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REPORTS

OF

CASES AT LAW

ARGUED AND DETERMINED

IN THE SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM, 1854, TO AUGUST TERM, 1855,
BOTH INCLUSIVE.

BY HAMILTON C. JONES.

SALISBURY:
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1855.

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FREDERICK NASH, CHIEF JUSTICE.
HON. RICHMOND M. PEARSON.
HON. WILLIAM H. BATTLE.

JUDGES OF THE SUPERIOR COURTS.

HON. JOHN M. DICK,
" JOHN L. BAILEY,
" MATHIAS E. MANLY,
HON. DAVID F. CALDWELL.
" JOHN W. ELLIS,
" ROMULUS M. SAUNDERS,
HON. S. J. PERSON.

ATTORNEY GENERAL.

J. B. BATCHELOR, ESQUIRE.

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TO THE NAMES OF CASES,

VOL. II.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1854.

W. W. GRIFFIN, ADM'R., *vs.* JOHN BLACK.

Where the action is for the detention of a written instrument, it is not necessary to give notice to the defendant to produce the paper on the trial, previously to proving the contents of such paper, as the suit itself is sufficient notice.

This was an action of DETINUE, tried before his Honor Judge BAILEY, at the special Term of Pasquotank Superior Court, December, 1854.

The plaintiff declared for the detainer of a policy of insurance upon the life of James G. Scott, insured by the New York Insurance Company, being policy No. 930, for $3,000.

In the course of the trial below, the plaintiff offered parol proof of the contents of the policy of insurance, which was objected to by the defendant, but admitted by the Court. Exception by the defendant's counsel.

Verdict for the plaintiff.

Rule for a *venire de novo* for the cause of exception above mentioned: rule discharged: Judgment and appeal.

Martin, for plaintiff.
Heath, for defendant.

NASH, C. J. We had supposed the rule of law to be well

settled that when an action is to recover the possession of a special written instrument, or the paper is itself the foundation of the action, the bringing of the action is notice to the defendant and none other is required. It *is* a general rule, that where a written instrument is in the hands, or power of the defendant, the plaintiff, in order to avail himself of parol evidence of its contents, or to give a copy in evidence, must give notice to produce it on the trial, and must then prove its existence and its being in the possession or under the control of the defendant: *Smith* v. *Sleap*, 1st Car. and Kir. 48.

To the first portion of the rule there are three exceptions stated by Mr. Greenleaf, in his treatise on Evidence, S. 51, vol. 1st: *First*: Where the instrument to be produced and that to be proved are duplicate originals. *Second:* Where the instrument to be produced is, itself, a notice; as a notice to quit the possession of land; or a notice of the dishonor of a bill of exchange. *Third:* Where from the nature of the action, the defendant has notice that the plaintiff intends to charge him with the possession of the instrument: as in TROVER for a bill of exchange or note of hand. In either of these cases is a notice to produce the instrument required, necessary; because the action itself is deemed in law sufficient to put the defendant on his guard and to prevent surprise. This case falls under the third exception. The action is brought for the detainer by the defendant of a policy of insurance, the property of the plaintiff's intestate: and it was proved that it was in his possession as the agent of Scott, the intestate, at the time of the demand made by the plaintiff. It was not necessary, therefore, for the plaintiff to give the defendant notice to produce the instrument, and his Honor committed no error in admitting the evidence complained of.

Judgment affirmed.

PER CURIAM.

WHITE & LAVERTY *vs.* WM. W. GRIFFIN, ADM'R.

The Administrator of one who was indebted to him on bills of exchange payable to him as "Cashier" of a bank, has a right to retain against creditors, not of higher dignity, although such bills were due from the intestate as copartner in a firm and the assets were of the intestate's individual property.

THIS was an action of DEBT, tried before his Honor Judge BAILEY, at the Special Term, December 1854, of Pasquotank Superior Court.

The plaintiff declared on an open account, and the following special case was submitted by agreement of counsel for the judgment of the Court: "The defendant, at the commencement of this suit, and yet is the administrator of Isaac Casey, deceased, and had in his hands, as such, assets of his intestate's individual property, to an amount larger than the plaintiff's demand. The intestate, at the time of his death, was one of the firm of Casey & Davis, which firm was, at the time of Casey's death, and still is, indebted to the defendant, who is the cashier of the Farmers' Bank, on bills of exchange, payable to him as cashier, and over due to an amount greater than the amount of assets that has come to his hands and for the satisfaction of which he claims to hold these assets under the pleas of 'retainer and debts of higher dignity,' and it is agreed that if the Court should be of opinion that the defendant is entitled to retain the assets, for the debts above mentioned, he should give judgement for the defendant, otherwise for the plaintiff to the amount of the debt sued for."

And upon consideration of the case, his Honor being of opinion with the defendant, gave judgment accordingly, and the plaintiff appealed to this Court.

Martin, for plaintiff.
Heath, for defendant.

BATTLE, J. The objection, that the defendant cannot retain because the debt was due from his intestate to him as "cashier of the Farmers' Bank," is clearly untenable. He is in law the creditor, and any suit to be brought for the debt, must be

in his individual name and it matters not, in a court of law, for whose benefit he is to hold the money when collected. *Horah* v. *Long*, 4 Dev. & Bat. Rep. 274. The only difficulty is in the question, whether the defendant can retain the proceeds of the separate assets of his intestate for a partnership debt as against the plaintiffs who are separate creditors of the intestate? But that difficulty is rather apparent than real. If Casey had been living, the defendant could undoubtedly have sued him alone under the provisions of the 89th sec. of the 31st ch. of the Revised Statutes, (See *Greer* v. *Fletcher*, 1 Ire. 417,) and upon obtaining judgment might have had his property sold under an execution. So upon his death, if any other person than the defendant had taken out letters of administration upon his estate, the defendant might have sued him and enforced the collection of the debt out of the assets in his hands. But as he administered upon the debtor's estate himself, he could not sue, and for that reason the law concedes to him the right of retainer. The right to sue another person is clearly given by the 90th sec. of the Statute referred to, (see *Smith* v. *Fagan*, 2 Dev. Rep. 298,) and the principle of retainer follows as a necessary consequence when the creditor becomes himself the administrator. If the plantiff has any rights against the defendant, they certainly do not exist in a court of law.

Judgment affirmed.

PER CURIAM.

STATE TO THE USE OF THOMAS D. WHITE AND WIFE *vs.* EDWARD F. SMITH, *et al.*

Where a Clerk and Master took money belonging to his Office and used it in speculation, the sureties of the bond for the term, then current, are liable: notwithstanding the amount invested had been paid to him by his copartner in trade after the time covered by that bond had elapsed, and a new bond had been given.

Such a return of the funds could only be considered in mitigation of damages,

and to have that effect it should be shown that the funds were specifically appropriated to the payment of those entitled to them.

Where the sureties on the second bond were erroneously sued and the money forced out of them, the judgment in that suit is no bar to the action against the sureties who were actually liable; and where the judgment had been assigned to the use of the sureties who had wrongfully paid, it will not be allowed to go in mitigation of damages.

Action of DEBT, tried before his Honor Judge BAILEY, at the Spring Term, 1854, of Perquimons Superior Court.

The bond sued on was executed by the defendant Smith, as clerk and master in Equity, and the other defendants, as his sureties at Fall Term, 1846, of the Court of Equity of the county of Perquimons, and is in the usual form. At Spring Term, 1848, it was ordered that the clerk and master lend out the fund in controversy, (the proceeds of the sale of a tract of land) and pay the interest to one Richardson during the joint lives of himself and wife, and if she survived, then to her, during her life. At the Spring Term, 1850, it was decreed that the clerk and master pay the fund to the relators upon bond being given to secure the interest annually to Richardson and wife, as directed in the former order. The relators executed the bond and called upon the defendant, Smith, for the fund. He failed to pay, and therefore the relators brought suit upon the bond of 1848, and obtained judgment against Smith and his sureties in that bond. Smith had become insolvent, and the sureties paid the amount of the judgment to the relators and took an assignment thereof. This action was then brought on the bond of 1846. The breach assigned is, that Smith had, in December, 1847, taken the fund out of the office and applied it to his own use. It was proved on the part of the plaintiff that he had used the fund in the purchase of a number of horses upon speculation; and it was proved on the part of the defendants that in July, 1848, he had a settlement with his partner in the horse dealing, to whom he had handed the money and received the amount back from him, a part in cash, and the balance in good notes upon individuals to whom he had sold horses. There was no evidence that Smith had returned either the money or the notes to his office: on the

contrary, there was evidence tending to show that he had not done it. His Honor intimated an opinion that the plaintiff could not recover; whereupon, a nonsuit was submitted to, and an appeal taken.

Smith, for plaintiff.
Heath, for defendant.

PEARSON, J. The ground upon which his Honor based his opinion is not stated: In the argument two grounds were taken to sustain it.

It is clear that the withdrawal of the fund from the office, and the application of it to his own use by Smith in December, 1847, was a breach of the bond of 1846. But it is said that this breach was repaired, and the cause of action extinguished by the fact, that in July, 1848, Smith received back the whole amount of the fund in cash and good notes.

If, after the misapplication, the fund had been actually paid over to the relators, that fact would have repaired the breach, to the extent of mitigating the damages to a mere nominal amount. It may be, that if the fund had been returned to the office and set apart specifically for the use of the relators, that fact would have mitigated the damages. But the simple fact, that Smith afterwards received back the amount of the fund in "cash and good notes," cannot have the effect of extinguishing the cause of action, nor does it in any way tend to mitigate the damages. It is the same to the relators whether Smith squandered the money in the first instance, or received it back and afterwards squandered it: The success of his first speculation was to them a matter of perfect indifference. The misapplication of the fund was a breach of duty on the part of Smith, and gave the relators a cause of action: His receiving back the fund did not amount to retribution; of course it could not amount to an extinguishment of the cause of action, and the injury stands unmitigated.

It is said, in the second place, that the proceedings had in favor of the relators on the bond of 1848, is a bar to the present action: either under the plea of "former judgment,"

or as a satisfaction of the damages. To sustain the plea of "former judgment," it must be for the same cause of action, and between the same parties. That action was upon the bond of 1848, and the parties were not the same. If the judgment on the bond of 1848, had been paid off and satisfied, so as to be extinguished, it may be granted that this action could not have been maintained, in as much as the relators by it, seek to recover damages for, and in respect of the same subject matter, in regard to which damages had been recovered in the former action, and the relators would not be entitled to receive the damages a second time: but that consequence was guarded against by having the judgment assigned over: The effect of which is to prevent it from being satisfied or extinguished, and to keep it outstanding for the benefit of the surety who advanced the money to the trustee to whom it was assigned, so as to make the transaction a purchase of the judgment and not a satisfaction. This contrivance (if you please so to call it) by which sureties are enabled to protect themselves, and to take the benefit of all the liens and securities, and remedies to which the creditor has the right to resort, has been so long, and so often sanctioned by the Courts, that it has become settled law, and cannot now be drawn in question.

This case is a striking instance, to show that the practice of taking assignments, so as to prevent bonds and judgments from being satisfied or extinguished, is in furtherance of justice. The fund was withdrawn from the office in 1847: there is no evidence that it was ever returned, and had the sureties upon the bond of 1848, been as well advised before, as they were after the judgment was obtained against them, no such judgment would have fallen, in the first instance, upon the present defendants, who are the sureties of 1846, and were bound at the time of the default of Smith. Justice requires that they should still bear the loss, to the relief of sureties who were not liable at the time of the breach.

Venire de novo.

Per Curiam.

STATE TO THE USE OF DANIEL RICHARDSON & WIFE *vs.* E. F. SMITH, *et al.*

(The first point in this case is the construction of the decrees of the Court of Equity, and cannot well be condensed.)

Where a Clerk and Master in Equity misapplies a fund of which one is entitled to the annual interest during his life, and his wife afterwards, during her life, in case she survived:—*Held*, that the husband and wife can recover on the official bond for the year current at the date of the misapplication to the extent of the interest.

ACTION of DEBT, tried before his Honor, Judge BAILEY, at the Spring Term, 1854, of Perquimons Superior Court.

The question of the defendants' liability on the bond of 1846, which arose also in the case having been disposed of in the foregoing case of White v. Smith, another question remains to be considered in this case; what interest the relators have in the fund for which they are liable, and their right to sue for the same? The feme plaintiff was the widow of John A. Morris, whose land was ordered to be sold, and as such was entitled to a share of the fund to the value of her dower, which she sold to one Brooks: but she became further entitled to an interest in the fund, for her life, by the birth of a posthumous child and its death, after the petition was filed for the sale of property. After the filing of the petition she intermarried with Daniel Richardson.

The following orders were made in the court of Equity in relation to this interest of Mrs. Morris, now Mrs. Richardson, viz, at Spring Term, 1848: "It appearing that the money was paid into Court (ordered) that title be made."

At the same term (Spring Term, 1848) it was "decreed that the master pay over to G. W. Brooks the amount decreed to the petitioner Elizabeth, in lieu of dower, and that the master lend out the residue claimed by the said Elizabeth C. and pay over the interest annually during the joint lives of Richardson and his wife to the said D. Richardson, and should the said Elizabeth C. survive the said Daniel, then to pay over the interest annually, during her life, to the said Elizabeth."

At Spring Term, 1850, the final decree was made in the cause, as follows: "It is ordered, adjudged and decreed, that the clerk and master in Equity collect all the residue of the sales of the lands of John A. Morris, deceased, and after paying out of the said fund, all the costs that have been taxed by order of this Court in this cause, that he pay over the residue to Thomas D. White, who, with his wife Mary, as heir at law of John A. Morris, deceased, is entitled to one undivided half part of the said funds: and as the *cestui que trust* in an assignment to J. C. B. Ehringhaus, by Mordecai Morris, the other heir at law of John A. Morris deceased, is entitled to the other undivided half of the said fund, upon the said Thomas D. White executing his bond payable to the clerk and master in the like sum that he may pay over to the said White, conditioned for the payment annually unto Daniel Richardson of the interest at the rate of six per cent per annum upon such sum as may be, by virtue of this decree, paid to him, said White, for and during the joint lives of Daniel Richardson and his wife Elizabeth C., and unto Elizabeth C. Richardson for and during her natural life if she should survive her said husband."

An amount sufficient to cover the interest accruing between the Spring and Fall Terms of 1848, was paid by Smith to Richardson.

The notes taken for the sale of the land by the master, bore interest from January, 1846.

The breach assigned, is the misapplication of the interest which had accrued upon the sale notes up to Spring Term, 1848, and the misapplication of the principal fund in which the relators are interested, to the extent of the interest which would afterwards accrue thereon, during the life of Mrs. Richardson. His Honor intimated an opinion that plaintiffs could not recover; whereupon, they submitted to a nonsuit, and appealed.

Smith, for plaintiffs.
Heath, for defendants.

PEARSON, J. The ground upon which his Honor based his opinion is not stated. In the argument, besides the two grounds taken to sustain it which were taken and have been disposed of in the case of the State to the use of White v. Smith, delivered at this Term, (ante 4) a third ground was taken: that by the decree at Spring Term, 1850, the interest which had accrued upon the fund as well as the fund itself, was directed to be paid over to White; so that the cause of action in regard to the interest, as well as the principal, vested in him: and Richardson and wife must look to him for the interest.

The decree is expressed in very general terms, but taking it in connection with the former orders, and the rights of the parties as declared and settled, there can be no doubt as to the fact that it does not include the interest which had accrued, and it is evident that it was worded upon the supposition that the interest had been, or ought to have been paid over to Richardson and wife. White had no right to receive, and had no pretence of claim to such interest. He was only entitled to the principal, subject to the right of Richardson and wife to have the interest during the life of Mrs. Richardson. The bond which White was required to give was to secure the annual payment of the interest which might accrue, and has no reference whatever to the interest which had already accrued and in which White had no concern. So as White has a cause of action for the misapplication of the principal which belonged to him, subject to the right of Richardson and wife to have the interest during her life, the latter upon the same grounds, have a cause of action for a misapplication of the interest which had accrued at the time of such misapplication, and constituted part of the fund so misapplied and drawn from the office: and also for the misapplication of the principal fund in which they were interested to the extent of the interest.

Venire de novo.

PER CURIAM.

WILLIAM E. MANN *vs.* T. HUNTER, *et al.*

The assignment of a bail bond, by the administrator of a Sheriff, passes no such interest in it as to entitle the assignee to maintain an action in his own name against the bail.

SCIRE FACIAS to subject bail, tried before his Honor Judge DICK, at the Fall Term, 1854, of Pasquotank Superior Court.

The bail bond was in the usual form, signed by the defendants as the bail of one Hendrickson, payable to Joshua A. Pool, Sheriff of Pasquotank county, and after his death assigned over to the plaintiff (who was the plaintiff in the former suit) by J. W. Hinton, the administrator of Pool, without affixing a seal to his name.

At the return Term of the process, the defendants pleaded "that the bond was not assigned," "assignment not under seal;" and it was contended by his counsel that the assignment by the administrator of the Sheriff was invalid, and conferred no right upon the plaintiff to bring this suit.

The case was submitted for the judgment of the Court upon the facts above stated by agreement of the counsel, and his Honor, upon consideration, being of opinion in favor of the defendants, the plaintiff submitted to a nonsuit, and appealed to this Court.

Smith and *Pool*, for plaintiff.
Heath and *Martin*, for defendants.

NASH, C. J. The decision of the question presented in this case, is governed by the second sec. of the Act of 1836, ch. 10. At common law, when the Sheriff arrested the body of a defendant on civil process, he was bound to take a bond for his appearance at the return day of the writ, and the defendant was then bound to perfect his bail by giving bail to the action. The former was made payable to the Sheriff, as it was taken for his security, and the latter to the plaintiff in the action. The Sheriff might assign the bail to the writ, to the plaintiff; but by the law was not bound to do so. If he did assign it,

the assignment conveyed to the plaintiff no legal interest in it, for if he sued upon it, the action was in the name of the Sheriff, and he being the plaintiff at law, could at any time dismiss the suit. To remedy this evil, the Statute of the 4th and 5th Anne was passed, which enacted—"that the Sheriff at the request and at the cost of the plaintiff, or his attorney, *shall* assign to him the bail bond by endorsing the same, and attesting it under his hand *and seal*, in the presence of two or more credible witnesses, &c." It then provides, that upon a breach, the plaintiff may bring an action in his own name. In this State but one bail bond is given by a defendant, and that embraces both bail to the writ and to the action. By the first section of the Act above referred to, it is made the duty of a Sheriff when he arrests a defendant to take such a bail bond and to return it with the writ; if he does not, he makes himself special bail. By the second section, it is made the *duty* of the returning officer to assign the bond to the plaintiff in the action. It enacts that "all bail bonds, returned to any of the Courts, &c., *shall* be assigned by the sheriff or coroner returning the same by an endorsement thereon, in the following form, (to wit,) &c." Such endorsement is required to be under the *hand and seal of the officer*. When so assigned, the plaintiff in the action may sue upon it in his own name, and after his death, it may be put in action by his executors or administrators. But to give the assignment this effect, it must be made by the returning officer: for though the section, which we are considering, directs the assignment to be made to the plaintiff, his executors and administrators, yet the power to make it is, under the Act of 1836, personal to the officer; it is to be under his *hand and seal*, and he is directed, in the first section, to return the bond with the writ; and then is the time, if he wishes to avoid becoming special bail, to perform this duty. The only substantial difference between the Statute of the 4th and 5th of Anne, and our Statute upon this point is, that the former requires the assignment to be attested by two or more witnesses; ours requires no attestation: Under the Statute of Anne it soon became a ques-

tion, whether the assignment could be made by any one but the returning officer, and it is now settled in England, that it may be made by an under sheriff or by a clerk in the sheriff's office. In Fitzherbert's Natura Brevium, 1st vol. 266, it is said an under sheriff may, by virtue of his office, be included in acts of Parliament, though not expressly named by virtue of the 25th of Edward the 3rd, ch. 17. In *Kitson* and *Fagg*, 1st Sh. 60, it was decided that an under sheriff might assign a bail bond in the name of the high sheriff, "it having been "the constant practice ever since the Stat. of Anne, but if the "assignment was neither by the high sheriff nor by the under "sheriff, it would not be good." In that case the assignment was by the under sheriff's clerk. But in the case of Harris vs. Ashley, 1st Selwyn's nisi prius, Lord Mansfield was clearly of opinion that the seal of the deputy sheriff's office being affixed to the assignment, it was good, 4th Camp. 36, *Middleton* v. *Sandford*. These cases show that in England the assignment must be made, either by the sheriff himself, or by his deputy, affixing the seal of the proper office. Petersdorf on Bail, p. 221, says, "if the sheriff die before he assigns the bond, the plaintiff must, as in common law, sue in the name of the sheriff, as the executors appear to have no authority to assign it, that is, so as to enable the assignee to sue on it in his own name." In the case before us, the sheriff took no bail bond when he executed the writ, the one he did take was at a subsequent stage of the proceedings, which was not assigned by him, but by his administrator after his death, nor did he offer any seal. His Honor decided that the plaintiff could not maintain the action. In this opinion we concur. There is no error in the judgment of the Superior Court, and it is affirmed.

Judgment affirmed.

Per Curiam.

STATE ON THE RELATION OF SUSAN ADAMS vs. BRYANT H. PATE, JR.

Where a defendant in a bastardy proceeding is acquitted of the charge by a Jury, upon an issue submitted to them, he is not bound for the State's cost.

PROCEEDING under the acts concerning bastardy at Spring Term, 1854, of Wayne Superior Court.

The question made below was on a motion to tax the defendant with the whole costs after he had been acquitted upon an issue made up and submitted to the Jury. His Honor Judge CALDWELL, made the order that he should be so taxed, and the defendant appealed to this Court.

Dortch, for the State.

J. W. Bryan, for the defendant.

NASH, C. J. The question submitted in this case grows out of the bastardy laws, which are purely municipal regulations adopted to protect the public from the burthen, which would otherwise be thrown upon it. A bastard is called by the law *filius nullius:* A legal absurdity. With much more propriety he may be called *filius communis*, for if the real father cannot be discovered, and the mother be unable to support him, he becomes the son of every man in the community; every one of whom is bound to contribute to his support, until he is able to take care of himself by being bound out. The bastardy laws then are but municipal regulations, and the mode pointed out for subjecting the culprit is therefore not a criminal, but one in the nature of a civil proceeding. The community says to the marauder, you have no right to amuse yourself at the public expense: If we can catch you, we will not punish you, but we will compel you to do that, which every principle of honor, justice and humanity, bind you to do.

The charge of being the father of a bastard child is easily made, and sometimes it may be very difficult for the individual who ought to be the best informed on the subject, to satisfy her own mind who is bound for the paternity. The law,

therefore, with a praise-worthy attention to the public welfare, says to the individual charged, if you can show to a jury of twelve men, who are, to a certain extent, interested in fixing the fact on you, that you could not be the father, we will let you off and support the child ourselves.

To enable the person charged to avail himself of this reasonable and just proposition, the act of 1814, Rev. Stat. chap. 12, s. 3, 4, provides, that the defendant shall be entitled to have an issue made up to try the fact of his paternity. As the act was originally passed, the 2nd section directed that the trial of the issue should be at the cost of the defendant. In the Revised Stat., 1836, that section is omitted, and this provides, that if the jury shall, upon the trial of such issue, find that the person so charged is the father, he shall give bond, &c., and shall be liable for the costs of such issue—a clear expression of the Legislative will, that the defendant, if acquitted, should not be taxed with the costs of the State. The common law gave no costs, and by the general statute, no provision is made for their payment. In the case now before us, the defendant was declared by two successive juries not to be the father of the child of the relator, and his Honor, the presiding Judge, either overlooking the fact, that the 2nd section of the act of 1814 was repealed, or considering the proceedings of a criminal character, gave judgment against the defendant for the costs of the State; in this there is error. That the proceeding is not in its nature criminal: See *State* v. *Carson*, 2 Dev. and Bat. 370; *State* v. *Pate*, Bus. Rep. 244; *State* v. *Brown*, 1 Jones' Rep. 129.

Judgment is reversed as to the costs of the State.

JOHN THOROUGHGOOD *vs.* W. W. WALKER.

Where an agreement was to do three things of different degrees of importance and value, or pay twenty-five hundred dollars as *stipulated damages*, and the breach assigned is the not doing one of the things which was readily ascertain-

able in value, and was clearly less than the sum specified as damages, the stipulation was held to be a *penalty*.

ACTION of COVENANT, tried before his Honor Judge DICK, at the Fall Term, 1854, of Tyrrel Superior Court.

The plaintiff declared upon the following obligation, viz: "Know all men by these presents, that I, W. W. Walker, of the county and State aforesaid, for the sale of one half the schooner named James F. Davenport, of Edenton, made to me this day by John Thoroughgood, do promise, covenant and agree to pay for the said John Thoroughgood, one half of the debt due from said Thoroughgood, to Doyle, Durvin & Rudder, which is about six hundred and seventy-five dollars: and I, the said W. W. Walker, do further covenant and agree for the same consideration, to pay the note of seven hundred and twenty dollars, which was given by the said Thoroughgood, to Casey & Davis, and to which W. B. Etheridge and myself are sureties, as on reference to the said note will more fully appear. Now, if the said John Thoroughgood shall pay back to me, within three years from the date of this agreement, the sum of $675, together with the further sum of $720, and the interest on both amounts up to the time of the payment, then and in that case, I do promise, covenant and agree, to reconvey to the said John Thoroughgood, a title for one half of the schooner, named J. F. Davenport. And I, the said W. W. Walker, do further covenant and agree, to pay unto the said John Thoroughgood, the sum of twenty-five hundred dollars, as liquidated damages, in case of a failure on my part to comply with the terms of the above agreement. This 17th April, 1852."

The breach assigned was the non-conveyance of the schooner to plaintiff, at the end of the three years. The proof was, that before the expiration of the three years, the defendant sold the vessel to one Simmons, who repaired her and made her more valuable, but that at the time defendant parted with her, the half was not worth more than the amount plaintiff was to pay for the repurchase of her.

The plaintiff insisted, 1st, that the measure of his damages

was the sum of twenty-five hundred dollars stipulated in the written contract.

2nd. That he was at least entitled to the difference between the value of half the schooner at the end of three years, (i. e. after the improvements were made upon her) and the amount of the redemption money, and called upon the Court so to charge, but his Honor declined giving such instruction, and told the jury that the measure of damages was the difference between the value of one half of the schooner at the time of Walker's sale to Simmons, and the redemption money then to be paid with interest on that difference. Exception by plaintiff.

Under this instruction, the jury found a verdict for *six pence damages.*

Motion for a *venire de novo* for error in the instruction excepted to. Rule discharged. Judgment and appeal.

Gilliam and Winston, Jr., for plaintiff.
Heath and Smith, for defendant.

BATTLE, J. The bill of exceptions presents an interesting question of damages which has not hitherto been decided in this State. It has, however, been much discussed in England, and, after some conflict of judicial opinions, seems to be settled there upon just and equitable principles.

For the better elucidation of the subject, it may be proper to give a brief history of the manner in which the question came to be entertained in a Court of law: and to do this, we need only abridge the clear and accurate account contained in Mr. Sedgewick's Work on damages. (See chap. 16 of the 2nd edition.)

The obligation or bond of the English law is either a single one, in the form of a simple promise to pay money, under seal, or it has a clause appended declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part or condition of the bond is that which discloses the real nature of the contract, and contains its essence. The former

part is the *penalty*. Formerly, if the condition was not strictly complied with, as in regard to the payment of money on a certain day, the moment the day was passed, the penalty became the debt, and at law recoverable: and neither payment, nor tender after the day, would avail; because a condition once broken was gone forever. If the condition were to do any other thing than pay money and were not fulfilled, the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. In an action of debt upon the bond for a condition broken, the plaintiff recovered the penalty, and the action could not be relieved against either by payment or tender: no defense would avail but a release under seal. Hence the party was driven for relief to the Courts of Chancery, which interposed and would not allow the plaintiff to take more than, in conscience he ought: holding that the condition of the bond expressed the agreement of the parties, and that therefore, the defaulter should not be compelled to pay the penalty. This practice was followed by the common law Courts, which ordered the proceedings to be stayed upon the defendant's bringing into Court the principal, interest and cost. Finally, this discretionary power was confirmed by the Statute 4th Anne, ch. 16, sec. 12 and 13, which provided that in actions on bonds, with penalties, the defendant might plead payment after the day, or bring in the principal, interest and costs, and be discharged. This Statute has been enacted in this State, and forms the 106th and 107th sections of the 31st chapter of our Revised Statutes. By the Statute 8 and 9, Will. 3, ch. 2, sec. 8, (which forms the 63rd section of the same chapter of the Revised Statutes,) it had been declared not long before, "that in all actions, &c., upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed or writing certain, the plaintiff or plaintiffs *may* assign as many breaches as he or they shall think fit, and the jury upon the trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also dam-

ages for such of the said breaches so to be assigned, as the plaintiff, on the trial of the same, shall prove to have been broken." The words "*may* assign breaches," have been held to be imperative, and that a judgment obtained under the former practice would be erroneous, *Rose* v. *Rosewell*, 5 Term, Rep. 538.

These two Statutes have produced this result, that in the case of an agreement to do, or to refrain from doing, any particular act secured by a penalty, the amount of the penalty is in no sense the measure of compensation: and the plaintiff must show the particular injury of which he complains, and have his damages assessed by the jury.

But there is a class of cases, in which upon entering into an agreement, the parties, to avoid all future enquiries, as to the amount of damages which may result from the violation of the contract, may settle upon a definite sum, as that which shall be paid to the party who alleges and establishes the violation of the contract. In these cases, the damages so fixed upon, are termed *liquidated*, *stipulated* or *stated* damages. But even when this course has been adopted, the Courts both of Law and Equity will not always hold the definite sum named, as liquidated damages; but if from the words used, and the nature of the contract, they can infer that such was the intention of the parties, they will hold it to be a penalty. If from the nature of the agreement, it is clear that any attempt to get at the actual damages would be difficult, if not impossible, the Court will incline to give the stipulated damages which the parties have agreed on. But if, on the other hand, the contract is such, that the strict construction of the phraseology would work absurdity or oppression, the use of the term "liquidated damages," will not prevent the Courts from inquiring into the actual injury sustained, and doing justice between the parties. In the earlier cases on the subject, we may not perhaps be able to deduce any definite rule, but the later decisions will be found to establish the one, which we have stated, and which is extracted from Mr. Sedgewick's treatise. Without examining all the cases on the subject, we will refer to those cited by

the defendant's counsel, which we think are decisive in the case before us. In *Ashley* v. *Weldon*, 2 Bos. and Pul. 346, an agreement was entered into by the defendant, to perform for the plaintiff, at his Theatre, and attend all rehearsals, or pay the established fines for all forfeitures of any kind whatsoever, with a clause that either of the parties, neglecting to perform the agreement, should pay the other 200 pounds; the declaration averred a refusal to perform, and the defendant pleaded *non assumpsit.* On the trial a verdict was taken for 20 pounds, with leave to the plaintiff to enter a verdict for 200 pounds, if the Court should consider the agreement one in the nature of liquidated damages. Lord Eldon, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the Court, said, that he had felt much embarrassment in ascertaining the principle of the decisions, and that "this appeared to him the clearest principle; that where a doubt is stated, whether the sum inserted be a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty; though the mere fact of the sums being apparently onerous and excessive, would not prevent it from being considered as liquidated damages." It was held to be a penalty. *Kemble* v. *Farren*, 6 Bing. Rep. 141, was a case very similar to the last, differing from it, however, in the use of the terms "liquidated and ascertained damages, and not a penalty or a penal sum, or in the nature thereof." The defendant had agreed with the plaintiff to act as principal comedian at Covent Garden, and to conform to its rules; the plaintiff was to pay 3 pounds, 6 shillings and 8 pence, every night that the theatre should be open; and the agreement contained a clause that if either party failed to fulfil his agreement, or any part thereof, or any stipulation therein contained, such party should pay the other the sum of 1000 pounds, to which sum it was agreed that the damages should amount, and which sum was declared by the parties to be liliquidated damages, and not a penalty or penal sum, or in the nature thereof: The breach alleged was a refusal to act during

the second season, and the jury gave a verdict for 750 pounds. A motion was made to increase the verdict to 1000 pounds, on the ground that that sum was the amount liquidated by the parties. The motion was denied, and the reasons for it were clearly and explicitly stated by the Chief Justice TINDAL. This case was distinctly recognized by the court of Exchequer, in *Hamer* v. *Flintoff*, 9 Mees. and Wels. 678, where the sum named was held to be a penalty: PARKE, Baron, saying "the rule laid down in *Kemble* v. *Farren* was, that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by the way of damages for the breach of any of them, shall be construed as a penalty, and not as liquidated damages, even though the parties, in express terms stated the contrary. When parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute and unimportant, they must be considered as not meaning exactly what they say, and a contrary intention may be collected from the other parts of the agreement." The same rule was again sanctioned in the subsequent case of *Green* v. *Price*, 13 Mees. and Wels. 695, though for the reasons therein stated, it was held not to govern that case. The defendant there had contracted not to practice as a performer within a certain district, and to insure the performance of his agreement, had bound himself to the plaintiff, in the sum of 5,000 pounds, "as and by way of liquidated damages, and not of penalty." *Kemble* v. *Farren* was cited for the defendant, but the Court said, "where the deed contains several stipulations of various degrees of importance, as to some of which, the damages might be considered liquidated, whilst for others, they may be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the Courts have held it to be a penalty and not liquidated damages. But when the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty." This cause was affirmed on a

writ of error to the Exchequer chamber, when TINDAL, C. J., who had decided *Kemble* v. *Farren* was present. See *Price* v. *Green*, 16 Mees. and Wels. Rep. 346.

The principle of the rule has been recognized in the Supreme Court of the United States, and in the Courts of many of the States. See *Tayloe* v. *Sandiford* 7, Wheat. 13; *Dakin* v. *Williams* 17, Wend. Rep. 447; S. C. in Error 22, Wend. 201, and the cases in other States in a note to 419 page of Sedgewick on Damages, (2nd Ed.)

Let us now apply the rule, which we have thus deduced from the cases, to the one before us. The defendant in consideration of his purchase from the plaintiff of one half of the schooner, John F. Davenport, covenanted to do three things: 1st, to pay one half of the debt due by the plaintiff, to Doyle, Durvin & Rudder, such half amounting to $675: 2ndly, to pay off a note due from plaintiff to Casey & Davis for $720: and 3rdly, to permit the plaintiff to redeem the half of the vessel, by repaying these sums with interest, at any time within three years from the sale: and if he failed to comply with these terms, he agreed to pay the plaintiff $2,500 as liquidated damages. It is manifest that if the defendant had failed to pay both, or either of the sums which he agreed to do, he would have broken the covenant as effectually, as he did by *failing to reconvey*. If the sum agreed on by the parties, is to be construed liquidated damages, as the terms import, then the defendant will be bound to pay a greater sum for a less; which cannot be, as that, according to all the cases, is a penalty. The sum, too, agreed to be paid by the way of damages, is for the breach of any of the stipulations which are of different degrees of importance and value, and so comes directly within the rule laid down in the cases to which we have referred. Nor is the damage for the breach assigned, to wit, the non-reconveyance of a half of the schooner in question, so entirely uncertain as to bring the case within the rule of stipulated damages. We have not learnt that the half of the schooner was of such peculiar value to the plaintiff, as to make altogether uncertain his damage for the defendant's failure to re-

convey it to him. The charge of his Honor in relation to the damage was right, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JAMES NICHOLS *vs.* GEORGE R. POOL.

If a note be payable at a particular time and place, a demand at the time and place need not be *averred* or *proven* in an action by the holder against the maker. A failure to make such demand can only be used in defense if the money was ready at the time and place.

ACTION of ASSUMPSIT, tried before his Honor Judge DICK, at the Fall Term, 1854, of Pasquotank Superior Court.

The plaintiff declared on the following promissory note, viz:

"Elizabeth City, Sept. 9, 1852.

