misdemeanor it may be granted to examine again in either guilt or innocence.

Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law is entrusted to the Judges; that in a jury it is only incidental; that in the exercise of this incidental right, the latter are not only placed under the superintendance of the former, but are in some degree controllable by them; and therefore that, in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendations of judges. In favor of this conclusion, the conduct of juries bears ample testimony; for, to

their honor, it should be remembered, that the examples of their resisting the advice of a Judge, in points of law, are rare, except where they have been provoked into such an opposition, by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity, by the misrepresentation and ill practice of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the Judge recommends their so doing; and though, in criminal cases, special verdicts are not frequent, it is not from any averseness to them in juries, but, from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that, in consequence of it, every person accused of a crime is enabled, by the general plea of not guilty, to have the benefit of a trial, in which the Judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a Justice of the Peace; which exception, from the necessity of the times, is continually increasing, but which, however, cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of Judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachments of ill-designing judges, or the wild presumption of licentious juries." Co. Litt., vol. 1, p. 155 b. n. (5.)

As to the case cited in the argument, it is met by the case of UNITED STATES v. BATTISTE, 2 Sum. Rep., 240, and COMMONWEALTH v. PORTER, 10 Metc. 263. These cases are noticed in the case from Vermont, and although opposed with much labor and ingenuity, are by no means satisfactorily answered.

Such having been the law and the practice, and course of our Courts, the next question is, was the act of 1844 intended, or does it have the effect of changing the law?

The act is in these words: "In all jury trials, the parties or their counsel have a right and shall be allowed to argue to the jury, their whole case, as well of law as of fact."

The argument is, for what purpose argue the law to the jury, unless they have the right to decide upon the law? *Ergo*, the jury have the right, and it was the intention of the Statute to confer it.

The right, if conferred, is by inference, merely—therefore, if any other reason for allowing the law to be argued to the jury can be suggested, except that of an intention to change the law, the inference must fail, because it would be indecent to suppose that the Legislature intended, in a covert and insidious way, to make so important a change in the law—a change which, they were aware, would strike every member of the bar as well as the bench with utter surprise, if the act can be accounted for in any other manner.

Indeed, we cannot admit the supposition of an intention to make so great an alteration in the law by inference merely. If such had been the intention, the bill would have set it out in so many words, so as to give opportunity for that full discussion which the importance of the subject would necessarily have elicited. But the reason for passing the Statute is obvious without the necessity of making any inference about it.

To give a general verdict, three things are necessary. The jury must learn the facts from the evidence; they must learn the law from the Court, and then make the application of the law to the facts. Now, it was known that juries were greatly assisted by the argument of Counsel in understanding the evidence and learning the facts therefrom; and it seemed to the Legislature they might also derive some, if not the same degree of, assistance from the argument of Counsel, in enabling them to understand the charge of the judge, and in learning the law therefrom, so as to be the better able to make the application and return their verdict. No good reason was seen why the jury should not have the benefit of this assistance.

That such was the only purpose of the Statute is manifest from the words used and its unpretending general appearance. That such was the light in which every body regarded it, is also manifest, from the fact that more than ten years elapsed before it was ever suggested that it could be made to have any other meaning, and, by inference, be made to have any other effect. But for this universal impression, it is not to be believed that the Counsel of some one of the many criminals, who have been convicted and executed during that time, would not have thought it to be his duty, *provided the law allowed it*, to appeal from the opinion of the Judge, which he knew was against him, to the better knowledge or more tender mercies of the jury.

The argument proves too much. The case from Vermont and the others cited confine the supposed right of juries to State cases, but this Statute embraces "*all jury trials.*" So, if the right to decide the law is conferred in State cases, it is conferred in all, as well civil as criminal.

After this, the inference, in order to make the right of juries effectual, must be extended—so as to take from the Court the right to give a new trial in any case, because the jury disregarded the instructions; for they had a right to do so: Otherwise, why should the law be argued to them?"

There is no error. This opinion will be certified to the end that sentence may be pronounced according to law.

Judgment affirmed.

THE STATE v JOHN CORBETT.

Where an indictment alleges a cheating in an executed contract, and the proof establishes an attempt to cheat in an executory contract, which was abandoned before its consummation, the variance is fatal to the prosecution.

State *v.* Corbett.

THIS was an indictment for cheating, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Bertie Superior Court. The indictment was as follows:

BERTIE COUNTY, SCT.,
Superior Court of Law, Fall Term, 1852.

"The jurors for the State, upon their oath, present that John Corbett, late of said county, at and in Bertie county aforesaid, on the 10th day of August, in the year 1852, and from thence until the taking of this inquisition, did use and exercise the business and calling of making, putting in barrels, and selling tar, and during that time did sell the said tar by measure or barrels, and that the said John Corbett then and there, and during the space of time aforesaid, fraudulently intending and contriving to cheat and defraud all the good citizens of the State aforesaid, whilst he so exercised his aforesaid business, did then and there knowingly, wilfully, fraudulently, and deceitfully put and place and cause the same to be done, large quantities dirt, earth, and stones inside of and into a certain barrel of tar, and did then and there mix together, within the said barrel, the said tar with such dirt, earth, stones and rubbish, so as to cause the said barrel to be and appear as and for a barrel of tar; and that the said John Corbett afterwards, to wit, on the day and year aforesaid, (the he said John Corbett, well knowing the aforesaid barrels to be so as aforesaid, filled with the said dirt, earth, stones and rubbish, mixed in with and concealed by the tar in the barrel) did knowingly, fraudulently and deceitfully sell and deliver unto Kader Biggs and William P. Gurley, the said barrel so as aforesaid, filled with said dirt, earth, stones and rubbish, mixed with the tar aforesaid, as and for a barrel of tar; whereas, the said barrel was then and there filled with dirt, earth and rubbish, mixed and concealed with tar therein, to wit, at the county aforesaid, on the day and year aforesaid, against the peace and dignity of the State.

The jury found a special verdict as follows: "That the defendant was a farmer; that he occasionally made tar and sold it in barrels—that one month before the indictment was found, the defendant sent by an agent six barrels of tar to the town of Windsor, Bertie county, to be sold by the agent: that the tar was carried in carts and stopped near the landing at the river, at which landing it is usually discharged from carts which carry tar to Windsor; that while the carts were left standing, the defendant's agent went a quarter of a mile to the store of a merchant, where the latter offered him the usual price of good tar for those six barrels, which offer the defendant's agent accepted: —that the Clerk of the merchant, thereupon, by the direction of his principals, went to the river to receive the tar, and on getting there, the carts were brought forward and the tar discharged: that the Clerk, as was his custom, inspected the tar, and found two barrels of it pure and merchantable: that two other barrels contained a portion of dirt, while the last two were nearly full of clods and dirt, which clods were not penetrated by the tar, and were of so large a size as they could only have got there by design. The jury found that the dirt and clods were put into the said barrel for the purpose of cheating: that the existence of the said dirt and clods were easily detected by the use of the inspecting rod; that upon ascertaining the extent of the dirt and clods, it was agreed between the clerk and the defendant's agent, that the four barrels, so containing dirt and clods, were equal to three, and should be settled for as such; that they were thus settled for. The jury found that the said dirt and clods were in the barrels before they were sent. Upon the foregoing facts, the jury say they are ignorant whether in law defendant is guilty or not guilty, and they refer the question to the Court, finding the defendant guilty, if in the opinion of the Court he is guilty; and not guilty, if in the opinion of the Court he is not guilty."

His Honor, being of opinion that the defendant was not guilty, gave judgment in his favor, and the Solicitor for the State appealed.

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

PEARSON, J. We will not decide whether the matter charged in the indictment constitutes an indictable offence, as the question is not presented by the facts stated in the special verdict; and a decision of that point is consequently not called for.

There is a fatal variance between the allegations of the indictment and the proof. An *executed* contract is alleged; whereas, the proof shows only an *executory* contract: And the fact is, that before the contract was executed, the fraudulent mixing in of dirt, &c., was discovered, which caused an abandonment of the original executory contract, and a new contract was then made and acted upon, in which there was no fraud; for the presence of dirt was then known and admitted, and an allowance was made to cover it.

Judgment affirmed.

STATE v. JONATHAN BAKER.

Where the wound is adequate and calculated to produce death, it is no excuse to show that had proper caution and attention been given, a recovery might have ensued. Neglect or mal-treatment will not excuse, except in cases where doubt exists as to the character of the wound.

If, after words of anger, the slayer took up an axe, and approached the deceased with a present purpose and design to take away his life, or do him some great bodily harm, and the deceased had sufficient grounds to believe that such was the intention of the assailant, he had a right to strike in self-defence, although the assailant was not yet in striking distance, and such striking by the deceased will not amount to a legal provocation to mitigate the killing to manslaughter.

Where an indictment charged that the blow was given on 27th of December, and that deceased then and there instantly died, and the evidence was that he lived for twenty days after receiving the blow, and then died, it was HELD, that the variance was not material.

This was indictment for murder, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Cumberland Superior Court.

The case is fully set forth in the opinion of the Court.

Attorney General for the State.
Banks for the defendant.

NASH, C. J. The correctness of the opinion delivered on the trial of the case below, rests upon the testimony which was beforethe jury. It is necessary, therefore, to examine it, in order to estimate its bearing upon the law. The blow which was received by the deceased, was inflicted by the prisoner about eight o'clock, of the night of 26th December, 1853, and the death ensued on the 15th or 16th of January, 1854. George W. Gibson testified that he was at Hays, about half a mile from Prince's Shop, the night that the affray took place, and that between six and eight o'clock, the deceased and prisoner had a fight—they were parted, and Hays took him into his house and fastened the door, and very shortly thereafter some one knocked at the door and enquired for Edwards, the deceased. The latter then went out at the back door and went off—the witness did not know who it was knocked at the door.

Currie, a witness for the prosecution, stated, that about eight o'clock of the night of the 26th of December, 1853, he went to a store, about half a mile from Rock-fish village, where he found Prince, the keeper of the store, and the deceased. In a short time the prisoner came up with his axe upon his shoulder, and sat it down a little way apart, and accosted them in the usual way. In a short time, the deceased, alluding to a fight on that evening, between him and the prisoner, observed, "Baker, I am sorry I had to hurt you this evening, but I could not help it. I had to protect myself." The prisoner observed, "It was too late to talk that way now—when a man whipped him when he was drunk, he would not stay beat." The prisoner and the

deceased talked the matter over in a friendly way, walked off a short distance and came back apparently friendly; the prisoner sat down on a chair, and the deceased on the ground near him, and to the fire, which was burning out of doors. Baker asked for some liquor, which was brought out by Prince; the prisoner and the deceased began again to quarrel—angry words were passed between them, and deceased observed, "he would settle it when Baker got sober," when Baker said "No, we will settle it now." The witness was asked by the prisoner to drink some of the liquor, and upon his refusal, threw it into the fire, and walked off some eight or nine paces to where his axe was, picked it up and advanced with it in a half drawn position towards the fire where the deceased was still sitting. The latter said, "Are you going to kill me with that axe?" The prisoner made no reply, but still advanced with the axe in the same position, elevated, and the handle and blade held out in front of his body, but not drawn back. The deceased then said "stand off," (the prisoner still advancing,) "if you come any nearer, I will knock you down;" and took from the fire a burning stick of wood, and threw it at the prisoner, which struck him on the shoulder and back, and caused his knees to bend or give way under him. At the time the prisoner received this blow, he was not near enough to strike the deceased, but was some eight or nine paces from him, and advancing towards him when struck. Immediately after receiving the blow, he pressed upon and after the deceased around the fire, and struck him one blow upon the head with the axe. The deceased, with the assistance of Prince and the witness, walked to the village of Rock-fish, where he was taken into house of the prisoner by his directions. On the next day the deceased was walking about, when the same witness observed to the prisoner it was fortunate that *he* was present, as he might have killed the deceased. The prisoner replied with an oath "that was what I intended."

The physician who was called in, after describing the wound, stated that it was a mortal wound, and the deceased died from

its effects. He could not say whether or not, under skilful treatment, he would have recovered: worse cases are reported as having been cured by treatment.

The prisoner's counsel then offered to introduce testimony to show that deceased died in consequence of severe exposure and mal-treatment of the wound, and mistreatment of himself, in walking seven or eight miles, and drinking whiskey, and further offered to call on Dr. Black, who had seen the deceased, but did not examine the wound.

The presiding Judge, after hearing what the counsel intended to prove, remarked that he deemed it proper to inform the counsel what he understood the law to be, and what instructions he should give the jury, which he repeated as stated in his charge, and should leave it with the counsel to introduce the evidence or not, as they, in their discretion, might see proper. The counsel declined to offer any evidence.

In his charge, his Honor gave the instructions to the jury, intimated to the counsel; and although they acquiesced in the propriety of the instruction of the Court, by declining to introduce any evidence, thus availing themselves of the right to close the argument to the jury—still, if the charge was, in this particular, wrong, it was an error in law, entitling the prisoner to a *venire de novo*. The testimony of the attending physician was brought to the notice of the jury, and they were instructed, "If these facts were believed by the jury, the law held the prisoner responsible. For when the wound is adequate and calculated to produce death, it would be no excuse to show that had proper caution and attention been given, a recovery might have been effected. Neglect or mal-treatment would not excuse, except in cases in which doubt existed as to the character of the wound; hence if the testimony and opinion of the physician were to be relied on, it was for the jury to say whether there was any ground for doubt." In this opinion we entirely concur. It is supported by the highest authorities. In Hawkins' Pl. C. book the 1st, ch. 13, s. 10, it is stated, if a person hurt by another dies thereof,

within a year and a day, it is no excuse for the slayer, that he might have recovered, if he had not neglected to take care of himself. So Lord HALE, 1st vol. Pl. C., 428, says: "If a man give another a stroke, which it may be is not *in itself* so mortal, but that with good treatment he might be cured, yet if he dies within the year and day, it is a homicide or murder, as the case is, and it has always been so held. But if the wound *be not mortal*, but with ill-application by the party, or those around him, of unwholesome salves or medicines, the party dies, if it *clearly appears that the medicines, and not the wound*, was the cause of the death, it seems it is not homicide, but then it *must clearly and certainly appear to be so.* Neglect or disorder in the person who received the blow, will not excuse the person who gives it. In REEVE'S case, Kelynge, 26, it was resolved, "that if one gives a wound to another, who neglects the cure of it, and is disorderly and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter, according to the circumstances of the case, because if the wound had not been given, the man would not have died. If the death be truly owing to the wound, it is immaterial, that under more favorable circumstances and with more skilful treatment, the fatal consequence might not have resulted." Thus, if an artery be opened, by the blow or wound, it will be no defence to show that by the assistance of a surgeon, the wound might have been staunched, and life preserved. Roscoe's Cr. Ev., 575. There was, then, no error in the charge of his Honor upon this point. The question as to the nature of the wound, and the cause of the death, was properly left to the jury.

The second branch of the charge was as favorable to the prisoner as well could be. His Honor confined the attention of the jury carefully to the transaction at the fire in the yard at Prince's, throwing out of view entirely the previous fight at Hays', the same night. The jury were instructed that if the testimony were believed, the case was one either of murder or manslaughter; and whether one or the other, would depend mainly upon

the view which they might take of what took place at the time when the blow was given; for, as the parties had made friends, if a legal provocation was given, the conduct of the prisoner was to be ascribed to that, and not to any previous quarrel. The charge then proceeds: "If after words or anger, the prisoner had taken up his axe and approached the deceased with a *present purpose and design* to take away his life, or to do him some great bodily harm, and the jury should, from the facts, be of opinion, that the deceased had sufficient grounds to believe that such was the intention of the prisoner, after the enquiry, and warning given, he (the deceased) had the right to defend himself, and the throwing the chunk of fire, though the prisoner might not have been within striking distance, would not furnish such a legal provocation as to excuse the act of the prisoner, and it would be a case of murder." The Judge then places the case upon the opposite hypothesis, that the prisoner had no present intention, and leaves it as a proper enquiry for them, and closes with the usual charge as to reasonable doubt. There can be no doubt of the correctness of the charge upon this point in the view which his Honor took of the reconciliation. According to the evidence, when the prisoner advanced towards the deceased, it was with a deadly weapon, raised after a quarrel; the deceased challenged him as to his intention of killing him; the prisoner made no reply, but continued to advance upon him; he was told if he did not stop, the deceased would knock him down; this threat did not stop him; the deceased was unarmed, and when the prisoner was within eight or nine steps of him, not near enough to strike, the deceased threw the chunk. He then endeavored to make his escape; the prisoner pressed upon him while so retreating, and gave the fatal blow. Death ensuing, the prisoner was guilty of murder. If, when the prisoner was advancing upon the deceased with his axe, the latter had killed him, he would have been justified in law. A man may kill another who assaults him in the high-way to rob or murder him. So may any man justify a homicide to pre-

vent the person slain from committing a felony, Haw. b. 1, ch. 10, s. 21. Now, was it necessary for the deceased, in this case to wait until the prisoner got near enough to strike with his axe? In such case it might be too late to protect himself. Thus, if a man is advancing upon me with a drawn sword, or a loaded pistol, with the avowed purpose to kill me, I am not called on to wait until he gets within the distance necessary to enable him to execute his purpose, but the law allows me to arrest his progress at any moment my safety demands it. The deceased then had a right to strike the prisoner with the chunk of fire, as stated in the case, and it was not in law a legal provocation to extenuate the killing of the deceased into manslaughter, 4 Bl. Com. 180.

After the verdict was rendered, the prisoner through his counsel, moved for a new trial, and in addition to the grounds growing out of the case as before stated, it was objected that the evidence did not support the charge contained in the indictment. The indictment charges that the blow was inflicted on the 27th of December, 1853, and that the deceased *instantly died;* whereas, by the evidence, the blow was inflicted on the night of the 26th of December, 1853, and the death ensued on the 15th or 16th of January following. In cases of homicide, the day of the stroke, as well as that of the death, should be expressed: the former, because, by the law of England, the escheat and forfeiture of lands relate to it; and the latter, because it should appear that the death was within the year and day after the stroke. The latter is the only reason applicable to the rule in this State, as we know nothing of forfeitures for felonies. Unless the death occurs within the year and day after the stroke, there is no felonious killing. 1st Ch. Cr. L., 222. Hawkins book 2, ch. 25, says: "Although an indictment, not alleging any time, would be bad, yet it never was necessary upon any indictment to prove that the offence was committed upon the particular day charged." Roscoe's Cr. Ev. 85; 1st Phil. Ev. 203, showing by the evidence that the death ensued within the year and day from the infliction of the blow is sufficient.

We concur with his Honor in each branch of his charge, and there is no error. This opinion will be certified to the Superior Court of Cumberland, which will proceed to judgment according to law.

PER CURIAM. Judgment affirmed.

STATE v. ABRAM THOMASON.

Where, on a trial for murder, the declarations of the deceased have been offered in evidence, and an attempt has been made on the other side to destroy the effect of such declarations, by showing the bad character of the deceased: the State, for the purpose of corroborating the evidence, may prove that the deceased made other declarations to the same purport, a few moments after he was stricken, though it did not appear that he was then under the apprehension of immediate death.

THIS was an indictment for the MURDER of one Ivey Jones, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Brunswick Superior Court.

The case sufficiently appears from the opinion of the Court.

Attorney General, for the State.
Wm. A. Wright and J. H. Bryan, for defendant.

NASH, C. J. No objection is raised as to the charge. In the course of the trial, one Woollard was examined in behalf of the prisoner. Before he was called, Dr. Lucas had been examined by the State, who testified that he saw deceased on Saturday morning after the affray, which took place on the night before. The deceased had three wounds—one on the hand, another on the breast, and a third in the abdomen, which had entered the cavity, and the bowels had been out, and he thinks the last

wound was mortal. He saw the deceased again on Tuesday morning, when he found him dying, and told him so, when the deceased told him the prisoner had done it, and told him the manner. Woollard stated that, on the night of the occurrence, hearing a noise, and some one exclaiming, "I am stabbed or cut," he went to the spot, and found the deceased lying on the ground, in the arms of a free negro, and asked him, who did it. Jones replied, Thomason. This question and answer were objected to on the part of the prisoner, on the ground that there was no evidence that, at the time, Jones thought himself in a dying condition. This testimony was admitted by the Court, upon the ground that it was made a few moments after the transaction, and as confirmatory of the dying declarations, as proved by Dr. Lucas, as the character of Jones for truth had been assailed by the prisoner. We think the testimony was admissible, as confirmatory of the declaration as proved by Dr. Lucas. The doctrine of confirmatory evidence has been repeatedly before this Court, and in MARCH v. HARRELL, decided at the present term, the authorities were all cited and critically examined, and it is not necessary to review them. That case decided, that, whenever the character of a witness is for any cause impeached, his previous declarations are evidence to sustain him. The declarations of the deceased, made to Dr. Lucas, were clearly admissible as dying declarations: Of the weight to which they were entitled, the jury were the exclusive judges. To weaken or destroy their force, the prisoner proved that Jones' character for truth was bad. The declaration made to Woollard was clearly, therefore, within the principle recognised in Harrell's case.

There was no error in the judgment of the Court below, in the admission of testimony.

This opinion will be certified to the Superior Court of Brunswick county, that it may proceed to sentence according to law.

Judgment affirmed.

STATE v. SAMUEL E. MOORE.

Where, by a private act of Assembly, a County Court is forbidden to grant a license to retail spirituous liquors by the small measure, within the limits of an incorporated town, without a written recommendation from the Board of Commissioners of such town, and it appears from the records of such Court that they granted a license thus to retail without such written recommendation, the person obtaining such license is not thereby protected from an indictment.

THIS was an indictment tried before his Honor Judge CALDWELL, at the Spring Term, 1854, of Edgecombe Superior Court.

By a private act of Assembly, entitled an act for the better regulation of the town of Tarboro', it is provided that the County Court of Edgecombe "shall not grant a license to any person to retail spirituous liquor by the small measure, within the corporate limits of the town of Tarboro', without a written recommendation from the Board of Commissioners of said town."

Notwithstanding the provision above mentioned, the County Court of Edgecombe did proceed to grant a license to the defendant, to retail spirits within the limits of the town of Tarboro', and a record was made and entered upon the Minutes of that Court, as the evidence of that proceeding, which is as follows:

"Samuel E. Moore, a citizen of Tarboro', comes into Court and moves for a license to retail spirituous liquor. He proves, by two respectable witnesses, that he is a man of good moral character, and a suitable person to retail spirituous liquors. But, failing to produce to the Court the written recommendation of the Commissioners of the Town of Tarboro', he in excuse alleges that there has been a fraudulent combination or purpose of the Commissioners aforesaid, to suppress all retailing of spirituous liquors in said town, by a measure less than a quart, by refusing a recommendation to all persons who may apply to them. The applicant then proved to the Court that each of the Commissioners had been heard to say that they would not re-

commend any person for license to retail in said town. It was further proved that there are only two retail shops in the town of Tarboro', and that the license of each would expire in a few days after the present term of this Court, and that there had been no other application to the Commissioners for a recommendation for license to retail, and that the applicant was the only person who had moved the Court for license to retail in the town, and that at least one retail shop in the town was necessary. Mr. Hugh B. Bryan, one of the Commissioners, being in Court, states that he had no objection to the character of the applicant—thought that he was a suitable person to retail, but, believing there was no necessity for a retail house in the town, that he would refuse to recommend any one who would apply. The applicant, by his counsel, insisted that he had proved a fraudulent combination on the part of the Commissioners to suppress retailing spirituous liquors, which was a sufficient ground for the Court's hearing the case and granting a license, as in other cases. The Commissioners of the town, by their counsel, insisted that there was no fraudulent combination or purpose, to withhold license, proven; but, if there was combination proven, the Court had no power to grant license, as they were forbidden to do so by act of the General Assembly, passed at the session of 1831-'2, chapter 66, sec. 6, without the written recommendation of the Commissioners of the said town."

"After hearing arguments of counsel, it is ordered by the Court, that the applicant have permission to retail spirituous liquors at his store in the town of Tarboro', for twelve months."

The defendant was indicted in a bill containing several counts: 1st. For retailing to one Littleton Walston, without a license to retail, against the form of the Statute, &c.; 2d. For retailing, in Tarboro', to the same person, without a license granted by the County Court of Edgecombe, upon the written recommendation of the Commissioners, against the form of the Statute, &c.; 3d. For retailing to the same person, in the town of Tarboro', without a license, against the form of the act of 1831; 4th.

For retailing with a license, but not with one obtained according to law, against the form of the act of 1831; 5th. As in the fourth count, but concluding against the "Statutes," in such case made and provided.

It was proved that the defendant did retail spirituous liquors within the year from the date of the license, within the limits of the town of Tarboro', and the Court being of opinion that he was not protected by the license granted by the County Court, so instructed the jury, who found the defendant guilty.

Motion for a *venire de novo*. Motion over-ruled. Judgment and appeal to this Court.

Attorney General, for the State.
Moore, for the defendant.

NASH, C. J. The defendant is indicted for selling spirituous liquors in the town of Tarboro', and the question arises under a private act of the General Assembly, passed in the year 1831, entitled "an act for the better regulation of the town of Tarboro." See Laws of North Carolina, 1831, ch. 66, s. 6.

By the general law of the State, the several County Courts, seven Justices being on the Bench, are empowered to grant licenses to individuals to retail spirits by the small measure—that is, less than a quart, Rev. Stat. ch. 83, s. 7; but they are not at liberty to grant such license to any one, who does not prove by at least two witnesses of known respectability that they have known the applicant's character for one year at least, and that his moral character is good. This amounts to a prohibition to the magistrates to grant a license upon any other terms; and it is a gross violation of their duties as Judges, if they grant a license, without such proof of his good moral character. Tarboro' is an incorporated town, and has a Board of Commissioners, invested with the usual powers to pass laws or ordinances for its regulation and government. At the request, no doubt, of the citizens of the place, the act of 1831 was passed. The power and right to grant licenses to retail spirits in

the town of Tarboro' was left in the hands of the County Court; but the evidence of the moral character of the applicant was changed to the Commissioners. The latter body, to whom the regulation of the police in other respects is committed, are chosen by the citizens themselves—men of integrity, information and discretion, and, it was presumed, would be well acquainted with the moral character of every man who might apply for a retailing license. Being themselves citizens of the town, and clothed with an important office, it was presumed that their recommendation would, to the magistrates, be a safer guide in the discharge of their responsible duties, than the evidence provided in the general law, in this respect. Upon this point, the language of the private act of 1831 is much stronger than that of the public act of 1836—so strong that no one can mistake its meaning and obligation. In the latter act, the language is, "that the County Court *shall not* grant a license to any person, &c., without a *written recommendation* from the Board of Commissioners," &c. Not from the Commissioners, as individuals, but as a board of public officers—not simply that the applicant is a man of good moral character, but must be recommended—not proved to the Court orally, but it must be in writing, that the Court may have upon its files the evidence upon which they have acted—thus placing the responsibility of their action where the law intended it should rest. Has this command of the law in this case been obeyed? On the contrary, the action of the Court has been in direct violation of it. It is said, however, that we cannot look behind the license, as it was granted by a Court having jurisdiction. Where a competent tribunal acts within the scope of its authority, their action cannot be questioned in a collateral way. Until reversed, it is not to be controverted. But, when such a Court does act, and their own record shows it had no power to do the act, their judgment is void, and conveys no authority. In the case before us, the record of the County Court shows that it was made known to them that the defendant had applied to the Commis-

sioners for a recommendation, and they had refused it. The record then proves they had no authority to grant the license, and it was void, and conveyed to the defendant no authority to retail spirituous liquors by the small measure, in the town of Tarboro'.

It was also insisted, that the Commissioners were guilty of a fraud in not agreeing to issue license to any one. There is no evidence of any fraud whatever, and the charge is fully answered as to the agreement, by the cases of YOUNG v. JEFFERS, 4th Dev. and Bat., and the ATTORNEY GENERAL against the JUSTICES OF GUILFORD, 5th Ired. 315.

The objection as to the conclusion of the indictment was not pressed here.

This opinion will be certified to the Superior Court of Edgecombe, to the end that the Court may proceed to sentence according to law.

Judgment affirmed.

STATE v. LYNN CURRY.

Where one strikes another a violent blow, with a heavy pole, pointed with iron, and a fight ensues, in which the assailed uses a deadly weapon, with which he knocks down his adversary and disables him, yet follows up his blows with great violence and cruelty and kills him: on account of the greatness of the provocation in the first instance, and the passion naturally produced by the conflict, this is but manslaughter.

THIS was an indictment for MURDER, tried before his Honor Judge CALDWELL, at the Spring Term, 1854, of Northampton Superior Court.

The prisoner and the deceased, both free persons of color, started from Gaston to ascend the Roanoke River in a loaded

boat, assisted by a slave, the deceased being the manager. After rowing up the river three-quarters of a mile, they were heard quarrelling by a witness then about one hundred and fifty or two hundred yards behind them in another boat. When the witness first heard them quarreling, the prisoner was standing in the bow, and the deceased in the stern. The witness stated that their boat was gaining on the boat in which the prisoner and deceased were; the latter was somewhat drifting with the current. During the quarrel, and when within about a hundred yards of the other boat, he saw the prisoner striking at some one in the bottom of the boat, at which time it was drifting, and continued to drift towards them; that the deceased so being stricken was near the stern, a little in advance of the point where he first saw him; that the prisoner continued striking until the boats were so near together that he could discover that it was the person of the deceased on whom the blows were being inflicted; that he was lying on his back with his legs across a pushing pole, and that the prisoner continued the blows, giving the deceased five or six after he ascertained who it was.

The witness also stated that the weapon used by the prisoner, while beating the deceased, was what is called a *boat-slide;* that it was about eight feet long and three and a half inches wide, and two and a half inches thick, and had iron on each side near the ends; that he went into the boat where the deceased was lying, and washed the blood off his head and face, and said to the prisoner, "You have killed Harris," to which he replied, "Damn him, he is only drunk." The witness then asked the prisoner why he had done so, and he replied the deceased had stricken him first. The witness did not see the parties when they first engaged. The same witness testified, as did three others who saw the prisoner immediately after the occurrence, that there was a bruise or puncture on the cheek of the prisoner, and that it was bleeding.

This witness also testified that the pushing pole, over which the legs of the deceased were hanging, was some fifteen feet

long, had iron on its end, and was broken off at the end at which the iron was. The jailor testified that the prisoner was committeed to jail a short time after the occurrence, and that he had a bruise or cut over one of his eyes, and said that it was caused by blows given him by the deceased. The deceased died about twenty-four hours after the occurrence. Several witnesses who examined the deceased, before and after his death, stated that his arms were bruised, and one of them broken; that his scull was badly fractured—that there was blood on the brain, after the bones of the scull were removed; and that his head was bruised and bloody all over.

The counsel for the prisoner insisted that the testimony only made out a case of manslaughter, for that there was evidence that the deceased had stricken the prisoner two blows in the first instance.

His Honor charged the jury that the weapon used by the prisoner was a deadly one, and that even supposing that the prisoner had been stricken by the deceased, as insisted by his counsel, still, if they believed from the testimony that the prisoner knocked down the deceased with the boat-slide in the rencontre, and, when the deceased was so down, continued to beat him from the time when first seen striking, up to the time when the two boats came together; that with the deadly weapon described, he bruised and wounded him to the extent deposed to by those who examined the body of the deceased, that it would be a case where the violence inflicted was out of all proportion to the provocation, and would be murder on the part of the prisoner.

The counsel for the prisoner then moved the Court to charge the jury that if the prisoner and the deceased entered into the contest upon equal terms, and, during the rencontre, the prisoner killed the deceased, it would be but manslaughter on the part of the prisoner.

The Court thereupon told the jury, that the general principle laid down by the counsel, all malice apart, was correct; but it

did not apply to this case; for even supposing the prisoner to have entered into the conflict upon equal terms, yet, if he knocked down the deceased, and continued to beat him with the weapon described, and in the manner and to the extent testified to by the witnesses, it would be murder on the part of the prisoner.

Under these instructions, the jury, by their verdict, found the prisoner guilty.

Rule for a *venire de novo*; for error in the instructions given the jury. Rule discharged, and appeal to the Supreme Court.

Attorney General, for the State.
Barnes, for the prisoner.

PEARSON, J. If two men fight upon a sudden quarrel, and one be killed, it is but manslaughter, although the death is caused by the use of a deadly weapon.

But if, in such case, the killing be committed in an *unusual manner*, showing evidently that it is the effect of deliberate wickedness—malice, not passion, it is murder, although there be a high provocation.

It is well settled that this is the general rule and the exception. His Honor was of opinion that the case under consideration fell within the exception, and the prisoner was guilty of murder. There is error.

From the manner in which the case was put to the jury, the prisoner is entitled to the benefit of every inference that the jury were at liberty to draw in his favor; for, his Honor took the case from the jury, and instructed them that in the most favorable point of view, the prisoner was, according to the evidence, guilty of murder.

The facts, then, are to be taken to present this case: Two free negroes start for the purpose of carrying a boat up the river; in a short time they get into a quarrel: one seizes a pole fifteen feet long, the other a slide, or a piece of plank eight feet

long; the deceased gives the first blow, by a stroke or push with the pole, (which has an iron spike at the end,) making a bruise or *puncture* on the cheek of the prisoner, and a bruise or cut over one of his eyes; the pole is broken by being struck against the side or bottom of the boat; the prisoner gives the deceased a blow with the slide on his head, by which he is knocked down upon the bottom of the boat; after he is down, the prisoner continues to strike with the slide many times; how many times he struck cannot be determined; the deceased died twenty-four hours afterwards. A witness says he continued to strike from the time the boats were one hundred and fifty yards apart, until they got near enough to see that he was striking at deceased in the bottom of the boat—one boat floating down the stream, and the other passing up to meet it. An examination of the body shows that "the arms were bruised, and one of them broken. The scull was fractured, and there was blood over the brain. The head was bruised and bloody all over."

Suppose the arm was broken by one blow, the scull by another which knocked the deceased down upon the bottom of the boat; this natural evidence, furnished by the state of the body, about which there can be no mistake, for it is not under the influence of the imagination, shows that there could not have been many other blows inflicted, and the evidence can only be reconciled by supposing that after the deceased was down in the bottom of the boat, not more than one out of ten of the blows made with a plank eight feet long, could take effect upon the body of the deceased. So, the force of most, if not all the blows, stricken after the deceased was down, must have been spent upon the sides or bottom of the boat.

We must here observe, that the fact that the prisoner *continued to strike* with the slide, after the deceased was lying in the bottom of the boat, and did not punch or *job* with the end, which was the only way in which the slide could then have been used with deadly effect, tended strongly to show that he was acting under

the blind fury of passion, caused not merely by the provocation of a blow, but by the excitement of a fight.

Assuming these to be the facts, the question is, does the case fall within any exception, so as to be murder, and not manslaughter? Take a general view of the subject. If two men upon a sudden quarrel, get into a fist fight, and one, without giving notice, draws a knife, and stabs the other to the heart, or blows his brains out with a pistol, it is manslaughter, because, out of regard to the frailty of our nature, the killing is supposed to be the effect of passion, brought on by the high excitement of the fight. Does the case under consideration, where both parties seize upon weapons not prepared before hand, but of a most unwieldy kind, and continue to use the same weapons throughout the conflict, bear any comparison in regard to its enormity with the cases of manslaughter stated above?

To go more into particulars: In order to make the proper application of a rule of law, it is necessary to reflect and see upon what principle the rule is founded, although there be a great provocation, if the presumption that the party acted under it is rebutted, and it be shown that he acted from malice, the killing is murder. STATE v. JOHNSON 1 Ired., 354; STATE v. MARTIN, 2 Ired. 101. If one puts his adversary to death in an unusual manner, the fact of his going out of the usual way, shows that he acted deliberately, and not under the impulse of passion, which always moves strightforward. Such deliberation shows malice. This is the principle (and it is founded in our nature) upon which the exception is made. For instance, two men upon a sudden quarrel, engage in a bloody fight, and are separated; whereupon, one of them proposed to "drink as friends," and contrived to put poison in the cup of his adversary: this is murder; for, although there is great provocation, and the thing is done instantly, while the blood flows and the wounds continue to smart, still, it was not done in the way that passion influences men to act, and shows deliberate wickedness of heart, which amounts to malice. 1 Hale, 453. So, if two persons fight,

and one of them overpowers the other, and then puts a rope around his neck, and strangles him, it is murder. "The act is so wilful and deliberate, that nothing can justify it." REX. v. SHAW, 25 E. C. L. 443.

On the other hand, we will state two other cases which were held not to come within the exception—upon a sudden quarrel, the prisoner pushed the deceased down; he got up and struck the prisoner several blows in the face with his fist; the prisoner pushed him down again, and stamped him upon the belly and stomach two or three times, and as he was getting up, kicked him in the face, "the blood came out of the mouth and nose of deceased, he fell backwards, and died the next day." Held to be manslaughter. AYES' case, 1st Russel 496.

Upon a sudden quarrel, two draw their swords and fight, the prisoner runs his sword through the body of the deceased, and after he fell, took him by the nape of the neck, dashed his head upon the ground, and said, "d—n you, you are dead." JENNER, B., told the jury this was only manslaughter; but the jury were disposed to find it murder, because of the dashing of the head against the ground; but ALLISON, J., repeated to them that it was manslaughter only, and they found accordingly. WATTERS' case, 12 State Tri. 113. The cases put above of one who, after engaging in a fist fight, without notice, stabs his adversary to the heart with a knife, or blows his brains out with a pistol, are as strong, if not stronger, than either of the two; and the principle is established, that where there is a strong provocation, and the violence is but the natural and usual effect of passion excited to the highest pitch, the killing is but manslaughter. We, therefore, think his Honor erred in holding that the prisoner's case came within the exception, and that he ought to have instructed the jury that it was manslaughter only; for there was a strong provocation, greatly excited by the exchange of blows, and the many blows given, or attempted to be given, while the deceased was lying on the bottom of the boat, were but the natural and ordinary effect of blind passion or "furor brevis,"

as the books call it. Under such circumstances, a man is not expected to count his blows or note their violence.

The general rule is, that a killing upon legal provocation is manslaughter. There is a second exception—if the provocation be *slight*, or as Foster calls it "trivial," and the killing is done with a degree of violence *out of all proportion to the provocation*, it is murder. The exception is made upon the ground, that as the provocation was slight, such excessive violence cannot be attributed to it, and must proceed from wickedness of heart: malice, not passion. This exception, as a matter of course, only applies where the provocation is slight; for, if the provocation be great, the violence cannot be out of all proportion to it. Accordingly, Foster, in his Crown Law, 291 and 292, expressly confines it to "cases of homicides upon *slight* provocation;" and for illustration, refers to several cases. A., finding a trespasser upon his land, knocks his brains out with a hedge stake. This is murder, because of the excess of violence. A parker found a boy stealing wood. He bound him to his horse's tail and beat him: the horse took fright, ran off, and dragged the boy on the ground, so that he died. This was held to be murder. The judges laid much stress upon the fact, that the boy come down out of the tree as soon as he was bid, and made no resistance. So the provocation was slight. Crown Cases, 131.

A woman gave a soldier a box on the ear; he struck her in the breast with the pummel of his sword. The woman fled. He pursued and stabbed her in the back. "Holt was at first of opinion that this was murder. A single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear." But, afterwards, it appearing that the woman had struck the soldier in the face with an iron patten, and drew a great deal of blood, it was held clearly to be no more than manslaughter. This case, and the others put by Foster, show conclusively, that the exception we are now considering, only applies to cases where the provocation is slight. His Honor, in the first part of

the charge, held, that the prisoner's case fell within the exception, and failed to advert to the fact that the doctrine was not applicable, because there was strong provocation, and the excitement of a fight.

There is a third exception. If one, having the right to chastise, as a parent or master, exceeds the bounds of moderation, the killing, although he did not intend to kill, will be manslaughter, as a general rule. The exception is, that if the measure of the punishment, or the instrument used, is "likely to kill, due regard being always had to the age and strength of the party, the offence is murder" Foster, 262. As where a master corrected his servant with an iron bar, and a schoolmaster stamped on a scholar's belly, so that they died. 4 Blackstone, 199.

This exception has no bearing upon the case before us, but we thought it proper to state it, in connection with the two others, so that the whole might be presented, and the dividing line, between the three exceptions to the general rule in regard to manslaughter, might be distinctly marked.

1st. Where there is strong provocation, if the killing is done in an unusual manner, it is murder.

2nd. Where there is but slight provocation, if the killing is done with an excess of violence, out of all proportion to the provocation, it is murder.

3rd. Where the right to chastise is abused, if the measure of chastisement or the weapons used be likely to kill, it is murder.

We were induced to enter thus fully into the subject, for the purpose of explaining some general remarks that fell from the Court in the opinion delivered in the case of STATE v. JARRATT, 1st Ired., 86, which (as we suppose) misled the learned judge who tried the case below, by confounding the distinction between the 1st and 2d exceptions, so as to put a case of strong or "grievous" provocation upon the same footing with one where the provocation was slight and "trivial."

Judgment reversed. *Venire de novo.*

STATE v. ADMIRAL N. CADWELL.

A defendant, upon a trial for a clergyable felony, is entitled to challenge, peremptorily, thirty-five jurors.

THIS was an indictment for Grand Larceny, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Anson Superior Court.

The defendant claimed the right to challenge, peremptorily, thirty-five jurors, and having challenged four, offered to challenge the fifth juror, but the challenge was disallowed, and the juror taken and sworn.

Defendant excepted for error.

The jury found the defendant guilty.

Rule for a *venire de novo*, for error in the matter excepted to. Rule discharged. Appeal.

Attorney General, for the State.
Kelly, for the defendant.

NASH, C. J. The question presented for our consideration on this record, arises under the 19th sec. of the 35th ch. of the Revised Statutes. It is as follows: "Every person on trial for his life, may make a peremptory challenge of thirty-five jurors," &c. Was the defendant on trial for his life? Unquestionably he was. Simple larceny, where the thing stolen is of the value of twelve-pence sterling, is a felony punishable with death by the common law; and but for the Statutes for the amelioration of the law, granting the benefit of clergy, might be still so visited. The stealing, to the value of twelve-pence, is a capital felony. 4th Bl. Com. 238. But the prisoner will not suffer death for the first offence. He is entitled to the benefit of his clergy. The verdict of the jury, when they convict, is that the prisoner is guilty of the felonious stealing. In order to

avoid the extreme penalty of the law, he must, in answer to the question asked him by the clerk, "what he has to say why sentence of *death* should not be pronounced upon him," pray the benefit of his clergy, which is immediately granted him. In contemplation of law, by a conviction of a clergyable felony, the prisoner's life is forfeited. See STATE v. CARROLL, 5th Ire. 259. The prisoner in this case was indicted for grand larceny, and was, under the act of Assembly, entitled to his full, peremptory challenge of thirty-five jurors. And the denial of this right was error in the presiding Judge, entitling the prisoner to a *venire de novo.*

This opinion will be certified.

Judgment reversed.

STATE v. ROBERT G. WARD.

In an indictment for forcible entry and detainer at Common Law, if the verdict is a general one, and the evidence fails to support either branch of the charge, there must be a VENIRE DE NOVO.

Whether an indictment will lie at Common Law, for a forcible detainer, where the entry was peaceable: QUERE?

THIS was an indictment for a Forcible Entry and Detainer, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of the Onslow Superior Court.

The evidence on behalf of the State was, that the *locus in quo* was a small uninhabited island, lying between Brown's Sound and the Ocean, mostly a barren sand-beach, and principally fit for fishing. There was a sparse grove of live oak upon it, and some pasture land, suitable for grazing stock. There had been an old established fishing beach upon it. The lower side of the island was entirely unfit for agricultural purposes.

The prosecutor had gone upon the island three or four years before the entry complained of, and rented out the fishing beach for three successive seasons, which was known to the defendant. He had also erected a house, where the fishermen resided during the time referred to: had occasionally cut live oak on the premises wherever he pleased, and had generally kept hogs upon the land, but at the time of the alleged trespass, had removed them temporarily. The prosecutor exhibited a grant for the premises to one Freeman, (which was received without objection,) dated May, 1846. The prosecutor lived upon the main land, about one mile from the island. On the occasion in question, he saw a number of persons approach the island with boats, and, going over immediately, he found the defendant and eighteen others with nets and other fishing apparatus on the beach: they said they intended to fish there; the prosecutor forbade their doing so, when they replied that if James Ward would give them a bond of indemnity, they would fish at all hazards; and that he had gone to prepare one. Finding that they persisted in their resolution to fish in defiance of him, he returned to his place of abode. A few days afterwards, prosecutor returned to the island, and again ordered the party to leave, to which they replied that James Ward had given them a bond of indemnity, and that they intended to remain at all hazards. Prosecutor stated to them he would bring a jury and dispossess them, to which one of them in the presence of the others replied, that their number was greater than the jury, and if he brought them there, they would expel the jury and prosecutor with force. He then left them, and they remained and continued to fish the remainder of the fishing season. It was proved, by a witness for the defendant, that James Ward had landed on the island in the morning, but had gone off to prepare a bond, and did not return until the prosecutor had left. The defendant, through his counsel, contended that the prosecutor had no actual possession of the island at the time of the entry; but that the same was in the possession

of James Ward; that no person being present forbidding the entry, the same was peaceable.

The Court charged the jury "that they must be satisfied that the prosecutor had the actual possession of the premises in question, to sustain the charge contained in the bill, and that if his evidence was true, as to the character of the premises, the uses of which they were susceptible, and to which he had applied them, he had an actual possession, though he was not upon the island at the time of the entry: "That, notwithstanding the entry of James Ward before the others, early on the morning, and before the arrival of the prosecutor on the afternoon, if the prosecutor was deterred from maintaining his possession when he did arrive, by the threats of the defendant and his associates, and their numbers arrayed against him, and their demeanor upon the occasion produced the conviction in the mind of the prosecutor, and satisfied the jury, that any efforts to retain the possession would have proved unavailing, and on this account he relinquished it, this would be such a forcible withholding the possession as would make the defendant guilty of the forcible detainer charged in the bill."

The jury found the defendant guilty. Rule for a *venire de novo*. Rule discharged and judgment and appeal to this Court.

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

NASH, C. J. The indictment is at common law, and is for a forcible entry and detainer. The verdict is a general one of guilty. If the evidence fails to support either branch of the charge, there must be a *venire de novo*. We think the evidence does not support the charge of a forcible entry. Every forcible entry necessarily implies a breach of the peace, an indictable trespass. Both these parties, the prosecutor and the defendant, Ward, claim title to the *locus in quo*, which was an uninhabited island, neither being in the actual possession. The prosecutor

had been in the habit of using the island as a fishing ground, and for pasturing his cattle. At the time the defendant and his party entered, no person was on it but themselves, and after being there some time, the prosecutor went over and ordered them off. They refused to go, and announced their determination to retain possession by force, if necessary. This was certainly sufficient evidence to support the charge of forcible detainer, if it be indictable at common law. Does it show a forcible entry? We think not. The defendant entered peaceably, committed no indictable trespass; and when one makes a *peaceable* and lawful entry into land, no one being in the actual possession, he has a right to maintain that possession with force, if necessary; and the rightful owner has no right to take possession by force, but must resort to his ejectment, or seek redress under the act against forcible entries and detainers. STATE v. JOHNSTON, 1 Dev. and Bat. 325. Every forcible entry necessarily, as before stated, embraces a forcible trespass. Was there any such trespass here? In the case STATE v. WALKER, 10 Ired. 234, the Court decide, to make a forcible trespass indictable, some person must be in the house or on the premises. In JOHNSON'S case, the same doctrine is held as to the peaceable entry of the defendant. In the STATE v. MCCAULESS, 9th Ire. 377, the Court say, "the gist of a forcible trespass is a high-handed invasion of the *actual possession* of another, he being present." Here the entry of the defendants was a peaceable one. His detainer was forcible and indictable, but cannot relate back to the entry. The verdict is a general one, finding the defendant guilty both of the forcible trespass, and the forcible detainer: and his Honor charged the jury, if they believed the evidence, the defendant was guilty of the forcible detainer. In this there is no error. The indictment here is to be considered as if it contained two counts—one for a forcible entry and detainer, and the other, for a forcible detainer. When that is the case, and one of the counts is good and the other bad, a general verdict will be sustained, as having been given on the good count. But,

where both counts are good, and the evidence supports but one, and there has been a general verdict of guilty, it is manifest that the verdict cannot stand, for the judge cannot know on which count to punish the defendant. For this error there must be a *venire de novo.*

On the trial it was objected, that an indictment for a forcible detainer could not be sustained at common law. The question is not without its difficulties; and though we *now* give no opinion on the question, we very strongly doubt if it can. The doubt has several times been expressed in this Court. In JOHNSON'S case, *ubi supra*, p. 326, the Court say: "If an indictment will lie at common law for a forcible detainer, after a peaceable entry," &c. But we refrain from going into the subject, as it is not *necessary* to a decision of the present question.

Judgment reversed and a *venire de novo.*

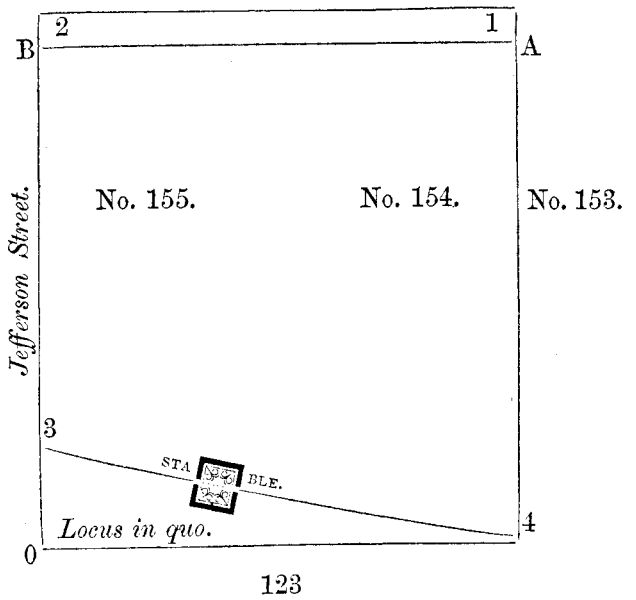
SAMUEL KISSAM v. SAMUEL T. GAYLORD.

Where A. takes a deed from B. for a part of a tract of land, they are both estopped by such deed from denying that B. had title, as to that part, and that it passed to A.; but such estoppel does not extend to the other part of B.'s land. In an action, therefore, against A. for trespassing on this omitted part, B., must show some other and better title than the estoppel, or he cannot recover, he having no actual possession of the LOCUS IN QUO.

THIS was an action of trespass *quare clausum fregit*, tried before his Honor Judge MANLY, at the Spring Term, 1854, of Washington Superior Court. Plea: *liberum tenementum.* (The same case was before this Court at December Term, 1852, and reported in Busbee's Law Report, 116.) The *locus in quo* was a portion of the lots designated in the plan of the town of

Plymouth, as numbers 154 and 155, and represented on the annexed diagram by the triangle 3, 4, 0.

DIAGRAM.



The plaintiff offered in evidence a deed to himself for the lots No. 154 and 155, also for lot No. 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 the said town as the upper parts of 154 and 155, upon which is located two store-houses, out-houses 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 153, thence along lot 153 to Water street, the first station."

It was in evidence that lots No. 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 two hundred feet, called for in the deed, and thence running eastwardly to the corner of the lots, would leave the defendant a trespasser.

The defendant contended that no title had been shown, and consequently no possession, (there being no actual possession of the *locus in quo ;*) but the Court held that there was title by estoppel as against the defendant, and a possession by construction.

The jury returned a verdict for the plaintiff.

Exception on account of misdirection, and after the judgment of the Court, defendant appealed to this Court.

Moore, for plaintiff.
Heath, for defendant.

PEARSON, J. At December Trem, 1852, it was held, that the general description in the deed, executed by plaintiff to defendant, was controlled by the particular description. So that the deed did not cover the whole lot, but left out a small triangle, which is the *locus in quo.*

Upon the last trial, the defendant took the ground that the plaintiff had not shown title, and consequently could not recover, as he was not in the actual possession, but the Court held "there was title by estoppel as against the defendant." There is error.

The plaintiff offered no evidence of title except a deed to himself by somebody for the whole lot. In regard to that part of the lot which is covered by the deed executed by plaintiff to the defendant, the parties are estopped. But what is there to

create an estoppel in regard to that part of the lot which is not covered by the deed?

We might content ourselves by saying there is no case or intimation in a text-book, that an estoppel ever extended to any thing which is not covered by the deed, out of which the estoppel grows, but it may be proper to go more fully into the subject.

The plaintiff claims title to the whole lot under one deed. We suppose his Honor yielded assent to this course of reasoning. The plaintiff's title is the same to every part of the lot. It is admitted his title to one part is good. It follows that his title to the other part must also be good; and, extending the syllogism, the title is the same to every part of the lot; the defenfant is estopped to deny the title as to one part, it follows that he is estopped to deny the title as to the other part.

Laying no stress on the fact, that when a deed operates by estoppel, it must do so *proprio vigore*, and can derive no aid from a collateral fact, such as that the plaintiff claimed title to the whole under one deed, we think it will be seen, upon a little reflection, that both of the above propositions are false.

The fact that the plaintiff claimed title to the whole lot under one deed, by no means sustains the major premise; that his title is the same to every part of the lot. It may well be, that the title of the person who made the deed to the plaintiff was good as to one part of the lot, and not good as to the other. So, although the plaintiff claims the whole lot under one deed, his title may be good as to one part, and not good as to the other.

If A. makes a deed to B., for a tract of 1,000 acres of land, and it be admitted that B., under that deed had acquired a good title to five hundred acres, a part thereof, it does not follow that he has a good title as to the other part. So, if B., (in the case put,) makes a deed to C., for 500 acres, a part thereof, although there is an estoppel as to the part covered by the deed, there is no ground for an estoppel, as to the part not covered by it. It may be, he did not include the whole, because he was aware of a defect of title as to a part.

We suppose his honor made the decision before he had taken time to clear away the confusion of *ideas* produced by propositions which, although false, were well calculated, at first blush, to mislead.

Mr. *Moore* yielded the position that a deed could not estop in regard to land not included in it, and pressed by the question. What is there to create an estoppel in regard to that part of the lot not covered by the deed, he says, it may be, there is no estoppel, technically speaking? As far as we are able to apprehend the idea he intended to suggest, his answer is this: "The defendant, upon the first trial, insisted that the deed executed by the plaintiff to him, covered the whole lot by its general discription. Failing in that, he insisted, on the second trial, that the deed covered the whole lot, because of some change that had been made in the location of Water street; and having thus, in a solemn manner, asserted that his deed covered the whole lot, which, by necessary implication, is an admission that the plaintiff, under whom he claimed, had title to the whole, he cannot be heard to say that such is not the fact; his mouth is shut; he is estopped."

Estoppels must be mutual. This is settled. That which shuts the mouth of one, shuts the mouth of the other. The plaintiff has not only been allowed to deny the allegation that his deed to the defendant covered the whole lot, but his right to recover depends (among other things) upon the fact that the deed does not cover the whole. The idea, therefore, that an estoppel or any thing in the nature of an estoppel, can grow out of the fact, that the defendant attempted to prove that his deed covered the whole lot, is out of the question. "*There never is an estoppel unless* both parties in a solemn manner, by word or act, agree as to a fact, and act upon such agreement, "then neither can afterwards be heard to gainsay it." IREDELL v. BARBEE, 9 IRED. 255.

The parties have agreed and acted upon the fact that the plaintiff had title to the part of the lot which is covered by his deed to the defendant. As to the other part, they have not, by word or act, agreed upon any thing.

We give no opinion upon the point made by the allegations of a change in the location of Water Street, because our opinion is not called for; and the point is not presented with clearness.

Venire de novo.

LEWIS AND JACKSON, v. JOHN W. KEELING.

The right of fishing in a navigable river is subordinate to the right of navigation.

A boat upon a navigable stream has a right to go to the bank when and where it is necessary to do so, and is not liable for damage done to seines drawn across the way, if such damage was done without malice or wantonness.

ACTION in the the case for negligently running into and injuring a seine, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of Hertford Superior Court.

As the correctness of the instruction given by the Court to the jury rests mainly on the evidence produced in the cause, it is deemed expedient to set it forth fully. The plaintiffs called one Taylor, who swore that they were engaged in fishing on Chowan river; that at the time of the alleged injury, the seine was partially drawn into the shore, the farthest part of it extending about four hundred yards outwards into the river; that the river was unobstructed for three fourths of a mile beyond the outer part of the seine, over any part of which outside space, the defendant could have gone with his boat. At this juncture, the hands at the fishery were engaged in taking in the seine, the two ends upon the shore being two hundred yards apart: A flat boat was stationed at the upper end, the bow of which was on the shore, and the stern towards the stream, at which they were taking in the seine and placing it in the boat, While thus situated, the steamboat of the defendant came

down the river, and when first seen, was on a course which would have taken her outside of the seine, had she kept it. As she approached, however, she turned suddenly in towards the shore, at the signal of a passenger standing on the beach near the fishing boat; she continued this course until within fifteen feet of the shore, when she came up against the stern of the fishing boat (upon which, in the meantime, the passenger had gone;) she was there entangled in the seine, which was lying and floating in the water near the stern of the boat, and it was thus torn. The steamer having taken the passenger from the flat, passed over the seine, tearing it apart, and proceeded down the river, passing over the lower part of the seine, and tearing that also: This was in the day time, the wind blowing freshly down the river. The plaintiff, Lewis, was upon the beach at the time, and after the boat's getting within the seine, expostulated with those in charge of the boat against running over his seine, to which he received no reply. The boat made no stop after taking in the passenger, and no effort to back up the river after she became entangled with the seine. This was not a public landing place, but passengers occasionally got on and off the steamboat at this point, always using for such purposes a small boat, while the steamboat stopped out in the river.