"Four months after date I promise to pay James Nichols or "order, for value received, one hundred and thirteen dollars "and ninety-six cents, negotiable and payable at the Branch "Bank of the State of North Carolina, at this place."

Signed by the defendant.

The note was endorsed to McGruder & Clark, and by them endorsed in blank. It was sent by McGruder & Clark to the bank for collection; and on the 11th of January, the plaintiff called at the bank, paid the amount due on the note to the bank, and took it away with him. It was not at the bank on the 12th of January nor afterwards. The defendant did not call to pay the note in question before the plaintiff came and paid it, nor did he call for it afterwards: He had no funds in the bank at the time the note came to maturity nor afterwards. After paying the note, before this suit was brought, the plaintiff informed the defendant that he had done so, and requested him to pay the same to him, which he refused to do.

Upon the question of lunacy, the defendant offered in evidence a record from the County Court of Pasquotank, of an inquisition and finding of a jury, that the defendant was a

lunatic, and the appointment of a guardian. The date of this proceeding was after the writ in the case was issued, but before it was executed. The Court rejected this evidence: for which the defendant excepted. The defendant's counsel contended, and asked his Honor to instruct the jury, that the holder of the note ought to aver and prove that he had the note at the bank after 11th of January: that defendant was entitled to the days of grace, and the payee having taken it away before that time had elapsed, he was not entitled to recover. The Court refused so to instruct the jury, but told them that the plaintiff was not bound to make such averment and proof, and that his taking away the note on the 11th of January, did not hinder him from recovering. For this the defendant's counsel further excepted.

It was contended further on behalf of the defendant, that the payee of the note having endorsed it, became the surety to the same, and that afterwards having paid it to the endorsee, such payment discharged the note, and that this action could not be maintained upon it: but the Court held the contrary, and for this the defendant further excepted.

Verdict for the plaintiff.

Rule for a *venire de novo* for the causes of exception above set forth. Rule discharged: Judgment and appeal to the Supreme Court.

Smith and Martin, for plaintiff.
Pool, for defendant.

PEARSON, J. A promissory note is drawn four months after date "payable at the branch of the bank of the State of North Carolina, at Elizabeth City." To entitle the payee to recover of the *maker*, must he allege and prove that the note was presented for payment, *at the bank in Elizabeth City*, on the day it fell due?

The point has never been decided by our Court, and it is now presented as an open question upon "the reason of the thing" and the cases in the books.

A note, payable on a given day at the Cape Fear Bank,

must be presented for payment *at the bank* on the day it falls due, in order to render the endorser liable, *Sullivan* v. *Mitchell*, 1 Car. L. R. 482; *Smith* v. *McLean*, N. C. Tr. Rep. 72. These cases settle the law in regard to the liability of endorsers, but they are clearly distinguishable from our case, (which is an action against the maker) and are expressly put on the ground that an endorser does not owe the debt, and is not liable except upon a condition precedent, for "the nature of an endorser's engagement is, that he will pay the amount of the note, provided the holder cannot, after using due diligence, obtain payment from the maker, and reasonable notice of this fact be given to the endorser"; and it is held, that when a note is payable at a bank, due diligence requires that payment should be demanded at the bank, and as against an endorser, this demand must be made, even although the maker dispenses with it; "for" (Ruffin Judge) "how can he say that the maker would not have found means to discharge the note at any sacrifice, rather than suffer a public dishonor of his note by a protest at bank?"

The maker of a promissory note, payable *on demand* at a particular place, is not bound to pay it until payment is demanded at the place. *Bank of the State* v. *Prest. &c., of Bank of Cape Fear*, 13 Ire. 75. This case is put on the ground that "until a demand at the place, the debtor is not in default, and so there is no cause of action." It is expressly distinguished from our case. RUFFIN, C. J., after some general remarks as to the law in respect to notes payable at a certain day as well as place, says it is not material, "since no one, either in England or here, has supposed that presentment of a promissory note was not indispensable when, in the body, it is payable on demand at a particular place."

The maker of a note owes the debt without any conditions about it. Why should the creditor agree to abridge his rights and have a condition precedent imposed on him, by force of which, he will loose the entire debt, if he fails to demand it at a particular time and place? Upon what ground could a debtor ask, or a creditor submit to have any such restriction?

If such is the intention of the parties, it ought to be expressed in unequivocal words, as "I promise to pay, &c., *provided*, or *upon condition*, or *if* this note is presented for payment at the bank in Elizabeth City, on the day it falls due": because the relation of creditor and debtor forbids the idea that the parties intend to make a condition precedent, whereby the debt will be lost unless demanded at a given time and place; consequently, a construction, by which the words "payable at, &c." are by implication made to have this effect, and are converted into a condition precedent, is against the reason of the thing. The more reasonable construction is, that they were used to convey the idea that the parties had made an arrangement suggested by considerations of convenience on both sides, according to which, the money is to be paid at a particular place, on a given day: or in other words, it is an assurance given by the debtor, and accepted by the creditor, that the money will be then and there paid. This arrangement is convenient to the creditor, because he is informed where he will find his debtor, and be able to get his money; and it is convenient to the debtor, because it relieves him from the necessity of seeking the creditor, wherever he may be, in order to make a tender. Considered in this sense, the effect is, that the creditor does not lose his debt by failing to apply for it at the precise time and place, but may afterwards recover it: While on the other hand, the debtor may, if in fact, he had the money at the time and place, use that fact as a defence, and defeat the action by bringing the money into Court: or if he deposited it, and it was lost by the failure of the bank, he can put the loss on the creditor, because of his *laches* in not calling to get it. This, as it seems to us, is the proper construction according to the reason of the thing. Nor is it opposed by our decisions in regard to an endorser: He does not owe the debt: His liability depends upon a condition precedent, and as to him the words "payable at, &c.," may well receive the construction of defining and making particular the condition which would otherwise be general. Nor is it opposed by our decision, that a note payable on *demand*, must be presented at the place specified before an

action can be maintained against the maker: In that case a demand must be made before the debtor is in default: This is a condition precedent to the right of action, and it follows that the demand must be made at the place agreed on. This is a reasonable construction, and is not forbid by the considerations stated above, in regard to a note which is to be due at a given time. The creditor does not lose his debt by failing to demand it at a particular time, but may demand it at any time, and thereby acquire a cause of action. The debtor being, by express agreement, relieved from the necessity of seeking the creditor, may reasonably insist that the demand must be made at the place agreed on: and inasmuch as the ground of defense, applicable to notes, when the time of payment is fixed, is not available when the time of payment is uncertain, because the debtor cannot make a tender, although he keep the money always at the place, until such time as the creditor may choose to call for it, the only way in which effect can be given to the intention of the parties, is to consider the demand at the place, as a condition precedent to the cause of action, so that no action can be maintained until it is made: which is altogether a different thing from a condition precedent by which the debt will be lost, unless a demand is made at the place on a given day.

The English cases afford no aid. The question was repeatedly before their Courts, but by reason of dissenting opinions and conflicting decisions, it became involved in such utter confusion, that it was found necessary to pass an act of Parliament, in order to clear away the difficulties, 1 and 2 G. 4 ch. 78: which provides that the acceptance of a bill, payable at a particular place, shall be deemed and taken to be a general acceptance, "unless the acceptor shall in his acceptance, express that he accepts the bill payable at a banking house, or other place *only, and not otherwise or elsewhere.*" The substance of this Statute is, that the words "payable at, &c." shall not by construction be converted into a condition precedent: and if the parties intend that a demand, at a particular place, shall be a condition precedent, they must say so in express

terms. So it is clear that the opinion of the British Parliament concurs with our opinion, in regard to the construction of a note or acceptance payable at a given time and place.

The cases in this country, so far as they have fallen under our observation, all show a uniform course of adjudication, and concur with our conclusion, "that in actions against the maker of a promissory note, or the acceptor of a bill of exchange, if the note be payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action. But if the maker or acceptor was at the place at the time designated, and was ready to pay the money, it is matter of defense to be pleaded and proved on his part," *Wallace* v. *McConnell*, 13 Peters, 137. Many decisions in our sister States are referred to, which settle the law in the same way, *Faden & Slater* v. *Sharp*, 4 John. Rep. 183, and many other cases in New York; *Watkins* v. *Cornish*, 5 Leigh 522, Virginia; *Bowie* v. *Duvall*, 1 Gil. and John. 175, Maryland; *Ruggles* v. *Patterson*, 8 Mass. Rep. 480; and also cases in New Jersey, Tennessee and Alabama. So that the question is settled in England by an act of Parliament, and in this country, by a uniform course of adjudications.

It is clear, therefore, that the defendant had no right to complain of the charge.

2nd. It was conceded in the argument, that at common law an endorser, who paid off a note, might strike out the endorsement and recover upon it in his own name; but it was insisted that, as by the act of 1827, Rev. Stat. ch. 13, Sec. 11, an endorser is made liable as surety, when he makes the payment the note is extinguished, and he must sue in Assumpsit for money paid.

The Statute provides that an endorser shall be liable "as surety to any *holder of a note*, and no demand on the maker shall be necessary previous to an action against the endorser." The object of the Statute was, to dispense with the necessity of a demand and notice in order to enable the holder to recover from an endorser, but it does not at all affect the rela-

tion of the endorser to the maker: as between themselves their rights remain as they were before the passage of the act.

3rd. Upon the question of capacity, the defendant offered to read in evidence, a record of the County Court, showing an inquisition and a finding, that the defendant was a lunatic, and the appointment of a guardian: which proceeding was had after the writ in this case issued, but before it was executed. This evidence was rejected: For this the defendant excepts. There is no error.

Admit, for the sake of argument, that the proceeding upon an inquisition of lunacy is a matter *in rem*, and is prima facie evidence of the truth of the facts found, and that its admissibility is not affected by its being *post litem motam*, it is not stated at what time the jury find the defendant to have been a lunatic, and we are to take it, upon this exception, that the time fixed on was the date of the inquisition; and the question is, whether the fact, that a man is a lunatic to-day, is relevant to show that he was a lunatic six months ago? A fair statement of the point, is sufficient to show that the evidence was irrelevant.

PER CURIAM. Judgment affirmed.

CHARLES S. JOHNSON *vs.* J. W. HOOKER.

The act of 1827, Rev. Sat. ch. 13, sec. 10, makes an endorser liable to the holder of a note in the same way that the maker is liable: and when it is payable at a particular day and place, he is liable according to the principles laid down in *Nichols* v. *Pool*, 2 Jones' Rep. 23.

Striking the name of a defendant out of the writ, does not in any manner affect the cause of action against another defendant: nor prevent the party whose name is stricken out from again being sued.

The endorsement of a note in blank by one, before the payee endorses it, is made regular by the endorsement of the payee, and the endorsement may be filled up as to both endorsers on the trial in the Superior Court, even after an appeal from the County Court: the trial being *de novo* in the Superior Court.

ACTION of ASSUMPSIT, tried before his Honor Judge MANLY,

at the Fall Term, 1854, of Cumberland Superior Court.

John A. McDonald, owing Peter P. Johnson for a bill of goods, gave him a note of hand worded as follows:

"Fayetteville, N. C., Nov. 20th, 1850.

"$259 68. Ninety days after date, I promise to pay Peter P. "Johnson or order, two hundred and fifty-nine dollars and "sixty-eight cts., for value received: Negotiable and paya- "ble at the Branch Bank of the State of North Carolina, or "at the bank of Fayetteville, at the option of the holder."

(Signed,) John A. McDonald.

The note was endorsed by the defendant in blank, he at the time requesting that it might not be discounted at bank, saying, that if the maker did not pay it he would. The payee afterwards endorsed in blank and sold the note to the present plaintiff.

The plaintiff had heretofore sued the maker, the payee and the present defendant upon this note, but struck out the names of the defendant Hooker, and of payee, P. P. Johnson, and took judgment against McDonald, the maker only. He proving insolvent, and discharging himself under the insolvent debtor's act, the plaintiff commenced the present suit against the defendant (Hooker) and the payee in the County Court. The name of the payee was again stricken out of the writ, and the suit stood against the defendant only. Judgment was recovered against him in the County Court, from which he appealed to the Superior Court.

The note was not discounted at the bank, and no demand was ever made at the bank for payment. The defendant's counsel upon the trial in the Superior Court, moved to nonsuit the plaintiff, upon the ground, that when the note came into the possession of the plaintiff, the endorsements of the payee and the defendant were both in blank, and the plaintiff's counsel had upon the trial in the County Court, made the endorsement of the defendant special, by writing above his name the words, "pay to C. S. Johnson," yet the endorsement of the payee was still left in blank. His Honor refused the motion, and allowed the plaintiff's counsel to fill up the endorsement

of the payee by writing above his name the words, "pay to J. W. Hooker."

For the defendant it was contended 1st, that Hooker was not liable as endorser, because the note was never transferred to him.

2. That the defendant was not liable, because there was no consideration between him and the plaintiff.

3. That the defendant was not liable, because the note was never presented for payment at the bank: nor offered for discount there.

4. That the defendant was released by the act of the plaintiff in striking his name, and the name of P. P. Johnson, the payee, out of the writ, in a previous suit instituted against them and the maker.

5. That the defendant was released by the act of the plaintiff in striking out the name of P. P. Johnson from the writ in this suit.

His Honor ruled against the defendant upon these several points: for which he excepted, and the jury having rendered a verdict for the plaintiff, defendant moved for a *venire de novo* upon the grounds above stated, which was refused. Judgment and appeal to this Court.

J. G. Shepherd, for plaintiff.
D. Reid and Buxton, for defendant.

PEARSON, J. The act of 1827, Rev. Stat. ch. 13, sec. 10, makes an endorser liable to the holder of a note as surety. The effect is to put him on the footing of a maker of the note, and to make his liability to the holder the same as if his name was on the face of the note instead of being on the back. Thus an endorser is brought within the decision, made at this term, *Nichols* v. *Pool*, ante 23. If a note be payable at a particular time and place, a demand at the time and place need not be averred or proven in an action by the holder against the maker: A failure to make it can only be used by way of defense, if the money was ready at the time and place.

The idea that the Statute does not apply to a note payable at a particular place has nothing to sustain it: The words of the Statute are general; so it is unnecessary to enter into the question of the supposed waiver of demand and notice, because no demand was necessary.

In regard to filling up endorsements in blank at the trial, the practice is too well settled, to be now drawn in question. The trial in the Superior Court is *de novo*—is the same as if the writ had been returned to that Court.

Striking the name of the defendant out of the *writ*, does not in any manner affect the cause of action against another defendant: Nor does it affect the right of the plaintiff to bring another action against the party whose name is stricken out: There is nothing to support the notion that it amounts to a release or to a discharge of the debt in any way.

The fact that the name of the defendant was put on the back of the note before the payee had endorsed it, in no wise affects the rights of the plaintiff as holder: when he put his name on the back of the note, it amounted to a general power of attorney to fill up the blank in such a way as was necessary to make him liable as endorser: and this by our Statute is the same as being surety. That this is the effect of an endorsement in blank, has been considered settled ever since, *Russell* v. *Langstaffe*, Doug. Rep. 514, (1780.) The defendant endorsed his name on fine copper plate checks made in the form of promissory notes, but in blank, and without sum, date or time of payment being mentioned in the body of the notes. The blanks were filled up and the plaintiff discounted the notes. For the defendant it was objected that the notes, being blank at the time of the endorsement, were not then promissory notes: Lord Mansfield, "There is nothing so clear as the first point. The endorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'trust Galley (the maker) to any amount, and I will be his security:' It does not lie in his mouth to say the endorsements were not regular."

Per Curiam. Judgment affirmed.

JOHN C. PETTIJOHN *vs.* HENRY WILLIAMS.

In a declaration for a deceit in the sale of a fishery, the price paid for the property, is not a material constituent of the cause of action, and need not be proved as alleged.

ACTION on the CASE, for a deceit in the sale of a fishery, tried before his Hon. Judge DICK, at the Fall Term, 1854, of Chowan Superior Court.

This cause was before this Court at December Term, 1853, and there was a *venire de novo* ordered as to this defendant: see 1 Jones' Rep. 145. The declaration charges that the defendant, and one Milson, falsely and fraudulently affirmed and represented that a certain scope of water, adjoining the close of the defendants, which had been used as a fishery, and was convenient and fit for the purpose of a fishery, was clear of obstructions, except that there were seven stumps within the space aforesaid, and that by these false and fraudulent representations, they induced the plaintiff to buy from them the said close at the price of $2,500; whereas in fact and in truth, there were in the scope aforesaid, not only seven stumps, but a much larger number of stumps, to wit, two thousand, by which the plaintiff was damaged, &c., to a large amount, to wit, $800. The proof was that the price paid by plaintiff for the fishery was $3,000, and for this variance in the sum alleged, and that proven, the defendant asked that the plaintiff be non-suited, which was refused by the Court, for which defendant excepted.

Verdict for plaintiff, and judgment.

Defendant appealed from the judgment, refusing to non-suit the plaintiff.

Heath, for plaintiff.

Smith and *Biggs*, for defendant.

PEARSON, J. When this case was before us at December Term, 1853, 1 Jones, 145, it was upon the appeal of the plaintiff for error in the charge as to the question of fraud, and

having come to the conclusion, that the plaintiff was entitled to a *venire de novo*, we might have stopped. Indeed, it was a departure from our general rule, to notice the exceptions taken by the defendant on the ground of variance, because it was not called for, and cases are not supposed to be made up with a view of presenting any points not embraced by the exceptions of the appellant. But the case, as made up, went out of the way to state the ground of the alleged variance, and as it seemed to us there was no difficulty in regard to the question, we expressed in very general terms, an opinion, that "the variances were immaterial." We, of course, did not intend that intimation to be conclusive, and expressed it in general terms, so as to leave the defendant at liberty to bring up the question directly, if the result of the new trial was unfavorable to him, and his counsel adhered to the opinion that there was a fatal variance. The case now presents one of the questions. It is this: The declaration states that the defendants sold to the plaintiff a piece of ground on Croatan Sound, having a sein hole annexed, in which a sein had been usually hauled to the beach in said close, "at and for a certain sum of money, to wit, the sum of twenty-five hundred dollars," and it alleges that the defendants falsely represented to the plaintiff, that there were only seven stumps in the sein ground, whereas in fact, there were two thousand stumps, and this fact was well known to the defendants: By means of which false representations, the defendants cheated and deceived the plaintiff in making the sale aforesaid to his damage $800. The evidence was that the price given was $3,000. The defendant insisted that this variance was fatal—his Honor was of opinion, that the variance was immaterial: For this the defendant excepts. There is no error.

It is a general rule of pleading that "time, quantity and value must be stated." This is required to give certainty to the statements in pleading, and is usually a mere matter of form. It is proper to state these circumstances, under what is termed a "videlicet," as in our case, and they need not be

proven as laid: because they are no part of the substance of the cause of action, and the statement is required merely to avoid too much generality. Thus a statement, that the defendant *heretofore* sold to the plaintiff a tract of land for a *large sum of money*, is too general: and the rule as to certainty in pleading requires that some time and some amount should be stated, but one time, or one sum, will answer as well as another; and if stated under a videlicet, these circumstances need not be proven as laid: indeed, if a traverse is taken so as to depend on them, it will be "too narrow," and a *repleader* will be directed.

A very familiar instance of the immateriality of the statement of time, occurs in bills of indictment. If an indictment charges that the defendant committed an assault on the 1st of January, proof that he committed the assault on the 2nd of January, will be sufficient; because it makes no sort of difference whether it was committed on the one day or the other: and although a charge that the defendant *heretofore* committed an assault is too general, and some day must be stated, yet proof of the commission of the offense at any time prior to the finding of the bill will suffice: so if an indictment charges that the defendant stole *one* hog, it is no fatal variance, although the proof be that he stole *six* hogs; for the gist of the offense is the commission of the larceny.

An exception is made to this general rule, whenever either of these circumstances constitutes a part of the description of the thing, or matter for which suit is brought, or enters into and forms a part of the substance of the cause of action. The reason of this is obvious: by way of illustration; a declaration in debt describes the note by stating its date and amount; the proof must correspond with the statement, for otherwise the suit would be for one debt and the judgment for another: so a declaration in a *qui tam* action for usury sets out the *day* when the money was lent and the *amount*, for the purpose of showing the rate of interest: a variance in the proof, either as to the time or the sum, would be fatal; because the gist of the action is the unlawful rate of interest taken, and these cir-

cumstances form a part of the substance of the cause of action, and show that the rate exceeded that of six per cent. per annum.

There is no difficulty in regard to the general rule and the exception; so our question depends merely upon making the application. In this there is as little difficulty. The *gravamen* of the action is the deceit practiced by the defendants: the price given for the fishery is a collateral circumstance, and it was only necessary to state it by way of inducement, for the purpose of showing a consideration so as to make the contract valid; for this purpose ten dollars would answer as well as ten thousand, and in regard to the deceit, which is the gist of the action, it makes no manner of difference whether the price paid was $2,500, or $3,000. It is not until the cause of action has been made out and it remains merely to assess the damages, that the price paid comes up for consideration, when it has no connection with the declaration or other pleadings, and presents itself simply as evidence bearing on the question of damages.

PER CURIAM. Judgment affirmed.

WILLIAM N. WHITTED AND WIFE *vs.* THOMAS C. SMITH, *et al.*

A reservation in a deed of "all the pine timber that will square one foot" to the vendors, "their heirs and assigns forever, with the privilege of cutting and carrying away said timber at any time that may be convenient to the vendors, their heirs and assigns," only embraces such timber as was of that size at the date of the conveyance, and not such as attained to it afterwards.

ACTION on the CASE in the nature of waste, tried before his Honor Judge MANLY, at the Fall Term, 1854, of Bladen Superior Court.

The plaintiffs (husband and wife) claimed damages for certain timber trees cut upon the land in question, which had descended to the feme plaintiff from Thomas Fred. Smith. The plaintiffs produced in evidence a deed from defendant, Thos.

C. Smith and another, for the land in question, (640 acres) on North-West River, to Thomas Fred. Smith, his heirs, &c., dated 14th day of May, 1827, reciting a consideration of $2,000, "to have and to hold all and singular the privileges and appurtenances thereunto belonging unto him the said Thomas Fred. Smith, his heirs and assigns forever, except that all the pine timber, upon said tract, that will square one foot, is hereby reserved unto the said Thomas Smith and Thomas Cyrus Council Smith, their heirs and assigns forever, with the privilege of cutting and carrying away said timber at any time that may be convenient for said Smiths, their heirs and assigns." To which there is a covenant of quiet enjoyment, "except the above mentioned reserved pine timber." Thomas C. Smith, with the other defendant, Council, who entered under him, went upon the land and cut pine timber, which he hauled off to market and sold, but none of the trees were of less size than would square one foot. The plaintiffs offered to show that some of the trees cut, had attained to the size reserved in the deed since its date of 1827: but the Court, construing the reservation in the deed to embrace, not only the trees of that size then growing on the land, but also such as thereafter might attain that growth, excluded this testimony, and upon this point charged the jury in favor of the defendants. Verdict for the defendants. Motion for a *venire de novo* for error in the ruling of the Court. Rule discharged. Judgment and appeal by plaintiffs.

Shepherd, for plaintiffs.
Winston, Sr., and *Winslow*, for defendants.

PEARSON, J. The exception embraces all the pine trees growing on the land large enough to square one foot at the date of the deed, but we see nothing by which its meaning can be extended so as to take in all pine trees that should at any time thereafter grow to be large enough to square one foot: such a construction is unreasonable: In the forcible language of Judge DANIEL, in *Robinson* v. *Gee*, 4 Ire. 186, "it could never have been intended by Reid, (the vendor,) when

he made the reservation, that the tract of land should be a perpetual plantation for the raising of pine timber for his benefit."

Such a construction would include all the pine trees that might at any time grow on the land: if it was the intention that the vendor should have all, why specify the size of any? Supposing the vendee to have no interest in them, it was a matter of indifference to him of what size the trees might be when the vendor saw fit to cut them: In fact, the sooner they should be taken off of the land the better it would be for him; because it would leave room for trees of some other kind, or at all events for grass to grow. So this identification of the trees, by specifying the size, tends to show that the intention was to include such only as at that time answered the description.

If the vendor reserved the right to all the pine trees, whenever they grew to be of a certain size, it follows that the vendee has not the right to cut down, or use a single pine tree of any size, because it would be inconsistent with the reserved rights of the vendor, and there is no stipulation securing to the vendee any such right. So the case is, one gives $2,000 (the consideration set out in the deed) for 640 acres, lying on the North West (Cape Fear) river, and has no right to cut a single pine tree for fencing or other plantation uses, or to clear an acre of the land!! The vendee, if this be so, instead of taking a conveyance of the land, might have been content with the right of common of pasturage: with these restrictions he could use it for little else than a sheep-walk. It is much the same as if one should buy a sheep, and allow the vendor to reserve the right to the wool, with the privilege of shearing it, *year after year*, as long as the animal lived.

In support of the construction contended for, two grounds were relied on: the words are, "that *will* square one foot." It is said that "will" is in the future tense, and includes all time to come. This is a strained inference. "Will" is obviously used in reference to the act of measuring, and the sense is "that will, if measured now, square one foot." You buy

all the hogs in a drove that will weigh 200 lbs.; the meaning is *now*—as soon as it can be ascertained; because no future time is fixed on, and from the nature of the thing, it is unreasonable to suppose that an indefinite future time is meant.

2ndly. The restriction is to the vendors, "their heirs and assigns forever:" The privilege to enter, is "to them, their heirs and assigns:" This, it is contended, shows that the meaning was to include all pine trees that should at any time, thereafter, grow to be of the required size," and the argument is, if this be not so, why insert the word "heirs?"

It is obvious that the word is used as a word of limitation, and it was necessary, in order to give the vendors a fee simple estate in the pine trees that were at that time of the size agreed on. But for this word of limitation the estate reserved would have been for life only, and upon the death of the vendors, their personal representatives could set up no claim to the trees left standing, because they were attached to the soil and formed real estate: nor could their heirs, because the estate was not one of inheritance, and as the tract was large, (640 acres) so that in all probability the vendors would not find it to their interest to cut all the timber to which they were entitled in their life times, there was a good reason for using apt words to make an estate in fee simple; which accounts for the words "heirs and assigns forever," without the necessity for supposing that the 640 acres was to be "a perpetual plantation for the raising of pine timber for their benefit."

In *Robinson* v. *Gee*, one Reid conveyed the land to James Gee, (under whom the defendant claimed) "reserving only to himself, the said Archibald Reid, and his heirs and assigns forever, all the saw mill timber on the same land standing and being, *or which may hereafter stand or be on the said land, or any part thereof*, with full and absolute privilege of egress and regress in and upon the said land at all times, for the purpose of cutting and taking away the said reserved timber, *except such timber only as shall be at any time necessary for fencing* or for plantation purposes on the said land," and yet notwithstanding the words "or which may hereafter stand or

be on said land or any part thereof," and the exception to the exception of "such timber only, as shall be at any time necessary for fencing and plantation purposes," so strong was the conviction of the Court, from the nature of the thing, that it could not have been the intention to make the land a "perpetual plantation for the raising of pine timber for the benefit of the vendor," that the circumstance of the description in the mesne conveyance being expressed in terms more general (although direct reference is made to the deed of Robinson to Gee,) is seized on, to support a construction by which it is held that the vendor had a right to cut up into cord wood, and sell any pine tree that was not large enough to be fit for the saw mill.

In our case no words pointing directly to a future state of things are used, consequently there is nothing to force us into the adoption of a construction so unreasonable, and according to which the owner of the land would not, in all time to come, have a right to cut a pine tree for fencing or other plantation purposes, or even to clear an acre of the land, if any of the growth happened to be pine.

If the doctrine of "future uses" be supposed to be applicable to a conveyance, or a reservation without the interposition of a trustee to hold the legal estate, certainly no such use can be raised except by an express declaration: in our case there is not the slightest intention to declare any such future use.

On the argument, the defendants' counsel insisted that the action was misconceived, and should have been trespass *vi et armis:* In reply, *Williams* v. *Lanier*, Bus. Rep. 30, was relied on. This point is not now before us, of course we are not at liberty to express an opinion.

PER CURIAM. *Venire de novo.*

ELZIFF BARFIELD *vs.* THOMAS BRITT.

In an action for words spoken, charging the plaintiff with the murder of an individual, what that individual said, though *in extremis*, and under the full impression that he would not recover, is not evidence on the plea of justification.

To establish a justification, the same cogency of proof is not necessary, as would be required if the plaintiff were on his trial upon a criminal charge for the offense imputed to him in the words.

THIS was an action of SLANDER, tried before his Honor Judge MANLY, at the Fall Term, 1854, of Robeson Superior Court.

The declaration was for words spoken, charging the plaintiff with murder by secretly poisoning one Jacob Britt. The words were proved within time, and the case turned upon the plea of justification. The defendant offered the dying declarations of Jacob Britt, charging the plaintiff with the crime imputed to him by the words of the defendant, which were objected to by the plaintiff's counsel, but admitted by the Court. For this the plaintiff excepted.

The plaintiff's counsel asked the Court to instruct the jury that to establish the plea of justification, the jury should have the same cogency of proof as if the plaintiff were on trial for his life under the criminal charge of murder. This, the Court, however, refused; and instructed the jury that a preponderance of evidence, as in a civil case, was all that was necessary. For this, plaintiff further excepted.

Verdict for defendant. Judgment and appeal.

J. G. Shepherd, for plaintiff.
Winslow and *Strange*, for defendant.

BATTLE, J. Two questions are presented by the bill of exceptions. *First:* Whether in the issued joined, upon the plea of justification, the dying declarations of Jacob Britt could be given in evidence by the defendant, to prove the truth of the words for which the action was brought? *Secondly:* Whether his Honor was right in refusing to instruct the

jury that the defendant must sustain his plea by the same cogency of proof as would be required against the plaintiff, were he on trial for his life, under a charge of murder; but on the contrary, saying to them that a preponderance of evidence, as in a civil case, was all that was necessary.

The first question is raised by the plaintiff's exceptions to the admission of the testimony, and we think the exception is well founded. The reasons by which his Honor's decision was influenced are not stated, and we do not know that he felt himself bound by the case of *McFarlane* v. *Shaw*, 2 Car. L. Rep. 102; or whether he thought the issue before him was the same as it would have been had the plaintiff been on trial for the murder of Jacob Britt, and that therefore this was an exception to the general rule, that dying declarations are not *per se* admissible in civil cases. We say *per se*, because where dying declarations constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact that the declarant was under the apprehension of death. 1 Greenlf. Ev. sec. 156. Whether the decision was influenced by the one reason or the other, or by both combined, we are satisfied that it is not supported by principle, while it is opposed by the whole current of the recent cases in England and in this country.

The case of *McFarlane* v. *Shaw*, was decided by the Supreme Court under its former organization, in the year 1815. The action was by a father for the seduction of his daughter: the defendant pleaded not guilty, and on the trial, the plaintiff, to prove the seduction, offered to show that after all hope of life was gone, his daughter, who was then sick in child-bed, desired that the defendant might be sent for; and upon being informed that he would not see her, exclaimed, "I am going: he will soon go too, when he will be obliged to see me, and will not dare to deny the truth." The testimony was objected to, but received by the Court; and the case came before the Supreme Court on a motion for a new trial: The Court, after stating that such testimony was admissible in certain criminal

cases, in which life was at stake, contended that, though they had no precedent to guide them, it ought, from reason and analogy, to be admitted in a case like the one before them; but they grounded themselves chiefly on the circumstance, "that the fact disclosed in her declaration could only be proven by herself: she was the injured party through whom the cause of action arose to the father." The Court then say further, "we give no opinion how far the dying declarations of an indifferent person, not receiving an injury and not a party to the transaction, would be evidence in a civil case. Our decision is confined to the state of facts presented in this case." It is manifest that the Court labored under the impression, which then generally prevailed, that dying declarations were admissible upon the general principle "that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is influenced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." If the admission stood upon this general principle alone, it might well have been contended, as it was contended, that dying declarations ought to be admitted in all cases, civil as well as criminal. But another element in the test of truth was overlooked by those who insisted upon this latitude of admission, to wit: the opportunity of confronting and cross-examining the declarant. The privilege of cross-examination has been carefully secured to the party, to be affected by them, in depositions taken before magistrates, and the testimony of deceased witnesses on a former trial. The importance of preserving it, has no doubt restricted the admission of dying declarations to the criminal cases only "where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations." Such delarations, then, are admitted "upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice. For it

often happens that there is no third person present to be an eye witness to the fact, and the usual witness in other cases of felony, namely, the injured party, is himself destroyed." See Cowen and Hill's notes to Phil. on Ev., pt. 1, 610; 1 Greenlf. on Ev., sec. 156, and the cases there cited. The principle of admission, being thus restricted, necessarily overrules the case of *McFarlane* v. *Shaw*, and shows that even if the issue be, as in this case, whether the plaintiff murdered the deceased, the dying declarations cannot be heard, because such issue is joined in a civil case.

As the plaintiff is entitled to a *venire de novo* for the error in admitting improper testimony, we might abstain from expressing an opinion upon the second question; but as that question may and probably will be raised upon the next trial, we will, for the guidance of the parties, state now the view which we have taken of it. We think his Honor was clearly right in declining to give the instruction prayed: "that to sustain the plea of justification, it was necessary that the jury should have the same cogency of proof they would require in case the plaintiff were on trial for his life." To such an instruction the case of *Kincaid* v. *Bradshaw*, 3d. Hawks, 63, was directly opposed: it being held there, that in an action for slander, in charging a plaintiff with perjury, the defendant is not bound, in support of his plea of justification, to produce such evidence as would be requisite to convict the plaintiff, if he were on trial for the offence: TAYLOR, C. J., in delivering the opinion of the court, concludes the argument thus: "It cannot, therefore, be a correct rule that a jury should require the same strength of evidence to find the fact controverted in a civil case, which they would require to find a man guilty of a crime; but the crime of perjury stands upon peculiar grounds and requires more evidence to produce conviction than crimes in general: one witness is not sufficient, because then there would be only one oath against another. A man knowing another to have committed perjury, may forbear to prosecute him, for the very reason that there is but one witness by whom the crime can be proven: Shall he,

therefore, be deprived of his justification if sued in an action of slander, although he might be furnished with convincing evidence of the truth of the words? Both reason and authority answer in the negative." The authority relied on was the case of the *Queen* v. *Muscot*, 10 Mod. Rep., 192, where the Chief Justice, PARKER, expressed himself in similar terms.

After declining to give the instructions prayed, his Honor told the jury "that a preponderance of evidence, as in a civil case, was all that was necessary." If the very language used by his Honor is correctly set forth, it must be confessed that it is not very perspicuous, and on that account not much calculated to enlighten the minds of the jury. The case on trial was a civil case, and it could afford the jury very little assistance to make it the standard of itself. But we suppose that the words "any other" were omitted by mistake in making out the transcript, and that a fair interpretation of the charge, taken in connection with the refusal to give that which was asked, is, that the party upon whom lay the *onus probandi* must produce such a preponderance of testimony as must satisfy the jury of the truth of his allegation, as he would have to do in any other civil case. If this be the meaning of the charge, it is directly sustained by the case of *Neal* v. *Fesperman*, decided at the last June Term, 1 Jones' Rep. 446. In that case the Court say in conclusion "how far *in favorem vitæ* this matter 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 the 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." It is unnecessary to pursue the discussion further, as we think we have said enough to prevent the recurrence of an error, if any was committed upon the second point made in the case. For the error committed in the admission of improper testimony, there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

JESSE WARTERS *vs.* NANCY HERRING.

Where a party was to come within a few days with a note and surety for the hire of a slave for the next year, and he postponed the performance of this part of the undertaking, from some time in the last week of December, to the 10th of January, the owner was not bound to keep the slave for him any longer, and was in no fault in then hiring him to another person.

THIS was an ACTION ON THE CASE, tried before his Honor Judge ELLIS, at the Spring Term, 1854, of Lenoir Superior Court.