Another witness for the plaintiffs, Mr. Smith, stated that the fishery could be seen from a point two or three miles up the river; that the steamboat floated sidewise down against the stern of the fishing boat; that she got into the seine with her right wheel, but witness did not see how she got entangled. Her bows were at this time pointing out towards the stream, and if she had gone straight-forward, she would not have gone over the lower part of the seine, but she turned down the stream and went into it. Her stern was on the shore. No steam was put on as she drifted against the seine. Both these witnesses said they had no knowledge of the management of steamboats.

The defendant introduced a witness, Mr. Halsey, who said, that he had commanded vessels for thirty years, and was in

charge of this steamboat at the time referred to, and had been so for several years, as agent for the defendant; that it was a regular passenger boat on the river, which was a large navigable stream. He stated that he had previously agreed with the passenger spoken of, to take him in the boat at this place. As he approached the fishery of the plaintiffs, he saw the signal of the passenger on the beach near by, and turned to take him off. On approaching the shore, he called to the passenger to get on board the fishing boat, and informed him at the same time that their small boat was lost. His aim was to run the bows of the steamboat up against the flat, but he did not intend to injure the plaintiff's seine. He saw the hands taking in the seine, but thought he could run the steamboat up against the flat without injuring it. He succeeded in stopping the steamboat just as she touched the flat, having shut off the steam just before, but immediately the seine became entangled with the wheels of his boat: He sent a hand down to disengage it: As soon as the passenger was taken in, he passed down over the seine carefully, sinking the lower corkline below the water, so as to enable the boat to pass without injury. He could not then go any other way, as the stern was towards shore, and her bows down the stream. The witness was not aware that the seine was injured. When he first became entangled with the seine, he attempted to back the boat off by using poles, and reversing her engines, but could not do so, as the stern was against the shore. He used all the skill and care possible to avoid doing an injury. The witness had frequently taken passengers on and put them off at this place, with the knowledge of the plaintiff, Lewis, and without objection from him, and did so at other points on the river, commonly using a small boat for the purpose. The wind was blowing freshly down the river.

Witnesses Freeman and Irvine, for the defendant, stated that care was used to keep off of the seine, and that the boat could not have been managed otherwise, after she ran up to the shore.

The Chowan river was admitted to be a navigable stream.

Defendant's counsel objected to a recovery upon the grounds:

1st. That in the exercise of the paramount right of navigation, the defendant had liberty to run over any part of the river, without being liable for any other than wilful injuries, and that, in the present case, his purpose was to take in a passenger in the usual course of his employment, and that the injury complained of was accidental and unavoidable.

2d. The defendant's counsel asked the Court to instruct the jury, that as the Chowan river was a navigable stream, the defendant had a right to the use of all its waters, from shore to shore, for the purposes of navigation, and the conveying of passengers, and that where a passenger presented himself on the shore, the defendant had a right to go in with his boat to take him on board, and if he did this *bona fide*, and in the exercise of the right all proper care and skill had been used in the management of the boat, the defendant was not liable.

The Court charged the jury, that all navigable waters, above the ordinary ebbing and flowing of the tides, are public highways: upon which steamboats and all other water craft are free to pass and repass at all times, without hindrance by riparian owners or others. In the same waters, however, riparian owners, and, in some instances, others, have a right to fish with nets, seines, and other contrivances, of a like nature. The two rights of navigation and fishing in these waters exist at the same time, but the right of navigation is ever held paramount to the right of fishing—the common good requiring that the private interest should yield to the public convenience, whenever the two may conflict. But when it can be done without such conflict, both rights may be exercised in the same waters, at the same time, and persons using the paramount privilege must respect the interests of those exercising the lesser, to the extent to which the law recognises the existence of the privilege itself.

Both rights being thus recognised, neither is left without protection against mere wanton and unnecessary injuries. All persons are protected, though they be in the commission of a wrong;

but where the law acknowledges a right, it extends still greater protection to those exercising it. Persons engaged in navigating public rivers, like the Chowan, are liable for other than mere wanton and unnecessary injuries to the seines and nets of those engaged in fishing in the same waters; they are required to use reasonable care and diligence to avoid injuries of this character; they are not confined to the strictest degree of care, but only such as is ordinary and reasonable. And if the evidence offered on the part of the plaintiffs, as to the circumstances under which the injury complained of was inflicted, be true, then there was such negligence upon the part of the agent, in charge of the steamboat, as would render the defendant liable to the action of the plaintiffs.

And, if the version given by the defendant's witness, Halsey, was true, and the other facts as to the condition of the seine, and the open space on the other side, as spoken of by the plaintiffs' witnesses, were true, then the defendant would be liable, and the plaintiffs should recover; for, it was unnecessary for any useful purpose of navigation to have turned out of his course, and gone up to the fishing flat, where, according to his statement, even good and skilful management of the boat could not then avoid the injury. There was negligence in going to the flat, when such a result was most likely to follow.

The counsel for the defendant asked the Court to charge the jury, that if they believed, from the evidence, that the commander of the boat saw the seine, and carried the steamer intentionally and wilfully to the stern of the fishing flat, when the injury happened, then, as every man is held to intend the consequences of his own act, the defendant could not be liable, as it was a wilful trespass on the part of the servant, the commander of the boat, and that trespass against the servant, and not case against the employer, would be the proper remedy.

The Court refused to give these instructions, remarking that the evidence of the defendant's own witnesses showed that the action on the case would lie. Verdict for plaintiffs.

Rule for a *venire de novo* for wrong instructions given to the jury, &c. Rule discharged; judgment and appeal.

Barnes, for the plaintiffs, argued as follows:

It is conceded that the public right of navigation is of a higher character than that of a fishery; the latter must not be exercised in derogation of commerce; but it does not follow that one, navigating a river, has the right to run his vessel either wilfully or negligently upon the seine of another engaged in the lawful employment of fishing, unless the seine obstructed the entire stream, or so much thereof, that it would subject the navigator to great loss of time in attempting to avoid it. The navigator and fisherman both have rights in the public waters, which may be exercised and enjoyed without any infringement or injury to each other; indeed, they are of mutual advantage, and the public are deeply interested in the protection and preservation of each. If there were an overruling necessity for the destruction of either, of course the fishing interest, being less important, must yield; but this necessity cannot arise while our broad sounds and rivers furnish ample space for the enjoyment and exercise of both rights.

If it were admitted, that the fishery were a nuisance, still the plaintiffs would be entitled to recover for the negligent conduct of the defendant's servant in the management of his boat. There was no reason for his attempting to land his boat at that particular part of the river bank. He might have taken on the passenger a short distance either above or below the seine, or have remained out in the stream until the passenger could have been sent aboard in a small boat, which was the usual mode of landing or taking them aboard on the river. The defendant negligently destroyed the plaintiffs' property, and even if it were a nuisance, he is responsible for its value. It is analogous to the case of DAVIS v. MANN, 10th Meeson and Welsby's Reports, page 545, "Where the defendant negligently drove his horses and wagon against and killed an ass which had been left in the highway, fettered in the fore-feet, and thus unable to get

out of the way of the defendant's wagon, which was going at a smartish pace along the road, it was held that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover."

So again in the case of the MAYOR OF COLCHESTER v. BROOK, English Common Law Reports, No. 53, page 339, it was decided thus: "If property be placed in a public navigable river, so as to create a public nuisance, a person navigating is not justifiable in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a nuisance, if he is not otherwise injured by it than as one of the public."

"A private individual cannot justify damaging the property of another on the ground that it is a nuisance to the public right, unless it does him a special injury."—DIMES v. PETLEY, English Common Law Reports, No. 69, page 275.

The maxim *sic utere tuo ut alienum non lædas* applies with equal force to navigators as well as others.

"Where a party is passing along a highway, he can only interfere with an obstruction as far as is necessary to exercise his right of passage."—Woolrych on Waters, Law Library, No. 77, pages 198 and 202.

A fishery may or may not be a public nuisance or obstruction to navigation, according to the circumstances of the particular case, and in the excellent work last quoted, at page 205, the author remarks, "that if the thing complained of (whether it be an erection of any kind or other fancied hindrance to navigation) be in reality a public benefit, it shall not be considered as an obstruction, nor punishable as such, unless it actually amount to a nuisance." Now, it will not be denied that our fisheries are a great public benefit. They furnish employment to a large class of our laboring and enterprising citizens, and they furnish also a large number of people with cheap and wholesome food, and give to the farmer abundant materials for

renovating or restoring to fertility his exhausted and impoverished lands. This large and important interest, unless protected in common with others, by the broad shield of the law, will be left to the mercy of careless and malignant navigators and must necessarily languish and perish.

Smith, for defendant.

PEARSON, J. The case presents a very interesting question, and we have given to it much consideration, with a view, if possible, to "mark the line" dividing the right of navigation, and the right of fishing. Both rights exist, not as private rights, depending on grant or *riparian ownership*, but as rights in common, to which one citizen is entitled as well as another. The right of navigation is paramount, because it is of most importance to the "public weal." The difficulty is, to lay down a rule by which to allow the free and full exercise of this paramount right, in such a way as to leave room for the other right to stand on, except as a mere matter of sufferance.

Unless the line can be marked distinctly, it is better to have no line at all; otherwise, there will be an infinity of law suits growing out of these conflicting interests.

We have concluded, that the line made by law is a very broad one, and that, in fact, the fishing interest has no ground to stand on, except as a matter of sufferance.

The ownership of the land lying near the water-course confers no right; for that stops at high-water mark, leaving the water and the beach, between high and low-water mark, for a public highway. The State has not, as the sovereign, made any special grant of the right to fish to the plaintiffs, so they stand like any other citizen, and have a right to catch as many fish as they can, like the rest of us. COLLINS v. BENBURY, 5 Ired., 119. Note the distinction. In the cases cited from the English books, the right of fishing is specially granted by the crown.

It is argued, that it never would do to require a steamboat, or other vessel, to stop or go out of the way, in order to avoid a set-net or seine, because, if obliged to stop for one, they may be obliged to stop for a thousand, and there would be no getting along.

But, it is contended, that the defendant had no right to come to the bank, at the time and place he did, and is therefore bound to pay all of the damage that resulted from the fact of his doing so. Thus, the question is, had the defendant a right to come to the bank at the time and place he did? He says that, by reason of the paramount right of navigation, he had a right to come to the bank at any *time*, and at *any place*, when and where there was a *bona fide* necessity for him to do so, in the pursuit of his vocation; that, in this particular instance, without any wantonness or malice, he did only so much as his business required him to do, and took pains to avoid doing any unnecessary damage to the plaintiff.

The fact that the defendant acted without wantonness or malice, is conceded, and there is no allegation that he did any unnecessary damage; but the *gravamen* of the plaintiffs is, that no skill or care could have brought the boat in without doing damage to the seine, and therefore, it was in contemplation of law, negligence and wrongful, for the defendant to attempt to do it. So we come fairly to the issue; must a steamboat stop until a seine can be drawn out of the way, or has the boat a right to go to the bank at any time, and at any place, when there is a "*bona fide*" necessity for doing so, to take in freight or passengers, doing no unnecessary damage?

We have come to the conclusion, that this is the only line that can be established. A boat on a navigable stream has a right to "take her course," and to go to the bank, when and where it is necessary to do so—doing no unnecessary damage, and acting without wantonness or malice; and is not obliged to stop or go out of her way, or wait upon the movements of those who are managing a seine or net, which they are permitted to use by

the sufferance of the sovereign, and not as a right conferred by grant. This is the only line that can be established, plain enough for practical purposes. There must be no wantonness or malice—no unnecessary damage, but a *bona fide* exercise of the paramount right of navigation.

There is error. *Venire de novo.*

MAXCY J. OVERTON v. FREDERICK F. SAWYER.

A land owner has a right, even without the use of a prescription, to have the water from his land to flow through the natural channels and drains convenient to it. And when another cuts him off from such right by an embankment, he has a right to remove such an embankment.

Whether the owner of the land would have an action against the person thus going on his land, QUERE? but certainly no one can complain of it.

ACTION on the case, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Camden Superior Court.

The plaintiff owned and cultivated a tract of land adjoining the lands of the defendant, and of one Chamberlain. The plaintiff had cut a ditch across his own land into a natural drain or depression, on the land of Chamberlain, through which the water from the adjacent lands had been used to flow for ten years, and that from the lands of the defendant for more than twenty eight years. A ditch had been cut through this depression some years before, but, from being neglected, had become filled up with dirt, and with the permission of Chamberlain, the plaintiff cleared out this ditch and deepened it; and in so doing, made an embankment along the side of the ditch, and near the line of the defendant for its whole length, which was about fifty yards. Both the ditch and embankment were entirely on the land of Chamberlain, but were near the line of the defen-

dant. After this embankment was made, the water was ponded and thrown back upon the swamp land of the defendant, so as to injure it.

There was also on the back part of defendant's land another drain called the Sanderlain ditch.

To prevent the injury which this embankment was causing to his adjacent land, the defendant went upon the land of Chamberlain and removed a part of the same, and in consequence of the additional flow of water, which was thus turned into the ditch below, the water was obstructed and ponded back on the plaintiff's land, by which he was injured.

The plaintiff insisted that the defendant had acquired no easement or right to drain off the water, through this natural channel, and that if he had such a right, he had no right to go upon the land of another to remove the obstruction: especially as he had the means within his power, of draining through the Sanderlain ditch.

The Court charged the jury, that if the defendant had been accustomed to drain his land through the run or natural drain for twenty-eight years, and the plaintiff, by throwing up an embankment, had obstructed the flowing of the water and ponded it upon his land and thereby injured it, this embankment amounted to a nuisance which the defendant had a right to abate. To which instructions the plaintiff excepted.

The jury found a verdict for the defendant.

The plaintiff obtained a rule for a *venire de novo*, which on argument, was discharged, and the plaintiff appealed to this Court.

Martin, for plaintiff.

No counsel appeared for the defendant.

PEARSON, J. Without reference to the acquisition of the easement by prescription, the defendant had a right to have the water allowed to pass off of his land through the natural drain;

and when the plaintiff, by means of the embankment across this natural drain, obstructed the water, and interfered with this right of defendant, the latter had a cause of action against the former, for causing the obstruction. Instead of bringing an action, he removed the obstruction. It may be, that Chamberlain might have maintained an action against him, for coming upon his land; but we can see no ground upon which the plaintiff can maintain an action against him, for merely undoing that which the plaintiff ought not to have done. If a man turns his hog into the cornfield of a neighbor, and the latter pulls down the fence and drives the hog out—doing no unnecessary damage, can he be sued for doing so, upon the ground that he ought to have let the hog alone, and brought an action for the trespass? There is no error.

Judgment affirmed.

JOHN AND WILLIAM McCLEES v. TRUXTON SIKES.

A count for trespass VI ET ARMIS to slaves, may be joined with a count for trespass QUARE CLAUSUM FREGIT to land, in the same declaration.

Trespass is the proper action for driving off slaves, though the defendant did not touch them.

THIS was an action of TRESPASS, tried before his Honor Judge BAILEY, at Spring Term, 1854, of Tyrrell Superior Court.

The plaintiffs declared in two counts: first, for a trespass, for entering upon land; and, secondly, for a trespass, in forcibly driving away certain negro slaves. The plaintiffs had placed the negroes in question to work at the business of getting shingles upon a tract of land which belonged neither to the plaintiffs nor defendant, but to one Blount, and the defendant entered upon the land, and drove the negroes off. The plaintiffs, after

going through with the evidence, abandoned their claim for damages on the first count, and therefore no instructions were given upon that count. Upon the second count, the Court charged the jury, that if the defendant went upon the land and drove the plaintiffs' hands away, they were entitled to recover. A verdict was rendered for the plaintiffs on the second count.

Exception was taken to the joinder of the two counts, which was over-ruled.

Motion for a *venire de novo* upon exception to the instruction of his Honor to the jury. Motion over-ruled, and appeal to this Court.

No counsel appeared for the plaintiffs.
Heath, for the defendant.

BATTLE, J, The objection to the joinder of the count for trespass *vi et armis* to slaves, with that for trespass *quare clausum fregit* to land, is clearly untenable. The form of action is the same, requiring the same plea and judgment. The question is too plain to require any reference to authority.

We think there is very little more force in the other objection. The defendant's conduct was certainly an unlawful interference with the plaintiffs' slaves. He did not touch them, it is true, but his driving them off was a direct injury with force, similar to that of an assault, for which trespass *vi et armis* is the proper remedy. In the case of SAMPLE v. BELL, Bus. Rep. 338, where the action was trespass on the case, there was no force, either actual or implied. The present is a much stronger case than that of LOUBZ v. HAFNER, 1 Dev. Rep. 185, in which it was held that, where the defendant beat a drum near the highway, which caused a team of horses to run away with, and damage a wagon, trespass *vi et armis* was the proper action. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

EUGENE MORTON, ADM'R *de bonis non* OF SAMUEL B. DOZIER, v. SOLOMON ASHBEE, ADM'R.

An administrator of a deceased sheriff, who is authorised, by a special private act of Assembly, to collect arrearages of taxes, is bound on his administration bond, for the amounts called for in the tax lists of those years for which he is thus authorised to collect.

Where such administrator was only a special administrator, when the act was passed, but became the general administrator afterwards, he is nevertheless liable as above stated, on his general bond.

Where such administrator dies before his administration is completed, his administrator is liable to the administrator DE BONIS NON of the deceased sheriff for the breaches of the bond above stated.

Where the first administrator of the sheriff had been a deputy sheriff under his intestate, and had tax lists to collect, as such, for certain districts, and failed to collect them, he was bound to have made good these amounts to his intestate, while acting as his administrator, and not having done so, his administrator is liable for the same to the administrator DE BONIS NON of the sheriff.

There being a bond to cover the duty of the deputy sheriff to his principal, and to indemnify him, does not make it necessary to show any other DAMNIFICATION than the not accounting for the sums he ought to have collected.

The administrator of the deceased deputy cannot allege the inability of the deputy, for the want of means, to account to the estate he represented as administrator, without suggesting and showing such inability.

The act of Assembly, authorising the sureties of a deceased sheriff to collect arrearages of taxes, does not abridge or supercede the power or duty of the administrator to make the collection, under the private act of Assembly.

THIS was an Action of Debt upon the bond of defendant's intestate, as administrator of Samuel B. Dozier, tried before his Honor Judge BAILEY, at the Spring Term 1854, of Currituck Superior Court.

The case was, by consent, referred to a commissioner, to whose report exceptions were filed, and, from the ruling of the Court on these exceptions, both parties appealed.

The facts of the case are sufficiently stated in the opinion of the Court.

Martin, for the plaintiff.
Heath, for defendant.

BATTLE, J. This case comes before the Court, upon the appeal of both parties, and to the proper understanding of it, the following statement is necessary: The plaintiff's intestate, Samuel B. Dozier, was, at the time of his death in December, 1850, and had been for several years before that time, Sheriff of the county of Currituck. Upon his death, the defendant's intestate, Thomas Gregg, who had been his deputy for several years, and, as such, had undertaken to collect taxes for him in a certain district of the county, took out, on the 23d day of December, special letters—and at the February Term of the County Court following, general letters, of administration on his estate. While special, and before he had become the general administrator, a private Act of the General Assembly was passed, authorizing him as Administrator of Dozier, the late Sheriff, to collect the arrears of taxes due for the years 1847, 1848, and 1849. (See Act of 1850, ch. 248.) He afterwards died before completing his administration, when the relator, Eugene Morton, took out letters of administration, *de bonis non*, on the estate of his intestate, Dozier, and the defendant, Solomon Ashbee, became administrator on his (Gregg's) estate. This suit was then brought against the defendant alone, on Gregg's bond as general administrator, and a reference was made, by the consent of parties, to a commissioner to state an account of the amount for which Gregg, as administrator, was responsible. Upon the coming in of the report, the defendant excepted to it, first, because the Commissioner had charged his intestate with the sum of $164.29, as the balance due but uncollected upon the tax list for the year 1847; with $433.91 due but uncollected upon the list for 1848; and with $404.38 due but uncollected upon the list of 1849.

Secondly, because his intestate was charged $543, which his intestate, as deputy Sheriff, ought to have collected upon the tax list placed in his hands for collection in his district from the year 1842 to 1850.

His Honor, in the Court below, overruled the first, and sustained the second exception, and gave a judgment accordingly, from which both parties appealed.

In the argument here, the defendant's counsel contends that the action upon the bond of the first administrator cannot be sustained at the relation of the administrator *de bonis non*. But it is clearly settled to the contrary by the cases, among others, of TAYLOR, v. BROOKS, 4 Dev. and Bat. Rep., 139, and STATE v. JOHNSTON, 8 Ired. 397. The counsel has next contended, that if the suit can be maintained, the relator can recover only nominal damages, because he has not shown that his intestate's estate has sustained any substantial damage by the default of the defendant's intestate, the first administrator, in failing to collect and pay over the taxes. This objection cannot be sustained, for the reason that it was the duty of the first administrator to collect whatever was due to his intestate's estate, for the purpose of paying debts, in the first place, and then distributing the residue among those entitled to receive it. Whatever he collected and left unaccounted for, or failed to collect for the want of due diligence, he is responsible for to the administrator *de bonis non*, whose duty it will be, when he collects it, to administer it by paying debts, &c. The counsel next contends, in support of his first exception, that Gregg could not, by the exercise of proper diligence, have collected the taxes due on the lists for the years 1847, 1848, and 1849; that he had no right to collect them, because, by the general law, (see 1, Rev. Stat. ch. 102, sec. 47,) that right was given to the sureties of the Sheriff, and the Legislature could not take it from them and give it to the administrator; that if the Legislature had such power, the right to collect was conferred upon him as special administrator, and as such, he had had no time to make the collections, and finally, that the act in question conferred only a discretionary power, but imposed upon him no obligation to collect the taxes aforesaid. We are clear as to the power of the Legislature to pass the Act in question, and that it gave him the right to collect as general administrator. If the act had said "that the administrator of Samuel B. Dozier, late Sheriff of Currituck county, shall collect the arrears of taxes, &c., we think there

can be no doubt, that, though there might have been no administrator at the time of the passage of the act, yet, whoever afterwards took out letters, would have been entitled to collect. Can it make any difference that a particular person was called administrator, who was not such at the time, but subsequently became so? We think not. The right having been conferred, the duty to collect became imposed upon him, either by implication from the same, or by the general law, and for his default in not collecting, he is responsible, and the first exception was properly overruled.

In support of his second exception, the defendant's counsel insists that his intestate was not liable as administrator on his administration bond, but was liable, if at all, as deputy sheriff, for failing to collect the taxes on the lists entrusted to him. His Honor sustained this exception, and in doing so, we think he erred. Had another person administered on the sheriff Dozier's estate, it would have been his duty to have collected the amount due from the deputy, and had he died after making such collection, or after committing a default in failing to do so, his administrator would have been liable on *his* inestate's administration bond to the administrator *de bonis non* of the sheriff, as we have just decided in passing on the first exception. The deputy, Gregg, upon becoming administrator of his principal, became bound in duty to his estate to make the collection or pay for the default out of his own private funds. If he did so, then his administrator is undoubtedly responsible for the amount received as part of the assets of his intestate. If he failed to do so, he committed a breach of duty for which his administrator is equally responsible. But it is said, that the relator has not shown that he was solvent and able to pay the amount while he was administrator. The answer is, that he ought to have suggested such insolvency in order to throw the burthen of proof on the relator, as a debt not marked desperate is taken to be good until the contrary appears. The order sustaining the second exception must, therefore, be reversed.

The result is, that a judgment *quando* for the whole amount

reported to be due by the clerk, with interest accrued since, must be given against the defendant, and he must pay the costs of both appeals in this Court.

PER CURIAM. Judgment reversed.

SARAH A. BELL, v. MONTREVILLE BOWEN.

Where the terms of hiring a slave were that he WAS NOT TO BE TAKEN OUT OF THE COUNTY OF CURRITUCK, NOR TO BE EMPLOYED UPON WATER, EXCEPT AT THE HIRER'S RISK, and the slave was put to making shingles out of that county, and died, during that year, from ordinary sickness, without defendant's being guilty of neglect: It was HELD that he was nevertheless liable for the value of the slave,

ACTION of Assumpsit, tried at the Superior Court of Currituck, at the Spring Term, 1854, before his Honor Judge BAILEY.

On the first of January, 1851, the plaintiff hired to the defendant and another a negro slave, Jacob, for the year ensuing, at a certain price, upon the terms, that the slave "was not to be carried out of the county of Currituck, nor to be employed upon the water, except at the hirer's risk." The slave Jacob was sent across the Albemarle Sound, and set to work in a *shingle swamp*, in another county, about one hundred miles from his owner's place of residence. He was sound and in good health when he left Currituck county. The slave was not returned to the plaintiff, nor to any one for her; but, upon being demanded of the co-partner of the present defendant, he said that "the slave was dead; that he died in Plymouth of ordinary sickness, after the best medical attendance he could procure." A verdict was rendered for the value of the slave, subject to the opinion of the Court upon the question, whether the action could be maintained upon the facts above stated, and it was

agreed that, if the Court should be of opinion with the defendant, the verdict should be set aside, and a nonsuit entered; otherwise, judgment should be entered for the plaintiff: unless the Court should be of opinion that only nominal damages are recoverable, in which case judgment should be rendered for the plaintiff, for six-pence.

The Court being of opinion with the defendant, the verdict was ordered to be set aside, and a nonsuit entered, from which judgment the plaintiff appealed.

Smith, for plaintiff.
Martin and *Heath*, for defendant.

PEARSON, J. The case turns upon the construction of the contract. What did the parties mean by the stipulation "that the slave was not to be carried out of the county, except at the hirer's risk?" The bailor supposed the slave would be in more danger if employed on water, or carried out of the county, than if he was employed on land in the county, and was induced to agree that the slave might be employed on water, or taken out of the county, provided the bailee would take upon himself the risk; and the stipulation amounts to this: "I do not prohibit you from employing the slave on water, or carrying him out of the county; but, if you do so, and any thing happens to him, you must bear the loss; you take the chances—you do so at your risk—if nothing happens, well; and if anything does happen, you pay the damage."

It is certain that the liability of the bailee was to be greater, if he carried the slave out of the county, than if he employed him on land in the county. The question is, to what extent was his liability to be greater? If the slave was employed on land in the county, the bailee was, according to the law of bailment, liable only for such loss as might happen by reason of some neglect on his part; and the agreement was, if he chose to take the slave out of the county, he was then to be liable for any loss that might happen without reference to the question of neglect. In

the words of the parties, "the risk" was then to be on the hirer. In the absence of any stipulation, the risk of death by sickness or other cause, without neglect on the part of the hirer, was upon the bailor, and the intent was to put this risk upon the bailee, if he carried the slave out of the county. We are forced to make the stipulation extend to a death by sickness, without reference to the question of neglect, in the event the slave is carried out of the county; for, otherwise, it amounts to nothing, and the liability would be no greater than if the slave had not been taken out of the county.

Suppose the slave had been hired with a stipulation that he was not to be carried out of the county. It is settled, that, by taking him out of the county, the bailee becomes liable for any loss that may happen, without reference to the question of neglect. Jones on Bailment, 69, 70, 121; Story on Bailments, sec. 413. Jones puts this case: "A. hires a horse to go to London; if he goes towards Bath, he becomes responsible for any *accident* that may befall the horse in his journey to Bath." And this: "Silver utensils are lent to a man for the purpose of entertaining a party of friends at supper in the *metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender, if the plate be lost by *accident, however irresistible.*" Such is clearly the rule of law: and it rests upon this ground: "It may be, if the horse had not been taken towards Bath, or if the silver utensils had not been carried into the country, the accident would not have occurred. There is no telling whether it would or would not; but as the bailee violates the terms of the bailment, and makes himself a wrong-doer, it is fair that the risk of loss during the time that it is so misused, should be upon the bailee. In the case before us, there is no stipulation that the slave should not be carried out of the county; but the parties seemed to be aware that it might be attended with some risk, and the intention was to put that risk upon the bailee, so as to make him liable for any loss that might occur without reference to the question of neglect. This was evidently fair, and was suggested by the same

Court of justice that gave rise to the rule in regard to the bailees who violate the terms of the bailment. The risk should be upon him for whose benefit the thing is done.

Mr. *Heath* admitted that the liability of the defendant was greater during the time that the slave was worked out of the county, than if he had not been carried out of it, but insists that although the defendant took the risk upon himself, yet the liability does not extend to all loss that might befall, but is confined to that which it results from—is a natural consequence of the fact of carrying him out of the county. For instance, he says, if the slave had been accidentally and without neglect, killed by the falling of a tree while he was at work out of the county, the defendant would be liable; but otherwise, if the slave, while out of the county, is taken sick, and without neglect dies a natural death.

The distinction cannot be maintained. If the defendant is liable in the one case, he is in the other. It is certain, if the slave had not been carried out the county, he would not have been killed by the fall of a tree in another county. So, it is certain, if the slave had not been carried out of the county, he would not have been attacked by sickness, and died out of the county. On the other hand, there is no way of telling, whether he would or would not have been taken sick and died, had not been carried out of the county. So, there is no telling whether a tree would or would not have fallen on him. It is this very uncertainty—this risk—that the defendant agreed to take upon himself, if he carried the slave out of the county.

He also says, his client, not having violated the contract, should not be put upon the same footing and be treated as a wrong-doer. This is true; and the difference is this: one who violates the terms of the bailment becomes a wrong-doer, and is liable to an action, and will have to pay the costs and nominal damage, although the property is returned safe and sound, and no loss has befallen it during the time it was misused. Whereas, the defendant did not expose himself to an action by the mere fact of carrying the slave out of the county, and is

only liable to indemnify the plaintiff for actual loss on account of what befell the property while out of the county. A further difference is, that the defendant can only be sued upon the contract.

Mr. *Heath* finally took the ground that his client was only liable for nominal damages, as there was no direct proof, that the death of the slave was a natural consequence of his being carried out of the county; and he called our attention to the concluding remarks of the opinion in TWIDY v. SANDERSON, 9 Ired. 5. We have seen above that a bailee who violates the terms of the bailment, thereby subjects himself to an action; and although no actual loss befalls the property during the time of the misuser, he is, nevertheless, liable for nominal damages; whereas, a bailee, who takes care to stipulate for the privilege of so using the property, provided he takes upon himself the risk, does not subject himself to an action, unless actual loss happens during the time that the property is being used at his risk. So if there be no actual damage, he is not liable at all. TWIDY v. SANDERSON was the case of a bailee who had violated the terms of the bailment, and was liable to be sued as a wrong-doer, whether there was actual damage or not. It is possible this idea presented itself to the Court, and suggested the remark, that the value of the slave was not the measure of damage as a matter of course; but however that may be, the remark was uncalled for, and must be treated as a mere *dictum*—something that fell from the Court, without having attention brought to bear and centred upon it, as it is on the point upon which the case turns.

The nonsuit must be set aside, and there must be judgment for the plaintiff according to the verdict.

Judgment reversed, and judgment on the verdict.

IN RE JOHN COX'S WILL.

Where one of the witnesses to a script, propounded as the last will and testament of the deceased, signed the same before the alleged testator signed it, not in his presence, although it was signed formally by the deceased, and acknowledged as his last will, and witnessed properly by another witness, and handed to the first witness, with a request that he should become a witness, who declined to do so, with the assent of the deceased, such will is not executed according to the requirements of the act of Assembly.

ISSUE of *devisavit vel non*, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Currituck Superior Court.

The will was propounded by John Cox, jr., the executor named therein, who gave notice to the next of kin, who came in and made up this issue. One of the subscribing witnesses to the script, propounded as the last will and testament of John Cox, deceased, testified that he drew the paper writing in question, by a copy which he had, and that this was done at his own house, and that he at the same time wrote the attestation clause; and supposing that the testator desired that he should become a witness, he subscribed his name as such, under the proper clause of attestation. Afterwards, on the same day, he took the paper over to the testator's house, and read the same to him, in the presence of the other subscribing witness. After he had finished reading the paper, the testator said he should want him to sign as a witness, when he told him that he had already done so, whereupon the testator said it would not make any difference he supposed, and then signed the paper in the presence of both witnesses, declaring it to be his last will and testament; and, turning to the other witness, requested him to subscribe to the same as a witness; that the other witness did then subscribe as a witness, in the presence of the testator, while the testator was looking on. After the testator had signed the will, he handed it to the witness who had subscribed it out of his presence, and said, "I acknowledge this to be my will." The witness took it and kept possession of it for a moment, and then handed it to

the other witness, who then subscribed it in the presence of the testator. The testator then folded it up, and took possession of it. The other subscribing witness testified that he subscribed the paper in the presence of the testator, and at his request; and both the witnesses testified to the capacity of the testator.

His Honor instructed the jury that the act of Assembly had not been complied with, and that the will had not been duly executed, because one of the subscribing witnesses did not sign in the presence of the testator, but signed it before the testator did, and that they should find that the paper writing propounded was not the last will and testament of the deceased. To which instruction the propounder excepted.

The jury found that the paper writing was not the last will and testament of the deceased. The propounder moved for a rule to show cause why a *venire de novo* should not be awarded for the matter excepted to. Rule discharged, and appeal to this Court.

Mr. *Martin*, for the propounder, argued as follows:

The paper writing propounded as a will was sufficiently attested in presence of testator.

The object of requiring attestation in presence of the maker is to prevent the fraud of substituting one paper for another. In this case such a fraud could not have been perpetrated.

The testator, after signing the paper writing, called upon the witness, Northern, to subscribe it in his presence as a witness, and was then informed that he had already written his name; the testator adopted his attestation, and so did the witness, by taking it in his hand, and retaining it for some moments, sufficiently long to write his name. If the witness had crossed a *t* or dotted an *i*, or gone over his name with a dry pen, intending it as a re-attestation, it would have been sufficient. What he did do was therefore sufficient, because intended as a re-attestation: both testator and himself adopted it.

The act requires that witnesses should subscribe; yet, it is held, that if they make their marks, it is sufficient. The fraud

intended to be prevented by the act could much more easily be perpetrated in that case than in this.

This case differs from RAGLAND v. HUNTINGDON. In that case the testator was informed, before signing, of the act of witness, and the witness was not called on after the execution of the paper writing. In that case, the witness did nothing after execution, evidencing a re-attestation: in this he did: both he and testator adopted his signature before execution, as an attestation after execution, in presence of testator.

Smith and *Heath*, for caveators.

PEARSON, J. A good deal can be said on both sides of the question.

On the one hand, while it is admitted that the requirement of the statute had not been *literally* complied with, it is insisted that there has been a *substantial* compliance; that the object for requiring the witnesses to *subscribe in the presence of he testator* was to prevent fraud, and guard against the possibility of having one paper substituted for another; and that, according to the proof in this case, this object has been fully answered; for the testator took the paper into his hands, so as to know it to be the same, and the witness adopted the signature in his presence. They, therefore, "stick in the bark," and require the idle form of drawing a pen through the name, and that the witness should thereupon *write the name over again.* GASKILL v. KING, 12 Ired. 211. The disposition that testators intend to make of their estate, should not be defeated by a construction so rigid.

On the other hand, it is said, the statue not only intended to prevent fraud, but also to prevent perjury, by requiring an act, as distinguished from mere words, to be done in the presence of the testator. If, under the circumstances presented by this case, the Court can dispense with the *act*, which the statute requires, and take words as a substitute therefor, it will follow, that if the witnesses take the paper into an adjoining room, out of the tes-

tator's presence, and subscribe it, and then bring it back and hand it to him, so that he knows what has been done, and that it is the very paper, this is a substantial compliance with the requisites of the statute; for, why require the idle form of drawing a pen through the names of the witnesses who have thus subscribed, and that they should *thereupon write their names over again?*

And then it will follow, that if the witnesses see the testator execute the paper as his will, such proof will be sufficient, although they do not subscribe it as witnesses—for, why require so idle a form, if the execution of the instrument as a will, can be clearly established to the satisfaction of the jury? In this way, one departure from the requirements of the statutes will lead to another, and thus, all the safeguards with which the statute intended to protect men in making their wills, when they are usually weak, and peculiarly exposed to fraud and undue influence, will be removed, piece by piece, and no greater formality will be necessary to make a will, than to make a deed; for, the substance of the thing is, did he execute it as his will, or his deed—if so, all idle forms and ceremonies may be dispensed with!

As to the suggestion, that the disposition that testators intend to make of their estates, should not be defeated by a rigid construction, the reply is—this is *petitio principii.* We cannot know the disposition which a man intended to make of his estate, except from his will, and no paper can be his will, unless it is executed with all the ceremonies required by law.

We are relieved from the necessity of deciding upon the weight of these arguments; for the question is settled by a decision of this Court upon the very point, RAGLAND v. HUNTINGDON, 1 Ired. 563. The witness must, *in fact*, subscribe his name in the presence of the testator. The *act* is necessary. No words will answer the purpose.

The English Courts have put the same construction upon a statute similar to ours. In truth, their decisions go further: if the witness subscribe in the presence of the testator, but does

so before he executes the instrument, although he afterwards does so in their presence, it is not a compliance with the statute; for, it was not his will when they subscribed. 7 Eng. Eccl. Rep., 341, IN THE GOODS of OLDING. And although in such case, after the testator has executed it, the witnesses add seals to their names, which had been signed before the paper was executed—it is not a compliance with the statute. Ibid. 391. IN THE GOODS OF BIRD.

There is no error. Judgment affirmed.

STATE ON THE RELATION OF J. P. SHUSTER AND WIFE, v. EDMOND H. PERKINS, *ET. AL.*

Where, in the order of a County Court, appointing a guardian, the name Margaret is by mistake inserted as that of the ward, instead of Miranda, a bond taken according to the proper requisitions, with the right name recited, will, under the operation of the act of 1842, ch 61, be sustained as an official bond.

THIS was an Action of Debt, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Pasquotank Superior Court.

The *feme* relator, Miranda, was the only child and orphan of Henry Taff, deceased, in March, 1838, when the Term of Pasquotank County Court was held. Since that time, to wit, in the year 1850, she intermarried with the other relator, J. P. Shuster, at which time she was under the age of twenty-one years. At this term of Pasquotank County Court, (March 1838,) the following entry appears of record: "*Ordered*, That E. H. Perkins be appointed guardian to *Margaret* Taff, orphan of Henry Taff, who appeared, and entered into bond, in the sum of $2.500—E. E. Wilson and N. S. Perkins his sureties." The bond declared on, is dated of that term, payable to the

State of North Carolina, and is signed by the three individuals mentioned in the above order, to wit, E. H. Perkins, E. E. Wilson and N. S. Perkins: it recites that, "Whereas Edmond H. Perkins hath been this day, by the worshipful Court of said county, appointed guardian to *Miranda* Taff, orphan of Henry Taff, deceased," and is in all respects in the proper and usual form of a guardian bond, and was found by the present clerk among the archives of the County Court of Pasquotank, in its proper place, and is attested by the then clerk of that Court, and on the trial was duly proven.

The plaintiffs were then proceeding to assign breaches of the bond declared on, when his Honor intimated an opinion, that even though the evidence sustained the breaches assigned, the plaintiffs could not recover.

In submission to this opinion, the plaintiffs took a nonsuit, and appealed.

Smith, for plaintiffs.
Martin, for defendants.

PEARSON, J. We are inclined to think, as it was proven that Miranda was the only orphan of Henry Taff, the mistake in calling her "Margaret" upon the minute docket, might be controlled by the general description which is added, *i. e.*, "orphan of Henry Taff," or, at all events, that the defendant was estopped under the authority of IREDELL v. BARBEE, 9 Ired. 250. Without deciding these points, we are clearly of opinion, that the case falls within the operation of the statute, acts of 1842, ch. 61. A guardian has an *appointment* as distinguished from an office. The statute uses both terms, and the bond, in the words of the statute, "was taken under the sanction of a Court of Record, and purports to be a bond executed to the State, for the performance of a duty belonging to an appointment." So, the case is embraced by the words of the statute; and it certainly falls within the mischief intended to be remedied. Persons claiming under guardian bonds, as well as persons claiming un-

der the bonds of sheriffs and constables, frequently lost their rights by reason of some defect in the manner of taking the bonds.

Judgment reversed. *Venire de novo.*

MIDGETT SPENCER v. W. F. WEATHERLY.

Where the bargainor in a deed, after executing a conveyance, remains in possession of the land, and contrary to the expressed wishes of the bargainee, cuts down timber, he is liable to an action of trespass QUARE CLAUSUM FREGIT.

THIS was an action of Trespass *q. c. f.*, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Tyrrell Superior Court.

The plaintiff showed title to the *locus in quo*, by reading a deed in fee simple for the premises, with warranty of title from the defendant to the plaintiff, executed six months previously to the beginning of this action. The land conveyed by this deed was a small tract of nine acres, of which about one acre was cleared, upon which there was a dwelling house, in which the defendant continued to reside from the date of the deed up to the date of the writ. There was no evidence as to the character of the defendant's occupation after making this deed. Shortly after its execution, the plaintiff found the defendant in the act of felling timber, and clearing on the woodland outside of the cleared acre. The plaintiff warned him to desist, but he declared that he would go on with the cutting and clearing as long as he pleased. After being forbidden, as above stated, the defendant cut other trees outside of the clearing, for which this action was brought.

A verdict was rendered for the plaintiff, subject to the opinion of the Court, whether the action of trespass could be sustained upon the facts of the case.

His Honor, upon consideration of the question, being of opinion against the plaintiff, set aside the verdict, and ordered a nonsuit, from which judgment of the Court the plaintiff appealed.

Heath, for the plaintiff.
Smith, for the defendant.

NASH, C. J. On the part of the defendant, it is contended, that the action cannot be maintained, as he was, at the time the trespass was committed, in the actual adverse possession of the *locus in quo*. If this be so, the action is misconceived. The action of trespass, *quare clausum fregit*, is a remedy for an injury done to the possession. It is necessary, therefore, that the plaintiff should show that, in law, the possession was in him. In the present case, the defendant had sold and conveyed the land upon which the injury was done to the plaintiff. It consisted of nine acres, one only of which was cleared and under fence, and within that enclosure was a house in which the defendant lived at the time of the sale, and where he continued to live after it. The trespass was committed outside of the enclosure. The defendant was a mere occupant of the land or tenement at sufferance. In HARDY and BROTHER against SIMPSON, Busbee 326, the Court decide, that where land is held under execution, and the defendant remains in possession without title, "he is looked upon in the light of a tenant at sufferance—a *mere occupant*." The principle is stronger when the owner of the land is the vendor. The defendant then was but an occupant, holding for the plaintiff, the owner, and as against him his occupancy or possession was not adverse, and did not extend beyond his enclosures. If, however, he could be regarded as a tenant at all, he was a tenant at sufferance, or at will; and, in either view, he had, by cutting down the timber, especially after being forbidden by the plaintiff, put an end to his tenancy, and subjected himself to this action. Lord COKE states, "if a tenant at will cutteth down timber trees, or voluntarily pull down houses,

the lessor shall have trespass against him, *quare vi et armis ;* for, the taking upon him to cut timber, &c., doth amount in law, to a determination of his will." Coke Lit. 57 a. See also 5th Coke, 13 a., and Croke Eliz., 777, 784, and the law is the same as to tenants at sufferance. Peake's N. P., 196; Bul., N. P., 98, 97; John Rep. p. 1. PHILLIPS v. COVERT. We have examined the case in 13th Ired. 94, and the others to which our attention was called. We do not think they interfere with the opinion we have formed and expressed. Judgment of nonsuit is set aside, and judgment for the plaintiff on the verdict.

Judgment reversed.

TIMOTHY MARCH AND WIEE v. AMOS HARRELL.

When the credibility of a witness has been attacked, from the nature of his evidence: from his situation: from bad character: from proof of previous inconsistent statements, or from imputations directed against him in cross-examination, the party introducing him may prove other consistent statements, for the purpose of corroborating him.

THIS was an Action on the Case tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Gates Superior Court.

The plaintiff declared in a special action on the case, with a count in Trover, for a negro girl named Drusilla. It was in evidence, that Drusilla was the property of one Geo. W. Smith, of Gates county, who died in the month of June, 1852, intestate. Letters of administration upon his estate were, at August Term following, of Gates County Court, granted to his widow, Sarah Smith, who brought this suit, and subsequently intermarried with Timothy March, who was made a party plaintiff with her. It further appeared in evidence that Joseph Duke married a daughter of the intestate Smith, in the Fall of the year 1851, and that the girl, Drusilla, went into his possession, and so remained until the death of the intestate; soon afterwards, Duke sold the slave in question to the defendant, a

negro trader residing in the town of Suffolk, Virginia, who carried her off to parts unknown.

On behalf of the plaintiffs, it was proved by two witnesses, who had been wards of the intestate, and resided in his family, that, on 29th of March, 1852, at the house of the intestate, it was agreed between Duke and intestate, that he (Duke) was to take the girl Drusilla, on a contract of hiring from the 29th of March until the 29th of August following; Duke gave his note (as they stated) for the hire, which was one dollar and fifty cents, payable on 20th of August following, dated 20th of March preceding. The note was produced, and the name of one of these young females (Miss Anne M. Savage) was subscribed as a witness thereto, and she stated that she was called on by the parties to bear witness to the contract, and to witness the note, in which statement she was confirmed by her younger sister: they both stated further, that Duke then carried the slave home with him in a cart into the State of Virginia.

The defendant then introduced Duke as a witness (having released him), and he swore that no such bargain was made between him and the intestate at any time; that he and the intestate swapped guns at the time the note bears date, and that the note was given for the difference which he agreed to give the intestate in this swap; that Drusilla was not then in possession of the intestate, but that he had given her to him in the month of February, 1842; that he had then carried her home, and that she remained in his possession until after the death of the intestate, and that he then sold her to the defendant. The defendant also proved declarations of the intestate, tending to show that he intended to give and did give the girl, Drusilla, to Duke; he also proved, that Duke was a man of good character, and entitled to credit.

The plaintiffs then offered evidence of the good character of the Misses Savage. They also offered to prove by a Mr. Smith, their present guardian, that he had repeatedly heard them give the same account of the transaction as that given by them on

the trial: this evidence was objected to by defendant's counsel, but was received by the Court.

It was admitted on both sides, that if the transaction was as stated by the Misses Savage, the plaintiffs were entitled to recover; but if as stated by the witness Duke, the plaintiffs were not entitled to recover.

There was a verdict for the plaintiffs.

A rule to show cause why a new trial should not be granted for the improper admission of the evidence excepted to. Rule discharged, judgment, and appeal to this Court.

Smith, for plaintiffs.
Heath, for defendant.

BATTLE, J. The corroborative testimony offered by the plaintiffs, and objected to by the defendant, was, we think, clearly admissible, upon the principle established by previous adjudications of this Court. That principle is, that where the credibility of a witness is attacked, from the nature of his evidence: from his situation: from bad character: from proof of previous inconsistent statements, or from imputations directed against him in cross-examination, the party who has introduced him may prove other consistent statements, for the purpose of corroborating him. JOHNSON v. PATTERSON, 2 Hawks, 183; STATE v. TWITTY, ibid 449; STATE v. GEORGE, 8 Ired. 324; HOKE v. FLEMING, 10 Ired. 263; STATE v. DOVE, ibid, 469. In the case before us, where the testimony given by the witnesses for the plaintiff was in direct conflict with that given by the witnesses for the defendant, it is manifest that there was an impeachment of testimony on both sides, and each party endeavored to strengthen his witnesses by proof of good character. It was but another instance of the application of the principle of corroboration to go a step further, and offer proof of previous consistent statements. It was competent for each party to do this; and we have very little doubt that the defendant, as well as the plaintiffs, would have done it, had he been able to pro-

duce it. There was no error in receiving the testimony offered by the plaintiffs, and the judgment must be affirmed.

Judgment affirmed.

ANNE E. GREEN v. CALVIN B. DIBBLE AND OTHERS.

A contract on hiring a slave from another, *to guaranty against loss, accident or misfortune, arising from a habit of intoxication* in the slave, embraces the case of suicide, by drowning, in a fit of intoxication.

ACTION of ASSUMPSIT for the value of a negro woman, slave, tried at Spring Term, 1854, of Lenoir Superior Court, before his Honor Judge MANLY.

The defendants were co-partners in running a steamboat on the Neuse River: being in want of a cook on board the boat, they applied to the plaintiff to hire the woman in question for that business. The plaintiff at first refused to hire them the woman, on the ground that she was much addicted to drunkenness, and she was afraid the life on board a steamboat would increase the force of that vicious habit, and expose her to greater danger. Whereupon, the defendants assured the plaintiff that there could be no risk from this cause, as they never allowed spirits to be carried on board at all; and agreed with the plaintiff, that if she would hire them the negro, "*they would guaranty against all loss from that source,*" and "*would pay all loss or damage from accident or misfortune, arising from that cause.*" Upon this understanding and agreement, the woman in question went into the service of the defendants, as cook on board their boat. A few weeks afterwards, the woman became much intoxicated, and by reason thereof, in a fit of drunkenness, delusion or abstraction, jumped overboard, and was drowned. Plaintiff

proved a demand and refusal by the defendants to pay anything for the loss of the woman.

The defendants counsel took the ground, that the contract of guaranty, did not apply to the case of suicide or self-destruction, though the act was immediately induced by intoxication from spirits. His Honor, however, held differently, and instructed the jury, that, upon the state of facts appearing in the case, the plaintiff was entitled to recover. Verdict for plaintiff. Defendant excepted to the charge of the Court, and obtained a rule for a *venire de novo*, which was discharged, and they appealed to this Court.

J. W. Bryan, with whom was *Green*, for the plaintiff, argued as follows:

The exception to the ruling in this case, is founded upon the opinion that this case is governed by the law applicable to Insurance upon Lives, and that such is the nature of this contract. Suicide, in such cases, is always an exception made in the contract. With respect to the risk which the underwriter is to run in insurance upon lives, this is usually inserted in the policy; and he undertakes to answer for all those accidents to which the life of man is exposed, unless the *cestui que vie* puts himself to death, or he die by the hand of justice; and these exceptions are always inserted in the policy. Park on Insurance, 491, '92. This case differs entirely from such a contract. Here the defendant agreed to guaranty against all *loss of property* arising from the use of, or indulgence in, "ardent spirits" by that property, or to pay all loss and damage from accident or misfortune to *that property* from that source. *Mania a potu*, or fits of drunken delusion or desperation, are natural consequences of excessive indulgence in the use of spirituous liquors. The contract of the defendant embraced these consequences. Drunkenness, and the consequences incident to it in the slave, were the perils the defendants insured against. These were the *immediate*, and not the *remote*, cause of the loss. Drunkenness brought about the loss. This was the vice of the slave or property which the plaintiff

guarded against in the contract, and the consequences of which the defendants insured against.

In an action upon a warranty of a chain cable, it was held that the plaintiff might reccover the value of an anchor, which was lost through the insufficiency of the cable, proof being given that the ship would have been lost, if the anchor had not been slipped. BONODAILE v. BRAXTON, 2 Moore 582; 8 Taunton 535; 3 Starkie on Ev. 1666; *vide* COIT v. SMITH, 3 Johnson's cases, 16.

Moore, for defendant.

BATTLE, J. The loss sustained by the plaintiff is certainly within the terms of the guaranty made by the defendants, unless it be taken out of them by a necessary implication. The defendants contend that it is so excepted, because a case of self-destruction was not within the contemplation of the parties to the contract, and was impliedly excluded from it on grounds of public policy. The objection is founded, we presume, upon the practice of Life Insurance Companies, in excluding from their policies, losses arising from suicide: the assured's "dying by his own hands;" or his own act, "whether sane or insane." The principle upon which that exclusion is founded, is thus stated: "A stipulation to uphold a policy in case of wilful self-destruction, would be contrary to sound policy, as taking away one of the restraints operating on the mind of men against the commission of crimes, by the interest which they have in the welfare and prosperity of their connections; nay, more, it would make those natural affections, which make every man desirous of providing for his family, an inducement to crime; for, the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause, would be a fraud upon the insurers; for a man's estate would thereby benefit by his own felonious act." It is manifest, however, that "where the policy is effected upon the life of a nominee, (a

third person) the above reasoning fails. The insurance can be no inducement to the criminal act, and may reasonably be construed to cover this, as well as every other risk. There is, indeed, no reason why it should not do so; for the general tables of mortality, which form the basis of the calculations upon which the policy is founded, include this, as well as every other case of death, so that the particular risk is actually insured gainst. In policies, therefore, on the lives of nominees, it is very usually, but not invariably omitted." Bunyon's Life Assurance, 71 and 73, 69th vol. Law Lib.

In the case before us, the loss of the plaintiff's slave by self-destruction is, as we have said, directly within the terms of the defendant's guaranty, and we can see no good reason why it should be impliedly excluded from them upon any sound principle of morals or law. His Honor was therefore right in holding that the plaintiff was entitled to recover, and the judgment must be affirmed.

Judgment affirmed.

JAMES C. GERRISH v. JACOB W. JOHNSON.

According to the several acts of Assembly, upon the subject of "pilots," where a pilot tenders his services to a vessel over one hundred and twenty tons burden, bound in over the bar at Ocracocke, before she gets to the bar, the commander is bound to pay the usual rates of pilotage, though he refuses to receive such pilot on board his vessel, and though the weather was fair, and though it was in the month of August, and though the defendant be fully competent to bring in his vessel with safety.

A plaintiff, commencing by warrant, may file a declaration, setting forth his cause of action more distinctly than is set forth in his warrant, taking care to make no departure from it.

The plaintiff, according to the ordinary practice, is entitled to the benefit of being considered as having filed his declaration, according to the facts set forth in a case agreed.

THIS was an Action, commenced by warrant, for a sum alleged by the plaintiff to be due him, as a branch pilot, and brought to the Superior Court of Craven county, by a writ of *recordari*, and tried before his Honor Judge ELLIS, at the Spring Term, 1854, of that Court.

The following is the case agreed between the parties: the plaintiff, at the time of the occurrence of the facts set forth, was a branch pilot for the district of Ocracocke, duly appointed, commissioned and qualified, and the defendant was the commander of a schooner called the "Isaac W. Hughes," of the burden of one hundred and twenty-six tons, sailing between the ports of New York and New Berne in this State, and bound to the latter port, and was owned by a citizen of New Berne.

When near the bar at Ocracocke inlet, and bound in, the plaintiff went off in his pilot-boat to the vessel, when she was outside the bar, and spoke her, for the purpose of piloting her over the bar, either to Beacon Island Road, or Wallace's Channel, at the option of the commander; but the defendant refused to heave to, or stop for the plaintiff, and came in over the bar without any pilot. It was admitted that this was in August; that the weather was fair, and that the defendant was competent to, and did bring the vessel over the bar in safety.

The plaintiff claimed the same pilotage as he would have had for conducting the schooner in, under the act, Rev. Stat. chap. 88, sec. 38.

The defendant contended that he was not bound to take a pilot, if he did not need or desire one; and that the act is unconstitutional and void, and, for these and other reasons, the plaintiff was not entitled to recover.

It was agreed, that if his Honor be of opinion that the plaintiff was entitled to recover, that a judgment be entered against the defendant for $12.60 and costs; otherwise, that the plaintiff be non-suited.

Upon consideration of which case agreed, the Court being of opinion with the plaintiff, rendered judgment accordingly, from

which judgment the defendant appealed to this Court. Exception was taken in this Court to the form of the warrant.

Donnell, for the plaintiff.
Moore, for the defendant.

PEARSON, J. The action is under the 38th section of the 88th ch. Rev. Stat. entitled "Pilots."

It being now admitted that the provision of the section is not unconstitutional, the main question is, does the act of 1846, ch. 49, repeal this section?

We are clearly of opinion that it does not, and that it is only affected by the act of 1846, by having the rate of compensation charged according to its general terms, (the terms used being general) on purpose to meet and accommodate it to any change that might be made in the rate of pilotage—(that is, the amount to be paid by a vessel that a *pilot has charge of*). The object being to make the rate of compensation allowed by this section correspond at all times with rate of the pilotage. So that, if the latter was made lower or higher, or altered in any way, the former would be altered in the same way, by force of the general terms, without the necessity of any special provision. In other words, the fomer was fixed on a sliding scale, and was always to be precisely the same as the latter.

This view of the Statute is shown to be correct by examination of its several sections. The *thirty-sixth section*, in *general terms, without saying at what bar*, provides that any branch pilot, (viz., one duly commissioned) who shall refuse or neglect to go out to a vessel, shall pay a penalty of forty dollars.

The thirty-seventh section, in the same general terms, provides, "that if, after a pilot is on board, the vessel is driven off the coast, the pilot shall be entitled to one dollar a day extra."