The defendant agreed with the plaintiff to hire to him a negro slave at the price of $67, for the year 1853, beginning with the 1st of January, he, first giving her a note for that sum with two individuals named, (Fields and Waters,) as sureties, and this was to be done within a few days. The agreement took place some time in the last week in December, 1852. On the 10th January following, Mrs. Herring hired the slave to another person; and on the 11th, the plaintiff tendered her a note with the surety agreed; on but having parted with the slave as above stated, she declined receiving it. It was proved that one of the proposed sureties was out of the county for five or six days about the 1st of January. It was also proved that persons in that neighborhood having slaves to hire out, usually did so about the first of January.

The Court was of opinion that a fair interpretation of the contract between the parties was, that the plaintiff should execute the note within a reasonable time from the agreement spoken of, so as to give the defendant an opportunity to hire the slave to some one else for the year, in case the plaintiff did not comply; and not having complied with his part of the agreement before the 10th of January, his delay was unreasonable, and the defendant was not bound to keep the slave for him any longer. So that the plaintiff had no cause of action against the defendant.

Under this instruction, the jury gave a verdict for the defendant.

Rule for a *venire de novo.* Rule discharged. Judgment and appeal.

No counsel for the plaintiff.
J. W. Bryan, for the defendant.

BATTLE, J. The construction put upon the contract between the parties, by his Honor in the Court below was undoubtedly correct. The bargain having been made during the last week in December, for the plaintiff to take the slave on the first day of January ensuing, the "few days" allowed him within which to prepare the note with certain named sureties, (which he was first to give,) could not reasonably be extended to the 10th day of January, when it might have been too late for the defendant to find another hirer for her slave. The absence of one of the sureties from the county was no excuse for the plaintiff, as it did not appear that the defendant caused, or even knew of it. Having waited until the 10th, and finding the plaintiff still in default, how could she know that he would comply at all with the terms agreed upon? If either party had a right to sue for a breach of the contract, it was the defendant herself, but she was not bound to do so. She took the more prudent course, instead of going to law, of treating the contract as a nullity and hiring her slave to another person. The law was correctly administered in the Superior Court, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

LEVI N. TARKINGTON *vs.* S. H. McREA.

The establishment of a road district or the assignment of hands to work on a public road, can only be made by an order of the County Court, and no acquiescence in the authority of an overseer by working under him upon a road, can amount to a presumption that a district was laid off, or that the citizen thus

acquiescing had granted the power to another of compelling him to work on the road.

ACTION for PENALTIES for failing to work on a public road, tried before his Honor Judge SAUNDERS, at the Spring Term, 1853, of Tyrrel Superior Court.

There was no question as to the plaintiff's appointment as overseer of this part of the road in question: He proved that the road had been used as a public highway for more than thirty years: that for that time overseers had been continually appointed, who successively acted and worked upon the same, and that for twenty-five years of that time, the hands belonging to the plantation now owned by the defendant, had uniformly, and without objection, obeyed the summons of the overseers and had worked on this part of the road, and that they did not, during that time work on any other road. That for many years previously to the failure complained of, the slaves of the defendant residing on this plantation had thus worked upon the summons, and under the direction of the plaintiff and the preceding overseers.

The plaintiff also proved that the defendant's slaves residing upon, and belonging to the plantation in question, had been duly summoned, and had failed to work.

There was no evidence of a road district having been laid off by Tyrrel County Court, including these hands, nor any other order assigning them to this part of the road; and it was insisted by the defendant's counsel, that for this reason, he was not liable for failing to work as required by the overseer, and he called on his Honor so to charge.

But the Court refused so to instruct, and told the jury "that if the hands liable to road duty, kept on this plantation by its respective and successive owners, for a period of more than twenty years before the failure complained of, had been regularly worked upon the said road, and no other, and the authority of the successive overseers of the road had, during that time, been recognized to require their labor whenever the repairs of the road made it necessary, and this had been ac-

quiesced in as of right, then the presumption arose of an assignment by the proper authority of the hands to said road, and it was not necessary to exhibit record evidence of the fact."

Under this instruction, the jury found in favor of the plaintiff, and defendant appealed.

Smith, for plaintiff.
Heath and *Gilliam*, for defendant.

BATTLE, J. There can be no doubt that the testimony offered by the plaintiff, was competent and sufficient to prove the existence of the road in question as a public highway. Its uninterrupted use by all persons as a highway for more than twenty years, fully justified the presumption that it had been granted or dedicated to the public by the former owners of the soil over which it ran. *Woollard* v. *McCulloch*, 1 Ire. Rep. 432; *State* v. *Marble*, 4 Ire. Rep. 318.

The road having been established by this presumption from its long and uninterrupted use, the counsel for the plaintiff contends that the assignment of the defendant's hands to work and assist in keeping it in repair, must be presumed on the same principle. But a moment's consideration will satisfy us, that the cases are very different, and are not at all susceptible of the application of the same principle. The road is an easement enjoyed by the public, in the lands of those over which it is located. It may be taken from the proprietors *in invitum*, by certain proceedings under the act of the Legislature authorizing the laying out and establishing public roads. In such cases, the requisition of the law must be complied with, and that must appear by the records of the County Court, to which jurisdiction over the subject is given. *State* v. *Johnson*, 11 Ire. Rep. 647. The easement may also be granted by the proprietors of the soil, and the right of the public must be evidenced by an actual grant unless the road has been used as a common highway for more than twenty years, in which case, no deed need be produced, as one will be presumed: that is, it will be presumed that a deed was actually executed,

and was, of course, formerly in existence, but is now lost. *Woollard* v. *McCulloch*, *ubi supra*. The proof of the existence of the road, in the present case, depends upon this common law presumption: and the easement claimed, and enjoyed by the public, is founded upon the same well-known principle which supports private prescriptive rights.

But the assignment of the defendant's hands to work on the road, or the laying off districts within which they may be summoned by the overseer, must necessarily be done by the County Courts: It is manifestly not the subject of a grant by those who are liable to send hands to work. It cannot, therefore, be claimed, as against such persons, by prescription, or upon any presumption analagous to it. Such seems to have been the view taken of this subject by the Court in the above cited case of *Woollard* v. *McCulloch*. There the defendant lived within a mile of the public road which he was required to work, and nearer to it than to any other. His hands, and those of the persons who had occupied the same premises, had worked the road for more than fifteen years, and he had on one occasion actually promised the overseer to make compensation for the failure of his slaves to work the said road. Notwithstanding all this, the Court, without intimating that the shortness of the time prevented any presumption, declared that "the plaintiff was an overseer without hands, he should have made application to the County Court for a list of hands, or an assignment of a *district*. The defendant's hands had never been assigned to that road, his lands were not comprehended by the Court in a district of the plaintiff, as overseer of the said road." As we have shown that no presumption could be made against the defendant, that his hands had been assigned by the County Court to work the road in question, or that his lands had been comprehended in any district laid out by said Court, in which the plaintiff was overseer, his Honor erred in leaving the question to the jury, and for this error the judgment is reversed, and a *venire de novo* granted.

PER CURIAM. Judgment reversed.

SUSAN CONNELLY, ADM'X. *vs.* JOHN McNEIL, EX'R. *et al.*

It is erroneous for a jury to give interest on damages found by them in an action of trespass *quare clausum fregit:* but this Court has the power to allow a *remittitur* to be entered for interest so given.

In the above case the remittitur was allowed on the payment of costs, and then the judgment below was affirmed.

ACTION of TRESPASS *quare clausum fregit*, tried before his Honor Judge MANLY, at the Fall Term, 1854, of Cumberland Superior Court.

The exceptions taken to the instructions which his Honor gave the jury were abandoned in this Court, and the only question submitted is upon a motion here by the defendants' counsel to arrest the judgment, because the jury in their verdict, had allowed interest upon the damages which they found for the plaintiff. The plaintiff meets that motion by another to be allowed to enter a remittitur for the interest.

J. G. Shepherd, for the plaintiff.
D. Reid, for the defendant.

NASH, C. J. The action is in TRESPASS *quare clausum fregit.* The jury returned a verdict against the defendant for ninety dollars, with interest on that sum from the date of the writ, for which judgment was rendered. A motion is made in arrest of judgment by the defendants, and the plaintiff moves for permission to amend the record by entering a *remittitur* for the interest. The judgment is unquestionably erroneous, and would be arrested, but for the counter motion by the plaintiff. That this Court can allow the judgment to be amended by permitting the *remittitur*, is fully established by the case of *Williamson* v. *Cannady*, 3 Ire. Rep. 349, in which the reasons for such a course of procedure are set forth at large, and we deem it unnecessary to repeat them.

The plaintiff has leave to enter a *remittitur* upon the payment of the costs of this Court. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* SAMEUL JACOBS.

A notice to subject a free person of color to the penalty of $500, if he shall not remove within twenty days, must be served personally. Leaving such notice at the dwelling house, is not sufficient.

APPEAL from the Superior Court of Richmond county, at the Fall Term, 1854, his Honor Judge MANLY, presiding.

THIS was a proceeding against the defendant, who is a free negro, to subject him to a penalty for immigrating into this State against the form of the Act of Assembly: It was instituted with the following order of the County Court of Richmond, at its January Sessions, 1851, viz:

"Ordered by the Court that the Sheriff of said County leave a written notice at the respective dwelling houses of (fourteen persons, naming them, among whom was the defendant,) informing said persons that representation has been made to the Court that they are colored persons, and have come into this State contrary to law, and unless they leave the State within twenty days from the date of the notice, they will be proceeded against according to the Act of Assembly. Witness," &c.

At the ensuing Term of the Court, a copy of this order was returned into Court endorsed as follows: "Executed by leaving notice at the dwelling houses of, or delivering to the persons of Samuel Jacobs, &c., (naming nine others,) on 27th Feb., 1851."

At July Term of the Court, the following proceeding was returned into the Court.

"State of North Carolina, Richmond county.

To the Sheriff of Richmond county, Greeting:

You are hereby commanded to take the bodies of Meredith Jacobs, Samuel Jacobs, senr., and Samuel Jacobs, junr., if to be found in your bailiwick, and have them before me, or some other justice of the peace, to answer a charge of having migrated into this State, and of having failed to depart the same

within twenty days after having been duly notified to do so, contrary to the form of the Statute, &c."

(Signed by two Justices of the peace.)

"In this case, Meredith Jacobs and Samuel Jacobs, senr., appeared before us, this 19th of July, 1851, and after hearing the evidence, bind the defendants over to our next County Court." (Signed by two other Justices of the county of Richmond.)

The defendants accordingly were bound and regularly appeared from term to term until October Term, 1853, when the defendant craved a trial by jury and pleaded—

1st. That the 65th, 66th, and 67th sections of the Act of 1836, are unconstitutional.

2nd. That three years had elapsed after his coming into the State, before this proceeding was instituted.

3rd. That he had gained a residence by living within the State twelve months before this proceeding was begun.

4th. That he is not a free negro or free mulatto within the fourth degree.

5th. That he has not migrated into the State contrary to the Act of Assembly in such case made and provided.

6th. That he is a native born citizen of North Carolina, and has never forfeited his citizenship by migration from the State.

Issue was joined upon these pleas, and the case transferred (under a special Act of Assembly) to the Superior Court of Richmond county.

In the Superior Court, under certain instructions given by his Honor, which are not excepted to, the issues above stated were submitted to a jury, who found the *second* and *third* issues in favor of the defendant, and the others in favor of the State.

The Court, considering the verdict, was of opinion that the cause of action was barred by the Statute, and declined giving judgment for the penalty of $500, from which judgment the *Solicitor* appealed to the Supreme Court. In this Court a motion was submitted in arrest of judgment.

Attorney General, for the State.
Ashe and *Banks*, for defendant.

BATTLE, J. We agree with his Honor that no judgment can be rendered against the defendant for the penalty of five hundred dollars, alledged to have been incurred by him for migrating into the State, and remaining here contrary to law, after being notified to leave it. But we do not deem it necessary, or even proper, to decide the question upon which his opinion was based, because there is a preliminary objection apparent upon the record, which is fatal to the proceeding. We are thus, too, relieved of the necessity of considering the grave constitutional questions which have been argued before us. The 65th sec. of the 111th chap. of the Revised Statutes, "concerning slaves and free persons of color," declares that "it shall not be lawful for any free negro or mulatto to migrate into this State; and if he or she shall do so contrary to the provisions of this Act, and being thereof informed shall not, within twenty days thereafter, remove out of the State, he or she being thereof convicted in manner herein after directed, shall be liable to a penalty of five hundred dollars," &c. In the record of the proceedings against the defendant, under this Act, it appears that the County Court of Richmond made an order, at its January Term, 1851, "that the sheriff of said county leave a written notice at the respective dwelling houses of Samuel Jacobs, and thirteen other persons, informing said persons that representations have been made to the Court, that they are colored persons, and have come into this State contrary to law, and that unless they leave the State within twenty days from the date of the notice, they will be proceeded against according to Act of Assembly." At the next term of the Court in April, 1851, the sheriff returned upon the order: "Executed by leaving notice at the dwelling house of, or delivering to the persons of," ten of the persons named in the order, among whom was the defendant, Samuel Jacobs. It is evident from this return, that it does not appear positively and distinctly that the notice to leave the State, within twenty days,

was served personally on the defendant. The sheriff does not distinguish among the persons named, at whose dwelling house he left a copy of the notice, or upon whom he served it personally. It must be taken, therefore, that he did not serve it personally upon the defendant, upon the maxim that *de non apparentibus et de non existentibus eadem est lex.* Now we think it is clear that the Legislature intended that the information which it directed should be given to an immigrating free negro, should be communicated to him personally, in words, or by writing. The act is a highly penal one and must therefore be construed strictly. The proper meaning of the verb, *to inform*, in this connection, is "to make known to, by word or writing." That this information was intended to be made to the party in person, is evident from the fact, that so short a time as twenty days, only, was allowed for acting upon it. Within that brief space he is to sell his property, collect and pay his debts, and make all other necessary arrangements for leaving the State forever. The time is short, very short, even if upon receiving personal notice he has the whole of it for the purpose of making his preparations for removal. The leaving the notice at his house, presupposes that he is not there to receive it in person. He may be absent from home, industriously engaged at work for some employer, or he may be on a journey, on some lawful errand, to a distant part of the same, or to an adjoining county, and may not return until the greater part, if not the whole of the twenty days, has expired. Would it be just that he should suffer so heavy a penalty for not having known or acted upon a notice, which had been left at his house twenty days before? It cannot be so. The Legislature never intended to act so oppressively towards a race to whom stern necessity has compelled it, in other respects, to deny so many of the privileges of freemen. The *Attorney General* virtually admitted this, but contended that the defendant had precluded himself from objecting to the insufficiency of the notice, by appearing at court, and tendering issues upon other questions to be tried by a jury. That would be so, undoubtedly, if the notice in question, had been

any part of the process issued against the defendant to bring him into court. But in truth it had nothing to do with the process by which the defendant was afterwards taken and bound over to appear at the County Court. It was something which was to be done on the part of the State to put the defendant in the wrong if he should disobey it. If not done as the law directed, the penalty never was incurred, and as the defect appears upon the record of the proceedings against the defendant he can now, in this Court, claim the benefit of it; for we are bound upon an inspection of the whole record to give such judgment, as ought to have been given in the Superior Court. 1 Rev. St., ch. 33, sec. 6. *State* v. *Jackson*, 12 Ired. Rep., 329.

For the defect to which we have adverted, the judgment of the Superior Court, arresting the judgment against the defendant, is directed to be affirmed, and this must be certified to the said Court.

Judgment affirmed.

PER CURIAM.

DAVID W. ROGERS, TO USE, &c. *vs.* HENRY F. PITMAN.

A levy and sale under an attachment will not authorize an action of trover, simply because the attachment was sued out maliciously and without probable cause. Case is the proper action for the redress of an injury of that kind.

ACTION of TROVER, tried before his Honor Judge SAUNDERS, at the Spring Term, 1854, of Robeson Superior Court.

This was a case agreed, and the following are the facts as presented in the statement signed by the counsel. The suit was brought for the conversion of 900 barrels of rosin, which had been the property of the plaintiff, who resided in Robeson county: He had gone to the town of Wilmington for a temporary purpose, and was there arrested and committed to prison on a criminal charge. While the plaintiff was in the

jail at Wilmington, the defendant, having a just claim against him, sued an attachment, which was levied on the rosin in question, and by virtue of which levy, and the subsequent proceedings, the same was sold and converted to defendant's use. When the attachment was sued, the defendant had good cause to believe, and did believe, that the plaintiff would give bail in the case upon which he was committed, and if he should succeed in so doing, that he would leave the State and forfeit his recognizance. The attachment was issued on the day after the defendant heard of the plaintiff's arrest and imprisonment. The plaintiff remained in prison for about five weeks, when he gave bail in the case in which he was charged, and also upon divers warrants and writs, which were served on him while in jail. The plaintiff has, since his discharge, gone to parts unknown, and has forfeited his recognizance. Upon this state of facts, it was agreed that if in the opinion of his Honor, the plaintiff was entitled to recover, judgment should be entered for $320; but if otherwise, he should be nonsuited. Upon consideration of the case, the Court being of opinion with the plaintiff, gave judgment according to the agreement, from which the defendant appealed to this Court.

Troy and *Wright*, for plaintiff.
Fowle, for the defendant.

PEARSON, J. We are not at liberty to decide the question of probable cause upon which the case was put by his Honor, because the plaintiff is met *in limine* by the objection that it cannot be presented in an action of trover.

The objection is fatal. We are to assume that the affidavit and bond are in due form, and that the attachment was issued by a judge or justice of the peace within his county: If so, the levy and conversion were authorised by the attachment, and the plaintiff cannot, in "trover," (the gist of which action is the wrongful conversion,) go behind the attachment and impeach it in a collateral way, on the ground that it was wrongfully sued out: when that is the *gravamen*, the attachment

must be impeached directly by an action on the case for wrongfully suing it out.

The distinction is this: if an attachment, state's warrant, or other process be *void*, *trespass vi et armis* or *trover*, is the proper action; because the process did not authorise the act, and may be treated as a nullity: but if the process be in due form, and is issued by one having jurisdiction, it is an authority for doing the act; consequently an action in which such an act is the *gravamen* cannot be maintained. The injury consists in wrongfully suing out the process, in *consequence* whereof the plaintiff sustained damages: for instance, if a justice of the peace in the county of Robeson should, while in the county of New Hanover, issue a state's warrant under which the party is arrested, the action is *trespass vi et armis:* because the warrant is a nullity. But if such justice issues a state's warrant in the county of Robeson, for an offense alleged to have been committed in that county, the party arrested cannot maintain *trespass vi et armis*, upon the ground that the warrant was sued out maliciously and without probable cause, for the warrant is not a nullity: it authorised the arrest, and the proper action is "case" for wrongfully suing it out.

All the cases for wrongfully suing out a state's warrant, attachment or other process, are "actions on the case." No precedent is found for any other form of action.

The distinction between TROVER and CASE is not a mere formal one: nor is it the objection, taken in this case to the form of action, *technical*, as was said in the argument: In *trover* the measure of damages is the value of the property: In *case* the jury are left to give such damages as will compensate for the injury really sustained, and if *malice* is proven, as well as a want of probable cause, the damages may be vindictive. The case agreed sets out that the defendant had a true debt, and "had reason to believe, and did believe, that the plaintiff would give bail for the criminal charge under which he had been arrested, forfeit his recognizance, and leave the State;" so the idea of malice is out of the question. If the action had been *case*, it would be for the jury to say whether the plain-

tiff had, *under all the circumstances*, sustained any real loss by reason of the fact that the defendant had sued out an original attachment instead of an ordinary writ, for the purpose of collecting his debt.

Judgment below reversed.
Nonsuit according to the case agreed.

PER CURIAM.

STEPHEN HAIR AND WIFE *et. al. vs.* ARTHUR MELVIN.

Whether the minutes of a County Court, showing the return by a sheriff of the list of lands to be sold for taxes due on the tax lists of a particular year, and that it was read in open Court, and that a copy was set up in the court room, designating the tract of land and the name of the owner and the amount of tax unpaid, is not sufficient evidence to sustain a sale for taxes, without producing the list itself. *Quere.*

But these minutes are proper evidence to be left to the jury on the question of the existence of such list, especially after the proper search has been proved, and its loss established.

For a trespass to the land of the wife before marriage, the wife is a proper party with the husband.

ACTION of TRESPASS *quare clausum fregit*, tried before his Honor Judge MANLY, at the Fall Term, 1854, of Cumberland Superior Court.

Plaintiff adduced in evidence a grant from the State to Jacob Grazier, dated 5th Sept. 1759, for a large quantity of land embracing the *locus in quo.*

Also, proof of a sale of sixty-seven acres (the land in dispute) as the property of the grantee, Grazier, to William Forbes, by Alexander McKay, sheriff of Cumberland, for taxes due on the said land. The evidence to establish this sale, consisted of exemplifications of the record of Cumberland County Court, as follows:

"EXTRACTS."

"A list of Taxables in Capt. Evans' district for the year 1821, returned into the office of the clerk of the county court,

on which list was 4,500 acres of land, listed by John Dickson for Conrad J. Grazier."

"At June Term of the County Court, 1823, the sheriff returned a list of lands advertised to be sold for taxes for the year 1821, which was read in open court, and a copy set up in the court room, on which list was Conrad Grazier 4,500, on Harrison's creek, $2 79 taxes."

At September Term, 1823.

"An acc't. of the sales of the lands sold on the 4th day of August, 1823, to satisfy the taxes and costs of advertising, &c., due thereon, for the year 1821, the same having been advertised according to law, was returned into office, and which account was—'Conrad Grazier 4,500 acres, 'Wm. Forbes took 6–10 acres, } $2 79 being the last and lowest bidder.'"

And he further adduced oral testimony from the clerk of the County Court, that he had made diligent search in his office for the tax list returned by the sheriff, noting the lands upon which the taxes were unpaid, with the names of the owners, &c., and that the same could not be found. There was no proof that it had ever been seen in the office.

Plaintiff also put in a deed from William Forbes to Wm. Nunnery, dated 21st January, 1828, for the same land.

Also, a deed from William Nunnery to Lucy Ann and Belinda, the female plaintiffs.

It was proved that the defendant had cut timber and got turpentine on the land in dispute, previously to the bringing of this suit in 1850.

The plaintiffs having closed their case, the defendant's counsel moved for a *nonsuit*, on the ground, that there was a misjoinder of the femes covert with their husbands. The motion was overruled, and the defendant excepted.

The defendant then introduced a grant to Wm. H. Melvin, dated in 1845, and a deed from said Melvin to himself.

The defendant relied upon a defect in plaintiff's title through the sale for taxes, contending that there was no evidence of

the sheriff's having returned his list of taxes with the delinquents, into the office of the County Court according to law, and that this was necessary to a valid sale: The Court, however, regarded the record as furnishing some evidence of the existence and return of the list, and left it to the jury to decide. He instructed them on this point, that it was necessary for the plaintiffs to show that the sheriff had a tax list in his hands, and that the same was returned into the County Court: also a list of the lands on which taxes were due and unpaid, and the names of the owners as required by law: That if they were satisfied of this from the proofs before them, the plaintiff had the older, and therefore, the better title; and in the absence of proof of any actual possession, the law would construe them to be in possession, and they would be entitled to recover. To which instructions defendant excepted.

Verdict for the plaintiffs.

Defendants moved for a *venire de novo* upon the several grounds of exception above stated. Rule discharged, and appeal to the Supreme Court.

W. Winslow, for plaintiffs.

D. Reid and *Shepherd*, for defendant.

BATTLE, J. The objection to the form of the action cannot prevail. It does not appear from the statement of the case whether the alleged trespass was committed before, or after the marriage of the *femes* plaintiffs. If before, then the action of trespass *vi et armis*, in the names of the husbands and their wives is undoubtedly correct. If after, there might be some doubt, but upon that we express no opinion: because on the motion to nonsuit, we ought not to presume any thing against the plaintiffs, which with equal probability, might be presumed for them.

The objection to the title of the plaintiffs upon the merits, is still more unfounded. The minutes of the County Court of Cumberland, at its June Term, 1823, showed that the sheriff did return a list of the lands, which he proposed to sell for the taxes due on the tax lists of 1821, which was read in open

Court, and a copy set up in the court room, on which was mentioned the tract in question, the name of its owner, where it was situated, and the amount of the tax unpaid. All this was recorded just as the Act required, (see 1 Rev. St. ch. 102, sec. 52,) and thereby became, as was said in *Kelly* v. *Craig*, 5 Ired. Rep., 129, something in the nature of a judgment. Whether it was necessary for the purchaser, or one claiming under him, after producing this record in support of his title, to go farther and produce the tax list itself, which was returned by the sheriff, may admit of some question. The reasoning of the Court, in *Kelly* v. *Craig*, upon the intention of the Act of 1819, from which, 52d sec. of 102d ch. of the Rev. Stat., was taken, would seem to favor the idea that the record alone would be sufficient. "The intention of the Act of 1819," says the Court, "was to provide a more certain and probable notice to the owner, of the intended sale of his land, and of the reason therefor, by requiring it to be given in open court, at the term next preceeding the sale, and to be recorded; so that the rumor thereof, at least, might reach him; and that upon investigation, he might find at a known place, a permanent and certain evidence of the truth of the matter. So, too the bidders cannot be deceived by any false representations, as they can respecting advertisements in the country, or in a newspaper, as the evidence is of record, and at hand, and if they choose to look, they must know, whether the sheriff has done his duty by the owner or not. If he has not, his sale ought not to pass the title, more than if it were by private contract, or was not made at the court house, or on a wrong day of the week; in all which cases, the wrongful conduct of the officer *must* be known to the bidder, and therefore his purchase ought not to stand. Indeed, the proceeding directed by the Act of 1819, is very much in the nature of a judgment; and a purchaser can as readily search for and find the one of record as the other, and therefore there is as little reason to dispense with the one as the other." If it be true, then, that the production of the record of the sheriff's return of the tax list be essential to the support of the purchaser's title, why

should the list itself be required? That being a loose piece of paper, deposited in the clerk's office, may be easily misplaced or lost, and therefore will not afford much protection to the owner against an unlawful sale of his land, or much security to the purchaser as a safe-guard to his title. Besides, in showing a judgment as the foundation of a title, it is not necessary to produce the preliminary proceedings, and we can see no reason for producing them in a case like this, where the recorded tax list is in the nature of a judgment.

But if this be not so, we think the record was testimony sufficient to be left to a jury, that the tax list was in the hands of the sheriff, and was returned by him into open court as required by law. We think farther, that this testimony was admissible for that purpose, after it had been proved by the clerk that he had made diligent search for the paper and could not find it in his office.

There is, in our opinion, no error in the judgment, and it must be affirmed.

Judgment affirmed.

PER CURIAM.

JETHRO MURPHREY *vs.* JONATHAN WOOD AND WIFE.

It is erroneous for a Court to set aside an execution issued on a dormant judgment where property has been purchased under it.

The purchaser of property at a sale, under an execution issued on a dormant judgment, has a right to intervene and appeal from an order of the Court setting such execution aside.

APPEAL from the Superior Court of Greene County at the Spring Term, 1854, his Honor Judge ELLIS, presiding.

McArthur Heidleburg and Wm. G. Jones, in right of his wife Emily, filed a petition and obtained an order of the County Court of Greene, for the partition of a tract of land, of which they were tenants in common: In the final judgment of that Court upon the report of the commissioners, who made the

partition, the share assigned to Jones and wife, was charged with the payment of a sum of money to each of the other tenants, and several judgments rendered against Jones and wife for these sums. After the lapse of more than a year and a day, executions issued on these judgments, and the lot of Jones and wife was duly sold, under them, to the plaintiff Murphrey, and a deed made to him by the sheriff for the same. An action of ejectment was instituted by Murphrey to recover the possession of this lot from Emily, her husband in the mean time having died: while this suit was pending, the defendant Wood, who had married Mrs. Jones, applied to the County Court of Greene to set aside the executions as having issued on dormant judgments, notice having been given of this application to Heidleburg and McArthur, and accordingly that Court adjudged that the executions be set aside: from this judgment the plaintiff, Jethro Murphrey, appealed to the Superior Court.

Upon consideration of the above case, his Honor was of opinion, and so adjudged, that although the executions in question had issued irregularly, the judgments being dormant by the lapse of a year and a day, yet, inasmuch as the rights of third persons had intervened, the County Court had no right to set aside the executions, and therefore refused to grant the motion, but dismissed it: from which judgment, Wood and wife appealed to this Court.

J. W. Bryan, for the plaintiff.
Donnell, for the defendants.

Battle, J. That an execution issuing upon a dormant judgment is irregular, and may be set aside upon the motion of the defendant, if made in proper time and under proper circumstances, is not disputed, Tidd's. Prac. 1032. But such execution, until set aside, is not void, and the officer to whom it is directed is bound to execute and sell under it, *Dawson* v. *Shepard*, 4 Dev. 497; *Brown* v. *Long*, 1 Ire. Eq. 190; *State* v. *Morgan*, 7 Ire. Rep. 387. And the purchaser will acquire a good title to the property sold, *Oxley* v. *Mizzle*, 3 Murph.

Rep. 250. It is the undoubted duty of the Court to protect the interest of one who purchases under its own process, and hence it follows, as a necessary consequence, that when the interest of such purchaser intervenes, the Court cannot rightfully deprive him of his property, by setting aside the execution under which the purchase was made. The order of the County Court, as made in this case, was therefore wrong; but could an appeal be taken from it? That question is answered by the recent case of *Williams* v. *Beasley*, 13 Ire. Rep. 112, in which Ruffin, C. J., said, "it was a mistake to suppose that an appeal does not lie to the Superior Court from an order of the county court allowing an amendment, or setting aside a judgment for irregularity, as the contrary has often been decided." It is manifest that an order for setting aside an execution for irregularity, must be subject to the same rule. Tidd. Prac. 488, 489. The order of the Superior Court reversing that of the county court was therefore right, for the reason given, to wit, that the interest of a third person had intervened before the notice to set aside the process was made in the latter Court. This seems to be the result of all the cases bearing upon the question, to which our attention has been called by the counsel.

But another objection is raised, that the purchaser of the land, Jethro Murphrey, was no party to the record in the County Court, and that he, therefore, had no right to appeal. It cannot be denied that he had an interest in the question of setting aside the execution. He had bought and paid for the land sold under it, and it was more than two years afterwards, and after he had commenced an action to recover the land, before the defendants moved to set the executions aside. And even then, the motion was not made for the purpose of having the money collected, restored to the defendants, but solely to defeat the action which had been brought by the purchaser. As the restoration of the money was not asked, the purchaser was in truth, the only person interested in the order made, and we think he had a clear right of appeal given him by the first section of the 4th chapter of the Revised Statutes, "con-

cerning Appeals and proceedings in the nature of Appeals." That section provides that, "where any person, either plaintiff or defendant, *or who shall be interested*, shall be dissatisfied with the sentence, judgment or decree of any County Court, he may pray an appeal, &c., to the Superior Court of law," &c., &c. The words "or who shall be interested," seem expressly to embrace the present case, and we have seen no authority against it, and should be sorry to find that there was one against so salutary a provision. The order of the Superior Court of law reversing that of the County Court, must be affirmed, and this opinion will be certified as the law directs.

PER CURIAM. Judgment affirmed.

STATE *vs.* EDWARD MOSS.

An act of the General Assembly giving to the Intendant of Police of a Town, the power of trying assaults and batteries, is unconstitutional and void.

INDICTMENT for ASSAULT and BATTERY, tried before his Honor Judge SETTLE, at the Spring Term, 1854, of Mecklenburg Superior Court. Plea, "not guilty," "former conviction" and *specially*, "that he was convicted and fined by the Intendant of the town of Charlotte, and that he has paid the fine and costs of that conviction and did not appeal from that judgment, and according to the section of the act incorporating the town of Charlotte, passed at the session of 1850, chap. he could not be indicted and punished."

It was proved that the defendant committed an assault and battery on the body of John Sloan, jr., in the town of Charlotte, in Mecklenburg county, within two years before the bill was found.

For the defendant, it was shown, that he had been convicted for the same offense before the Intendant of Police of the Town, and fined; and that he had submitted to such judgment and

paid the fine. The act of Assembly set forth in the plea, was also offered in evidence for the defendant, and it is admitted that the act confers the authority upon the Intendant which he exercised. Upon these facts, the defendant's counsel asked the Court to instruct the jury that he was protected, by the proceeding before the Intendant, from indictment, and that the plea was sustained.

His Honor declined to instruct the jury as asked, but gave it as his opinion that the act in question was unconstitutional, and that a conviction and punishment under it were invalid, and did not protect the defendant from this indictment. Verdict of guilty. Judgment and appeal.

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

NASH, C. J. The defendant is indicted for an assault and battery committed in the county of Mecklenburg. He pleaded, among other things, a former conviction for the same offense, and specially, that he was convicted and fined by the Intendant of Police of the town of Charlotte, where the offense was committed, and that the judgment had been executed, and by the private Act of 1850, incorporating said town, he could not be indicted.

It is a principle of the common law, that when a man has once been acquitted or convicted, upon any indictment, or other prosecution, before any Court having *competent jurisdiction* of the offense, he may plead such acquittal or conviction, to any subsequent accusation for the same offense. 4th Bl. Com. 335. To render the plea available, the former judgment or trial must have been before a Court possessing the power to hold jurisdiction of the offense; in other words, the defendant must have been legally convicted or acquitted. The act of incorporation of the town of Charlotte does give to the Intendant of Police, the power to try and punish the offense with which the defendant is charged, so far as the Legislature could confer it. This brings up directly, the constitutionality of the act, so far as this question is concerned. The power of

the Judiciary to adjudge an act of the General Assembly unconstitutional, is too firmly established to be questioned; but the Courts will not exercise this power in cases of doubt. Every act of the Legislatue is presumed to be constitutional and within its authority, and is to be declared unconstitutional only when no doubt exists. *Hoke* v. *Henderson*, 4th Dev. 1. *Bank* of *Newbern* v. *Taylor*, 2nd Murphy 266. When the words used are plain and clear, and the sense distinct and perfect arising on them, there is, in general, no room for construction or interpretation; 1 Story's Com. on the Con. of the U. S. sec. 401.

The bill of rights, constitutes a part of the constitution of this State. By the 8th sec. it is declared, "that no freeman shall be put to answer any criminal charge, but by indictment, presentment or impeachment;" and by the 9th, "that no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open Court, as heretofore used." The act in question is a clear and undoubted violation of both of these sections.

The defendant was charged with having committed an assault and battery in the town of Charlotte; the act was a breach of the peace, and therefore, constituted a criminal charge, and by the 8th section, he could "be put to answer it, but by indictment or presentment;" and by the 9th sec. could be convicted only "in open Court, by a jury of good and lawful men." These principles are dear to every freeman; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be *rights* of the citizens of North Carolina, and ought to be vigilantly guarded. The act of 1850, which we are considering, violates also the 12th section of the bill of rights. It declares, "that no freeman ought to be, &c." or in any manner destroyed or deprived of his life, liberty or property, but "by the law of the land." Lord Coke, in his commentaries on Magna Charta, where the phrase is first used, says these words, "by the law of the land" mean, "by due course of law," which he afterwards explains to mean by indictment or pre-

sentment. Institute, 45, 50. Under the process, issued by the Intendant of Police, the defendant was deprived of his liberty for the time being, and there is nothing in the case to show that the Intendant was a Justice of the Peace for the county of Mecklenburg, within which the town of Charlotte is situated, or that he was acting in that capacity when he issued his process. All that he could do, if authorised to have the defendant arrested, was to bind him over to the proper Court for trial.