The thirty-eighth section, in the same general terms, without saying *at what bar*, or *fixing upon any definite terminus on the inner side*, provides, "that if a branch pilot shall go off to any vessel *bound in*, and offer to pilot her *over the bar*, the master or

commander of such vessel, if he refuses totake such pilot, shall *pay* and *satisfy* to such pilot, if not previously furnished with one, the *same sum as is allowed by law for conducting such vessel in.*"

The thirty-ninth section applies to pilots acting under the authority of the Commissioners of Navigation for Newbern, Edenton, Washington, and old Topsail inlet, and provides that pilotage shall not be paid by a vessel under sixty tons, unless she has made a signal for pilot, &c.

The fortieth section fixes the rates that branch pilots authorized by the Commissioners of Navigation, for Edenton, Washington, Newbern or Ocracocke shall be entitled to demand of any vessel they may have charge of, from the other side of the bar to Beacon Island Roads or Wallace's Channel; and also fixes the pilotage through the swashes.

The forty-first section applies to pilots for old Topsail inlet, and fixes the rates they are entitled to for such vessel as they have charge of, from the other side of the inlet into Bogue Road, or Shacklesford Road.

The forty second section applies to pilots for Bogue inlet, and fixes the pilotage they are entitled to for bringing a vessel into said inlet.

The act of 1846 changes the rates of pilotage that was allowed by the fortieth section to pilots authorized by the Commissioners of Navigation for Edenton, &c., from outside of the bar to Beacon Island Road or Wallace Channel, leaving the rates through the swashes the same.

This act has no reference to the pilotage allowed by the forty-first and forty-second sections, and expressly confines itself to the fortieth section, by quoting and reciting so much of that section as the act is intended to apply to.

This makes the whole subject plain. The thirty-eighth section allows the same compensation *as is allowed by law* for pilotage. The rates of pilotage at one inlet are changed by the act of 1846; the rates at the others remain the same; the effect is, that the rate of compensation is changed at one inlet, and re-

mains the same at the other—and this by force of the general terms, i. e., the compensation is to be the same *as is allowed by law* for pilotage.

It is said, in the second place, that the 30th section of the Pilot Act conflicts with the thirty-eighth section, and compensation is not allowed between April and October.

The thirtieth section is an amendment made in 1836, and it must be admitted, as it gives no explanation of itself, that its insertion does throw some confusion on the construction of the chapter taken as a whole. In such cases, the rule of construction is to reconcile the different parts, if it can be done. It is suggested, that the thirtieth section applies only to vessels *bound out*, and is entirely consistent with the thirty-eighth section, which is confined to those *bound in*. It is probable this is the true solution of the apparent conflict; but whether it be so or not, the thirtieth section must give way to the thirty-eighth; for the latter, in positive and express terms, entitles the pilot to compensation. The former can only be made *by inference* to exclude the right to compensation during a certain time of the year, from the fact it allowed compensation during the other part of the year. In other words, the conflict can only be made by an inference drawn from the fact that the thirtieth section may be treated as an affirmative pregnant. There can be no sort of doubt, that an inference of this kind must give way to an express and positive enactment; in fact, such an enactment excludes the inference, and prevents it from being made.

Again, it is insisted, a single justice had no jurisdiction. It is not a debt due on special contract, or for goods sold and delivered, or for work and labor done, or a contract express or implied; it was only a tender to do work.

We think it clear, that the plaintiff is entitled to the compensation for work and labor done, under a contract created by law, in the same way that the right to pilotage is under a contract, created by law. In the one case, the pilot takes charge of the vessel; in the other, he goes out to sea, and is at the trouble of coming back. This is work and labor which he is required by

law to do, and for doing it, the law entitles him to the same sum as is allowed by law for conducting the vessel in. Both are put on the same footing.

Again, it is said, the cause of action is not stated with certainty. Plaintiff does not allege he was a pilot, or that he crossed the bar and tendered his services, &c., and he refers to but one statute.

Warrants issued by a single justice are usually treated as the plaintiff's declarations, as well as the leading process; but the plaintiff may, if he chooses, file a declaration in addition to the warrant, and set out more at large and in detail his cause of action, (taking care, of course, to make no departure;) just as he can in his declaration set out his cause of action more at large than it is in the writ. It would be strange, if a plaintiff is bound more strictly by a warrant issued by a single justice for a debt, or is required to be more particular in the specifications, than he is by a writ issued for a debt from a Court of record.

In this case, according to the practice of the members of the bar, by which declarations are, in most cases, waived, the plaintiff is entitled to the benefit of being considered as having filed a declaration according to the facts set out in the case agreed. If so, these difficulties for the want of particularity, &c., are all removed.

Judgment affirmed.

BRIGHT THOMPSON, TRUSTEE, v. WILLIAM C. BRYAN, ADM'R.

Where a slave was stipulated in a deed to be thereafter conveyed in writing to a trustee, to the separate use of a FEME COVERT, and is put into the possession of the trustee for another purpose, but afterwards it is formally agreed by the seller and the trustee, that the latter is thenceforth to be invested with the title to the negro, (he not being present, however, at the time:) HELD, that the trustee is at least the BAILEE of the former owner, and as such is entitled to recover the possession against one wrongfully withholding him.

ACTION of Detinue for a slave, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of Wayne Superior Court.

The plaintiff claimed title under one Gard Thompson, who was called as a witness, and testified that, on ———— day of ————, A. D. ——, one Tilghman Gardner and his wife joined in a conveyance to him of certain monies, then in the clerk's office, the proceeds of the wife's real estate: one of the stipulations of this conveyance was, that the witness, in consideration of $125 of the said monies, should convey the slave in question to the plaintiff, in trust, for the separate use of said Gardner's wife; that, soon after the execution of this deed, but before the actual receipt of the money from the clerk's office, he, the witness, who was the owner of the slave, placed it in the possession of the plaintiff, that it might be with its mother. Soon after this, he went to plaintiff's house, where the slave was, and told him to keep it for the use of the said Tilghman's wife, according to the terms of the said deed; that he told the plaintiff he then delivered to him the slave for this purpose; that the plaintiff agreed thus to receive and hold the slave; that it was his, (witness's,) intention thereby to convey the negro for the purpose above stated, and thus to confer upon him the legal title, and that it was so understood by them both at the time; that the slave was not present at this time, but was on the plaintiff's plantation, subject to the control and direction of him, (the witness); that he never took back the said slave, but left him with the plaintiff.

Upon a cross-examination, the witness said, that after the occurrence above narrated, he had executed a bill of sale, in writing, to the plaintiff, declaring the trust theretofore stipulated, which bill of sale, he was advised, was void, for the want of a subscribing witness. This bill of sale was then offered in evidence. The same witness further stated, that, at a still later period, he had executed another bill of sale for the same slave, with the requisite legal formalities, which it was admitted conveyed nothing, as the slave had then been levied on, and was at

the time, in the adverse possession of a constable. This bill of sale was also read in evidence.

The defendant claimed as a purchaser, under an execution against Tilghman Gardner, and showed judgment, execution, a sale and purchase, in due form.

It was contended by the defendant, that the plaintiff could not recover, because there never had been any sale of the negro by Gard Thompson to the plaintiff; that there was no evidence of an actual delivery, as required by the statute, and that the subsequent attempt to convey by deed, was evidence that the parties never intended any other mode of conveyance.

The Court left the evidence to the jury to determine, as a question of fact, whether there had been a sale and delivery of the slave by Gard Thompson to the plaintiff, with instructions, that there must have been a sale and an actual delivery, to pass the title; that a manual delivery was not essential, but that an actual delivery was; that if it was the intention of Thompson, at the time relied on, to sell and deliver the slave to the plaintiff, and then to invest him with the absolute title and possession, he having control of the slave at that time, and the plaintiff thus received him; that this understanding would be sufficient in law to pass the title, though the slave was not actually present at the time, but in possession of the plaintiff.

There was a verdict for the plaintiff. Rule for a new trial; rule discharged; judgment and appeal to the Supreme Court.

Dortch and *Person* for the plaintiff.

No counsel for the defendant.

BATTLE, J. There is no doubt of the plaintiff's right to retain his verdict and judgment. The only difficulty is, as to the true ground upon which that right should be placed. The case of EPPES v. MCELMORE, 3 Dev. Rep. 345 is a strong authority in favor of the Judge's charge as to the sale and delivery of the slave from Gard Thompson to the plaintiff, independently

of the bill of sale. But that case is supposed to be weakened by the decision of the Court on the subsequent one, of ADAMS v. HAYS, 2d Ired. Rep., 361, in which it was held, that to a parol gift of slaves, an actual delivery was necessary, and that the circumstance that the slaves were in the possession of the donee was not sufficient, if they were not present at the time of gift.

The unattested bill of sale would have been undoubtedly good between the parties prior to the revision of the statutes in 1836. CUTLER v. SPILLER, 2 Hay. Rep. 61. Whether that had not been altered by the ommission of the preamble in the Revised Statutes, (1 Rev. Stat. ch. 37, Sec. 19) has been made a question in STATE v. FULLER, 5 Ired. Rep. 26, and BENTON v. SAUNDERS, Bus. Rep. 360.

But however these questions may be settled, whenever it shall become necessary to decide them, it is clear that the plaintiff, as the bailee of Gard Thompson, had a right to recover in this action, his possession of the slave from the defendant. 1 Roll's Abr. Title Detinue C., page 636; 1 Chit. Plead. 139; 4 Bing. Rep. 111; 1 Saund., P. and E. 435. The defendant's intestate claimed as a purchaser under an execution against Tilghman Gardner, who, it is evident, never had any title to the slave in question, and the intestate who purchased his interest, and stands in his place, is therefore to be regarded as a mere wrong-doer. The only pretence of title which the debtor could set up was derived from the conveyance to his wife's trustee, and that the defendant contends, passed nothing. The plaintiff then, as bailee, has no obstacle in his way to prevent a recovery.

The judgment is affirmed.

JAMES LAWRENCE v. FRANKLIN G. PITT.

Where, by the death of her grand-father, (the person last seized,) a child is entitled to a reversion in land, expectant on the termination of a life estate, and such child dies before the expiration of the life estate: HELD, that the inheritance does not vest for life in the parent of the deceased child, under the 6th Canon of Descents, on the expiration of the life estate. The person entitled to take must make himself heir to the person last seized.

THIS was an action of Ejectment, tried before his Honor Judge CALDWELL, at the Spring Term 1854, of Edgecombe Superior Court.

The plaintiff claimed the right to enter upon an undivided fifth part of the tract of land set forth in the declaration, and the following facts are submitted as a case agreed:

"Noah Little died intestate, in the year 1824, seized of a tract of land, leaving Mary E. Little his widow, and the following children, who were his only heirs at law, to wit: Joseph J. Little, Cullen Little, Wm. G. Little, Elisha Little, Patsy Howard and Amariah Little. At the November Term, 1824, of Edgecombe County Court, the widow, Mary E. Little, filed her petition for dower, in the said land, which was assigned, and she took possessien thereof, and continued in possession until her death in 1852. At August Term, 1826, of said Court, a petition for partition of the land was filed by the heirs, and under it a partition was had, and the share assigned to Amariah Little was covered by the dower of the widow and is the tract of land described in the declaration. Amariah Little died in 1842, intestate, and without issue. Patsey Howard died intestate, before 1842, leaving a child her only heir, by the name of Martha, who intermarried with the lessor of the plaintiff. Martha, the wife of the lessor, died in 1844, leaving a child (Joseph) her only heir—the issue of the marriage between her and the lessor of the plaintiff. Joseph, the child, died intestate and without issue in 1850. The defendant was in adverse possession, at the time of the demise, in the declaration.

If the Court should be of opinion that the plaintiff is entitled to recover, judgment is to be entered in his favor for six-pence and costs, with an order to issue a writ of possession. If the Court should be of opinion that the plaintiff is not entitled to recover, judgment of non-suit is to be entered."

His Honor being of opinion with the plaintiff, gave judgment accordingly, from which the defendant appealed.

Biggs, for plaintiff.

Howard, for defendant, argued as follows:

The plaintiff claims under the proviso to the 6th Rule, in chapter 38, on Descents, of the Revised Statutes. The wording of the Statute is, "that in all cases where the person last seized shall have left no issue, nor brother, nor sister, nor the issue of such, the inheritance shall vest for life only in the parents of the intestate, or in either of them," &c. It is admitted by the defendant, that the child of the plaintiff died, leaving no brothers, sisters or issue, and the only question is, whether reversions are within the purview of the statute, or whether the child had such *seizin* as will support the plaintiff's claim. The word "seized" is a "word which is well ascertained at common law," and it has been decided by this Court in KITCHEN v. TYSON, 3 Murphy, 314, that when such is the case, it must "be understood in the statute in the same sense in which it is understood at common law." The certainty and security attained by this mode of construction, was judicially considered and approved in ROBERTS v. CANNON, 4 Dev. and Bat. 256. And in 1 Jones 84, RIVES v. GUTHRIE, the Court say, that "we are bound to give to words, when used in a statute, the meaning attached to them at common law." What, then, is the common law meaning of the word "seized."

Seizin was of two kinds, "actual and legal." Actual, when the possession was held either by the party himself or his tenant for years; and legal, when he had a present right of entry, either by deed or descent, without having taken possession.

There is certainly no actual seizin. The plaintiff must, therefore, contend that the words "actual and legal," used in Rule 1, extends through the canons of descent, and entirely changes the common law; and that, by a construction, suited to our condition and circumstances, the plaintiff's child had legal seizin, within the intendment of the Legislature. By the common law, "a person can only be said to be entitled to, *not seized* of, an estate in reversion." Cruise, vol. 2, title 17, section 13. At common law, the rule was fully recognized in our Courts, that a widow was entitled to dower in all cases of legal seizin; could she claim dower in this instance? Certainly not. At common law, heirs must make out their title to reversions when the life tenancy falls in. Recognized and confirmed in EXUM v. DAVIS *et al*, 1 Murphy 475. The statute certainly deserves no more liberality of construction than other canons of descent—the father, no more favor than any other heir. This rule of law has been clearly and forcibly set forth by Mr. Justice STORY, in COOK v. HAMMOND, 4 Mason 467, 484, 485. After showing that, by certain acts, such seizin might be gained as to create a new stock, he says: "But, if no such act be done, and the reversion on remainder continues in a course of devolution, by descent, the heir of the first donee or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men, through whom it was devolved." No act of ownership was exercised.

BATTLE, J. The facts stated in the case agreed, present the question, whether the reversionary estate in lands in fee simple, after a life estate in the same is to be regulated in its descent by the sixth rule in our canons of inheritance in the same manner as if it were an estate in possession. The solution of this question depends upon the sense in which the word "seized" is used in those canons. This word is a well known term of the common law, signifying the possession or occupation of the soil by a free man or freeholder, one who has at least a life estate in the land, 2 Black. Com. 104. Seizin was of two kinds, sei-

zin in deed, or the actual possession or occupation of the land, and seizin in law, which was a bare right to possess or occupy it. Ibid 127. The difference between the two kinds is thus illustrated: "Where a freehold estate is conveyed to a person by feofment, with livery of seizin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seizin in deed and a freehold in deed. But where a freehold estate comes to a person by act of law, as by descent, he only acquires a seizin in law; that is, a right to the possession; and his estate is called a freehold in law. For, he must make an actual entry on the land to acquire a seizin, and a freehold in deed." 1 Cru. Dig., tit. 1, sec. 24; Co. Lit. 266 b. In the English Canons of Inheritance, an actual seizin of land was necessary to constitute a person an ancestor from whom an estate could be derived by descent. A bare right or title to enter or be otherwise seized, would not do. Hence the maxim, *seisina facit stipitem.* Black. Com. 209; Co. Lit. 15. It is manifest, from this explanation of seizin, that neither actually nor legally could it be had of a remainder or reversion after a life estate. It could not be so had, because the tenant for life was in the present occupation of the land, and there could not be two distinct or separate seizins in the same land, at the same time. Hence arose a peculiarity in the descent of such estates, which is well expressed by Judge STORY, in the case referred to in the argument of the defendant's counsel, of COOK v. HAMMOND, 4 Mason's Rep. 484. "Where the estate descended, is a present estate in fee, no person can inherit it, who cannot, at the time of the descent cast, make himself heir of the person last in the actual seizin thereof. But of estates in expectancy, as reversions and remainders, there can be no actual seizin during the existence of the particular estate of freehold; and, consequently, there cannot be any mesne actual seizin, which of itself shall turn the descent, so as to make any mesne reversioner or remainderman a new stock of descent, whereby his heir, who is not the heir of the person last actually seized of the estate, may inherit. The rule, therefore, as to reversions and remain-

ders, expectant upon estates in freehold is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seized in fee, and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser." See the note on the 228th page, in any of later editions of Black. Com., and the cases there cited. The same was held to be a rule of the common law in New York. JACKSON v. HENDRICKS, 3 John. Cases, 214; BATES v. SCHRAEDER, 13 John. Rep. 260; It has also been decided to be a part of our common law. EXUM v. DAVIE, 1 Murp. Rep. 475.

It is manifest, then, that, prior to the passage of our act to regulate descents in 1808, the son of the plaintiff's lessor would not have been the *propositus* or stock from whom the inheritance could have been derived. Is the rule changed by that act? is the question which we now have to consider. The plaintiff's counsel contends that it is, by force of the words "actually *or legally*," which are used in the first rule, in connection with the word "seized;" that those words must be supplied by construction, to explain and qualify the term seized wherever it occurs in the other rules; that a person is legally seized of an estate in reversion, after a particular estate for life; and that all these propositions are established by the case of BELL v. DOZIER, 1 Dev. Rep. 333. We do not understand the counsel to insist that the words "legally seized" have a different signification in our act, from what they bear at common law. We suppose that he acquiesces in the rule, which is well established, "that when a statute makes use of a word, the meaning of which was well ascertained at common law, the word shall be understood in the same sense it was at common law." KITCHEN v. TYSON, 3 Murph. Rep. 314; RIVES v. GUTHRIE, *ante.* 84.

It is so even with regard to words used in our Constitution. ROBERTS v. CANNON, 4 Dev. and Bat. Rep. 256. In the matter of the contested election between Berry and Waddell, published in an appendix to the reports of the cases decided at December Term, 1848, 9 Ired. Rep. These words must then be understood in the same sense in which they are used at common law, as there is nothing in the act itself to show that they were intended to be used in any other sense. We admit that the words "actually and legally" are to be supplied whenever the term seized is used alone in any of the rules of descent prescribed in the act, because they are expressed in the first rule, and we can see no reason for excluding them from the others; and it was so held in BELL v. DOZIER. We admit further, that that case is apparently an authority in favor of the other propositions contended for by the plaintiff's counsel; and yet, we cannot yield our assent to the conclusion which he deduces from it. The judgment in that case may well stand, though some of the positions assumed in it are manifestly wrong, and the inferences drawn from them therefore erroneous. It was an action of waste against a dowress and her second husband, in which it is expressly stated, in the opinion of the Court, that the waste was committed upon the land assigned to the widow for her dower. She and her husband were therefore liable to the action, whether she held the land as dower, or as being vested in her for life, upon the death of her son Jesse, under the 6th Rule of Descents.

In the course of his opinion, Judge HENDERSON says: "The case does not expressly state that Jesse was ever actually seized; but I think it may be inferred from the assignment of dower—for it is taken out of his seizin." This is a plain mistake, for the widow's dower is not taken out of the seizin of the heir, but of that of her husband. The well known maxim of *dos de dote peti non debet*, depends upon this very principle; for the reason is, that when the heir endows the widow of the ancestor, the assignment defeats the seizin which the heir acquired by the descent of the land to him; so that the widow is in of the estate

of her husband, and the heir is considered as never having been seized of that part. In the same manner, if a woman, on whom lands descend, endows her mother, afterwards marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the curtesy in those lands, whereof the mother was endowed, because the daughter's seizin was defeated by the endowment. 1 Cru. Dig. tit. 6, ch. 3, sec. 20-21. Co. Lit. 31 a, 4 Rep. 122 a. The opinion upon which we are commenting, after using the words quoted as above, proceeds thus: "But, if it did not, the first canon of the act, speaking of lineal descents, declares that a seizin in law shall make a *propositus;* and although no such declaration is made in case of collateral descents, but the word 'seized' only is used, I apprehend that the Legislature intended to make a legal seizin sufficient in both cases. No reason can be given why, if it is good in the one case, it is not so in the other." By turning to the case, it will at once be perceived, that, upon the death of Jesse Barnard, the plaintiffs were entitled, as the next collateral heirs of his father, Peter Barnard, the person last actually seized. So that it was entirely unnecessary to raise the question whether they could claim the reversion after his widow's life estate in her dower, as heirs of his son Jesse. But it must be admitted that the Court seemed to think that the question was presented, and they disposed of it, by assuming the position that Jesse Barnard was legally seized of the reversion. In that we think they were in error. We have already given the definitions of, and pointed out the distinctions between, an actual seizin, or seizin in deed, and a legal seizin or seizin in law. In doing so, we have derived our information from the highest authorities known to the common law. That they are correct, we have the additional assurance in their application to the well known instances of curtesy and dower. Actual seizin in the wife is essential to give curtesy to the husband, while only a legal seizin in the husband is necessary to entitle the wife to dower; and yet neither curtesy nor dower attaches to a reversion after a life estate in the lands. 1 Cru. Dig., tit. 5, ch. 2, sec. 23, and tit.

6, ch. 2, sec. 15; Co. Lit. 29 a, and 32 a. The law is different with regard to reversions after terms for years, because the possession of the tenants for years does not prevent the seizin of the reversioners.

But it is said that, in pleading and other legal proceedings at the common law, a person is often said to be seized of a reversion; and therefore the term seized may well be applied to reversions in our statute of descents. It is true, that it was held by the Court in the case of WROTESLY v. ADAMS, 1 Plow. Rep. 191, that in pleading it was not error to say, that one was seized as of fee of a reversion after a life estate. But, though that case was decided early in the reign of Elizabeth, the essential character of seizins, "actual and legal," remained the same, and continued still to influence the doctrine of the common law, in relation to curtesy, dower and descent. It is almost certain, that our statute intended to refer to it; else, why use the words, "actually or legally," at all? The argument derived from the use of the word "seizin," in pleading, as applied to a reversion, would have been much stronger, had our statute used that word alone, without other words qualifying it, and pointing to the well established distinction between actual and legal seizin.

It is said again, that hardships will sometimes be felt, unless the construction contended for by the counsel be adopted. For instance, if one die seized of an estate, leaving a widow and a daughter, and dower be assigned to the widow, and then the daughter has a bastard child, and dies in the lifetime of her mother, the bastard could not, under the 10th rule, inherit from his mother the part assigned to the widow. That may be true, but it only shows that the act is not broad enough to extend to every case of descent, leaving some to be regulated still by the rules of the common law. Among these are remainders and reversions after life estates, which were manifestly not within the purview of the legislature, else it would have given something more substantial to parents, in the very rule under which the plaintiff claims, than a dry reversion for life, after an estate

for life in the same lands. In reply to the argument derived from the supposed case of hardship which might occur under our construction, we can state a case equally hard, which might happen under the construction contended for by the plaintiff's counsel. If an alien father, having two sons, should come into this State with one only of his sons, and they should he naturalized, and then the father should purchase land, marry a second wife and die, devising the land to his wife, or, leaving it to be assigned to her for dower, and then his other son should come into the State with the view to be naturalized, but his brother should die before the widow, he could not inherit the land under the plaintiff's construction, though he might be naturalized before the death of the widow, because it would have escheated before that period; whereas, according to our construction, he might have taken it, when the life estate fell in, as the heir of his father, the person last actually seized. The case of EXUM v. DAVIE, above cited, is an instance of the benign operation of the rule at common law. The truth is, that the act was mainly intended to operate upon estates in possession, and upon remainders and reversions, after estates for years, of which the owner might be said to be seized, either actually or legally, according to the meaning of those terms at common law. Some of its rules, as for instance, the second, which abolishes *primogeniture*, and prescribes equality among males and females, and the third, which provides for the right of representation, extend to all inheritances, because they do not use the word "seized" at all. In the case of remainders and reversions after life estates, the rules of the common law still prevail, and the person who claims them must, when the particular estate falls in, "make himself heir of the original donor, who was seized in fee, and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder." In our case, the plaintiff's lessor, not being entitled to the land in question, either by the common law, or by our act of descents,

must submit to have the judgment in his favor set aside, and judgment upon the case agreed entered for the defendant.

Judgment reversed.

P. W. DOWD v. CHARLES GILCHRIST.

Where a person enters into a tract of land, under a written contract to purchase the same, he becomes a tenant at will to the obligee, and is not permitted to deny his title in an action of Ejectment brought against him for the possession.

One of several heirs at law can recover in ejectment upon his several demise, though the others, entitled jointly with him, do not join in the action.

(HOLDFAST and SHEPPARD, 6 Ired. Rep. 361; BRONSON and PAYNTER, 4 Dev: and Bat. 493. CITED AND APPROVED.)

THIS was an Action of Ejectment, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Moore Superior Court.

There were two counts in the declaration; one on the demise of P. W. Dowd, the other on the joint demise of the heirs at law of Willis Dickinson. The action was commenced in 1850. The plaintiff offered in evidence a deed from one Johnson to Willis Dickinson, dated in November, 1812, and showed title and possession of the land in controversy in those under whom he claims, as far back as 1796. Dickinson died seized and possessed of the land in 1820, leaving a wife and seven children. The widow and a son as tenants held possession of the land until 1830, when Major Dowd, who married a daughter of Dickinson, exchanged the land with Gilchrist, who entered into possession and continued to hold it until 1836, when the contract was rescinded. Gilchrist then purchased the land of Dowd, giving his notes and taking Dowd's word for a title. Major Dowd died in 1840, leaving twelve children, of whom P. W. Dowd was one and a grand son of Dickinson. The defendant, after the death of Major

Dowd, took a deed from his son, Alexander Gilchrist, for the land in dispute. .The defendant offered this deed in evidence, which was objected to by the plaintiff, but received by the Court, subject to the exception. It was not registered until 1851, after the death of Major Dowd, and only once, during his whole occupation, was he heard to assert any other right or title, than the one he had acquired from Major Dowd. It was proved that on several occasions he spoke of his occupation as being under Dowd, by virtue of a bond to make title. The notes which had been given for the purchase money were also in evidence.

P. W. Dowd for himself and the other heirs, in the year 1850, demanded the land of the defendant, which he refused to surrender, and this action was then brought.

It is agreed that if the Court shall be of opinion that the plaintiff is entitled to recover, judgment is to be entered accordingly; otherwise, for the defendant. Defendant contended that as thirty years had not elapsed at the death of Dickinson, the ancestor, the plaintiff could not recover, as the occupancy had not been sufficient to support the presumption of a grant. The defendant also contended that he had acquired title by more than seven years' adverse possession under a color of title. The plaintiff further insisted, that as the defendant had come in under Major Dowd, who had married a daughter of Willis Dickinson, he was estopped to deny the plaintiff's title.

A verdict was entered for the plaintiffs, subject to the opinion of the Court. The Court being of opinion with the plaintiffs, gave judgment for them, from which judgment the defendant appealed to this Court.

D. Reid and *Kelly*, for the plaintiffs.
Person, for the defendant.

BATTLE, J. His Honor was right in directing a judgment for the plaintiffs, to be entered on the special case; that stated that the defendant was in possession of the land in 1836, claiming under

a contract of purchase from Major Dowd, who had married one of the daughters of Willis Dickinson, who died in 1820, seized and possessed of the land, and leaving a widow and seven children. Major Dowd died in 1840, leaving twelve children, of whom the lessor, P. W. Dowd, was one. When the defendant entered under his contract of purchase from Major Dowd, he became his tenant at will, and as such, could not dispute his title. LOVE v. EDMONSTON, 1 Ired. Rep. 152. Now, that title was either the title of his wife, as one of the heirs at law of Willis Dickinson, or his own independent title. Whichever it was, the defendant could not dispute it while he remained in possession under it; nor could he acquire a new title under which to protect himself, until he had surrendered the possession to his *quasi* landlord, or been put out by him, or by some other person acting under the authority of legal process. GILLIAM v. MOORE, Bus. Rep. 95; and the cases there cited. If the defendant then was in possession, under the title which descended from Dickinson to his heirs, the plaintiff was entitled to recover under the second demise; but if he were in under an independent title in Major Dowd, then the plaintiff was entitled on the first demise of P. W. Dowd, one of *his* heirs at law. So, *quacumque via data*, the plaintiff was entitled to a judgment on the special case.

But the defendant's counsel contends that, as a general verdict and judgment were rendered upon both demises, and as the lessor in the first demise was one only of several heirs who were entitled, the verdict and judgment were wrong. It was decided directly to the contrary in the cases of HOLDFAST v. SHEPPARD, 6 Ired. Rep. 361; BRONSON v. PAYNTER, 4 Dev. and Bat. Rep. 487.

The judgment must be affirmed.

DOE ON THE DEMISE OF JOHN D. PIGGOTT *ET. AL.* v. CHEERS.

In an action of Ejectment, where the plaintiff declared upon the demises of several lessors, upon three several counts, a refusal by the Court to strike out two of the counts, at the instance of the defendant, is a matter of discretion, from which an appeal will not lie to this Court.

THIS was an Action of Ejectment, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1854, of Brunswick Superior Court.

The case sufficiently appears from the opinion of the Court.

Strange, *W. A. Wright*, and *J. H. Bryan*, for the plaintiffs.
D. Reid, for the defendant.

NASH, C. J. The doctrine of amendments, and the power of this Court to control the action of an inferior Court in such matters, are fully and elaborately discussed by Judge PEARSON, in the opinion delivered in the case of PHILLIPSE against HIGDON, Bus. 382. It is there laid down with such perspicuity, that we had hoped it would prove to the profession a sure guide. The Court decide "that our jurisdiction in regard to amendments in the Courts below, is confined to the question of power; with its discretion in the exercise of the power, supposing the Court to have it, we have no concern." The question presented to us in the present case, is very clearly of the latter character. The declaration contains three counts; the first, is one on the demise of George W. Styron, of the whole tract of land; the second is on the demise of John W. Piggott, of one-third of the same tract, the third is on the demise of George W. Styron, for one-third of the same tract. At Spring Term, 1854, of Brunswick Superior Court, where the cause was pending, a motion was made, on the part of the defendants, to strike out of the declaration the two counts on the demise of George W. Styron, which was refused by the

Court, and for that refusal, the defendant appealed. Whether he would or would not grant the motion, was clearly within the discretion of the Judge. For reasons satisfactory to himself, he did not choose to exercise the power he certainly possessed. The action was brought by order of the County Court of Brunswick, to try the legal title to the tract of land mentioned in the declaration, and for a partition of which a petition was then pending in said Court; the petitioner, John W. Piggott, claiming to be a tenant in common with the defendant who claimed the whole tract as his. There was, therefore, a manifest propriety in supposing the plaintiff to count as many demises as might be necessary in ascertaining the question directed by the Court to be settled.

But the motion being one addressed to the discretion of the Court, we cannot interfere with its exercise.

Appeal dismissed with costs.

JAMES KNIGHT v. WILMINGTON & MANCHESTER RAILROAD COMPANY.

A bond to pay money, and to do something else, as to feed and clothe a slave, is not negotiable.

THIS was an Action of Debt, upon a bond tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of New Hanover Superior Court.

The plaintiff declared as the endorsee of the following bond, to wit:

"$100. On the first day of January, 1853, the Wilmington and Manchestor Railroad Company promise to pay William H. Laspeyere or order, one hundred dollars for the hire of negro Bob, (to be paid in quarterly instalments,) until the first day of January, 1853. The Company promises to feed and clothe said negro, and pay such expenses as are customary in the case of hired negroes.

"Witness the seal of the corporation, and the President's name affixed."

The bond was endorsed, "pay the within to James Knight." Signed, "W. H. Laspeyre."

Pleas: the general issue, payment, and set off, Statute of Limitations, and specially, "that the bond declared upon is not negotiable."

The execution and endorsement of the bond were admitted, and the only question was, whether it was negotiable, so as to enable the plaintiff to sue upon it in his own name, and upon this question, his Honor being of opinion with the plaintiff, so instructed the jury, who returned a verdict for the plaintiff.

Rule for a *venire de novo*; rule discharged, and appeal to this Court.

D. Reid, for the plaintiff.
Moore, for defendant.

NASH, C. J. We do not concur with his Honor in his opinion. At common law, neither bonds nor promissory notes were assignable at law, for the reason that they were considered mere choses in action, and the transfer of them would lead to litigation and increase maintenance. 2d Bl. Com. 291, n. 6. By the statutes 3d and 4th, of Ann, of which the first section of our act of 1836, (Rev. Stat., ch. 13,) is substantially a transcript, promissory notes were made assignable, so as to enable the assignee to maintain an action on them, in his own name. By the 3d section of the act, bills, bonds and notes are put on the same footing as to their negotiability. In both the statutes of Ann, and in our act, the promissory notes and bonds which are made negotiable, are such as are made to pay *money*. Under the statute of Ann, the decisions are numerous, that bills and notes, to make them negotiable, must be for *money only*. An order or promise to pay money, and *do some other act*, is not a bill or note. Bailey on Bills, p. 9. In the case of MARTIN and CHAUNTRY, Str. 1271, in error from the Court of

Common Pleas, the Court of King's Bench held that a written promise to deliver up horses and a wharf, and pay money at a particular day, was not a note within the statute, and reversed the judgment of the Common Pleas. In COOK and SATTERLER, 7th Cowen, 108, an order by A. upon B. to pay a certain sum to C., and to take up A.'s note to C. and D. for that amount, was decided not to be a bill. The bond in this case is not for the payment of money only; but it is to do with that another thing, to wit, "clothe and feed the negro," for whose hire it was given. The case of ALEXANDER and OAKS, 2 Dev. and Bat. 513, is decisive of this question. There the note declared on was to pay the sum of fourteen hundred dollars in bank stock, or lawful money of the United States, and the note was decided not to be within the act. See also the STATE against CORPENING, 10th Ired. 58. The case of HAMILTON v. MCCARTY, 1st Dev. and Bat. 226, has been brought to our notice, as an authority in favor of the plaintiff. We do not so consider it. The question there was between the obligors and the original obligee. This is a question of negotiability. There the doubt was, whether the obligee could recover upon the bond the money secured by the instrument, in an action of debt before a single magistrate; and the Court decided that he could; that he might abandon the covenants in the bond, and go for the money secured by it. Here the question is, can an obligee in such a bond assign it, either in whole or in part, so as to enable the assignee to sue in his own name? This point is decided by this Court in the case of MARTIN and HAYS, Bus. Rep. 423. There the Court say that the effect of an assignment is to vest the legal interest in the assignee, and to give him the right to sue in his own name. As a matter of course, then, the assignment must be of the whole instrument. An assignment, by piecemeal, is an idea unknown to the law. The assignment in the case before us is, therefore, of the whole interest of the assignor, not only of the money, but of the covenants to feed and clothe the slave hired. Suppose the defendants had paid to the plaintiff, the assignee, the $100 mentioned in the bond, could the latter have

brought an action in his own name for damages, in not feeding and clothing the slave? Very certainly he could not. There is error in the judgment below, and there must be a *venire de novo*.

Judgment reversed.

CALEB L. NICHOLLS, v. OWEN HOLMES.

In some cases the Presiding Judge, in order to save time, and when he sees no harm will result from it, may, in his discretion, allow a leading question to be put, yet his refusing to allow it is never error.

To award a deed in law, under the plea of *non est factum*, upon the ground of fraud, there must be fraud in the *factum* as by substituting one paper for another, so as to show that the party did not intend to execute the paper he was made to sign, seal and deliver.

THIS was an Action of Trover, tried before his Honor Judge DICK, at the Spring Term, 1854, of New Hanover Superior Court.

The case sufficiently appears from the opinion of the Court.

D. Reid and *Troy*, for the plaintiff.
Strange and *W. A. Wright*, for defendant.

PEARSON, J. The case is not stated with the order and clearness that is so necessary in all judicial proceedings; but, as we understand it, four points are intended to be presented.

1st. Ned, the slave in controversy, was the child of a woman by the name of "Rittey." The plaintiff alleged that Rittey was bequeathed to him by his father's will, and it was material to prove that Rittey was one of the slaves of the testator. Whereupon, he called "a witness, who named several slaves as formerly belonging to the testator, when the plaintiff's counsel remarked to the witness, that for the purpose of refreshing his memory, he would ask him whether or not the testator did not own one by the name of Rittey. His Honor said that was an improper question, and refused to allow it to be put in that form,

but required the counsel to confine himself to the question in general terms, what slaves did the testator own? There the case, so far as this point is concerned, stops; and we are left to infer that the witness, in answer to "the question in general terms," went on to name Rittey as one of the slaves, who formerly belonging to the testator. So, the point presented is, that the Court erred in refusing to allow the particular question to be asked. A sufficient reply is, the fact was proven; and, supposing the Judge to have erred in refusing to allow the question to be put in the manner proposed, it can make no kind of difference whether it was proven by way of answer to the particular question, or to the "question in general terms." But we are not disposed to admit that his Honor did err, even supposing the error to be harmless; for, it was certainly a suggestion and leading question; and although in some cases the presiding Judge, in order to save time, and when he sees no harm will result from it, may, in his discretion, allow a leading question to be put, yet his refusing to allow it is never error.

2nd. The defendant then read in evidence three deeds, duly executed and registered, as follows:

STATE OF NORTH CAROLINA—NEW HANOVER COUNTY:

Know all men by these presents, that we, the undersigned, do hereby agree and firmly bind ourselves to the following articles, to wit, viz: that we, the said John Cruse, and Unity Cruse, and Caleb L. Nicholls, do hereby agree to give unto Mary Jane Lee the following property for her and her heirs, Unity Cruse's natural life excepting, Orrice, Thomas, Rittey, three negroes, and two cows and calves, which we, the said John Cruse and Unity Cruse, and Caleb L. Nicholls, do defend all other claims made by us hereafter. Whereof, we have set our hands and seals, this 12th day of May, 1819.

JOHN CRUSE, (SEAL.)

UNITY HER ⋈ MARK. CRUSE, (SEAL.)

CALEB LOPER NICHOLLS, (SEAL.)

Witness DANIEL MCLAMMY,
A. M. SWANN.

"STATE OF NORTH CAROLINA—NEW HANOVER COUNTY:

Know all men by these presents, that I Caleb Loper Nicholls, of the one part, and Unity Cruse, of the other, do hereby give all my right and title to the said Unity Cruse for all negroes, and other property arising from the estate of the late Caleb Nicholls, except the following negroes: Fanny, Caswell, Fillis, Enoch, and the house and lot in town, on the promise that the said Unity Cruse gives the said Caleb L. Nicholls, on demand, the said four negroes, and the said house and lot in town, which was left her her life time. I do hereby defend all right and title heretofore made by me, provided the above articles are agreed to. In witness whereof, I set my hand and seal, this 12th day of May, 1819.

CALEB HIS ⋈ MARK. LOPER NICHOLLS, (SEAL.)

Witness, Amos M. Swann,
Daniel McLammy."

"STATE OF NORTH CAROLINA—NEW HANOVER COUNTY:

Know all men by these presents, that I, Caleb L Nicholls, of the State and county aforesaid, am held and firmly bound unto John Cruse, and Unity, his wife, in the sum of one thousand dollars, should I, the said Caleb L. Nicholls, refuse to make a firm right to the tract or parcel of land willed to me by my father, Caleb Nicholls, the above to stand in full virtue; otherwise, to be null and void, and of *non-effect.*

"May 12th, 1819.

"Given under my hand in presence of us,
"DANIEL MCLAMMY,
"A. M. SWANN."

CALEB L. HIS ⋈ MARK. NICHOLLS.

The plaintiff thereupon contended that the deed executed by Unity Cruse, John Cruse and himself had not the legal effect of passing the title, but was a mere executory agreement; and further, that, as a life estate, was reserved, it was inoperative

pass the remainder. His Honor was of a different opinion; we entirely concur with him.

3rd. The plaintiff then proved that he was a man of "weak mind, illiterate, and had to make his mark; that his mother, Unity Cruse, was a woman of turbulent and overbearing character, had entire control over him, and could do what she pleased with him;" and thereupon moved the Court to instruct the jury, that, if they were satisfied that the plaintiff had been induced to execute the deeds by misrepresentation, imposition or undue influence, the deeds were void. The Court refused to give the instruction, but told the jury that, in order to make a deed void at law, "there must be evidence that it was obtained by duress, or that there was fraud in the *factum;* that is, that the party did not, at the time of its execution, intend it to be his deed." This is clearly settled. DEVEREUX v. BURGWIN, 11 Ired. 493. "Under the plea of *non est factum*, if the execution of the deed is proven, it cannot be avoided in a court of law, by proof that it was procured to be executed by means of falsehood and misrepresentation, or other fraud. There must be fraud in the *factum*, as by substituting a paper instead of the one intended to be executed, so as to show that the party did not intend to execute the paper, he was made to sign, seal and deliver as his deed."

So in GANT v. HUNSUCKER. "Upon *non est factum*, the instrument would not be avoided, but be held to be the defendant's deed, notwithstanding any fraud in the consideration, or false representation of a collateral fact, whereby the defendant was induced to execute the instrument." LOGAN v. SIMMONS, 1 Dev. and Bat. 13; REED v. MOORE, 3 Ired. 310.

4th. The plaintiff further offered to prove, that, at the time these papers bear date, he was of intemperate habits, and an habitual drunkard; but his Honor refused to allow the testimony, unless the plaintiff could prove that he was drunk at the time he executed the papers. There is certainly no error in this. DEVEREUX v. BURGWIN, cited above.

Judgment affirmed.

STATE ON THE RELATION OF J. E. JONES v. JOSEPH D. BIGGS.

No action can be maintained on the bond given by a clerk, conditioned for the faithful performance of his duty, except where there has been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty.

It was not the intention of the act of Assembly, requiring clerks to issue *ex-officio* notices to guardians, to make them liable, on their official bonds, for failing to do so.

THIS was an action of Debt, upon the official bond of the defendant, as Clerk of the County Court of Martin county, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of Beaufort Superior Court.

The plaintiff declared for a breach of the condition of the defendant's bond, executed on 10th of October, 1837, upon his appointment as Clerk, for a failure on his part to issue an *ex-officio* summons to Joseph S. T. Redding, the guardian of the relator, to renew his bond. Redding was appointed guardian on the 12th day of January 1835, and gave bond in the sum of $10,000, with John Pierce and Lewis A. Powell his sureties, who removed from this State to the State of Mississippi, in the year 1837, and it was admitted that Powell has resided in the State of Mississippi from that time to the present, and is amply good to pay the amount of the bond which he executed as Redding's surety.

The evidence was contradictory as to the pecuniary condition of Redding, the guardian, in January 1838. Some of the witnesses expressed the opinion that he was insolvent; others, that although he was embarrassed, his credit was good; but he was insolvent before and at his death, in 1843, which was before the relator became of age. In August 1840, the defendant did issue a notice to Redding, requiring of him to show cause why he should not renew his bond, which was served and returned to October session, 1840, of Martin County Court, which was placed upon the docket, and continued from session to session

until July 1841, when it was dismissed, without Redding having renewed his bond, or the Court having removed him.

The plaintiff gave evidence of the indebtedness of Redding as guardian, and claimed to recover of the defendant, as damages, the amount due from him to the relator, and he insisted, that, although Powell, one of the sureties to the guardian bond, was good for the amount, yet, that the relator, upon his arrival at full age, was not bound to go to Mississippi to seek his remedy.

The Court instructed the jury, that, as it was admitted that the defendant did not issue the summons at the proper time, the relator was entitled to nominal damages; but that, before he could recover more than nominal damages, he must satisfy the jury that he could not recover anything, by prosecuting the guardian bond of 1835.

Under these instructions, the jury returned a verdict for the plaintiff, and assessed his damage at one dollar.

The plaintiff obtained a rule for a *venire de novo*, for error in the instruction given the jury by the Court, which was discharged, and the plaintiff appealed to this Court.

Donnell, for the plaintiff.
Biggs, for the defendant.

PEARSON, J. In the Court below, the case turned upon whether the plaintiff was entitled to actual or nominal damages, assuming his right to maintain the action. It was held that he could only recover nominal damages, and he appealed.

Upon the argument here, it was mentioned by the Court, that the case of the STATE v. WATSON, 7 Ired. 290, left the question of the plaintiff's right to maintain the action open, owing to the peculiar circumstances under which the decision was made. Judge Nash thought the plaintiff could maintain the action, and was entitled to actual damages. Judge Daniel thought the plaintiff was only entitled to nominal damages, but might show himself to be entitled to actual damages, provided he could make proof of several contingent events. Judge Ruffin dissen-

ted, but filed no opinion. The question being open, it was suggested that the point might be raised here, although it was not taken in the Court below, by a motion in arrest of judgment. For, if the plaintiff, by his own showing, had no cause of action, he of course could not be entitled to a *venire de novo;* nor could he have judgment for the nominal damages; and, on the other hand, the defendant could not ask for judgment, because in the Court below he had, upon the trial, made no question as to the plaintiff's right to nominal damages.

Mr. Biggs thereupon moved in arrest of judgment. After much consideration, Judge Battle and myself, (Judge Nash still retaining his former opinion,) think that, upon authority, and a proper construction of the statute, the plaintiff had no cause of action.

We take it to be clear, that the purpose for which officers are required to give bond and sureties, is to make the bond a security for any damage that may be sustained by reason of a breach of their official duty; that is the only object for requiring the bond. It follows, no action can be maintained on the bond, (for no breach can be shown,) except where there has been such damages sustained, as would give the party a right to maintain an action on the case. So the question is, could the plaintiff maintain an action on the case against the defendant for a neglect of his official duty in not issuing the summons? That this presents the true question, will also appear from the fact, that the breach assigned by the declaration, is a neglect of official duty in not issuing the summons, whereby the plaintiff sustained damage. That would be the gravamen of an action on the case; and as the gravamen is the same, of course the cause of action must be the same. This view is pressed, because it would seem not to have been taken by Judge DANIEL, in STATE v. WATSON, and may account for the position in which he is placed between the other two Judges. It is settled, that, "to sustain an action on the case, it must not only appear that the plaintiff 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 can be clearly defined and ascertained." "If the damage be too remote, indefinite and contingent, the action will not lie." BOOE v. WILSON, ante. 182; MARCH v. WILSON, Busbee 143; GARDINER v. SHERRED, 2 Hawks. 173; LAMB v. STONE, 11 Pickering 527. The statute makes it the duty of the overseers of roads to keep up "finger boards" at the forks of the road. Suppose an overseer neglects his duty in this particular; a traveler comes along and takes the wrong road; after going a short distance, his horse stumbles and falls, and he is much injured by a fall: or, suppose the traveler goes so far before he discovers his mistake, that he is belated, and so much detained that he is unable to reach a certain place in time to attend to important business, in consequence of which he loses a chance to make money, or a chance to save it; can he maintain an action against the overseer to recover such damage as the jury may see proper to give? *Non constat*, but his horse would have fallen, if he had taken the right road. *Non constat*, that he would have noticed the finger board, if one had been there; and *non constat*, but he would have missed his way at some other fork. So in our case, *non constat*, if the defendant had issued the summons, that the sheriff would ever have served it, or if he had, *non constat*, that the guardian or his sureties would have paid any attention to it; and *non constat*, that the County Court would have caused such proceedings to be had thereon, as would have resulted in any good. On the contrary, from the fact that a summons afterwards did issue, and after lying in Court several terms, was dismissed, and resulted in nothing, the chances are, that such would have been the fate of the notice, for the failure to issue which, the plaintiff now sues. These damages are too remote and conjectural to be made the ground of an action of this kind to maintain it. The damage must be certain or capable of being made certain, and must be the natural consequence of the wrongful act, so as not to rest on mere contingencies.

But we do not in the second place think it was the intention

of the statute to make clerks liable to be sued upon their official bonds for neglecting to issue these notices, for several reasons.

1. The damages for a breach would of necessity be uncertain and conjectural; so that actual damage could not be assessed, and it could hardly have been the intention to give actions, by which the plaintiffs could in no event be benefitted, for the mere purpose of distressing the defendants by way of costs.

2. The second section of ch. 54 Rev. Statute, "guardians and wards," directs the Courts to take good security for the estates of infants, and makes "the Justices appointing such guardian liable *for all loss and damages sustained by the orphan for the want of such security being taken*, to be recovered by action," &c. The 12th section of same chapter requires guardians to exhibit their accounts to the Justices for examination, and provides "that it shall be the duty of the clerk of the Court, *under penalty of one hundred dollars, (to be applied to the use of the ward,) to issue ex-officio summons*, returnable to the next Court," &c. The 12th section allows the clerk, for issuing the summons, as in the last section directed, *a fee of sixty cents*, to be recovered of the guardian.

The 7th section, the one now under consideration, requires guardians to renew their bonds every three years, and provides, "it shall be the duty of the clerks of the several County Courts *to issue an ex-officio summons* against each guardian who shall fail," &c.

No provision is made that the clerk, on failure, shall be liable for the amount of the orphan's estate, or for all loss and damages sustained by the want of such summons. No provision is made that he shall be liable to a penalty, or by which he is allowed a fee for issuing the summons, and no time is fixed, within which the summons *must be issued or be made returnable*. Now, from what can it be inferred that it was the intention to create and fix upon the bonds of the clerks of the several County Courts a liability that might amount to the value of the estates of every ward in their county? There is nothing, except that it is made their duty to "*issue an ex-officio summons*."

What is the meaning of *ex-officio* in the sense in which it is here used? Clearly, that he is to issue the summons without *waiting* for the County Court to make any *order* to that effect. Just as the Governor is *ex-officio* chairman of a board, without waiting for any further appointment. This satisfies the meaning of the word; and there is no rule of construction, by which it can be extended, so as to make an inference which will be attended by such important results.

3d. If so great a change in regard to the liabilities of clerks had been contemplated, it is natural to have expected to find the law, under the head of "clerks," accompanied by a requisition that the penalty of their bonds should be increased; and it is also natural to have expected to find some limit fixed in regard to the time during which the liability should continue, and the number of years that it was expected, and made the duty of the clerk to look back among the papers, and see who had not renewed his bonds, among the guardians whose appointments appear on the books. Whereas this matter is left open, and he is bound to see to the bond of every guardian appointed within twenty-one years next before he became clerk, and this without fee or reward.

4th. Upon the whole, we conclude that it was not intended to make this one of the *duties appertaining to the office of clerk*, as to keep safely the records, issue writs, &c., and that the clerk was selected as the person to issue these summonses, simply because it was as convenient, or more so, for him to do it, than any one else; otherwise, why the omission to annex a penalty, or some other mode of enforcing the performance of this new official duty.

Judgment arrested.

DOE ON THE DEMISE OF LEWIS B. BOHANAN v. WILLIAM V. SHELTON.

The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the Administrator of said deceased obligor, is within the spirit and meaning of the Act of 1846, ch. 68, (which is a remedial statute,) and is admissible without accounting for the absence of the original.

This was an Action of Ejectment, tried before his Honor, Judge MANLY, at the Spring Term, 1854, of Stokes Superior Court.

The plaintiff showed the defendant in possession of the land in question at the time of the bringing of this suit, and he read in evidence a grant for the land to Electious Musick, a deed from Musick to one Vernon, and a deed from the Administrator of Vernon to the lessor of the plaintiff. He then offered, in evidence, a copy of a title bond properly authenticated, taken from the books of the Public Register of Stokes county, which registry bore date before the date of the deed of the Administrator to plaintiff's lessor, wherein it was stipulated that the said Vernon should make title, &c., to the lessor of the plaintiff. This evidence was objected to, upon the ground that the original should be produced, or its absence accounted for. The evidence was received by the Court, and defendant excepted. Verdict for the plaintiff.

Rule for a *venire de novo*, for error in the matter excepted to. Rule discharged. Judgment and appeal.

Miller, for plaintiff.
Morehead, for defendant.

PEARSON, J. The act of 1846, ch. 68, provides, "The registry, or duly certified copy of the record of any deed or conveyance of land for conveying the same, registered or recorded, as by the Revised Statute ch. 37, entitled "Deeds and Conveyances," is directed, may be given in evidence in any Court of Record with-

out accounting for the original, unless," &c. By the 28th sec. ch. 46, Revised Statutes, it is provided, "An administrator of any deceased person is fully empowered to execute a deed for any land that may have been "bona fide" sold and for which a bond to make title has been given, *Provided*, said bond be first proved in the Court of the County, where the lands are situate, and is recorded and registered in the Register's book of said county."

The 37th chapter of the Revised Statutes requires all deeds and powers of Attorney to convey land to be registered, and directs how they are to be proven and registered.

The bond, to make title, in this case, had been fully proven and registered, and the administrator had executed a deed, and the question was, could "the registry" or copy of the record of the bond be given in evidence without producing or accounting for the original, by force of the act of 1846?

This is a remedial statute, and should be construed liberally, so as fully to effect the purposes for which it was enacted. The words are "any deed or conveyance of land, or *power of attorney* for conveying the same, registered as required by the 37th chapter," &c.

The bond may not literally be a power of attorney, but the statute gives to it the force and effect of a power of attorney, requires and fully *authorizes* and *empowers* the administrator to convey the land in pursuance thereto, and directs that the bond shall be proven and registered in the manner that deeds for land and powers of attorney for conveying the same are required to be proven and registered.

The plain meaning of the Statute is, that a duly certified copy of the record of any instrument which forms a part of the conveyance of land, and which is required to be registered, may be given in evidence.

A construction excluding from the operation of the statute a bond, which by law is converted into, and made a power of attorney to convey land, and must be registered as such, would fall within the maxim "*hæret in litera, hæret in cortice*," because the case is within the evil that the statute was made to

remedy, and although this very mode of conveying land may not have been prominent before the eyes of the law makers, it is clear that the intention was to include a class, and make a general rule, applicable to deeds or conveyances of land, and all and every such part thereof, as, by law, is required to be registered. There is no error.

PER CURIAM. Judgment affirmed.

CLEMENT SMITH, v. W. M. BENNETT.

The use and enjoyment of a private way, for more than twenty years, will not give a title to the easement alone. Such use and enjoyment, to have that effect, must have been *adverse* and *as of right.*

Action on the Case for obstructing a private way, tried before his Honor Judge MANLY, at the Spring Term, 1854, of Rockingham Superior Court.

The road in question passed over the land of an ancestor of the plaintiff for sixty or seventy years, and had been used by him and by the plaintiff for that length of time as a mill road, and also for the purpose of going to meeting, and for getting out into the Danville Road, when they had occasion to visit that place. More than twenty years ago, the lower part of the land had been sold off by the father of the plaintiff, which embraced a portion of the road, and since its detachment, the father, and then the son, had continued to use and enjoy, for twenty years or more, the privilege of passing along the road, for the purposes above set forth. A short time before the bringing of this suit, the defendant, who had become the owner of the lower part, put a fence across the road, within the boundaries of his own lands, and obstructed it. The Court instructed the jury, that if the plaintiff had used and enjoyed the way for more than twenty years, he would be entitled to recover.

Under these instructions, the jury found a verdict for the plaintiff.

Rule for a *venire de novo*; rule discharged, and appeal to this Court.

Miller, for the plaintiff.
Morehead, for the defendant.

PEARSON, J. The charge was, in effect, that if the plaintiff had used and enjoyed the way for more than twenty years, he was entitled to recover. This is correct, as far as it goes; but it does not go far enough. The user must be adverse, and as of right. No right can be acquired, unless it be claimed and asserted. This case is settled by that of MEBANE v. PATRICK, ante. 23; INGRAM v. HOUGH, id. 39, not published until after the trial.

Venire de novo.

STATE TO THE USE OF ALSEY J. JONES, v. UZ W. COX, *ET AL.*

There is no error in refusing to dismiss a suit for the want of a prosecution bond, where there is no motion to dismiss.

Whether a Court will order a further security for costs, is a matter of discretion, from the decision of which there is no appeal to this Court.

THIS was a motion for a rule to show cause, &c., in a suit on a constable's bond, made before his Honor, Judge SAUNDERS, at the Spring Term, 1854, of Sampson Superior Court.

The case presented to this Court is contained in the following record, sent up from the Court below: "Motion for a rule on relator to show cause why he should not give a prosecution bond, argued and disallowed by the Court, (Spring Term, 1854.) De-

fendant prayed an appeal to the Superior Court, which was allowed."

Banks and *Kelly* for the plaintiff.
No counsel for the defendant.

BATTLE, J. This suit was brought against the defendant, Cox, and his sureties on his bond as Constable, by the relator, in the name of the State, and was returned "executed" to the May Term, 1853, of Sampson County Court. It was then continued from Term to Term until February Term, 1854, when, on motion, a rule was obtained on the relator, to show cause why he should not give a prosecution bond, and the cause was then taken to the Superior Court. In that Court, at Spring Term, 1854, before his Honor Judge SAUNDERS, the motion was argued and disallowed, and the defendants prayed and obtained an appeal to the Supreme Court.