It is however, argued, that trial by jury was not denied in this case to the defendant, he might have appealed. Grant that he might: does that comply with the constitutional provisions, as set forth in the 8th and 9th sections of the bill of rights? What if he could not appeal, could not give security, are his constitutional rights to be denied him, because of his poverty? But again, the right is absolute and unconditional, untrammelled by any restrictions whatever. Every free person charged with a criminal offense, has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt; first, by a grand jury, and secondly, by a petty jury of good and lawful men; he shall not be put to answer but by indictment, presentment or impeachment. Suppose, then, that he does appeal, how is he to be tried? Upon the Intendant's warrant and the judgment pronounced by him? Where then is the constitutional protection? He has lost it; no grand jury has been called on to say whether he shall go before a petty jury or not, but a single individual has sent him there. It would be often a mockery to tell a defendant, you do not lose the right of a trial by jury, because you may appeal: a palpable evasion of the constitutional protection guaranteed to every freeman. Nor can the acquiescence of the defendant in the judgment before the Intendant, give the latter jurisdiction of the case. *Burroughs* v. *McNeil*, 2 Dev. and Bat. Eq. 297.

We agree with his Honor who tried the cause below, that the act of 1850, giving power to the Intendant of police of the town of Charlotte, to try such offenses, is unconstitutional and

void; and that the conviction before him was illegal, and that it cannot avail the defendant under his plea of *autre foits convict;* there was against him no legal judgment.

PER CURIAM. Judgment affirmed.

WALTER L. OTEY *vs.* GOOLD HOYT, EX'R.

A witness who did not profess to be a chemist, nor to be able to give an opinion on any branch of the science, but had only been employed for a few weeks in a drug store, was *held* not qualified to give his opinion as an expert.

To permit such a witness to say he had seen writing extracted by the use of chemicals from a piece of paper which he held in his hand at the trial before a jury, was error.

Where it was admitted that the signature to a paper, offered as a bond, was genuine, but contended, at the same time, that the body of the note was a forgery, the *onus* was not thereby taken from the plaintiff and imposed on the defendant; but the former was still bound to prove the execution of the bond declared on.

ACTION of DEBT, tried before his Honor Judge ELLIS, at the Fall Term, 1854, of Pitt Superior Court.

Plea, *non est factum.*

On the trial it was admitted that the signature to the bond was the genuine signature of the testator, Norcott; but the defendant denied the seal and the body of the bond, and alleged that the same was a forgery: that the ink had been extracted from the body of some genuine paper by the use of chemicals, and the writing, composing the obligation declared on, had been substituted, and a seal added.

To establish this position, the defendant offered a witness, one *Moore*, to prove that he had just seen an experiment performed whereby legible writing, with ordinary ink, had been erased and extracted from a piece of paper (which he then held in his hand) by the application of certain chemicals.

This witness said he was not a professed chemist, and had only been employed in a drug store for a few weeks—knew little or nothing about the science, and could give no opinion upon any branch of it. This testimony was objected to, but received by the Court; for which the plaintiff excepted.

The plaintiff's counsel asked the Court to charge the jury that as the signature of the defendant's testator to the bond had been admitted, it was for the defendant to satisfy the jury that it was a forgery.

The Court, however, was of a different opinion, and instructed the jury that the plea of *non est factum* imposed the burden of proof upon the plaintiff, and that it was for him to satisfy them that the paper in question was the genuine bond of the testator. For which the plaintiff again excepted.

Verdict for the defendant.

Rule for a *venire de novo* for the causes of exception above stated. Rule discharged. Judgment and appeal.

Moore and *Attorney General*, for the plaintiff.
Biggs and *Rodman*, for defendant.

NASH, C. J. Three questions are presented for our consideration: Upon the first, we shall express no opinion, inasmuch as it is not likely, on a second trial, the second deposition of Oliver will be used for the purpose contemplated on the former.

The 2nd question is as to the admissibility of the testimony of the witness, Moore. The action is upon a single bill, or bond, and the plea of *non est factum* alone relied on. The defendant contended, that although the signature to the instrument declare on, was the hand writing of his testator, yet the body of it was a forgery; the original writing having been removed by some chemical process, and the present writing substituted. To show that this could be done, the witness, Moore, was introduced. He testified that he had just seen an experiment performed, whereby legible writing, with ordinary ink, had been erased and extracted from a piece of paper (which he then held in his hand) by the application of certain chemicals.

This witness stated he was no professed chemist, but had only been in a drug store a few weeks back, and knew little or nothing of the science; and could give no opinion on any branch thereof. The admission of this testimony, after objection by the plaintiff, was erroneous. It is a general principle of the law of evidence, that no man shall be permitted to manufacture evidence for himself. Immediately before the trial an ignorant man is taken to a room, a paper is produced, and pouring on it a chemical preparation, the writing is obliterated, and he comes into Court to show the paper and tell what he saw. We know there are inks variously manufactured; some from minerals and others from vegetables. To pick up a man who tells you he is entirely ignorant of all these things, is throwing no light upon the subject, and is well calculated to mislead the jury. Daily experience teaches every man who is in the habit of writing, that ink, which is freshly applied to paper, is much more esily obliterated than that which has been for a long time on the paper. The latter sinks into the paper, and gets dry and hard, while the former rests on the surface, and simple water will remove it.

The witness, Moore, did not state whether the paper experimented on, had been recently impressed with the writing, or whether it was a writing of long standing, or whether it was written then, merely for the purpose of enabling him to testify in Court what he saw. The simple fact by itself, as stated by this witness, was not entitled to the character of evidence. A very happy illustration was used by the counsel at the bar, to show the incompetence, as evidence, of the fact so testified to by the witness. A man is indicted for murder, from a blow on the head; the instrument a small stick; the doubt is, whether the instrument used was likely to produce death. The State calls a witness to swear that he saw a man killed by a stroke on the head with a stick of the same size, as the one used by the prisoner. Would this evidence be received? Surely not. And yet it would be as competent, and as much to the purpose, as the evidence we are considering. His Honor erred in admitting the evidence.

Here we might close our opinion; but as on another trial the third objection *may* occur, we think it right to express our opinion upon it. His Honor was requested by the plaintiff's counsel, to charge the jury, that the signature to the instrument, having been admitted, it was for the defendants then to satisfy the jury that it was a forgery; but the Court was of a different opinion, and charged that the plea imposed upon the plaintiff the burthern of proof, and that it was for him to satisfy them that it was the bond of the testator. There is no error. In the argument before us, the counsel of the plaintiff relied on "Best on presumptions, page 75." He says, "things there presumed are divisible into three classes:" the first and second do not reach this case: we have now only to do with the third.

"Where, from the existence of a posterior act or acts, in a supposed chain of events, the existence of prior acts are inferred or assumed, *ubi priora præsumuntur a posterioribus.*

2nd. Where the existence of the posterior act is inferred from that of prior acts; as where the sealing and delivering of a deed, purporting to be signed, sealed and delivered, on proof of signing only, the sealing and delivering are to be inferred; *præsumuntur posteriora a prioribus*, sec. 62."

This latter branch of the statement by Mr. Best, certainly does bear out the position taken by the counsel, and sustains the instructions required.

If from the proof of signing, sealing and delivering are to be assumed as a matter of law, then it follows as a necessary consequence, that it devolved upon the defendant to sustain the negative, by showing that the instrument was not sealed and delivered. But, Mr. Best, in the 71st section, explains his meaning—"and there are many instances of the application of this presumption, even where it is strictly necessary to prove the execution of an attested instrument. Thus when a deed is produced, purporting to have been executed in due form, by signing, sealing and delivering, but the attesting witness can only speak in fact of the signing, it *may be properly left to the jury* to presume a sealing and delivery," and for this he cites the case of *Burling* and *Patterson*, 38 E. C. L. R. 233. It

was an issue directed by the Court of Queen's bench, to try whether certain goods were, on a certain day, the property of the plaintiff. In the course of the trial, it became important to ascertain the validity of an instrument of writing purporting to be signed, sealed and delivered by one Sophia Wray. JUSTICE PATTERSON told the jury, "the witness recollects her signing it, which is the least material part; however, you will say, whether this evidence *satisfies* you, that Sophia Wray authenticated the seal, &c." The deed was in the usual form, and the subscribing witness could only recollect seeing Sophia Wray sign the deed, and could not recollect whether any other form was observed. The instruction asked in our case, was based upon the idea, that from the proof of signing, the *law* inferred the sealing and the delivery; whereas JUSTICE PATTERSON considered it a question of fact, which the *jury* might infer, and such must have been the idea of his Honor who tried the case below; for he uses very nearly the language used by the Court in *Burling's* case, "if this evidence, (to wit, the proof of the signature) satisfies you, &c.," and when the instrument purports to be executed with all the due forms of law, the inference is strong as a matter of fact, that *posteriora a prioribus præsumuntur*, and the jury might well draw the inference. Such we understand to be the charge of the Court.

But for the error as to the testimony of Moore, there must be a *venire de novo.*

PER CURIAM. Judgment reversed.

CALEB SANDERLIN *et al. vs.* ADELINE DEFORD, ADM'X.

A bequest of slaves to one for life, and at his death, *to his heirs lawfully begotten by his body, and for the want of such heirs,* to certain persons designated, was *held* to be a good limitation in remainder, under the Statute of 1827.

A bequest of a contingent interest to children, without any reference to their

death during the pendency of the contingency, vests such an interest as survives them on their dying before the determination of the contingent event, and goes to their personal representative.

THIS was an action of DETINUE for slaves, tried before his Honor Judge DICK, at the Fall Term, 1854, of Camden Superior Court.

The case was agreed between the parties and depends, mainly upon the construction of the following clause of the will of Isaac J. Sanderlin, viz:

"And I lend the use of the balance of my property, both "real and personal, after paying my just debts, unto my son, "Willis Sanderlin, during his natural life, and at his death, I "give and bequeath it unto his heirs lawfully begotten by his "body; and for the want of such heirs, to go to W. W. San- "derlin's children, and Maxcy Sanderlin's children."

Willis Sanderlin held the properly under this bequest for about fifteen years, when he died intestate and without having had issue, (having never married,) and administration was taken upon his estate by the defendant, who holds the slaves, for which this suit is brought, in that right; insisting first, that her intestate had an absolute estate, and that the limitations over were upon a contingency too remote, and therefore void.

Several of the children of W. W. Sanderlin and Maxcy Sanderlin died in the life time of Willis Sanderlin, and this suit is brought by their administrators. It was objected, secondly, that nothing vested in these intestates in their life-time, and that, in no point of view, can their administrators recover. It is agreed that if either of these questions is against them, that a nonsuit shall be entered, otherwise that they have judgment on the special case.

His Honor was of opinion upon this case, that the limitation over was good and effectual to vest the title in the children of W. W. and Maxcy Sanderlin; but only to those of them who were living at the death of Willis. Whereupon a judgment of non-suit was entered, and the plaintiffs appealed.

Martin, for plaintiffs.
Pool and *Heath*, for defendant.

BATTLE, J. The questions presented for our consideration in this case, arise upon the construction of the following clause in the will of Isaac J. Sanderlin, which was made, and published the 17th day of June, 1838: "I lend the use of the balance of my property, both real and personal, after paying my just debts, unto my son, Willis Sanderlin, during his natural life, and at his death, I give and bequeath it unto his heirs lawfully begotten by his body, and for the want of such heirs, to go to William W. Sanderlin's children, and Maxcy Sanderlin's children."

The defendant's counsel contends, first, that the legatee, Willis Sanderlin, took an absolute interest in the slaves which composed a part of the personal estate, and that the limitation over was too remote, and therefore void: and secondly, that if the limitation over was good, then only such of the children of W. W. Sanderlin and Maxcy Sanderlin as were living at the death of the legatee Willis, could take under it, and that, therefore, the present suit, in which the administrators of the deceased children of the said W. W. and Maxcy Sanderlin are parties, cannot be maintained.

We agree with the defendant's counsel, that Willis Sanderlin took an absolute interest in the slaves by virtue of the rule in *Shelly's case*, as applied to personal chattels. See the leading case of *Ham* v. *Ham*, 1 Dev. and Bat. Rep. 598, and the authorities there referred to. The bequest of the use of the personal property to the legatee for life, was the same as the loan or gift of the chattels themselves for life; since, "undoubtedly," said Judge GASTON, in delivering the opinion of the Court in *Vanhook* v. *Vanhook*, 1 Dev. and Bat. Eq. Rep. 592, "in ordinary discourse as well as in legal construction, the use or profits of a chattel for life, and the loan of the chattel for life, are of equivalent meaning and operation." This distinguishes the present from the case of *Payne* v. *Sale*, 2 Dev. and Bat. Eq. Rep. 455, where it was held, where slaves were

given to a trustee in trust for the legatee for life, and the legal interest in them was given to the heirs of her body, the two estates, being of different natures, the one legal and other equitable, could not unite, and therefore the rule in *Shelly's* case, would not apply.

We differ from the counsel as to the limitation over being too remote, the case of *Weeks* v. *Weeks*, 5 Ire. Eq. Rep. 111, is, in our opinion, a direct authority to show that though the limitation over, would at common law have been too remote, yet it is made good by our act of 1827, 1 Rev. Stat. ch. 43, sec. 3. It is true, that act uses the terms, "dying without heir or heirs of the body, or without issue or issues of the body," &c.; but it is said by the Court, in *Weeks* v. *Weeks*, that the act was intended to establish "a beneficent rule of construction which the Legislature found necessary to prevent the frustrating of the intentions of testators upon technical grounds." We should be very poorly engaged in carrying out the beneficent design of the law-makers, if we were to yield to the argument of the counsel, and hold that the words, "for want of such heirs of the body," did not come within the meaning of the act.

The remaining question is, whether the children of W. W. and Maxcy Sanderlin, who died in the life time of Willis Sanderlin, took such an interest in the executory bequest as, upon their death, devolved upon their personal representatives? It is very certain that if an estate for life only had been given to Willis Sanderlin, the bequest to the children of W. W. and Maxcy Sanderlin, would have become vested as they came into existence during the life of the legatee, and upon the death of any one or more of them, before the death of the legatee for life, would have gone to his or their representative or representatives. See *Vanhook* v. *Vanhook*, 1 Dev. and Bat. Eq. 589; *Wallace* v. *Cowell*, 3 Ire. Rep. 323, and many other cases. It is equally certain that if the children, instead of being designated as a class, had each been named personally, the interests, though contingent, would have devolved upon the administrators of such of them as died in the life time of

Willis Sanderlin, *Robards* v. *Jones*, 4 Ire. Rep. 53; *Pinbury* v. *Elkin*, 1 Peer. Will. Rep. 563; *Barnes* v. *Allen*, 1 Brown's, ch. cas. 181; Roper on Leg. 402, 1 Jarm. on Wills 777. It is not so certain upon the authorities, that such contingent interests given to children as a class, will devolve upon the representatives of such as died before the contingency happens. Mr. Jarman says, in the page above referred to, "that a contingent interest will or will not be transmissible to the personal representative of the legatee, according to the nature of the contingency on which it is dependant. If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects, and consequently such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time. Where, however, the contingency on which the vesting depends, is a collateral event, irrespective of attainment to a given age, and surviving a given period, the death of any child pending the contingency works no such conclusion, but simply substitutes and lets in the legatee's representative for himself." For this he cites *Pinbury* v. *Elkin*; *Barnes* v. *Allen*, herein before referred to, and several other cases. The case of *Gill* v. *Weaver*, 1 Dev. and Bat. Eq. Rep. 41, supports the first part of Mr. Jarman's proposition. There the personal representative of a deceased child was excluded from the benefit of a legacy given in the following terms: "I give to my wife all my personal estate, to have the sole use of it until my youngest living child comes of age, provided she, my wife lives: if she dies before my youngest living child becomes of age, then all my personal property shall be equally divided among my living children, male and female, except, &c., &c. It is my desire, that if my wife does live until my youngest living child comes of age, she shall have one equal share of my estate as is mentioned." In excluding the representative of a child who died before the contingency happened, the Court laid much stress upon the word "living," in the

direction for the division among the testator's "living children, male and female." The deceased child not being then living, was held to be necessarily excluded: the Court at the same time declaring that the "inclination of the Court is to construe legacies, and especially provisions for children, to be vested and transmissible, if the words will possibly admit of it, and they are most reluctantly held to be contingent." The case of *Stanley* v. *Wise*, 1 Cox's Rep. 432, may, it seems to us, be relied on in support of the latter part of the proposition. In that case the testator having four daughters, three of whom were named, Mary, Sarah and Elizabeth, bequeaths to the two first £4,000 each, but if either of them died unmarried, he empowered her to dispose of £400, part of her £4,000, and the residue of that sum, £3,600, he directed to go and be divided among his surviving daughters, and the children of such of them as should be then dead, the children taking their mother's share. Sarah died unmarried. Elizabeth died before Sarah, having had five children, two of whom survived Sarah, and the other three died before her. The question was, whether the share given to the children of Elizabeth was so vested as they came *in esse*, subject to be divested upon the contingency of Sarah's marriage, that the interest of the children who died before Sarah, would be transmissible to their personal representatives. Lord KENYON, who was then Master of the Rolls, held that they were, and therefore, that the fund must be equally divided between the representatives of the deceased children, and those who were living. The principle decided in *Stanly* v. *Wise*, is directly applicable to the case before us, and must govern it. There, the fund was given absolutely to the testator's daughter, Sarah, with a limitation over, in the event of her dying unmarried, to the children of her sister, Elizabeth. The legacy given to the children as a class, was necessarily executory and contingent, and yet it was held, that each child took such an interest in it, that upon his or her death, before the contingent event happened, it devolved upon his or her representative. It is not stated whether either of the children who died, was born after the death of

the testator, but we do not think that would make any difference. We have seen that it would not, in the bequest of a remainder to the children of a certain person after the death of a legatee for life. Such after-born children, as much answer the description as any others; and the construction which gives the interest in the executory bequest to the personal representatives of those who die before the contingency happens, will always tend to secure such interests to the issue of such deceased children, should they leave any, and thus carry out more completely the beneficent intention of the testator towards the family of him or her, to whose children the bequest is made.

It is to be further remarked in favor of this construction, that if the deceased children should have died intestate, leaving no issue and no debts to be paid, the other children would, as next of kin, be entitled to claim from the representative the share assigned to such deceased child, so that in most cases the result would be nearly the same, whether the executory interest go to the representative of the deceased child or not. Our conclusion then, in the case before us is, that upon the death of Willis Sanderlin without leaving any lawful heirs of his body, the slaves bequeathed to him, with their increase, went to the administrators of the children of W. W. Sanderlin and Maxcy Sanderlin, who had died in the life time of the said Willis Sanderlin, as well as to those who were living at his death. The judgment of nonsuit given in the Court below, must therefore be reversed; and according to the case agreed, judgment must be entered for the plaintiff in this Court.

Judgment reversed.

RUFUS STAMPS AND WIFE *vs.* SAMUEL MOORE, ADM'R.

An Executor in Virginia, has no right to assent to a legacy when the property is situated in this State, without making probate, and taking letters testamentary in our courts.

Stamps *v.* Moore.

THIS was an action of DETINUE, tried before his Honor Judge BAILEY, at the Fall Term, 1854, of Caswell Superior Court.

The action was brought for certain slaves bequeathed to the plaintiffs in the will of Alexander Moore, of Halifax county, in the State of Virginia. The slaves in question, at the time of the making of this will, and, afterwards, till the testator's death, and since that time, up to the bringing of this suit, were in the county of Caswell, in this State, in the possession of defendant or his intestate, and never were in the possession of the executor of Alexander Moore.

The deposition of the executor was offered to prove that he had assented to the legacy of the plaintiffs: the defendant denied that such assent was proved by the deposition, but insisted that if such were its effect, that an assent could not be given by an executor residing in Virginia, under a will there proven, and not proven in North Carolina, the property being in this State. The question of law was reserved by the Court with the consent of the parties, with leave to enter a nonsuit in case his Honor should be of opinion against the plaintiff, on the question reserved.

Verdict for the plaintiffs.

Afterwards, upon consideration of the question reserved, his Honor being of opinion with the defendant, set aside the verdict and ordered a nonsuit. Plantiffs appealed.

Norwood, for the plaintiffs.
Morehead, for the defendant.

PEARSON, J. One domiciled in the State of Virginia, dies there, leaving a will, appointing an executor who makes probate of the will and takes letters testamentary in pursuance of the law of that State. Does his assent vest the legal title in a legatee in reference to property, which before, and at the death of the testator, was situate in this State? Story's "Conflict of laws," sec. 513: "It has hence become a general doctrine of the common law, recognised both in England and America, that no suit can be brought by or against any foreign executor or administrator in the courts of the country in vir-

tue of his foreign letters testamentary or of administration. But new letters of administration must be taken out, and new security given according to the general rules of law prescribed in the country where the suit is brought. The right of the foreign executor or administrator to take out such new administration, is usually admitted, as a matter of course, unless some special reasons intervene; and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. Still, however, the new administration is made subservient to the *rights of creditors*, *legatees* and *distributees* resident within the country, and the residuum is transmissible to the foreign country only, when the final account has been settled in the proper domestic tribunal upon the equitable principles adopted in its laws."

The same doctrine is held in *Hyman* v. *Gaskins*, 5 Ired., 267, and in *Alvaney* v. *Powell*, decided at this term, (see Eq. No.) where the subject is fully discussed, so as to make it unnecessary to repeat it.

The result is this: the executor in Virginia could not maintain a suit in this State, for the slaves alleged to be detained, without making probate and taking letters testamentary in the proper court of this State; consequently, he cannot, by his "assent," confer upon a legatee a right to do that which he could not do himself.

Creditors in this State would have no protection, if it was in the power of an executor in Virginia to assent to a legacy of property situate here, so as to vest the legal estate in the legatee: Nor would legatees be able to enforce their rights to an abatement *pro rata* if the estate should not be sufficient to satisfy the debts and leave enough for the payment of legacies.

We put our decision upon the ground that an executor in Virginia has no right to assent to a legacy when the property is situate in this State, without making probate and taking letters testamentary in our courts; and for that reason do not advert to the fact that the executor in Virginia, according to the proofs, never did assent. He says, in his deposition, that

he would have assented to the legacy, but for the fact, that he never considered that he, as an executor in Virginia, had any thing to do with property in North Carolina.

This conclusion of his, as we have seen, is fully supported by the authorities.

Judgment affirmed.

PER CURIAM.

STATE *vs.* WILLIS HESTER.

Where notice was given to a prisoner in close custody, four days before the trial, to produce a certain paper which was traced to his possession, his residence being only four and a half miles distant when he received the notice; *Held* that this was sufficient to authorise the admission of secondary proof.

Where two of the jurors charged in a capital case left the rest of the jury for fifteen or twenty minutes, but did not speak to any one about the prisoner or his trial, nor hear any one speak of them, the Court below having refused a new trial on the facts, *Held* that this Court will not award *a venire de novo* for the same causes of exception.

The act of 1852, concerning the stealing of slaves, is not a repeal of the 10th section of the 34 ch. Rev. Stat., on that subject.

THIS was an INDICTMENT for stealing a slave, tried before his Honor Judge BAILEY, at the Fall Term, 1854, of Chatham Superior Court.

The defendant was found guilty by the jury, and a rule was obtained for a *venire de novo*, which was discharged, and the defendant appealed. Two grounds of exception are stated in the bill sent up.

1st. Because secondary evidence of the contents of two bills of sale, given by the defendant to one Martin Rippey, was admitted without sufficient notice to the defendants to produce the originals. The facts in relation to this point are fully stated in the opinion of the Court.

2nd. Because there was a separation of the jury between the time of their being impanneled and the rendition of their verdict.

It appeared that two of the jurors ate supper alone, and were separated from the remainder of the panel, who were in a room above the supper room, for fifteen or twenty minutes: it also appeared that these two jurors left the supper room separately, and were apart for about five minutes: and that several of the persons who had come with the prisoner from Orange county, as a guard and as witnesses sat at the table with these jurors, but they did not speak to any one, nor did any one speak to them, or in their presence, about the prisoner or his case. The officer, in charge of the jury, stated in an affidavit, that this separation was entirely accidental; that after the jury had taken their seats at the table, on the occasion referred to, the door was opened, and finding that other persons were admitted, he directed the jury to retire and went out with them in a body, supposing that all were with him, but after getting to the room which they occupied, he found that the two, above mentioned, were absent; and he immedidiately went in pursuit of them and brought them to the room with the others. The jurors themselves were sworn, and made oath substantially to the foregoing facts. Upon consideration of these causes of exception, his Honor refused a new trial, and the defendant appealed to the Supreme Court.

Attorney General, for the State.
Norwood, *J. H. Bryan*, *Phillips*, and *Turner*, for the defendant.

Battle, J. The prisoner was found guilty at the last Term of the Superior Court for the county of Chatham, upon a bill of indictment, containing several counts charging him with stealing a slave named Dick, the property of John U. Kirkland. His counsel filed a bill of exceptions for two errors alleged to have been committed on the trial by the presiding Judge, which upon his appeal are brought before us for our determination.

The first supposed error relates to the notice to produce the bills of sale, which were shown to have been in the prisoner's possession, and which notice, it is contended, was not given to

him in proper time. The rule in such cases is, that notice must be given in a reasonable time; but what shall be deemed a reasonable time, must depend on the circumstances of each particular case. Roscoe's Crim. Ev. 11, and the cases there cited. The object of the notice being, not to *compel* the party to produce the papers, for that the Court has no right to do, but to enable him, by having them ready, to protect himself against the possible falsity of the secondary evidence; the inquiry in each case must be, did he have time, under all the circumstances with which he was surrounded, to procure the papers and have them ready at his trial: The answer will depend upon the proof, as to the extent and efficiency of the means which he can command within a given time, for the accomplishment of the desired object.

In the case now under consideration, the bill of indictment was found and the prisoner arraigned at the September Term of 1854, of Orange Superior Court, which commenced on the 11th day of that month. The transcript of the record before us, does not show on what day of the Term, the plea of not guilty was entered, and issue joined between the prisoner and the State. Supposing it to have been on the first day of the Term, that was the earliest day on which notice could have been served, because until that time there was no judicial certainty that any trial would take place. If a trial was to be had at that Term, as the prisoner had a right to insist, a notice served on that day must have been deemed sufficient; but it was not served until three days afterwards, to wit, on the 14th; a delay which might have prevented the State from giving the secondary evidence at that Term. The prisoner, however, for good cause shown, declined a trial in Orange county, and removed his cause to the adjoining County of Chatham, where he was tried on the 19th day of the same month. Whether the notice which he received on the 14th, would have been sufficient for his trial in Chatham, is unnecessary for us to decide, as the Solicitor, out of abundant caution, after the order for removal was made, caused another notice to be served the next day, with direct reference to the trial in the latter

County. That notice, we think, was given in sufficient time. The papers must, in the absence of proof to the contrary, be supposed to have been in the prisoner's possession, about his person, or at his dwelling house. He has a right to the supposition that they were at the latter place, which is four and a half miles from the jail where he was confined; he could not go and fetch them himself, because the law required that he should be kept in close custody; he must therefore, of necessity, have used other means to procure the papers, or it must be ruled that in capital cases, where the party is not entitled to bail, the State can never give secondary evidence of papers which the prisoner chooses to withhold. We think that the time which intervened between the service of the second notice on Friday and the Monday following, when the prisoner was removed from the county, was amply sufficient for him to have sent for the papers, through the agency of some relation or friend; and we think further, that if no person would undertake the agency voluntarily, the Court would, upon a proper application, have made an order upon one of its officers to get the papers and hand them to the prisoner. If he should, under such circumstances, have failed to procure the papers, it would no doubt have been good ground for a continuance of this cause?

The second error assigned in the bill of exceptions is the the ruling of the Judge upon the effect of the separation of two of the jurors from their fellows, after they were charged with the prisoner's case, and before their verdict was rendered. The question raised by this exception we cannot now consider or treat as an open one; since the cases of the *State* v. *Miller*, 2 Dev. and Bat. Rep. 500, and *State* v. *Tilghman*, 11 Ired. Rep. 513, where the subject was so fully and elaborately discussed and decided against the prisoner, we must regard it as definitively settled, that the question is one addressed to the sound discretion of the Judge who presided on the trial, and is not the subject of an appeal to this Court.

In the event of the application for a new trial being unsuccessful, as it has been, the prisoner's counsel have submitted a

motion here, in arrest of the judgment. The ground of the motion is, that the 10th sec. of the 34th chap. of the Revised Statutes upon which some of the counts of the indictment are framed, has been repealed by the 87th chapter of the Act of 1852, entitled "An Act to prevent the stealing, taking, or conveying away of slaves," and that the latter Act is so unmeaning that no judgment can be pronounced upon either of the counts founded on it.

We admit that owing, as we suppose, to a mistake in enrolling the Act, it is difficult to put a sensible construction upon it; but we do not think that it repeals the former Act, or at all affects any indictment framed upon it. The latter was manifestly intended to be an addition to, and not to supersede, the former act. It was intended to embrace cases which were supposed not to be within the provisions of the formed, to wit, cases where the owner was not in the actual or constructive possession of the slave at the time when he was stolen, &c., or where some other person was in possession of such slave at that time. It was also intended by the second section to simplify the indictment in such cases by making it unnecessary to set out, or aver how, or with whom, was the possession, direction or control of the slave, at the time of the commission of the offence. There is no clause in the latter Act repealing the former; nor, indeed, is there any reference to it in any way: hence, we conclude, that the two Acts may well stand together; and that consequently, the latter is not an implied repeal of the former. The counts framed upon the former, or at least some of them, are clearly good, as will be seen by reference to the opinion of this Court in the *State* v. *Williams*, 9 Ired. Rep. 140, and any one good count will sustain the judgment. *State* v. *McCanless*, 9 Ired. Rep. 375. The motion in arrest is therefore overruled.

It must be certified to the Court below, that there is no error in the record.

Judgment affirmed.

PER CURIAM.

DOE ON DEMISE OF JOHN WARD *vs.* WILLIE HATLEY.

To supply the loss of a deed under the Act of 1830, in relation to the destruction of the records of Hertford county, proof that a deed had been seen by several persons and copied by one of the witnesses, having in it the names of several creeks, but in what connection was not remembered, also calling for the lands of three individuals, but such proof not establishing any course or distance, nor whether the deed had a seal or whether the word *heirs* was in it, is not sufficient for the purpose intended.

ACTION of EJECTMENT, tried before his Honor Judge ELLIS, at the Special Term of Stanly Superior Court, June, 1854.

The lessor of the plaintiff gave in evidence a State Grant issued in 1795, for 17,880 acres to William Moore and Thomas Carson: A deed from Moore to Carson for all his interest, and the will of said Carson appointing his son John K. Carson his executor, with power to sell the land: He then put in the will of Doctor Thornton of Washington City, devising the land to his wife, Anna Maria and another, and appointing her (Mrs. Thornton) his executrix, with power to sell the same: also a deed from Mrs. Anna Maria Thornton to one Adderton and others, and from them to the lessors of the plaintiff: Evidence was given, tending to show, that the land in controversy was included in these conveyances.

Thomas Carson died in 1804, and Dr. Thornton in 1818. To establish title from Thomas Carson to Dr. Thornton, plaintiffs alleged that a deed had been executed to him by John K. Carson under the power in his father's will, and that the same had been destroyed by fire in the burning of Montgomery Court House, in 1843, and proposed to supply the deficiency under authority of the Act of Assembly passed in relation to the Court House in Hertford, and by another Act made to apply to Montgomery. The proper foundation for admission of secondary evidence, to prove the existence of the deed in question being made, the following testimony was adduced:

Mr. Martin, swore that he was clerk of Montgomery County Court in 1824, when the Honorable John Culpepper, then a member of Congress, as agent of Mrs. Thornton, had a deed

proved in Court, from a man by the name of Carson to Doctor Thornton: it was duly proved and certified, and ordered to be registered and then returned to the said Culpepper: That he did not know what Carson made the deed, nor the boundaries. He remembered that it contained several large tracts in the western part of Montgomery county: that Long Creek, Bear Creek, Mountain Creek, Ugly Creek and Rocky River, were mentioned in it in some connection; as to what that was, he was unable to say. He did not remember the consideration of the deed: nor whether the word "heirs" was named in it: nor whether it had a seal, but thought it was in the usual form; that he saw nothing to make him think otherwise. He further testified, that all the books and papers of the Register's office were burned with the court house of Montgomery, in 1843.

Lilly's evidence was substantially the same.

One *Knight*, swore that he was a deputy in the Register's office in Montgomery, and made a copy of a deed from one Carson to Wm. Thornton for *Col. Barringer*, the Attorney of Mrs. Thornton: that it was for a large tract of land, in several tracts, in the western part of Montgomery county, and referred to, and recited grants to Moore and Carson: He did not remember the numbers nor in what connection the deed referred to the grants to Moore and Carson: nor the given name of Carson. Long Creek, Bear Creek, Mountain Creek, Ugly Creek and Rocky River, were named in it; also the lands of Barney Dunn, George Whitley and one Udy, but did not recollect in what connection: that he did not remember the boundaries of the lands set forth in the deed, nor the description thereof: nor in what direction the lines of the survey ran; nor their length, nor the precise quantity of land specified. He did not remember whether a consideration was stated or whether there was a seal. The deed appeared to be in the usual form.

It appeared from other testimony, that Dr. Thornton had come into the State in 1805, soon after Carson's death, and remained several days near the lands in question, making

claim to them, and from that time they were called "Thornton's lands." It appeared from the face of the grant to Moore and Carson, that the land is described as lying in the fork of Rocky River and Long Creek and Bear Creek, "beginning at a red oak, near Conrad Woody's land, on the waters of Bear Creek." One of the lines crosses "Bear Creek," and runs to a stake in Barnydun's line; with it south 52 poles to a large poplar, his corner in Cobble's line, &c." The fourth call after this is for a hickory, George Whitley's corner.

The plaintiff's counsel contended, that from the evidence, aided by the provisions of the Act passed on the subject, the jury should infer that there was a deed from John K. Carson to William Thornton, and that enough appeared from the evidence to enable them to locate the land, and to identify it as that mentioned in plaintiff's declaration.

His Honor charged the jury that there was no evidence that a deed was ever made from John K. Carson, as executor, to William Thornton, and that the contents of the deed relied on, did not sufficiently appear, to enable the Court to say that it was such a deed as would convey the land, or to tell the jury what were the boundaries specified in it, so that they could ascertain where the land was located; and for these reasons the plaintiff was not entitled to recover.

Verdict for defendant. Rule for a *venire de novo.* Rule discharged. Judgment and appeal.

Mendenhall and *J. H. Bryan* and *Moore*, for plaintiff.
Ashe, for defendant.

BATTLE, J. The defect which the lessors of the plaintiff admit that there is in their chain of title, their counsel contend is supplied by the testimony of the witnesses Martin, Lilly and Knight, aided by the 4th section of the Act of 1830, chap. 68, entitled "An Act for the relief of such persons as may suffer from the destruction of the records of Hertford county, occasioned by the burning of the court house and clerk's office of said county," the provisions of which were, by the Act of 1844,

chap. 53, extended to the county of Montgomery, whose court house had then been recently burnt also.

We have given to the arguments of the counsel all the consideration in our power, without being able to come to the conclusion to which they have endeavored to bring us. If we admit every thing else for which they contend, there remains still a total want of proof as to the boundaries of the deed which they seek to establish. Two of the witnesses only, to wit, Lilly and Knight, profess to have any recollection of the contents of the deed, and they both say, expressly and distinctly, that they do not remember the boundaries set forth in it. They say they remember the names of certain rivers and creeks, and of certain men, but in what connection they occur they cannot recollect. Surely, no Court on earth, could tell a jury *what* were the boundaries of such a deed, and it is very certain that no jury could find *where* they were from such a description. Nor is the defect aided in the least by the section of the Act to which the counsel refer. That section provides, "that any person likely to be injured by the loss of his deed in the fire which consumed the court house, and who shall be desirous of establishing the same, shall proceed, after giving thirty days notice to all parties whose lands may join in any manner, the land, the metes and boundaries of which are about to be established, to take the testimony of one or more credible witnesses, and to call upon a processioner or other lawful surveyor, to go upon the land and ascertain the metes and boundaries and the number of poles contained in each line; and such processioner or surveyor is hereby required to file a certificate and plat of said land in the next succeeding County Court, setting forth the name of the claimant, on what water courses the land lies, what is the number of acres, the corners and the number of poles in each line; and such certificate and plat shall be recorded by the clerk, and shall, as to the parties who have had notice of such survey, have the same faith, validity and effect, as the original deed would have had." Then follows a proviso as to what shall be done in case a line is disputed; and the next succeeding section provides what shall

be done when the correctness of the copy of the deed which is to be established, is called into question.