No reason is assigned in the case why the motion was made, nor why it was disallowed. We have had the benefit of an argument for the relator only, and that, not by the counsel who appeared for him in the Court below. We may not be able, therefore, to ascertain the true grounds upon which the motion of the other party was based. We suppose, however, that it was upon one or the other of two grounds, both of which depend upon the express words, or the just construction of the 44th section of the 31st chapter of the Revised Statutes. That section directs the clerks of Courts of Record, to take from plaintiffs, bonds with security for the prosecution of suits, before the writs are issued, and declares that if "any writ or leading process shall be issued without such security being given or order (to sue *in forma pauperis*) made, the same shall be dismissed by the Court, on motion of the defendant." If the object of the motion in this case was to obtain an order from the Court to dismiss the suit for want of a prosecution bond, it ought to have been so made in express terms. If it was to obtain other or additional security, under the power of the Court to protect its suitors, de-

rived either from the common law, or the just construction of the section aforesaid, (see TYLER v. PERSON, 1 Murph. Rep. 498,) then it was addressed to the discretion of the Court. Taken in either way, we cannot disturb the order made in the Superior Court, because that Court did right in declining to dismiss the suit when no motion to that effect was made, and whether it did right or not, in disallowing the motion which was made, it was a discretionary exercise of power, which we are not at liberty to revise. The order must be affirmed.

Judgment affirmed.

DEN ON THE DEMISE OF JOHN THOMAS v. ABEL KELLY.

In ejectment, where A. and B. both attempt to show title under C., and the jury find that B.'s deed was not delivered: It was HELD, that B. could not be permitted to show that A. had conveyed the land in question to another person, before he conveyed to either of them.

This is not technically an estoppel, but a rule founded in justice and convenience.

THIS was an action of Ejectment, tried before his Honor Judge SETTLE, at the Fall Term, 1853, of Moore Superior Court.

The case is fully stated in the opinion of the Court.

Kelly, *D. Reid* and *Person*, for the plaintiff.
Strange, for the defendant.

BATTLE, J. This was an action of ejectment, for a certain tract of land, of which it was admitted that the defendant was in possession. The lessor of the plaintiff, in support of his title, offered and read in evidence a deed from John Gunter to Joseph Thomas, for the land in question, dated the 5th of Au-

gust, 1806, and then a deed from Joseph Thomas, jr., to him, the lessor, dated 4th February, 1845. The defendant then offered, and read in evidence, a deed from the same Joseph Thomas to him, dated 20th of November, 1844, for the same land, which he had procured to be proved and registered, and contended that it conveyed the land to him. He also read in evidence a deed from the said Joseph Thomas, to one Reuben Thomas, of a prior date, to wit, 17th of February, 1840.

In reply, the plaintiff's lessor introduced testimony, tending to show, that the paper writing, purporting to be a deed from Joseph Thomas, jr., to the defendant, was never delivered, but was wrongfully and forcibly taken by the defendant, without the consent and against the will of the said Joseph Thomas. Other testimony was introduced, to show that the deed from Joseph to Reuben Thomas was fraudulent and void; but it is unnecessary to state it, because the bill of exceptions sets forth, that his Honor proposed to submit to the jury, the question, whether Joseph Thomas, jr., ever delivered the paper writing of the date of 20th of November, 1844, to the defendant as his deed? reserving the question of law, how far the defendant was estopped by that paper writing, and his acts under it, from denying the title of the lessor; and that, if the jury should find that the paper writing had never been delivered, and his Honor should be of opinion that the defendant was estopped, a verdict of guilty should be entered; but, if he should think that the defendant was not estopped, then a verdict of not guilty should be entered, and then a judgment to be rendered according to the verdict. This proposition was expressly agreed to by the parties, and the jury acting thereon, returned as their verdict that the paper writing had not been delivered to the defendant. On the reserved question of estoppel, the plaintiff's lessor insisted that the defendant Kelly, by proving and registering the paper writing, and exhibiting it as a deed on the trial, and claiming under it as a deed, had estopped himself from denying the title of the lessor.

The defendant, on the contrary, insisted, that, as the paper

writing had not been delivered to him, it was no deed, and he could not be estopped by it. He contended further, that estoppels must be mutual, and the paper not being a deed, the grantor, Joseph Thomas, could not be estopped by it, and of course *he* could not be estopped.

His Honor was of opinion that the defendant was estopped, and under the agreement, a verdict of guilty was entered, and a judgment being rendered thereon, the defendant appealed.

The law applicable to this case is well settled, and the only difficulty which it presents arises from a misapplication of terms. The defendant, for the reasons given by his counsel, is not technically speaking, *estopped* from denying the title of Joseph Thomas, jr., under whom the plaintiff's lessor claims. But, as both the lessor and the defendant set up a claim to the land under the same person, neither of them can deny the title of that person. This is a rule, not strictly of estoppel, but one founded in justice and convenience, which has been long recognized, and acted upon in this State. The defendant, as we said, in JOHNSON v. WATTS, ante. 228, can, in such a case, "defend himself only by showing that he has a better title in himself than that of the plaintiff's lessor, derived either from the person from whom they both claim, or from some other person who had such better title;" but he is not at liberty to show a better outstanding title in a third person. (See all the cases on this subject, referred to in JOHNSON v. WATTS.) Here the defendant sets up a claim to the disputed land, under an instrument, which he alleged was executed by Joseph Thomas, jr., of a prior date to that under which the lessor claimed. Being defeated in that, by the proof that the paper writing had never been delivered as a deed, he is prevented by the just and useful rule which we have stated, from changing his ground, with the view to defeat the plaintiff's lessor, by showing a better title in Reuben Thomas, a third person. The judgment was right, (although a wrong reason was given for it,) and must be affirmed.

Judgment affirmed.

McPHERSON AND CONN, v. W. S. PEMBERTON, *ET. AL.*

Where persons enter into a co-partnership, with the fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, such persons cannot maintain an action of trespass, q. c. f., jointly against a person who forcibly enters the store house and seizes the goods.

An officer who has an execution against one of several partners in trade for the individual debt of the partner, may sell the joint property of the co-partnership and does not, thereby, subject himself to the action of the other joint owner by so doing.

(BLEVINS v. BAKER, 11 Ired. Rep. 291. Cited and approved.)

Appeal from the Superior Court of Montgomery, at the Fall Term, 1853, tried before his Honor Judge SETTLE.

This was an action of Trespass, q. c. f., for breaking and entering plaintiffs' store-house, and for carrying off a quantity of goods. It appeared from the evidence that previously to the trespass complained of, the business of merchandising had been carried on, in the house in question, in the names of McPherson and Conn, and that, in consequence of the absence of the plaintiff, McPherson for some time, the defendant, Pemberton, took out an original attachment againt him, for a debt which he owed him and placed the same in the hands of the other defendant, Ballard, a deputy sheriff of the county, who by virtue thereof, broke open the house in question, and took out and sold the goods there found by him, as the property of the Plaintiff, McPherson.

The proceeding by attachment was objected to as evidence, upon the ground that an attachment for the individual debt of one of the partners could not be levied upon the partnership effects.

The defendant insisted that the sole interest of the property in question was in the plaintiff, McPherson, and that no partnership existed between him and the other plaintiff, Conn, and that it was a mere fraudulent contrivance, to hinder and delay the creditors of McPherson, and that the note upon which the attachment issued, and the judgment rendered thereon were ex-

amined to show that defendant, Pemberton, was a creditor so as to entitle him to raise the question of fraud. The evidence was received by the Court. Other evidence was adduced by the defendants tending to show the fraudulent nature of the co-partnership. It was contended by the defendants that the seisure and sale of the property was lawful under the process in the hands of the deputy sheriff, and that, whether the co-partnership was *bona fide* or otherwise; and furthermore, that allowing it to be true, that an attachment could not be served on the plaintiffs' effects for the individual debt of one of the partners, yet, that the doing so was an injury personal to the partner who was not a debtor, and that a joint action, in the name of the two partners, could not be maintained therefor.

His Honor, reserving the other questions in the case, told the jury, that, if they believed that a *bona fide* partnership existed between the plaintiffs at the time of the entering the store by the defendants, they ought to give the plaintiffs damages to the amount of the injury they had sustained; but that, if they did not believe the partnership existed at all, or that it had been entered into without sufficient valuable consideration paid, or *bona fide* agreed to be paid by Conn to McPherson, and with ar intent to defeat, hinder, and delay the creditors of McPherson they ought to find for the defendants.

Under these instructions, the jury rendered a verdict for the defendants.

Rule for a *venire de novo*, which was discharged. Judgment and appeal to this Court.

Kelly, for the plaintiffs.
Strange, for the defendants.

NASH, C. J. We are saved the labor of investigating the questions raised at the Bar, by the finding of the jury. One of the questions involved in the case, and which lies at its threshold, is the form of the action. The plaintiffs claim to have been partners in trade, and that the goods seized by the

defendants were their joint property, and the house entered, to have been in their joint possession. The defendants, among other things, contended that no partnership existed between the plaintiffs, and if any did, it was entered into fraudulently, for the purpose of defrauding the creditors of McPherson. Several other legal questions arose on the trial, all of which were reserved by the Court, and the question of fraud submitted to the jury. His Honor instructed them, that if they believed a *bona fide* partnership existed between the plaintiffs at the time of the entering the store by the defendants, they ought to give the plaintiffs damages, &c. But, if they did not believe the partnership to have existed at all, or that it had been entered into without a sufficient valuable consideration paid, or *bona fide* agreed to be paid by Conn to McPherson, and with an intent to defeat, hinder or delay the creditors of McPherson, they ought to find for the defendants. The jury found a verdict for the defendants. This finding put an end to the action. They were not partners, or, if so, it was for a fraudulent purpose, negativing their right to bring a joint action.

Although the finding of the jury supercedes the necessity of considering the several questions of law raised in the argument, yet, as there is, among them, one of considerable importance, both as regards the duty of the public officers of the State, and also the interests and rights of partners in trade, we have concluded to call the attention of our brethren of the Bar to it. It was urged at the Bar, that an officer cannot levy on the partnership property, to satisfy the individual debt of one of the partners; and, if he did, he was answerable in an action to the other partner. The case of BLEVINS and BAKER, decided at August Term, 1850, of this Court, 11th Ired. 291, removes all doubt upon the subject. It is there determined, that an officer, who has an execution against a tenant in common of chattels, may levy it upon the property and take it into possession, for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common. And the Court say, the interest

of a partner in the partnership effects may be sold under a *fi fa* for his individual debt; and that the other partner can maintain no action of any kind against the officer or purchaser.

There is no error in the judgment below, and it is affirmed.

WILLIAM T. J. VANN v. JOHN B. HUSSEY, ADM'R.

No action at law of any kind can be maintained against a sheriff for seizing, selling, and delivering goods of a partnership to the purchasers, in obedience to a *fi fa* against one of the partners.

(BLEVINS v. BAKER, 11 Ire. Rep. 291; McPHERSON v. PEMBERTON, ante. 378, cited and approved.)

THIS was an action of Trover, brought to recover the value of certain partnership goods, sold by the sheriff and delivered to the purchasers, tried before his Honor Judge SAUNDERS, at Spring Term, 1854, of New Hanover Superior Court.

The plaintiff and one Southgate were partners, in the business of merchandizing, at a place called Strickland's, in the county of Duplin. The plaintiff resided in the town of Wilmington, while the other partner, Southgate, gave his personal attention to and carried on the business at the place above named.

The defendant's intestate, who was the sheriff of Duplin county, by virtue of an execution, issuing from the County Court of New Hanover, against Southgate, levied upon the goods in question, which were those of the firm, and sold the same at auction, and delivered them to the purchasers. Southgate was proved to be insolvent at the time of this levy and sale, but the plaintiff was solvent.

The goods brought $250, but they originally cost $600, and were worth at Strickland's $700.

The defendant contended that the plaintiff was not entitled to recover.

1st. Because one partner alone cannot sue at law, in *tort*, for an injury to the partnership effects.

2nd. Because the defendant's intestate was authorized, by the execution against Southgate, to levy and sell the partnership goods, and to deliver the same to the purchaser.

3rd. He also contended, that, if the plaintiff was entitled to recover at all, he was only entitled to damages for a moiety of the goods sold.

The Court charged the jury, that if the evidence was believed, the defendant's intestate had the right, by virtue of the execution against Southgate to levy and make sale of the goods levied on, but had no right to deliver them to the purchaser, and that the plaintiff would have the right to recover the whole actual value of the goods sold.

Under these instructions, the jury returned a verdict for the plaintiff.

Rule for a *venire de novo*; rule discharged, and appeal to this Court.

E. G. Haywood, for the plaintiff.
J. H. Bryan and *W. A. Wright*, for the defendant.

BATTLE, J. In the case of BLEVINS v. BAKER, 11 Ired. Rep. 291, this Court said, that "the interest of a partner in the partnership effects may be sold under a *fi fa* for his individual debt." TREADWELL v. ROSCOE, 3 Dev. Rep. 50. The sheriff must of necessity seize and take into his possession the effects levied on, in order to make the sale, and the other partner cannot maintain an action of any kind, either against the officer who levies and sells, or against the purchaser who takes possession." The same doctrine has been recognized and confirmed at the present term, in the case of MCPHERSON v. PEMBERTON, ante. 378 These seem to be direct authorities, that the sheriff may not only seize and sell the partnership effects, but may deliver possession of the articles sold to the purchaser, and that no action can be maintained therefor against either the officer

or purchaser. But our attention has been called to the case of DEAL *et. al.* v. BOGNE, (recently decided in the Supreme Court of Pennsylvania, and reported in the March number, 1853, of the American Law Register, page 301,) where it was held, that though, in such a case, the sheriff may seize and sell, he cannot deliver possession of the partnership effects to the purchaser; and that if he does so, the injured partner may maintain an action of trespass, *vi et armis*, against him, and also against the plaintiff in the execution, should he attend the sale and become a purchaser of any part of the effects. If that case be law, it shows that the present action in trespass on the case, cannot be supported; for, it decides that the sheriff's, by delivering the articles sold to the purchaser, executed the writ illegally, and became thereby a trespasser *ab initio*. Of that, however, we say nothing, because we do do not acquiesce in the decision that an action in any form can be maintained. The only case cited in its support, besides some from the same State, is TAYLOR v. FIELDS, 4 Ves. Jr. 369; the facts of which are said to be more fully stated in a note to YOUNG v. KEIGHLY, 15 Ves. 559. That case, which was one of those referred to by the plaintiff's counsel in his well considered argument before us, was a case in equity, and was decided upon the equitable principles to which we will hereafter advert. It is no authority in favor of the present action at law, whilst the case of PARKER v. PISTOR, 3 Bos. and Pul. Rep. 288, decided by the Court of Common Pleas, is a strong authority directly against it. That was a rule calling on the plaintiff to show cause why the sheriffs of London should not have time, until the first day of the next term to return a writ of *fi. fa.* The defendant was one of two partners, and the application was made on the part of several creditors of the partnership, and the object was to prevent the partnership goods from being sold until an account could be taken of the several claims upon this property. The Court, after argument by able counsel, discharged the rule, saying "that it was a very plain case at law, and that all the difficulties were to be encountered in equity; that the safest line of conduct for the sheriff to pursue

was to put some person in possession of the defendant's share as vendee, leaving him and the parties interested, to contest the matter in equity, where a bill might be filed, stating that he had taken possession of the property, and praying that it might not be disposed of until all the claims were arranged." Upon a similar application made on the same day, in CHAPMAN v KOOP, ibid, 289, Lord ALVANLY, C. J., said he hoped it might be the last;—and after some other observations, proceeded as follows: "By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But, if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity, against the vendee of the sheriff, or they may buy in the property when put up to sale. It has been said that the Court of King's Bench would suspend the plaintiff's execution until he consented to an account being taken before the master, but I do not think we are authorized to take such a step in this case. Indeed, I can hardly conceive a case in which we should be authorized so to do." In thus clearly stating the right and duty of the sheriff to seize, sell and deliver the goods of the partnership in an execution against one partner, the Court was but following what had been done by Lord HOLT, about a century before, in the case of POPE v. HAMAN, Com. Rep. 217. "Upon a *fi. fa.* against one co-partner, (said his Lordship,) the sheriff may take the goods of both in execution, and the other co-partner hath no remedy at law, otherwise than by re-taking the goods if he can; for the vendee of the sheriff becomes tenant in common with the other co-partners." These cases, which seem to have escaped the attention of the Judges who decided the case in Pennsylvania, have been followed in this State." In TREADWELL v. ROSCOE, above referred to, HENDERSON, C. J., after

stating that partnership property is liable to the separate debts of individual partners, said, "It is true, that the purchaser of partnership property under a *fi. fa.* against one of the partners, stands in the place of such partner, and can only claim, so far as the article purchased extends, what that partner could claim, that is, a share in the profits, or rather surplus, after the payment of the debts of the firm. But what are the rights of the purchaser, or his relation to the other partners, affects not the creditor in the *fi. fa.* or the sheriff, who has seized the partnership effects." A still stronger case, perhaps, is that of WELLS v. MITCHELL, 1 Ired. Rep. 484, in which it was held that one partner cannot maintain an action of any kind, at law, against a person who purchases from another co-partner, the partnership effects, though such sale was made by the co-partner in fraud of the partnership rights, and to satisfy his own individual debt. Now, we suppose it to be very clear, that whatever tangible property a debtor may sell and deliver in payment of his debts, may be seized, sold and delivered by the sheriff under a *fi. fa.* against such a debtor. Such has been stated to be the rules with respect to all the vested legal interests of a debtor, and it must apply as strongly to those which are vested in possession as to any others. KNIGHT v. LEAK, 2 Dev. and Bat. Rep. 133. In WELLS v. MITCHELL, RUFFIN, C. J., in delivering the opinion of the Court, shows clearly and conclusively how little adapted Courts of law are to afford an adequate remedy to the partner who is likely to be injured by the sale, and concludes by saying that those Courts "leave the whole subject to that tribunal which can administer exact justice in the premises." The tribunal to which allusion is thus made is the Court of Equity, and the remedy is, for the parties interested, who are likely to be injured, either to file a bill against the purchaser from the sheriff, or, what, perhaps, would be better, a bill to enjoin the sale until an account of the state of the partnership could be taken, so as to ascertain the share of the partner whose interest was levied upon under the execution. However that may be, we think that no action at law of any kind can be maintained against the

sheriff for seizing, selling and delivering the goods of the partnership to the purchasers, in obedience to the writ of *fi. fa.* against one of the partners, under which he acts. The judgment must be reversed and a *venire de novo* awarded.

JAMES K. MELVIN v. HENRY EASLEY.

Professional books, or books of science, (e. g. medical books,) are not admissible in evidence, though *experts* may be asked their judgment, and the grounds of it, which may in some degree be founded on books, as a part of their general knowledge.

Where counsel, in his address to the jury, read and commented on a book of science, as evidence in the cause, without being interrupted by the adverse counsel, this is no waiver of the error, for it was the duty of the Judge, in his instructions to the jury, to present the case to them properly, and to correct any errors into which counsel may have fallen.

For the Judge to say that a book on farriery, which had been read by counsel, was entitled to as much authority as a witness, who had been examined (as an expert in the science of diseases of horses,) is a clear violation of the act of 1796, (1 Rev. Stat. ch. 31, sec. 136,) forbidding the Judge to express an opinion on the facts.

THIS was an action of Assumpsit, for a breach of a warranty of the soundness of a horse, tried before his Honor Judge SAUNDERS, on the last Circuit at New Hanover.

For the purpose of proving the unsoundness of the horse, the plaintiff introduced three witnesses, who testified to the swelling of his sheath, &c., and his death.

The defendant then examined a witness, who stated he had been the keeper of a livery stable, and thought he had some knowledge of the diseases of horses; and upon being asked his opinion, said he thought that the swelling of the sheath was not

such a disease as would permanently impair the value of the horse, for that it was only a temporary disease.

The counsel for the plaintiff, in his address to the jury, alluded to this testimony of the defendant's witness, and said that though the swelling of the sheath might not be a disease of itself, it was one of the symptoms of stone in the bladder, which he contended was the disease of which the horse died. In support of this, the counsel referred to a book which he held in his hand, but did not read, which stated this as one of the symptoms of that disease. No objection was taken to this course, and the counsel closed the book, and handed it to the Judge.

His Honor, in his charge to the jury on this point, said that the defendant's witness had been permitted to express an opinion that swelling of the sheath was not such a disease as to impair, permanently, the value of the horse; and, in answer to this, the plaintiff's counsel argued, that although this might not be a disease of itself, yet it was one of the external symptoms of stone in the bladder, and referred to the book which he held in his hand, in support of the truth of his position. His Honor then added, that he had looked into the book, and found under the head of "Stone in the Bladder," that the swelling of the sheath was stated to be symptomatic of the disease of stone in the bladder; and further, that, as it was an American edition of an English book, that treated of the diseases of horses, he supposed it might be entitled to as much authority in the science as the witness; that, as no *post-mortem* examination had been made to establish the fact of stone being found in the bladder, it was for the jury to say, under all the circumstances of the case, whether they were satisfied of the unsoundness of the horse at the time of the purchase. Under this charge, the jury returned a verdict for the plaintiff. Whereupon, there was a motion for a new trial, which was overruled, and the defendant appealed.

E. G. Haywood, for plaintiff.
D. Reid, for defendant.

BATTLE, J. We have no hesitation in saying that the defendant is entitled to a *venire de novo*, because of two errors committed, to his prejudice, by the Court. The book on the diseases of horses, extracts from which were given in charge to the jury, was not admissible in evidence, and yet the Court gave it all the effect of such. The rule is, that professional books, or books of science, (e. g. medical books,) are not admissible in evidence, though experts may be asked their judgment, and the grounds of it, which may in some degree be founded on books, as a part of their general knowledge. COLLIER v. SIMPSON, 5 Carr. and Payne 73, (24 Eng. C. L. Rep. 219,) Cow. and Hill's notes to Phill. on Ev., part 1, page 761. The reason of the rule is obvious, that if the authors were present, they could not be examined without being sworn and exposed to a cross-examination. Their declarations or statements, whether merely verbal, written or printed and published in books, are not admissible. But it is said that no objection was made when the plaintiff's counsel referred to and made statements from the book which he held in his hand, but did not read. It was not the duty of the opposite counsel to interrupt the argument of the plaintiff's counsel, by stopping him to make his objection then, because the presiding Judge was not bound to notice the error at that time. This Court said, in the case of the STATE v. O'NEAL, 7 Ired. Rep. 251, that "it is the right and the duty of the presiding Judge, if counsel state facts as proved, upon which no evidence has been given, to correct the mistake, and he may do it at the moment, or wait until he charges the jury, perhaps the most appropriate time." Here the Judge did not correct the mistake at the time, nor when he came to charge the jury. On the contrary, he in effect decided that the book was admissible in evidence, and charged the jury upon it as evidence. In doing this he erred, and then he committed another error, in saying that, "as it was an American edition of an English book, that treated of the diseases of horses, he supposed it might be entitled to as much authority in the science as the witness."

That was a clear violation of the act of 1796, (1 Rev. Stat. ch. 31, sec. 136.) It is the duty of the presiding Judge to decide all questions arising upon the competency of testimony, but he is not at liberty to express any opinion as to its credibility or weight. See STATE v. CARDWELL, Bus. Rep. 245, and the cases therein cited.

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

DOE ON DEMISE OF DAVID COOPER v. THOMAS WHITE.

A mistake in the course or distance, contained in the calls of a deed, will not be permitted to disappoint the intent of parties, if that intent appear, and the means of correcting the mistake are furnished, either by a more certain description in the deed, or by a plat annexed to such deed, and referred to in the same.

Where one of the calls in a grant was "South, eighty degrees East," but in the plat and certificate of survey annexed, the same call was "South, *eight* degrees East," and it appeared, that, to run according to the grant alone, the lines would cross each other several times, dividing the land into three distinct parcels, and would only contain about half of the number of acres called for, and by so running: HELD, the lines would terminate far from the beginning; but, by running according to the plat and survey, a consistent diagram would be made, embracing the proper quantity: HELD, that the latter description must be adopted.

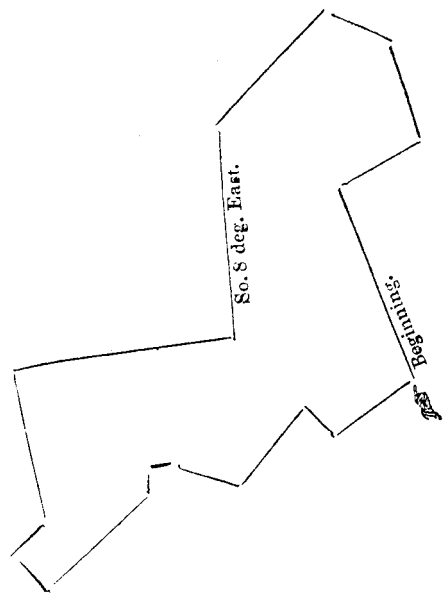
Action of Ejectment, tried before his Honor, Judge BAILEY, at the Spring Term, 1854, of Tyrrell Superior Court. The following case agreed was submitted to his Honor:

One Hillory Bacon obtained a grant from the State, the boundaries of which commenced at a well known point, and after running various courses and distances, contained a call "South, eighty degrees East," and thence various courses and distances, to the first station, after which is added "*as per the next plat appears.*" On reference to the plat annexed to the grant, it is found that the call therein, for this part of the description, is

"South, *eight* degrees East, &c." and it was admitted that if the latter course was adopted as the boundary of the grant, it covered the land in controversy; but, if the call in the grant, of "South, eighty degrees East," was adopted, it was not contained within the boundaries. The original survey filed in the office of the Secretary of State, upon which the grant was issued, corresponds with that annexed to the grant, viz: it calls at this point, for a course unning *South, eight degrees East.*

The diagram formed by running the lines according to the calls of the "plat annexed" is thus:

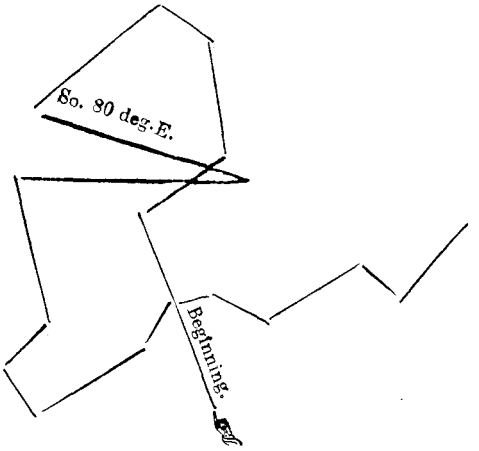
DIAGRAM.



If the courses and distances called for by the grant itself uncontrolled by the plat, be adopted, the lines will cross each other several times, and will terminate far from the beginning, and will contain less than half the number

of acres called for in the grant; and the following is the figure formed by thus running:

DIAGRAM.



The title of the grantee, Bacon, was duly established by mesne conveyances down to the lessor of the plaintiff, David Cooper, and it was admitted that the defendant was in possession when this suit was brought.

The case being thus agreed, it was submitted to his Honor, whether, according to law, the plaintiff was entitled to receive. And, upon consideration of the matter submitted, his Honor being of opinion with the defendant, gave judgment against the plaintiff, from which there was an appeal to this Court.

Heath, for the plaintiff.

No counsel appeared for the defendant.

BATTLE, J. It is now well settled, that a mistake in the course or distance contained in the calls of a deed, shall not be permitted to disappoint the intent of the parties, if that intent

appear, and if the means of correcting the mistake are furnished, either by a more certain discription in the same deed, or by reference to another deed, containing a more certain description. CAMPBELL v. MCARTHUR, 2 Hawks. 33 ; RITTER v. BARRETT, 4 Dev. and Bat. 133. It is equally well established, that a similar mistake in a grant may be corrected by reference to a plat annexed, or by such plat and the certificate of the original survey, where a more correct and certain description is therein contained. BLAKE v. DOHERTY, 5. Wheat. Rep, 359; HURLY v. MORGAN, 1 Dev. and Bat. 425. It is true, that when a natural object, as for instance, a large lake, is called for in the grant, and the lake is not laid down in the annexed plat, the latter cannot control the calls of the grant, because the grant, by calling for the natural object, furnishes the more certain description. LITERARY FUND v. CLARK, 9 Ired. 58. This, however, is but an exception, which, in the very reason upon which it is founded, the more clearly proves the general rule.

That the grant, in the case before us, contains a mistake in the call for the course, "South, eighty degrees East," is manifest from an inspection of the plat, made according to the survey on that call. The line thus run makes the other lines cross each other, and throws those which are subsequent to it so much out of their proper position, that the land actually enclose, is in three distinct parcels, amounting in the whole to not more than half of what is expressed to have been granted. In addition to this, the twelfth line of the grant crosses the first, and those subsequent to the twelfth go off in a direction from the beginning, and never reach it. It must be admitted, then, that there is a mistake in the call alluded to, which ought to be corrected by the annexed plat, or by that, together with the certificate of the original survey, if the description therein given be more consistent, and thereby leads to a more certain ascertainment of the intention of the parties. Such, it will be readily perceived, is the case. The call in the plat, as well as in the certificate of the original survey, is "South, eight degrees East," and by adopting that, instead of the course, "South,

eighty degrees East," and running according to it, all the other courses and distances will be consistent with it, and one entire tract of land will be found to be enclosed by them. The mistake was, no doubt, made inadvertently by the Secretary of State, in adding the letter "y" to the word "eight" in the call in question. Under these circumstances, we have no hesitation in saying, that his Honor erred in holding that the mistake in the grant was not corrected by the plat and certificate of the original survey; and proceeding upon the agreement of the parties, we direct the judgment in favor of the defendant to be set aside, and a judgment to be entered for the plaintiff.

PER CURIAM. Judgment reversed, and judgment for plaintiff.

STEPHEN B. FORBES, v. THOMAS WILLIAMS.

Where the lessee of a lot, for a term of years, covenanted that he would not remove off of the lot any building which he might put thereon, until the rents were paid; and a building put thereon during such lease, was removed by a third person, by the consent of the lessee, the rent being unpaid: HELD, that such third person was liable in damages to the lessor for such removal.

HELD, further, that the lessee was a competent witness for the lessor, against such third person.

Action on the Case for an injury to the plaintiff's freehold, tried before his Honor, Judge ELLIS, at the Spring Term, 1854, of Craven Superior Court.

The plaintiff was the owner of the freehold of a lot in the town of New-Berne, and leased the same to one French, for the term of five years; and during the term, the defendant removed from the lot, and appropriated to his own uses, a house situated thereon, for which the plaintiff alleged "that the security of the plaintiff was impaired, and he was damnified to the extent of the

rent due upon the lease." The plaintiff was the owner in fee of the lot in question lying in the town of New-Berne, and leased the same by deed to one Henry French, on the first day of March, 1848, for the term of five years. This deed was offered in evidence, and objected to by defendant, but was received by the Court. One of the covenants in this deed is as follows: "The said Henry E. French, for themselves, their heirs, executors, administrators and assignees, doth covenant and agree to and with the said Stephen B. Forbes, his heirs, executors, administrators and assigns, that they will not remove off any building or buildings, that are or may be put on the said lot of ground until the rents are fully paid and satisfied." French built a house upon the lot after he took possession, and afterwards sold it to the defendant, who removed it from the lot before the expiration of the lease, to wit, in March, 1849, the rents remaining unpaid, and which have not since been paid, except for the first year, which was paid by the defendant. These facts were proved by French, who was objected to by the defendant, as incompetent, on the ground of interest, but he was admitted by the Court.

The plaintiff only claimed damages to the amount of the rent which was in arrear. Upon these facts, the defendant contended that the plaintiff could not recover, and requested the Court so to instruct the jury; but his Honor being of a contrary opinion, refused so to instruct. His Honor charged the jury, further, that the rule of damages was the value of the house; but in case this value exceeded the amount of rent due, they should give no more than that sum, as that was only the amount claimed by the plaintiff. The jury found a verdict for the plaintiff.

Rule for a *venire de novo* for the admission of improper testimony, andfor mis-direction by the Court. Rule discharged and appeal.

J. H. Bryan, for plaintiff.
Green, for defendant.

NASH, C. J. We concur with his Honor in the opinion given in this case. The deed containing the lease from the plaintiff to French was competent evidence, and French himself a competent witness for the plaintiff. The case states that the lot, from which the house was removed, was owned in fee by the plaintiff; the act of removing the house from it by the defendant was a tort to be remedied, ordinarily, by an action of trespass *vi et armis*; but the plaintiff could not bring that action, because French, at the time it was committed, was in the actual possession of the lot, under a lease from him. The lease, therefore, itself, was pertinent evidence to show the illegal nature of the act complained of. Again, it was competent, if not necessary evidence to show, that, at the time the defendant removed the house, neither he nor French, the lessee, had the right to do so. The lease to French was for five years, commencing the first day of March, 1848, and ending the first day of March, 1853. The lessee covenanted, that no building then on the lot, or which should thereafter be put upon it, should be removed off the lot "until the rents are fully paid and satisfied." This covenant ran with the lease, and extended to the last moment of it. The house was removed, in 1849, four years before the expiration of the lease. To show the terms of the lease, it being reduced to writing, the deed itself was necessary evidence, so far as it was necessary to show those terms. French was a competent witness for the plaintiff, but not a necessary one. French had covenanted not to remove any house from the lot, until the rents were fully paid. What he could not legally do, his vendee could not legally do. The defendant purchased the building, subject to the restriction laid upon his vendor; and to make the removal of the house legal at any time, the burden of showing that the rents were fully paid, devolved on him. It was not therefore necessary, on the part of the plaintiff, to have introduced French in the first instance; but he had a right to do so. Again, the house was treated both by French and the defendant as personal property, and in every sale of personal property, the law implies a warranty of title by the vendor;

and, therefore, the vendee has, generally, a right of action against the vendor, if the latter has no title. Admitting, then, that the defendant had no notice of the covenant, on the part of French in his lease, but that he purchased in good faith, believing that he had a right to sell the house, then French would have been answerable to him for the full amount of the damages he might sustain by reason of the breach of his implied warranty. But French is also liable to the present plaintiff, his lessor, to the full amount of the damages sustained by him, in consequence of the breach of his covenant; and in each case, ordinarily, the measure of damages would be the same. French, therefore, having an interest on both sides, stood indifferent between them, and was a competent witness. The question as to the right of lessees to remove buildings erected to carry on trade does not arise in this case. French, the lessee, bound himself by express covenant, to remove no building until the whole rent was paid, and the case states that the rent was in arrears and the covenant allows him to remove any house he should erect after the expiration of the lease.

There is no error in receiving the testimony objected to, nor in the charge.

Judgment is affirmed.

THOMAS G. McLEAN, ADM'R v. MARY B. NELSON.

A grantee is not a necessary party to a bill of sale for slaves.

Where a deed, conveying slaves upon certain trusts, was duly executed, by a woman and her intended husband, in contemplation of marriage, and was duly proven and recorded, it is valid, although the draftsman may have added an extra seal, intended for the signature of the trustee, and although the same was not signed by such trustee.

Where a deed is delivered to a third person, in the absence of the grantee, the latter is presumed to accept it, and it forthwith becomes effectual to pass the property included in it.

Whether a trustee has undertaken the burden of executing the trust, is not a question that concerns the valid execution of the deed in this case, but can only be raised in a Court of Equity by the *cestui qui trust*, after its due execution is established.

THIS was an action of Detinue, for eight slaves, tried before his Honor Judge SAUNDERS, at Spring Term, 1854, of Alamance Superior Court.

The plaintiff claimed title as the administrator of William A. Nelson, who, it was alleged, acquired the slaves in question by his intermarriage with the defendant, in the county of Cumberland, State of Virginia, in the year 1845. From the time of this marriage, up to the death of the husband, in July 1852, Nelson and his wife, the present defendant, resided in the counties of Orange and Alamance. The negroes had been brought from Virginia, to their late place of residence in this State, in the year 1851, and plaintiff's intestate, Nelson, had treated them as his own, by putting some of them to work for him, and by hiring out others, up to the period of his decease. After Nelson's death, his widow, the defendant, took possession of the negroes, and held them as her own property, up to the time of bringing this suit. A demand and refusal was admitted by the parties.

The defendant claimed the negro slaves in question, by virtue of a deed which was produced in evidence, bearing date the 8th day of November, 1845, by which these slaves were conveyed to John W. Wilson, of the county of Cumberland, in the State of Virginia, to be held by him "in trust for her own benefit until the contemplated marriage should take place, and then for the joint use and benefit of herself and the said William A. Nelson during their joint lives, and after the death of either of them, for the benefit of the survivor, and for the support and education and maintenance of the issue of such marriage for and during the life of such survivor, and, after the death of such survivor, in trust, to convey the same to the issue of such marriage." The deed was duly executed by the plaintiff's inestate and by "Mary B. Williams," the present defendant, and a third seal had been affixed, which the reciting part of the deed indicated

as being intended for the signature of the trustee. This deed appeared to the Court below to have been duly proved and recorded, according to the statute law of Virginia, of which law there was evidence (not excepted to) before the Court.

The plaintiff's counsel insisted that the deed did not operate as a conveyance to pass the title of the slaves from Mary B. Williams to the trustee: first, because it was obvious, from the form of the instrument, and from a blank seal being left, that it was intended Wilson should sign the deed as a party to it, which he had failed to do; and, secondly, because there was no evidence that he had ever accepted the trust or the title to the slaves under such deed; and the Court was requested so to charge the jury.

His Honor declined giving the instructions prayed, and the jury found a verdict for the defendant.

Rule for a *venire de novo*, for misdirection in the Court. Rule discharged and appeal.

J. H. Bryan, for the plaintiff.
Norwood, for the defendant.

PEARSON, J. Is the grantee a necessary party to a bill of sale for slaves, or will the due execution of the deed by the grantor suffice? This is the first point made in the case sent, and is really too plain to talk about.

2d. "From the form of the instrument, and a blank seal being left, it is obvious that it was intended that the bargainee should execute it as a party, which he failed to do;" and the inference is, that it was left incomplete, and was therefore void and of no effect.

It is stated in the case sent, that the defendant, before her marriage, and with the consent of her intended husband, executed a deed conveying the slaves to one Wilson, upon certain trusts, and that this deed was duly proven and recorded in Virginia, where the parties resided, and had the property. It is difficult to conceive, how a deed, duly executed, can be nullified

and made void, by the fact, that one, who is not a necessary party, omits to sign it, even although the draftsman may have added an extra seal! The case is not at all like that where one signs a bond as surety, and delivers it as an *escrow* to become his deed, provided it is also executed by certain other persons as co-sureties.

3d. "There is no evidence that Wilson ever accepted the trust, or the title under said deed."

When one delivers a deed to a third person, in the absence of the grantee, the latter is presumed to accept it; so that, it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may of course be rebutted by proving that the party refused to accept it; but, until he refuses, his assent is presumed, for the purpose of giving effect to the instrument as a deed: "*ut res magis valeat, quam pereat.*"

The plaintiff's counsel admits this to be the general rule, but insists it is founded upon the presumption that a deed is for the benefit of the grantee, and that in this case the presumption is rebutted; for, it appears upon the face of the deed, that the grantee is not to be benefitted by it; but, on the contrary, is to be burdened with a trust.

Without stopping to enquire, whether the rule rests upon the ground of a personal benefit to the grantee, or whether it does not lay deeper, and rest on the maxim, "*ut res valeat,*" &c., the presumption being necessary to give effect to a solemn act of the maker, it is sufficient to say that, in a Court of law, a trust is not taken notice of. So the legal effect of the deed is to make the grantee the owner of the property; and, taking the plaintiff upon his own ground, there is a presumption of a benefit to the grantee, and nothing to rebut it in this Court, where the question, deed or no deed, is to be decided.

The position taken by the counsel is true to this extent: there is no presumption that one accepts and undertakes the burden of executing a trust; and, if this presumption was necessary, in order to give legal effect to the conveyance, the plaintiff would have some ground to stand on; but this pre-

sumption is not necessary; for, as soon as the instrument becomes a deed by the acceptance of delivery, which is presumed, the title passes; and this, in our case, puts the plaintiff out of Court.

Whether, after the legal title is vested in him, the grantee accepts or refuses to accept the burden of executing the trust, is another question, and one with which the plaintiff has no concern. It is, then, for a Court of Equity, in behalf of the *cestui qui trust*, to see that the trust does not fail for the want of a trustee. There is no error.

Judgment affirmed.

WILLIAM W. CLEMENTS, v. RICHARD B. HUNT.

The declarations of deceased members of a family are competent to prove the time of the birth of a child belonging to that family, although there may be a family register of births in existence: for the one kind of evidence is of no higher dignity than the other.

THIS was an Action of Debt, tried before his Honor, Judge MANLY, at the Spring Term, 1854, of Granville Superior Court.

The plaintiff declared upon a bond, to which defendant pleaded *infancy*. Upon the trial, the defendant offered a witness, his brother, to prove the declarations of their mother and father, both now dead, made from time to time to him, anterior to this or any other controversy on the subject, as to the time of the defendant's birth: In answer to inquiries touching the competency of this evidence, the witness stated that there was a family register of *births* in existence; the plaintiff objected to the admissibility of these declarations and contended that they were inferior in dignity to the register. The Court, however, admitted the evidence, and upon that and other evidence (not excepted to) the defendant had a verdict.

Rule for a *venire de novo* upon the ground of error in the Court, in admitting the testimony excepted to. Rule discharged, judgment and appeal to this Court.

A. W. Venable, for the plaintiff.
No counsel for the defendant.

NASH, C. J. The strict rules of evidence have been, upon a principle of necessity, departed from, in enquiring into facts long since past. Great difficulty would necessarily exist in their proof, if living witnesses were required. It is upon this principle that hearsay and reputation are admitted, in cases of pedigree. Thus, declarations of deceased members of a family are competent to prove relationship, as who was a particular person's grand father, or whom he married, how many children he had, or as to the time of the birth of a child. So, also, descriptions in wills, upon a tomb stone, an entry in a family bible, are all admitted. In the case before us, the witness stated "that there was a family register of births in existence." The plaintiff objected to the the declarations of the parent, because they were of inferior dignity, and therefore, inadmissible. The mistake consisted in considering the declarations as of an inferior grade, in the scale of evidence, to this family register, as it is called; whereas, the grade is the same. All the writers on the law of evidence class them as such. 2d Story on Evidence, 611. 1st Phil. on Evidence, 239. In GOODRIGHT v. MOSS, 2 Cow. Rep. 504, the same classification is made by Lord MANSFIELD. The general rule upon this subject is, that the best evidence is to be given which the nature of the case admits, yet the rule does not require the strongest possible assurance of the fact. If a bond is attested by several subscribing witnesses, the production of one on the trial is sufficient. So, to prove satisfaction of a plaintiff's demand, the defendant may give evidence of the admission by the plaintiff that such was the fact, though it should appear that the plaintiff had signed a receipt. JACOB v. LINDSAY, 1 East. 460; SMITH v. YOUNG, 1st Camp. 439. In gene-

ral, if the distinction of written or unwritten, or direct and circumstantial, does not exist between the evidence offered and that withheld, the former will be received, though less satisfactory. The rule of the best evidence does not require all the evidence or the strongest, but *that* only is excluded, which, from the nature of the case, supposes evidence *superior in grade* to be behind and in the power of the party. Here, as before stated, the grade of the evidence offered and that withheld is the same. The declarations were direct, and not circumstantial evidence, made *ante litem*, at different times; and though they might not have been equally satisfactory as the family register, they were unquestionably competent.

Judgment is affirmed.

JOHN W. ODOM v. WILLIAM HARRISON.

In an action for a deceit in a false warranty, on the exchange of horses, it is not competent for the defendant to give in evidence the defects of the property which he received from the plaintiff.

ACTION on the case for a fraud in the exchange of horses, tried at Spring Term, 1854, of Nash Superior Court, his Honor Judge CALDWELL presiding.

The plaintiff declared in deceit for a false warranty. On the trial, it appeared that the plaintiff's horse was estimated by the parties at ninety dollars, and that of the defendant at sixty dollars. Several witnesses of the plaintiff testified, that, because of certain defects in the qualities of the horse which the plaintiff got in the trade, he was of little value, and some short time after the trade, was sold at auction for $17. The defendant then offered to prove that the horse which he got from the plaintiff was defective, on account of bad eyes, which im-

paired the value of the animal. This testimony was objected to by the plaintiff's counsel, and rejected by the Court. There was a verdict for the plaintiff.

Motion for a *venire de novo*; motion refused, and an appeal.

Dortch, for the plaintiff.
Miller and Lewis, for the defendant.

NASH, C. J. The evidence offered by the defendant was properly rejected. The parties had swapped horses, and the action was brought to recover damages for an alleged fraud committed by the defendant. The latter, with a view to diminish the damages, offered to prove that the horse he had got from the plaintiff, was not sound in his eyes, which diminished the value of the animal. There is no allegation of fraud by the defendant. His offer is in effect an attempt to rebut the plaintiff's claim, by a set off of unliquidated damages. The attempt is rather a novel one. The case that comes the nearest to it, is that of CALDWELL v. SMITH, 4 Dev. and Bat. 64. That was an action of assumpsit, to recover the value of a negro, sold by the plaintiff to the defendant. The defendant's counsel, for the purpose of reducing the amount of the stipulated price, proposed to show that, at the time when the defendant took the negro into possession, he was in bad health, and of little or no value. His Honor, who tried the case below, rejected the evidence, and that opinion was sustained here. When goods are sold by sample, and the articles tendered do not correspond with the sample, the purchaser may reject them. If he does not, and has full opportunity to examine them, and there be no warranty or fraud, he cannot throw the vendor back upon his *quantum valebant*. Here, as in the case referred to, the defendant got the very article he contracted for, to wit, the plaintiff's horse. But this is an action of deceit, a tort, and the defendant, if he has been injured by the plaintiff, in imposing upon him an unsound horse, must resort to his cross action; and cannot, in this way, lessen the damages to which the plaintiff is

entitled. In DICKSON v. JORDAN, 12th Ired. 81, the Court say, "if a defendant is not allowed to abate the amount of damage for a breach of contract, in failing to pay for goods sold and delivered, when the price is agreed on," by proof of their inferior quality, it would be singular if he were allowed to do so, because the price had not been expressly agreed on; and it would be still more singular, if, on a swap of horses, an action is brought for a fraud in the exchange, the defendant could be admitted to prove that the horse he received was not worth the value set upon him by himself, at the time of the sale, or that the plaintiff had practiced a fraud upon him in the trade. The Judgment is affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM S. WARD, v. DAVID W. SIMMONS, EXECUTOR.

In reference to a Commissioner under the acts of Assembly, 31st chapter of Revised Statutes, section 119, and of 1850, chapter 52, the Court has the power of making an order to examine the executor or administrator on oath.

Action of Debt upon the Bond of the Defendant's testator, tried before his Honor, Judge ELLIS, at the Spring Term, 1854, of Carteret Superior Court.

The defendant pleaded general issue, payment, set off, Statute of Limitations, fully administered generally and specially, debts of higher dignity, retainer, no assets ultra, &c., relying mainly upon the plea of "fully administered." At the Spring Term, 1852, of the Court, it was ordered that it be referred to William G. Bryan, to take an account of the defendant's administration of the estate of his testator under the act of 1850, ch. 52. At the present term, it was moved by the plaintiff that the order of the referee to state an account, be further amend-

ed so as to authorize and empower the commissioner to examine the defendant on oath touching his administration of the estate of his testator. This was objected to by the defendant's counsel, but allowed by the Court, and it was accordingly ordered "that the said commissioner have power and authority to examine, on oath, the said executor as to his receipts, distributions and other matters relative and pertinent to his acccount as executor aforesaid." The defendant prayed and obtained an appeal from this order to the Supreme Court.

Donnell and *Green*, for the plaintiffs.
J. H. Bryan, for the defendant.

BATTLE, J. The interlocutory order, from which the appeal is taken, is founded upon the 119th section of the 31st chapter of the Revised Statutes, amended by the 52nd chapter of the act, of 1850. These enactments declare that "whenever suit shall be brought upon any bond given by any executor, &c., or against any executor, &c., it shall be the duty of the Court, at the appearance Term of said suit, on motion of either party, to refer the same, &c., to the clerk or any other person, &c., and such person, &c., shall take an account, under the same rules, regulations and restrictions as are now provided for taking an account in a Court of Equity," &c. The defendant objects to the order, upon the ground that the Court had no power, by virtue of these statutes, to authorise the commissioner to examine him upon oath at all; but that, if it had, the authority conferred was greater than the statutes justified. We have no hesitation in saying that the terms, "*same rules, regulations and restrictions* as are now provided for taking an account in a Court of Equity," which define the power given to the Court of Law, will authorise an order for the examination of either party upon oath, if the Court of Equity be possessed of such power; and that it is, all the standard books of equity practice abundantly show. 2 Dan'l Ch. Pr. 1367, and note 1 Adams' Eq. 382. We see no ground for the complaint, that the order, objected

to, exceeded the power possessed by the Court. It restricts the examination of the defendant "to his receipts, distributions and other matters relative and pertinent to his account as executor." It could not have been less to have insured a full and fair examination of his accounts as executor; and yet, it effectually guards against any impertinent or improper enquiries. In the case of FULLER v. MCMILLAN, Busb. Rep. 206, we held that the power conferred upon Courts of law, by the 86th section of the 31st chapter of the Revised Statutes, to compel parties to produce books or writings, was, by its reference to the rules of chancery practice, to be regulated by the power of the Court of Equity in such cases. The two statutes have very much the same object in view, and ought to receive a like construction. The order was proper, and must be affirmed.

Judgment affirmed.

DOE ON THE DEMISE OF WILLIAM C. LOFTIN v. RICHARD G. COBB.

Possession of two tracts of land, adjacent to the one in controversy, for seven years, with color of title, though they had all three been conveyed in one deed, by separate and distinct descriptions, is not a possession of the land in question, and will not amount to a bar under the Statute of Limitations.

Cutting of trees upon a tract of land susceptible of other uses and enjoyment, and feeding hogs upon it, under a color of title for seven years, do not constitute such a possession as will bar an entry.

THIS was an Action of Ejectment tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Lenoir Superior Court.

There were two counts in the declarations, one, upon the demise of William C. Loftin, and the other upon that of the trustees of the University. The plaintiffs claimed title from one

Thomas Box, to whom two grants had issued, one in 1757, and the other in 1760, which together covered the land in dispute. It was proved by a witness, now seventy years old, "that he had heard Thomas Box spoken of, and that it was said that he had left this country about, or soon after, the Revolutionary war, and went to South Carolina; that he had never known or heard of any relations he had left; and he had never heard of him, or of his return, after he had left, and no person had appeared claiming to be his heir, that he had heard of." Plaintiff then introduced a deed from the Trustees of the University to William C. Loftin, one of the lessors of the plaintiff, dated in 1850, and he proved the defendant's possession at the time of the service of the declaration.

The defendant showed title to various tracts of land adjoining the one in question, to wit, deeds from one Mundine to Tisdale, in 1771, and from Tisdale to Richard Caswell, in 1775, and from Caswell to Jesse Cobb, in 1783.

The deed from Caswell to Cobb conveyed three tracts of land, by separate and distinct descriptions, and by separate and distinct clauses of conveyance, one of which was the tract in question between the parties, which was adjoining the other two: of the two former tracts, the defendants had had a long possession of thirty years, both by residence and cultivation: of the other, the tract in dispute, they had no possession, except that for more than seven years, he, and those under whom he claimed, cut timber upon it, and hauled it off to a saw-mill on one of the other tracts, where it was sawed into lumber, and that he, and those under whom he claimed, for that length of time, fed hogs upon it. The land was not swamp land, but was good turpentine land, having on it a good many pine trees, fit for making turpentine, which were not cut or carried off, but the timber trees during this period had been nearly all taken off. The tract in question was wood land, and had not been cultivated, or in anywise improved or occupied.

The defendant insisted that the plaintiff could not recover, upon the ground—

1st. Because Wm. C. Loftin had no title.

2d. Because the persons under whom defendant claimed had possession of the adjacent tract, for upwards of thirty years, and being in possession of a part, he was in possession of the whole, under the deed aforesaid, and that the law would presume a grant for the same land.

3d. That, if the actual possession of the other two tracts would not in law be a possession of the tract in dispute, that the cutting of timber on the land, and having the same sawed at his mill, and feeding his hogs upon the land, constituted an actual possession, and this continuing for seven years, under color of title, his defective title became a good one.

As to the first objection, the Court instructed the jury, that though Loftin's deed was invalid, the plaintiff would be entitled to recover upon the other demise, provided the land had escheated to the University; that, if Thomas Box died without leaving any heirs, the lands would, by law, escheat to the trustees of the University; that the possession of the two tracts of land, adjoining the lands in dispute, was not a possession of that tract, and that the cutting of timber on the land, and having the same sawed, and feeding hogs upon the land, although this continued for seven years, was not such a possession as would, with color of title, give him a good title.

Under these instructions, the jury found a verdict for the plaintiff, and the defendant obtained a rule for a new trial. Rule discharged and appeal.

Person and *Green*, for the plaintiff.
J. W. Bryan, for the defendant.

BATTLE, J. Upon the trial, three objections were taken against the right of the plaintiff to recover, of which two only have been urged by the defendant's counsel in the argument here. The proposition, that because the defendant, and those under whom he claimed, had been in possession for more than thirty years of the adjoining tracts of land, they thereby had possession of the tract in question, inasmuch as all the

tracts, though separate and separately described, had been conveyed by one deed, has been properly given up. It cannot be supported upon principle, and is directly opposed by the authority of the case of CARSON v. BURNETT, 1 Dev. and Bat. 546.

The objection to the title of the Trustees of the University, under whose demise the verdict for the plaintiff was taken, is founded upon an alleged error in the Court, in leaving the question of escheat to the jury, as one of fact, instead of deciding it as one of law. But, by looking at the charge, in connection with the evidence, it will be seen that no such error as is supposed was committed." The testimony of an aged witness was, that Thomas Box, the grantee of the land under whom the Trustees claimed, "had left the State about the period of the Revolution, and had never since been heard of; that he had no relations, and that no person had ever come forward, claiming to be his heir." Surely, this was testimony proper to be submitted to the jury, upon the question whether the said Box had died without heirs, and the jury were instructed that, if they found in the affirmative, then his land had escheated to the Trustees of the University. There was no question of heirship, such as whether certain persons were not the heirs at law of Thomas Box, the grantee, to make it a question of law for the Court, and thus bring it within the principle of BRADFORD v. ERWIN, 12 Ired. 291. The charge was, in effect, that, if the jury should find that Thomas Box had died, leaving no relations, then he died without heirs, and his lands escheated to the Trustees of the University, and to it, as thus understood, no just exception can be taken.

The last objection to the plaintiff's recovery, is the one mainly relied on, and has been argued with zeal and ability by the counsel on both sides. It is, that, supposing the plaintiff's lessor had once had title, the defendant's ancestor, John Cobb, had gained it from them by an adverse possession for more than seven years, under color of title; for that, cutting the timber off the land, and having it sawed at his mill, and feeding his hogs upon the land, constituted such possession as the Statute of Lim-

itations requires. The question raised by the objection then is, whether the acts specified, continued for seven years, are sufficient, as a possession, to make good a defective title. This question we do not consider an open one: the principle having, as we conceive, been definitively settled by repeated adjudications of our Courts against the defendant. The first case, in which it was discussed and decided, was ANDREWS v. MULFORD, 1 Hay. Rep. 311. Where the Court say that a person relying upon a possession under the Statute, "must take possession with such circumstances, as are capable in their nature of notifying mankind, that he is upon the land claiming it as his own—as in person, or by his tenant;" and they held that a claimant did not acquire possession by putting his cattle upon the land to range upon it. "Cattle may be a long time ranging upon land, without its being publicly known whose they are, or that they were put upon the land by a third owner, or that he meant to claim it; but if a man settle upon the land by himself or tenants, and continues that possession, builds a house, or clears the land and cultivates it, his claim then becomes notorious, and gives fair notice to the adverse claimant to look to his title." The same principle is clearly stated by the Court in GRANT v. WINBORNE, 2 Hayw. Rep. 56. "The law has fixed the term of seven years, both for the benefit of the prior patentee and the settler, that the latter might not be disturbed after that time; and that, in that time, the prior patentee might obtain notice of the adverse claim, and assert his own rights. Hence arises the necessity that the possession should be notorious and public, and in order to make it so, that the adverse claimant should either possess it in person, or by his slaves, servants or tenants, for feeding of cattle or hogs, or building hog-pens, or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all these are but acts of trespass. Whereas, when a settlement is made upon the land, houses erected, lands cleared and cultivated, and the party continues openly in possession, such acts admit of no other construction than this,

that the possessor means to claim the land as his own: in order to make this notorious in the country, he must also continue in the possession for seven years; occasional entries upon the land will not serve, for they may be either not observed, or, if observed, may not be considered as the assertion of rights; and, from this view of the subject, arises the following definition of a possession which is calculated to give a title: "A possession, under color of title, taken by a man himself, his servants, slaves or tenants, and by him or them continued for seven years together."