We are at a loss to conceive how the lessors of the plaintiff can avail themselves of the benefit of these sections without acting in accordance with their requisitions. But even supposing that they can, and by the spirit of the Act, they are allowed to proceed upon less testimony, in proving their lost deed, than would be required of them under other circumstances, still, they must furnish the Court and jury with *some* evidence of the boundaries of the land described in their deed. One of the witnesses testified that he "did not remember the boundaries named in it; he recollected that it contained several large tracts of land in the western part of Montgomery; that Long Creek, Bear Creek, Mountain Creek, Ugly Creek, and Rocky River, were mentioned in it in some connection, as to which he was unable to say." The other witness stated that "in it (i. e. the deed) Long Creek, Bear Creek, Mountain Creek, Ugly Creek and Rocky River were named, as well as the lands of Barney Dunn, George Whitley and Udy, but did not recollect in what connection; that he did not remember the boundaries of the land set forth in the deed, nor the description thereof, nor in what direction the lines of the survey run, nor their length, nor anything relating to their boundary; nor did he remember the precise quantity of the land specified."

These are the only witnesses who profess to testify as to the description of the land contained in the deed, and we feel ourselves bound to say that they furnish no evidence of what the boundaries were, and this total defect of testimony is not aided in the least by any recitals in the wills of either Carson or Dr. Thornton. On that account alone, the Judge was justified in telling the jury that the lessors of the plaintiff were not entitled to recover.

Judgment affirmed.

PER CURIAM.

DANIEL MORRIS *vs.* WILLIAM HAYES.

The possession of one tract of land is no possession of another adjoining, the two being held by the same individual under different titles.

Making pole bridges over a ditch on the side of a public road for driving cattle into a tract of swamp land, and the ranging of cattle on the same, and occasionally cutting a few timber trees, is not such a possession as will maintain the action of trespass.

Where one not having title, drives the hands of another, who has no title, off of land from where they are working, (except one who remains at another place on the land to take care of the tools,) and the former continues at the spot where he had found the hands, and afterwards the owner of the hands returns and finds the plaintiff still on the land where he had been left, and makes his hands resume their work in defiance of the remonstrances of the plaintiff, this is no such possession as will sustain the plaintiff's action of trespass.

TRESPASS *quare clausum fregit*, tried before his Honor Judge DICK, at the Fall Term, 1854, of Hertford Superior Court.

The plaintiff read in evidence a deed to him from Kinsey Jordan, dated in 1831, for two hundred acres of land, embracing the *locus in quo:* and showed that for forty years he had held and enjoyed, under an undisputed title, a tract of land, adjoining that contained in the Jordan deed. He further showed, that these two tracts adjoined another tract belonging to the defendant, and formed a part of its boundaries. The plaintiff had no distinct actual possession of the 200 acre tract by cultivation or residence, it being wholly swamp or *pocosin* land, though ever since the date of the deed from Jordan, he had used it as a range for his cattle, and had built several pole bridges across the ditch on the side of the public road which passed through it, and had also, occasionally got timber upon it. From these facts the plaintiff insisted that he was in possession of the Jordan tract including the *locus in quo.*

The plaintiff also adduced as evidence the Act of Assembly passed in consequence of the burning of the court house of Hertford county, and contended that the true construction of that Act gave him such possession of this tract, as would enable plaintiff to maintain this action. From the following facts, the plaintiff also contended, that he had an actual possession

of the *locus in quo* which would enable him to sustain Trespass.

When the plaintiff heard that the hands of the defendant were at work on the Jordan tract, he went to them in the swamp, and drove them into the public road which ran through the swamp. The defendant's hands carried with them their tools, which they deposited in the road, and left one of their number in charge of them, while the remainder went off of the land: shortly after, they returned to the place where they had been at work, accompanied by the defendant, and where the plaintiff still was. Here the hands, against the commands and remonstrances of the plaintiff, were made to resume their work. Both plaintiff and defendant then left the premises, and this suit was then brought.

A verdict was entered in favor of the plaintiff with leave to set it aside, and enter a nonsuit if the Court should be of opinion against the plaintiff upon the foregoing case, and afterwards the Court being of opinion against the plaintiff on the questions of law reserved in pursuance of the agreement, set aside the verdict and ordered a nonsuit: from which judgment the plaintiff appealed.

Smith and *Winston, Jr.*, for the plaintiff.
Moore, for the defendant.

NASH, C. J. The question referred to this Court, is, did the plaintiff in the trial below, show such a possession of the *locus in quo*, as to enable him to maintain this action? The plaintiff claimed title to two coterminous tracts of land: he showed a good title to one, on which he lived and cultivated, and a deed of conveyance, in fee simple, from one Jordan to the other tract for two hundred acres of land, on which the said trespass was committed. The defendant has no title to the *locus in quo*. Several points were made by the plaintiff's counsel in the argument here. The first was, that under the private Act of '30–'31, his title under the Jordan deed, was complete. It is a sufficient answer to say that deed has no recitals to be verified by its execution. The construction and

operation of that Act has been discussed, this term of the Court, in other cases; and we do not deem it necessary to enter into it here.

The conveyance from Jordan to the plaintiff, is a simple deed without marks and boundaries, and the case states there is no marked line between the land of the defendant and that of the two hundred acre tract. The second position taken by the plaintiff, is, that the possession of the tract on which the plaintiff lived, gave him under the Jordan deed, the constructive possession of the two hundred acre tract, which is sufficient to maintain trespass against a wrong-doer; and to support this position, we are referred to the case of *Carson* v. *Burnett*, 1 Dev. and Bat. 546. This case does not bear out the plaintiff's claim: it is rather an authority against him. It decides, that when a man holds two tracts of land, under different titles and different boundaries, the actual possession of one of the tracts is not the actual possession of the other. In the case before us, it will be seen, that the plaintiff had no actual possession of the Jordan tract.

The third point is, that the plaintiff had the actual possession of the Jordan tract, and if his title had not ripened into an indefeasible one by actual possession for seven years, yet he had a possession sufficient to sustain an action of trespass against a wrong-doer. For this we are referred to the leading case of *Myrick* v. *Bishop*, 1 Hawks, 485. In that case the plaintiff exhibited a deed for the land on which the trespass was committed and an *actual possession* of part, but not for seven years: the Court decide that his *actual* possession extended to all the land embraced within his deed, there being no adverse possession in any part. What constitutes an actual possession of land, so as to sustain an action of trespass, is so fully stated in the case of *Loftin* v. *Cobb*, 1 Jones' R. 406, that we do not deem it necessary to minutely review the cases to which we have been referred; they are all, with a few exceptions, reviewed and commented on in that case. Some few of them, we shall call attention to, as more peculiarly applicable to this case. In *Williams* v. *Buchanan*, 1 Ire. 535, the

Court decide that "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 an occasional trespasser. In *Andrews* v. *Mulford*, 1 Hay. 311, the Court say, that putting cattle to range on land is not taking possession. And in *Grant* v. *Winborne*, 2 Hay. 56, the Court decide, that feeding cattle and 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.* In *Green* v. *Harman*, 4 Dev. 158, the Court intimate the opinion, that making turpentine as practiced on lands fitted for it, would be a sufficient possession for the reasons therein stated. "That it does not consist in single acts of trespass, like *cutting down trees and carrying them away.*"

The case expressly states that no possession by residence or cultivation of the two hundred acre tract was shown by the plaintiff, it being wholly swamp pocosin land. The plaintiff relies, however, upon the principle, that he made such use of the land, as from its nature, being pocosin land, it was susceptible of; and upon the fact, that he had thrown bridges across the ditches of the public road, which runs through the land at different places, to enable his cattle to pass over into the swamp, which they did, and *had also occasionally got timber upon it.* We have seen that neither of these acts, in themselves, constitutes such a possession in the absence of a title, as will support an action for a trespass: that the depasturing of the cattle will not answer, neither will the cutting the timber *occasionally*, as stated in the case.

But it is said that when the plaintiff went upon the premises and ordered off the workmen of the defendant, that they all, with their tools, went into the public highway, and he was then in the *pedis positio* of the land covered by his Jordan deed. We do not concur in this proposition. The servants of

the defendant did, upon the command of the plaintiff, leave the spot where they had been working, and went into the public highway; but they there deposited their tools and left one of their number in charge of them, the rest went to the defendant, who soon returned with them, and by his direction *went into the locus in quo*, and recommenced their work against the express remonstrance of the plaintiff. From the circumstances stated, the defendant, by his servants, were in the actual possession of the land when the plaintiff went upon it. The leaving of the premises by the servants, and their immediate return, accompanied by the defendant, was one continuous act. The workmen left their work, with an evident *animus revertendi*, and when the plaintiff went off the premises, he left the defendant in the actual possession. If the plaintiff can maintain this action, then certainly the defendant can maintain a similar one against him, for going on the land and ordering his servants off; neither party had such possession as would support an action of trespass. The plaintiff had not acquired any legal title to the two hundred acre tract, and the acts set forth do not amount to a possession; they are mere acts of trespass. The case states there are no courses or distances in the deed to the plaintiff, which called for the lines of Sharp's deed to the defendant, nor in that of the defendant which called for the lines of the plaintiff, *nor were there any marked lines*. It further states, that the deed from Sharp to the defendant described it as meeting the lines of the cultivated tract of the plaintiff, and as running along his line through a pocosin to Chowan river. The plaintiff contends that this is an acknowledgment on the part of the defendant, that the line in the plat running due east from the south-east corner of the plaintiff's cultivated land through the pocosin, was the southern boundary of the two hundred acre tract, and that this latter tract belonged to the plaintiff. We do not see how this fact betters the plaintiff's claim. The admission by the defendant could not confer a title upon the plaintiff, and the case expressly states that the plaintiff's title under the Jordan deed, had not ripened into full title, by a seven years' posses-

sion; neither could that deed to the defendant, establish the boundary of the Jordan tract, but simply acted as a declaration where his line was, or ought to be, for it is admitted there is no marked line there. Admit all, however, that the plaintiff asks upon this point, still the question remains upon which the action rests: had the plaintiff such a possession as will sustain an action of trespass against a mere wrong-doer? We think not.

There is no error in the judgment below, and it is affirmed.

PER CURIAM.

BANK OF CAPE FEAR *vs.* A. J. STAFFORD.

Where a writ is issued against three, two of whom were in one county and the third in another county, in which latter county the judgment is rendered, *Held* that in the absence of special instructions, the clerk may issue an execution to either county.

An allegation in a sci. fa., that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties, will not justify an amersement under the Act of 1850.

APPEAL from an AMERSEMENT against the Clerk of Forsyth County Court, under the Act of 1850, rendered at the Superior Court of that county, at Fall Term, 1854, his Honor Judge BAILEY, presiding.

The case was brought from the County Court by appeal. The following is the record made of the motion to amerse in that Court, viz:

"It appearing to the satisfaction of the Court that the President, Directors and Co., of the Bank of Cape Fear at September Term, 1852, of this Court, recovered judgment against I. G. Lash, Jesse Austin and George Austin, for the sum of $107 11, of which sum $100 70 is principal money and his costs of suit, and that A. J. Stafford, the clerk of this court,

failed to issue an execution to the county of Ashe, the place of residence of the defendant, but improperly issued an execution to the county of Davie; and further, that he failed to enter upon record the day of issuing the said execution—It is therefore considered, and adjudged by the Court, that the said A. J. Stafford be amersed in the sum of $100, and that the plaintiff have execution therefor *nisi causa.*"

A scire facias reciting this record verbatim, issued to the defendant to show cause why the said amersement should not be made absolute, and why execution should not issue thereon. The County Court adjudged for the plaintiff, and the defendant appealed.

Upon the allegations contained in this record, a motion was made in the Superior for judgment and execution, when the following facts also were made to appear to the Court: I. G. Lash, one of the defendants, lived in the county of Forsyth, and the other two (the Austins) lived in Ashe. The only writ in the original case, was one issued against the parties directed to the sheriff of Ashe, and service was acknowledged by Lash, George Austin and Jesse Austin. An execution was issued to Davie county, on which was endorsed the date of its issuing, but no such entry was made on a court docket. No special instruction was given to the clerk. Neither of the defendants had property in Davie county.

Upon consideration of this case, his Honor gave judgment against the defendant, who appealed to this Court.

No counsel appeared in this Court for the plaintiff.

Miller and *Morehead*, for the defendant.

PEARSON, J. The Act of 1850, chap. 17, makes it the duty of the clerks of the County and Superior Courts, "*to issue executions* on all judgments rendered in their Courts, unless otherwise directed by the plaintiff, within six weeks of (after) the rendition of such judgment, and to endorse *upon the record* the date of such issuing:" and for failure to comply with *the requirements* of the Act, subjects the clerk to an amersement of $100, and to an action for damages.

This statute is highly penal, and must be construed strictly; by which is meant, not an adherence to the very letter, but that no intendment or inference can be made to supply an omission, or aid the generality of the language used.

In regard to the execution issued to the county of Davie, to say that it is a compliance with one of the requirements of the Act would be "sticking to the letter." There was no more reason for issuing the execution to that county, than to any other county in the State. The judgment was not rendered in that county; neither of the defendants lived there, or had any property there: so the defendant can take no benefit from the fact that he did issue this execution. But, on the other hand, he ought not to be prejudiced for doing so. He attempted to do his duty, but made a mistake: which certainly is no worse (even if it be as bad) than if he had wholly neglected his duty, and had issued no execution at all. This circumstance, therefore, may be put out of the case.

We are satisfied that the requirement to "endorse on the record the date of the issuing," means that the entry should be made on the "execution docket," and is not complied with by an entry on the execution. If a sheriff failed to return an execution, the plaintiff, in order to amerse him, had to rely on the affidavit of the clerk to prove that an execution had been issued, and in time to be served. In many cases, the clerk's recollection did not enable him to prove these facts satisfactorily, and it was thought best to provide higher evidence by requiring the clerk, when he issued an execution, to put the date of "such issuing" upon the "record." It will be seen at once that this purpose of the Statute is not effected by making the entry upon the execution: if the sheriff returns it there is no cause of complaint: if he fails to do so, there is no proof but the "slippery memory" of the clerk. We have no doubt the defendant, and many other clerks, have fallen into this error by not adverting to the object of the Statute; being misled by the fact, that they are required to enter upon "process" the day it issues, and that sheriffs are required to endorse upon all writs "when they came to hand." The clerk of this

Court, who is a gentleman of much experience, informs us, that although the Act did not apply to him, yet in endeavoring to conform to it he has committed the same mistake.

As the execution to Davie, upon which this entry was made, was of no force or effect, a failure to endorse on the record the date of its issuing can make no sort of difference; it would be "sticking to the letter," to hold that a clerk was liable to amersement for not entering upon the record the day he issued an execution that was of no account; so that this circumstance may also be put out of the case.

The question then is this: the judgment was rendered in Forsyth; one of the defendants resided in that county: the other two defendants resided in Ashe, and the writ issued to that county: is the clerk liable to an amersement for not issuing an execution to Ashe?

It may be remarked that although no writ issued to the county of Forsyth, where the defendant Lash resided, yet one ought to have issued in order to give the county of Forsyth jurisdiction: for the plaintiff, being a corporation, had no locality; and it was the residence of Lash alone, that gave that county jurisdiction: Suppose he had a right to waive the necessity of a writ and to accept service of the writ directed to Ashe, still the defendant cannot be prejudiced, because there was, in fact, no writ to Forsyth.

The clerk is required to "issue an execution;" but the Statute is silent as to the county to which it must be issued. In this it differs from the statute concerning bail, which requires the plaintiff to cause a ca. sa. to be issued against the principal "to the proper county," that is, the county of his residence, which is taken *prima facia*, to be the county to which the process, under which he was arrested was directed. We can, therefore, see nothing by which it is made the duty of a clerk to take upon himself the responsibility of deciding which is the proper county to which execution should be issued; unless all the defendants reside and have property in the county where the judgment is rendered, this is a question of no little difficulty: the analogy of a ca. sa. to charge bail, will not solve it; because

there the object is to take the body: but in an execution the object is to find property: A man may be in one county and have his property in another: or he may own property in several counties: or if there be several defendants, they may reside and own property in several counties: Are we at liberty in the construction of a penal Statute, by intendment or inference, to supply this omission and aid the generality of the language used? We think not: if thereby the responsibility of deciding which is the proper county, is to be put on the clerk: and are inclined to the opinion that a clerk will protect himself from amersement by issuing an execution to his own county in the absence of special directions from the plaintiff. We do not, however, feel at liberty to conclude the question by so deciding in the present case, because it is not necessary to put the decision on that ground alone, inasmuch as there are other facts connected with it, so as to put the question beyond doubt. Our clerk informs us, that in the absence of instructions, he always issues the execution to the county from which the case is sent, without reference to the county to which the process issued.

Let it be assumed, for the sake of argument, that the defendant could have protected himself from an amersement by showing, that, in the absence of special instructions, he had "taken the responsibility" and issued the execution to Ashe; still it does not follow that he is liable to an amersement for not doing so, if he could also protect himself by showing that he had issued an execution to Forsyth.

A judgment ni. si. for an amersement is rendered in a summary way upon motion; but still the allegations necessary to show that the party is entitled to it are made, or are presumed to be made, in the same way as if they were orderly set forth in a declaration. Suppose a bond with a condition by which a party is bound to issue an execution either to Ashe or to Forsyth, and the breach assigned is, that an execution was not issued to Ashe: this would be bad on demurrer, because the declaration does not show a good cause of action; for the condition being in the alternative, the breach assigned should be

that he had failed to issue an execution either to Ashe *or Forsyth*, consequently there is error in the judgment by which the defendant is amersed for not issuing an execution to the county of Ashe, if he could have also issued it properly to Forsyth. So the question is narrowed to this; suppose he had issued an execution to Forsyth, would that have protected him from amersement?

We have seen above, from a general view, that Forsyth was the proper county: but in this case one of the defendants resided in that county; so in addition to the reason for preferring that county because the judgment was rendered there, we have the further reason of the residence of one of the defendants, which latter reason, puts it on precisely the same footing in this respect as the county of Ashe. When the defendants reside in different counties, (unless it be held that the clerk is bound to issue an execution to both counties, for which construction, the statute furnishes no grounds) he certainly has a right to issue it to the county where one of the defendants resides, that being also the county in which the judgment was rendered.

It is said had the defendant issued an execution to Forsyth, he could have relied on that fact by way of defense; but as he did not do so, he has no excuse.

This depends upon whether the defendant would have complied with the requirements of the Statute, by issuing an execution either to *Ashe or* Forsyth; for if so, he was not liable to amersement for "failing to issue an execution to Ashe," and his failing to issue an execution to Forsyth was a substantial averment, which it was necessary for the plaintiff to make in order to entitle himself to judgment. If the motion to amerse had been put on the ground that the defendant had failed to issue an execution *either to Ashe or Forsyth*, we do not see how he could have escaped. But the motion is put expressly on the ground, that he did not issue an execution to Ashe: This raises a question of pleading—suppose one covenants to deliver a horse on a certain day, either at the city of Raleigh *or* the town of Salem: the breach assigned is a fail-

ure to deliver a horse "at the city of Raleigh:" if the covenant be set forth, it is clear the objection that there was not also an averment that he had failed to deliver a horse at the town of Salem, would be fatal on demurrer, motion in arrest of judgment or writ of error: if it be not set forth in the declaration, there would, upon the trial be a fatal variance, and the plaintiff must be nonsuited. This is a familiar rule of pleading, based on the ground, that a plaintiff must make all averments necessary to entitle him to judgment. After he does so, then any matter of justification, excuse or discharge, comes in by way of defense.

Judgment reversed, and judgment for the defendant.

PER CURIAM.

ANGUS CURRIE *vs.* KINNETH H. WORTHY.

It is not an escape in a sheriff to permit a debtor committed under a *ca. sa.*, to remain in prison with the door of the prison open, unless such debtor passes out of the prison.

ACTION OF DEBT for an ESCAPE, tried before his Honor, Judge BAILEY, at the Special Term of Moore Superior Court, June, 1854.

This action was brought against the Sheriff of Moore county, for an escape. The case is presented in the opinion of the Court.

Moore and *G. C. Mendenhall*, for the plaintiff.
Winston, Sr. and *Kelly*, for the defendant.

PEARSON, J. The plaintiff examined several witnesses, who swear, that "on many occasions, during the period of John M. Currie's imprisonment, they found company with him in jail, the door being open, and the jailor not present." "On

several occasions they found said Currie alone in jail, the door being closed, but not locked: on some occasions, when they called to see Currie in the jail, they found him there alone, the door of his room being open, so that nothing prevented his escape, if he desired to leave the jail." Two or three witnesses swear, that "they were *under* an impression that they saw said Currie step from his room into the jailor's room, and then back into his own room, the jailor not being present."

His Honor instructed the jury, "if they believe the witnesses, the plaintiff was entitled to recover." To this the defendant excepts.

We think there is error.

The evidence was fit to go to the jury, upon the allegation that Currie had been permitted to go out of the debtor's room; but his Honor took the question from the jury, and held that the facts proven by the witnesses, constituted in law, an "escape." The impression of two or three witnesses, that they saw Currie step from his room into the jailor's room and then back into his own room, is not a fact that can be dealt with by a Court; so we are to take it that his Honor was of the opinion, that if a debtor is allowed to see company in the debtor's room, the door being open and the jailor not present, or to be in the room alone with the door closed, but not locked, or to have the door of the room left open, so that nothing prevented his escape, if he desired to leave the jail, is, in law, an escape, although the debtor does not in fact leave, or go out of the debtor's room.

The Act of 1795, requires that the jails of the several counties shall have an apartment for the confinement of debtors. A debtor who is not allowed to go out of this apartment, and to take the benefit of prison bounds, is said to be in "close prison."

The Statute, 13 Ed. 1 ch. 1, Rev. Statute ch. 109, sec. 20, gives the creditor an action of debt against a sheriff who shall wilfully or negligently suffer a debtor to escape. Our question is, what amounts to an escape, in the meaning of this Statute?

The acceptation of the term is, "to get away from, to go out of, a place of confinement;" and in the declaration under this statute the allegation is, "and the said defendant, on &c., at, &c., suffered and permitted the said E. F., to escape and go at large; and the said E. F. did then and there escape and go at large, wheresoever he would, out of the custody of the said defendant." See form, 2 vol. Chitty on plead. 418; another form, 420, and another, 422. See a like form, *Jones* v. *Pope*, 1 Saunders' Reports, 35.

How it can be said that a debtor "did escape and go at large," when, in point of fact, he never went out of the room in which it was the duty of the sheriff to keep him, is beyond the reach of our comprehension. We know of no rule in the construction of a statute, which subjects the sheriff to the payment "of all such sums of money as are mentioned in the said execution and damages for detaining the same," as a *penalty for suffering a debtor to escape*, by which we are at liberty to hold, that an *opportunity* to go out of the debtor's room, is the same, in legal effect, as if the *debtor had, in fact, gone out of the room.*

We admit that if a debtor be permitted to walk in the passage of the jail, although it is secured by two outer doors, both of which are locked; or if he be permitted to walk out in the yard, not having taken the benefit of the prison bounds, although he is accompanied by the jailor and a strong guard, it is an escape: because he has to be kept in close prison, and has been suffered to go out of the room in which it was the duty of the sheriff to keep him. But if he remains in the room, and does not go out of the limits in which it is the duty of the sheriff to keep him, we are not able to perceive how there can be an escape. Suppose one of two debtors break open the door or window and makes his escape, leaving the room open; but the other debtor remains there. Can it be said that the latter made his escape? Suppose a jailor, in admitting the friends of a debtor to visit him, leaves the door open longer than is necessary, and does not instantly "turn his key" after every ingress and egress; or suppose

he should leave the door ajar, while he goes to fetch a chair for the visitor to sit on, but the debtor does not leave the room: do these acts amount to an escape? If this doctrine of *constructive* escape be admitted, it will include all of these varieties. Whether there has been an escape or not, is a question of easy solution when it depends upon the fact whether the debtor has remained in or gone out of the room; but to make it depend upon the degree of indulgence which is shown to him, while he actually remains in prison, is to render the application of the law difficult and uncertain. The rights of the creditor are not violated, unless the debtor goes beyond the limits assigned by law. Our attention was called, in the argument, to *Wilkes* v. *Slaughter*, 3 Hawks, 211. We have no doubt that was the authority upon which his Honor felt bound to decide this case. Judges HALL and HENDERSON, who make the decision in opposition to the opinion of TAYLOR, C. J., lay peculiar stress upon the fact that the jailor had given the debtor *the key* of his room, so as *to make the debtor his own keeper*. Possibly this might furnish some ground for distinguishing that from the case now under consideration. The distinction is not substantial enough to be made the ground of a practical difference. For this reason, we prefer to put our decision on the ground, that we do not concur with the two judges who decided that case, and do not admit the correctness of the doctrine of "constructive escapes" as at all applicable to the statute under which the present action is brought. Besides the fact that the authority of that case is weakened by the dissenting opinion of the Chief Justice, the decision is inconsistent with every precedent of a declaration under the statute of Ed. 1st., to be met with in the books. They all contain an express allegation that the "debtor did escape and go at large." (See precedents cited above.) In all the precedents of pleas of "fresh pursuit and recaption," it is assumed that the debtor had gone out of the jail. We are told by Lord Coke, "one of the best arguments, or proofs, in law, is drawn from the right entries in course of pleading; for the law itself speaketh by good pleading:

therefore, Littleton here sayeth, 'it is proved by pleading,' &c., as if pleading were *ipsius legis viva vox*;" Coke Lit. 115b. We think "it is proved by pleading," that no constructive escape can make a sheriff liable to the penalty imposed by the Act, Ed. 1st.

Upon an examination of the cases relied on by judges HALL and HENDERSON, we find there is not any one case cited in which the debtor had not *in fact* "left the jail and gone at large;" and we are satisfied that the two very learned judges were misled by the "cunning and curious learning" which they met with in Plowden, applicable to the state of the ancient law, when sheriffs had the appointment of their own jails; but having no application whatever to the present state of the law, where each county has a common jail, with an apartment (or room) for debtors, in which it is made the duty of the sheriff to see that they remain, unless they give bond for the benefit of the prison bounds.

Plowden puts two cases: "If a woman be jailor, and one imprisoned in the jail marry her, it is an escape in the woman." "If the warden of the fleet, who hath his office in fee, die seized, his son and heir being there imprisoned, and the office descend to him, being imprisoned, the law will adjudge him to be out of prison, *although* he has fetters upon him; because he cannot be his own prisoner."

We imagine Plowden would have added another to his list of queries, had he been called upon to frame a declaration in debt for an escape under our statute, against the executor or administrator of a sheriff, seized of the office in fee, whose heir apparent happened, at the time of his death, to be confined in the debtor's room, and was discharged by act of law, to wit: the *descent cast*, "although the fetters were kept upon him."

But this learning evidently has no application to the doctrine of escape under our statute, as is fully shown by Chief Justice PARSONS; *Barttlet* v. *Willis*, 3 Massachusetts Reports, 102. The case before him was that of a debtor, who had, in the *night* time, contrary to the condition of his bond not to go

out of the jail yard in the night time, gone a few steps outside of the yard to get a pitcher of water, the pump inside of the yard being frozen up: and he takes occasion to show how the law stood when sheriffs had the appointment of their own jails: how it was afterwards in regard to the Marshalsea and Fleet prison, when the debtors could be allowed by the jailor, the privilege of "the rules," by giving bond; and how the law now is, in his own State, under a statute similar to ours, in regard to "prison bounds," where debtors are allowed by law the privilege of "the bounds."

The general remarks in regard to the state of the law when sheriffs had the appointment of their own jails, is relied on in *Wilkes* v. *Slaughter*, and no reference is made to the point before the Court for its decision.

Venire de novo.

PER CURIAM.

JOSEPH W. T. BANKS *vs.* IVEY RICHARDSON, *et. al.*

The word "copy" general presupposes an original, but not always. It was error, therefore, to reject a deposition stating a telegraphic dispatch that spoke of it as a "copy," on the ground that an original was necessarily implied, which was not produced, nor its absence accounted for.

ACTION ON THE CASE for words published through the Telegraph, tried before his Honor Judge DICK, at the Fall Term, 1854, of Camden Superior Court.

The plaintiff excepted to the ruling of his Honor, excluding the testimony of the operator at Portsmouth, giving a telegraphic dispatch, upon the ground that there was testimony of a higher character, to wit, an original dispatch from which the words were taken. In submission to the opinion of the Court, the plaintiff took a nonsuit and appealed.

Heath and *Martin*, for the plaintiff.
Smith, for the defendant.

NASH, C. J. This is an action to recover damages for an alleged slander, published through the electric telegraph, passing from Portsmouth, in Virginia, to Weldon, in this State. To connect the publication with the defendant, the plaintiff offerred, in evidence, the deposition of one Lundy, the telegraphic operator at Portsmouth, in which he makes the following statement, to wit.:

"'PORTSMOUTH, Jan'y. 28, 52.

'MR. FLANAGAN, Weldon:

'Two men by name James Banks and a Mr. Beach has ran 'off with two small negroes: please have them arrested: I 'will be up to-morrow: be sure and stop them. I pay all 'expenses. J. J. WILLIAMS.

'Answer immediately'—

was a copy of a telegraphic dispatch sent by him to Weldon, January 28, '52."

The plaintiff further offered the deposition of one Campbell, telegraphic operator at Weldon, in which he stated that the same words as stated above by Lundy was a *copy* of a telegraphic dispatch received by him, Jan'y. 28, '52, at Weldon. The evidence was objected to by the defendants on the ground that there was an original in the town of Portsmouth. The Court sustained the objection and rejected the evidence.

The plaintiff is entitled to a *venire de novo*. The objection to the testimony, as stated in the case, was that there was an original of the telegraphic dispatch in the town of Portsmouth, and before the copy could be read, the absence of the original ought to be accounted for, and notice given to produce it.

There is no evidence in the case that there was an original in the town of Portsmouth, aside from the statement made by the witness, Lundy: The Judge, however, assumed the fact to be so without any other evidence than the use of the word "copy," in the deposition.

The word "copy," in general presumes an original from which it is taken, as seems to have been the opinion of the presiding Judge; but this is not always the sense in which it is used. *Mr. Worcester*, in giving the various uses of the

word, says it sometimes means the original: as, for instance, "autograph," which means the name of a person written by himself, or some of his own writing. This is called a copy; but it has no original, and is therefore itself the original. So a pattern to write after is called a copy, as where a teacher writes a word, or a line, for his pupil to imitate, the writing is called a "copy;" or the master is said to set a copy. These definitions show that the word *copy* does not necessarily imply that there is an original from which it is taken; but that its meaning is to be gathered from the context of the writing in which it is used; that is, the words which precede and follow it. Now let us advert to the language of the witness: He first gives us the message that was sent, and then says—"was a copy of a telegraphic dispatch sent by him to Weldon." What was the telegraphic dispatch? The message sent by the wires of the telegraph and communicated to the operator at Weldon, by the dots and notches which were made on the paper at the telegraphic office at Weldon. It will be remembered there is no evidence in the case that the communication to Lundy, the operator at Portsmouth, was in writing: If, then, the telegraphic dispatch was the original, it follows, as a necessary consequence from its nature, that the word "copy," as used by the witness, is not to be taken in its ordinary and common sense; and that the message as he sets it forth, is itself the original, existing no where but in his memory, or in the dots and marks made at the office in Weldon. That the word copy, as used by the witness Lundy, referred to the telegraphic dispatch, and not to any written or oral message he had received, is further shown by the fact that the witness, Campbell, uses the word "copy," in the same sense: "was a copy of a telegraphic dispatch received by him." To him no communication, either in writing or orally, had been made except by the telegraph. If Lundy had been sending his own message, he might have used precisely the same language; in which case there could have been no original.

But suppose it be granted that the paper upon which the telegraph made its dots, is to be considered the original of the

message, which certainly it cannot be, and it had been produced to the Court and jury: of what use could it possibly have been? It would have been necessary for Mr. Campbell to have attended and told the jury what the dots meant; but this would have been a translation; a copy would have been as incomprehensible to the Court and jury as the original; for it would necessarily, in order to be a copy, have been in similar dots. When, therefore, the witness says that this is a copy of a telegraphic dispatch, he must be understood as saying, this message I sent by telegraph to Weldon: and his statement was not a copy, but the thing itself, and as much an original as it could be, unless the message had been communicated to Lundy in writing. Of an oral communication there can be no copy.

It is suggested, however, that the defendants ought not to be made to answer for words they never spoke: the telegraphic operator may mistake its language and send a message different from that he received. This may, and probably does occur: such things often take place in courts of justice, particularly on trials for words spoken, and where the defendant denies the speaking of them as stated by the witness. Yet if the jury believe the witness, though the latter may have sworn falsely, either inadvertently or corruptly, the defendant is made to pay damages for words he never uttered. It is but another proof of the imperfect operation of every system for eliciting truth, however perfect in itself, when its working is entrusted to imperfect beings. In the case of telegraphic dispatches, the danger of error is, perhaps, greater than in any other mode of communication; more caution ought, therefore, to be taken by those who take advantage of them. They can, if they choose, always provide themselves with a check upon the workings of the wires, by preserving a properly attested copy of the message they do send. If they fail to do this, it is their own fault. There is error in the ruling of the Judge, and there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

CHARLES JOHNSON AND WIFE *vs.* WILLIAM D. ARNOLD.

One who has been appointed an executor in a Will, who did not qualify or renounce, cannot set up an adverse possession under a bill of sale obtained before the testator's death, until some one qualifies as executor or administrator, no such adverse possession having begun in the life time of the testator.

Whether if an adverse possession had begun in the life time of the testator, and was still continuing, an assent could be given by the executor to the legatee, so as to enable him to maintain a suit in his own name—*Quere.*

ACTION of DETINUE, for Ben, a slave; tried before his Honor Judge MANLY, at the Fall Term, 1854, of Robeson Superior Court.

The plaintiffs, Johnson and his wife Harriet, claimed the slave in question, under a clause in the will of one Solomon Arnold, by which it was bequeathed to the feme plaintiff by name, though they had intermarried previously to the execution of the will.

The will was executed on the 12th of March, 1838, and admitted to probate at January Term, 1847, of Moore County Court. There was evidence tending to show that the will in question had been deposited with the defendant, William S. Arnold, and by him concealed from the knowledge of the executor, Henry, (who qualified,) from the testator's death, which took place the 24th of October, 1844, until about the time of its being propounded, (January Term, 1847,) and concealed also from the knowledge of the plaintiffs.

The testator, Solomon Arnold, lived in the County of Moore at the date of the will, and continued his residence in that County until the year 1843, during which time he had possession of Ben. In this year he removed, with all his family and household goods, to the house of the defendant, in Cumberland, (carrying with him, also, the slave in question,) where he died in 1844, as above stated, still having possession of the slave in question up to that time.

Harvill Arnold, Henry Arnold, and the defendant, William S. Arnold, were named executors in the will, of whom Harvill died in the life time of the testator, and Henry only, qual-

ified. Upon his qualification, the executor assented to this bequest to the plaintiffs who, in October, 1847, demanded the slave from the defendant, who refused to give him up; and thereupon this action was brought on the 20th of January, 1848.

The defendant claimed title to the slave in question, under a bill of sale bearing date in April, 1842; and insisted that his possession had been adverse to the plaintiffs title from the time of the testator's death, in 1844, up to the bringing of this suit; and that their cause of action was barred by the statute of limitations.

The defendant also contended that as he was in the adverse possession of the slave at the time the executor gave his assent to the legacy, such assent was void and passed no right to the plaintiffs.

Upon the first point, his Honor held, and so instructed the jury, that if the defendant had the custody of the will in question, and concealed it, for a time, from the knowledge of the executor and the plaintiffs, the statute would not begin to run until after its discovery.

Upon the second question, his Honor held against the defendants.

Verdict for the plaintiffs.

Defendant obtained a Rule for a *venire de novo* for error in the instructions of the Court in the matter above stated. Rule discharged. Judgment and appeal.

Strange and *Kelly*, for plaintiffs.
J. G. Shepperd, for defendant.

PEARSON, J. Upon the first point, we concur with his Honor; but not for the reason assigned by him.

The Act limiting the time in which prosecutions shall be commenced for misdemeanors, has a *proviso*, that in case the offender shall abscond or conceal himself, or the offence shall have been committed in a secret manner, the statute shall not begin to run until the apprehension of the offender, or discov-

ery of the offence. The Act limiting the time in which civil actions may be brought, has no proviso to this effect, and it is settled, that no fraud or concealment will prevent the statute from beginning to run, at the time the cause of action accrues, or the possession becomes adverse; *Baines* v. *Williams*, 3 Ired. 481. *Hamilton* v. *Shepperd*, 3 Mur. 115. The question is, at what time did the defendant's possession become adverse, so that a cause of action accrued against him? The case as made up, assumes that there was no adverse possession prior to the death of the testator.

The defendant, as one of the executors appointed by his father's will, had a right, upon the death of the testator, to take the slave into possession, and keep the possession until the will was admitted to probate, and the other executor qualified and took letters testamentary. This doctrine is fully discussed, and the law is so settled, *Arnold* v. *Arnold*, 13 Ired. 174.

As the defendant had a right to the possession of the slave under his father's will, his possession was not adverse, and nothing that he could say or do could make it so. His claiming him as his own property under the deed amounted to nothing: There can be no adverse possession, and one cannot acquire a title by having property in possession, unless he exposes himself by the fact of his possession, to an action by the owner or his representative: The defendant could not, as executor of his father, "sue himself" for claiming to hold the slave as his property under the deed; nor could the other executor sue him for doing so until the letters testamentary were taken out; for had he known of the existence of the will, he would, until his qualification, have been but a tenant in common with the defendant. The defendant's position is, that he acquired the title to a slave of his father which he had willed to the plaintiffs by reason of the fact that he had held possession for more than three years, during no part of which time was he exposed to an action! so there would have been no error if his Honor had instructed the jury that the statute did not begin to run until January Term, 1847; and as the writ issued in 1848, the statute was no bar to the action.

We have seen that the defendant could not have an adverse possession until the other executor qualified: it does not follow that he then had an adverse possession, "*ipso facto*;" for as he took the possession rightfully it would seem that it did not become wrongful, and he was not exposed to an action until a demand. The case does not state that the defendant ever renounced; or that the executor who qualified, ever made a demand; or the time of his assent to the legacy: for these reasons, if the second question decided by his Honor was attended with any difficulty we should not feel at liberty to decide it, upon the ground that it is not presented by the facts stated. But as it seems to have been assumed, that at the time of the assent, the defendant was in the adverse possession, we have no hesitation in saying that we fully concur with his Honor.

The testator being in possession at the time of his death, the title passed to the legatee by force of the will, subject, only, to the right of the executor to hold it until he gave his assent. When he did so, the title did not pass from him, but his assent amounted merely to an extinguishment of his right to withhold the title, if the property should be required to pay debts. After his title was thus extinguished, the title of the legatee related back, and he held the property by force of the will, and not of the executor's assent. *Lillard* v. *Reynolds*, 3 Ired. 366. The assent of an executor, therefore, does not in any particular fall within the reason of the rule, that one cannot transfer title to property which is in the adverse possession of another; for the same reason it has never been considered as coming within the operation of the statute, which requires all transfers of slaves to be in writing.

Whether, if there be an adverse possession at the death of the testator, the executor can assent, so as to give the legatee the right of action, and is not bound to reduce the property into possession before he can give his assent, is a different question, as to which we express no opinion.

PER CURIAM. Judgment affirmed.

DOE ON THE DEMISE OF JOHN MORRISON *vs.* CALVIN J. COOK.

The Act of 1830, concerning the burning of the Court House of Hertford county, made applicable to the County of Montgomery by Act of 1844, only relates to such deeds as were in existence at the time the Court Houses of these counties were burnt.

ACTION OF EJECTMENT, tried before his Honor Judge MANLY, at the Fall Term, 1854, of Montgomery Superior Court.

The plaintiff's lessor offered in evidence a deed executed by John L. Christian, late sheriff of Montgomery, bearing date the day of March, 1845, to him for the land in question, in which was recited a judgment before a justice of the peace, in favor of the plaintiff's lessor, against Edmund Cook and Mastin C. Williams, and execution on said judgment, and a levy made of the same on the land sued for. And that a *venditioni exponas* had issued from July Term, 1842, of Montgomery County Court, commanding the then sheriff to sell the lands levied on to satisfy the plaintiff's judgment and costs. Upon which vendi. expo. the sheriff, in October, 1842, had sold said land, and that the plaintiff's lessor had become the purchaser upon which the deed was made.

The plaintiff's lessor then proved that the defendant Calvin J. Cook, was in possession of the premises, and that he acknowledged that he entered in under Mastin C. Williams, one of the defendants, in the execution named in the sheriff's deed aforesaid. He then offered in evidence the 2nd section of the private Act of Assembly, passed in the year 1831, in relation to supplying proof of the records destroyed, by the burning of the court house of Hertford county, as follows, to wit: "That in all cases hereafter, when any person shall produce, and offer in evidence, any bill of sale for slaves or other property, or a deed for lands, purporting to be executed by any attorney, or by virtue of a power, or by any sheriff in virtue of any execution from any Court of the county of Hertford, or by a clerk or master under a decree, the production of such bill of sale or deed for lands, shall be held and deemed, *prima*

facia evidence that there was a valid power of attorney, judgment and execution or decree authorising such sale, and that in such cases, it shall not be necessary to produce the said power of attorney, judgment and execution or decree or a copy thereof, but such bill of sale or deed of lands shall be *prima facia* evidence of the title, so far as the title could in law be transferred, in case the judgment and execution, power of attorney or decree, had been shown in evidence;" also, the Act passed in 1844 and 1845, making the said Hertford Act applicable to the burning of the records and court house in Montgomery, in March, 1843. He then stopped his case.

The defendant's counsel contended that, inasmuch as the sheriff's deed was executed in 1845, three years after the burning of the records in Montgomery, and when the said sheriff was out of office, it was necessary that the plaintiff's lessor should prove, by evidence, the existence of the record recited in the deed, and that the deed itself was not *prima facia* evidence of such record, according to the provision of the said 2nd section of the Hertford Act as aforesaid, as the deed alluded to in said section, must be one made while the record itself was in existence for the sheriff's inspection.

The Court was of a different opinion, thinking the deed sufficient in form, and the recitals therein of the judgment, execution, &c., to be evidence by virtue of the Acts of Assembly referred to, of the former existence of said records, and the jury being so advised, gave a verdict for plaintiff.

There was a rule which was discharged. Judgment and appeal.

Kelly, for plaintiff.

G. C. Mendenhall, for defendant.

BATTLE, J. The question in this case depends upon the proper construction of the Act of 1831, chap. 96, entitled "an Act in addition to an Act passed at the last session of the General Assembly of this State, in relation to the burning of the records of the county of Hertford;" the provisions of which

were applied by the Act of 1844, chap. 53, to the county of Montgomery, the records of which had been then recently burnt also. "There are," says Mr. Justice Blackstone, "three points to be considered in the construction of all remedial statutes; that is, how the common law stood at the making of the Act; what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges so to construe the Act, as to suppress the mischief and advance the remedy;" 1 Black. Com. 87, citing 3 Rep. 7. Co. Litt. 11 and 42. Now, with regard to the statutes under consideration: the common law required as evidence of title, under certain circumstances, the production of certain records; the mischief was, that those records had, in the county of Montgomery, been entirely destroyed by the burning of the court house, so that they could not be produced; and the remedy provided was, that when a party claimed under a deed for lands executed by the sheriff, by virtue of an execution from any Court of the said county, the production of the deed should be *prima facia* evidence, that there was a valid judgment and execution, authorising the sale without the production of the record of the judgment and execution, or a copy thereof.

We think it almost certain, that the mischief in the contemplation of the Legislature, and that against which they intended to provide, was the loss of records upon which the validity of deeds then in existence depended. Such deeds could hardly be founded, as to their recitals, either in mistake or fraud, because the means of detecting it were easily accessible to the party to be affected by it. The law-makers could, in this view, confidently extend to those claiming under the deed, the remedy which they did provide, without fear of doing injustice to others. But if the remedy is to be as broad as is contended for by the plaintiff, there is very little, if any security for the rights of others. The officer through mistake, or fraud may, by executing deeds at any time, and making therein what recitals he pleases, deprive an owner of his lands or put him to great trouble and expense in rebutting the *pri-*

ma facia case which the law sets up against him. This seems to us to be so manifestly unjust, that we cannot believe it was so intended by the Legislature. In this very case, the defendant is sought to be deprived of his land by the acts of a man who was out of office—and who professed to remember, and undertook to recite judgments and executions two years after the records had been destroyed. We think that the Judge erred in his construction of the statute, and that in consequence of such error, the defendant is entitled a *venire de novo*.

PER CURIAM. Judgment reversed.

JOHN FLANNER, EX'R., *et al.*, *vs.* WM P. MOORE.

Property held by copartners in a trading firm, is not the subject of suit for partition under the Act of 1829. Nor will it become so by the rights of the copartners passing into other hands. Such rights can only be, with propriety, dealt with in a Court of Equity.

A dissolution of a copartnership without a settlement of its affairs, does not convert the members of the firm, or the purchasers of the partnership effects under them, into tenants in common, so as to authorise a proceeding under the Act of 1829.

PETITION for the sale of a slave, for partition, tried before his Honor Judge CALDWELL, at the Fall Term, 1854, of Craven Superior Court.

The slave in question had belonged to the defendant, and by him sold to one Prentiss, who was a partner with one Masters in a tannery, called the Linden tannery, and there was evidence that he had been put to work at that business, and had been treated by both the partners, in some respects, as copartnership property. The plaintiffs allege in their petition, that Prentiss and Masters were tenants in common of the slave Daniel, that they purchased, under a deed in trust made by Prentiss, in September, 1848, his half of the property; and that

the defendant having purchased that of Masters, they became tenants in common likewise; and they pray a sale and division of the proceeds.

The defendant denied in his answer that he held as tenant in common with the plaintiffs, or that they have any interest in the slave Daniel. He avers that the slave was partnership property, and that as such, any sale made by Prentiss for his own emolument, was a fraud on the rights of the firm, and therefore void: that Prentiss' interest in the said slave had been sold by executions against him and purchased by the defendant before any assignment or transfer of his rights in the same to the plaintiffs. He alleges further, that he purchased Masters' interest in the slave in question, and afterwards finding that the firm was largely in debt, and that this property was still subject to these debts, in order to remove the incumbrance, he paid off and discharged the debts of the copartnership, and that this was done before the filing of this petition. He also avers in his answer, that the interest of the said Prentiss in the slave Daniel, had been conveyed by a deed in trust to one Bishop, dated November, 1848; and that he had purchased under the sale of Bishop, and held Prentiss' interest in Daniel by this title also.

Upon the plea of the defendant, that he was not a tenant in common with the plaintiffs, of the slave Daniel, there was an issue taken, and was submitted to the jury on the trial of the cause.

Upon the trial of the issue, his Honor held "that the defendant acquired no interest in said Daniel by the sheriff's sale, and that none was conveyed by the deed from Prentiss to the said Bishop: that it was not important whether the said Daniel was held by the original owners as tenants in common or copartners, that the deed of September, 1848, operated as a dissolution, and that the equity insisted on did not appear; and if it did, it could not be noticed in this Court." To these instructions defendant excepted.

Verdict for the plaintiffs.

Judgment and appeal.

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

BATTLE, J. The Act of 1829, chap. 17, re-enacted in 1836, 1 Rev. Stat. chap. 85, sec. 18, authorises one tenant in common of slaves to file a petition, either in the County or Superior Court against his co-tenant for the purpose of obtaining a partition of such slaves either specifically, or if necessary, by a sale of them. The present suit is a proceeding under that Act, but the defentant in his answer, denies that the plaintiffs have any interest in the slave in question; and, if that be not so, he insists that plaintiffs' interest is that of copartners, and not that of tenants in common with him. The testimony given on the trial shows, or at least tends to show, that the original owners from whom the present parties claim, stood towards each other, with regard to the ownership of the slave, in the relation of copartners, instead of tenants in common. His Honor in the Court below, held that it made no difference whether the original owners as copartners or as tenants in common, for that the partnership had been dissolved, and that the equity which one of the partners might have had against the other as to the settlement of the partnership and the disposition of its effects, could not be noticed in a court of law. The questions then are 1st. Whether the present parties have become tenants in common by their purchases respectively from the original partners? and 2ndly, if they have not, but have become themselves copartners of the slave, whether as such, one of the parties can sustain this proceeding against the other for a partition?

We think that both questions must be decided against the plaintiffs, upon principles which have received the sanction of this Court. In *Treadwell* v. *Roscoe*, 3 Dev. Rep. 50, HENDERSON, C. J. 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." So of a sale by one of the partners of an article belonging to the partnership for the payment of his own separate debt, RUFFIN, C. J. said, "that as respects the right to the thing sold, the assignee stands in the shoes of his assignor," *Wells* v. *Mitchell*, 1 Ire. Rep. 484. Both these cases have been referred to, and recognized as authority in the very recent ones, *Blevins* v. *Baker*, 11 Ire. Rep. 291, and *Vann* v. *Hussey*, 1 Jones' Rep. 381. As the plaintiffs and defendant then, upon their respective purchases from the original owners, who, in this argument, are to be taken as partners, stood respectively in the place of their assignors, they must stand towards each other as partners, and not as tenants in common. If this be so, then it is said by RUFFIN, C. J., in *Baird* v. *Baird*, 1st Dev. and Bat. Eq. 539, that "there can be no division of partnership property until all the accounts of the partnership have been taken and the clear interest of each partner ascertained." The reason of this is stated very fully and clearly by the same eminent Judge, in *Wells* v. *Mitchell*, *ubi supra*, "The difference between tenants in common and partners, is exhibited more plainly, when it is considered what remedies persons standing in those relations respectively have against each other. If a tenant in common destroys the chattel, or, as some think, if he sell the whole, his fellow may have trover or trespass against him; but it is clear between partners, those actions do not lie: nor indeed, any others at law. Every thing rests in confidence between partners, and lies in account while the partnership continues, and if one of them sell, or take, or destroy the joint effects, all that can be done is to charge to him the value in account. The interest of partners in particular chattels cannot be determined by the number of the partners, or their shares of the profits, nor can any one of them claim a division of specific articles: an account must be taken of the whole partnership, so as to ascertain the clear interest of each partner: until such account be taken, it cannot be told whether the partner, who for his benefit sold or consumed the partnership property was not justifiable, inasmuch as his interest in the joint stock may

have exceeded the value of the property." After some remarks about the difficulty of settling controversies between partners in a court of law, he concludes thus: "As a court of law thus finds itself incapable of ascertaining the rights of the parties and doing justice between them, it ought not to assume the jurisdiction for any purpose, but leave the whole subject to that tribunal which can administer exact justice in the premises."

It is very clear from these authorities which are founded in reason and good sense, that Prentiss could not have sustained this proceeding against Masters, for the sale and partition of of the slave Daniel, provided they held him as partners; and it seems to us equally clear, that those who purchased their interests respectively in the said slave, must be governed by the same rule. The Judge erred in charging otherwise, and there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

A. W. BURTON, SOLICITOR, UPON THE RELATION OF JACKSON W. REEVES *vs.* JOHN E. PATTON *et al.* COMMISSIONERS.

An information in the nature of a *quo warranto* may be filed against public officers after the expiration of their office, where their conviction is necessary to invalidate their acts, when such acts are of public concern, and are intended to confer rights upon others.

Therefore, *held* that such a proceeding against commissioners appointed by an Act of Assembly, to purchase a town site and to lay off and sell lots, is not too late after they have professed to act, and have professed to perform every particular duty prescribed by the Act.

Persons who have been regarded as public officers for a greater part of the time during which the office existed, and whose acts are recognised by other public functionaries, must be taken to be officers *de facto*, and their acts will be regarded as valid, unless declared otherwise by some competent tribunal in a proceeding *directly* against them.

THIS was an INFORMATION in the nature of a *quo warranto* against the defendants, alleging that by usurpation and with-

out legal authority, they were proceeding to lay off and sell town lots in the town of Marshall, in the county of Madison, under an Act of Assembly, passed in the year 1852, brought to this Court by an appeal from the Superior Court of Madison county.

The defendants filed a written statement of facts which is agreed to be treated as a special plea, the substance of which appears from the opinion of the Court.

Upon consideration of the case in the Court below, his Honor being of opinion against the plaintiff, dismissed the information, from which judgment, he appealed to this Court.

Merriman, for plaintiff.
Williams and *N. W. Woodfin*, for defendants.

BATTLE, J. The pleadings in this case exhibit a defect, which we deem it not improper to notice: the defense ought to have been made by way of plea, instead of answer: Cole on Crim. Inf. and Quo Warranto, 204, (53 Law Lib.) 1 Rev. Stat. chap. 97, sec. 1; *State* v. *Hardie*, 1 Ire. Rep. 42. But the counsel, by a written agreement, filed in the cause, have waived all objections on account of this defect, and have referred the matter to the Court to be decided upon its merits on the information and answer.

We are to take the answer then, as a special plea in bar: and the case made by the pleadings, and some admissions of the parties, is this:

The Legislature by an Act passed in the year 1852, ch. 17, entitled "An Act to appoint commissioners to locate the town of Marshall," appointed "Joseph Cathey of the county of Haywood, William Lescor of the county of Caldwell, Gen. Alxey Burgin of the county of McDowell, Leander S. Gash of the county of Henderson, Col. George Bower of the county of Ashe, Francis P. Glass of the county of Burke, and Dr. Columbus Mills of the county of Rutherford, commissioners, to select a site for the location of the town of Marshall, in the county of Madison, with power for any five of them to act." The

third section directed these commissioners to obtain by donation or purchase, a quantity of land, not less than fifty acres, for the use of the county, and to take the deed or deeds therefor to the county of Madison, or to the chairman of the county court, for the use of the county; "and to file with the clerk of the county court of said county, a statement of their decision." The fourth section appointed the defendants commissioners to lay off and sell the lots in the town to be located on the lands purchased by the commissioners herein before named, or any five of them, and to take the bonds for the purchase money, and file them with the clerk of the county court for the use of the county. By the fifth section any three of them were authorised to act; and any one or more of them, neglecting or refusing to perform the duties enjoined, were made liable to be indicted, and upon conviction, to be fined at the discretion of the Court.

After the 17th day of February, 1853, the defendants were notified that an instrument of writing, bearing that date, was filed in the office of the clerk of the county court of Madison, in the words following, to wit: "The undersigned commissioners, appointed by act of the Legislature at the last session, having proceeded according to the said Act, as explained by a member of the Legislature, to an examination of all the locations near the centre of the county of Madison, after a careful examination, and a patient hearing of all the parties interested, have agreed upon a location for the town of Marshall, on the lands of Z. B. Vance and Samuel Chunn, securing by title bond in the sum of five thousand dollars, fifty acres from Vance; and a conveyance from Chunn for a tract adjoining Vance, for about fifteen to twenty-five acres, which will be more fully understood by a reference to said title papers, all of which respectfully reported to the worshipful court of pleas and quarter sessions of Madison county, and those whom it may concern.

N. B. We hereby constitute Wm. Williams, Esq., Attor-

ney at Law, our agent to take the deeds from the said Vance, or to have the same properly executed.

WM. A. LENOIR,
ALNEY BURGIN,
J. CATHEY,
F. P. GLASS,
C. M. AVERY."

The deed from Vance was subsequently taken by the agent for these commissioners, and then the defendants proceeded to perform the duties enjoined by the Act, by laying off and selling the lots on the land purchased by the commissioners on the French Broad river, near the residence of Adolphus E. Baird, and had completed all that was required of them, before the information against them was filed.

Two objections have been made by the counsel for the defendants against this proceeding, for which it is contended that it ought to be dismissed. The first is, that the defendants were not in the exercise of any office: that they were *functi officio*, and that therefore an information, in the nature of *quo warranto*, was too late, and would not lie. *Secondly:* That the persons who located the town of Marshall by purchasing lands, taking the deed therefor, and filing a statement of their decision, in the office of the clerk of the county court of Madison, were commissioners *de facto* if not *de jure*, and the defendants had no right to question their authority; but were bound to consider their acts as valid, and consequently must be justified for having done so, until by a proceeding directly against such commissioners, it shall be adjudged that they usurped ed their office, and acted without authority of law.

To the first objection, the opinion of the Judges, in the case of *Rex* v. *Harris*, 6 Adol. and El. 475, (33 Eng. C. L. Rep. 117) referred to by the plaintiff's counsel, is a decisive answer. In that case, LITTLEDALE, J., remarked that, "there have been instances in which an information has issued after the office expired, where something done in the office would have affected the general administration of affairs in the borough." And

COLERIDGE, J., added, "In *Rex* v. *the Aldermen of New Radnor*, 2d Ld. Kenyon's Notes 498, the conviction of the officer *de facto* might have become necessary as evidence to invalidate the title of other members of the corporation claiming through him." In the present case, the manifest object of proceeding against the defendants, is by the conviction of them, to invalidate the acts of those who are going on to erect a court house and other public buildings, and thus to fix the town of Marshall upon the site selected by the commissioners of location. With that view, the information does not come too late. But that proposition necessarily suggests the enquiry, whether the relator has selected the proper persons against whom to proceed?

And this brings forward for consideration the second objection, which, we think, is as decisive against the plaintiff, as the first is for him.

In the case of *Burke* v. *Elliott*, 4 Ire. Rep. 355, it was decided that the acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers *de jure*. In delivering the opinion of the Court, the Chief Justice, RUFFIN, very ably reviewed the whole subject, and showed beyond doubt, that the conclusion arrived at by the Court, was supported as strongly by authority, English and American, as by reason and public policy. It may admit of doubt, say the Court, what shall constitute an officer *de facto* in different cases. "The mere assumption of the officer by performing, one, or even several acts, appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must, at least, be some colorable election and induction into office *ab origine*; or so long an exercise of the office, and acquiescence therein of the public authorities, as to afford to the individual citizen, a presumption strong, that the party was duly appointed, and therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason, was bound to submit to his authority as the officer of the country. A public office

is to be supposed necessary for the public service, and for the convenience of all the various members of the community, and therefore, that it will be duly filled by the public authority. Where one is found actually in office, and openly and notoriously exercising its functions in a limited district, so that it must be known to those whose official duty it is to see that the office is legally filled, and also that it is not illegally usurped, and when this goes on for a great length of time, or for a period which covers much of the time for which the office may be lawfully conferred, it would be entrapping the citizen and betraying his interests, if, when he had applied to the officer *de facto* to do his business, and got it done, as he supposed, by the only person who could do it, he could yet be told, that all that was done was void, because the public had not duly appointed that person to the office, which the the public allowed him to exercise." The above remarks apply more particularly to officers of a greater or less permanent character. But they may be applied with equal force to those, who, like the commissioners in the present case, had but a single duty to perform. Here the commissioners were appointed by the highest public authority, the Legislature, for the sole purpose of locating the town of Marshall. In doing this, they were required to select a site, purchase lands, and take deeds therefor, and file with the clerk of the county court a statement of their decision. Certain persons, professing to act under the authority of the Legislature, and some of whom were, without question duly appointed, proceeded to act as commissioners, and did perform the duty required of them as such. The defendants were notified of the statement of the decision of these persons, professing to act as commissioners, being filed with the clerk of the county court, which was to be their authority for proceeding to lay off and sell the town lots: Could the defendant question the validity of the act of these persons, when it had been recognised by the clerk of the county court? Were they bound to dispute, at the risk of being indicted and punished, what no one else had disputed? We think not. As to them, the persons professing to act, and

acting as commissioners, must be regarded as such *de facto*, if not *de jure*. The Information itself attacks the defendants, by calling in question the validity of the power of the commissioners of location. The relator ought to have proceeded directly against them in the first instance, and until that be done, and they be convicted of usurpation of power, the doings of the defendants must stand unimpeached. In coming to the conclusion, that the Information must be dismissed, we have not, as will be seen, noticed the proceeding of the persons professing to act as commissioners, on the 14th day of January, 1854, and thereby to ratify and confirm the location first made. Whether that will avail any thing in an Information against the commissioners of location, is not for us to say. We have performed our duty to this case, when we declare that the present Information cannot be sustained, and that the judgment dismissing it must be affirmed.

PER CURIAM. Judgment affirmed.

BUFFALOW AND COOKE *vs.* STUART PIPKIN.

The maker of a promissory note, not for accommodation, is not liable for costs incurred by the payee in defending a suit brought against him by an endorsee.

APPEAL from the Superior Court of Wake county, at the Fall Term, 1854, his Honor Judge ELLIS, presiding.

The following case agreed was submitted to his Honor:

The defendant executed his promissory note to the plaintiffs as partners in trade, who endorsed it to a third person. Suit was brought on the note against the present plaintiffs as endorsers, and against the present defendant, by the endorsee. The writ was returned executed as to the plaintiffs, but returned *non est inventus* as to this defendant. At the return term of the Court a *nolle prosequi* was entered as to this defendant. The present plaintiffs put in pleas to the action, and at a subse-

quent term judgment was rendered against them on their endorsement, for principal, interest and cost, which they paid. Afterwards the defendant paid to the plaintiffs, Buffalow and Cooke, the principal and interest of the judgment, but refused to pay the costs accruing thereon. For this refusal, this action is brought.

On consideration of the case agreed, his Honor, being of opinion with the plaintiffs, gave judgment accordingly, and the defendant appealed.

Busbee, for plaintiffs.
Miller and *H. C. Jones*, for defendant.

NASH, C. J. The defendant is not liable to pay the demand upon which he is sued. He was the maker of a promissory, in which the plaintiffs were the payees; they endorsed it over, and being sued by the endorsee, the amount now claimed by them as costs was expended in defending that suit. By their endorsement the plaintiffs become the sureties of the maker, and as such, were at liberty to consult their own safety, by paying up the note, when it came to maturity, without waiting for a suit, for it was not necessary for them to stand a suit, in order to charge the principal. Sedgwick on Damages, 326, *Craig* v. *Craig*, 5th Raw. 191, and *Wynne* v. *Brook*, do. 106. In *Dawson* v. *Morgan*, 9th Bar. and Cre. 618, it is decided, that the endorser of a *regular* bill of exchange, who has been sued by the endorsee, is not entitled to recover from the acceptor, the costs incurred in such suit; the Court say, upon the ground, that there is no privity between them. BAILEY, Justice, in reply to Mr. Patterson, who had referred to the case of *Smith* v. *Dudley*, 4 Term, 691, and to *Jones* v. *Brooks*, 4 Taun. 464, said, there "the bill was accepted for the accommodation of the drawer. There was a bargain between the parties, that the drawer of the bill should indemnify the acceptor. No case goes the length of saying that every person, who is sued upon a bill, is entitled to recover against the acceptor the costs of the suit." And Lord TENTERDEN,

Chief Justice, in delivering his opinion, says, "What privity is there between the endorser and the acceptor? What obligation is there on the acceptor, except that raised by the custom of merchants? That custom does not give a right to the endorser to recover the re-exchange, *much less costs incurred by him in an action on the bill.*" To the same point see *King* v. *Phillips*, Peters C. C. 350; and in *Simpson* v. *Griffin*, 9th John's. R, 131, it is decided that the mere fact of the maker's drawing the note, does not imply a promise to save the payee harmless from all costs and charges, that he, as an endorser, has incurred. In order in any such case to subject the maker, there must be a contract for an indemnity, on the making of the note or endorsement of the bill. *Mott* v. *Hicks*, Cowen 518. But the principle of express indemnity does not apply between the accommodation acceptor of a bill and the drawer, and the accommodation endorser of a promisory note, as it does to the surety of an ordinary note; Sed'k. 325, and cases cited. In *Short* v. *Kalloway*, 11th Ad. and Ellis 28, Lord DENMAN says, "no person has a right to inflame his own account against another, by incurring additional expense, in the unrighteous resistance to an action which he cannot defend." This is not an accommodation note. The judgment below is reversed, and judgment on the case agreed, for the defendant.

PER CURIAM. Judgment reversed.

RULE BY THE COURT.

IREDELL ON EXECUTORS, may be read by applicants for license, at their option, instead of the authors now required.

—:o:—

MEMORANDUM.

The Hon. SAMUEL J. PERSON, of Wilmington, who had received the temporary appointment of Judge of the Superior Courts, by the Governor and Council, was appointed to that office by the General Assembly, at its last session, in the place of Judge SETTLE, resigned.

CASES AT LAW

ARGUED AND DETERMINDED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1855.

P. A. R. C. COHOON *vs.* RUFUS K. SPEED AND OTHERS.

Where a Justice of the Peace has not jurisdiction of the subject matter, his warrant is void and will not protect the officer who acts under it, nor the Magistrate himself.

A Justice of the Peace has no power to issue a warrant to search for a runaway slave.

ACTION of TRESPASS, tried before his Honor Judge PERSON, at the Spring Term, 1855, of Pasquotank Superior Court.

Matthews, the town constable for Elizabeth City, applied to Speed, the justice, for a warrant to search for, and arrest a runaway slave, supposed to be concealed upon the premises of the plaintiff: the warrant was issued, and under it the defendant, Matthews, assisted by one Hay, broke open the door of a stable which opened into one of the public streets of the town of Elizabeth City. The breach was effected by the defendant Matthews, standing in the street and pulling out a staple with his fingers, but he did not enter the stable any further, nor did any one by his authority or command.

His Honor charged the jury that the warrant was no protection, and that the acts alleged by plaintiff constituted a

trespass, and that the magistrate who issued the warrant, though not present when the stable was opened, as well as the constable and those aiding him, would be guilty upon these acts, if established to their satisfaction. Defendants excepted.

Verdict and judgment for the plaintiff. Appeal.

Jordan, for the plaintiff.
Pool, for the defendants.

NASH, C. J. There can be no doubt that the acts complained of will support the plaintiff's action, unless the defendants were justified by the law in committing them: the drawing of the staple of the stable door by Matthews, or by any one else acting in concert with him, or by his direction, was an act of violence in itself: it made not the slightest difference that the side of the stable, containing the door, was on the line of the public street, and that Matthews stood on the street when he drew the staple: it would be a strange doctrine indeed, if a man's house should lose the protection of the law because it was placed on the line of a street, or on the line between the owner and his neighbor. The house might be injured and broken by any one who chose wantonly or maliciously to injure it—this would not do. Nor was it necessary for him, Matthews, to have entered the stable. Those that did so, entered under his authority, he being present aiding and abetting them.

But it is said he had the warrant of a justice of the peace, the defendant, Speed, for doing the act. Matthews was a ministerial officer, and bound to execute any legal process placed in his hands, and had no right to look into the evidence upon which the magistrate acted: whether that was sufficient or not, the warrant justifies him and all, who by his orders, aided him: but every man, particularly every officer, is presumed to know the law. When, therefore, the precept upon its face shows that the justice issuing it had no jurisdiction of the subject matter, it gives no authority to the officer: he is, if he acts under it, a trespasser, and so are all who aid him, 2 Hawk. pl. cr. 130, *Shergold* v. *Holloway:* Strange 1002, *State* v. *Mc-*

Donald, 3 Dev. 468. A justice of the peace has jurisdiction to issue a search warrant in this State, only when a larceny is charged. (*McDonald's case supra.*) Here the warrant states explicitly that it issued to search for a runaway slave. Over such a matter he had no jurisdiction: his warrant was utterly void and is no justification, *State* v. *Mann*, 5 Ire. Rep. 45.

It is not necessary to make a man a trespasser that he should do the act complained of himself, or that he should be present when it is done: it is sufficient if he counsel or advise the act. Nor is it an excuse to the magistrate, Speed, that he mistook his power. He is bound to know the extent of the jurisdiction conferred upon him: and if a trespass is committed under a warrant in a case, where a magistrate goes beyond his legal authority, he is not protected by his judicial character; but is a trespasser. There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

D. B. PENDLETON *et. al. vs.* PENELOPE PENDLETON.

THE jurisdiction of the Supreme Court in relation to amendments in the courts below, is confined to the question of *power*. When the court below has the power to make an amendment, this Court cannot enquire how it has exercised that power. *Phillipse* v. *Higdon*, Bus. 380, cited and approved.

MOTION to amend the record of Pasquotank County Court, tried before his Honor, Judge PERSON, at the Spring Term, 1855, of the Superior Court of that county.

A motion had been made in the county court of Pasquotank, at the June Term, 1854, upon due notice given, for leave to amend the record of that court so as to enter the following on the record of that court of the December session, 1840: "This cause coming on to be heard upon petition evidence, &c., and it appearing to the satisfaction of the court that there were debts to a large amount due by the said Pendleton, (for some of which, judgments have been rendered and execution issued,

against her land named in the petition,) which render a sale of the land named in the petition expedient and necessary: it is ordered, adjudged and decreed by the court that the petitioner, G. W. Pendleton, sell the land of his ward named in the petition, on the premises, at public sale, to the highest bidder, upon a credit of six months, with interest from the date: that he take bond with approved security from the purchaser, and make report to the next Term of this court."

Also a motion was made, on notice, that the commissioner be allowed to file his report of the sale which had been made of the land in question, as of the next term.

These two motions were allowed by the county court, and an appeal taken to the superior court, and upon consideration of the case before his Honor in that court, satisfactory proof being adduced from the memoranda of the county court, and from the testimony of the commissioner appointed to sell the land, that these amendments ought to be allowed, he gave judgment accordingly, from which the defendant appealed to this Court.

Smith, for the plaintiffs.
Pool, for the defendant.

BATTLE, J. It is settled by several decisions that the jurisdiction of this Court upon the subject of amendments in the court below, is confined to the question of power; and that when that court has the power, we cannot interfere with its discretion in the exercise of it. *Phillipse* v. *Hidgon*, Busb. 380; *Campbell* v. *Barnhill*, 1. Jones' Rep., 557. In the former of these cases, the subject is fully discussed, and the instances in which the Superior Court has the power to allow amendments are given, and distinguished from those where such power is denied it. "The subject," as it is said in that case, "may be divided into three classes: 1st. Every court has ample power to permit amendments in the process and pleadings of any suit *pending before it; Quiett* v. *Boon*, 5 Ired. 9." "2d. Every court of record has ample power, *after a suit is determined*, to amend its own record; that is, the journal

or memorial of its own proceedings, kept by the court or its clerk, by inserting what has been omitted, or striking out what may have been erroneously inserted." "3d. The power of a court to allow amendments, after the determination of a suit, in the process or returns made to it by ministerial officers, is much more restricted and qualified; for the reason, among others, that the court is not presumed, in such cases, to act upon its own knowledge; but upon information derived from others. The case now under consideration falls within this class of amendments, and may be subdivided into three heads: 1st. Where the amendment is for the purpose of correcting a mere oversight of an officer in not making an entry, such as he ought to have made as a matter of course, and as a part of his duty according to law, the court has power to allow the amendment, notwithstanding third persons may be thereby affected."

It is unnecessary to state the second and third heads; under the last class, in which it was held that the court had no power to make amendments, because it is manifest that the amendments proposed to be made in the case now before us, fall under the second class and the first head of the third class as above set forth.

The first of the proposed amendments is nothing more than the drawing up and entering in proper form, the orders and decrees of the court upon the petition filed in the cause of which the clerk had only entered loose minutes.

The second is allowing the commissioner (who, for the purpose of selling the land was an officer of the court,) to make out and file a report of the sale which he ought to have done as a matter of course at the time, or which, if then done, has been since lost.