In GREEN v. HARMAN, 4 Dev. Rep. 158, it was held, that the overflowing of land, by stopping a stream below, was not a possession which would perfect a defective paper title, nor would the cutting of timber trees upon the land have that effect. In discussing the latter question, the Court say, "that it is not entirely clear of difficulty. There is much land in the State, of which nearly the whole value consists in the timber, its fertility not being sufficient to induce a prudent proprietor to erect habitations or clear a plantation on it. In such cases, the timber is frequently all taken off, and it would not seem easy to give more positive evidence of asserted ownership and of enjoyment. On the other hand, any rule that could be laid down would be so wanting in precision as to the extent to which the trespasses should be carried to constitute an ouster, as to leave the whole subject in uncertainty. It is safest to require an actual occupation, such as residence or cultivation; something to make it emphatically the party's close, which is in conformity to the ancient rule of the common law, and also to the application of it to our situation, as early made in this State, in the cases of ANDREWS v. MULFORD, and GRANT v. WINBORNE." The Court then go on to intimate that the making of turpentine, as practised in the Eastern part of the State, would be a sufficient possession, as being an operation partaking of the nature of cultivation. "It cannot be pursued secretly, and does not consist of single acts of trespass, like cutting down trees and carrying them away; but requires a continued attendance on the land for a considerable portion of the year, and from year to year, as the

same trees are worked for several years in succession." This intimation was carried out into a direct decision in the case of BYNUM v. CARTER, 4 Ired. Rep. 310. The principle established by these adjudications and some others, (see BURTON v. CARRUTH, 1 Dev. and Bat. 2, and GILCHRIST v. MCLAUGHLIN, 7 Ired. 310,) is still further strengthened by the cases to which we shall now advert, which are, *from necessity*, exceptions to it. In SIMPSON v. BLOUNT, 3 Dev. 34, and TREDWELL v. REDDICK, 1 Ired. Rep. 56, it was decided that cutting timber and making shingles in a swamp unfit for cultivation, continuously for seven years, is a good possession under the statute. "It is exercising that dominion over the thing, and taking that use and profit, which it is capable of yielding *in its present state*. It is all that can be done, until the subject shall be changed. It is like the case stated in the books, of cutting rushes from a marsh. This is sufficient, though it might appear that dykes and banks would make the marsh arable." Again; it was held in WILLIAMS v. BUCHANAN, 1 Ired. 535, that, as to a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish, constitute an unequivocal possession thereof. "Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use, and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, and not of occasional trespasser."

If we test the case before us, by applying to it the principle thus clearly settled by a series of decisions, running through a period of many years, we shall find that the defendant's claim of title, arising from possession, cannot be sustained. The land is not swamp land, but good turpentine land, having a great number of pine trees upon it, fit for making turpentine. The feeding of hogs upon it, and cutting of timber trees from it, was not making the ordinary use, and taking the ordinary profit, of which it was susceptible in its present state, and did not,

therefore, show that the acts were done in the character of owner, and not of an occasional trespasser. The judgment must be affirmed.

Judgment affirmed.

JONATHAN JENKINS v. LUCY T. PEACE.

Where a father, who was in embarrassed circumstances, sold to his two daughters, who lived with him, three slaves, for a fair price, a part of which was paid down, and the remainder was to be paid toward *bona fide* debts which the father owed, which payments were made accordingly: HELD by the Court, that this was not a fraud, in law, upon the rights of a creditor, existing at the time of the transaction, so as to authorize a Court thus to declare it.

THIS was an action of Replevin, tried before his Honor Judge CALDWELL, at the Spring Term, 1854, of Warren Superior Court.

The action was brought to recover a slave by the name of Mourning, formerly the property of John T. Peace: the plaintiff claimed title as a purchaser at an execution sale. The execution, under which the sale was made, was in favor of the plaintiff, against John T. Peace, returnable to May Term, 1846, of Granville County Court.

The defendant claimed title under a bill of sale from her father, John T. Peace, above named, dated May 4th, 1844, which purported to convey to her the slave in question also another slave, named Peyton, at the price of $400. It appeared in evidence, that John T. Peace made a bill of sale, of the same date, to his daughter Elizabeth, of a slave by the name of William, at the price of $250; both of the said bills of sale were in due form, and were proved and registered. It was proved, by the subscribing witness to the bills of sale, and by another witness, who was present at the time of their execution, that, immediately before the time of the execution of these in-

struments, it was agreed between John T. Peace and his daughters, that he should convey these three negroes to them, at the price of $650, for which they were to pay him $250 in cash, and were to pay four debts which the father owed, making, as was proved, about the balance of the $650, which sum of $650 was proved to be about the value of the slaves. Immediately after the bills of sale were made, the daughters paid their father the sum of $250, and agreed and undertook verbally with John T. Peace, to pay the debts above mentioned. The subscribing witness to the bills of sale, who was also one of the creditors, testified that, about eight months after the date of the bills of sale, the daughters, Lucy and Elizabeth, put their parol undertaking for the payment of these debts into writing, and afterwards paid the same, except a portion of the interest, which was not charged. It also appeared in evidence, that, sometime after the date of the bill of sale, the daughters gave their note to one Rosa Jinkens, one of the father's creditors, for the amount of her debt, and afterwards paid the same: they also paid a debt between the years 1846 and 1850, to one Rosa Blackwell, with the exception of a small portion of interest, which was given them. It was also in evidence, that, shortly after this contract and sale, the defendant applied to James Hockady, one of James T. Peace's creditors, to settle his debt, and that she afterwards paid it. It appeared from the evidence, that these debts were *bona fide* due, and owing at the date of the bills of sale. The defendant lived with her father before the date of the bills of sale, and continued so to reside with him, up to the time of his death in 1846. What control, if any, was exercised by John T. Peace over the slaves, after the making of the bill of sale, did not appear in evidence. Josiah Peace, the witness to the bill of sale, who was also a creditor, stated that the amount of his debt was not mentioned at the time of this transaction; indeed, that at that time, it was not known to him.

The plaintiff was a creditor of the father in 1842 or '43. In July, 1844, he brought suit and prosecuted it to a judgment, and, in March 1846, caused the slave in question to be sold un-

der the execution issuing thereon, when he purchased her. It was in evidence, that John T. Peace was in embarrassed circumstances, in May 1844, that he had been so for years before, and remained so afterwards, until the time of his death. There was a great deal of other testimony in relation to the fraud, which it was agreed, by counsel below, need not be stated. The facts stated, concerning the execution of the bill of sale, and the existence of the four debts, and their assumption and payment, were proved by witnesses introduced by the defendant.

The counsel for the plaintiff insisted that supposing all that had been proved by the defendant to be true, it was a fraud in law, and moved the Court so to charge the jury; the Court declined so to charge, remarking that it was a mixed question, and went on to explain the law arising from the facts.

For refusing to instruct the jury as requested by counsel, the plaintiff excepted.

The jury found a verdict for the defendant.

Rule for a *venire de novo;* rule discharged, and appeal to the Supreme Court.

Winston and *Ransom*, for the plaintiff.
Miller, *J. H. Bryan* and *Moore*, for the defendant.

NASH, C. J. His Honor, who tried the case below, could not give the instructions prayed for. If all the facts proved in behalf of the defendant were true, the transaction between her and her father was not in law a fraud. John T. Pearce, the father, was the owner of three slaves, whom he sold to his two daughters, the defendant and her sister, Elizabeth, at the price of $650. Two of the slaves, of whom the negro in question was one, were conveyed to the defendant at the price of $400, and the other to Elizabeth, at the price of $250. At the time of making and executing the contract, the sisters paid in cash $250, and the remaining $400, it was agreed, should be discharged by the payment of certain specified debts then due and owing by the father, and amounting to about the sum of $400. The price agreed on was a free and fair one, and the specified debts to be paid by

the sisters were afterwards paid by them. The father at the time was in embarrassed circumstances, and then owed a debt to the plaintiff, which is still due and unpaid, and the negro now in dispute is looked to by him as the source from which he is to get his judgment. The whole question was properly left to the jury. Before us it has been urged that the Court ought to have given the instruction asked for, because the promise by the daughters was a promise to pay the debts of another, and not being in writing, was under the Statute void, and their subsequent payment of them could not render the previous promise good, as it was a voluntary agreement on their part. The principle on which the argument rests is correct, but the argument itself rests on an assumption not warranted by the facts. The promise by the daughters to pay the creditors of their father, was not a promise to pay the debt of another, but an original promise to discharge their own debt in a particular and agreed way—a promise founded on a new and valuable consideration. There is nothing in the law of debtor and creditor which forbids the latter, however much indebted, from selling any portion of his property, provided he does it *bona fide*, without any intent to defraud, hinder, or delay his creditors. Nor can the sale be otherwise than legal, when he sells for the purpose of paying his creditors, though they may be preferred creditors, LEE v. FLANNAGAN, 7th Ired. 471. Nor is a parent forbidden to sell to his child; the only difference would be, that the latter would be held to fuller and stricter proof of the fairness of the transaction. In this case, one of the creditors of the father is the subscribing witness to the conveyance. By the purchase of the negroes, the daughters became indebted to the father for the amount of the purchase money. They paid more than two-thirds at the time, and the remainder was left in their hands to discharge certain debts due by the father; and the debts so specified were paid by them, and the payment discharged the debts the father owed, and the debt they owed him. In fact, the amount left in their hands was the money of the father, which might have been recovered of them by him, at any time, before

they had appropriated it as directed, or before they had made themselves responsible to the creditors for it. It is true, the original indebtedness discharged by the plaintiff and her sister, was that of the father; but their promise was a new and original promise for a new and valuable consideration, and is not within the Statute of 1826, ch. 10, sec. 1st; San. 211., note a.; COOPER v. CHAMBERS, 4th Dev. 261; ASHFORD, v. ROBINSON, 8th Ired 117. The principle there decided meets this entirely. The case does not come within the operation of our statute, and is not an attempt to substitute a valid for a void contract. The promise to pay over the amount of the deferred payment to the creditors of the father was a valid promise, and their actual payment a valid one.

Judgment affirmed.

J. M. HEATH AND AVA HEATH, BY THEIR GUARDIAN, v. R. J. GREGORY.

A sealed note, signed by one of two partners, cannot be given in evidence to establish "an account stated" in a suit brought against the partner who did not sign it.

THIS was an action of Assumpsit, commenced by a warrant from a Justice of the Peace, and brought by successive appeals to the Superior Court of Wayne county, where it was tried before his Honor Judge ELLIS, at Spring Term, 1854.

Upon the trial, the plaintiffs offered in evidence the following sealed obligation:

"Twelve months after date, we, or either of us, promise to pay Wm. B. Taylor, Guardian to the minor heirs of Mark Heath, dec'd, the sum of sixty two dollars, for value received, as witness our hand and seal, this 6th day of Dec. 1845.

"GREGORY & HEATH, [SEAL.]
"H. S. HAMLET, [SEAL.]
"WM. H. TAYLOR, [SEAL.]"

It was admitted that this bond was signed and sealed by Heath, the partner of Gregory, in the absence of the latter, and without any sufficient authority from him to execute a deed. The plaintiff proved that the defendant and Heath were partners in trade; that this note was given for the hire of a slave, the property of the plaintiffs, who were then minors; that Taylor, the obligee in the bond, was then their guardian, and the slave was hired from him. The slave went into the employment of the defendant and Heath, and served with them the term for which he was hired.

It was conceded by the plaintiff's counsel that he could not recover upon the bond against the defendant (Gregory,) because he had not executed it; but he contended that the seal should be regarded as surplusage, and the paper writing treated as a liquidated and signed account, for which they were entitled to recover in this action, commencing by warrant, though the sum exceeds sixty dollars; that the proofs explained the paper writing, and showed for what the account had been rendered.

The defendant objected to the recovery—

1st. Because the bond was not evidence of a liquidated account; that, if read at all, it must be read as a bond, and as such it was not binding on him, because he had not executed it.

2d. That, if it be regarded as a liquidated and signed account, then it must be regarded as an account with Taylor, the obligee in the note.

3d. That the note did not specify any thing which could be the subject of an account; that it was merely a promise to pay a sum of money, and could not be explained by the evidence.

By the consent of parties, a verdict was entered for the plaintiff, subject to the opinion of the Court, upon the question reserved, as to the plaintiff's right to recover upon the facts presented.

Subsequently, the Court, being of opinion that the plaintiff could not recover, set aside the verdict, and directed a non-suit to be entered, according to the agreement of the parties, from

which judgment the plaintiff prayed an appeal to the Supreme Court.

Husted and *Dortch*, for the plaintiff, argued as follows:

1st. The warrant was originally brought for the "sum of $62 due by note," and in the County Court was amended to "assumpsit" for the same amount. It was clearly within the jurisdiction of a single magistrate at first; and it is contended that the amendment allowed during the pendency of the suit could not oust that jurisdiction; in analogy to the known rule in equity, that when the Court for any purpose has jurisdiction of a case, it holds that jurisdiction for all other purposes, whether this would entitle the party to equitable relief or not.

2d. Though it is conceded that Heath did not and could not bind the defendant Gregory by the seal, as in a bond, still it is contended, that as the defendant would have been bound in assumpsit, had there been no seal, there is no inconsistency in confining the effect of the seal to Heath himself, whom it certainly bound, and rejecting it as to Gregory, who never adopted it, and whom consequently it did not bind. It was a seal as to Heath, and not as to Gregory. Heath was bound in a bond, and Gregory in assumpsit, as if he had signed his own name to the instrument, without a seal.

3rd. At all events, this instrument is effectual as a liquidated account, signed by the party to the bond thereby. The unauthorised use by Heath, of a seal, cannot vitiate the instrument as the acknowledgement of an account. The acknowledgment of payment by one partner, using the partnership name under seal, must certainly discharge a debt. So of a release or discharge in form. So such admission as would take a debt out of the Statute of Limitations, made in writing, with a seal attached, would surely revive the debt against the co-partnership. In all these cases, a seal would be unnecessary to accomplish the purpose designed, and would, most unquestionably, be rejected as surplusage, "*ut res magis*, &c." Where is the principle that distinguishes the above cases from this? It cannot be contend-

ed, because, that in the one case a debt is contracted, and in the other a debt is discharged; that the seal may be rejected as surplusage, in instruments purporting to *release* a debt, but must be stringently retained, so as to vitiate a similar effort to acknowledge a just debt. For, at least in the case of the admission, sufficient to bar the operation of the Statute of Limitations, it is, if not the creation of a new debt, a revival of an old one, that had been extinct by time.

It is contended that the true rule ought to be and is, that in instruments *requiring a seal*, one co-partner cannot bind another without either his authority previously given, or his subsequent adoption and ratification; but where instruments *require no seal*, and are equally effectual without one, and a seal has been inadvertently affixed, it should be rejected as surplusage, and not allowed to frustrate the true intents of the parties, and sacrifice the rights of the creditor to a refined technicality.

4th. The seal thus being disregarded as to the defendant Gregory, the instrument, aided by the proofs stated in the case may well be regarded as a liquidated account due to the plaintiffs and signed by the defendant, by which he became liable under our act of Assembly. For, though in form it was a transaction with a Guardian of the plaintiffs, then infants, it was for the hire of *their* slave, whose services the defendant enjoyed, and for *their* benefit.

J. H. Bryan, for the defendant.

PEARSON, J. There is no error. The note offered in evidence is, manifestly, as against the defendant, not "an *account stated in writing* and signed by the party to be charged therewith."

It was very ingeniously argued that the seal might be rejected as surplusage, and as a partner was authorised to sign the name of his co-partner, the note might be considered as signed by the defendant.

To avoid unnecessary argument, suppose the objection as to the *signing* is removed. There remain two others. The debt is not stated as due to the plaintiffs, but as due to W. B. Taylor. There is no "account stated in writing;" no item is given—it does not appear *in writing* for what the $62 was due. So the utmost stretch of ingenuity cannot suggest a ground upon which the note can be considered an "account stated in writing."

As the cause of action exceeds the sum of $60, a single justice has no jurisdiction.

Judgment affirmed.

DANIEL McKEETHAN v. WILEY ATKINSON, *ET AL.*

The presumption of payment, created by the act of 1828, from the lapse of ten years, is rebutted by the payment of a part of the sum within ten years before suit brought. And this is the case as to the joint obligors who are sureties as well as the principal who makes the payment.

THIS was an Action of Debt, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1854, of Bladen Superior Court.

The plaintiff declared upon a bond for one hundred and twenty-two dollars payable to John McKeethan, Administrator of the estate of Dugald McKeethan, deceased, due twelve months after date, and dated the 6th of February, 1837, signed by G. J. McKeethan, W. Atkinson, and Robert Murphy, on which there was a credit of $13.03, endorsed the 5th of October, 1844. This suit was brought the 5th of April, 1850. The plaintiff relied on the presumption of payment from the length of time, and showed that both Atkinson and Murphy were solvent.

To meet this objection, plaintiff discontinued as to the obligor, G. J. Atkinson, and introduced him as a witness, who proved

that the bond was executed by him, Atkinson, and Murphy; that the payment of $13.03, endorsed on the bond as paid on the 6th of October, 1844, was correct; that he was the principal in the note, and Atkinson and Murphy were but sureties, and that in September, 1844, he made an additional payment of sixty dollars.

Upon this state of facts, the Court was of opinion that the presumption of payment was rebutted, and so instructed the jury, who thereupon rendered a verdict for the plaintiff.

Rule for a *venire de novo;* rule discharged, judgment and appeal.

Person, for plaintiff.
D. Reid, for defendants.

PEARSON, J. The question is, does the fact that a principal in a bond makes a payment of $13.03, and another payment of $60, both within the time of presumption, (10 years,) rebut, as against the sureties, the presumption of payment, which is made by our statute from the lapse of ten years?

Without entering into the question whether the acknowledgement of a debt which is barred by the statute of limitations, by a partner after the dissolution of the firm, will revive the debt as against others who had been members of the firm, or whether a payment or acknowledgement by one obligor, after the time necessary to make a presumption of payment, will rebut that presumption, we are clearly of opinion that a payment made by one obligor, before the expiration of ten years, takes the case out of the rule of presumption, and of the reason upon which it is founded, until there be ten years after the time of the payment.

The rule is based on the ground, that if nothing is said or done by the parties, by which the existence of the debt is recognised, for the space of ten years, (by our statute) the debt, although secured by deed, shall be presumed to have been paid.

But if a payment has been made by one of the parties, say the principal obligor, whose duty it was to make the payment

within ten years, then something has been done, and the reason of the rule ceases. If this be not so, the principal may make payments towards the principal debt, and may pay up the interest annually, and still, after the expiration of ten years, the sureties may insist the law raises a presumption that the whole debt has been paid. The reply is, the payments were made for your benefit—if sued, you could have claimed credit for the amount; and, in short, the note has not been suffered to lie over without anything being said or done, for more than ten years. The creditor has been diligent, and the maxim "*leges vigilantibus non dormientibus*" applies to you.

Judgment affirmed.

ROGER KIRKHAM v. JOHN P. COE, WESLEY A. COE, AND ALFRED E. CAUSEY.

In an action on the case, for wrongfully sueing out an attachment, it is sufficient to show a want of probable cause. It is not necessary to show that defendant was actuated by malice.

THIS was an action on the case for wrongfully sueing out Attachments, tried before his Honor, Judge MANLY, at the Spring Term, 1854, of Guilford Superior Court.

The plaintiff introduced a witness by the name of *Sidenham*, who proved that, at the request of Wesley Coe, he went, shortly after daylight, on Monday morning, to plaintiff's house, and he assisted the defendant, Wesley, to remove from the crib of the plaintiff some thirty-five or forty bushels of corn. This defendant assigned as a reason for going so early, that he expected that others would be at the crib that morning, and that he might as well have his debt as any body else. Upon cross-examination, this witness stated that the plaintiff was in the habit of

wagoning to the South, flour, grain, spirits, bacon, &c., of his own production, and sometimes articles of this description purchased from others. He also testified that John P. Coe said, while removing the corn, that he thought he might as well save his debt as others, and he believed that the plaintiff would not return; that there was no one at the plaintiff's house when he went there with the defendant, Wesley, that morning, but on returning home with his wagon, the same morning, he saw smoke in the plaintiff's chimney, and in a short time, learned that the plaintiff was at home; that he was a near neighbor to the plaintiff, who had been to the South with his wagons on a previous trip; had sold a wagon, returned home on Thursday, and started back on Saturday, with a load of Bacon, for the *Scotch Fair*, taking along with him his wife and only child; that plaintiff had stock, crop, and other property, but in whose charge, or whether left in charge of any one, he had no personal knowledge.

The defendants introduced and read the affidavits upon which the attachments were founded, in which the defendants, John and Wesley, swore that they had reason to believe, and did believe, that plaintiff had absconded, or removed himself from Guilford county, or so concealed himself that the ordinary process of law could not be served on him.

A witness named Scott, was called for the defence, who swore "that he was a neighbor of the plaintiff, and that on his return from the first trip, plaintiff had applied to him for his wagon, and urged him to let him have it, but he had refused to do so, assigning, as a reason for such refusal, that he was about to use the wagon himself; but the witness told another neighbor by the name of Moore, that his true reason for not letting plaintiff have his wagon was that he feared he would not return.

Moore, the person last referred to, was then introduced, who stated that he was working in the shop of the defendant, John P. Coe, when the above mentioned communication was made to him, and that on the same day at dinner, on its being mentioned by another neighbor who was present, that plaintiff had gone again, he told them what Scott had said to him, and thereupon

J. P. Coe said he would go to Newton Swaim's, and see him about it, and that afternoon he went to see Swaim. This witness also testified that on that or the same day on which the corn was brought to the defendant's, the plaintiff came to the house of the defendant, John P. Coe, about ten o'clock in the forenoon, and complained about the defendant's sueing out the attachments, and removing the corn, and offered to pay the debts against him, if they would haul the corn back. Defendant, Wesley, said he would do what his brother would do, but they refused to haul the corn back, but offered to lend plaintiff their wagon to haul back the corn if he would pay their debt and all their costs, which offer was declined by the plaintiff, alleging that his horses were tired.

The defendants then introduced a witness by the name of Landreth, a neighbor of plaintiff, who testified that John P. Coe asked him what they thought about plaintiff's coming back, to which he (witness) replied that there was a difference of opinion; some thought he would come back, and some thought he would not.

F. Fentress was introduced by the defendants, and they offered to prove by him that he had also sued out attachments. The defendant's counsel was asked if the defendants had knowledge of this before they sued out their attachments, to which the counsel replied that they were not prepared to show that; whereupon, the testimony was excluded by the Court; but the witness went on to state that he lived some four or five miles from the plaintiff, and, it was understood in the neighborhood, that the plaintiff was considerably indebted for one of his means.

Plaintiff, in reply, read in evidence the deposition of Newton Swaim, who stated, in substance, that John P. Coe came to see him the day before the attachments were sued out, when witness explained to him that plaintiff had gone with a load of Bacon to the Scotch Fair, and that he had loaned him his wagon; that he lived in a quarter of a mile of the plaintiff; that plaintiff owed him more than he owed the defendants; that witness had no doubt plainliff would return, to which Coe replied that

he never did believe but that the plaintiff would come back. This witness, also, on cress-examination, testified that he had refused to become bound for the property levied on.

The plaintiff showed, by several witnesses, that he was not from home longer on the last trip than usual; that he was from home about the length of time usually consumed in such a trip.

Robert Kirkham, a witness for the plaintiff, testified that plaintiff returned from the South on Thursday, and started back on Saturday of the same week, with a load of bacon, which he had bought in the meantime; that he had sold his wagon on the first trip, and had a horse either stolen or strayed from him on the trip just made; that he was anxious to get to the Scotch Fair, under the belief that the horse might be brought to that place for sale, if he had been stolen, or that he would hear from him, if he had strayed; that he and plaintiff went to the Fair together; that plaintiff had relations living near the place, where the Fair was held; that four miles this side of the Fair-ground, plaintiff started in a buggy to take his wife and child to one of his relations, leaving his wagon and load to be taken by witness to the Fair; that the plaintiff came to the Fair, took charge of his wagon and load, and was selling his bacon when witness left. Witness returned from the Fair by the way of Fayetteville, and arrived at home one day before the plaintiff returned with his wife and child; that when he left the plaintiff at the Fair, he had not sold out his load; that plaintiff had not been from home longer than usual with persons on such trips; that he went with plaintiff the same day when the corn was removed to the defendant's, John P. Coe, to whom he complained of the issuing of the attachments and the removal of the corn, and that Coe said in reply that he never did believe that he had run away, and he never did believe but that he would come back, but he thought he had as well have his debts as other people. Plaintiff offered to pay the defendants if they would send the corn back, which they refused to do, and offered to loan him a wagon; that it was the general understanding in the neighborhood that Newton Swaim attended to the plaintiff's stock, and had the

hogs in his absence; that plaintiff got back to his father's on Sunday night, and staid there all night, which was a mile from his own residence, and the corn was removed early next morning.

Another witness of the plaintiff, Peter Kirkman, testified that he had been to the South on the trip before with the plaintiff, and that the plaintiff had a horse stolen or strayed from his wagon in the night time, near the fair grounds, on their return home; that this was five days before the Scotch fair, and defendant's object in going back was to try to get the horse. He also stated that plaintiff had relations near the fair grounds.

Plaintiff's witness, Franklin Swaim, testified that on the day the attachments were levied, he saw the defendant at the plaintiff's house, and John P. Coe said he did not believe plaintiff would come back; and they were going to bring on the corn in the crib; that they went to the house of Newton Swaim and got the bags from him. Witness wanted them to bring on the cattle, as they could remain in the stalk-field, till it would be seen whether plaintiff would come back, to which defendants objected; that the cattle was worth more than the debts amounted to.

The only question made was, whether on the whole testimony the defendants had probable cause for suing out their attachments, on which the court was against defendants, and instructed the jury to that effect, who found a verdict for plaintiff.

Rule for a *venire de novo;* rule discharged. Appeal.

Miller, for the plaintiff.
Morehead, for the defendants.

PEARSON, J. From the manner in which the case was put to the jury, the defendants are entitled to have the benefit of every inference of fact that the jury was at liberty to draw from the evidence.

But we fully concur with his Honor, that even in the most favorable point of view, the defendants had no probable cause to believe, that the plaintiff "was fraudulently eluding the ordinary

process of law, or had privately removed, or so absconded, absented or concealed himself, that the ordinary process of law could not be served on him." ABRAMS v. PENDER, Busb. 261.

We are bound in charity to suppose that, at the time the defendants took the oath required by law, before an attachment can issue, they did believe that the plaintiff had, in the language of the country, "run away;" but it is clear, there was no good ground for this belief, and no fair-minded man, who had a due regard for the rights of others, would have come to any such conclusion. So the defendants, if such was their belief, must have persuaded themselves into it from an extreme eagerness to collect their debt. We, also, in charity, suppose they were ignorant of what the law requires before an original attachment can rightfully be taken out.

Admit, that as the plaintiff was "considerably indebted for one of his means," and had got back from a trip on Thursday without his wagon and one horse, when it was known that he had left home again on Saturday, taking his wife and child, a prudent creditor would have been put on enquiry; still, when he found that his debtor had gone off in the usual way, (in the day time,) with bacon that he had bought from one person, in a wagon that he had borrowed from another, and said that he was going to the Scotch Fair, near to which place his wife's relations lived, and that he had left his cattle, hogs, crop, corn, &c., in charge of a neighbor, to whom he had given his keys, all suspicion would have been removed, or, at least, a conclusion would have been suspended until after the time when it might be expected the debtor, if he was acting honestly, would return. As there was nothing suspicious in the manner of his going away, the debtor was entitled to a few days of grace at least, to see whether he would come back, before he could be charged with absconding and fraudulently concealing himself to avoid service of the ordinary process of law.

It was insisted upon in the argument here, that, to support the action, malice must be proven as well as a want of probable

cause. We do not think so. There is a marked difference between this action, and one for malicious prosecution.

It is the policy of the law to encourage the citizens of the country in their efforts to bring public offenders to the notice of the Court, to the end that they may be regularly put on trial. Hence, one who institutes proceedings for that purpose is in some measure protected, and he does not expose himself to an action merely by acting without probable cause: it must appear also that he acted from malice. It is true, malice is usually inferred by the jury from a want of probable cause, and without explanation, it is the duty of the jury to make the inference; but it may be rebutted, and, if so, the action fails.

But, when one, in the assertion of a civil right, resorts to an extraordinary process, without probable cause, and thereby injures his neighbor, there is no ground of public policy upon which to excuse him. It is a matter between private citizens, and if the wrongful act of one causes loss to another, there is no reason why compensation should not be made. Whether in such a case proof of malice would entitle the party, not only to compensation, but to vindictive damages, is a question not now before us. It is sufficient to say, malice need not be proven in order to support the action, for the damage is the same to the plaintiff, and the "gist" of action is that the defendant had injured him, caused him to sustain damage wrongfully, by sueing out the process without probable cause. ABRAMS v. PENDER, cited above. Indeed, the bond which the Statute requires is to provide against *wrongfully* sueing out the attachment, which does not embrace the idea of malice, except so far as it may have a tendency to aggravate the wrong of causing loss to another, by having his property seized without probable cause, for believing that he has absconded or concealed himself to avoid the ordinary process of the law.

By way of further illustration, we have seen that if one institutes a criminal proceeding, although it turns out that the person charged is innocent, the prosecutor may defeat an action for malicious prosecution, by showing that he had probable cause.

But if, instead of instituting a criminal proceeding, the party utters slanderous words, he cannot defeat an action, by showing that he had probable cause; he can only justify by proving the truth of the charge, because the public could, by no possibility, be benefitted by the slander. This shows that the action for malicious prosecution stands on peculiar grounds, which clearly distinguish it from an action like the present, and from the action of slander. To maintain an action like the present, it is sufficient to show a want of probable cause. To maintain an action of slander, it sufficient to show malice. To maintain an action for malicious prosecution, both a want of probable cause and malice must be shown.

PER CURIAM. Judgment affirmed.

SUSAN N. THOMPSON v. WALTER N. THOMPSON.

A widow is entitled to dower in land, covenanted to be conveyed to her husband.

THIS was a Petition for Dower, heard before his Honor Judge MANLY, at the Spring Term, 1854, of Orange Superior Court.

The cause was heard upon the petition and answers, and the following are the facts of the case: The petitioner is the widow of Porter Thompson, who, having made his last will and testament, died in 1853. From this will the widow dissented, and had her dissent duly entered of record in the County Court of Orange. In 1849, Porter Thompson contracted with one Richeson Nicholls, for the purchase of a house and lot, in the town of Hillsborough, and took a bond from him to convey the title in fee simple to him, whenever he (Thompson) should pay the purchase money for the same, to wit: the sum of six hundred dollars. Thompson entered upon the premises immediately, and continued to occupy them up to the time of his death, and paid, during that time, of the purchase money, four hundred dollars. The balance due is something over two hundred dollars.

The petitioner prayed for the writ of dower, for her dower to be assigned in the house and lot in question.

The Executor of Porter Thompson and his heirs at law were made parties, defendant, who filed answers admitting the facts as above stated, but denying the right, in law, of petitioner to have dower in the premises.

Upon consideration of the facts above stated, his Honor being of opinion against the petitioner, so declared and ordered the petition to be dismissed. From which judgment the plaintiff prayed an appeal to this Court.

Bailey, for plaintiff.
Winston, for defendants.

PEARSON, J. By the act of 1828, a widow is entitled to dower in an "equity of redemption or other equitable or trust estate in fee, of which her husband dies seized." The question is, does the case of a vendee who is let into possession and dies, leaving a part of the purchase money unpaid, and without taking a conveyance, come within the operation of the Statute, so as to entitle his widow to dower?

The object of the Statute was to abolish the distinction between a legal and equitable estate, in regard to the right of dower, which had been taken to the prejudice of widows, soon after the introduction of the doctrine of "trusts," and uniformly acted upon up to that time, although it was admitted that the effect was to introduce an anomaly, by excluding widows from dower, under circumstances where husbands obtained curtesy.

The prominent word of the Statute is "estate," as distinguished from a mere right. We readily yield our assent to the suggestion, that it was not the intention to abolish this distinction, and that as a widow is not entitled to dower where a husband has a mere right at law, so she is not entitled where the husband has a mere right in equity. By way of illustration: the wife of a disseizee, who neglects to enter, cannot claim dower; for, although the husband had a right, which was transmissible

by descent, he had no estate; so, where one makes a feoffment upon condition, and dies after condition broken, but without revesting his estate by entry, and afterwards the heir enters and revests the estate, the widow is not entitled to dower. This distinction, which applies where the widow claims dower at common law, is equally applicable where she claims under the statute: for instance, if a trustee sells the land in violation of the trust, and the *cestui qui trust* marries and dies without revesting his estate, the widow is not entitled to dower; for he had a mere right to apply to a Court of Equity, and have the purchaser declared a trustee, if he bought with notice: but, as he did not in his lifetime assert this right, although his heir may do so after his death, it was not intended to give the widow a claim to dower. Indeed, it could not be done, without destroying all analogy between a legal and an equitable estate, which, the intention was, to put on the same footing. So, if a trustee uses money belonging to the trust fund, and invests it in land, although the *cestui qui trust* may in equity follow the fund, and claim the land, yet, until he does so, he has a mere right, not an estate.

No question is made as to the distinction between an estate and a right in equity. Indeed, we were informed upon the argument, that his Honor, in the Court below, decided against the widow, upon the ground, that her husband had only a right, and not an estate. So there is no difference of opinion as to the principle; but we think his Honor was mistaken in making the application, and in holding that the vendee had no equitable or trust estate. The ground of the distinction consists in the difference between a trust created by the act of the parties, where he who has the legal estate, consents to hold it in trust for the other, and there is no adverse possession or conflict of claims, and a trust created by the act of a Court of Equity, where there is a conflict of claims, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one by a decree founded on fraud, or the like. In the former, the *cestui qui trust* has an estate; in the latter, there is a

mere right; and the idea of dower or curtesy, is out of the question. So the enquiry is narrowed to this: does the case of a vendee who has been let into possession, and has paid a part of the purchase money, fall under the head of a trust created by the act of the parties, where there is no adverse possession or conflict of claims; or, of a trust created by the act of the Court, where there is an adverse possession and conflict of claims, until the legal owner is converted into a trustee by a decree?—Apart from authority, there would seem to be but little difficulty in coming to the conclusion that it is a trust created by the act of the parties. They consent and agree that the legal title shall be retained by the vendor in trust, as a security for the payment of the purchase money, and then in trust for the vendee. So, there is no conflict of claims, or anything adverse in their position towards each other. But the question is settled by the adjudications; 1 Sug. V. and P., ch. 4, sec. 1; ch. 6, section 2.

"A contract for the sale of land, enforcible in Equity, though in fact unexecuted, is considered as performed, and the land is in Equity the property of the vendee." Adams Eq. 140. The vendee is entitled to the rents; if the property decreases in value, the loss is his; if the value is enhanced, it is his gain. At his death, it descends as real estate to the heir, or will pass to a devisee, and they will be entitled to have the price paid out of the personalty. If the contract, after the death of the vendee, be rescinded, his heir or devisee will be entitled to the purchase money BROOME v. MARCH, 10 Vesey 597.

As owner of the estate, the vendee may follow it in the hands of a purchaser, who takes a conveyance with notice. Here we are presented with a striking illustration of the difference between the two kinds of trusts; while the vendor retains the legal estate, the vendee has an equitable estate, and his widow is, under the statute, entitled to dower, and there is no Statute of Limitations to affect him. But if the vendor passes the legal estate out of him, this divests the equitable estate of the vendee. He has then a mere right, and the Statute of Limitations will bar him, unless

he asserts his right against one who has taken the legal estate, either as a volunteer or a purchaser, with notice. HOVENDEN v. LORD ANNESLEY, 2 Sch. and Lef. 633; EDWARDS v. UNIVERSITY, 1 Dev. and Bat. Eq. 326.

There is another view which tends strongly to show the correctness of our conclusion. We have seen above that soon after the introduction of the doctrine of "trusts," widows were excluded from dower in equities of redemption and other equitable and trust estates under circumstances where husbands obtained curtesy, and the object of the Statute was to abolish this invidious distinction. Now, it is clear, that husbands were entitled to curtesy, not only in equities of redemption, but in all other equitable or trust estates, under which is held to be included all trusts created by the act of the parties where the wife had an estate, as distinguished from a mere right to have the owner of the legal estate converted into a trustee. SWEETAPPLE v. BINDAN, 2 Vernon, 536; Id. 630. Bell on property of husband and wife; title equitable seizin, 67 Law. Lib. 119; and the cases there cited. By which it will be seen, that the husband is entitled to curtesy in a sum of money directed to be invested in land for the use of the wife in tail, she dying before the investment: or, where the wife is entitled to land in fee under articles of purchase, and dies before the price is paid, or a conveyance is exected; or, where land is conveyed in trust for the payment of debts, and then in trust for a woman in fee; she marries and dies before the debts are paid. WATTS v. BALL, 1 P. W. 108.

It was insisted upon the argument, that the act of 1828, and the act of 1812, which make trust estates subject to sale under execution, ought to receive the same construction; and as the estate of the vendee cannot be sold under the act of 1812, so the widow cannot be entitled to dower in such estate. The conclusion does not follow. The reason why the estate of the vendee cannot be sold under the act of 1812, is, because, under that act, the purchaser becomes entitled to the legal as well as the equitable estate; consequently, it can only apply to

a "pure" or "unmixed" trust, as it is termed, (although the better expression is, to a case where the trust is held only for one person.) For, if the trust be held for another besides the debtor, the statute cannot operate, inasmuch as the trustee should hold the legal title for such other *cestui qui trust:* for instance, in the case of the vendee, his estate cannot be sold, because the vendor holds as well to secure the purchase money as in trust for the vendee; and the statute could not have intended the manifest injustice of depriving him of his security, by transferring the legal title to the purchaser under an execution against the vendee.

This reason for excluding such equitable and trust estates from the operation of the act of 1812, has no application whatever to the act of 1828; for, by the latter, the widow takes expressly subject to the rights of the vendor.

Again, it was insisted, if the widow be endowed of one-third of the land, although it is subject to the rights of the vendor, still his security will be impaired; for it will be subdivided and split up into several parts. This does not follow. As long as the vendor is content with his security, and permits the widow to continue in possession of the one-third allotted to her, she can only be required to keep down the interest upon one-third of such part of the purchase money as remains unpaid. When the vendor desires to have his money, if it cannot be made out of the personal estate of the vendee, (which is the fund primarily liable,) he can file a bill for the specific performance of the contract, and the money must then be paid or raised by a sale of the land. Whether the other two-thirds of the land, and the reversion of the third, covered by the dower, will not be bound to exonerate the widow, by being applied to the discharge of the debt of her husband, is a question that we will not now decide, as it was not discussed before us. Analogies may be found in the case of husbands who have taken curtesy in their wives' equities of redemption and other equitable and trust estates; and also, in the case of widows, who have taken dower in the reversion of

their husbands, subject to a term for years, conveyed by way of mortgage.

The petitioner is entitled to have dower allotted to her in one-third of the house and lot. Judgment below reversed. This opinion will be certified.

PER CURIAM. Judgment reversed.

COMMISSIONERS OF WASHINGTON v. FRANK AND JOHN.

The Intendant of Police of an incorporated town, who issues a warrant against a slave, for a penalty for violating a town ordinance, which warrant is in the name of the Commissioners of the town, as plaintiffs, of whom he also is one, is a competent witness to prove the disorderly conduct of such slave, alleged as a breach of such ordinance.

Where the Commissioners of an incorporated town, under a general authority in the charter to pass ordinances to preserve the peace and quiet of the town, establish an ordinance forbidding "all disorderly shouting, dancing and all disorderly and tumultuous assemblies, on the part of slaves and free negroes, in the streets, market and other public places in said town:" HELD, that this prohibition is not limited to violations of pre-existing laws.

HELD, further, that it was properly left to the jury by the Court, to determine whether the conduct charged amounted to a disturbance of the community.

A warrant for a penalty, in violating an ordinance of a town, must set forth the act of Assembly, by virtue of which the ordinance is passed, and for an omission of this kind, the judgment will be arrested.

HELD further, that this Court will permit an amendment of a warrant in this particular, upon the payment of costs by the plaintiffs.

THIS was an action originally brought by a warrant against two slaves for violating the provisions of an ordinance of the town of Washington, tried before his Honor Judge ELLIS, at Spring Term, 1854, of Beaufort Superior Court.

The warrant under which the defendants were arrested was as follows:

STATE OF NORTH CAROLINA, }
Beaufort County. }

Town of Washington: To the Sergeant of said Town, to execute according to law:

Whereas, the Commissioners of Washington complain that negro slaves John and Frank, the property of John Myers and son, did, on Sunday, 5th instant, violate town ordinance, No. 5: Now, therefore, you are hereby commanded to arrest, &c., to answer said complaint, and otherwise to be dealt with according to law, &c.

(Signed,) JOHN NORCOM, [SEAL.]
Int. Police of Town of Washington.

The ordinance No. 5, of the town of Washington, upon which this proceeding is based, is as follows:

"The Commissioners for the Town of Washington do hereby prohibit and forbid all disorderly shouting and dancing, and all disorderly and tumultuous assemblies on the part of slaves and free negroes in the streets, market and other public places in said town, by day and by night. Any white person, or free person of color, violating this ordinance, shall, upon conviction of the same, forfeit and pay a sum not exceeding ten dollars, and any slave violating said ordinance shall, upon conviction, be punished with not more than thirty-nine lashes for each and every offence."

The charter of the town, under which the ordinance was passed, was in evidence, but as no question arises in the case, upon its provisions, it is deemed unnecessary to set it forth.

John Norcom, the Intendant of Police, was offered as a witness in behalf of the plaintiffs, and objected to by defendants, upon the ground of interest, but the objection was over-ruled by the Court, and the witness proceeded to state that he was sitting in the back room of his office, in the town of Washington, on Sunday, with the door closed; that he heard a loud noise in the street, went to the door, and saw a company of half a dozen negroes, among whom were the defendants. They were laughing and talking, making much noise. One negro had a stick in his hand, and the others were engaged in a scuffle

with him, with a view of taking it away. There was no quarreling or fighting, but only laughing and talking. There was no white person present. Witness commanded the negroes to disperse, which they did, and he returned to his office. In a very few moments afterwards, the witness heard a still greater noise at the same place, and, on going to the door, he saw that they were the same negroes re-assembled, making much noise and disorder, by loud and boisterous laughing and talking. He again dispersed them.

The defendant's counsel contended that they could not be convicted upon this evidence, because it did not appear that the slaves had been guilty of any breach of the peace, nor had violated any pre-existing laws, nor had they assembled for any unlawful purpose, nor had done any unlawful act while they were assembled, and that for this reason they had not violated the ordinance.

The Court expressed the opinion that the Intendant and Commissioners of the town of Washington had power, under their charter, to pass all needful rules and regulations for protecting the quiet and repose of the citizens, whether such rules and regulations prohibited acts already contrary to the laws of the State, or otherwise, provided they were not inconsistent therewith. The Court further instructed the jury, that the intent of this ordinance was to prevent all such noise and disorder in the public places of the town, arising from the acts therein specified, as would molest the quiet of the citizens. The evidence was left to them, to say whether the noise made by the defendants was so great as to disturb others. If so, the defendants would be liable, though such noise may have been produced by a sport or play, in which they were engaged.

Under these instructions, the verdict was rendered for the plaintiffs.

Rule for a *venire de novo,* for admission of improper testimony and for misdirection to the jury. Rule discharged. Judgment and appeal.

Donnell, for the plaintiffs.
Biggs, for the defendants.

NASH, C. J. The first objection raised in behalf of the defendants, is, as to the competency of Dr. Norcom, as a witness for the prosecution. The objection is placed on two grounds: 1st. The witness is a party of record, being one of the Commissioners of the town; and, 2ndly, that he is a corporator. As to the first, he is necessarily a party plaintiff, by force of the town ordinance, and his being a Commissioner does not deprive him of his privilege as a corporator; and as such he is a competent witness. Although Dr. Norcom is a corporator, yet he is entirely without interest in the matter, or it is so remote that the law cannot regard it. The same objection in principle was raised in the case of JACKSON against the COMMISSIONERS of Hillsboro', Dev. and Bat 177. The action was in ejectment for a lot in the town. One Horton, who was a corporator, was offered as a witness by the defendant. The Court say, as a corporator, Horton was competent, because he had no private and distinct personal interest. It is clear that simply being a corporator does not disqualify him as a witness. In this State, the citizens of a county are constantly received as witnesses upon indictments, although the fines imposed belong to the county, and it is liable for the costs if it fail. In the case of JACKSON, the Court conclude their opinion by saying, "it would seem to us, that an interest in the whole community, for the common weal only, it is not a particular private interest which makes the verdict of advantage or disadvantage to each citizen; or that if it be, that it is so minute and remote, that the argument of slight bias from it, is repelled by the frequent necessity of using such witnesses or having none." And it must be so; if it were not, the revenue laws never could be enforced against a delinquent officer. The principle established by the case referred to, is an answer to each ground of objection to the competency of Dr. Norcom as a witness.

The counsel for the defendants contended that the acts complained of were no violation of the ordinance; that the ordinance only intended to prohibit such acts as were in violation of some pre-existing law of the State. We cannot agree to this proposition. If true, it would sweep away the whole of the police regulations of the different public corporations of the State. The very object of their institution is to call into existence such laws and regulations of conduct, as may be thought by the corporators to be required by their several situations. Different regulations are required in different localities; for example, regulations which are needful and proper for the town of Wilmington, would not be so for the town of Hillsboro', or any town off the sea-board. The Commissioners of Washington had the power to pass the ordinance in question; for it violates no law of the State nor the constitution. Did the conduct of the defendants bring them within its operation? We are very clearly of opinion that it did, not only in word but in spirit. They were violating the Sabbath, and were creating a noise in the public streets, within the limits just expressed; the Commissioners of every incorporated town have a right to establish any and every regulation which, in their judgment, is needful to the comfort and interests of the citizens. His Honor instructed the jury, that the intent of the ordinance in question was to prevent all such noise and disorder in the public places of the town, arising from the acts therein specified, as would molest the citizens. It was left to the jnry to say, whether the noise made by the defendants was so great as thus to disturb others. If so, the defendants were guilty, though the noise was made in play. In this charge, we entirely concur. The language of the ordinance is, "that the Commissioners of Washington do hereby prohibit and forbid all disorderly shouting, dancing, and all disorderly and tumultuous assemblies on the part of slaves and free negroes in the streets," &c., "both on Sundays and on other days," &c. Slaves compose so large a portion of the population of our towns and villages, that, in passing rules and regulations for their government, much must be left to the judg-

ment and discretion of those who are to enforce them, in their application to particular cases. STATE v. BILL, 13th Ired. 573. We think in this case the ordinance was violated, and that the presiding Judge committed no error in admitting the testimony of Dr. Norcum, or in his charge to the jury.

A motion was made to arrest the judgment, because the warrant did not set forth the act of Assembly, by virtue of which the ordinance was passed. The objection is a fatal one. STATE v. MUSE, 4th Dev. and Bat. 219. A motion was then made to amend the warrant; which, on the authority of Muse's case, is allowed at the costs of the plaintiffs.

Judgment affirmed, and opinion to be certified.

S. S. BLACKBURN v. E. BOWMAN.

Where a person occupying land adjoining another, and in ignorance of the true boundaries of the tracts, trespasses upon the land of the adjacent owner, but disclaims title, and tenders reasonable amends before the suit was brought: HELD, that such trespasser is protected under the Act of Assembly, Rev. Stat. 31st chapter, 83d section.

Action of Trespass, *quare clausum fregit*, tried before his Honor, Judge MANLY, at the Spring Term, 1854, of Forsythe Superior Court.

Plea, general issue, and a special plea under the statutes, disclaiming title, alleging the trespass to be involuntary, and tender of sufficient amends.

The case presented by the evidence was, that the defendant, a short time before the trespass complained of, had become the tenant of a piece of land adjoining the plaintiff's, and had, in ignorance of the boundary between them, not far from his, defendant's house, cut a few sticks of pine wood, which were not taken away.

At another time, the defendant admitted to a witness that he had cut a board tree on another contiguous parcel of the plaintiff's land, but stated, at the same time, that he did not know he had got over the line of the land he occupied, and reckoned the plaintiff would not care or make a fuss.

Soon after the sticks were cut for fire-wood as above stated, the plaintiff went into the field of the defendant, where he was at work, and enquired who did it. The defendant answered that he had cut them, stated the circumstances under which it was done, and offered to make any amends required; to which plaintiff answered, "he had the advantage, and he intended to use it." The defendant tendered two dollars to the plaintiff, before the bringing of the action, and afterwards, at the appearance term to which the writ was returnable, paid the same into Court.

The counsel for the defendant contended that the trespasses proved were involuntary, and were against the will of the defendant, and therefore within the meaning and purview of the Statute.

To which was replied by the other side, that as to the trespass in cutting the board tree, there was no evidence that it was involuntary, and asked the Court so to charge the jury.

But his Honor declined the instructions asked, thinking there was evidence for the jury to consider, as to both the trespasses complained of, and informed them that if these trespasses were made in ignorance of the boundary by the defendant through an honest mistake of his rights, and upon being properly informed, sufficient amends were tendered and paid into Court by him the second plea might be found in favor of the defendant.

There was a verdict for the defendant upon the last plea.

Rule for a *venire de novo;* rule discharged; judgment and appeal to this Court.

Miller, for the plaintiff.
Morehead, for the defendant.

BATTLE, J. The second plea of the defendant, upon which the issue was found in his favor, was given by the 83d section of

the 31st chapter of the Revised Statutes, which is as follows: "In all actions of *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the lands in which the trespass is, by the declaration, supposed to be done, and the trespass be by negligence, or involuntary, and the defendant shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass brought; whereupon, or upon some of them, the plaintiff shall be enforced to join issue, and if the said issue be found for the defendant, or the plaintiff shall be non-suited, the plaintiff shall be clearly barred from the said action, and all other suits concerning the same."

The plaintiff's counsel contended that the cutting by the defendant of the board tree and fire-wood on the plaintiff's land, though done by mistake, in ignorance of the boundary line, was neither by negligence nor involuntary, within the meaning of the statute. In support of this position, he argues that the cutting was an act of the defendant's will; that he intended to do what he did, not being forced to it by any inevitable necessity, and that, therefore, it was a wilful trespass, and within the letter and spirit of the statute. We do not assent to the correctness of the reasoning. It is rather a play upon words, and, if allowed to prevail, would manifestly defeat the object which the law-makers had in view. That object was to prevent a party who had inadvertently committed a trespass upon another's land, from being harrassed with a law suit, and burdened with costs, when he was ready to disclaim title, and make sufficient amends. What more, in such a case, could the plaintiff reasonably desire? He could not by a suit recover vindictive damages, and if the defendant tender him a sum sufficient to compensate his actual loss, he could have no other purpose in refusing it, and bringing suit, than to gratify his malice. We should be sorry to be compelled to put a construction upon the statute, which would lead to such a result. Besides, in the plaintiff's own style of reasoning, we might say, that, though the *cutting the timber* was voluntary, the *trespass* upon the plaintiff's land

was not so. As to that, it might very properly be called involuntary. The charge of the presiding Judge was right, and the Judgment must be affirmed.

PER CURIAM. Judgment affirmed.

DURHAM LEWIS, ADM'R. v. DAVID LEWIS.

Under a deed of gift of slaves, before the act of Assembly, of 1823, to A. in trust for the life of B., and after his death to A., absolutely: HELD, that the life estate in B. being but a trust estate, not noticed by the common law, did not absorb the whole interest in the slaves.

ACTION of Detinue for a slave, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Bladen Superior Court.

On the trial, the plaintiff having shown his appointment as administrator of Thomas Simpson, and that the slave in question was the increase of a woman named Lydia, who was in possession of the plaintiff's intestate, at the time of his death, in the year 1806, and having proved the value of the slave in question, and a demand:

The defendant gave in evidence the following deed of gift for the woman Lydia, to Sarah Lewis, the mother of the defendant, under whom he claimed title, viz:

STATE OF NORTH CAROLINA, }
Bladen County. }

Know all men by these presents, that I, Thomas Simson, of the county and State aforesaid, planter, for and in consideration of the natural love and affection I bear to my daughter, Sarah Lewis, wife to Richard M. Lewis, have given, granted, bargained and delivered, and by these presents do give, grant, bargain

and deliver, unto the said Sarah Lewis, the negro slaves Lidda, Bet, Jean, Nance, Jack and Tom, with the future increase of the females; and for the like consideration do grant, bargain and sell unto my daughter, Sarah Lewis, her heirs and assigns for ever, one hundred and fifty acres of land in said county, on the South side of Bryan's swamp, joining Peter Simmons' line, the place where Richard M. Lewis now lives, with all improvements and hereditaments thereto belonging, to have and to hold the said bargained premises, and every part and parcel thereof unto the said Sarah Lewis, her heirs and assigns forever, in trust, for the use and occupation of myself during life, and from and after my death, to the sole use of the said Sarah Lewis, and her heirs and assigns for ever.

In witness whereof, I have hereunto set my hand and seal, this tenth day of August, in the year of our Lord one thousand eight hundred and three.

THOMAS SIMSON, [SEAL.]

Signed, sealed, and delivered in the presence of

JOSEPH NANCE,
EDWARD SIMSON.

His Honor directed a verdict to be entered for the plaintiff, subject to his opinion upon the construction of the deed, and, after consideration of the question reserved, being of opinion with the defendant, ordered the verdict to be set aside, and gave judgment for the defendant.

Appeal to this Court.

D. Reid and *Moore*, for the plaintiff.

No counsel for the defendant.

NASH, C. J. The deed, under which the defendant claims the slave in question, is inartificially drawn, but enough appears to show that the legal title to the negro, Æsop, is in him. The objection to the conveyance, raised by the plaintiff's, that, by the deed, a life estate, in the negro mentioned in it, is reserved to

Thomas Simpson, the grantor, and being prior to our act of Assembly, of 1823, the whole interest in them remained to him. The common law does not allow a remainder in chattels to be engrafted in a life estate, the granting of a life estate consuming the whole interest. But, though this cannot be done by a common law conveyance, it may be done by will or by a conveyance to trustees, 2d Bl. Com. 398. From the phraseology of the deed of conveyance, it may well be questioned if it was not a conveyance of the present absolute title to the slaves to the daughter, and the life estate reserved only in the land. But, waiving that question, and admitting that the reservation did embrace the slaves, we are of opinion that the life estate did not absorb the whole interest in them. The conveyance was in trust. The language of the deed is, "To have and to hold the said bargained premises, and every parcel thereof, unto the said Sarah Lewis, her heirs and assigns forever, in trust for the use, occupation, and convenience of myself during my life, and from and after my decease, to the sole use of the said Sarah Lewis, her heirs and assigns forever." The deed, then, is a conveyance in trust to Sarah Lewis, for the use of the grantor for life, and after his death to her absolutely. The old gentleman is dead; and the defendant now holds the negro, Æsop, as his absolute property. With trusts the common law does not meddle, nor can they be subject to its rules. There is no error.

PER CURIAM. Judgment affirmed.

FRANCIS M. NEAL v. MICHAEL FESPERMAN.

The party affirming a fact must prove it to the satisfaction of the jury, because the *onus probandi* is upon him: if he does so prove it to the satisfaction of the jury, it is well settled, that in all cases, he is entitled to a verdict in his favor on the issue.

It is not error in a judge to refuse to instruct the jury in a civil case, that they must be satisfied "beyond a *reasonal doubt*."

Action of Slander, tried before his Honor Judge SETTLE, at the Spring Term, 1854, of Stanly Superior Court.

Pleas, General Issue, and Statute of Limitations.

Exception to the instructions given by the Court to the jury, upon the Statute of Limitations.

Upon this part, his Honor charged the jury, that the rule in relation to evidence, which existed in capital, and existed in all criminal cases, did not apply to such cases, to wit, that the jury must be satisfied, beyond a *rational doubt;* that in capital cases, the jury were not at liberty to find against a defendant, if, allowing the evidence to be true, there was any hypothesis, consistent with the defendant's innocence, or where there was any, the slightest, rational doubt of the truth of the evidence. But in civil cases, the jury might weigh the evidence and give their verdict for the side on which the evidence preponderated, looking to all the facts of the case; but they must be satisfied, before they could find for the plaintiff, that the words were spoken within six months, before the bringing of the action.

The jury found a verdict for the plaintiff, and the defendant moved for a rule for a *venire de novo.* Rule discharged and Judgment. Appeal to this Court.

Strange, and *J. H. Bryan*, for plaintiffs.

No counsel appeared for defendant.

PEARSON, J. The defendant's counsel moved the Court to charge that "before the jury could find for the plaintiff, they must be satisfied, beyond a rational doubt, that the words were spoken within six months before the bringing of the action." His Honor refused so to charge, but told the jury that before they could find for the plaintiff, they must be *satisfied* that the words were spoken within six months before the bringing of the action. For this the defendant excepts. There is no error.

The party affirming a fact must prove it to the satisfaction of the jury, because the "*onus probandi*" is upon him. If he does prove it to the satisfaction of the jury, it is settled, that, in civil

actions, he is entitled to a verdict in his favor, upon the issue. We are not called on here to say, how far a different rule has been adopted in capital cases. Where the evidence is circumst ntial, it is admitted to be proper "*in favorem vitae*," for the Court to instruct the jury, that if there be any hypothesis consistent with the prisoner's innocence, they should find him "not guilty;" that is, if the circumstances proven may all be true, and still the prisoner be not guilty, they should acquit.