These amendments come clearly within the power of the court, as appears not only from the case of *Phillipse* v. *Higdon*, above cited; but also from the prior adjudications in *Galloway* v. *McKeethan*, 5 Ire. Rep. 12; *Bradhurst* v. *Pearson*, 10 Ire. Rep. 57; and *Green* v. *Cole*, 13 Ire. Rep. 425.

As the court has the power to make the amendments, and

we have no right to interfere with its discretion in making them, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

SAMUEL RODGERS *vs.* JOS. B. DAVENPORT.

Where A and B had come to a settlement, and agreed upon a particular sum, which B was entitled to as a credit, which was accordingly entered on a bond which A held against B, and afterwards upon a complaint by A that the credit was too large, B said "go and alter it, and if you can show me the mistake, it will all be right; and if not, the credit must be put back or altered back." *Held* in a suit brought on the bond, that it was incumbent on A to show on the trial that there was a mistake in the settlement, or that he had, before that, shown such mistake to B.

THIS was an ACTION by a warrant, brought by successive appeals to the Superior Court of Tyrrel, where it was tried at the Spring Term, 1855, before his Honor Judge PERSON.

The plaintiff produced a bond, payable to him, for fifty-five dollars due 27th of December, 1851, on which was an endorsement of a credit of $43.05, which however had been erased and made to read $4.05. This was explained thus: the parties having come together for a settlement of accounts, upon a computation it was agreed and settled that the defendant was entitled to a credit of $43.05, which was accordingly entered on the bond in question. A few days afterwards, the plaintiff met the defendant and informed him that there was a mistake in their settlement, and that the credit ought to be for four dollars and five cents, instead of the sum entered, and requested the defendant to go with him a short distance to where his papers were and he would show the error: the defendant declined going, but said "go and alter it, and if you can show me the mistake, it will be all right; and if not, the credit must be put back" or "altered back:" at the same time Davenport, the defendant, sent his step-son to witness the alteration.

There was no further evidence to show that there was a mistake in the credit as first entered.

Upon this state of facts his Honor instructed the jury that the question for them to try was, what was the credit to which the defendant was really entitled? That the agreement on the sum of $43.05, and the entering of that sum on the bond, entitled the defendant to that amount as a credit, unless, acording to the subsequent agreement, the plaintiff had shown to the defendant the mistake alleged by him, or was able to show it there, upon the trial; to which instructions the plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Winston, jr., for the plaintiff.
Heath, for the defendant.

NASH, C. J. His Honor, who tried the cause below, would have been guilty of gross error if he had charged the jury otherwise than as he did. The plaintiff contended that the agreement between the parties as to the endorsed payment, was divisible into two contracts; one executed, the other executory—that as soon as the alteration of the endorsement was made by the plaintiff it was final, that is, executed and bound both parties; but as to the restoration of the original endorsement it was executory and had never been done. There is no foundation in law for any such distinction between the parts of the agreement: the whole was one transaction—one agreement: upon a settlement of accounts between the plaintiff and defendant it was agreed between them, that the former owed the latter the sum of $43.05, and that this sum should be endorsed on the note, now in controversy, as a payment to that amount; subsequently the plaintiff, alleging that there was an error in the settlement, and that the credit ought to be $4.05, the defendant agreed the plaintiff should alter the endorsement to the latter sum, upon the express condition, that if he did not show him that the mistake as alleged did exist, the endorsement should stand as it was; to this the plaintiff assented. Without pretending so far as is disclosed by the case that he ever showed to the defendant that there was any error in the settlement, he brought his action: nor did he on the trial of

the case then show that any error did exist. The defendant is entitled to a credit on the note to the extent of the sum originally endorsed.

Allowing the payment of $43.05, there would still be a small sum due the plaintiff: as, however, the jury gave a general verdict for the defendant, and it forms no part of the plaintiff's bill of exceptions, we presume there was evidence of other payments discharging the note, and that the only question intended to be brought before us was as to the endorsed payment.

PER CURIAM. Judgment affirmed.

JOHN LONG *et. el. vs.* TOWNSEND WRIGHT, ADM'R. OF HARRIETT WRIGHT.

Construction of a Will depending on its peculiar phraseology.

ACTION of ASSUMPSIT tried before his Honor Judge PERSON, at the Spring Term, 1855, of Perquimons Superior Court.

This was a case agreed, arising upon the construction of the will of Thomas Long, senior, of which the following are the portions bearing upon the question, viz:

"I give to my three sons, John Long, Joseph Long, and James Long, the plantation whereon I now live, and my grist mill, with the exception of those reserves hereafter made, to them and their heirs for ever: if either of my three sons, John, Joseph, or James should die under age, it is my will and desire that the two surviving should heir the same between them."

"I give unto my three daughters, Mary Long, Sarah Long, Harriet Long, and the child or children, which my wife now appears pregnant with, the following negroes, viz: Sam, Hannah, Thompson, Lewis, big Esther, and little Esther, reserving the use of Hannah to my wife, Doughty, during her life, and

the use of big Esther and Lewis two years after my death: also, I give to my three named daughters, Mary, Sarah, and Harriett, and the child or children aforesaid, half a dozen silver table spoons and one dozen tea spoons, all of them to be equally divided among them at my daughter Mary's arriving at the age of sixteen years; and if either of my daughters, child or children as aforesaid should die, after the division, without lawful issue, it is my will that such part should be equally divided between my said wife and all of my surviving children, to them, and in that way to be enjoyed by them forever."

"I give unto my beloved wife, Doughty Long, two feather beds (&c., embracing a great many small articles): I give the use of one-third part of my plantation and wood land, with the improvements thereon; the third part of my grist mill and the beufat and desk which stands in my hall room, during her widowhood."

And it was agreed that if by the true and proper construction of these clauses, there was a valid limitation over of the slaves Sam, Hannah, &c., in the event of one of the legatees dying without issue before a division was made of said slaves, but after Mary had arrived at sixteen, the plaintiff should have judgment for the sum of five hundred and thirty-five dollars and seventeen cents with interest; otherwise, judgment was to be entered for the defendants.

Upon consideration of the case agreed, his Honor being of opinion with the defendants, gave judgment accordingly, and the plaintiffs appealed.

No counsel for the plaintiffs.
Heath, for the defendants.

PEARSON, J. But for the reservation of a life estate to the widow in the negro girl Hannah, beyond all question, the cross limitation, in the event of one of the daughter's dying without a child, would extend, as well to the negroes as to the silver spoons. This circumstance, we think, is not enough to restrict the limitation, and confine its operation to the half dozen silver

table spoons, and the dozen silver tea-spoons. The division could be made, subject to the life estate of the widow in one of the negroes, in the same way as land is divided among heirs at law—subject to the widow's dower.

This conclusion is confirmed by the fact that in the clause, next preceeding, the testator gives to his three sons, the plantation on which he lives, and the grist mill, subject to a life-estate of the widow in one-third of the plantation, and one-third of the grist mill, and notwithstanding this reservation, makes a cross limitation in the event that either of his sons should die under age. We think the daughters took the slaves subject to the limitation over.

PER CURIAM. Judgment reversed and judgment for the plaintiff according to the case agreed.

JOHN J. GRANDY *vs.* JESSE McCLEESE.

A. agreed to deliver to B. a quantity of corn at his farm in another county, B. sending for it; nothing was said as to the time or manner of payment. B. sent a vessel for the corn, but sent no money, nor did he give the agent sent, any instruction as to the payment, or in any way communicate with A. upon that subject. A. denied the contract and refused to deliver the corn: *Held* that although A. denied the contract, still, in order to entitle B. to recover, he should have showed that he was ready and able to perform his part of the contract, though, under the circumstances, an actual production of the money was dispensed with.

ACTION of ASSUMPSIT, tried before his Honor, Judge DICK, at the Fall Term, 1854, of Pasquotank Superior Court.

The declaration was for a refusal to deliver a quantity of corn sold to the plaintiff.

On the trial, one *Killinger* testified that he was present at the plaintiff's store, in Elizabeth City, on 1st of September, 1853, and heard the plaintiff enquire of the defendant what he would take for his corn? The reply was, "sixty cents per bushel;" upon which the plaintiff offered 58 cents; to which

the defendant answered, "you can send for it." Nothing was said about the mode or time of payment, nor did this witness recollect that the quantity of corn was mentioned.

Another witness, one *Jolee*, testified that he was present at the conversation spoken of by Killinger: that he heard defendant say he had from 2500 to 2800 bushels of corn to sell, and proposed to sell it to the plantiff: plaintiff said, "I will give you 58 cents a bushel for it;" to which the defendant answered, "you can take it at that price and may send a vessel after it." The defendant resided in Tyrrel county.

One *Silvenus Harris* testified that he had a vessel at Elizabeth City early in September, 1853, which was chartered by the plaintiff to go to Tyrrel for this corn, which he was to take on board and convey directly to Norfolk in Virginia: that he accordingly proceeded to defendant's plantation with his vessel, and delivered to the defendant, plaintiff's written order for the corn; on reading which defendant remarked, "Grandy seems to reckon in his order as if I had sold him the corn; but I did not consider it a permanent bargain, though I talked with him about it: corn has risen since I have seen him, and I had as well profit by it as any one else." Witness said, "I must have the corn or the freight on it:" defendant refused to put the corn on board as the plaintiff's; but it was agreed to ship it on board witness' vessel on defendant's account, he saying at the time, "I will go over with it to Elizabeth City, and see Mr. Grandy, and if we can come to any understanding about it, we will set aside our contract about the freight:" that defendant did thereupon deliver on board his vessel 2103 bushels of corn to be conveyed to Norfolk, which was all the vessel could carry. On reaching Elizabeth City with the defendant on board, he went ashore, but plaintiff was absent from town: witness then proceeded to Norfolk, and there delivered the corn under defendant's order, which was afterwards sold at 76½ cents per bushel. Witness stated that plaintiff gave him no funds, nor other means, to pay for the corn, nor any directions in regard to payment of the purchase money; but that this was not made known to the defendant.

Plaintiff proved further, by one *W. W. Griffin*, cashier of the Farmer's bank, that previously to his leaving home, he had made arrangements with witness by which he was to advance the necessary funds for the payment for corn when required; and witness had always been ready to do so, and this was known to Killinger, plaintiff's clerk, who had charge of his store in his absence; but there was no proof that it was known to the defendant.

It was in evidence that Killinger saw defendant at the wharf, when at Elizabeth City; but had no communication with him. Defendant, on the occasion spoken of, did not call at plaintiff's store before leaving.

Defendant proved that the market price of corn at Elizabeth City when the vessel arrived there, was from 55 to 60 cents a bushel, though there was little or none for sale in the market, and no large lots: that corn is generally worth 12½ cents a bushel less in Elizabeth City than at Norfolk.

His Honor charged the jury, that if, from the evidence, they should find that the defendant denied the contract, and for that reason refused to deliver the corn, it was not necessary for the plaintiff to pay, nor to offer to pay, on delivery; for that such refusal would dispense with payment or an offer to pay on his part.

That if the jury should believe, from the evidence of the arrangement with Griffin, in connection with the evidence of the defendant's refusal to deliver the corn, it was to be paid for on application of defendant, after delivery on board the vessel, then the plaintiff would be entitled to recover. To which instructions the defendant excepted.

Verdict of the jury for the plaintiff. Judgment and appeal.

Martin and *Pool*, for the plaintiff.
Smith, for the defendant.

BATTLE, J. The contract proved by the testimony was simply an executory one for the sale of a quantity of corn at a stipulated price: the legal effect of it was to bind the parties to the performance of concurrent acts: The plaintiff was to

send for the corn and to pay for it upon delivery; and the defendant was to deliver it upon receiving payment. Neither party could demand a performance by the other, without the allegation and proof of his own readiness and ability to perform his part of the agreement, 2 Bla. Com. 447; *Cowper* v. *Saunders*, 4 Dev. Rep., 283; *Cole* v. *Hester*, 9 Ired. Rep. 23. The plaintiff, then, could not sustain his action for a breach of the contract by the defendant, without showing that he himself had paid, or tendered the price of the corn, or was ready and able to do so, or that the defendant had done something to discharge him from that duty. It is contended by his counsel that the denial of the contract by the defendant was a breach of it, and dispensed with proof on the part of the plaintiff that he had paid, or tendered the money, or had it ready to be paid or tendered at the time when he demanded the corn; and such was the charge of his Honor to the jury in the court below. We do not concur in that opinion, in the extent to which it was carried: we admit that the conduct of the defendant dispensed with the obligation on the part of the plaintiff to pay the money, or even to tender it; but it did not relieve him from the necessity of having it ready to be paid or tendered; *Abrams* v. *Suttles*, Busb. Rep. 99. Until he had provided the means to pay for the corn upon delivery, he had not put himself in a situation in which he had a right to demand it. There was no testimony to show that it was to be paid for at any other time, or place, than that when and where it was to be delivered; the arrangement made by the plaintiff with the cashier of the Farmer's bank at Elizabeth City for procuring the money with which to pay for the corn, could not have availed him, had it been made known to the defendant, and of course it cannot aid him when it was never communicated to the defendant. There was error in the instructions given by the court to the jury for which there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

JOSEPH MARDREE *vs.* THOMAS SUTTON.

If A knows, or has good reason to believe that B is about to shoot, or kill the hogs of C, which are in B's field, and A permits his slave to go with B in pursuit of the hogs, and the hogs are by B, with the aid of the slave destroyed, A is liable in an action of trespass for such destruction.

ACTION of TRESPASS *vi et armis*, tried before his Honor Judge PERSON, at the Spring Term, 1855, of Chowan Superior Court.

In order to connect the plaintiff with his son George, who was the active agent in the trespass complained of, three witnesses testified that they heard a conversation between the plaintiff and defendant early in the morning after the night of the alleged trespass, and near the spot where it took place, in which plaintiff asked defendant if he had sent his boy and dogs to help his son George to kill his hogs? Which question was repeated three times, to which there was no answer till repeated the third time, when the defendant said, "I did sir, and help yourself if you can." The plaintiff then said to the defendant, "the reason why he made the inquiry was, that if the boy had come there to help kill his hogs of his own accord, he would have him whipped, but as he was sent by his master he should hold him equally liable with his son."

The plaintiff further showed that three of his hogs had been shot dead; two more severely injured by gun shots, and that several sows, that had pigs, were so badly hurt that nearly all their pigs (21 in number) perished for the want of suck: it was further proven that one of the hogs shot, was badly torn on the ham by a dog; also that between the hours of midnight and day, several neighbors heard the barking of dogs, as if chasing something—the squealing of hogs—firing of guns, and other loud noises, all in the direction of the spot where the hogs were found the next morning, dead and torn.

It was also in evidence that these hogs were in the field of *George Sutton* when thus injured; that they were at the time doing damage to his growing crop, but had got into the field through the deficiency of the fence, which was only three and a half or four feet high.

The defendant then introduced *George Sutton*, the son, as a witness, who stated "that he was the owner of the field in question; that the hogs had got in there on the night alluded to; that he went about midnight and shot one of them dead, and being unable to get them out, went to his father's for assistance; that he told him the circumstances and asked him for the services of his boy in getting the hogs out of the field: defendant said the boy might go, but said, "George you must not kill, or injure the hogs;" but the boy did not hear this. This witness also took five of his father's dogs along with him: he then returned with the slave and dogs and shot three other hogs dead, but the boy did nothing but pursue the hogs in endeavoring to get them out; that the dogs would not bite hogs, and did not injure them. This witness also stated that he was present at the conversation deposed to by the first mentioned witnesses, and that it was not as they had stated it; that his father only admitted that he had sent his slave to help drive out the hogs. Plaintiff objected to the reception of that part of George's testimony in regard to what the defendant said to him when he applied for the slave, but it was received by the court; for which plaintiff excepted.

His Honor charged the jury that if the evidence satisfied them that the defendant lent his slave to his son George, or sent him to the field himself, for the purpose of aiding George in killing, or otherwise injuring the plaintiff's hogs, then the defendant would be liable for all the damage done to the hogs by both George and the slave: but if, on the contrary, they were satisfied from the evidence, that the defendant lent his slave to his son, or sent him to the field himself, to assist him in getting the hogs out, with orders not to kill or hurt the hogs, and the slave disobeyed the orders, and either of his own head, or by the command of George, committed the trespass complained of, that then the defendant would not be liable at all. To this charge the plaintiff excepted.

Verdict and judgment for the defendant. Plaintiff appealed.

Smith and *Jordan*, for the plaintiff.

Heath, for the defendant.

PEARSON, J. If a father, at the request of his son, agrees that his slave may go and aid the son in driving hogs out of the son's field, and the son, with the assistance of the slave, wilfully and wantonly kills some of the hogs and injures others, the father is not liable in an action of trespass. But if, at the time the father agreed that his slave might go, he knew, or had reason to believe, that the son intended, or would kill the hogs, or otherwise injure them, then the father is liable to the owner of the hogs in an action of trespass for the damage done, as an aider or abettor, under the rule *qui facit per alium facit per se;* and in trespass all are principals.

There was evidence in this case, that the defendant knew, or had reason to believe, that his son would kill the hogs or otherwise injure them; the son came at night in hot haste: told his father that the hogs were in his field; that he had shot one, and wanted the slave to help drive the others out; besides getting the slave, the son took five of his father's dogs; three of the hogs were shot dead; two others were severely injured by gun shot wounds, and others badly torn by dogs; the father, when apprised of these facts and asked if he had sent his slave to help kill the hogs, hesitated and gave no answer, until the question was put three times.

The plaintiff is entitled to a *venire de novo* because the case was not submitted to the jury in such a way, as to make it turn upon the question, did the defendant, when he agreed that his slave might go, know, or have good reason to believe, that his son intended, or would kill, or otherwise injure the hogs?

The expression used by the defendant according to the testimony of the son, "George you must not kill or injure the hogs" was competent evidence to be weighed by the jury and to pass for what it was worth.

PER CURIAM. Judgment reversed.

BOND & WILLIS *vs.* JAMES B. HILTON.

For every breach of the duties arising out of a contract, the law awards some damages; and if none other are proved, *nominal damages* should be given by the verdict of the jury.

ACTION of TRESPASS ON THE CASE, tried before his Honor, Judge PERSON, at the Spring Term, 1855, of Washington Superior Court.

The plaintiffs and defendant were part owners of the schooner *Sarah Louisa:* a cargo belonging, one half of it to Short & Co., and the other half to the owners of the vessel, was put on board. The defendant agreed to act as master of the schooner from Plymouth to the West Indies and back, and the cargo was consigned to him. The defendant, in charge of the vessel, left Plymouth on the 26th or 27th of December, 1848; arrived at New-Berne, (where it was understood he should call to have a sail repaired,) on 30th December; left that place about 6th of January, for Ocrocoke, and returned to New-Berne on 26th January. Sometime in February, the defendant put one Capt. *Moss* in charge of the schooner as master, (quitting her himself,) and about the latter part of March, the schooner, under the command of Moss, left New-Berne and made her voyage to the West Indies. She returned in April or May. The usual time of a voyage to the West Indies is two months. It was in evidence, on behalf of the defendant, that the return to New-Berne and the detention there, were caused by the necessity for repairs, which were made on the vessel at that place.

It was in evidence that the value of the vessel was $10 per day, of which sum, the captain's wages constituted a part, and were equal to $1.50 per day. The plaintiff's counsel contended that the defendant was guilty of neglect in the delay: also in abandoning the vessel to Moss; and that they were entitled to recover for these breaches of the duties arising out of the contract.

His Honor charged the jury that, inasmuch as the plaintiffs had not declared on the contract, they could not recover for any violation of it, merely.

That if the defendant had omitted to act with ordinary skill and diligence, and plaintiffs had suffered damage thereby, they could recover to the extent of that damage.

That the mere fact that the defendant had turned the vessel over to Moss, did not entitle the plaintiffs to recover any thing, unless they satisfied them that they had sustained damage thereby. To these instructions plaintiffs excepted for error.

Verdict for the defendant. Judgment and appeal.

Winston, jr., and *Rodman*, for the plaintiffs.
Smith and *Heath*, for the defendant.

NASH, C. J. When this case was before the court at June Term, 1853, it was decided that the action was properly brought in "Case." Busb. Rep. 308; see also, *Williamson* v. *Dickens*, 5 Ired. R. 269. The controversy arises upon the charge of his Honor, who tried the cause below upon the question of damages: the jury were informed that "inasmuch as the plaintiffs had not declared on the contract, they could not recover for any violation of it merely." And again, "the mere fact that defendant had turned the vessel over to Moss, did not entitle the plaintiffs to recover any thing, unless they satisfied the jury that they had sustained damage thereby:" in other words, that to entitle the plaintiffs to recover, they must show that they had sustained actual damages. In this opinion we do not concur.

The defendant had entered into a contract with the plaintiffs, as owners of the vessel, to navigate her as Master, to the West Indies and back to Plymouth. He took charge of her, and on his way, at New-Berne, he put a Capt. Moss in command, and abandoned the vessel: No special loss or damage was proven by the plaintiffs. Under these facts, the sole question is, are the plaintiffs entitled to recover any thing of the defendant? We hold that they are.

Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages, by way of declaring the right, upon the maxim, *ubi jus*

ibi remedium. In *Ashby* v. *White*, 1st Salk. 19, Lord HOLT declared that "every injury imports a damage, though it does not cost the party a farthing." This principle has been applied to a variety of cases where the plaintiff's recovery is in damages: thus, in an action for words spoken, where no actual damage has been sustained: so, trespass to the person or to realty. A remarkable case, as exemplifying this doctrine, is that of *Taylor* v. *Henniker*, 12 Adol. & Ellis 488. There the action is in case, brought by a tenant against his landlord for illegally distraining for more rent than was due: it appearing that the proceeds of the sale were insufficient to satisfy the rent actually in arrear, the jury found a verdict for one shilling: a motion was made on the part of the defendant for a nonsuit, which was denied. DENMAN, Chief Justice, said: "there was a wrongful act of the defendant, and though by reason of the nature of the goods taken, falling short of the actual rent due, no real damage was sustained, yet there was a *legal damage* and cause of action, for which the plaintiff was entitled to a verdict." In *Laffin* v. *Willard*, 16 Pick. 64, a sheriff had neglected to return an execution: the action was in case, and the court declared that though there were no actual damages proved, where there is a neglect of duty, the law presumes damages, and the plaintiff was entitled to a verdict for nominal damages. In *Whittimore* v. *Cutter*, 1 Gal. 429, Justice STORY says: "we are of opinion that where the law gives an action for a particular act, the doing that act imports, itself, a damage to the party: every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." The rule, that the invasion of a right gives, in all cases, a claim to nominal damages, applies equally to matters of contract: thus in an action brought against a banker for refusing payment of a check, although in funds, no actual damage being shown, the court of King's Bench decided that the plaintiff was entitled to nominal damages, *Marzetti* v. *Williams*, 1 Barn. & Adol. 415. See Sedgewick on the measure of damages, 46. In every contract implying a duty to be performed, the neglect of that duty gives, in law, a cause

of action to the opposite party under the maxim, *ubi jus ibi remedium*: and where the law gives an action, it gives damages for the violated right, and if no actual damage be shown, then the plaintiff is entitled to nominal damages.

In this case, the defendant had contracted to carry the vessel of the plaintiffs, to the West Indies and back: he was in duty bound so to do: the plaintiffs had acquired a right to his services: to desert the vessel, therefore, before the completion of the voyage, was a violation of that right.

The authorities cited, show that it is no answer, except as to the *quantum* of damages, that the plaintiffs had sustained no actual injury by the substitution of Moss as Captain. The defendant had violated his duty and broken his contract: the plaintiffs had a right to bring their action on the *contract*, or in *tort*, and to allege the *gravamen* to consist in a breach of duty.

His Honor, below, erred in his instruction to the jury, that in the latter case, the plaintiffs could not recover, unless they showed substantial injury.

PER CURIAM. Judgment reversed.

Den on demise of JERDAN HATHAWAY *vs.* PENELOPE DAVENPORT.

A copy of the probate of a deed by the subscribing witness, also of the order made by a County Court to appoint commissioners to take the private examination of a *feme covert*, was inserted on the deed itself, as also was the report of the commissioners, which were duly registered, though no other commission issued to them, and no other report was made to the Court: it was *Held* that this was a substantial compliance with the act of Assembly, and that the deed was duly authenticated.

THIS was an ACTION of EJECTMENT, tried before his Honor Judge PERSON, at the Spring Term, 1855, of Washington Superior Court.

The only question made in the case, was whether the deed, and the proceedings in regard to the probate thereof, are suf-

ficient in law to pass the estate of the *feme covert*, which it purports to convey, and it was agreed that if the court should be of opinion that they were sufficient for that purpose, judgment should be entered for defendant, otherwise for the plaintiff.

The following order was passed by the county court of Washington, at November session, 1834, viz:

"This deed from Asa Ansly, and wife, Nancy, to Abraham Davenport, was proved in open court by the oath of Jordan Snell, the subscribing witness thereto, and ordered to be registered.

Test, JAMES HOSKINS, clerk."

Also, the following: "State of North Carolina, Washington County, Court of Pleas and Quarter Sessions, November Term, 1834. Ordered by the court that Uriah Chesson and Hamilton W. Davenport, Esqrs., two of the justices of the peace of this county, be appointed to take the private examination of Nancy Ansly, wife of Asa Ansly, touching her free and voluntary act in joining her said husband in a deed conveying land to Abram Davenport, on the 28th of December, 1833, the said *feme covert* being too infirm to attend court, 18th November, 1834.

Test, JAMES HOSKINS, clerk."

"Pursuant to a commission, to us directed, from the November Term of Washington county, of 1834, to take the private examination of Nancy Ansley, wife of Asa Ansley, concerning her free and voluntary assent in assigning this deed of sale for land with her husband, Asa Ansley, we have examined the above named, Nancy Ansley, wife of said Asa Ansley, separate and apart from her said husband, she says she did assign this deed of sale for land to Abram Davenport, of her own free and voluntary consent and without the constraint of her said husband. December 4th, 1834.

(Signed,) H. W. DAVENPORT, J. P. [seal.]
URIAH CHESSON, J. P. [seal.]"

There was no entry of these proceedings on the minutes of

Washington county court, or other note of them, except that they were written on, and now appear on the deed itself.

At the November term, 1851, of that county court, the following order was made and duly entered on the docket:

"Upon motion, in open court, it is ordered that the following entry be made now, as of February Term, 1835:

"A deed of bargain and sale of land, from Asa Ansley and wife, Nancy, to Abram Davenport, was proved in open court, by the oath of Jordan Snell, the subscribing witness thereto, and the Justices, H. W. Davenport and Uriah Chesson, Esqrs., appointed at November Term, 1834, of this court, to take the private examination of the *feme covert*, Nancy Ansley, apart from her husband Asa, having made their report to this term of the court, it is ordered that the report be confirmed, and that it be with the deed and commission registered.

Test, F. F. FAGAN, clerk."

The said deed, with the foregoing entries on its back, and the entry above stated, of November Term, 1851, were registered March 15th, 1855. Upon consideration of these proceedings and certificates, his Honor was of opinion that the deed was properly authenticated to pass the land of the *feme covert*, and judgment was entered for the defendant according to the agreement of the parties, from which the plaintiff appealed to this court.

Winston, jr., and *Heath*, for the plaintiff.
Moore and *Smith*, for the defendant.

PEARSON, J. The object of the statute was to favor *feme coverts* who resided out of the State, or were unable, from age or infirmity, to come to court, by conferring upon the court, or judge, the power to direct the clerk to issue a commission to take the acknowledgment and private examination of such *feme coverts* at home: thereby relieving them from the inconvenience of coming to court: and for the purpose of aiding the clerks in the discharge of this duty, the statute gives the form of the commission which they ought to issue. It is evi-

dent that the commissioners derive their authority from the act of the court or judge, and not from the commission, which is only evidence of the fact of their appointment. In this case, the clerk, instead of pursuing the form which the statute sets forth for his guidance and direction, endorsed upon the deed the order of the court, by which the persons named were appointed commissioners. In pursuance of this order, they take the private examination, which is certified to by them upon the back of the deed and duly returned; whereupon the deed, the order of court, and the certificate, that they, as commissioners, had taken the private examination of the *feme covert*, were all duly registered. The question is, does this substantial compliance with the requirements of the statute, pass the title of the *feme covert*, or is her deed inoperative and void, because the clerk did not follow the form which the statute sets forth as a direction for him in the discharge of his duty?

A mere statement of the question is sufficient without the need of argument, unless we act upon the assumption that the object of the law is to enable women, after the death of their husbands, to defeat the title of purchasers who have honestly bought and paid for the land. Must a purchaser lose his land because the sheriff did not do his duty in making advertisement, as he is required by law to do; or because a clerk did not do his duty in issuing a commission in the very form which the statute lays down for his direction? These are ministerial acts; the statute is directory, and if the thing required to be done, has been done in *substance*, the deed is valid, although the clerk did not attend to the direction given to him as to the form of the commission.

PER CURIAM. Judgment affirmed.

STATE TO THE USE OF JOHN WALKER *vs.* WM. A. WRIGHT, ADM'R. *et al.*

If a debtor has had the *means* or *ability* to pay the debt sued for during 12 or 15 years before suit is brought, this is sufficient to meet the effect of reputed

insolvency, which was relied on to repel the presumption of payment from the lapse of time, although he may not have been able to pay his other debts during that time.

The law gives to the lapse of time an artificial and technical weight beyond that which it would naturally have, as a mere circumstance, bearing upon the question of payment.

ACTION of DEBT, tried before his Honor Judge BAILEY, at the Spring Term, 1855, of New Hanover Superior Court.

The plaintiffs declared on the administration bond of Wm. A. Wright, as administrator of William C. Lord, to which the other defendants were sureties, and the breach assigned was the non-payment of a judgment for $536.17, obtained by the relator against defendants' testator, in 1820.

The pleas were, "conditions performed; and not broken; and payment."

The execution of the bond declared on was admitted, and evidence of the judgment of 1820, was put in.

To fix the defendant with assets, he proved that the intestate died in the summer of 1847, and that his mother died some three or four months before him; and he exhibited her will, by which certain property was directed to be sold, and the money divided among her next of kin. The executor of the mother was then called, by whom it was proved, that under the provision in this will, he had paid to the administrator of Wm. C. Lord, the present defendant, the sum of one thousand dollars. ($1000.)

The defendant relied upon the presumption of payment arising from the lapse of time under the act of Assembly. Rev. Statute.

To rebut this presumption, the plaintiff proved, that in the year 1819, the intestate, Lord, had failed—indebted to the amount of fifty or sixty thousand dollars, and was notoriously reputed to be entirely insolvent from that time till his death; and that in the year 1835, one McRae, who was the deputy United States marshal, had sundry executions against the said Lord, and after diligent search could find no property; and upon application to him (Lord) was told by him that he had no property.

In reply to this evidence, the defendants showed that for 12 or 15 years before his death, the intestate, Lord, had the ability and means to pay the debt sued for, and the same might have been made either by a *fi. fa.* or *ca. sa.*

His Honor charged the jury, that if they were satisfied that the intestate, Lord, had the ability and means to pay the debt sued for, although he could not pay any other of his debts, the law presumed it to be paid, and they ought to find for the defendants. To which plaintiffs excepted.

Verdict for the defendants. Judgment and appeal to this court.

Moore, for the plaintiff.

J. H. Bryan and *Wm. A. Wright*, for the defendants.

PEARSON, J. In *Buie* v. *Buie*, 2 Ire. Rep. 87, the Judge, below, charged "whether the presumption of payment was repelled or not, was not to be left as an open question of fact for the jury: for, if so, and the lapse of time had no more than its natural weight as a circumstance bearing upon the question of payment, the act of Assembly would amount to nothing; whereas the law intended to give to the lapse of time an artificial and technical weight, so as to require the jury to presume a payment unless the presumption was repelled; and it was a question of law for the court what circumstances, if true, were sufficient to repel it." This instruction was approved of by the supreme court.

This decision was not supposed to conflict with *Matthews* v. *Smith*, 2 Dev. and Bat. Rep. 287; *McKinder* v. *Littlejohn*, 1 Ire. Rep. 67, where it is held "proof that the debtor had the means or opportunity of paying, is in law sufficient to repel the presumption." This doctrine was acted upon and reaffirmed in *McKinder* v. *Littlejohn*, 4 Ired. 198, where the ruling of the Judge below, *i. e.*, "to repel the presumption, the evidence must satisfy the jury, that the obligor *could not, and in point of fact, did not* pay the bond," is sanctioned by the court.

So the law is settled. *Mr. Moore*, for the plaintiff, drew in

question the soundness of this doctrine "upon the reason of the thing," and put this case: one owes ten debts of $1000, and has property only to the amount of $1000: if the fact of his owning this property, is sufficient to prevent the presumption of payment from being repelled when an action is brought by one of the ten creditors, it must be on the assumption that property to the value of $1000, has paid debts to the amount of $10,000! which is impossible in the nature of things.

Carry out the argument: one owes ten debts of $1000 each, and has property only to the value of $9000; if the fact of his owning this property is sufficient to prevent the presumption of payment from being repelled when an action is brought by one of the ten creditors, it must be on the assumption that property to the value of $9000 has paid debts to the amount of $10,000, which is impossible in the nature of things! So the result is, that to prevent the presumption of payment from being repelled, there must be proof that the debtor had property enough to pay all his debts! This is absurd, and shows that the argument is fallacious. The fallacy is in this: It is not supposed that $1000 can, in fact, pay debts to the amount of $10,000, or that $9000 can pay $10,000; but when a creditor lets his debt stand for ten years, during all which time nothing is said or done in regard to it, from public policy, the law raises a presumption that it has been paid, and gives to the lapse of time an *artificial and technical* weight beyond that which it would naturally have as a mere circumstance bearing upon the question of payment.

In our case the action was commenced in 1851: the plaintiff's debt was reduced to judgment in 1820, (upwards of thirty years): to repel the presumption, the plaintiff proved that in 1819, the intestate of the defendant had failed; indebted to the amount of $50,000 or $60,000, and was *notoriously reputed to be entirely insolvent* from that time till his death: that in 1835, the Marshal of the United States had sundry executions against him, and after diligent search, was unable to find any property, and on application to the intestate, was told by him, that he had no property. The defendant then offered evi-

dence to show, that for 12 or 15 years before his death, his intestate had the *ability* and *means* to pay the debt sued for, and that the same might have been made either by *fi. fa.* or *ca. sa.*: His Honor was of opinion, that conceding the proof made by the plaintiff to be sufficient (if standing alone and unexplained) to repel the presumption of payment, yet, "if the jury were satisfied, that the intestate of the defendant had the ability and means to pay the debt sued for, although he could not pay any other of his debts, this fact took from the matter, proven by the plaintiff, its force and effect, so as to make it insufficient in law to repel the presumption of payment." This is his Honor's charge in substance, and we think it is in strict conformity to the law as held in *Buie* v. *Buie*.

Whether the evidence that the intestate was "notoriously reputed to be entirely insolvent" from 1819, until his death, together with the other matters stated, was in law sufficient to repel the presumption of payment, we do not decide; but we think it clear, that if the jury were satisfied that this *notorious reputation of entire insolvency* was unfounded, and that in *point of fact*, the debtor, for twelve or fifteen years before his death, had the *ability* and *means* to pay the debt sued for, and that it might have been made by *fi. fa.* or *ca. sa.*, it was the duty of the court to instruct the jury that there was no evidence to repel the presumption of payment. There is no error.

PER CURIAM. Judgment affirmed.

OSCAR G. PARSLEY *vs.* ISAAC HUTCHINS.

An Act of Assembly, requiring a citizen of a town to get a permission from the commissioners of the town to retail spirituous liquors, within its limits, does not confer the right to retail; but the applicant must also get a license to retail from the county court, and such court-license will protect him though it runs beyond the time embraced in the permission of the commissioners.

ACTION for a PENALTY, brought by appeal to the Superior

Court of New Hanover, and tried at the Spring Term, 1855, of that court, before his Honor, Judge MANLY.