How far "*in favorem vitae*" this mater is to be extended, so as to require the Court in a capital case, when the evidence of guilt is direct, to charge the jury that they must be satisfied, beyond a rational doubt: that is, that they should not have a rational doubt of the truth of the evidence, or credibility of the witnesses, we are not now to say. Suffice it, in civil cases, if the jury are *satisfied*, from the evidence, that an allegation is true in fact, it is their duty so to find, and they should be so instructed.

Judgment affirmed.

DEN ON DEMISE OF FABIUS D GIBBS v. SAMUEL BROOKS.

The County Court has no power to authorise an amendment in the return of a levy of a Justice's execution upon land, by a constable, after the sale of the premises.

EJECTMENT, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of Hyde Superior Court.

The plaintiff claimed title under a sale by the sheriff of Hyde, under a *venditioni*, founded upon a Justice's judgment, and a levy upon the premises in question by a constable. The levy made by the constable, and endorsed on the execution in his hands, was as follows:

"This day levied on Silvester G. Swindell's right and title of land that he inherited by Jackson Swindell, dec'd, this March 24th, 1849." (Signed.)

After the sale of the land levied on, and after the commencement of this action, to wit, at May Term 1854, the County Court of Hyde granted leave to the constable to amend his levy *nunc pro tunc*, which was accordingly done, so as to be as follows:

"This day levied on Silvester G. Swindell's right in a tract of land adjoining Fabius D. Gibbs, and Festus A. Gibbs, on Wysocking creek, March 24th, 1849." (Signed.)

It was contended by the defendant's counsel that the original levy was defective, and did not authorize the proceedings had upon it, and that the amendment exceeded the power of the County Court, and was therefore void. His Honor being of this opinion, the plaintiff took a non suit, and appealed to this Court.

No counsel for the plaintiff.
Donnell, for the defendant.

BATTLE, J. The amendment in this case was allowed after the sale under a *venditioni exponas*, and the County Court had no power to make it, as was expressly decided by this Court at the last Term, at Morganton, in the case of PHILLIPSE v. HIGDON, Busb. Rep. 380. The judgment of non-suit was proper, and must be affirmed.

PER CURIAM. Judgment affirmed.

CASES IN LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1854.

SAMUEL TUCKER v. THE JUSTICES OF IREDELL.

The return of the defendants to an *alternative mandamus* will be taken as true, unless its falsity is shown by the petitioner.

Where the return of the defendants is filed, which admits a material allegation set out in the petition, but avers new matter in avoidance, the issue, to avail the petitioner, in falsifying the return, should be taken on the new matter, and not on the admitted fact. Such an issue as the latter will be treated as immaterial.

Where a *mandamus* is asked for, to compel the Justices of a county to pay for the building of a bridge, and a verdict is rendered by a jury, finding that the bridge was not built according to the contract, the petitioner has no right to recover, in this form of action, the value of the bridge, during the time it had been used by the public.

APPLICATION for a *mandamus* to compel payment for building a bridge over the South Yadkin River, heard before his Honor Judge CALDWELL, at Spring Term 1853, of Iredell Superior Court.

The petition was as follows:

"To the honorable the Judge of the Superior Court of Law in and for the county of Iredell, State of North Carolina:

"The petition of Samuel Tucker respectfully showeth to your Honor, that, at the November sessions, 1847, of the Court of Pleas and Quarter Sessions for the county aforesaid, the Justices thereof made an order, and caused the same to be entered of record, appointing Henderson Forsythe Enos Gaither

and Alexander Bailey, Commissioners, to let and contract for the building of a bridge over the South Yadkin river, near where Belts' bridge formerly stood.

"Your petitioner further showeth that the said Commissioners, in the month of January, 1848, contracted with your p titioner for building said bridge, at the place designated, according to certain written specifications, describing and establishing, with great particularity, the kind of a bridge, the manner of building it, and the material to be used about the same; that the said Commissioners required your petitioner to sign specifications, and the same were returned to, and are now on file in the office of the clerk of the County Court, and that, to secure the performance of the contract, your petitioner was required to and did execute a bond, with good security, in the sum of two thousand dollars, which said bond was delivered to the said Commissioners, for and in behalf of the county of Iredell, and returned to the said Court, and is now on file in the clerk's office.

"And your petitioner further showeth that the said Henderson Forsyth, Enos Gaither and Alexander Bailey, in contracting with your petitioner, only acted for and in behalf of the county, and by virtue of their appointment as Commissioners as aforesaid, of the County Court.

"And he further showeth, that the said South Yadkin River, at the place designated, is within the limits of Iredell county, and within the jurisdiction of the County Court.

"Your petitioner further showeth, that it was contracted by the Commissioners aforesaid, to pay your petitioner the sum of seven hundred and ninety-nine dollars, for building the bridge according to the said specifications.

"Your petitioner further showeth, that he soon thereafter went to work, and employed a large number of hands, and, in as substantial and workmanlike manner, as the specifications would adm t, built and completed a bridge, which, in every respect, your petitioner positively avers, corresponded to the specifications above mentioned; that, in all things, he performed his contract, and fol-

lowed the said specifications as his guide. Your petitioner further showeth to your Honor, that the said Commissioners, after viewing and examining the bridge after its completion, entirely approved the same, and made their report to the November session, 1848, of the County Court, stating their examination and approval, and recommending that your petitioner be paid the sum of seven hundred and ninety-nine dollars, according to agreement, (which is filed as an exhibit.) That, upon the presentation of said report, and, according to its recommendation, the Justices of the Court, at the said November session, 1848, made an order, directing the county trustee to pay to your petitioner the sum of $799, for building the bridge as aforesaid contracted for, and completed by your petitioner, a copy of which order, marked B, is herewith submitted, as a part of this petition. Your petitioner further showeth to your Honor, that said bridge thereupon was opened to and used by the community as a county public bridge; and your petitioner applied to the county trustee for his pay; that said trustee deferred payment at the time for the want of the necessary county funds wherewith to discharge the same. Your petitioner further showeth to your Honor, that, after said bridge had been used by the citizens of the county, and the public generally, a part of said bridge fell down, not because of any deficiency in the execution of the work on the part of your petitioner, as he is fully convinced and satisfied, but entirely from the plan of the bridge itself, as prescribed in the said specifications, and your petitioner shows, that it is next to impossible to make a permanent bridge on the plan proposed: for this one reason that the pillars, built of common rough rock, without mortar or cement, and bounded and built as specified, of only four feet base, and twenty feet high, and three feet at top, are not calculated to stand and support a bridge; that your petitioner has taken the opinion of an intelligent engineer, upon the plan of the pillars and bridge, and he states, unequivocally, that such a structure could not be expected to stand. And your petitioner shows to your Honor, that he faithfully and to the best of his ability, performed the

work specified by the county, and for which he and the Justices, by their Commissioners, contracted, and that he did not contract to insure the work to be permanent, and is in nowise responsible for defects in the original plan of the work. Your petitioner further showeth, that, after said bridge had fallen in part, the Justices, at the February Term, 1849, rescinded ther former order of payment, and have instructed their County Trustee not to pay your petitioner. Your petitioner shows to your Honor, that he has repeatedly demanded his money, and sought to obtain it, but that his demands have been and still are met with positive refusal; that, having performed his contract, according to his written directions, and received an order for his money, he is now strictly entitled to receive, from the treasurer of the county, the sum of $799, with interest on the same, from the 17th November, 1848, until the same be paid; and as he can have no relief in the premises, save by the extraordinary process of *mandamus*, he shows that he is entitled to the same; that he learns from the clerk of the County Court, and so shows to your Honor, that the following are the Justices of the Peace, in and for the county of Iredell, (setting them forth at large.)

" Your petitioner therefore prays your Honor, that an *alternative mandamus* may issue to the aforesaid Justices, commanding them, that, unless they show good cause to the contrary, whenever thereto required by this honorable Court, they pay, or cause to be paid, by the officers of this county, the said sum of $799, with interest thereon, from the said 17th of November, 1848; that, upon their failure to show such cause, they be absolutely and peremptorily commanded by this honorable Court, to pay to the petitioner, the aforesaid sum of $799, with the interest thereon, as aforesaid.

Osborne Guion and *Boyden*, Attornies.

NORTH CAROLINA, }
Iredell County. }

Samuel Tucker maketh oath, that the several matters of fact set forth in the foregoing petition, as of his own knowledge are

true, and those as not of his own knowledge, he believes to be true. SAMUEL TUCKER.

(Sworn to before the Clerk of Superior Court.)

This petition was then entered upon the minute docket of the said Court. and the following proceedings had, viz:

SAMUEL TUCKER,
vs.
THOMAS A. ALLISON, and others,

This petition coming on to be heard on the petition and affidavit of the petitioner, it is ordered by the Court, that, unless the defendants shall pay the sum of $799, and interest, as prayed for in the plaintiff's petition, on or before the first day of January, 1852, that the Clerk of the Superior Court of Iredell county shall issue notices to the several defendants, to show cause, at the next term of this Court, wherefore a writ of *mandamus* shall not issue, as prayed for by the petitioner.

And at Spring Term, 1852, said suit appears on the trial docket, and the following proceedings are had: "Motion to quash disallowed, and defendants required to make a return." From which order the defendants were allowed to appeal. No appeal bond to be filed, by consent.

In the Supreme Court, the judgment below was affirmed (13 Ired. Rep. 434;) which, being certified, an *alternative mandamus* issued, requiring the defendants to pay the petitioners the sum of $799, with interest, or show cause, and make return to the next term of the Court.

At the Fall Term, 1852, of our said Court, came the defendants and made return to the said petition of Samuel Tucker, as follows:

To the petition of Samuel Tucker, praying a *mandamus* against the justices of Iredell county, they the said justices make return, and for cause show respectfully, to this Honorable Court, that they, from the best of their knowledge and belief, in refusing the payment of the petitioner, as alleged in his petition, have not acted in bad faith or unjustly to-

wards him, and do not withhold from him a debt which in good conscience he can demand, but they have acted with a sole regard to their public and official duty to the county, and from a desire to protect it from an unfounded and iniquitous claim. They say it is true, that at November Term, 1847, of their county Court, they made the order mentioned in the petition; and also, that the petitioner undertook a contract to build a bridge on the South Yadkin River, according to specifications in writing, (the substance of which is set forth below.)

They deny that the petitioner has built the said bridge in all things, according to his contract, and the said written specifications. They represent that from the best of their knowledge and belief, the petitioner built the said bridge with such gross negligence and wilful unskilfulness, that it is of no public utility whatever; that owing to the frail and insufficient construction of the work, one end of the bridge had crushed the abutment, upon which it was supported, before the petitioner had finished his work; and in less than two months afterwards, the other end crushed the abutment upon which it was supported, and sunk down, and that since then, the greater part of the bridge has been carried off by the waters of the stream.

These defendants show, that in the petitioner's contract, it is specified that "the face wall of the abutment on the South side of the river was to be started in the bottom of the river, against a rock; to be four feet thick tapered up twenty feet high, to be three feet thick at the top for the cope; two side walls to be started, fifteen feet from outside to outside; to be three feet thick at bottom, tapered to two feet at top, and the space between the walls to be filled with rock and dirt to settle them; and the abutment on the North side of the river is to start forty-eight feet in the river, and to be constructed as the abutment of the South side." And they represent, from the best of their information and belief, that the face walls and side walls of the abutments were not built as specified in the terms of the contract, but that stone, without regard to their fitness, in size and form, were so laid as fraudulently to present

the face of a wall, when in truth, what represented walls were of unequal thickness, and of a single stone, and varying with the size of the stone; and instead of rock and dirt, the abutments were filled in with loose sand. These constructions started in water, from foundations loosely placed in the mud and sand, instead of at the bottom of the river against the rock, and were reared on one side of the river to the height of twenty feet. These defendants represent, from the best of their information and belief, that these pretended walls, in many parts, did not exceed a foot in thickness, and were so frail as to be totally inadequate for the support of the bridge, and for this cause they crushed, and the bridge sank down, and was rendered impassable and useless. They further represent, from their information and belief, that the timbers used in the construction of the said bridge were not such as are specified in the terms of the contract;—were not all of heart timber, but large portions of material pieces were white pine or sap wood; the defendants show that the petitioner, in the several particulars mentioned, as well as others, has violated the terms of his contract for building said bridge, and has no just demand for the payment of the stipulated price. The defendants show that the said bridge fell down and became useless from the deficiency of the execution of the work, by the petitioner, and that it was not because of any defect in the plan of said bridge as contained in said specifications. Defendants further show, that it is true, that two of the commissioners, appointed by them to make the contract for the building of said bridge, did represent to them in writing that said contract was completed according to agreement, but such representation was untrue. The petitioner and the said commissioners knew at the time it was made, that it was untrue; they were all fully aware that the bridge, in its construction, was deficient in the particulars, herein before alleged, and that it was of little or no use to the public. These defendants are informed, and believe, that the said commissioners, before they would agree to make the said fraudulent representation to the justices concerning the structure of said bridge, knowing it to be frail and wholly insuf-

ficient, required the petitioner to put a wooden pillar, consisting of two wooden posts upright under the main wooden structure of the bridge, to support it, and that said bridge was in this condition, supported by such wooden posts, when they made the aforesaid representation to the defendants. The defendants believe and say that with a knowledge that petitioner had not performed his contract, these commissioners with him fraudulently confederated to procure from these defendants an order for the payment of the stipulated price of the work, and in pursuance of this design, they falsely made the above mentioned representation, by which the defendants were misguided and deceived, and induced to make an order directing the county trustees to pay the stipulated money. The defendants believe and represent that the said certificate of the commissioners was advised, counselled, and approved by the petitioner with a perfect knowledge, on his part, that the contract for building said bridge had not been substantially performed, and with the design of fraudulently taking and receiving money from the county, without any just title to demand it. These defendants state that at the next term of their County Court, they rescinded the aforesaid order, (it being the very first opportunity they had of so doing, after learning that they had been imposed upon by the petitioner,) and that said defendants believed at the time, and they still believe, that they had power and authority in law so to rescind their own order. These defendants state that they are not informed that any surrender of the bridge was made to them or the public, by the petitioner, nor have they surrendered or dedicated it to the public use, by any special act of their own; nor have they any knowledge or belief that the aforesaid commissioners accepted it, except as the above mentioned certificate may be evidence of acceptance.

Mitchell Lillington, and *W. P. Caldwell* for defendants.

Personally appeared Thomas A. Allison, one of the defendants in behalf of all the justices of the county of Iredell, and

maketh oath that the several matters which are set forth in the foregoing return, as of their own knowledge are true, and those set forth as not of their own knowledge, are true to the best of his understanding and belief. THOMAS A. ALLISON.

Sworn to in open Court. W. H. HAYNES, Clerk.

This suit was regularly continued in Court until the Spring Term, 1853, when the following proceedings were had, his Honor Judge CALDWELL presiding:

The following issues were made up between the parties:

1st. Was the bridge in question built according to contract?

2d. Was the bridge in question accepted by the County Court, or by the Commissioners, after it was so built?

Whereupon, the following jury of good and lawful men are empanelled, and sworn to try the issues joined between the parties, viz: (naming them;) who, for their verdict, say, as to the first issue: "That the bridge in question was not built according to contract."

And, as to the second issue, they say, "That the said bridge, after it was built, was accepted by the County Court of Iredell."

Upon which verdict and premises aforesaid, it is moved by the plaintiff that a peremptory *mandamus* issue to the said Justices of the Peace, commanding them to pay the said sum of $799, in the pleadings demanded.

The Court, upon consideration, refused the said motion, "and thereupon it is considered by the Court, that the said writ be quashed, and the defendants go without day," from which judgment the plaintiff appealed to the Supreme Court.

Boyden, *Osborne* and *Guion*, for the plaintiff.

Mitchell and *W. P. Caldwell*, for the defendants.

PEARSON, J. At common law, the return to a writ of *mandamus* could not be traversed; and if the matters set forth were sufficient in law, the defendant had judgment to go without day. If the return was false, the remedy of the person aggrieved thereby was an action on the case for making a false return; and if

the plaintiff proved the matters of fact false, he recovered damages and costs. By 9th Anne, ch. 20, in certain cases, all or any of the material facts set out in the return may be traversed. Our statute of 1836, ch. 97, section 5, extends this provision to all cases, and upon a traverse of any of the material facts, "such proceedings shall be had, as might have been had, if the person suing such writ had brought his action on the case for a false return," &c.

In our case, the return states that, after the return was made, the following issues were submitted to the jury: 1st. "Was the bridge in question built according to contract?" 2nd. "Was it accepted by the County Court, or by the Commissioners after it was built?" The jury find that the bridge in question was not built according to contract. They find further, that the said bridge, after it was built, was accepted by the County Court of Iredell. The record formally drawn up from these entries on the minute docket, shows that the petitioner traversed the return in two particulars, on both of which the defendants joined issue, and there was a verdict in favor of the defendants, upon the first issue, and in favor of the petitioner upon the other.

The petitioner thereupon moved for judgment, that a *peremptory mandamus* issue, &c., which was refused, and he excepts. There is no error.

The return sets out, that the bridge was not built according to the contract in several important particulars, which are specified; "that it is true that two of the commissioners, appointed by them, to make the contract, did represent to them, in writing, that the petitioner had built the bridge according to contract, and that, thereupon, the defendants did make an order, directing the money to be paid to the petitioner;" but they aver that the representation, so made to them by the two Commissioners, was wilfully false, and was fraudulently procured to be made by the petitioner, with intent to deceive the defendants, and induce them to make the order; that, having soon afterwards discovered the fraud, and being satisfied that the bridge

had not been built according to the contract, they, at the next *term*, (which was the first opportunity they had for so doing,) rescinded this order, and refused to direct the money to be paid to the petitioner. The main, and most material fact set out in the return, is, that the bridge was not built according to contract: this fact the petitioner traverses, the defendants join issue, and it is found in their favor.

The petitioner also traverses the fact that the bridge had not been accepted by the defendants: upon this issue is joined, and is found in favor of the petitioner.

It will be observed, that the fact here traversed was averred by the petitioner, and was admitted by the return. So it was a fact agreed, and the issue thereupon was immaterial, for the defendants confess it, and seek to avoid its effect, by averring new matter, viz., that the representations, made to them in writing, by the two Commissioners, were wilfully false, and fraudulently procured by the petitioner. This was a fact material for the petitioner to traverse: he did not do so, but puts his traverse upon a fact confessed. In the absence of a traverse, or a finding thereon in favor of the petitioner, we are to assume all the averments of the return to be true, the petitioner being only entitled to ask for a *peremptory mandamus, upon the ground that he has shown the return to be false*, as if he had at common law established the falsity in an action on the case.

The material fact, that the bridge was not built according to the contract, being found by the verdict, and the other material fact being taken as true, because not traversed, and shown to be false, we are at a loss to see any pretext whatever that the plaintiff had to ask for a judgment against the defendants, on the ground that they had made a false return; and, as the matter is now presented, we should have considered the defendants guilty of a gross neglect of a high public duty, if they had not refused to let the petitioner receive the money.

It was suggested upon the argument, that, although the petitioner was not entitled to recover the specific sum, yet he might recover the actual value of the bridge, if it had been used

by the public. "A *mandamus* is a high prerogative writ, and is only granted when one has a *special legal right* which cannot be recovered by an ordinary action." STATE v. JUSTICES OF MOORE, 2 Ire. Rep. 430. So the petitioner must show himself entitled to the specific right, and, failing in that, the suggestion that he should recover damages, and have a writ of enquiry, as upon a *quantum meruit*, under the common counts in assumpsit, has nothing whatever to support it.

In looking at the judgment, we perceive it is, that the "*writ be quashed*," and the defendants go without day," &c. The former part was inadvertently entered, and the judgment must be corrected, so as to be, "It is considered by the Court that the defendants go without day, and recover of the petitioner their costs." A judgment that the writ be quashed is not conclusive, and is proper when the petition does not disclose a case coming within the legitimate scope of the writ of *mandamus*, or where it is informal or defective, by the omission of necessary parties, or of some material fact. The case, set out, presents one proper for a *mandamus*: both the petition and the return, so far from being informal or defective, are well drawn for the purpose of putting the matter of controversy upon the merits, and may be used "as forms," with the exception of some repetition and unnecessary statement, which most pleaders use from abundance of caution, under cover of the maxim, that *utile per inutile non vitiatur*.

This case has been decided upon its merits, and the judgment should be final and conclusive, as directed above.

Judgment affirmed.

JOSEPH C. NEWLAND, ADM'R OF CATHARINE NEWLAND v. JAMES H. NEWLAND.

Where it is manifest, from other clauses in the will, that the testator meant to separate the two slaves in question, from the mass of his estate, and to dispose of them differently from that which had been given to his wife for life, and it appearing also that his wife was an object of his special bounty, the following words were construed to pass the absolute estate to her, viz: "I further will and bequeath unto my wife Catharine Newland, two servant boys Richard and Pinkney, to have and to hold, and to expose (dispose) of at her own discretion while she lives and at her death so as not to be disposed of out of the family.

The latter words, "not to be disposed of out of the family," being inconsistent with the absolute estate, were held to be inoperative.

ACTION of Detinue, tried before his Honor Judge DICK, at the Fall Term of Alexander Superior Court.

The only question in the case arose upon the clause in the will of Benjamin Newland, which is cited by his Honor Judge BATTLE, in giving the opinion of this Court, and it was agreed, that if, under said clause, Catharine Newland was entitled to an absolute estate in the slaves Richard and Pinckney, the plaintiff was entitled to recover; but, if otherwise, the verdict must be for the defendant. His Honor, on this question, being of opinion with the plaintiff, so instructed the jury, who found a verdict for the plaintiff.

Motion for a *venire de novo;* rule discharged. Judgment and appeal.

Boyden, T. R. Caldwell and *Avery*, for the plaintiff.
Gaither, for the defendant.

BATTLE, J. The contest between the parties arises upon the construction of the following clause in the will of Benjamin Newland:

"N. B.—I further will and bequeath unto my wife, Catharine Newland, two servant boys, Richard and Pinckney, to have and to hold, and to expose of at her own discretion, while she lives

and at her death, so as not to be disposed of out of the family," &c. The question is, whether the testator's widow took a life estate only in the two slaves thus bequeathed to her, with a power of disposing of them, either during her life, or at her death, in the family, or whether she hath an absolute interest in them, by force of the expression, "to have and to hold, and to expose of at her own discretion, while she lives, and at her death," which cannot be controlled by the words which follow, "so as not to be disposed of out of the family." If, in ascertaining the meaning of the testator, we were confined to this clause alone, we should feel great difficulty in coming to any satisfactory conclusion.

The testator was evidently *inops concilii*, and was himself unskilled in the use of language, and, perhaps, had no very definite idea of what he desired, with regard to the ultimate destination of his servants, Richard and Pinckney; or, what is more likely, he had desires inconsistent one with another, which he did not well know how to reconcile. But it is fortunate for us, that in our investigations to find out his intentions, we have the right, and it is our duty, to look to other parts of his will, so that the lights, if there be any there to be found, may be brought to bear upon and illumine the darkness of the clause under consideration. In turning then, to the other parts of his will, we at once perceive that the controlling desire of the testator was to make ample provision, so far as his estate would allow, for the comfort of his wife, during her life. To that end, after giving to each of her daughters a servant girl, and to his sons each an inconsiderable portion of personal property, he gives to his wife, for life, all his land, servants, and other chattel property, and after her death, the same to be equally divided among his sons, with certain exceptions to the prejudice of some of them. With this clause, and the one which follows, in which he appoints his wife and two of his sons as executrix and executors of his will, he seems to have made an end of disposing of the wordly estate, "wherewith it had pleased God to bless him," for he thereto adds the usual form of attestation. He

then seems to have thought that he had not yet sufficiently provided for his wife, and that he ought to give her two of his male servants, to be disposed of at her own discretion, either for her own benefit, or for that of some of the family, perhaps one or more of their children, to whom he had not given an equal share with the rest. He therefore proceeds with a "*nota bene*" to add the clause which we are now called upon to construe. From this view of the will, it is clear that the testator intended to separate his servant boys, Richard and Pinckney, from the other servants, and to give to his wife a different interest in them from what she had in the others; that is to say an interest other than a life estate. The question then is, what is the interest which he intended to give her. It is not, and cannot be pretended that the wife was to take these slaves merely in trust, to be disposed of by her for the family, or for any particular member or members of it, whom she might select. That would be wresting the language used from its ordinary signification, and would moreover be opposed to the settled construction of such modes of expression. There is nothing imperative in the language which is essential to the creation of a trust. The wife might possibly be held to have a power over the property, but by no means to hold it merely in trust. The distinction between a power and a trust is marked and obvious. "Powers (as Lord C. J. WILMOT said) are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." Wilm. 23; Sug. on Powers, page 100 of the Law Library edition, volume 6. The bequest to the wife, then, must be a life-estate, with the power of appointment, or an absolute interest, with an attempted restriction of her power of disposing of the slaves. Now, it is manifest, that a life-estate is not given in express terms, but, on the contrary, the expression "to have and to hold and expose of, (meaning obviously to dispose of) at her own discretion while she lives, and at her death," gives her an absolute interest, unless such interest is cut down to a life-estate by the remaining words of the

clause "so as not to be disposed of out of the family;" MASKELYNE v. MASKELYNE, Ambl. Rep. 50; PACE v. ARCHBISHOP OF Canterbury, 14 Ves. jr., 370, and other cases collected in Sug. on Powers, page 144 of the Law Library edition, volume 5. The question, then, is narrowed down to this, Whether these words can have that effect? Chancellor KENT, in a very able opinion, delivered in the Court of Errors, for the State of New York, in the case of JACKSON v. ROBBINS, 16 John. Rep. 537, says at page 587, "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life ONLY, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and marked gift of a power of disposition of the reversion. The distinction is carefully marked and settled in the cases."

Again, this same very learned Judge says, in the 4th volume of his Commentaries, pages 35 and 586: "If an estate be given to a person, generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." These rules are laid down after an elaborate review of English and *American* authorities, in some of which it was said, that there was, in this respect, no distinction between real and personal estate, and we have no doubt as to their correctness. They establish, very clearly, that the wife, in our case, took an absolute estate in the slaves Richard and Pinckney, by force of the power given to her to dispose of them at her discretion. The enquiry remains, what is the effect of the words, "So as not to be disposed of, out of the family?" We hold them to be repugnant to the absolute estate given in the preceding part of the clause, and there-

fore void. In this, we believe, that we are supported by principle as well as by authority. The words, if operative at all, must convey either a remainder or an executory devise. They cannot convey a remainder, because there cannot be anything to remain after an absolute estate in the property. There cannot be an executory devise, for the reason, that an executory devise cannot be destroyed or prevented from taking effect, by any disposition of the property, made by the first taker, and that would be directly inconsistent with and repugnant to the power given to the wife to dispose of the slaves at her discretion. In support of these positions, the case of JACKSON v. ROBBINS, above referred to, may be relied upon. In that case, the question arose upon a clause in the will of Lord Stirling, by which he devised and bequeathed "all his real and personal estate whatsoever to his wife Sarah, to hold the same to her, her executors, administrators and assigns; but, in case of her death, without giving, devising and bequeathing by will or otherwise selling or assigning the estate, or any part thereof, then he devised all such estate, or all such parts thereof as should remain unsold, undevised or unbequeathed, unto his daughter, Lady Catharine Duer, to hold the same to her, her executors, administrators and assigns."

The Chancellor KENT, in discussing the question, whether the limitation to the daughter was good, said: "This limitation over must be either as a remainder or as an executory devise, and it is impossible that it should be either. Upon every known principle of law, no remainder can be limited after an estate in fee, and therefore, if a devise be to A. and his heirs, and if he dies without heirs, then to B., the remainder is repugnant to the estate in fee, and void. PRESTON v. FUNNEL, Willes' R. 154; PELL v. BROWER, 2nd point Cro. Jac. 590. Nor can the limitation over operate by way of executory devise, because the power to dispose of the estate, by will or deed, which Lord Stirling gave to his wife, is fatal to the existence of that species of interest. It is a clear and settled rule of law. that an executory devise cannot be prevented or defeated by any alteration

of the estate, out of which, or after which, it is limited, or by any mode of conveyance. It cannot be created, and it cannot live, under such a power in the first taker. These limitations (says Mr. Justice POWELL, in SATTERWOOD v. EDGE, 1 Salk. Rep. 229,) make estates unalienable; for every executory devise is a perpetuity, as far as it goes: that is to say, it is an estate unalienable, though all mankind join in the conveyance; (See also 2 Fearn, p. 51, by Powell; 2 Saun., 388th note.) We are obliged, therefore, to have recourse to the explicit and settled doctrine, in the cases of the ATTORNEY GENERAL v. HALL, Fitzg. Rep. 3 14; IDE v. IDE, 5 Mass. Rep. 500; and JACKSON v. BULL, 10 John Rep. 19, and say, "that an absolute ownership or capacity to sell in the first taker, and a vested right, by way of executory devise, in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void."

The principles thus clearly enunciated, and shown to be supported by the highest authority, apply directly to the case before us, and are decisive of it. The testator intended, undoubtedly, as we think we have proved, to give his wife an interest in the slaves in question, greater than a life estate. The words which he used, did give to her an absolute estate, to which the restrictive expression is repugnant, and must therefore be declared to be void. The consequence is, that the slaves in question, not having been disposed of by Mrs. Newland, during her life, or at her death, formed a part of her estate, to which her administrator was entitled. The judgment must be affirmed.

Judgment affirmed.

DEN ON THE DEMISE OF JOHN LAUGHTER v. JOHNSTON BIDDY.

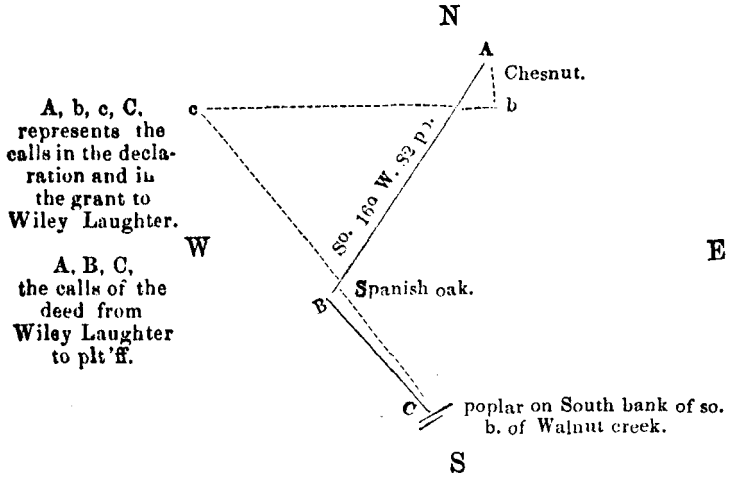
The rules of law, established for the ascertainment of boundary, are applicable in locating the lease formally set forth in a declaration of ejectment, so that where trees were marked originally by a surveyor, for the purpose of obtaining a grant, and are called for as such in the grant, and are mentioned as such in the lease set forth in the declaration, the lines in establishing such lease must be run to such marked and recognized trees, regardless of other calls, depending merely on course and distance.

ACTION of Ejectment, tried before his Honor, Judge CALDWELL, at the Fall Term, 1853, of Rutherford Superior Court.

The plaintiff's declaration described the premises as "a certain tract or parcel of land situate and lying in the county of Rutherford, on the South Branch of Walnut creek, beginning at a chestnut; thence South 16 poles, West 82 poles to a spanish oak; thence South 45 East 24 poles to a poplar on the South bank of the fourth branch of Walnut Creek; thence down the branch, &c., various calls to the beginning. He exhibited a grant from the State to Wiley Laughter, dated in 1834, corresponding in its calls with those in the declaration, except that the third call was for a poplar on the South bank of the South branch of Walnut Creek. He then exhibited a deed from Wiley Laughter to himself, describing the boundaries of the land as "beginning at a chestnut, thence South 16 West 82 poles to a spanish oak, thence South 45° East to a poplar to (on) the South bank of the South branch of Walnut Creek; thence, &c., purporting to include a much larger number of acres, and one or more tracts, besides the Wiley Laughter tract; the calls, too, above mentioned, were the same until after they passed the place where the trespass was alleged to have been committed. The plaintiff then called the surveyor, who testified that he made the survey upon which the Wiley Laughter grant issued; that he did not run as was set forth in the said grant, but that he began at the chestnut, and ran South 16°, West 82 poles to a

Spanish oak, &c., corresponding with the calls of the deed from Wiley Laughter to the lessor of the plaintiff; that if the lines were run according to the courses called for in the declaration, or of the original grant to Wiley Laughter, the boundaries would not include the defendant's possession; but if they were run according to the calls of the deed from Wiley Laughter to the lessor of the plaintiff, or according to the lines made by the surveyor originally, upon which the grant was issued, then the *locus in quo* would be included. He further testified that he had been raised in that neighborhood, and was well acquainted with the country, and knew of no branch of Walnut Creek called *fourth* branch, but that the land laid on the *south* branch of Walnut Creek. He further testified that the deed of Wiley Laughter to the plaintiff's lessor included other tracts besides the one described in the grant to Wiley Laughter. Plaintiff's lessor showed a possession of seven years before the defendant's entry.

DIAGRAM.



The defendant exhibited a grant to those under whom he claimed, dated in 1796, covering the land in controversy.

Defendant moved that the Court should order a non-suit, because of the variance between the deed and the declaration, which his Honor refused.

It was contended by the defendant's counsel, and the Court was called on to charge the jury, that the plaintiff was compelled to run according to the calls of the declaration, and not according to the deed or grant exhibited; and as, according to the calls in the declaration, the land on which the trespass was committed, was not within the boundaries, he could not recover; that there was a variance between the deed and the declaration, and between that and the grant to Wiley Laughter, and that the one could not explain the other.

The Court instructed the jury that a variance between the declaration and the proof would be fatal to the plaintiff's action; but in ascertaining the boundaries of the land described in the plaintiff's declaration, if there was a conflict between the courses called for, and natural objects, the latter being more certain, ought to control. And if they believed that the monuments of boundary made by the surveyor originally, and called for in the grant to Wiley Laughter were the same called for in the plaintiff's declaration, and by running to these monuments the *locus in quo* would be included within the declaration, they ought, on this part of the case, to find in favor of the plaintiff. The other exceptions were abandoned in this Court. Under these and other instructions in the case, the jury found a verdict for the plaintiff.

Rule for the plaintiff to show cause why a *venire de novo* should not be granted for the matters above excepted to. Rule discharged, and judgment and appeal to the Supreme Court.

J. Baxter, for the plaintiffs.
Bynum, for the defendant.

PEARSON, J. In compliance with the rule, that in pleading, the commencement of every particular estate must be set out, the declaration recites the lease for years under which the plaintiff claims. In doing so, it is usual to follow the description contain-

ed in the original grant on some one of the mesne conveyances. In this case, the description in the grant and that in the deed to the lessor differ, both in a general and in a particular point of view; in the general, in this the deed covers two or three other tracts of land, besides the tract described in the grant; in the particular, in this: both begin at a chestnut, and then go to a spanish oak corner, but in getting to the spanish oak, the grant makes two steps, e. i., South 16 *poles*, West 82 poles, whereas, the deed gets there by one step, e. i., South 16 West (degrees omitted) 82 poles to a spanish oak. The lease recited in the declaration shows an attempt to follow the description in the grant, as that covers, according to plaintiff's allegation, the tract sued for, and it was unnecessary to encumber the case by the description which covers other tracts; but the attempt fails in this: the grant as well as the deed to the lessor, after leaving the spanish oak, calls South 45° East to a a poplar on the South bank of the South branch of Walnut Creek. The lease calls South 45° East to a poplar on the South bank of the *fourth* branch of Walnut Creek."

The defendant's counsel moved to nonsuit the plaintiff, because of the variance of the deed and declaration; the motion was refused; for this, the defendant excepts; there is no error. There is, of course, no variance between the lease recited in the declaration, and the lease under which the plaintiff claims; for, by the common rule, the defendant admits a lease to have been made as set out in the declaration; so the point of the objection is, that the lease varies from the deed to the lessor and also from the grant under which he derives his title. In regard to the deed, the variance, in a general point of view, between it and the grant, as well as the lease, is immaterial, for the fact that the deed includes other tracts, besides the one in controversy, can make no difference. The variance, in a particular point of view, is made the ground of a second exception, and will be noticed below. In regard to the grant, there was no fatal variance between it and the lease; for the plaintiff was at liberty to explain it on the ground of a misprision in the draughtsman, by mistaking *south*, as writ

ten, and supposing it to be *fourth* branch of Walnut Creek; or, by rejecting that part of the description in the lease as surplusage, upon its appearing in the proof that there was no such water course as the fourth branch of Walnut Creek. By rejecting it, the only difference is that the description in the grant is more full than that in the lease; but, if the latter is sufficient to bring the lease to the poplar corner, it answers every purpose; for the proof is that the other part of the description will then cover the *locus in quo*. It is by no means true that the lease must follow either the grant or the mesne conveyance under which the defendant makes title. A general description in the lease is sufficient, provided it covers the *locus in quo*, e. g., "a certain tract of land in the county of ———, upon which C. D., (the tenant in possession) then lived." For the true question is, does the description in the lease and the description in the grant and deeds under which the lessor makes title, cover the *locus in quo?*

This brings us to the second exception. It is admitted that the deed to the lessor covered the *locus in quo;* it is also admitted that the grant, if run according to the rules. applicable to questions of boundary, covers it; but the defendant's counsel insisted that the plaintiff was "compelled to run according to the calls of the declaration, and not according to the calls in the deed or grant; and as, according to the calls in the declaration, the *locus in quo* was not covered, he could not recover." His Honor refused so to charge, but held that in locating the lease, the lines were to be run according to the rules applicable to questions of boundary, which he explained to the jury with clearness and accuracy. The defendant excepts, because the Court held that the plaintiff was not compelled to run "according to the calls of the declaration," but was entitled, in locating the lease, to the benefit of the rules applicable to questions of boundary; e. i., that a natural object, or a tree marked as a corner in the original survey, and called for, would control course and distance. There is no error.

The defendant's counsel puts his exception upon the ground, that there is a distinction between a question of pleading, and a

question of boundary; in the latter, certain rules are applicable, as laid down by the Court below; but, in the former, these rules are not applicable, and a defective declaration cannot be aided by them. The distinction is a sound one, and is recognized by this Court. PRESIDENT OF THE DEAF AND DUMB INSTITUTE v. NORWOOD, Bus. Eq. 65; MAYOR OF LINN REGIS, 10 Rep. 123: "If the name of a corporation be mistaken in a writ, a new writ may be purchased of common right; but if it were fatal in leases and obligations, the benefit of them would be wholly lost; and therefore one ought to be supported, and not the other." It may be conceded further, that the reason of the distinction extends to "the thing" sued for, as well as the person or corporation sued; and yet, we think it clear that the distinction does not apply to the case under consideration. The location of the lease, under which the plaintiff claims, is no more a question of pleading, than the location of the grant or deed under which the lessor claims, and if the rules in regard to boundary are necessary and proper, in the location of a grant or deed in fee simple, they must be equally so in the location of a lease or deed for an estate less than a fee, and the plaintiff is not to be prejudiced in the slightest degree by the fact that, instead of taking an actual lease on the premises, he is allowed, by the course of the Court, to suppose that a lease was made to him, and the defendant is required to admit that such is the fact. Now, if there had been an actual lease for years, describing the land, as it is in the lease recited, by the declaration, there can be no sort of question, but that the rules in regard to boundary would be applicable; of course they are applicable to the lease for years, which the declaration supposes and the defandant admits to have been made. Consequently, it was proper to instruct the jury, that, in locating the lease, a natural object, or a tree marked and called for as a corner, would control the course and distance, and that the plaintiff was not compelled to locate the lease according to the calls of the declaration, (by which we understand the courses and distances of the lease recited in the declaration;) and that the jury should extend

the lines, disregarding course and distance, to the Spanish oak and poplar; if they were satisfied that these were the trees originally run to and marked by the surveyor, and called for as a corner, by the grant and lease, you must go to it, and it made no difference whether you get there by one step, South, 16 degrees West, 82 poles, or two, South, 16 poles, West, 82 poles, (the *locus* not being in the triangle thus made,) and, after getting to the Spanish oak, you must run to the poplar, if that tree was originally run to and marked by the surveyor, and was the tree called for as a corner by the grant and the lease, and the fact, that it was described in the lease, as standing on the South bank of the *fourth* branch of Walnut creek (there being no water course of that name) made no difference. These are well settled rules of boundary, applicable as well to leases for years, as to deeds for an estate for life or in fee, and the facts of this case show conclusively that the rules are founded in good sense, because, by their aid, the lease is located, so as to correspond with the grant, which it was clearly the intention to follow, notwithstanding the mistake in taking *South*, as written, to be *fourth*, and the mistake in filling up the grant so as to call from the chesnut, "thence South 16 "poles" West, 82 poles, to a Spanish oak, thence South 45 degrees East, 24 poles to a poplar, thence," &c., instead of pursuing the survey, and calling *thence* South, 16 *degrees* West, 82 poles to a Spanish oak: a mistake originating by the omission of *degrees* after 16, and supposing it to be 16 *poles*, instead of degrees: whereas, it is evident, that it was not the intention to make a corner before getting to the Spanish oak, the making of a corner being followed throughout the grant as far as it is set forth by the word "thence."

PER CURIAM. Judgment affirmed.

JOHN LONG v. JAMES F. JAMESON AND JOHN A. LOWRANCE, EXECUTORS.

A promise to pay such sum as the plaintiff might deem just, when he should bring forward his account, is not sufficient to release a demand from the operation of the Statute of Limitations.

ACTION of Assumpsit, tried before his Honor Judge MANLY, at the Fall Term, 1851, of Rowan Superior Court.

In this case it appeared that Miles Lowrance, the testator of the defendants, was the guardian of David Long and John Long, children of David; that, upon the death of the father, in 1836, the children (being then of tender years,) were taken by the plaintiff and kept by him until the appointment of the defendants testator as guardian in 1840.

It appeared further, that John was the eldest of the boys, of healthy constitution, but that David was delicate and sickly. Upon the appointment of the guardian, he took custody of the elder child, and upon being told to take the other, as the plaintiff did not wish to keep either, and could not afford to do it, the guardian replied, that "he might keep that one, that the child had some property, and he should have pay."

It was also in evidence, that the child continued sickly, and was a portion of the time seriously deceased, requiring much attention and tender nursing, which he received from Long and his wife.

A witness on the part of the plaintiff, further proved that in January, 1847, after the death of the defendants testator, John A. Lowrance, one of the executors, declared that he was going to see the plaintiff, who, he understood was not satisfied with the services of the boy as a compensation for maintaining him, and in the interview told the plaintiff, (who was sick at the time and unable to make out his account,) to *bring it forward and he would settle it.* The wife of the plaintiff said that "if the sum was credited upon a note of her husband, which the executor held, payable to his testator, as guardian, it would be satisfactory, as they did not want the money. The executor said he

would settle it. As this Court approve the charge of his Honor upon the liability of the defendant's testator, it is deemed unnecessary to state it.

With respect to the Statute of Limitations, the Court instructed the jury, that a promise by the executor to credit a note, would not relieve the debt from the bar of the statute, nor would the promise upon the rendering of the account to adjust the same with the plaintiffs, and pay such sum as he, the executor, might deem just, have that effect; but a promise to pay such sum as the *plaintiff* might deem just, when he should bring forward the account, would release the demand from the operation of the statute, and, in the existing state of the testimony, it was referred to the jury to inquire what was the true nature of the promise made in 1847. The suit was brought in April 1849. The jury returned a verdict for the plaintiff.

The defendants excepted. Rule for a *venire de novo;* rule discharged and appeal to this Court.

Boyden, for plaintiff.
Craige, for the defendants.

NASH, C. J. There is error. The declaration made by the defendant, in 1847, as stated in the case, does not prevent the bar of the Statute of Limitations. The action was brought within three years after that time. There is no error in the charge, as to the liability of the defendants, on the promise which the testator made at the time he induced the plaintiff to keep the little boy with him, and the only question is, as to that portion of it which refers to the Statute of Limitations. "In 1847 (the case states) the defendant declared he was going on to see plaintiff who, he understood, was not satisfied with the services of the boy as a compensation for maintaining him, and in the interview, he told the plaintiff, who was sick and unable to make out his account, to bring it forward, and he would settle it. The wife of the plaintiff then said that if the sum was credited upon a note which the executor held payable to his

testator as guardian, it would be satisfactory, as they did not want the money. *The executor said he would settle it.*" The first part of his Honor's charge is correct; the exception is to the latter part. The jury were instructed, "but a promise to pay such sum as the plaintiff might deem just, when he should bring it forward, would release the demand from the operation of the Statute." In this there is error. This case brings up the often disputed question what declaration by a defendant will take a case out of the Statute of Limitations.

The original departure from the Statute has proved a legal Pandora's box, and will continue so, a fruitful source of litigation too firmly fixed upon the Courts to be now got rid of by them. We are saved all trouble of investigation in drawing lines of discrimination, most frequently in themselves unsatifactory, and hard to be drawn, by the recent cases of McBryde v. Gray, Busbee 420; McRea v. Leary, ante. 91. The opinions, in both these cases, were drawn by one brother Battle and all the other cases upon this subject elaborately examined. In the first, the declaration relied on by the plaintiff, was that the defendant's testator, in less than three years before the action brought, declared "that he intended to pay the plaintiff for keeping the old woman until he was satisfied." The Court decide "that the declarations were too vague and indefinite, to amount to an express promise to pay the plaintiff's claim, or to such an acknowledgement as would justify the inference of an implied promise to pay it, and there is no account rendered nor anything else by which the claim can be rendered more definite and certain," and it was held the declaration did not take the case out of the Statute. The second case is still more to the purpose. It was proved that the account which was entered upon the plaintiff's books had at different times been handed to the defendant's testator, and that a few days before his death, the testator said, "my account has been handed in, I owe John McRea a large amount of money, and am afraid he is getting uneasy, but as soon as I finish the building I am now working on, I will call and settle it." In delivering the opi-

nion, the Court ruled "that if the account handed in by the defendant's testator was referred to by him, as that account was not produced, and there was no evidence of its amount, there was no means of ascertaining it by computation or otherwise, and there was nothing to prevent the operation of the Statute," &c. In our case, at the time the declaration relied on by the plaintiff was made, the latter had no account reduced to writing, for the case states that at the time the declaration was made, the plaintiff was sick and unable to *make out* his account. There was, then, no means of ascertaining the amount due from which by computation or otherwise, that amount could be ascertained, under the principle *id certum est quod certum protest reddi.*

The principle established by these and other cases, is, "that to take a case out of the Statute of Limitations, there must be a promise expressed or implied to pay a *certain* definite sum, or an amount capable of being reduced to certainty by reference to some paper, or by computation, or in some other *infallible mode* not dependent on the agreement of the parties on the finding of arbitrators, or of a jury." We consider the principle thus expressed as a wholesome one, and as near an approach to the Statute as any departure from its expressions will allow. For this error the judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

EDWARD RIPPEY v. W. T. J. MILLER, EX'R.

The rule adopted in criminal cases, that is, that where circumstantial evidence is submitted for their consideration, the facts proved must be such as to preclude every other hypothesis, but the guilt of the accused does not apply in civil cases.

Where wheat is brought to a machine to be threshed, and while there is burnt up by the wilful act of another, together with the house and machine, the jury may in their verdict give the value of such wheat to the owner of the machine, &c. They may also give interest on the value of the property destroyed, from the time of its being destroyed.

An action for willingly destroying a horse, may be joined with a count for trespass, in entering upon the plaintiff's tenement; and where there is no formal declaration, such additional count will be understood as made.

ACTION of Trespass *q. c. f.*, tried before his Honor Judge CALDWELL, at the Fall Term, 1855, of Cleaveland Superior Court.

This case was before this Court at the August Term, 1850, 11 Ired. Rep. 247. The trespass alleged was, that the defendant's intestate entered upon the plaintiff's land in the night time, in July 1844, and set fire to the plaintiff's machine house, which contained a Wheat Thrasher, Cotton Gin, a quantity of Wheat, Cotton, Straw, and other articles all of which were destroyed by the fire, and also that the defendant's intestate at the same time entered into the plaintiff's barn yard upon another part of the same premises, and there killed a horse belonging to the plaintiff, by breaking his skull. A part of the wheat destroyed was the property of other persons, brought there by to be threshed for a certain toll. The evidence against the defendant was circumstantial, no one having seen the act perpetrated.

The defendant's counsel contended—

1st. As this was a case of circumstantial evidence, the jury must be satisfied, beyond a reasonable doubt, of the guilt of the intestate, and unless the facts proved precluded every other hypothesis, except that of his guilt, they must find for the defendant.

2nd. As this was an action, brought to recover damages for an injury done to real estate, in no event could the jury find the value of the horse killed.

3rd. That the defendant was not liable for the wheat in the plaintiff's possession, which belonged to other persons, and was brought to plaintiff's Thresher to be threshed.

4thly. That plaintiff was only entitled to recover the actual damage of his property destroyed by the fire, at the time it was destroyed, without interest.

His Honor charged the jury that the defendant, in this case, was not on his trial for the criminal offence of burning the plain-

tiff's property, and that the strict rules of eveidence applicable to the crime of Arson, did not apply to this, which was only an action brought to recover the value of property which plaintiff alleges was destroyed by the defendant's intestate. And, to entitle the plaintiff to recover, he must satisfy the jury that the defendant's intestate did the acts complained of, and that the jury must weigh the whole evidence, and say how the matter was.

Upon the other points made up by the defendant's counsel, the Court instructed the jury that they might find the value of the horse killed, the value of the wheat and straw which was destroyed with the house, as well that brought there to be threshed, as that of his of his own. If the jury desired, they might find interest upon the value of the property destroyed from the time it was destroyed; but that the question of interest was a matter wholly for the jury.

Under these instructions, the jury returned a verdict for the plaintiff.

Motion for a *venire de novo*. Rule discharged. Judgment and appeal.

Bynum and *Lander* for plaintiff.
Guion, *J. Baxter*, and *Gaither*, for defendant.

NASH, C. J. No declaration has been filed, and in such case, it is the practice of the Court to consider such declaration filed, as meets the facts stated in the case. This rule is adopted to prevent surprise on a plaintiff from the loose manner in which the pleadings are conducted on the circuit. The declarations in this case we consider as having several counts, and one for the killing of the horse. The first objection raised by the defendant, was that as this is a case of circumstantial testimony, the jury must be satisfied, beyond a *reasonable doubt*, of the guilt of the intestate, and unless the facts proved precluded every other hypothesis except that of his guilt, they must find for the defendant. This is the rule in capital cases, and adopted in *fa-*

vorem vitae, but does not extend to misdemeanors or civil suits. The point was before the Court at June Term last, at Raleigh, and the principle declared substantially as stated in the case by the presiding Judge.* Upon no controverted fact, ought a jury to find it established, unless the party alleging it produces proof to *satisfy* their mind that it is so. The object of all evidence is to satisfy the minds upon the controverted facts, and when the tryers are so satisfied by competent and legal testimony, they ought so to declare, and not until so satisfied. His Honor stated the rule upon this subject correctly.

The second exception, as we consider the declaration, surely cannot arise. If the declaration contained but one count, and that for the trespass to the freehold, there might be a doubt whether under the allegation of *alia enormia*, damages could be given by the jury, for the killing of the Horse; but, as there is a separate count for that injury, and the proper action for redressing it is trespass, *vi et armis*, and as every count is considered in law as a separate declaration, there surely can be no doubt the evidence was properly received, nor can there be any serious doubt that the counts can be joined, 1st Ch. Pl. 230. There is no error in the charge upon this point.

The third exception was properly abandoned by the defendant in the argument here.

The 4th exception cannot be sustained, and the jury, in an action of Trover or Trespass *de bonis asportatis*, may in their discretion, give interest on the value of the article converted or taken away or destroyed from the time of the conversion or injury as a part of the damages, DEVEREUX v. BURGUIN, 11 Ire. 490, so as to make the trespasser do full justice, by charging him with the price as on a cash sale.

Judgment affirmed.

* Neal v. Fesperman, ante 446.

JESSE YATES, v. JOHN WAUGH, EXECUTOR.

Upon the question before a jury, whether a note had been erased, it is not improper for a witness to say he could see the marks of erasure, and that he had seen the paper in a better light, and could see the erasure more distinctly then than now. A witness need not profess to be an expert to answer these inquiries.

THIS was Action of Debt, on a bond, tried before his Honor, Judge SETTLE, at the Spring Term, 1854, of Wilkes Superior Court.

The signature of the hand in question was established to be the hand writing of the defendant's testator. The defendant contended that the body of the note was a fabrication, written above the name of the testator upon some paper, which had been written on for some other purpose, and that to effect this fraudulent substitution, the original writing had been scratched out, or in some way obliterated, to make room for the present writing. To establish this, General Samuel F. Patterson was asked whether he could see marks of erasure on the paper, and whether he thought there was an erasure? To which questions plaintiff's counsel objected, unless he was proved to be an expert in the detection of forgeries. Upon enquiry as to his qualifications to speak as an expert, he answered that he had been Treasurer of the State, President of a Railroad Company, and President of the State Bank for a short time, but did not profess to be an expert. The evidence was decided to be admissible, whereupon the witness stated that on a former occasion, when he had seen the paper, the light being better, he saw marks of erasure more distinctly then, than he now could see them, but that he could still see them. Plaintiff excepted.

Verdict for the defendant. Rule for a new trial for the matter excepted to. Rule discharged. Judgment and appeal.

H. C. Jones, for plaintiff.

Boyden and *Mitchell* for the defendant.

NASH, C. J. The doctrine of experts has no application to the case; the question was not one of skill or science, but simply of vision and as to that, the jury might or might not be able to decide as well as the witness; that would, in some degree, depend on the excellence of their eye-sight: at any rate, it cannot be error in law to prove to a jury that which they might arrive at, unassisted by the witness.

But there was was one part of the witnesses testimony, important on the trial, and which the jury could not know without testimony. It appears, from the case, that the witness had seen the note before, and its then situation as to the scratches was certainly a relevant inquiry. Suppose, at that time, instead of being scratched, it had then been entirely free from them, that fact would have been very important to the plaintiff. The charge is, that although the signature was genuine, yet that some matter had been written above it, which had been erased or scratched out, and the obligatory part written on the paper, so that the appearance, when first seen, would have been very material to the plaintiff. Its previous condition, as corresponding with its appearance was important to the defence. More espepecially as the witness stated that when he first saw it, the light was better, and he saw it more distinctly than when giving his evidence; and this surely had a tendency to aid the jury, in the dim light with which they were provided, when viewing the instrument themselves.

Judgment affirmed.

JOHN DAMERON v. JUSTICES OF CLEAVELAND.

A contractor to build a Court House, who has not done the work according to the contract, is not entitled to a *mandamus* to compel the Justices of the county, employing him, to pay the sum agreed on.

THIS was an application for a *mandamus* against the Justices of Cleaveland, to compel them to pay the plaintiff for building a Court House in the county of Cleaveland, tried before his Honor Judge SETTLE, at Spring Term, 1854, of Lincoln Superior Court.

The questions growing out of the case, arose upon certain issues, which were agreed on, and submitted to the jury, and it was upon exceptions to the charge of his Honor, in submitting these issues, that the plaintiff appealed to this Court, all which is sufficiently noticed by the Court in its opinion.

Bynum and *Craige*, for plaintiff.
Guion and *Lander*, for defendants.

BATTLE, J. This was an application by the plaintiff for a *mandamus* to compel the defendants to pay him a certain balance alleged by him to be due for building a Court House for the county of Cleaveland. To his petition the defendants made their return by way of answer, and therein stated, that the plaintiff had failed to execute his contract according to the specification therein contained, and that they had already paid him as much as his work, labor and materials were worth, and they insisted that they were under no obligation to pay him any more. The plaintiff traversed the return of the defendants, and the following issues were drawn up, by the counsel of the respective parties, under the direction of the Court, to be submitted to a jury:

"1st. Did the plaintiff execute the contract according to the specifications and agreement; and, if so, to what sum is he entitled from the defendants.

"2d. If the plaintiff failed to perform his contract, according to said agreement and specifications, and yet erected the building in a different way, and with different materials, and the building so erected was accepted and used by the Justices of Cleaveland, to what sum is the plaintiff entitled therefor."

Upon the trial of these issues, testimony was introduced by

both parties, from which it appears that the plaintiff did not execute his contract according to the specifications therein set forth, but that he did erect a house, which the defendants used as a Court House. It was admitted by the plaintiff, that the defendants had paid him the sum of six thousand dollars. His Honor, in his charge to the jury, stated that the plaintiffs ought to recover of the defendants on two counts; first, on a special contract, and, secondly, on a *quantum meruit;* that he could not recover on the first count, unless he had performed his contract with the defendants, but that, if they received and used the building erected by the plaintiff as a Court House, he might recover on the second count, provided his work, labor and material amounted in value to more than the sum which he had already received. The jury found for the defendants, whereupon the plaintiff moved for a new trial, which was refused, and a judgment given for the defendants, from which he appealed. The only error which we can discover, is one of which the plaintiff has no right to complain. His Honor seemed to treat the case as if it were an action of assumpsit, in which the plaintiff declared in two counts, one on a special contract, and the other on a *quantum meruit.* The charge ought to have had reference solely to the issues submitted to the jury; for, upon their verdict, upon them, depended the further proceeding of the Court, either in granting or refusing the *mandamus.* But, notwithstanding this informality, the substance and effect of the verdict was a finding of the issues against the plaintiff, and we cannot see that he was prejudiced by the manner in which the case was submitted to the jury. It was certainly as favorable as he could have desired, for the jury to be told that they might find for him if the value of his work, labor and materials amounted to more than the sum he had already received. Upon the verdict, his Honor was certainly justified in refusing the writ of *mandamus*, and dismissing the proceeding, which was the effect of what he did. The judgment must be affirmed.

Judgment affirmed.

STEPHEN MUNDAY v. ROBERT HENRY.

Where several defendants are sued in assumpsit, and they severed in their pleas, one who had a verdict in his behalf, was fairly entitled to have the attendance of witnesses, summoned specially for him, taxed in his bill of costs, although the jury found for him upon a point in the case, which made it unnecessary to enquire as to the matter to which they were summoned.

THIS was a motion as to the taxation of the costs, before his Honor, Judge DICK, at the Spring Term, 1854, of Haywood Superior Court.

The suit in which the motion was made, was an action of assumpsit brought by the plaintiff against R. M. Henry, William L. Henry, and the defendant, Robert, for work and labor done in building a mill. The defendants pleaded severally "General issue, payment, and set off." The jury rendered a verdict against R. M. Henry, and W. L. Henry, but in favor Robert Henry.

Several witnesses had been summoned for Robert Henry, who spoke chiefly of the value of the work which inured to the advantage of the other defendants, but as the jury found for him on tho ground that he did not assume, were not material for him. Before the jury, the plaintiff insisted throughout upon the joint liability of Robert for the value of the work and in his defence he contended that he was not liable at all, but if liable, he was only liable to the amount proved by the witnesses in question. The motion was to strike the attendance of the witness from the costs taxed for defendants.

Upon the argument of this rule, the plaintiff contended that the defendant had fraudulently summoned these witnesses, to entitle the other defendants to get the benefit of this evidence without becoming liable for it.

His Honor refused to correct the bill of costs as insisted upon by the plaintiff, and the plaintiff appealed.

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

PEARSON, J. As it is has turned out, it was unfortunate for the plaintiff that he made Robert Henry, sr., a defendant, but as he was sued, he had reason to suppose the plaintiff would be able to offer some evidence tending to make out a cause of action against him. As the defendants severed in their pleas, he had a right to summon witnesses in his behalf, and as a verdict was given in his favor, he had a right to have those witnesses taxed as part of his costs. There is no proof set out in the case, to support the suggestion of fraud, and there is no suggestion that the defendant, for the purpose of vexation, summoned more than two witnesses as to each fact. There is no error.

Judgment affirmed.

DEN ON THE DEMISE OF SAMUEL SMITH v. LEWIS FORE.

Where land has been levied on and sold under a justices judgment and execution, and has brought less than the debt in the execution, it cannot be again levied on and sold under a judgment of the Court, entered for the remainder of the debt, under the provisions of the act of 1836, although the former owner (the debtor) is residing on the land, and the suit is brought against him, he remaining there as the tenant of the vendee of the purchaser.

Such former owner being thus sued, and the vendee of the purchaser having been admitted to defend as landlord, the rule precluding the debtor from impugning the purchaser's title, acquired under the sheriff's deed, does not apply in favor of the purchaser under this second sale.

THIS was an action of Ejectment, tried before his Honor Judge CALDWELL, at the Fall Term 1853, of Buncombe Superior Court.

The facts of the case sufficiently appear from the opinion of the Court.

J. Baxter, for the plaintiff.
Avery, for the defendant.

NASH, C. J. There is no error in the opinion of the Court below. The land in question belonged to Lewis Fore, senior, against whom judgments, in 1841, were obtained before a single Justice, in the name of J. T. Poor, and were levied on the premises in dispute, and, in 1842, an order of condemnation was obtained in the County Court, to which the levy had been returned. A *venditioni exponas*, duly issued, under which the land was sold, in 1842, and one Davis became the purchaser, and procured a deed of conveyance from the sheriff, and, in March 1843, leased the land to the defendant Lewis Fore, jr., who continued his tenant 'till 1846, when he purchased the land from Davis. Lewis Fore, senior, was living on the land at the time the judgment was obtained against him, under which the plaintiff claims the land, and continued to live with the defendant, and was so living with him when the lessor of the plaintiff acquired the title under which he claims, which title is as follows: The sale of the land under the *venditioni exponas* did not entirely discharge the amount of the judgment, but left a small amount due; to raise this amount, a *fieri facias* was issued from the County Court, which was levied on the same land, and under a *venditioni exponas* it was again sold, and the lessor of the plaintiff, became the purchaser, The *fieri facias* issued in April 1843, and the sale under the *venditioni* was made in October of that year. The notice issued against Lewis Fore, senior, the father, and the son, Lewis Fore, junior, claiming to be the landlord, was permitted to come in and defend the suit. On the trial below, the plaintiff objected to all evidence to show that the title of the land was not in him, the lessor of the plaintiff. The objection was rightly overruled by the Court, and shows clearly that the doctrine, of estoppel does not apply to the case. The general rule certainly is, that a purchaser at a sheriff's sale, is entitled to recover the premises in ejectment, against the debtor, whose estate he has purchased, upon showing a judgment, execution sale, and a sheriff's deed.

Considering, then, that the defendant, Lewis Fore, jr., is confined in his defence to that which Lewis Fore, sr., could allege, let us see whether, in this case, he would not have been permitted to show that the lessor of the plaintiff had no title at the time the action was brought. A purchaser, at a Sheriff's sale, to show a good title, must exhibit a valid execution, authorising the sale. If he does not, his case does not come within the principle before stated, that a debtor, whose land had been sold under an execution, cannot contest the right of the purchaser to possession. This case was in this Court heretofore, and the question decided, 10 Ire. Rep. 38. The Court there say that the lessor of the plaintiff was not within the rule, because, the execution under which he purchased was not a valid one. The land had been previously sold under a valid execution issued upon the same levy. The act of 1836, Rev. Stat. ch. 45, sec. 9, provides, "that if, by the sale of the land so levied upon, and returned to to Court, a sufficient sum shall not be produced to satisfy the judgment and costs, the plaintiff is hereby authorized to to issue an execution from the Court, for the residue thereof, in the same way and under the same rules and regulations, as if the judgment had been originally rendered by the Court." The *fi. fa.* then, under which the plaintiff claims, (as all other *fi. fas.*) issues against the goods and chattels, lands and tenements of the defendant, and authorizes the Sheriff to collect only the balance remaing due upon the judgment, after the sale of the land. But in this case, it issues for the whole judgment, and was levied upon the very same land which had been levied upon under the magistrate's judgment. This surely could not have been the intention of the Legislature. The land in question did not at the time of the levy of the *fi. fa.*, belong to Lewis Fore, sr., he was living with his son, Lewis Fore, jr., upon the land and the latter was the tenant of Davis, who had purchased under the first *venditioni exponas.* In law, the possession was in Lewis Fore, jr., and the father would not have been estopped to deny the title of the plaintiff by shwing the defect in it; namely that the *venditioni exponas* is not a valid one. The same principle is recognized in the case of MURRILL v. ROBBRTS, 11 Ired. 424.

The *fieri facias*, under which the plaintiff claims the land in question issued from April, 1853, of the County Court; in March preceding, the sheriff had completed his sale to Davis by a conveyance, who had been let into possession, and whose, the defendant's tenant, Lewis Fore, junior, was in possession at the time the *fieri facias* was issued, and, at the time the *venditioni exponas* issued, and the sale took place, and Lewis Fore, senior, would not have been estopped to show that the lessor of the plaintiff had no title. There is no error.

Judgment affirmed.

WILLIAM D. JONES v. JOSIAH JONES.

Where the question is, whether there was a legal arrest of a person by an officer, it must be determined by the intention and understanding of the parties, at the time of the transaction. JONES v. JONES, 13 Ired. 448.

ACTION on the case for a malicious prosecution, tried before his Honor Judge DICK, at the extra Term of Buncombe Superior Court, in June 1853.

It appeared in evidence that the plaintiff was a deputy sheriff in said county, in the years 1843 and 1844, and as such had for collection a justice's judgment in favor of one A. B. Chunn, against Hugh Clark and Reuben Brown. In the spring of 1844, he sued out a *ca. sa.* thereon, under which he arrested them, when they gave bonds as required by law for their appearance at the next County Court. At that Court, they moved by counsel to be discharged from custody, on the ground that they had been previously arrested by the plaintiff, for the same cause of action, and voluntarily discharged by him; this motion was entertained by the Court, and the plaintiff was examined to the point, and particularly, whether he had not arrested and discharged the defendants in that case. The defendant took out

a State's warrant, charging the plaintiff with perjury, alleging that he swore falsely in saying that he had not, before the arrest then under consideration, previously arrested and discharged Clark and Brown; upon which warrant the plaintiff was brought before an examining magistrate and discharged. For the taking out the State's warrant, and for arresting plaintiff, and bringing him to a trial, this suit was brought.

To show what the plaintiff swore in the County Court, on the return of the *ca. sa.*, and the question thereupon tried, plaintiff produced as a witness one Pierce Roberts, who swore that, on the occasion above stated, that plaintiff swore that he went to the house of Clark, and told him he had a *ca. sa.* against him, and directed him to come on to the house of Brown, to see if they could not arrange it; that he went on to Brown's, for the purpose of arresting him, and laid his hand on his shoulder, and told him he arrested him, upon which Brown required him to show his paper, and he did so; but, on examining it, they discovered a defect in the process, upon which he did not proceed further in the arrest, but summoned the debtors, Clark and Brown, before a magistrate, to have the papers corrected. Witness gave as a reason for remembering the oath of plaintiff with so much distinctness, that plaintiff was his (witness's) deputy, in the office of sheriff, and as he had heard some complaints against plaintiff about this transaction, his attention was particularly directed to it.

Several witnesses were examined for the defendant, who deposed that plaintiff swore in the County Court, that he did not arrest Clark and Brown, but did not remember whether he stated the reason why he did not arrest them.

The plaintiff then examined Hugh Clark, who swore that plaintiff came to his house in December 1843, and told him he had a *ca. sa.* against him and Brown, in favor of Chunn; that he was going on to Brown's, and desired him to go on there and see if they could'nt have the matter settled; that Brown had some notes with which he could settle it; that they immediately went on to Brown's, but, as witness was on foot, and plain-

tiff on horseback, he did not keep up with him; that he did not consider himself arrested.

The defendant then examined J. W. Reeves, who stated that he was at Brown's house at the time spoken of by Clark; plaintiff told Brown he had a *ca. sa.* against him and Clark. Brown inquired where Clark was; plaintiff replied that he would be there in a few minutes, for that he had come by to see him, and he was on his way. Brown entreated the plaintiff not to serve the *ca. sa.* on him, as he was a poor man, and was not able to give security; to which plaintiff replied it was one of Lee Wells' papers, and he must serve it, and stepping up to him, gave him a slap, and said, "I served it on you also." Brown then requested plaintiff to show him his papers, which plaintiff did, and a defect was discovered in the judgment or *ca. sa.*, and B. told the plaintiff he had no authority to arrest him on those papers, and he would sue him for false imprisonment. Plaintiff said the papers had been put into his hands by Lee Wells, and he was not aware of the defect; he then summoned these parties before a magistrate to have tne papers corrected. Plaintiff did not require either Clark or Brown to give security either to appear before the magistrate or at Court.

S. King was examined for the defendant also, who gave the same statement as Reeves. He further stated that Clark took him out and asked him to be security for his appearance upon the *ca. sa.* in question, which he declined; when they returned into the house, the defect in the papers had been discovered, and plaintiff said he would return the papers to Lee Wells or to the magistrate, to have the mistake corrected.

Willie Jones was then sworn for defendant. Said that plaintiff told him he had arrested Clark and Brown before, and had to let them go on account of a defect in the papers.

The defendant's counsel requested the Court to charge the jury, that if they should believe there was in fact no arrest of Clark and Brown, yet, if they believed the testimony of J. W. Reeves, J. King and Willie Jones, there was probable cause, and they should find for the defendant.

The Court refused so to charge, but instructed the jury that the first question for them to decide was, whether there was in fact an arrest of Clark and Brown, and that depended on the intention of the parties when they were together at Brown's; that if there was an arrest, and the parties so considered it, and they should find that the plaintiff swore there was no arrest, there was probable cause for suing out the State's warrant, and they ought to find a verdict for the defendant. But if, after duly considering the evidence, they should be of opinion that it, in fact, was no arrest of Clark and Brown, and that the plaintiff stated in the County Court what took place at Brown's, as deposed to by Pierce Roberts, in the presence and hearing of the defendant, then the Court instructed them that there was no probable cause for taking out the State's warrant by the defendant, and if they should further believe that the defendant was actuated by malice in what he did, the plaintiff would be entitled to damages.

Under these instructions the jury found a verdict for the plaintiff.

Motion for a new trial. Rule discharged, judgment and appeal to this Court.

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

BATTLE, J. The charge of his Honor, in relation to the enquiry, whether the plaintiff had in fact arrested Clark and Brown, previously to his examination in the County Court, where he swore that he had not done so, is fully supported by the decision of the Court in the action of slander between the same parties, growing out of the same transaction. JONES v. JONES, 13 Ired. Rep. 448. The residue of the charge followed necessarily from the previous part of it, and the defendant's counsel has very properly declined to contend that it is erroneous. The testimony of J. W. Reeves, S. King and Willie Jones, as stated in the bill of exceptions, is substantially the same with

what was sworn by the plaintiff in the County Court, as testified by Pierce Roberts; and his Honor was therefore right in refusing to instruct the jury, otherwise than he did, upon the testimony of Roberts. The judgment must be affirmed.

Judgment affirmed.

WILLIAM D. JONES v. JOSIAH JONES.

According to the general understanding of the profession, where a plaintiff is not required to file a formal declaration, the Court is to assume that his declaration contains all the averments necessary to sustain his case.

In an action of slander, where the words proved are not actionable in themselves, they cannot be made so by the aid of other words, spoken at a different time and place, which are barred by the Statute of Limitations.

ACTION of Slander, tried before his Honor Judge DICK, at the Spring Term, 1854, of Buncombe Superior Court.

The plaintiff's *incipitur*, or memorandum of his cause of action, filed in lieu of a declaration, is as follows, "that he, the plaintiff, had sworn a lie, in swearing in the County Court of Buncombe, in a case wherein A. B. Chunn was plaintiff, and Reuben Brown and Hugh Clark were defendants, on a *ca. sa.* that he had sworn a lie, in stating that the plaintiff had not served a *ca. sa.* on the defendant Brown. That he swore a lie in swearing that he did not have a *ca. sa.* in his hands against the said Brown. A charge of perjury in the above case, with all the variations of expression, and with the necessary inuendoes. A charge of perjury generally." The plaintiff first offered in evidence the depositions of Henry Worley and Mira Worley.

The deposition of Worley is as follows: "I heard Josiah Jones say that W. D. Jones swore a lie about serving a *ca. sa.* on Reuben Brown, and he could prove it. He said he swore a lie in two other cases. Some time in September 1845, the conver-

sation took place at my house, relative to his swearing a lie in serving a *ca. sa.* on Reuben Brown, and the balance of the conversation took place next day, as we were travelling together, relative to his swearing a lie in two other cases."

Mira Worley swore as follows: "I heard Josiah Jones say that W. D. Jones swore a lie, but I did not hear him say in what case."

The plaintiff also proved by one David Duckett, that he heard the defendant, more than six months before the commencement of this action, say, that the plaintiff had sworn a lie in the County Court of Buncombe, in the case of A. B. CHUNN v. BROWN and CLARK, and he also proved by a witness that plaintiff was sworn in that suit as a witness for the defendants. The plaintiff's counsel contended that the jury had a right to take into consideration the evidence of Ducket, although he spoke of words spoken more than six months before the commencement of this suit, in order to fix the meaning of the words stated by the witness Worley and wife; but the Court was of opinion, and instructed the jury, that before the plaintiff was entitled to recover, he must prove the speaking of actionable words by the defendant, within six months preceding the commencement of the action, and as the words proved by Worley and wife were the only words spoken within six months, and as they were not actionable, the plaintiff could not recover; for, that the words proved by Duckett could not be brought to aid the other words, so as to make them sustain the plaintiff's cause of action. What was proved by Duckett might have been considered by the jury to show the defendant's malice, so as to aggravate the damages, had the plaintiff made out a good cause of action independently of them, but, having failed to do so, they were not to be considered by them at all.

In obedience to these instructions, the jury rendered their verdict for the defendant. Plaintiff moved for a *venire de novo*, for error in the charge of the Court. Rule discharged; judgment and appeal to this Court.

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

BATTLE, J. His Honor was undoubtedly correct in holding that the actionable words proved by the witness Duckett to have been spoken by the defendant, six months before the commencement of the suit, could not be taken into consideration by the jury, for the purpose of ascertaining what was said to Worley and wife, in the State of Georgia. The testimony of Duckett, as his Honor very properly stated, could be used only to show malice, and enhance the damages, after words actionable in themselves had been proved to have been uttered by the defendant of the plaintiff, within the time of limitation. The question then is, whether the words spoken in Georgia, less than six months before the writ was issued, as testified by Worley and wife, were in themselves actionable? The defendant's counsel contends that they were not, because they did not refer to any judicial proceeding, so as to show that the crime of perjury was imputed to the plaintiff; and, in support of his argument, the counsel refers to the cases of HOLT v. SCHOLFIELD, 6 Term Rep. 691; BROWN v. DULA, 3 Murp. Rep. 574. In the latter case, it was said by Chief Justice TAYLOR, that "it is established by a long series of cases, that, to say a man is foresworn, or that he has taken a false oath, generally, and without reference to some judicial proceeding, is not actionable, and the reason is, that, in the latter case, a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished; in the other, a breach of morality is imputed, of which the law does not take cognizance. The declaration in the case did not aver any colloquium, but stated merely that the defendant spoke of the plaintiff, "these false, scandalous, malicious and defamatory words; that is to say, *he swore a lie, and I can prove it*, meaning thereby that the said plaintiff had committed wilful and corrupt perjury." The facts, as they appeared upon the trial, were, that the plaintiff and one Allison were standing together, when the defendant walked up, and address-

ing himself to Allison, said, "You are a good man, and I like you, but that man (pointing to the plaintiff) is a rascal; he swore to a lie against me, and I can prove it." Allison was well acquainted with the parties, and had heard that, upon the trial of an indictment against the defendant, in Wilkes Court, the plaintiff had been examined as a witness for the State, and the record of the prosecution was given in evidence. A verdict was rendered for the plaintiff, subject to the opinion of the Court upon the question, whether the words were actionable. The Court was of opinion that, as the declaration did not set forth any *colloquium* to which the *inuendo* could have reference, the words were not actionable, and gave judgment accordingly, which upon appeal was affirmed in this Court, upon the ground that "in a charge of false swearing, unless from the accompanying words it is clear that a judicial forswearing was meant, the plaintiff must show upon the record, that the defendant alluded to some particular forswearing, which amounted to perjury."

It is manifest that the judgment in favor of the defendant was founded upon the want of an averment in the declaration, that there was a colloquium, referring to a false swearing in a judicial proceeding. The same objection was made and prevailed in the case of HOLT v. SCHOLFIELD. In both cases, had there been proper averments in the declaration, the plaintiff, respectively, could have recovered upon the proofs. Thus, in the case of SASSER v. ROUSE, 13 Ired. Rep. 142, Judge PEARSON, in delivering the opinion of the Court, said, that "the general rule is, words are to be taken in their ordinary acceptation, and it is the duty of the Court to decide whether they do or do not import a charge which is slanderous. An exception in favor of a plaintiff is, that though the words do not in their ordinary meaning import a slanderous charge, *yet, if they are susceptible of such a meaning, and the plaintiff avers a fact*, from which it may be inferred that they were used for the purpose of making the charge, upon proof of the averment, it should be left to the jury to say whether the defendant used the words in the sense imputed, or in the ordinary sense." As an

illustration, two examples are given: one of which is, that "if there is an averment, that the plaintiff had been examined as a witness in Court, and the words are, "he is forsworn," upon proof of the averment, it might be left to a jury whether the word forsworn was used in the sense of having committed a perjury." In the case before us, as the defendant did not require a formal declaration, we are to assume, according to the general understanding of the profession, that the plaintiff's declaration contains all the necessary averments, to wit, that there was a cause pending in the County Court of Buncombe, in which A. B. Chunn was plaintiff and Brown and Clark defendants, and that the plaintiff was examined as a witness in said suit, and gave the testimony which the defendant charged to be a lie; under such a declaration, we think, upon the principles established in the cases above referred to, that the testimony of Worley and wife ought to have been submitted to the jury, together with the other testimony in the cause, for them to determine whether the defendant, in using the words, that "William D. Jones, (the plaintiff) swore to a lie, about serving a *ca. sa.* on Reuben Brown, and he could prove it, "and that he swore to a lie in two other cases," did not mean to refer to his swearing to a lie in the case of CHUNN v. BROWN and CLARK, and thereby to impute the crime of perjury. In refusing to do this, his Honor erred, and for this error the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

JOHN WILFONG v. PAUL CLINE.

Where an appeal is taken from the judgment of a Justice of the Peace to the Superior Court by one of two defendants, but by mistake of the Clerk, it is sent up as the appeal of both, is tried as the appeal of both, and upon the

trial, the admissions of the party who did not appeal, are given as evidence against the defendant who did appeal, and after the trial, and a verdict in favor of the plaintiff, the magistrate is permitted, by consent of parties, to amend his proceeding so as to make it the appeal of one only, it was error to permit the verdict to stand; for, by the amendment, the admissions of the dismissed party were rendered incompetent.

Where one of the co-obligors in a bond says, "I signed the note, but will never pay it," this will not rebut the presumption of payment arising from the length of time; for, though it may afford proof that he has not paid it, it does not follow that the co-obligor has not.

Action of Debt, begun by warrant and carried to the Superior Court of Catawba, by appeal, where it was tried before his Honor Judge DICK, at the Fall Term, 1853.

The case sufficiently appears from the opinion of the Court.

Boyden, for plaintiff.
Craige, for defendant.

NASH, C. J. In the opinion of his Honor below, there is error. The suit in the Superior Court was against Cline alone. It had been commenced before a single magistrate against the present defendant and the administratrix of John Bost, upon a bond excuted by both Bost and Cline. The defence was, under the act of 1836, ch. 65, sec. 13. More than ten years had elapsed after the course of action accrured before the issuing of the writ, whereby a presumption of payment arose. The magistrate gave judgment against both defendants, and Cline alone appealed. By mistake the appeal was taken up to the Superior Court for both the defendants, and it was so tried in that Court before the mistake was discovered, and by consent of plaintiff's counsel, the record was amended according to the truth. Upon the trial, the plaintiff, after objections by defendant, was permitted to give in evidence the declarations of Mrs. Bost, the widow and administratrix of John Bost, deceased upon the ground that they were the declarations of a party to the record. This, we have seen, was not the fact. She was not a party to the record in the Superior Court, she would have been, and was a competent

witness against the defendant, but her declarations certainly were not.

At the time the warrant was served on Cline, he admitted he had executed the bond, but declared he never would pay it. This declaration certainly could not operate to repel the presumption of payment from the lapse of time. This may amount to an admission that *he* had never paid it, but was no evidence that his co-obligor had not. Were the declarations of the representative of John Bost competent evidence against his co-obligor, Cline? We think not. In the case of McKEETHAN v. ATKINSON, ante. 421, this Court decided that a payment by the principal in a note or bond of any portion of the money due upon it, within ten years before the bringing of the action, would be a sufficient answer to the presumption, and that, upon the ground that a payment is an act which operates to the benefit of both the obligors, and and of which both can avail themselves. Whether the declarations of John Bost would, as to Cline, be competent, we do not decide, the *declarations* of his administratrix, of what she had heard him say, are not.

The record was amended by the magistrate after the Judge's charge, and after the jury had returned their verdict. It then stood as the amendment spoke, and his Honor ought either to have withdrawn his charge, and directed the jury to disregard the evidence as to the declrations of Mrs. Bost, or to have set aside the verdict and granted a new trial.

For this error in receiving the testimony of Mrs. Bost, the judgment must be reversed and a *venire de novo* awarded.

Judgment reversed.

DOE ON THE DEMISE OF HUGH McAULAY, v. CALVIN EARNHART.

Whether the tenant in possession is the tenant of the defendant, or of one as whose land the premises in controversy had been sold, by virtue of a judgment and execution, at a Sheriff's sale, is a question of fact, which is to be submitted to the jury, and the deeds under which the defendant entered, are clearly admissible on that subject.

Where a paper is proved to be destroyed, its contents may be spoken of without any notice to the other side to produce it.

Evidence of "a family arrangement," to defraud creditors by giving off other lands, than the tract in dispute, to other sons as they arrived of age, it not being shown that the father was in debt at the time of the conveyances, is not admissible on the question of fraud.

THIS was an action of Ejectment, tried before his Honor Judge ELLIS, at the Fall Term, 1852, of Cabarrus Superior Court.

The plaintiff's lessor claimed title from one Solomon Earnhart, sr., the father of the defendent, and showed in evidence several judgments and executions against the said Solomon, sr., a levy upon the premises in question, a sale and Sheriff's deed for the same.

A witness was then called for the plaintiff, who testified that the defendant was the son of Solomon Earnhart, sr., and living with him on the land at the time of the sale to plaintiff's lessor, and that on the day after the sale, the father left the premises, leaving the defendant in possession, and was in the habit of returning and taking part in the management of the farm and workshop.

The defendant claimed title as the tenant of one Solomon Earnhart, jr., another son of the defendant in the exucution, who claimed title by a deed of bargain and sale from his brother, one John M. Earnhart, who claimed by a similar deed from Solomon, sr. This deed was dated in 1843, and that from John M. to Solomon, jr., in 1844. The plaintiff objected to the introduction of these deeds, upon the ground that the defen-

dant was estopped from setting up any defence which the defendant, in the execution could not set up, as the defendant went in under him. The objection was overruled, and the evidence admitted, to which the plaintiff excepted.

The conveyance from Solomon, the father, to John M. Earnhart, was attacked for fraud, and many witnesses examined.

To rebut this evidence, the defendant introduced John M. Earnhart, who, in the course of his evidence, stated, that the deed from himself to his brother, Solomon, was made in consideration of a note for $1200, which was afterwards paid off and destroyed. The plaintiff objected to his speaking of a note, unless he produced it. The evidence was admitted by the Court. Plaintiff excepted.

The plaintiff then offered to prove the fraud alleged, by showing that there was a family arrangement, whereby Solomon, sr., gave other tracts of land to other sons, as they came of age, contending, that the plan for defrauding his creditors was preconcerted between the said Solomon, the father, and his sons.

The evidence was objected to and rejected by the Court, for which plaintiff excepted.

There was a verdict and judgment for the defendant, and appeal for error in the matters excepted to by the plaintiff.

Wilson, *Barringer* and *Bynum*, for plaintiff.
Osborne and *Boyden*, for defendants.

BATTLE, J. The only questions raised upon the trial, relate to to the admission and rejection of testimony:

1st. Both parties claimed under Solomon Earnhart, sr., the father of the defendant; the lessor of the plaintiff, as a purchaser at sheriff's sale, under a judgment and execution; the defendant as tenant to his brother, Solomon Earnhart, jr., who was alleged to be a purchaser by deed, dated in 1844, from his brother John M. Earnhart, who claimed under a deed, dated in 1843, from his father, the said Solomon, the elder. Both these deeds were prior to the time when the plaintiff's lessor acquired

title; but he contended that Solomon, the elder, was the actual occupant of the land in question, and that the defendant was his tenant, and could not set up any other title as against the lessor, and he introduced testimony, tending to show such tenancy. To rebut this proof, the defendant alleged that he was the tenant, not of his father, but of his brother, Solomon, the younger, and offered the deeds above mentioned, to show his brother Solomon's title, together with testimony tending to show his tenancy under his said brother. The deeds and other testimony were objected to, but were, as we think, properly admitted by the Court, for the purpose indicated. The question of tenancy was certainly one of fact, which was to be ascertained before the rule of law, insisted upon by the lessors, could apply. The testimony introduced by the lessor, to show that the defendant was the tenant of his father, could not conclude the defendant from introducing testimony to contradict it, and show that, in truth, he was not the tenant of his father, but of his brother. The deeds were certainly admissible, to show that his brother had the prior and preferable title from his father, under whom both parties claimed.

2. The witness had undoubtedly a right to speak of the contents of the note of $1200, without producing it, because he swore that he had paid it off, and destroyed it. ROBARDS v. MCLEAN, 8 Ired. Rep. 522.

3. The testimony proposed to be offered by the lessor of the plaintiff, to show that Solomon Earnhart, sr., with the view to defraud his creditors, executed deeds to his sons, as they successively come of age, for different portions of his land, was inadmissible, for the reason that it does not appear that, at the time when they were executed, he had any creditors to be defrauded. The bill of exceptions does not set forth a single debt which Solomon Earnhart, the elder, owed at any time, except the one upon which the judgment and execution were obtained, under which the lessor purchased, and it no where appears when that was contracted.

We can see nothing, therefore, to show that the Court was wrong in rejecting the evidence. Being unable to find any error in the record, we must affirm the judgment.

Judgment affirmed.

BARILDA ROYAL v. OBADIAH SPRINKLE.

To make the acts and declarations of a person evidence against a party, upon the ground of his being an agent, such agency must be established by evidence, independent of such acts and declarations.

ACTION of Trover for a wagon, tried before his Honor Judge CALDWELL, at the Spring Term, 1853, of Wilkes Superior Court.

It appeared on the trial, that the plaintiff and defendant had some understanding about the ironing of a wagon for a certain quantity of bacon, and that the wagon and bacon were taken to the defendant's smith shop, where the bacon was weighed and put into the defendant's possession; that some disagreement took place between the parties in relation to the work, and thereupon the wagon was taken home by the plaintiff, and the bacon left. A warrant was brought by plaintiff for the bacon, a judgment rendered, and an appeal prayed by defendant; but, before the same was carried to Court, one Sturdevant went to the house of the plaintiff, taking with him the cart and oxen of defendant, and told plaintiff that Obadiah said, if he would send over the wagon, it should be ironed for the bacon. This testimony was objected to, but received by the Court, for which defendant excepted. The wagon was ironed, but refused to be delivered on demand, upon the ground, as defendant contended, that she was first to deliver him the judgment for the bacon. There was much other evidence in the case, but it is not material to be stated, as the only question raised for the determina-

tion of this Court, was, whether any sufficient agency had been established as to Sturdevant, so as to render his declarations admissible.

Verdict for plaintiff; motion for a new trial, for the matter excepted to; motion overruled; judgment and appeal.

Mitchell, for plaintiff.
Boyden and *H. C. Jones*, for defendant.

NASH, C. J. The case states, that the only question referred to this Court is, whether there was evidence of the agency of one Sturdevant, so as to admit his declarations. The controversy between the parties is as to the title of a wagon for the alleged coversion of which the action is brought. The witness Sturdevant was a workman in the shop of the defendant, and came to the house of the plaintiff, driving an ox-cart belonging to the defendant, and delivered to her the message stated in the case. The reception of this testimony was opposed by the defendant, but received by the Court, upon the ground that there was evidence that, as Sturdevant acted as the agent of the defendant, what he stated or did within the scope of his authority, and in the course of its execution, bound his principal. But, to have this effect, and to make his act or declaration evidence, it must be proved by proper evidence, independent of such act or declarations, that he was the agent of him, he professes to represent. If it were not so, any man might be bound to a contract to which he never had assented, by the acts and declarations of a person he never had authorized to act for him. WILLIAMS v. WILLIAMS, 6 Ired. Rep. 283; MONROE v. STUTTS, 9 Ired. Rep. 49. The evidence set forth in the exception does not show any agency whatever, and we are at a loss to see, under the rule, as to the proof of agency, upon what circumstance or testimony the opinion was founded. We are compelled to declare there was no such evidence, and that there is error.

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

ALEXANDER DUCKWORTH v. DAVID WALKER.

The want of castration in a male mule does not meet the allegation of unsoundness.

Where a male mule, which has the usual developments in the scrotum, is sold at public auction, the maxim of *caveat emptor* applies to the claim of damages for unsoundness in respect of the animal's being not castrated.

ACTION in the case for a Deceit in the sale of a mule, tried before his Honor Judge DICK at the Spring Term, 1854, of Burke Superior Court.

The defendant offered for sale, at public auction, a male mule, which had not been castrated, but which had the usual visible developments in the scrotum. While the mule was being cried by the auctioneer, the plaintiff came up and proposed to give seventy five dollars for the animal if he was sound; to which the defendant replied that the mule was sound. The trade was thereupon concluded; the plaintiff paid the seventy-five dollars to the defendant, and had the mule sent to a stable which he designated. A few hours afterwards, the plaintiff accosted the defendant and informed him that he had discovered, since the sale, that the mule was not gelded; that he had no idea he was purchasing a stud mule, and was cheated. To this the defendant replied that he suppposed everybody knew the quality of the animal in this particular, but offered to take back the mule and refund to the plaintiff the money he had received. This the plaintiff refused to do, saying he never made a *child's bargain*, but was willing to forego his right to sue, if the defendant would pay him five dollars, which, he said, would cover the risk of the necessary operation of gelding. The defendant rejected this proposition, and accordingly the plaintiff brought his suit.

His honor charged the jury "that the fact of the mule's being a stud, and not castrated, would not in law amount to unsoundness; and that the evidence, if believed, showed that the mule was an entire animal, and such certainly did not make him unsound,"

and charged further that even if the law was otherwise, the plaintiff would not have a right to recover, because the unsoundness alledged was one of those apparent defects to which the doctrine of *caveat emptor* applies.

Under these instructions, the jury rendered a verdict for the defendant.

Motion for a *venire de novo*. Rule discharged; Judgment and appeal to the Supreme Court.

Avery, and *Gaither*, for the plaintiff.
Bynum, for the defendant.

BATTLE, J. We cannot conceive of any principle upon which the decision of his Honor can be impugned. The plaintiff's counsel acknowledge that they have been unable to find any authority opposed to it, and we should require a very direct and strong one against it, before we could feel ourselves at liberty to overrule it. The mule was in good health, and was possessed of all the parts, with which nature had endowed him, and therefore, was sound in law as well as in fact. But if the want of castration could be deemed unsoundness, "the usual visible developments on the scrotum" which the plaintiff might have seen, had he looked as well before as after the sale, were sufficient to have admonished him, "*caveat emptor.*" The jury were properly instructed, and the judgment upon their verdict, in favor of the defendant, must be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. ROBERT SHERRILL.

An indictment charging the defendant with going into a religious congregation engaged in actual service and then and there exhibiting himself drunk, and by cursing and swearing with a loud voice, and by making indecent gestures and

grimaces, disturbing them, is not sustained by proving that he disturbed them by striking the meeting house, on the outside, with a stick.

Indictment for disturbing a religious congregation, tried before his honor, Judge DICK, at the Fall Term, 1853, of Catawba Superior Court.

The facts of the case sufficiently appear from the opinion of the Court.

Attorney General for the State.
Guion, for the defendant.

NASH, C. J. The indictment charges that while the congregation of Olivet Church were engaged in religious worship, the defendant "unlawfully, willingly and of purpose, maliciously and contemptuously, did come into the congregation aforesaid during divine service, actually going on as aforesaid, and did then and there willingly and of purpose, &c., disquiet and disturb said congregation, by then and there exhibiting himself drunk, and by then and there cursing and swearing with a loud voice, and also by talking with a loud voice, and also by making unusual gestures and grimaces." The several facts charged upon the defendant, certainly amount to an indictable offence, but, unfortunately, the evidence sustains no one of them. The case states that the defendant was not within the meeting-house during the meeting, and that the only noise, which disturbed the congregation, was the one made by the defendant, striking with a stick against the outside of the house. The State did not rest its charge against the defendant, by averring that, by loud and unusual noises, he had disquieted the congregation; in which case, any such noises, however made, with a view to such disturbance, and attended with that effect, would have sustained the indictment; but it has particularized *when* the acts were done, and *what* they were. It was the duty of the State to have given evidence of some one of them. Certainty, in stating the facts constituting the offence, is required in every indict-

ment, but not absolute certainty; and if the offence is stated with more particularity than is required, it must be proved as laid; any material variance will be fatal. Arch. Pl. and Ev. 45, 98. REX v. DOWLIN, 5 T. R. 311, 17. In the case of STATE v. COWAN, 7 Ired. Rep. 239, his Honor Judge RUFFIN, in commenting upon an opinion of Lord HALE on this subject, says: "Fairness to the prisoner, and all legal analogy, require that, when the offence is laid in one of those ways, (where the statute, under which the prisoner was charged, described the offence as taking place in two ways,) it ought to be proved as laid, and not in the other mode." This principle, we think, governs this case. It was not necessary that the indictment should have located the misconduct of the defendant in the house; the unusual noise, if made for the purpose, and with the intent to disturb the congregation, was as much a violation of the peace and of the law, when made outside the house, as when made within it. It is true, it was the noise which, in this case, constituted the offence, and if so charged, it would have been sufficient; but the State has charged how the noise was made, and *where;* and it must be held to the proof of it, as laid.

There must be a *venire de novo.*

WILLIAM JOHNSTON v. JAMES C. RUDESILL, *ET AL.*

Evidence. Damages.

THIS was a petition to recover damages for an injury to the plaintiff's saw mill, caused by the defendant's erecting a dam for a mill below, over the same stream, and thereby ponding the water back on the wheels of the plaintiff's mill. The suit was commenced in Gaston County, and removed to Mecklenburg, where it was tried at the Fall Term of 1853, before his Honor Judge DICK.

On the trial, it was admitted that the plaintiff was entitled to

recover, and the only question was the amount of the damages. For the purpose of affecting the question of damages, the defendant offered one Ramsour, a Millwright, as a witness, and proposed to ask him "if he could not, with an expenditure of five hundred dollars, take the site of the plaintiff's saw mill, obstructed as it was, and put a saw-mill, which would saw one thousand feet per day," it having been proved before, that when unobstructed, the plaintiff could saw only about four hundred feet per day. The question was excepted to by the plaintiff, and rejected by the Court. After a verdict for the plaintiff, a motion for a new trial was made, for error in rejecting this testimony, which was refused, and a judgment given, from which the defendant appealed.

Boyden, for plaintiff.
Guion, *Wilson*, and *Bynum*, for defendant.

BATTLE, J. We cannot conceive of any principle upon which the testimony offered by the defendant, and rejected by the Court, was admissible for any legitimate purpose, in ascertaining the amount of damages to which the plaintiff is entitled. The plaintiff certainly was not bound to make the improvements in his Saw Mill, suggested by the question which the defendant proposed to put to his witness, Ramsour. And because he declined to erect a more costly, though it might be a more profitable establishment, he did not forfeit his right to recover the actual damages which he had sustained in his more humble mill by the wrongful act of the defendants.

The judgment must be affirmed.

E. H. GRANT *ET. AL.* EXECUTORS v. J. A. REID *ET. AL.* ADM'R.

In an action at law, upon a negotiable paper alleged to be lost, the loss cannot be proved by the oath of the plaintiff. His affidavit is not admissible to prove that he had not negotiated the paper, nor for any other purpose, but, in Courts of Equity, to give jurisdiction ; and in both Courts, to let in secondary testimony

(CHAUNCY v. BALDWIN, Jones' Rep. 78, cited and approved.)

ACTION of Debt, tried before his Honor Judge DICK, at the Spring Term, 1854, of McDowell Superior Court.

The suit was commenced originally by a warrant before a Justice of the Peace, by the plaintiff's testator, and came up by successive appeals to this Court. On the trial before the Justice of the Peace, the plaintiff's testator made the following affidavit:

"William Grant maketh oath, that John Reel, late of McDowell county, was indebted to him in the sum of forty dollars; that, on the 5th day of May, 1848, he, the said Reel, executed his note to affiant, due one day after date, for forty dollars, as evidence of said indebtedness. Affiant swears that the note has been mislaid or lost."

He also swore, in another affidavit, "that the note had not been negotiated or assigned by him, but was justly owing to him by the defendants." These affidavits were offered on the trial in the Superior Court, and objected to by the defendant, but received by the Court, subject to the question reserved.

The plaintiff's intestate having died, and the present plaintiffs, his executors, having, in the mean time, been made parties, they made the further affidavit, "that they had made diligent search for the note, and could not find it," which was also objected to, but received by the Court, on the terms above stated. Upon this and other evidence, the cause was submitted to the jury, under an agreement that the questions above stated should be reserved for his Honor's consideration, with leave to set aside

the verdict and enter a non-suit, if rendered for the plaintiffs. The jury found the verdict for the plaintiffs.

Afterwards, his Honor, having considered the questions reserved, and being of opinion with the defendants, ordered the verdict to be set aside, and a non-suit of the plaintiffs entered. From which judgment the plaintiffs appealed to this Court.

Bynum and *Davis*, for plaintiffs.
Avery, for defendants.

BATTLE, J. We are informed by the counsel for the plaintiffs, that this appeal was taken before the case of CHAUNCY v. BALDWIN, decided at the last December Term, (see ante. 78,) was reported. We think that the present case is substantially the same with that, and must be governed by it. The affidavit of the plaintiffs' testator, that the note sued on had not been assigned nor negotiated by him, was inadmissible as testimony, and cannot therefore make any difference. The loss or destruction of a note or bond, is the only fact which the party's own affidavit is admissible to prove, and that only for the purpose of giving jurisdiction to the Court of Equity, and of admitting secondary evidence of the contents of the note or bond, in the Courts either of law or equity.

Judgment affirmed.

JOHN P. HOUSTON, SURVIVING PARTNER, v. ROBERT SIMPSON.

A bailee who has hired a horse for a year, has such an interest as may be sold by execution.

The officer who sells such an interest, but makes a bill of sale for the property absolutely, does not thereby subject himself to an action; his act passes the particular interest of the bailee, and is void as to the remainder.

Action of TROVER, for the conversion of a mule, with a count in case, tried at the Spring Term, 1854, of Union Superior Court, his Honor, Judge SETTLE, presiding.

The mule in question had been bought in South Carolina, in December, 1850, by one James M. Houston, who returned with the animal, and sold it to the plaintiffs for seventy-five dollars, and by way of payment, received a credit for that amount on the books of the plaintiffs, who were merchants. At the same time, it was stipulated and agreed that J. M. Houston was to have the mule for twelve months, at a dollar a month. An execution was put into the hands of the defendant, (who was a constable,) in April, 1851, under which he levied upon the mule in question as the property of James M. Houston made sale and conveyed it by a bill of sale to the purchaser, "out and out."

The mule was in the neighborhood when the writ was sued out, never having been taken away.

His Honor charged the jury that the plaintiff could not recover in the count for Trover, for that he had not the right of immediate possession, when the suit was brought. But, inasmuch as the defendant had made a bill of sale for the absolute property in the mule, he was entitled to recover on the count in case.

Under these instructions, the jury found a verdict for the plaintiff, and the defendant appealed.

Osborne, for plaintiff.
Bynum, and *Wilson*, for defendant.

PEARSON, J. There is error in his Honor's charge. The count in Trover is abandoned. The only question arises under the second count, which is in case, upon the special circumstances. The jury were instructed that if they believed the title of the mule was in the plaintiff, they were, upon that count, entitled to a verdict, inasmuch as the defendant had made an absolute sale of the mule during the continuance of the particular estate. The animal in question had belonged to one Houston, who, being indebted to the plaintiffs, sold him to them, in

discharge of their claim. Immediately after the sale, Houston hired the mule from the plaintiff for one year, giving a dollar a month. Before the expiration of the year, a justice's judgment was obtained against Houston, and the execution being levied on the mule, he was sold absolutely. The interest which Houston had, though but for a year, as a bailee for hire, was such an interest as could be sold under execution, and the purchaser could acquire, by virtue of the sale, *per se*, nothing but the interest which was in the debtor Houston, and after the expiration of the time for which Houston had hired the animal, the right of possession reverted to the plaintiff. The defendant had a right to levy on the mule, and sell the interest which Henderson had in it, and though his bill of sale was for the animal absolutely, its legal effect was to pass only the debtor's interest. It deprived the plaintiff of no right which he possessed, and did him no injury whatever; his right to the mule remained to him precisely as if there had been no sale by the defendant.

The case stated that the mule had not been taken out of the county, but is still in the neighborhood.

Judgment reversed, and *venire de novo* awarded.

B. J. EARLE, TO THE USE OF F. A. WEAVER v. ROBERT DOBSON *ET AL.*

A judgment on a *ca. sa.* bond, payable to one having the use in the judgment, in favor of the plaintiff in the judgment, although taken by default, is erroneous, and may be set aside on motion, though such motion is made on a day subsequent to its rendition.

(WILLIAMS v. BRYAN, 11 Ire. Rep. 613, cited and approved.)

THIS was a motion before his Honor Judge DICK, at the Spring Term, 1854, of Rutherford Superior Court, to set aside a judgment.

The defendant had been arrested by virtue of a *ca. sa.* issued by a magistrate of Rutherford county, upon a judgment in favor of B. J. Earle, to the use of F. A. Weaver, and, in order to be discharged from custody, gave the following bond:

"STATE OF NORTH CAROLINA, }
Rutherford County. }

"Know all men by these presents, that I, Robert Dobson, am held and firmly bound to F. A. Weaver, in the sum, &c.

"The condition of the above obligation is such, that, if Robert Dobson shall appear at the Spring Term of Superior Court at Rutherfordton, in 1854, then to be null and void; otherwise, to be in in full force. March 4th, 1854."

(Signed by defendant and his sureties, with their seals.)

At this term of the Court, the defendant failing to appear, on being called, judgment was rendered in favor of the plaintiff B. J. Earle, to the use of F. A. Weaver, against the defendant and his sureties, for the penalty of the bond, to be discharged, &c., on the payment of the judgment and costs.

On the next day of the term, without the defendant's still having appeared, his counsel moved to set aside the judgment, which was refused by the Court, and the defendant appealed to this Court.

Avery and *Gaither*, for the plaintiff.
J. Baxter, for the defendant.

BATTLE, J. The defendants counsel has urged several objections against the judgment entered in favor of the plaintiff, of which it is necessary that we should notice one only, as that is decisive of the case. The bond, taken by the officer from the defendant, in the execution, was made payable to F. A. Weaver instead of B. J. Earle, the plaintiff therein, and yet the judgment was entered upon that bond in favor of the plaintiff, who was no party to it. This was clearly erroneous, as was express-

ly decided in the case of WILLIAMS v. BRYAN, 11 Ired. Rep. 613, and the judgment ought to have been set aside upon the defendant's motion, though made the day after defendant Dobson had been called and failed. The cases of PAGE v. WINNINGHAM, 1 Dev. and Bat. Rep. 113; DOBBIN v. GASTER, 4 Ire. Rep. 71, and WATTS v. BOYLE, 4 Ired. 331, referred to by the plaintiff's counsel, show, indeed, that the debtor cannot, after failing to appear, adduce any matter of fact, by way of defence, nor take any objections to the previous proceedings; but that is where the bond is properly taken, payable to the plaintiff in the execution. "The case (as was said in Williams and Bryan) may be likened to a default in an action of debt, in which the declaration states a bond to A., without deriving any title from A. to the plaintiff, upon which certainly it would be erroneous to give judgment against the defendant, though in default. Here the creditor's own case, the bond, upon its face, showed that Williams (the plaintiff) could not have judgment upon it in any form of proceeding, whether by action or motion. The default admits the whole case stated in the declaration, in the one case, or in the bond, in the other; but it admits no more, and does not authorise a judgment on the bond, in favor of any person but the obligee."

The judgment, therefore, in favor of the plaintiff Earle, on a bond payable to Weaver, was erroneous, and ought to have been reversed.

Judgment reversed.

DOE ON THE DEMISE OF ROBERT SIMPSON, v. WILLIAM HYATT.

A possession of a field, for more than twenty years, will create the presumption of a grant, for that much, at least, of the tract on which it is situated.

The question of "color of title, and known and visible boundaries" arise under the act of 1791, and are not necessary to the presumption of a grant from length of time at common law.

Action of Ejectment, tried before his Honor, Judge DICK, at the Fall Term, 1853, of Mecklenburg Superior Court.

The case stated many points of exception, and much of the testimony, but as there was error in the one instance stated below, and the opinion of the Court regards that alone, and fully recites the facts, it is deemed unnecessary to set forth more of the case sent up.

Wilson, *Bynum*, and *Craige*, for plaintiffs.
Boyden, and *Osborne*, for defendant.

PEARSON, J. The lessor derived title under Allen Chaney, who was the son of one of the heirs at law of Henry Chaney, and the question is, was there evidence to be left to a jury of such a possession on the part of Henry Chaney, as would raise the presumption of a grant? One Helms swore that "Henry Chaney had possession of the land for thirty or thirty-one years before his death, and cleared and cultivated a field on it; that Chaney bought the entry of Blount, who had the land for some years before." Helms was then examined by the defendant's counsel as to what kind of a possession Henry Chaney had of said land? He replied "that Chaney cleared a field on it, and wore it out, but had never built on the land." This witness was then asked if he knew the boundaries of the land? He said he did not know all the boundaries; he only knew two lines adjoining his tract; that he never saw any other lines until four years ago, after the death of Henry Chaney, and after the commencement of this suit. Lines were then pointed out to him as the lines of the tract, but by whom made, or when made, not known."

The Court remarked to the plaintiff's counsel that "taking all that Helms stated to be true, it did not make out such a claim and possession for thirty years, under known and visible boundaries, by Henry Chaney, or by Blount and Chaney, as would in law raise the presumption of a grant to Henry Chaney." The plaintiff submitted to a nonsuit and appealed.

The presumption of a grant may be raised in two modes, e. i.,

under the act of 1791, by a continual possession for twenty-one years, with color of title, under known and visible boundaries; likewise at common law, by a possession of thirty years, REID v. EARNHART, 10 Ired. Rep. 516. "The presumption of a grant from long possession, is not based upon the idea that one actually issued, but because public policy and the quieting of titles make it necessary to act upon that presumption. It is the duty of the Court to instruct the jury, when land has been for a long time treated and enjoyed as private property, to presume that the State has parted with its title." "A grant is to be presumed from long possession, not because the jury believe, as a fact, that one issued, but because there is no proof that one did not issue."

His Honor seems to have fallen into error by confounding these two modes. Put the act of 1791 out of consideration, then the question of "color of title," and "known and visible boundaries" do not complicate the case; and so far as the *field* is concerned, (which is enough to enable the plaintiff to recover) the question is narrowed to this: was there evidence from which the jury might infer a possession of thirty years by Henry Chaney? Upon his examination in chief, Helms swore "Chaney had possession of the land for thirty or thirty-one years, and cleared and cultivated a field on it." This is direct testimony of the fact; is it explained away, so as to amount to nothing, by his saying on cross examination "that Chaney cleared a field on it, and wore it out, but never lived on it?" We suppose that the lat er circumstances could have had no effect, for certainly a man can have thirty years possession of land without living on it, if he kept it in cultivation during that time; and in regard to wearing out the field, it was for the jury to say whether he intended to be understood as explaining away what he had said about thirty years' possession; there is no legal presumption that a field must, of necessity, be worn out and its possession abandoned within a less time than thirty years. So this explanation was not, of necessity, inconsistent with his direct testimony as to the possession for thirty or thirty-one years.

Judgment reversed, and a *venire de novo*.

CLAIBORNE J. SHARPE v. ROBERT T. CAMPBELL.

Where a testator had put certain slaves into the possession of his son in law and daughter A., as he had done towards several other of his children, and shows by other provisions of his will, a general intention to confirm such possessions as gifts, and adds a qualification as to the gift to A. and her husband, to subject their legacy to the payment of a debt to him, due by the son in law, if the debt was not paid within a certain time, and the debt is paid within the time, such gift will be established, according to the general intention thus expressed.

ACTION of Detinue for a negro slave named Susan, tried before his Honor Judge DICK, at the Fall Term, 1853, of Iredell Superior Court.

The plaintiff is the administrator of Asenith Sharpe, (one of the daughters of Elihu S. King,) who had intermarried with one Ezra A. Sharpe, and died within three years before this suit was brought. In 1826, her father, without writing, had put into the possession of Mrs. Sharpe and her husband, a negro woman named Violet, who, before the death of the father, E. S. King, had borne two children, named Amanda and Susan. The sole question in the case, is, whether the plaintiff's intestate acquired a title to the slave Susan, under the will of Elihu S. King; and the clauses of the said will, relating to this question, are as follows. After various other bequests to his wife Elly, the testator proceeds: "Also, the entire and absolute disposal of a note of hand, which I hold on Ezra A. Sharpe and Joel B. King, for the sum of $800, with interest thereon, which note, if not paid in four years from this date, it is my wish that my executor shall proceed to have two negroes, the children of Violet, Amanda and Susan, now in the possession of E. A. Sharpe and wife, valued by disinterested men, and the amount of the valuation of said negroes, Susan and Amanda, placed as a credit on the said note, and the said negroes to be taken and held by my executors, and disposed of as hereafter directed. To my beloved daughter Asenith, wife of E. A. Sharpe, I confirm such property of every kind, as I have before

given her, and also the use and labor of my negro woman Violet, and the use of her daughter Amanda, provided they choose to keep her (Amanda) at the valuation placed upon her, which negro Violet, and daughter Amanda, I leave in trust with my executors, for the purpose that they shall give the labor of the said negroes, Violet and Amanda, and their increase, to the said Asenith Sharpe, and her heirs forever."

And, after other irrelevant provisions, the will contains the following:

"To my beloved daughter, Sarah White, wife of Joseph White, I confirm such property of every kind that I have heretofore given her, together with my negro woman Dina and her children, John Wesley, Lavina and Henry, and their issue, to her and her heirs forever."

"To my beloved son, Richard Franklin King, I give and confirm all the property I have heretofore given him, including the tract of land he lives on, and my negro boy Lewis, to him and his heirs forever."

Then, after several other clauses, not bearing on this question, comes the following:

"To my beloved daughter Mary King, I give and bequeath one negro girl named Susan, (child of Violet, who is now in the possession of my daughter Asenith Sharpe;) one horse beast, saddle and bridle, worth one hundred . . . . . Also, two hundred dollars in money, to be paid out of my estate, if she fails to get the negro girl above named; but, if she gets the said negro girl, this bequest of two hundred dollars is not to be paid to her and her heirs forever."

The note of $800 was paid within the four years from the date of the will. The slaves Violet, Amanda and Susan remained in the possession of E. A. Sharpe and wife, for two years after the death of the testator, and, at the end of that time, were taken possession of by the executor, and the girl Susan was delivered to the defendant Campbell, who in the mean time had intermarried with Mary King above mentioned, and they have had possession of said slave, since the year 1846,

up to the bringing of this suit. It was insisted that, under a proper construction of this will, the plaintiff had no title to the slave in question.

A verdict was rendered for the plaintiff, by consent, subject to the opinion of the Court, upon the question reserved, and afterwards, upon consideration of the question, the Court being of opinion with the defendants, set aside the verdict, and entered a nonsuit, from which judgment plaintiff appealed.

Boyden, for plaintiff.
Mitchell, for defendant.

PEARSON, J. We concur with his Honor, that the plaintiff failed to show title in his intestate, to the slave sued for; consequently, that the action could not be maintained.

The intestate claimed the slave under the will of her father, Elihu King, and the case depends upon its construction. In regard to this, we have some difficulty. A prominent intention on the part of the testator was to confirm the gift of all the property, including the slaves that he had, from time to time, put into possession of his several children; but, in reference to the slaves that he had put into the possession of his daughter Asenith, (the plaintiff's intestate, and the wife of Sharpe,) he intended to annex a qualification, so as to subject the two children of the negro woman Violet (Amanda and *Susan*) to the payment of a note of $800 that Sharpe owed him, and, in attempting to do so, he has suffered the one idea to become involved in the other, which produces the confusion. We think, however, that it is sufficiently apparent, that, in the event that Sharpe paid off the debt, (for which purpose he was allowed four years,) the gift of the slaves to his wife was confirmed, and was to remain undisturbed in like manner, as the gifts to the other children; and it was *only in the event that Sharpe failed to pay the debt*, that Amanda and Susan were to be valued, and their valuation put as a credit on the note, which was all the benefit he expected Sharpe to take; and the negro woman

and her child Amanda, were to vest in the executors, for the purpose of aiding Mrs. Sharp, and in trust to let her have the use and profits, and then for her heirs; but the girl Susan was, in that event, taken away from Mrs. Sharpe, and given to his daughter Mary, with a proviso, that, if she failed to get Susan, she was to have $200 in her stead; and the way in which it was expected she might fail, was obviously by the fact of the gift to Mrs. Sharpe becoming confirmed and unqualified by Sharpe's paying the debt within the time allowed.

This he did; so the gift to his wife stood confirmed, and the contingent provisions never took effect. The result is, that upon the payment of the money, the gift to his wife became absolute, and the property vested in Sharp, the husband. Mrs. Sharpe, therefore, had no title, nor has her administrator any.

Judgment affirmed.

ALEXANDER FOX v. WILLIAM R. KEITH.

Where there are several counts in a declaration for distinct causes of action, and the plaintiff abandons one of the counts in the progress of the trial, and obtains a verdict on the other counts, the Court, on motion of the other side, ought to give instructions to the Clerk not to tax the defendant for the attendance of the witnesses summoned to sustain the abandoned count.

ACTION on the case for slanderous words, tried before his Honor Judge CALDWELL, at the Fall Term, 1853, of Buncombe Superior Court.

The declaration contained several counts, one for charging the plaintiff with stealing a horse and a blowing horn; and two others, for charging him with distinct perjuries, growing out of other matter. The evidence showed that the defendant, in speaking the words alleged in the first count, accompanied them with an explanation, which showed clearly that they only imput-

ed to the plaintiff a breach of a bailment, and his Honor intimated to the counsel for the plaintiff, who last addressed the jury his opinion, that the count could not be sustained, and thereupon it was abandoned. The other counts were then relied on, and the jury returned a verdict for the plaintiff upon them.

The defendant's counsel moved the Court to instruct the clerk in the taxation of costs, to exclude from the bill of costs, the attendance of the witnesses summoned to sustain the first count. This the Court declined to do, but gave judgment for the plaintiff for the costs upon all the counts in the declaration, from which judgment the defendant appealed to this Court.

N. W. Woodfin and *J. W. Woodfin*, for plaintiff.
Williams, for defendant.

NASH, C. J. The subject of cost is, in this State, regulated by the act of 1836, ch. 31. The common law gave no costs to either party. By the 79th section of the above statute, the party, in whose favor judgment is given, shall recover full costs, and it is under this section that the plaintiff resists the motion for a retaxation of the bill of costs. The declaration in the case contained three counts. Upon an intimation of the presiding Judge, that the first count could not be maintained, it was abandoned, and the cause put to the jury on the second and third counts, upon which a verdict was rendered for the plaintiff, and a judgment given. A motion was made on the part of the defendant, for instructions to the clerk not to tax against him the witnesses of the plaintiff, summoned on the first count. This was refused by the Court. In this there was error. The defendant is not bound under the statute to pay them. Every count in a declaration is in the nature of a seperate declaration, and, to be in itself good and available, must contain matter sufficient on which to charge the defendant, and must be sustained by competent testimony; and all the counts but one may be stricken out without injury to the plaintiff's action. When, therefore, in this case the first count was aban-

doned by the plaintiff, is was, as to the declaration, precisely as if it had never been inserted, and constituted no part of his case. The plaintiff was bound to know whether the facts embraced in the first count, laid the foundation of a legal claim against the defendant: if they did not, the witnesses to prove them were not necessary to his case. Nothing is more usual in the trial of a cause, when a witness proves nothing, than to note him as not to be taxed against the adverse party. The law of costs would otherwise be intolerable, and it would be in the power of a malicious man, by joining with a just and legal claim, others that were unfounded, to overwhelm his adversary under a load of costs.

The opinion in COSTIN v. BAXTER, 7 Ire. 111, does not conflict with our opinion in this. In that case, the declaration contained three counts, and on the trial, the plaintiff offered no evidence upon two of them, and was permitted to enter a *nol. pros.* as to them, and recovered a verdict upon the third, and had his judgment for the amount awarded him by the jury, and for his costs. The defendant had summoned witnesses to defend him upon the withdrawn counts, and moved the Court for a judgment against the plaintiff for the amount of their attendance. This Court affirmed the judgment below, in refusing the motion, upon the ground that the act of 1836, ch. 31, sec. 79, provides for no division of costs between the parties plaintiff and defendant in any case. The case of Costin and Baxter is, however, a direct authority in support of our opinion here. It is stated in that case, that the plaintiff was not entitled to tax against the defendant his costs upon the expunged count, and, in stating what are the full costs of the successful party, his Honor Judge RUFFIN says: "The Court frequently refuses to allow sums claimed by the successful party, as if he had summoned more witnesses to a single fact than is allowed by the act of 1783, or summoned witnesses to an irrelevant matter."

The judgment is erroneous in allowing full costs, and to that extent is reversed, and judgment that the plaintiff recover the

damages assessed by the jury, with costs, to be taxed by the clerk, with instructions not to tax against the defendant the attendance of the witnesses summoned by the plaintiff upon his first count; and, for the purpose of having judgment entered in accordance with this opinion, it will be certified to the Superior Court of Buncombe county. HARRISS v. LEE, ante. 225. The cost of this Court will be paid by the plaintiff.

Judgment reversed.

STATE v. WILLIAM B. MARCH.

A witness, on a cross-examination, in order to discredit him, may be asked if he had not committed perjury in the State of Georgia.

Where there are two counts in a bill of indictment, and evidence of two corresponding offences proved, the Court will not order the Solicitor to select one of the offences and abandon the other.

THIS was an indictment for an assault and battery, and false imprisonment, tried before his Honor Judge DICK, at the Fall Term, 1853, of Rowan Superior Court.

There were two counts in the bill of indictment, one for assault and false imprisonment, and the other for an assault and battery. On the trial, a series of violence, by words and gestures, several amounting to assaults and two or three of them to batteries, were proved. During the progress of this series, the defendant went off to his room, in the village where it occurred, and immediately returned and renewed his violent treatment of the prosecutor. Upon this state of the case, the defendant's counsel insisted that there were two distinct offences proved, and moved the Court that the State's counsel should be compelled to select which offence he would go for, and should be confined to that, but the Court refused so to order, to which defendant's counsel excepted.

In order to discredit Hall, the State's witness, he was asked if he had not committed wilful and corrupt perjury in Georgia, by swearing that he had not brought negroes into the State, and the defendant's counsel admitted that the question was in no wise pertinent to the issue, except to discredit the witness. The Court decided that this question was not a proper one, and the answer was withheld, to which defendant's counsel again excepted.

Under the instruction of the Court, the jury found the defendant guilty.

Motion for a *venire de novo*, for the causes of exception above set forth; rule discharged; judgment and appeal.

Attorney General, for the State.
Craige, for the defendant.

BATTLE, J. The first exception taken by the defendant to the propriety of his conviction, cannot be sustained. The two counts in the indictment were very properly inserted, and it would have been strange had the Court been bound, upon the defendant's motion, to have had one of them stricken out, or what was the same in effect, to have compelled the Solicitor to confine his testimony to one of them only. The other exception is well founded, as the question, which the defendant's counsel, upon the cross-examination, proposed to ask the witness, Hall, was admissible within the rule of practice established by the cases of STATE v. PATTERSON, 2 Ired. 346, and STATE v. GARRETT, Busb. Rep. 357. The object was, as the counsel stated, to discredit the witness, either by his admitting that he had sworn falsely, or by his refusing to answer, and, in that view, the question certainly was not irrelevant; for the credibility of a witness, whose testimony is material to the issue on trial, can never be immaterial or irrelevant. If the witness had been asked, whether he had or had not committed perjury, in swearing to an affidavit, in this State, he certainly would have been protected from answering what might have exposed him to a

criminal prosecution in our Courts, and, in such a case, we are inclined to think that the question ought not to be allowed to be put at all. But our Courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them. We are of the opinion, therefore, that the question was improperly ruled out, and that the defendant is entitled to the benefit of another trial. This opinion will be certified to the Superior Court of law for the county of Rowan, to the end that the judgment may be reversed, and a *venire de novo* awarded.

Judgment reversed.

SARAH TAYLOR v. WILLIAMSON TAYLOR.

In suits for divorce or for alimony, brought by the wife, under the act of 1852, ch. 53, after the preliminary adjudication, e. i. *that the petition is fit to be entertained*, which is made in every case, before such a suit can be carried on, it is the duty of the Court, without considering the merits of the case, to make a reasonable allowance of alimony for the wife *pendente lite*, and if, upon motion, such allowance is refused, the wife can appeal to this Court.

APPEAL from the deision of his Honor Judge DICK, on a motion to grant the petitioner alimony *pendente lite*, in a suit for alimony, heard at the Spring Term, 1854, of Rutherford Superior Court.

The petition was filed at Spring Term, 1853, alleging violent and abusive treatment and oppression, on the part of the husband, and a final driving of the petitioner from his house, and frequent refusals to let her return, and prays for alimony, &c.

The answer of the husband was filed at the return term, and explicitly denies all violence and ill treatment, and denies expelling her from his house, but attributed their dissension to the obstinate and violent temper of the wife. The defendant also answered as to the amount of his property.

At Fall Term, 1853, the Court made an order, that the defendant pay twenty-five dollars into Court, to be applied towards the payment of petitioner's counsel, "and all other matters reserved without prejudice."

At the Spring Term, 1854, plaintiff's counsel moved for an allowance and alimony *pendente lite*, which his Honor *pro forma* refused to make, and thereupon the plaintiff, by permission of the Court, appealed to this Court.

Bynum, for the plaintiff.
John Baxter, for the defendant.

PEARSON, J. In ordinary proceedings, when the party gives a prosecution bond, his suit is entertained and mesne process issues, as of course. But, in proceedings for a divorce, the party is required to exhibit the petition to a Judge, who, upon consideration of the allegations, decides whether the petition is "fit to be entertained." If he thinks it is not, he refuses the order, if he thinks it is, he orders that it may be filed, and process issue.

This preliminary adjudication in regard to the sufficiency of the petition both as to form and substance is required in all cases, and is not confined to those where the party seeks to sue *in forma pauperis*: it is derived from, and suggested by, the practice of the ecclesiastical Courts in England, where the same person who first passes upon the sufficiency of the petition constitutes the tribunal before which it is finally disposed of. This precaution, like that requiring an oath that the cause of complaint has existed for more than six months, is deemed proper, in consequence of the extreme delicacy of the relation of husband and wife, which ought not to be assailed lastily—ought not to be publicly assailed at all, unless the petition is first submitted to one competent to pass on its sufficiency, according to the party's own showing, because the mere fact of a public assault, although it should turn out to have been made on insufficient ground,

will, in most cases, cause a breach which cannot be easily repaired.

The fiat for entertaining the petition is taken, in all motions in the cause, until the final hearing, as presumptive, on *prima facie* evidence of the sufficiency of the petition in substance, and in form, and on this ground, the Court in England, when the petition is on the part of the wife, and there is no suggestion that she has a separate estate, make an allowance of "alimony *pendente lite*;" e. i. something for the wife to live on during the controversy, as a matter of course.

In WILSON v. WILSON, 2 Dev. and Bat. 377, this Court held, that the power to grant "alimony *pendente lite*" did not exist in the Superior Courts, upon the ground that the jurisdiction in petitions for divorce being given by statute, "the power of the Court must be collected either from the express enactments, or from the general scope of these statutes," and that no power could be derived by inference, or from any analogy furnished by a coincidence of the provisions of the statutes, with the practice of the ecclesiastical Courts in England.

By the act of 1852, ch. 53, it is provided, that where a petition for divorce shall be filed by a wife, the Court shall have power, *at the term to which process shall be returned*, or at any term thereafter, to decree such reasonable and sufficient alimony as, *in the discretion of the Court*, may be necessary for the support of herself and family pending the suit, provided that the Court shall have power, *at any time during the pendency of the suit*, upon due notice and cause shown, to *alter such allowance*, as circumstances may require.

The proper construction of this statute, makes it the duty of the Court, at the return term, or at any time when application is made, to act upon the presumption of the sufficiency of the petition, arising from the fiat of the Judge by whom it is allowed to be filed, and to decree, as alimony *pendente lite*, such an amount as, in the discretion of the Judge, may be reasonable and sufficient. In doing so, the statute does not contemplate that the Court is to look into the petition. For its sufficiency

has already been passed on. Nor is the answer to be taken into consideration, (except in reference to the amount of the allowance,) for it may not be in at the return term. The relative weight to which the petition and answer are entitled, if each is to show for itself, will depend upon whether the wife or husband can swear hardest. Because the merits cannot be decided upon, until the hearing, so, as the same Judge, or one of the same competency, has passed on the petition, its sufficiency is to be assumed.

Accordingly, it is held, (EARP v. EARP, Jones' Eq. 120,) that the relief, as to alimony *pendente lite*, contemplated by the statute was an *immediate one*, upon the ground that, after the petition was entertained, the wife was entitled to be supported out of the husband's estate during the controversy; and that, when the Court made an allowance, there was no right of appeal, because the only question that could be brought up, would be in regard to the amount, which was a matter of discretion, and could be altered in the Court below at any time, and an appeal would defeat the purpose; e. i. immediate relief.

It was said in the argument, if there is no right of appeal, when the Court gives alimony, there can be none when the Court refuses to give it. This is a *non sequitur*. In the former, the Court discharges its duty, and in the exercise of a power given in express words, makes an allowance which, in its discretion, is considered reasonable and sufficient; and, for the reasons given above, this question of discretion cannot be reviewed. In the latter, the Court mistakes the proper construction of the statute, and, in consequence thereof, commits an error, not in a matter of discretion, but in a matter of law. The right to have such an error corrected comes very clearly within the provision of the statutes upon the subject of appeals. Suppose (as we take to be the fact in this case) the Judge to whom the application for alimony is made, instead of acting upon the preliminary adjudication, that the petition is sufficient, considers it to be his duty to look into the petition, as also into the answer, and conceives the law to be, according to the course of a Court of

Equity, upon motions to dissolve injunctions, that the answer, so far as it is responsive to the petition, is to be taken as true, and thereupon refuses to allow to the petitioner that which, under the statute, she is clearly entitled to, "of course" there is an appeal to correct such an error. This opinion will be certified.

PER CURIAM. Decree below reversed.

HOKE'S EXR'S v. OBADIAH EDWARDS AND OTHERS.

Upon a default or a *nil dicit*, on an action of debt, in a Justice's judgment, the plaintiff is entitled to a final judgment, at the time when the default is made, and need not execute an inquiry before a jury.

SCIRE FACIAS to revive a judgment, tried before his Honor Judge CALDWELL, at the Fall Term, 1853, of Yancey Superior Court.

At the January Term, 1844, of Yancey County Court, a judgment was rendered by default, in favor of John Hoke, for the sum of $19.29, with interest, against defendants Obadiah Edwards, William Edwards, Samuel Fleming and A. Hampton, on an appeal from a magistrate's judgment and execution issued thereon, returnable to March term following, which was returned "not collected," upon which an *alias fi. fa.* issued to the next term, (July 1844,) returned in like manner "not collected."

At the October term, 1849, "Ordered, That the clerk enter judgment in full, according to the papers upon which the appeal was taken;" also, "Ordered, That a *sci. fa.* issue in favor of the executors of John Hoke, (he having died in the mean time,) for the defendants to show cause why execution should not issue upon the above mentioned judgment, on which a *sci. fa.* was issued accordingly, returnable to June term 1850, to which the defendants at that term pleaded *nul tiel*, record, payment,

Statute of Limitations. And at the same term appears this record, "to be certified to the Superior Court for trial." The cause was docketed at the Fall Term 1850, of Yancey Superior Court, and thence regularly continued until Fall Term 1853, when the cause was taken up and considered, and the following entry of record appears: "Abated as to Samuel Fleming. Upon inspection of the record by the Court now here, it is considered by the said Court, that there is such a record, and it is further considered by the said Court, that the said plaintiffs do have execution against the said defendants, for the sum of $19.29 cents principal $11.28 cents interest, and their costs, to be taxed by the clerk."

The only question raised in the case is, whether the plaintiffs shall have an execution upon the judgment in the pleadings mentioned, it having been entered without a writ of enquiry.

Appeal to the Supreme Court.

Avery, for plaintiff.
N. W. Woodfin, for defendants.

PEARSON, J. According to the English practice, no judgment could be entered, unless the defendant appeared and made defence. If he appeared and failed to put in his plea, there was judgment upon *nil dicit*, either final; or interlocutory, with a writ of enquiry: depending upon whether the action was in debt for a specific thing, or whether it sounded in damages. If the defendant did not appear and make defence, after being served with *mesne* process, the plaintiff could only run the process to *outlawry*, or, if the *mesne* process was a *capias respondendum*, charge the sheriff and fix the bail below.

There were many inconveniences attending this practice, which the act of 1777 was intended to remedy. Rev. Stat. ch. 31, s. 62: "The defendant shall appear and plead, or demur, at the same term to which the writ is returnable; otherwise, the plaintiff may have judgment by default, which, in actions of debt, shall be *final*, &c., and, in all other actions, not specially

provided for, where the recovery shall be in damages, a writ of enquiry shall be executed at the next succeeding term." The 95th and 96th sections of the same chapter, makes provision in regard to interest. So, if the action had commenced by writ, upon its being returned "executed," it would have been regular at the next term to enter final judgment, according to the former judgment, if the defendant had failed to appear and enter his pleas. Of course it was regular to do so in the present case, which was commenced before a single Justice, where the defendants appeared, made defence, and appealed; which appeal stood for trial at the next term of the County Court. Rev. Stat. ch. 62, sec. 24. By the 12th section of the same chapter, it is provided, "Upon a warrant on a former judgment, such judgment shall be evidence of the debt, subject to such deductions as the defendant may make appear to have been paid." The defendant appeared and made defence before the justice, and took an appeal. So, even, according to the English practice, he was in Court, upon his default in not entering his pleas, it was according to the course of the Court, to enter a final judgment, without the aid of the act of 1777.

Judgment affirmed.

JAMES N. BIGGERSTAFF v. DAVID N. COX.

Where a suit is pending in Court, and after several terms an order is made that the plaintiff be permitted "to continue his suit without further security:" It was HELD, that under such order, being bound to pay his witnesses for their attendance, as well after this order as before, he was entitled to his full costs, under the act of 1836, ch. 31, sec. 79.

THIS was an appeal from the judgment of a Justice of the Peace of McDowell county, brought by successive appeals to the Superior Court of that county, and decided at the Spring Term, 1854, his Honor, Judge DICK presiding.

At Spring Term, 1852, of the Superior Court, defendant filed an affidavit, setting forth the insolvency of the sureties of the prosecution bond which had been filed by the plaintiff. Upon which, a rule was obtained on the plaintiff to justify the present security, or file another prosecution bond by the time this suit is reached at the next term, or suit stand dismissed." At the next term of the Court on consideration of the matters alleged in answer to this rule, it was "adjudged by the Court, that the prosecution bond filed is insufficient, and it appearing that the plaintiff is unable to give other security, counsel having certified that he has a good cause of action, the rule was discharged, and the plaintiffs allowed to continue his suit without further security. A comrpomise was made between the parties, and plaintiff had judgment for sixpence and costs. Upon these matters exhibited by the record to his Honor, on motion, it was adjudged that "the plaintiff recover only such costs as accrued in the case prior to the terms at which he was allowed to prosecute in *forma pauperis*, and that the bill of cost be revised as to all costs which are taxed after said order was made," from which judgment the defendant appealed to this Court.

J. Baxter, for plaintiff.
Gaither, and *T. R. Caldwell*, for defendant.

NASH, C. J. Two questions are presented on this record, both upon motions to retax the bill of costs. The original action commenced before a single magistrate and upon its reaching the County Court, the plaintiff, by order of Court, gave bond and security for its due prosecution. From the County Court it was carried by appeal to the Superior Court, where, on the affidavit of the defendant, the plaintiff was laid under a rule to give other and better security, or justify, or the suit stand dismissed. The plaintiff failed to justify or give other security; whereupon, the Court modified the previous order, and directed as follows: after reciting the failure, the order proceeds as follows—"**and the plaintiff is allowed to continue his suit without further security.**"

In giving judgment for the plaintiff's costs, the Presiding Judge considered this order as giving to the plaintiff the right to further prosecute his suit as a pauper, and directed the Clerk to strike from the bill of costs the attendance of the plaintiff's witnesses subsequent to that period. In this there is error. The order did not give to the plaintiff the right of a pauper in the further prosecution of the suit. His Honor might have dismissed the suit from the docket, if he had thought proper to do so, or continue it as he has done under the prosecution bond filed. The order is that the plaintiff might continue his suit without giving further security, HOLDER v. JONES, 7 Ired. 191. The prosecution bond was not set aside, but was continued, and under it the cause was still prosecuted. That bond being in force, the witnesses of the plaintiff were properly charged in the bill of costs against the defendant, because they were entitled to be paid by the plaintiff. In other words, the plaintiff having obtained a judgment, and being bound to pay his witnesses for their attendance, as well after the order referred to, as before, he was entitled to his full costs, under the act of 1836, chapter 31, section 79.

In the order directing the Clerk to strike from the bill of costs the attendance of the plaintiff's witness after the order referred to is erroneous, and must be reversed. The second question will be considered in the succeeding cases. The defendant to pay the costs of this Court. This opinion to be certified.

PER CURIAM. Judgment reversed.

JAMES N. BIGGERSTAFF v. DAVID N. COX.

There is no provision in the laws of this State for taxing, as the costs of suit, services rendered by a sheriff, under a writ of *capias ad testificandum*, in carrying a witness to Court beyond the fee for the execution and return of the writ.

THIS was another question of cost arising in the case preceding this, (ante. 534,) tried at Spring Term, 1854, of McDowell Superior Court, before his Honor Judge DICK.

The following additional facts appear from the record in the case, which will show the question now presented to the Court.

Two of the witnesses summoned for the plaintiff, refusing to obey the process of *subpoena*, on affidavits laid before his Honor, a *capias ad testificandum* was issued to the county of Cherokee, under which these witnesses were taken into custody and brought to the Court in McDowell. An item for this service was inserted in the bill of cost, taxed against the defendant, and this was a motion to strike out this item from the bill, which motion was allowed by the Court, and the charge ordered to be stricken out.

From this judgment the plaintiff appealed to this Court.

J. Baxter, for the plaintiff.
Gaither and *T. R. Caldwell*, for the defendant.

NASH, C. J. It is the order and rule of this Court, that, when both parties appeal from different orders or judgments in the same case, each appeal shall be separately docketed, in order to avoid conflicting judgments on the same record. On the trial of this case, two orders or judgments were pronounced by the Court, from both of which there were appeals. The first was considered in the preceding case, and the other is now to be reviewed.

On the motion of the plaintiff, properly supported by affidavits, the Court had ordered a *capias ad testificandum* to issue to the sheriff of Cherokee county, against Tubal Huskins and Hannah Huskins, two recusant witnesses. The precept was served, and the witnesses conveyed by the sheriff to McDowell Superior Court, where the case was pending. The sheriff claimed the expenses he had incurred in carrying them to McDowell; the clerk, in taxing the costs, included these expenses, at the rate provided by the act of Assembly for carrying criminals to

jail. The plaintiff was laid under a rule to show cause why this charge should not be stricken out of the bill of costs, which being made absolute, the plaintiff appealed to this Court. We concur with his Honor in his opinion. The sheriff has no legal claim upon the plaintiff for these expenses, and therefore the plaintiff has no right to have them taxed against the defendant. It has before this, during this term, been decided that all the costs in judicial proceedings are regulated in this State by statute; nor can any officer of the law charge any other or greater fees than are so allowed; if he does, it is a misdemeanor in office. We have carefully looked through the acts of Assembly, and can find no warrant for this charge. The *capias ad testificandum* is a common law writ, and in force in this State, but the Legislature has not made any allowance to the sheriff for obeying its commands, further than its execution and return. The officer must obey the precept at his peril; but, as the case now stands, he does it mostly at his own expense. In the act of 1836, ch. 105, sec. 21, are enumerated all the different services to be rendered by the sheriff, and for which he is entitled to charge a fee, and the amount; among these is not to be found any compensation for conveying a witness to Court. The act provides for executing a *capias ad satisfaciendum* issuing from and returnable to a Court of record beyond the sheriff's county, and carrying the defendant and confining him in the jail of such county, but makes no provision for carrying a witness under such circumstances. With a view to remove any doubt upon the question, the 21st section commences as follows: "The several sheriffs shall receive the following fees, and no others." It is clearly a *casus omissus*, originating doubtless in the fact that the writ of *capias ad testificandum* has been so rarely resorted to in practice in this State; but it is an omission, however much to be regretted, which cannot be supplied by a Court of justice. There is no error in the judgment appealed from, which is affirmed at the cost of the plaintiff.

PER CURIAM. Judgment affirmed.

STATE TO THE USE OF PHILIP WARLICK v. WESTLEY BARNETT *ET. AL.*

A receipt given by a Constable to the defendant in an execution, for money in his hands for collection, is not conclusive against him, but he may show that he did not receive the money, and could not make it, by reason of the debtor's insolvency.

ACTION of Debt on a constable's bond, tried before his Honor Judge DICK, at the Spring Term, 1854, of Burke Superior Court.

The suit was brought upon the official bond of Wesley Barnett, Jan. 31st, 1834, and the breaches assigned were—

1st. For failing to use due diligence in collecting a note due plaintiff by one John Deal;

2d. For collecting and failing to pay over on demand;

3d. For failing to discharge his duty faithfully as a constable.

The suit was brought against the constable Barnett and Hiram Taylor, one of his sureties. The execution of the bond in the usual form was proved. The plaintiff then offered in evidence a Justice's judgment, in favor of the plaintiff, against John Deal, which had been taken by defendant Barnett, upon a note put into his hands by plaintiff for collection, as constable. This judgment was dated on 9th of March, 1844, two days after the warrant was taken out. A *fi. fa.* on the judgment was issued on the 23d of April, 1844. It appeared in evidence, hat John Deal, during the year 1844, and up to the year 1849, was insolvent. In that year he became solvent. It was further n proof, that, in the year 1844, the defendant Barnett gave to Deal the following receipt:

"Received of John Deal seventy-six dollars, in full of a judgment in my hands, in favor of Philip Warlick, this the 18th of March, 1844. WESLEY BARNETT."

The defendant proved, that, when this receipt was given,

there was no money, nor anything of value paid; that Barnett and Deal played for it at cards, Deal beginning with a five dollar stake of money, against five dollars in the judgment, which the latter won, and they continued thence to play for five dollars in the judgment per game, until the whole of it was won by Deal, and delivered up. Afterwards, on the suggestion of Barnett, that he wanted the judgment, to enable him to settle with Warlick, Deal gave it back to him, and took from him the above receipt. It was admitted that the judgment had been returned to plaintiff before the suit was brought.

Defendant's counsel asked the Court to instruct the jury, that, if Barnett gambled off the judgment, as deposed to by the witnesses, and really received no money therefor, and they believed Deal was insolvent during the constable's official year, so that no money could be collected out of him, that the plaintiff would be entitled to only nominal damages.

But his Honor declined so to instruct the jury, and told them, "that if they were satisfied, from the testimony, that the defendant Barnett received the said bond due the plaintiff, from Deal, as a constable, for collection, and sued out a warrant, and obtained a judgment for plaintiff against Deal, and subsequently gave Deal his receipt for the amount thereof, that he, Barnett, would be liable to Warlick for the full amount of the judgment on his official bond, and that he, Barnett, could not be allowed to impeach said receipt, because of the alleged gambling consideration, for that he had, by his own act, as agent of the plaintiff Warlick, acknowledged the payment of the debt by the said John Deal."

To which defendant excepted.

Under these instructions, the jury found a verdict against the defendants for the whole debt. Rule for a *venire de novo;* rule discharged; judgment and appeal.

Avery, for plaintiff.
Bynum, *Gaither* and *T. R. Caldwell*, for defendants.

NASH, C. J. We do not concur with his Honor in his view of

the law governing this case. The action is upon a constable's bond. The defendant Barnett was elected a constable for the year 1844; his official bond, to which the defendant Taylor is a party, as surety, is dated the 31st January, 1844, and his office expired in a year from that time, to wit, at the January Term of the County Court, in 1845. The office of constable is an annual one. When the bond was put into the hands of Barnet for collection does not distinctly appear, but it must have been after the 31st of January, 1844; and, on the 7th of March following, the warrant issued, and judgment was rendered the 9th of March, two days thereafter, and, on the 23d of April, a *fi. fa.* issued. During the defendant's official year of 1844, Deal was entirely insolvent. Several breaches were assigned—

1st. For failing to use due diligence in collecting the note;

2d. For collecting and failing to pay over, on demand; and

3d. Failing to discharge his duty as constable faithfully.

For the first breach assigned, the plaintiff is not entitled to recover anything. During the whole of the year 1844, and up to 1848, Deal, the defendant in the Justice's judgment, was insolvent. A constable is guilty of no negligence in not taking out a *capias ad satisfaciendum* against an insolvent debtor. Gov. v. CARRAWAY, 3d Dev. 438, "for where is the use of an execution at the expense of his principal," unless the latter specially desires it. STATE v. HOLCOMBE, 2d Ired. 211. Under the act of 1818, (Rev. St. ch. 24, s. 7,) constables are made collecting agents, and as to them the rule of diligence required, is, that degree of vigilance, attention, and care which a prudent person, conversant with business of that description, would ordinarily use. Such men do not, ordinarily, sue out process, or run themselves to the expense of bringing suits, obtaining judgment and issuing execution against paupers. MATHEWS v. SMITH, 2 Dev. and Bat. 287; MCKINDER v. LITTLEJOHN, 1 Ire. 66; MORGAN v. HORNE, Bus. 25. The insolvency of Deal removes from the constable the charge of negligence, and is an answer to the first and third breaches assigned. As to the second breach,

there is no pretence that the constable ever actually received the money due from Deal. But the plaintiff relied upon the receipt given by Barnett to the debtor Deal, it being in full of the judgment. Upon this point his Honor instructed the jury, that if Barnett, after obtaining the judgment, gave Deal his receipt for the amount thereof, he, Barnett, would be liable to Warlick for the full amount of the judgment, "on his official bond, and that he, Barnett, could not be heard to impeach said receipt," because of the alleged gambling consideration; for he had by his own act, as agent of the plaintiff Warlick, acknowledged the payment of the debt of Deal. In this there is error. The receipt was certainly evidence against the defendant, but it was not conclusive evidence. The person giving it may show he never did receive the money. This is the rule of evidence as to receipts not under seal. 3 Stark 1045; Coke Lit. by Harg. and But. 373, in note; LATOUR and BLAND, 2 Stark. cases 386. A mere receipt, not under seal, cannot operate as an estoppel, but is mere evidence of the fact, to be left to the jury, and subject to be rebutted by other circumstanees of the case. BENSON v. BENNETT, 1 Camp. 394; BRISTOW v. ESTMAN, 1st Esp. ca. 172. The receipt in this case was not conclusive against the constable, and he could be heard to prove, that in fact he had received no money—was at liberty to show why, and for what he had given it. It was won from him by Deal in gambling; the latter acquired no property in it, and Barnett, having returned it to the plaintiff, the defendant in it is still liable to the plaintiff under it. The act of the General Assembly makes void every contract to pay, deliver or secure money or other thing won at gaming. Rev. Stat. ch. 51. The constable had no power to transfer the judgment to Deal: the latter acquired no right to it by having won it at gambling, or by virtue of the receipt?

Judgment reversed and a *venire de novo.*

BARNETT BURNETT v. W. H. FULTON.

Where the Court, on the trial of a cause, submits a question for the finding of the jury, upon which there is no evidence, it is error.

THIS was an action of Trover, tried before his Honor Judge DICK, at the Spring Term, 1854, of Henderson Superior Court.

The plaintiff proved that he bought a wagon from one Cook, at the price of seventy-five dollars, and paid for the same. The wagon, at the time of the purchase, was in the possession of the defendant, and Cook gave plaintiff an order to the defendant, directing the delivery of the wagon to him, the plaintiff presented Cook's order, and demanded the wagon of the defendant, who refused to deliver it up, alleging that the wagon had been conveyed by Cook to one Davenport, to secure a debt due him, the defendant.

Plaintiff proved by one Peebles, that when he, witness, was about to purchase the wagon from Cook, a short time before the sale to plaintiff, he called upon the defendant, to know if he would give up the wagon, provided he bought it from Cook, to which the defendant replied that he would give it up, provided the Jones debt was paid. It was in evidence, further, that there was a compromise of the Jones debt, by which the wagon was to go back to Cook, and did go back to him. Afterwards, the wagon was again in the possession of the defendant, and was so at the time of the bringing of this suit, but how defendant got the posession is not stated in the case sent up. One witness said he professed to hold it for rent due him from Cook.

A deed in trust from Cook to one Davenport, for the wagon in question, dated before the sale to plaintiff, was also put in evidence.

The defendant's counsel requested the Court to charge the jury, that, if the defendant was in the adverse possession of the

property, at the time the plaintiff bought the property in question from Cook, he was not entitled to recover.

The Court refused so to instruct the jury, but told them, "that if they believed that the defendant ever got the possession of the wagon, by the consent of Cook, as a loan, to be returned to Cook when requested, or at the end of a term agreed on by them, which had expired, it would be a bailment of the wagon, and the defendant could not properly set up an adverse title, either against Cook, or the plaintiff, who claimed under Cook."

Defendant excepted to this part of his Honor's charge.

Verdict for the plaintiff. Rule for a new trial; rule discharged. Judgment and appeal.

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

BATTLE, J. We are of opinion that the plaintiff is entitled to a *venire de novo*, because his Honor submitted to the jury a question of fact, without any testimony to raise it. Upon closing the evidence on the trial, the defendant's counsel requested the Court to charge the jury, that the plaintiff could not recover, because, at the time when he purchased the wagon in question from Cook, the defendant was in the adverse possession of it. This instruction his Honor declined to give, but charged that, if the jury should believe that the defendant ever got possession of the wagon, by the consent of Cook, as a loan, to be returned to Cook when requested, or at the end of a certain time, agreed on between them, which had expired, it would be a bailment, which he could not set up as an adverse title, either against Cook, or the plaintiff, who claimed under him. Now, there is no testimony set forth in the bill of exceptions, to show how the defendant got possession of the wagon the second time; but it appears from the statement of one of the plaintiff's own witnesses, that, on a certain occasion, the defendant said he would not give up the wagon, because Cook owed him for rent.

When this occurred, does not distinctly appear, though, from the manner in which it is set out in the bill of exceptions, it may be inferred that it was whilst the wagon was the second time in the defendant's possession; but, however this may be, it is not disputed, that, when the plaintiff purchased the wagon from Cook, it was in the defendant's possession; that possession was *prima facie* evidence of title, and it was incumbent upon the plaintiff, to show that it belonged to Cook, and that the defendant had no right to retain it from him. Upon this point in the case, the plaintiff offered no testimony to show that the defendant held as mere bailee, who was bound to surrender the article to Cook or his vendee, and his Honor erred in submitting the question to the jury without testimony, and for this error the judgment must be reversed, and a new trial granted.

Judgment reversed.

RICHARD LEDBETTER, ADMINISTRATOR OF REUBEN SEARES. v. ISRAEL MORRIS.

Where a note is agreed to be discharged and satisfied, by the acceptance of note upon other persons, which are alleged to have been insolvent, and to have been imposed upon the plaintiff, by the fraudulent misrepresentations of the agent of the maker of the original note, in a suit against such agent for the fraud, a receipt, given at the time of this transaction against the note agreed to be delivered up ought to be produced on the trial, and evidence of its contents in the first instance is not admissible.

ACTION on the case for a fraud in passing insolvent notes, tried before his Honor Judge CALDWELL, at the Fall Term, 1853, of McDowell Superior Court.

This was an action on the case to recover damages for passing to the plaintiff's intestate notes on certain individuals whom he knew to be insolvent, and whom he represented as solvent. The plaintiff's intestate had a note on Lewis, Green and Bright, for

$327, upon which he had brought suit by attachment, and which, at the time spoken of, was in the Clerk's Office, at Rutherfordton. The defendant, at the instance of Lewis, went to the house of the plaintiff's intestate, carrying with him these and other notes, furnished by Lewis, amounting to $1000, all on insolvent persons, and proposed to him to take certain notes on other persons, in lieu and discharge of the one owing him, and by falsely representing these notes to be good, and on solvent persons, prevailed on him to make the trade. On this arrangement being agreed upon, the plaintiff's intestate executed a receipt against the note, which he agreed to give up, and on the trial was proceeding to give parol evidence of the contents of such receipt, without notifying the defendant to produce it or accounting for it, when the same was objected to, but admitted by the Court. To which defendant excepted.

Verdict for the plaintiff, and appeal by the defendant.

J. Baxter, and *Gaither* for plaintiff.
Bynum and *W. W. Woodfin*, for defendant.

NASH, C. J. On the trial of this case below, the plaintiff was permitted to give parol evidence of a receipt, without notice to the defendant to produce it, or otherwise accounting for it; in this there is error. The case has been likened to a receipt for the payment of money. In such case it has been held, that the receipt is not conclusive against him who gave it; that he may show he never received it. STRATTON v. RESTALL AND OTHERS, 2 Term. 366; for parol proof is of as high nature as the receipt. SOUTHWICK v. HAYDEN, 7 Cowen 335; Starkie on Ev. 1044. A mere receipt, not under seal, cannot operate as an estoppel, but is mere evidence of the fact to be submitted to the jury, and capable of being rebutted by the other circumstances of the case. ALME v. GEORGE, 1 Camp. 392; SAMPSON v. COOKE, 7 E. C. L. R. 205; LATOUR v. BLAND, 3 E. C. R. 392; Star. on Ev. 1275. These cases show, that where a receipt for the payment of money is given, the payment may

be proved without the production of the receipt, and if produced, it may be contradicted by oral testimony. The receipt here is not for the payment of money, but is in the nature of a contract. The plaintiff's intestate held a note for $327 upon Lewis, Green and Bright, dated in 1841. In 1843, Lewis engaged the defendant to take to the intestate notes to the nominal amount of $1000, which he owned and held upon different persons, all of whom were insolvent. Several of these notes, to the amount of the one held by the intestate, he was induced to take from the defendant, upon his assurance the debtors were perfectly solvent and able to pay. Before that time, the intestate had commenced an action by attachment against the obligors on the note due him, and the note was then in the clerk's office. So that the parties were actually making a compromise, and we may well presume that its terms were set forth in the receipt. It is well settled, that when the terms of an agreement are reduced to writing, the document itself is the only evidence the law will recognise, so long as it exists. Star. on Ev. 1002. As this point decides the case for the present, we give no opinion upon the other and more important one.

There was error in the reception of the parol evidence objected to. The judgment reversed and a *venire de novo*.

PER CURIAM. Judgment reversed.

DOE ON THE DEMISE OF JOSEPH, JAMES AND W. R. FEIMSTER v. THOMAS McRORIE.

Where both parties in an action of ejectment claim under the same person, neither can deny the title of him under whom they both claim.

This rule is not excluded because one of the parties claims by sheriff's deed.

(GILLIAM v. BIRD, 8 Ire. 363; MURPHY v. BARNETT, 2 Murp. 251; S. C. Car. L. Rep. 105; LOVE v. GATES, 4 Dev. and Bat. 363; COPELAND v. SAULS, ante. 70; JOHNSON v. WATTS, ante. 228, cited.)

ACTION of Ejectment, tried before his Honor Judge SETTLE, at Spring Term, 1854, of Iredell Superior Court.

The plaintiff's declaration contained two counts, one on the demise of Joseph James, and the other on the demise of Wm. R. Feimster, each of which counts alleged the demise of two tracts of land, the one of one hundred and thirty-five acres, and the other of fifty-one acres. A deed in trust for the land in question, from James K. Feimster to W. R. Feimster, one of the lessors of the plaintiff, was offered in evidence, in behalf of the plaintiff, dated 17th of February, 1849. The plaintiff further offered in evidence a sheriff's deed for the same land, dated in August 1849, conveying the interest of James K. Feimster to the defendant, and showed that, at the time of bringing this action, the defendant was in possession.

The defendant assailed the deed in trust, as being fraudulent and void as to the creditors of the bargainor. He showed that he had obtained a judgment for a debt which J. K. Feimster owed him, at the date of the deed in trust; a levy, which was, however, after the date of the trust; a regular order of sale; a *venditioni exponas*, and a sale to himself.

To show that some of the debts mentioned in the deed in trust were fairly due and owing, a deed was produced in behalf of the plaintiff, from Joseph James, one of the lessors of the plaintiff, to J. K. Feimster, for the larger tract of land, and was offered for no other purpose. This deed, for the want of the words necessary to create a larger estate, conveyed but a life estate to the bargainee, and it was admitted that, before the suit was begun, he was dead.

It was insisted in behalf of the plaintiff, that the defendant, having taken the sheriff's deed for the land in question, as the property of J. K. Feimster, and showing no other title to it, he was estopped to deny it in this action.

For the defendant, it was contended, that the deed from James to J. K. Feimster, which had been put in by the plaintiff, showed the title out of the lessor of plaintiff, Wm. R. Feimster, the bargainor's life estate having ended before the deed in trust

was made. And he further contended, that, as to the other lessor, James, he must trace his title back, and show it out of the State.

His Honor reserved the question, whether the deed from James to J. K. Feimster was entitled to have the effect in law contended for by the defendant.

The other points in the case were disposed of without exception.

The jury, under the instruction of the Court, found a verdict for the plaintiff, and afterwards, his Honor, upon consideration of the point reserved, being of opinion with the plaintiff, gave judgment for him accordingly, and the defendant appealed to this Court.

Guion, for the plaintiff.
Boyden and *Mitchell*, for the defendant.

BATTLE, J. We understand the defendant's counsel to admit the general rule, that, when parties in an action of ejectment claim under the same person, neither can deny the title of him under whom they both claim. But they contend, 1st. That the rule does not extend to a defendant who claims as a purchaser at sheriff's sale; and, 2dly. That at least it does not apply where the plaintiff's lessor shows, himself, that the title is in a third person. We are not aware of any principle upon which the first objection can be sustained, and it is directly opposed by the case of GILLIAM v. BIRD, 8 Ired. Rep. 280, where the defendant claimed from a purchaser at sheriff's sale, and yet it was not pretended that the rule was excluded on that account.

The second objection is equally unsustained by principle and opposed by authority. In MURPHY v. BARNETT, 2 Murp. Rep. 251, (S. C. 1 Car. Law. Rep. 105,) which is the first reported case in which the doctrine was judicially settled, this very objection was raised and overruled. The subject has been so often discussed in several recent cases, that it is unnecessary for us to add anything more than the following extract from the

opinion in JOHNSON v. WATTS, decided at the last December Term, in Raleigh, and reported, ante. 228. That case is very much like this, so far as the objection under consideration is concerned, and it needs only the change of names to make the extract fit the case now before us: "The defendant, in a case like the present, can defend himself only by showing that he has a better title in himself than that of the plaintiff's lessor, derived either from the person under whom they both claim, or from some other person who had such better title. LOVE v. GATES, 4 Dev. and Bat. 363, and COPELAND v. SAULS, decided at the present term, (ante. 70.) It is not a case strictly of estoppel, but one founded in justice and convenience. Nor is the present a case of landlord and tenant, as the defendant's counsel has contended, where the landlord's title has expired, but depends upon the just and convenient principle above stated. As both parties derived title under William Mackey, who was once in possession claiming the fee, neither is at liberty to show that such title is not a good and subsisting one. Unless the defendant can show that he has in himself the outstanding title of Cherry's heirs, the lessor of the plaintiff must recover." (See also THOMASON v. KELLY, decided at last term at Raleigh, and not yet reported, ante. 375.) Here the defendant has offered no such proof, and the judgment in favor of the plaintiff must be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. JOHN WILSON *ET. AL.*

Where a party is taken on a peace warrant and bound to appear at Court, such Court cannot review the judgment of the magistrate below allowing costs.

MOTION to retax the bill of costs, heard at Spring Term, 1854, of Macon Superior Court.

The defendants were arrested on a peace warrant, at the instance of one William Tatham, and upon the hearing of the complaint before a Justice of the Peace, the defendants were ordered to be bound to the peace, and to be bound to the next term of Macon Superior Court, and they gave bonds accordingly. In the proceeding below, the constable who made the arrest had summoned a guard to assist him in making the arrest, and also in detaining the defendants in custody after being brought before the magistrate who tried the matter. The judgment of the Justice of the Peace was, that the defendants should pay the constable's charge for mileage, and for the services of the guard, as part of the costs, amounting to thirty dollars: also, that they should be bound to the Superior Court. On their appearance, it was ordered, that they should be discharged on their paying costs, to be taxed by the clerk. All the Court costs were taxed, which were paid by the defendants; but the costs for which the Justice of the Peace had given judgment were not included in the bill taxed by the clerk.

This was a motion to have the costs retaxed, with instructions to include those given below by the magistrate, to the constable and his guard.

Upon consideration of this motion, his Honor gave judgment for the costs, as asked for in the plaintiff's motion, and ordered an execution to issue therefor; from which judgment defendants appealed to this Court.

Attorney General, for the State.
Gaither and *J. W. Woodfin*, for the defendants.

PEARSON, J. We have no statute in reference to "peace warrants," and the proceedings under them depend upon the common law. Whether, in rendering his judgment, the Justice of the Peace was right in including, as a part of the cost against the defendant, the officer's charge for mileage, and for the guard, we do not decide; but we are clearly of opinion that it

was error in the Court below to include these items in its judgment.

The practice is, that any single Justice of the Peace, or a Judge may, upon probable cause, require a party to give security that he will keep the peace, and be of good behavior. This is done to prevent a breach of the peace, or the commission of an offence against the public, and also for the protection of the individual immediately concerned. To make it effectual, it must be done at once; consequently, there is no appeal from the action of the justice or judge; for that, by vacating the judgment, would defeat the object in view.

To guard against oppression, the obligation entered into to keep the peace, and to be of good behavior, is only till the next term of the Court, to be held for the county where the matter takes place, and the party is also required to enter into recognizance for his appearance at Court. Upon his appearance, the Court may discharge him, or may require him to give new security to keep the peace and be of good behavior, according to the facts as they appear upon investigation before it. But the Court does not review the judgment of the justice or judge, and consider whether it was founded upon sufficient ground or not, for it has answered its purpose, and is past. The proceeding of the Court is independent and unconnected with it, except so far as it constitutes the process by which the party has been brought in, and the judgment is necessarily confined to the Court costs; because the Court cannot give judgment and award costs for or against the party, in regard to the proceeding before the justice or judge, without looking into and reviewing the proceeding before that tribunal; which, as we have seen, it has no authority to do, and, of course, it can give no judgment in reference to it.

PER CURIAM. Judgment reversed; *scire facias* dismissed.

THOMAS CURTIS AND WATAUGA COUNTY v. MARSHALL MILLER.

The action for the penalty for fornication, under the act entitled, "Vice and Immorality," must be brought within ten days after the commission of the offence.

Appeal from the judgment of a Justice of the Peace to the Superior Court of Watauga tried before his Honor Judge DICK, at Spring Term, 1854, of that Court. Pleas, General Issue, Statute of Limitations, former judgment.

This was an action, originally brought against the defendant, and one Rhody Byers (with whom the act of fornication was alleged to have been committed) by warrant for the penalty of $2 50 each, under the act of Assembly entitled "Vice and Immorality," and a judgment being rendered by the magistrate, he alone appealed to the Superior Court, and upon the trial in the Superior Court, the defendant's counsel contended that the suit could not be brought after ten days from the time the criminal act was committed, and asked his Honor so to charge the jury, who declined the instructions asked for, but told them that the action was well brought after ten days. To which the defendant's counsel excepted. The jury found defendant guilty.

Rule for a *venire de novo*, for cause of exception above stated. Rule discharged, judgment and appeal.

Neal and *T. R. Caldwell*, for plaintiff.
Lenoir and *Gaither*, for defendant.

PEARSON, J. The warrant was for a penalty imposed for the offence of fornication, by the 119th chapter, section seventh, Revised Statutes, entitled "Vice and Immorality," "if any persons commit fornication, upon due conviction, each of them shall forfeit and pay $2.50 for each and every such offence, to be *recovered and applied* to the same use as the fines in this act." The defence was, that the information was not made within ten

days after the commission of the offence. His Honor was of opinion that the information might be made after ten days. There is error.

It is admitted, that in regard to the use to which the penalty is to be applied, this section has reference to the previous sections; but it is insisted, that there is no such reference in regard to the manner in which the penalty is to be recovered. We think it clear, that a reference is made to the previous sections, both in regard to the manner in which the penalty is to be recovered, and the use to which it is to be applied: if so, according to the 5th section, the information must be made within ten days after the offence is committed. But suppose there is no such reference in regard to the manner in which the penalty is to be recovered, then there is no provision made for the recovery of the penalty, and the plaintiff has no authority to sue for it as common informer: so, *quacumque via*, take it either way, he is not entitled to recover. There must be a *venire de novo*.

Judgment reversed.

ROBERT THOMAS v. JAMES J. SUMMEY *ET. AL.*

Where a sheriff takes a bond from his deputy to *indemnify, etc., during his continuance in office*, such bond only pertains to the term of the principal's office then current, and cannot be held to embrace defaults which occur during the succeeding term.

(BANNER v. MCMURRAY, 1 Dev. 218, cited and approved.)

ACTION of Debt on a penal bond, tried before his Honor Judge DICK, at the Spring Term, 1854, of Henderson Superior Court.

Plaintiff was sheriff of the county of Henderson for two official terms, embracing four years, to wit, from September 1840, to September 1844, and appointed the defendant, James

J. Summey, his deputy, and took from him a bond dated day of February 1842, with the other defendants as his sureties, conditioned, " that he shall well and truly collect and pay over all sums of money that shall or may have been collected, to the proper person, and all fines and amercements, and all taxes that shall or ought to have been by him collected as deputy sheriff *during his continuance in office*, and shall well and truly *indemnify* the said Robert Thomas, sheriff as aforesaid, from all fines, and amercements, and liabilities, which he, the said Robert Thomas, may be subject to by reason of any act or illegal process of the said James J. Summey, and in all things well and truly demean himself as deputy sheriff."

On the 27th of November, 1842, the defendant Summey, as deputy sheriff, collected eighty dollars from one Allen for one Ramsour, which he failed to pay over, and the sheriff was sued for the same on his official bond, given Sept. 1842, (the beginning of his second term,) and the money was recovered out of him. For this default and consequent loss, plaintiff brought this suit, and the only question in the case was, whether defendants are liable upon this bond of the deputy to his principal.

The Court below held, that they were liable, and so charged the jury, who, under these instructions, rendered a verdict for the plaintiff.

Motion for a new trial. Rule discharged; judgment and appeal.

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

NASH, C. J. The case of BANNER v. MCMURRAY, 1 Dev. 218, which was decided in 1827, established the principle, that where a sheriff appointed a deputy, who gave bond for his faithful conduct during his continuance in said appointment, and the sheriff was reappointed, and the deputy continued to act under him for several years, without giving any other bond, that the bond given was restricted to the first year, for the deputation then necessarily expired, and Judge HENDERSON, in his opinion,

expressed the doubt, whether the deputation would not so expire, even if it contained words importing a substitution in future years. But he treats it as perfectly certain, that it is so when the words are general. It is urged, however, that there is a difference between the words used in McMurray's bond, and in the one now under consideration. The words in the former are during *his continuance in said appointment;* in the present one, they are *during his continuance in office.* We see no substantial difference in the expressions: both relate to the duties to be performed by the deputy, during the time for which he is appointed. It matters nothing by what words the obligation is created: the principle is, that the deputation is necessarily confined to the official term of the officer appointing; for the reason that the latter could confer no power he himself did not possess. In McMurray's case, the decision is put upon the general wording of the bond. The plaintiff's office of sheriff commenced in September 1840, and extended through two terms, the first ending in September 1842. The bond executed by the defendant Summey, on which the action is brought, is dated in February 1842. In November 1842, a note was placed in his hands for collection, the money due upon it was collected by him, and appropriated to his own use. This money was recovered from the plaintiff, and he now seeks to recover it from the defendant, under his bond of February. The sheriff's then official term expired in September 1842, and, though he was reappointed, the bond, given by the defendant, did not extend beyond the time for which he was legally deputised. His continuing to act after that time, with the consent of the sheriff, could have no effect on the construction to be put on his bond.

There is error. Judgment reversed, and a *venire de novo* awarded.

Judgment reversed.

GEORGE L. CAMPBELL v. THOMAS J. BARNHILL *ET. AL.*

A Court has the power to allow an amendment in a former proceeding, so so to insert the names of infant heirs, in the order appointing them a guardian *pendente lite*, and in the *scire facias* issuing against them.

The exercise of the Court's discretion, in making such amendment, is not subject to be reviewed by this Court.

THIS was a petition brought in the County Court of Mecklenburg, to correct and amend a record of that Court, and was brought to the Superior Court of that County by appeal, and tried at the Spring Term of that Court, his Honor Judge SETTLE presiding.

The petition and affidavit filed, embracing the specifications, stated that one Thomas Jamison, as administrator of one John Barnhill, filed his petition in the County Court of that county, at May Term 1832, against the children and heirs at law of Barnhill, alleging that he had paid large sums out of his own funds, for the estate of his intestate, beyond the amount of assets that had come to his hands, and praying that the real estate of the said Barnhill might be sold to re-emburse him in such amount. Whereupon, the Court appointed "Isaac Alexander, Clerk of the Court, guardian *pendente lite* of the heirs of John Barnhill," who were all then infants, and the entry of such appointment was made in the case, in those words; that the cause was referred to the clerk, who reported a balance due the petitioner, which report was confirmed, and a judgment was entered for eighty-five dollars, for which an execution issued, and levied on a tract of land which descended to the heirs above mentioned; that Jamison bid off the land, and sold it to this petitioner, who has had the occupation of it for eight years, and has made valuable improvements on it; that, in consequence of the defect in the record of appointment of the guardian to the infant defendants, in not naming them, he is advised that the title to his land is defective, and that he may suffer great wrong and inconvenience, and he prays that the record may be amend-

ed in that particular, *nunc pro tunc*. There was no answer or formal plea to the petition. The case sent to this Court states that there was no evidence offered of the facts alleged in the petition, and no proof that the defendants were the heirs of Barnhill, nor any proof that the plaintiff was a purchaser from Jamison.

The defendants contended that the record could not be corrected, without full proof of all the facts alleged, and that it could only be corrected at the instance of Jamison or his heirs.

But his Honor being of opinion with the plaintiff, affirmed the decision of the County Court, allowing the record to be amended, as prayed for in the petition, from which judgment the defendants prayed an appeal to this Court.

Osborne, *Wilson* and *Bynum*, for plaintiff.
Boyden, for the 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 that power, supposing the Court below to have it, we have no concern. PHILLIPSE v. HIGDON, Bus. 380. Upon the allegations set out in the affidavit of the petitioner, and because the defendants did not deny, nor take issue thereupon, the amendment was allowed to be made in the Court below. The amendment to be made was in the process after the determination of the suit, not so as to change it in substance, but merely to make it more full by *setting out the names of the heirs*, the *sci. fa.* having issued against the heirs of John Barnhill, without naming them. There is no question as to the power of the Court to allow this amendment, being a formal one merely, and with the exercise of discretion, we have no concern.

Judgment affirmed.

DOE ON THE DEMISE OF JAMES F. GILMER v. SOLOMON EARNHARDT.

A provision in a deed in trust, for the postponement of the sale of the property for nine months, and then to be sold on a credit of six months, is not a fraud in law, so as to require of the Court to declare it void from its face.

ACTION of Ejectment, tried before his Honor, Judge SETTLE, at the Spring Term, 1854, of Cabarrus Superior Court.

The question upon which the opinion of the Court proceeds, arises, upon a deed of trust, under which the defendant claimed title to the premises in question, which was attacked as being fraudulent and void as to creditors; this deed was dated the 28th of January, and the sale was to be on the 1st day of November next, on a credit of six months. The counsel for the plaintiff asked his Honor to instruct the jury that the long postponement of the sale, and then the credit of six months, of themselves, authorized the presumption of a fraudulent intention on the part of the maker of the trusts, and made it void in law.

But his Honor declined so to charge, and instructed them that any open provision or stipulation whereby the debtor provided for any enjoyment and use of the property, or any benefit or advantage to himself from the Trustee or the creditors, as a home for himself or his family, would be fraudulent, but he did not perceive anything of that kind in the deed, and did not feel authorized to say that, upon its face, it created a presumption of fraud. Plaintiff excepted to this part of the charge.

He went on to explain the principles, in other respects, governing the case, to which there was no exception.

Verdict for the defendant. Motion for a *venire de novo*. Rule discharged and appeal.

Wilson, *Craige*, and *Bynum*, for plaintiff.
Osborne, *Boyden*, and *R. Barringer* for defendant.

BATTLE, J. In declining to give the instruction which was

prayed by the plaintiff's counsel, his Honor was fully supported by the authority of the cases of CANNON v. PEEBLES, 4 Ired. Rep. 204; LEE v. FLANNIGAN, 7 Ired. 471; YOUNG v. BOOE, 11 Ired. 347; HARDY v. SKINNER, 9 Ired. 191, and HARDY v. SIMPSON, 13 Ired. 132. The deed in trust contains no stipulation that the debtor should retain possession of and use the property conveyed until the sale; and it might well be, that the postponement of the sale, for nine months after the deed was executed, and the provision for selling upon six month's credit, instead of for cash, was intended to operate, and did operate for the benefit of all the creditors. Still, if the deed was made with the intention to hinder, delay or defraud the creditors, of the bargainor or any of them, it was void; and upon that question, the plaintiff has no just cause to complain of the instructions which his Honor gave to the jury. They were as favorable to him as he had any right to require; and whether they were not more so, it is unnecessary for us to decide.

The whole subject has been so fully, as well, and so recently discussed in the cases to which we have referred, that we deem it useless to add anything more.

The judgment is affirmed.

INDEX.