The warrant was for a penalty of twenty-five pounds, for a violation of a private act of Assembly, applicable to the towns of Wilmington and New-Berne, forbidding the licensing of any one to retail spirituous liquors, within the limits of those towns, without a permission from the commissioners of the town.

The act of Assembly under which this action is brought, was passed in 1800, and the part material to this consideration is as follows:

"Whereas many abuses and irregularities have been found to prevail in the towns of Newbern and Wilmington in consequence of improper persons being permitted to keep ordinaries, and to retail spirituous liquors by the small measure; to remove the cause of such abuses and irregularities in future,"

It is enacted, "That from and after the next March Term of Craven and New Hanover county courts, no person shall keep an ordinary, or retail spirituous liquor, by the small measure, in the towns of Newbern or Wilmington, until he or she shall have first applied to the commissioners appointed for the government of the said towns, and have obtained from them a certificate of their permission for that purpose, which certificate and permission shall be valid and in force for one year from the time it is granted, and no longer; and every person who shall keep an ordinary, or who shall retail spirituous liquors by the small measure, in either of the said towns, after, &c., without having first obtained the permission of the commissioners as aforesaid, shall forfeit, &c."

2d. "That every person who wishes to keep an ordinary, or to retail spirituous liquors by the small measure, in either of the said towns, and who has obtained permission of the commissioners as aforesaid, may, on application to the county courts of Craven and New Hanover, be ordered, at the discretion of said courts, to have a license for the purpose aforesaid, &c." The act requires the applicant to give bond and security for conforming to the act of 1798, regulating ordinaries, &c.

The defendant obtained from the commissioners of the town of Wilmington, the following certificate of their permission to retail spirituous liquors by the small measure, viz:

This is to certify, I. Hutchins has obtained from the commissioners of the town of Wilmington, their permission to retail spirituous liquors by the small measure, at one place in the town of Wilmington, for one year from the June term, A. D. 1852, of the county court of New Hanover.

(Signed,) R. MORRIS, Town Clerk.

Three months afterwards, that is, at the September Term of the court, the defendant exhibited this certificate, and obtained an order for a license to retail for one year in the town of Wilmington, which was duly issued. The defendant continued to retail under this license for more than one year after the date of the commissioners' certificate, but not more than a year from the date of his license from the court, and it was for these acts of retailing, (between June and September Terms, 1853,) that it is alleged this penalty was incurred.

Upon this state of facts, his Honor advised the jury that the defendant had not violated the law, and that they should find a verdict in his favor. Exception to the charge of his Honor, and appeal to this Court.

W. A. Wright and *Cantwell*, for the plaintiffs.
D. Reid and *J. H. Bryan*, for the defendant.

BATTLE, J. The construction placed by his Honor, in the court below, upon the private act, for the violation of which this suit was brought, was, in our opinion, correct. The mischief which the act was intended to remedy, is recited in its preamble, and it was "in consequence of improper persons being permitted to keep ordinaries and to retail spirituous liquor by the small measure," in the towns of Wilmington and Newbern. The power of granting licenses to keep ordinaries and retail spiritous liquors in this State was, at that time, as it is now, confided to the county courts. (See Act of 1798, ch. 501, of the Revised code of 1820.) Any person might then

apply for such license, and the court might, in its discretion, grant it to him, unless it should appear that he was a person of "gross immorality, or of such poor circumstances and slender credit," that he could not comply with the conditions upon which he was to obtain it: upon obtaining his license, each person was to pay certain fees to the clerk of the court for his own use, and a certain tax to the sheriff for the use of the State; and the license thus obtained was to continue in force for one year, and no longer. The disregard which the justices of the county courts of New Hanover and Craven showed to the restrictions of the Act, or the loose construction which they put upon the terms, "gross immorality" and "poor circumstances and slender credit," produced the abuses and irregularities in the towns of Wilmington and Newbern which rendered necessary the private act in question. That act, as will be seen by reference to the second section, makes no change in the granting power, nor in the terms and duration of the license, nor the manner in which it was to be procured. But for the security and protection of the towns named, each applicant to the county court for license, must produce a certificate of his having applied to, and obtained from the commissioners of the town, a permission to retail therein, "which certificate and permission shall be valid and in full force for the term of one year from the time it is granted, and no longer;" and then a penalty is imposed upon every person who shall presume to retail spirituous liquors without such permission. The plaintiff contends, that no person obtaining such permission, can retail beyond the year for which it was granted, though he may have procured a license from the county court which extends beyond that time. Such a construction of the act seems to us entirely inadmissible. The error consists in the supposition, that the certificate of the permission, obtained from the board of commissioners, confers a portion of the authority to retail; but, in truth, that is derived entirely from the county court, as is manifest from an inspection of the second section above referred to. The certificate of the commissioners is only a recommendation to the county court, that

the applicant is a fit person to be licensed to retail within the limits of the town. It is an indispensable pre-requisite, without which the county court cannot confer a license, and for obvious reasons the certificate has limits assigned to it, beyond which it cannot operate. The person recommended might fall into bad habits, and become grossly immoral; but it was not thought probable that such a change for the worse, would come over him in the short space of twelve months. Hence the county courts were allowed to act upon it at any time within that period, but not afterwards. It was but a prudent precaution to require a new certificate of character every year.

But there is another objection to the plaintiff's construction of the Act, suggested and strongly insisted upon by the defendant's counsel: the license is always granted for one year, and if the certificate of permission had the effect contended for, the two must always be cotemporaneous, which is, strictly speaking, impossible; because the certificate must be first obtained, and that would admit at least of an instant of time to intervene. But if that view be considered too much like sticking in the bark, yet it must be confessed that the other would require the certificate to be obtained at least during the term of the court at which the license is granted. This would necessarily be so inconvenient in practice that we can hardly suppose it was ever intended. At all events, the construction adopted by the Superior court, in which we concur, is fully justified by the words of the act; and besides being reasonable, and convenient, makes all the provisions harmonious with each other.

PER CURIAM. Judgment affirmed.

Doe on the Demise of JOHN NEWLIN *vs.* MATTHEW OSBORNE.

The rule adopted in our Courts, in the action of ejectment, that where both plaintiff and defendant claim under the title of a prior grantee, neither shall be allowed to dispute the title of such prior grantee, does not forbid the defendant

from showing, that before the plaintiff had got his conveyance, (which was a sheriff's deed) such prior grantee had conveyed to him, though without consideration, and that he had conveyed to a third person for a full and valuable consideration, who had no notice of the rights of the plaintiff.

THIS was an ACTION of EJECTMENT, tried before his Honor Judge DICK, at the Spring Term, 1855, of Alamance Superior Court.

Graham, for plaintiff.
Norwood, for the defendant.

PEARSON, J. In ejectment, the plaintiff asks the court to turn the defendant out, and put him in possession of the land sued for; hence the rule, "the plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant."

Two exceptions are made. 1st. Where the plaintiff's lessor is a purchaser at sheriff's sale, and the defendant is the defendant in the execution.

2d. "Where both parties claim under the same person, neither shall deny the title of the person under whom both claim." This exception is not based on the idea of an estoppel, but is a rule of practice, which has become a rule of law, adopted by the courts for the purpose of aiding the administration of justice, by dispensing with the necessity of requiring the plaintiff to prove the original grant and mesne conveyances (which in many cases it was out of his power to do) upon proof that the defendant claimed under the same person. An exception is made to this exception, when the defendant can show that the true title was in a third person, paramount to the title of the person under whom the plaintiff and defendant both claim; and that the defendant has acquired this paramount title from such third person, or can connect himself with such third person, as by showing that he held possession for him, or under him. *Love* v. *Gates*, 4 Dev. and Bat. Rep. 363; *Copeland* v. *Sauls*, 1 Jones' Rep. 70.

In our case, both parties make title under Davis, and there is no reason why it should not fall under the second exception:

so, neither party is at liberty to deny that Davis was the owner of the land.

Taking that to be a "fixed fact," the question is, has the plaintiff acquired the title of Davis? The sheriff's deed to him was *prima facie* evidence of the fact.

The defendant offered to prove that the title of Davis was not in the plaintiff, but in one Jeremiah Osborne, by showing that in 1845, Davis made a deed for this land to the defendant, and afterwards that the defendant made a deed to Murchison as trustee, who sold the land and conveyed it to Jeremiah Osborne, for a full and valuable consideration, without notice of the claim of Newlin, whereby Jeremiah had, before the sheriff's deed to Newlin, acquired a good and indefeasible title, although the deed from Davis to the defendant was without consideration and void in regard to Newlin, who was a creditor at the date of the deed. His Honor rejected this evidence, and for this the defendant excepts. There is error.

The defendant did not, by offering this evidence, deny the title of Davis, under whom both parties claim. On the contrary, he assumed that to be the fact, and offered to show that the title had passed from Davis to Jeremiah Osborne, and not to the lessor of the plaintiff. There is no rule of law or of practice that forbids this.

The plaintiff had the benefit of the rule, that where both parties claim under the same person, neither shall deny his title, and was relieved from the necessity of showing the grant and mesne conveyances; this was as much as he could ask for, and we can see no ground, whatever, upon which he could insist that the defendant ought not to be allowed to show, that, prior to his purchase at sheriff's sale, or the lien of his execution, the title of Davis had become vested in Jeremiah Osborne: so that the plaintiff's lessor acquired nothing by his purchase at sheriff's sale, and having no title, of course, had no right to ask the court to turn the defendant, or any one else, out of possession, and put him in. *Venire de novo.*

PER CURIAM. Judgment affirmed.

JOSEPH A. WEATHERLY *vs.* JOHN MILLER.

Where one agreed with the owner of a slave that he would pay him $100, if his slave should run away, provided he would remove the hand-cuffs with which he was confined, the hand-cuffs being removed and the negro having run away, it was *Held* that a suit could not be sustained for the breach of this contract without a notice of the slave's escape to the defendant.

It was not necessary that a joint owner of the slave, who was not present when this contract was made, should be a party to this suit.

ACTION of ASSUMPSIT, tried before his Honor Judge DICK, at the Spring Term, 1855, of Guilford Superior Court.

The plaintiff had purchased from the defendant a slave for himself and his father, who were trading in slaves as partners, and having put hand-cuffs upon him, the defendant told him the slave was honest, and that if he would remove the hand-cuffs he would guarantee to him one hundred dollars if the slave should run away. The hand-cuffs were accordingly removed and the slave went off with plaintiff. He ran away that night. The plaintiff immediately posted up hand-bills, making known the escape of the slave, some of them in the neighborhood of the defendant; but did not call on the defendant to make a demand of the $100, or to notify him of the slave's escape.

His Honor charged the jury that on these facts the plaintiff was entitled to recover the sum of $100. Defendant excepted to this charge. Verdict for the plaintiff. Judgment and appeal.

Morehead, for plaintiff.
Miller, for defendant.

NASH, C. J. On the trial of the cause below, three grounds of defense were assumed:

1st. That the plaintiff could not maintain the action, as his father, Isaac Weatherby, was a partner with him in the purchase of the slave, and ought to have been joined as a party plaintiff.

2d. That there was no consideration for the promise.

3d. That the plaintiff had given the defendant no notice.

The charge was correct upon the first and second objections. The action was properly brought by the plaintiff alone: in the purchase of the slave the father was a partner with the son, and would have been a necessary party to any action upon that contract; but the contract upon which this action is brought was personal to the son alone, and he alone was competent to bring the action for a breach of it.

There was a sufficient consideration for the defendant's promise. To constitute a valid consideration in law, it is not necessary there should be any gain to the person making the promise: if it imports a loss or injury to him, to whom it is made, it is sufficient. The defendant certainly had no interest in freeing the slave from his shackles: it was a mere act of humanity on his part; but his promise induced the plaintiff to remove the hand-cuffs, whereby the security of the property was diminished, and a loss consequently sustained by him. It cannot be necessary to cite authority for this.

Upon the third point, however, we do not concur with his Honor. The general doctrine, upon the subject of notice for the breach of a contract in the nature of guarantee, is, that where the circumstances which are alleged as the foundation of the defendant's liability, are more properly within the knowledge and privity of the plaintiff than the defendant, notice thereof should be averred in the declaration and proved on the trial; but where they lie equally within the knowledge of both parties, no notice is necessary: *Lewis & others* v. *Bradbury*, 2 Ire. 303, *Spooner* v. *Baxter*, 16 Pick. 409. To evade the operation of the rule, the plaintiff contended that this cause of action accrued the moment the slave ran away, and therefore, there was no necessity to give the defendant any notice; but if such necessity did exist, that he had complied with the law by his advertisement. It is true, the plaintiff's cause of action commenced at the moment the slave did run away, but in law it was not complete until notice was given to the defendant; until notified of the fact he was in no default in not paying the $100. In Bradbury's case the de-

fendant had bound himself by parol, to pay certain notes and accounts, if they could not be collected by legal process; they were put into the hands of a collecting officer, who made due returns, and in some, that nothing could be made; the action was brought to subject the defendant to the payment of the debts so returned; no notice of such return was given before bringing the action; the Court ruled that the defendant's contract was not a guaranty, but in the nature of one, and that he was entitled to notice; and that the officer's return was not a notice.

This case is greatly stronger. Here, although the running away of the slave was the cause of the action, yet he was not bound, at his peril, to know the fact, as it was more particularly within the knowledge of the plaintiff. The law being, that he was entitled to notice, it became a part of his contract.

As to the advertisements made by the plaintiff, they cannot serve as notice to the defendant, though published in his neighborhood; he was entitled to personal notice of the fact.—There is no evidence that he ever saw the advertisements or heard of the absconding of the negro. See *Carraway* v. *Cox* Busb. 173.

PER CURIAM. Judgment reversed.

MARY J. O'NEAL *vs.* DANIEL B. BAKER.*

In order to sustain the action of detinue, even against a wrong-doer, the plaintiff must show, not only a right of property, but a present right of possession.

ACTION of DETINUE, tried before his Honor Judge BAILEY, at the Spring Term, 1855, of New Hanover Superior Court. Judgment for defendant. Appeal.

*Two other cases, viz: *O'Neal* v. *Nichols* and *O'Neal* v. *Nichols et al.*, were sent from the same court, and depending on the same facts and rules of law, were decided in the same way. In these, the judgments below were also affirmed.

Strange and *Wright*, for the plaintiff.
J. H. Bryan and *D. Reid*, for the defendant.

NASH, C. J. The action cannot be sustained: To support an action of detinue, the plaintiff must have the right of property in the thing claimed, and also the present right of possession. A bailor may sustain the action, because he has a special right of property, and the right of present possession. The case discloses that the mother of the slave sued for, belonged to the plaintiff in the year 1826, when she intermarried with Thomas O'Neal. Before the intermarriage, articles of agreement were entered into by the parties, and in pursuance of them, the mother of the slave, Henry, sued for, together with other property, was conveyed to trustees for the use and benefit of Thomas O'Neal and his wife, the plaintiff, and after their death, for their children. O'Neal died in the year 1849, in possession of the slaves, and his widow continued in the possession of Henry until he passed into that of the defendant. The sole question is, in whom is the right to bring the action? The plaintiff relies on her possession, as sufficient to entitle her to a recovery of the slave, against a mere wrongdoer. It is true such a possession will, in general, support an action of *Trover* against one, who, without right or title, converts the property to his own use: such was the case in *Amory* v. *Delamire*, 1 Stra. 505: the jewel was lost and found by the plaintiff, the owner being unknown: in which case the presumption is that the right is with the possession. But if it appear on the trial that the plaintiff, although in possession, is not in fact the owner, and that the property belongs to a third party, who is known, the presumption of title, inferred from the possession, is rebutted. It would be manifestly wrong to allow the plaintiff in such a case to recover the value of the property; for the real owner may immediately recover the value against the defendant, and the former judgment would be no defence: *Barwick* v. *Barwick*, 11 Ire. Rep. 80.

In the case in Strange, the jewel was lost and found and the

owner was unknown. Here the slave was neither lost nor found, and the legal owner was known. Mr. Walker, one of the trustees, was alive and his interest in the slave was known—the legal title was in him.

In reply it is shown that Mr. Walker had released all his right, title and interest in and to the slave in controversy, to the plaintiff. Without inquiring into the effect of this conveyance, as it touches the legal title to the slave, it can have no effect upon the question now before us. The deed was executed in 1854, and this action was commenced in 1850. At the time when the action was brought, the legal title was not in the plaintiff, but in Mr. Walker, who, as the surviving trustee, was alone competent to bring the action. His Honor committed no error.

PER CURIAM. Judgment affirmed.

Doe on the demise of JAMES CARROWAY *vs.* RANSOM A. CHANCEY.

Where the owners of adjacent tracts of land ran and staked off a line, supposing it to be the true line between them, and had so considered it for more than twenty years, but there was no actual possession of the part included between this line and the true one, the original rights of the parties are not thereby altered and the true line being afterwards ascertained and fixed, the respective owners will hold according to it.

THIS was an action of EJECTMENT, tried before his Honor Judge ELLIS, at the Spring Term, 1855, of Beaufort Superior Court.

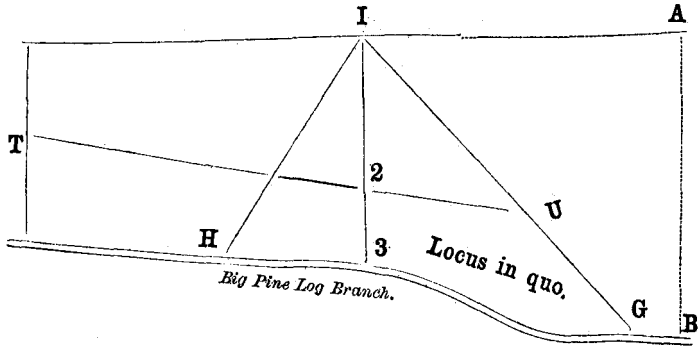
The diagram below, as commented on and explained by the Court, will present the points in the case, without a further statement.

Attorney General, *Biggs* and *Donnell*, for the plaintiff.
Rodman, for the defendant.

PEARSON, J. The grant under which the plaintiff sets up

title, covers the *locus in quo*, and the question was, how much of the land covered by this grant had been taken off by the deed to Meazles, under which the defendant sets up title?

[DIAGRAM.]



It was admitted "I" was the beginning: the next call is—"then a straight course to the great Pine log branch." The plaintiff insisted this line terminated at H; the defendant contended the terminus was at G. The Court properly charged the jury that the line must be run so as to strike the great Pine log branch at the nearest point, which was the line I 2 3, which being intermediate between I H, and I G, left a part of the land in controversy out of the Meazle deed, and in regard to that part, the plaintiff was entitled to recover, unless the right was affected by the length of the possession of the defendant and those under whom he claimed, up to the line I G.

In reference to this second question, the evidence was that the parties under whom the present parties claim, had, many years ago, more than 20 years, run the line I G, and agreed it was the proper line separating the Meazle land from the balance of the land covered by the original grant, and "had put light-wood stakes up against pine trees upon this line," and had acquiesced ever since in the fact of its being the proper dividing line; neither party having ever, in disregard of it, taken possession by cultivating turpentine trees or burning tar-kilns; on the contrary both parties had cultivated turpen-

tine trees and burnt tar-kilns up to it; *with this distinction in regard to the party under whom the defendant claims, i. e.,* Mary Gayner, one of the persons under whom the defendant claimed in 1834, had the line T U, run and marked the trees, and there was no proof that there had ever been any cultivation of turpentine trees or burning of tar-kilns or other species of possession west of the line I G, and south of the line T U.

Let it be admitted that the possession by the defendant, and those under whom he claims for so many years, of the land west of the line I G, and north of T U, defeated the plaintiff's title as to that part which is designated on the diagram by I 2 U, what evidence was there to defeat the plaintiff's title to that part west of I G, and south of T U, designated upon the diagram by 2 U G 3? As to this part there never had been any species of possession, and this effect, if produced at all, must have been done by the fact that I G had been agreed on as the proper line, light-wood stakes set up against pine trees along it, and it had for more than twenty years been acquiesced in and never disregarded, so far as the acts of the parties tended to show, during all that time.

So the question presented is, can the true line of a deed be changed and its location be transferred to another place by the fact that the parties, acting under a mistake as to its true location, had agreed that it was at a different place and was the line indicated by I U G, and not I 2 3, and had, acting under this mistake, for the purpose of making *known and visible* what they then supposed to be the true line, set up light-wood stakes against pine trees, and ever after acquiesced in it as the true line?

In regard to the land lying west of *the part of this line* from I to U, and north of T U, we have seen that possession may have had some effect; but in regard to the land lying west of *the part of this line* from U to G, and south of T U, there was no possession, and the naked question was, could that part of the line be changed by the facts set out above? His Honor does not intimate an opinion to that effect, but he confounds the subject by treating the whole line I G, as a

unit and indivisible; whereas the persons under whom the defendant claimed, had, by running and making the line T U, and *confining the possession to the north side of this latter line* divided the line I G, into two parts and made the several parts the subject of different considerations and rules of law; the one becoming a question of possession and rights that may be acquired thereby; the other being left as a mere question of boundary.

For this error the plaintiff is entitled to a *venire de novo*.

PER CURIAM. Judgment reversed.

STATE *vs.* NEWSOM & BRINDLE.

The State, on a trial for a misdemeanor, upon a question under the statute of limitations, is not restricted to the time stated in the Indictment, but is at liberty to go back two years previously to the finding of the bill.

THIS was an INDICTMENT for fornication and adultery, tried before his Honor Judge DICK, at the Spring Term, 1855, of Forsyth Superior Court.

The defendants asked his Honor to charge the jury that unless they were satisfied from the testimony in the case, that the defendants were guilty within the time stated in the bill of indictment, they were entitled to a verdict of not guilty.

His Honor refused *so* to charge, but told the jury that they were at liberty to consider any acts that had been proved against the defendants within two years next before the finding of the bill. Defendants excepted to the charge.

Verdict against the defendants, and judgment. Defendants appealed.

Attorney General, for the State.
Miller and *Gilmer*, for the defendants.

NASH, C. J. The court below could not charge the jury

as required; they were not restricted in their inquiry to the time embraced in the indictment, but were at liberty, as directed by his Honor, to take into consideration any acts of the defendants, charged in the bill and proved to have been committed within two years, next before the finding of the indictment or the legal presenting of the offence. At common law it is indispensable that the indictment should fix some certain day at which every material fact, constituting the crime, occurred. The authorities, however, fully show that it is sufficient to prove on the trial, that the offence was committed before the prosecution was commenced. The rule does not apply to cases where time enters into the offence. Time does not enter into the offence here charged, except that time which limits the commencement of the prosecution. His Honor was perfectly correct in telling the jury that if they were satisfied, from evidence, that the defendants were guilty within two years before the finding of the bill of indictment, they should convict them. See *Pettijohn* v. *Williams*, *ante* 33.

PER CURIAM. Judgment affirmed.

CHRISTOPHER WATKINS' ADM'R. *vs.* JAMES D. PEMBERTON *et al.*

The next of kin of an intestate have a right to appeal from an order obtained by an Administrator to sell the slaves of the estate for distribution.

THIS was an APPEAL from a judgment of his Honor Judge SAUNDERS, reversing an order of the County Court of Anson.

There were no debts to be paid beyond what could be paid out of the proceeds of the other personal property, but the administrator, deeming it the most convenient mode of settling with the distributees, applied for an order to have the slaves of the estate sold: there were thirty-one slaves; and there were eleven distributees, all of whom were adults: seven of these opposed the order, and on its being made, appealed to the superior court.

In the superior court, his Honor refused a motion to dismiss the appeal, and ordered the judgment below to be reversed; from which judgment the plaintiff appealed to this Court.

Ashe, for the plaintiff.
Winston, for the defendant.

BATTLE, J. The only question presented by the record is, whether an appeal to the superior court could be taken from the order of the county court, and we are clearly of opinion that it could. Those of the next of kin of the plaintiff's intestate who preferred a division of the slaves to a sale of them for partition, by the administrator, were certainly *interested* in the order of sale made by the county court. Being so, and being dissatisfied with it, they had a right to appeal from it by the express words of the first section of the 4th chapter of the Revised Statutes "concerning appeals and proceedings in the nature of Appeals."

The present is the same in principle as the case of *Murphrey* v. *Wood*, *ante* 63, in which we held, at the last term, that the right of appeal was given.

The order of the superior court, reversing that of the county court, is affirmed; and this opinion must be certified as the law directs.

PER CURIAM. Judgment affirmed.

AMOS SHELFER *vs.* THOMAS I. GOODING.

A Master is not liable to an action of Slander for words spoken while acting as counsel in behalf of his slave while he is on trial before a competent tribunal, provided the words are *material* and *pertinent* to the matter in question.

THIS was an action of SLANDER, tried before his Honor Judge ELLIS, at the Spring Term, 1855, of Jones Superior Court.

The defendant's slave had been brought before two justices of the peace at the instance of the plaintiff, upon a warrant, charging him with destroying his (plaintiff's) property. Upon the trial of the slave, the plaintiff was examined as a witness against him, and the defendant being called on by the magistrates to know if he wished to be heard in behalf of his slave, said, addressing himself to the justices, "I wish you gentlemen to understand, that what Amos Shelfer (the plaintiff,) has sworn, is a tissue of falsehood and a damned lie from beginning to end." This he repeated.

The defendant's counsel contended that defendant acted as counsel in behalf of his slave and was privileged by the law in using the language proven, and could not be held liable, unless the jury were satisfied that he used the occasion as a mere pretext to gratify his malice; that the presumption of law, in this case, rebutted the legal presumption of malice, and it was for the plaintiff to show malice.

The court charged the jury that the plea of the general issue threw upon the plaintiff the burden of showing, both the truth of the words, and that they were spoken maliciously; that the defendant, as owner of the slave, had a right to appear before the magistrates and defend his slave, and would be protected in using the language imputed to him, if he did so by way of setting up a just and proper defence, as he conceived, free from all malice, but not if he used the words maliciously. This was left to them as a question of fact, and the repetition of the words, together with the oath, as evidence of actual malice.

Defendant's counsel excepted to these instructions. Verdict for the plaintiff. Judgment, and appeal by the defendant.

Green, for plaintiff.
Donnell, for defendant.

Battle, J. It is unnecessary for us to decide whether the charge against the defendant's slave was too vague and indefinite to give the magistrates jurisdiction, because, supposing that they had it, no action can be sustained for words spoken

upon such an occasion and under such circumstances as were those uttered by the defendant in this case.

When the slave was arrested and taken before the magistrates for examination, it was not only the right, but the duty of his master to appear in his defense, *State* v. *Leigh*, 3 Dev. & Bat. 127; the interest of the master, the dependent condition of the slave, and the fair administration of public justice, alike required it. Upon the trial the defendant had imposed upon him, all the obligation, and secured to him, all the rights of counsel, or of a party appearing for himself. After the plaintiff in this suit was sworn as a witness, it was undoubtedly competent for the defendant to insist before the magistrates in defense of his slave, that what the plaintiff had sworn was false; and we can see no difference whether that was insisted on in an elaborate argument, or in the short emphatic allegation which he thought proper to employ. What he said was certainly pertinent and material to the cause. The question then, is, can an action of slander be maintained against him for the words which he uttered, considered either as counsel or party? We think that, upon principle, it ought not to be; and that the weight of authority is decidedly in favor of such principle.

All human tribunals, established for the investigation of truth, must necessarily partake of human infirmity. In the prosecution and defense of suits before such tribunals, the testimony of fallible witnesses must often be relied on. To test the credibility of such witnesses, many rules have been laid down, by which it is sought to be discovered whether they, in the language of their oath, have told "the truth, the whole truth, and nothing but the truth," or whether from defect of memory, from imperfect observation, or from a settled design to suppress or pervert the truth, they have withheld, or made a false statement of the material facts of the case. In carrying these rules into effect, the aid of counsel has, in all civilized countries, been allowed to such parties as desired it. To make that aid effectual, great latitude must necessarily be allowed to counsel, not only in the examination and cross-examination of

the witnesses, but in commenting upon their testimony and upon their demeanor in giving it. They must be allowed to speak freely whatever is *relevant* and *pertinent* to the cause, without the fear of being harrassed with slander suits and by attempts to prove that they were actuated by malicious motives in the discharge of their duty. So manifest and so strong was the necessity for the allowance of this liberty of speech in judicial proceedings, that we find it early disclosing itself in the free spirit of the English common law. In *Buckley* v. *Wood*, 4 Rep. 146, the libel was contained in a bill in the Star-Chamber against Sir R. Buckly, charging him with divers matters examinable in that court, and also that he was a maintainer of pirates and murderers; and it was held that for any matter contained in the bill which was examinable in the Star-Chamber, "no action lies, although the matter is merely false, because it was in the course of justice; but for the latter words, which were not examinable in that court, an action on the case lies, for that cannot be in a course of justice." Another strong case is to be found in 1 Roll's Abr. pl. 817 (reported also by Sir W. Jones 431, and March 20 pl. 45). The substance of it was this: In an action on the case by A against B, the plaintiff declared that he took his oath in the King's Bench against B, of certain matters to bind him to his good behavior, and thereupon B *falsely and maliciously* said, intending thereby to scandalize the plaintiff, "there is not a word of truth in that affidavit and I will prove it by forty witnesses." On a motion in arrest of judgment, after a verdict finding that the words were false and malicious, it was held by the court that the action could not be maintained; and the reason given was, "that the answer which B made to the affidavit was a justification in law, and spoken in defense of himself and in a judicial way." Again, in the case of *Astley* v. *Young*, 2 Burr. Rep. 807, the declaration charged that the defendant did *maliciously* make, exhibit and publish to the court of King's Bench a *malicious, false and scandalous* libel contained in an affidavit, in which there were certain *false, malicious* and scandalous matters: the plea was, that the de-

fendant made the affidavit in his own defense against a complaint made to the court against him, for his refusing to grant an ale-license, and in answer thereto, and to an affidavit of the plaintiff. There was a general demurrer and joinder therein. After argument, in the course of which the plaintiff's counsel urged that the defendant, by his plea, admitted the charge that the affidavit was made *maliciously*, there was a judgment for the defendant. Lord MANSFIELD, and the whole court of King's Bench thereby deciding, that an action for defamation will not lie if the words, though spoken or written maliciously, were so spoken or written in a course of justice. The same principle was decided in the case of *Hodgson* v. *Scarlett*, 1 Barn. and Ald. 232, (4 Com. L. Rep. 111), two of the Judges, Lord ELLENBOROUGH, C. J., and BAYLEY, stating it without any qualification; ABBOTT, saying, that no action would lie "unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable;" and HOLROYD, concluding, "that if the words be fair comments upon the evidence, and be relevant to the matter at issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable; at least our judgment in the present case does not decide that they may not be so." In the subsequent case of *Flint* v. *Pike*, 4 Barn. & Cress. 473, (10 Com. L. Rep. 380,) decided in the same court, BAYLEY, J., said: "The speech of a counsel is privileged by the occasion on which it is spoken; he is at liberty to make strong, even calumnious observations against the party, the witnesses, and the attorney in the cause. The law presumes he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege because it is of advantage for the administration of justice that he should have free liberty of speech." And HOLROYD (the same eminent Judge whose remarks in the case of *Hodgson* v. *Scarlett* have been quoted,) used the following remarkable language: "With a view to the due administration of justice, counsel are privileged in what they say. Unless the administration of justice

is to be fettered, they must have free liberty of speech in making their observations; which, it must be remembered, may be answered by the opposing counsel and commented on by the Judge, and are afterwards taken into consideration by the jury, who have an opportunity of judging how far the matter uttered by the counsel is warranted by the facts proved: therefore, in the course of the administration of justice, counsel have a special privilege of uttering matter, even injurious to an individual, on the ground that such a privilege tends to the better administration of justice. And if a counsel in the course of a cause, utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not therefor be responsible to the party injured in a common action for slander; but that it would be necessary to sue him in a special action on the case, in which it must be alleged in the declaration and proved at the trial, that the matter was spoken maliciously, and without probable and reasonable cause." The same principle was recognised by the court for the correction of errors in the State of New York, in the case of *Hastings* v. *Lush*, 22 Wend. Rep. 410. The Chancellor, WALWORTH, (who delivered an elaborate opinion, in which the court *unanimously* concurred,) after saying that no action of slander would lie against a member of Congress or of the State Legislature, acting in the discharge of his official duties, however false and malicious might be his words, uttered against the private reputation of an individual, spoke thus of the privilege of counsel: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel, in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class, where they have confined themselves to what was *relevant* and *pertinent* to the question before the court; and that the motives with which they have spoken what was relevant and pertinent to the cause they were advocating, cannot be questioned in any action of slander." In another part of the opinion, he says that counsel would not be protected in uttering calumnious words not *relevant* and *pertinent* to the matter

before the court: "Thus, if counsel in the argument of his client's cause should avail himself of that opportunity to say of a party or a witness, against whom there was nothing in the evidence to justify a suspicion of the kind, that he was a *thief* or a *murderer*, it might be a proper case for a jury to say whether the counsel was not actuated by malice, and improperly availed himself of his situation as counsel to defame the party or witness."

The irresponsibility of counsel and parties, for words spoken in the course of a judicial proceeding, was adverted to by this Court in the recent case of *Holmes* v. *Johnson*, Busb. Rep. 44. The question was, whether the defendant could be sued in an action for malicious prosecution for merely taking out a warrant against the plaintiff, charging him with larceny? The Court held that the action would lie: saying, that if the plaintiff could not avail himself of that action, he would be entirely without remedy; for that he could not sue for the slanderous words merely, "because they were spoken in the course of a judicial proceeding."

We are aware that there are some opinions, expressed by courts of high authority, which cannot be reconciled with those to which we have adverted; and among them stands the case of *White* v. *Nicholls*, decided by the Supreme Court of the United States, 3 How. Rep. 266.

In delivering the opinion of the court, Justice DANIEL said upon the subject: "With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion and cannot form the foundation of an action of slander without proof of express malice; for, it is said, it would be matter of public inconvenience and would deter persons from preferring their complaints against offenders, if words spoken in the course of their giving or preferring their complaints, should be deemed actionable." For this the learned Judge refers to two cases, *Johnson* v. *Evans*, 3 Esp. N. P. C., 32, and *Hodgson* v. *Scarlett*, *ubi supra*. In the first of these, it is observable that Lord ELDON says, broadly, that "words used in the course of legal or judicial proceeding,

however hard they might bear on the party of whom they were used, were not such as would support an action for slander," and he does not give the slightest intimation that proof of malice would have made any difference. In referring to the other case, the Judge quotes the language of the two junior Judges, ABBOTT and HOLROYD, but does not notice that the two seniors' Lord ELLENBOROUGH, C. J. and BAYLEY, J., state the principle of the irresponsibility of counsel for words spoken on the trial of a cause, and material and pertinent to the issue, without any qualification whatever. Of that case it is further to be remarked, that the two junior Judges, if they intended to say that the action of slander might have been sustained had malice been proved, were hardly justified in so doing consistent with the decision which they concurred in making. The plaintiff on the trial before WOOD, Baron, had been non-suited as soon as it had been ascertained that the words for which the action was brought were uttered by the defendant in the trial of a cause and were pertinent to the matter before the court: one of the grounds of complaint, on the motion for a new trial, was, that the Judge had stopped the cause too soon, without hearing the evidence, and yet the court of King's Bench *unanimously* concurred in refusing to set aside the non-suit. The opinion of the learned Judge in the Supreme Court of the United States is liable to the further remark, that though he afterwards refers to the case of *Flint* v. *Pike*, (*ubi supra*,) for another purpose, he does not notice the *emphatic* language of the same Judge HOLROYD repudiating his former opinion, if that opinion is to be understood as Mr. Justice DANIEL conceives it.

The language used by RUFFIN, C. J., in pronouncing the opinion of this court in the case of *Briggs* v. *Bird*, 12 Ire. Rep. 377, may also be supposed to qualify the principle which we are discussing, and not to sustain it in the unqualified terms in which we have stated it. He says, "a person is not answerable for any thing he says in honestly preferring a complaint before a justice of the peace, and *prima facie* every application is to be deemed honest, and to have been

preferred upon good motives, until the contrary be shown, because it is a duty to bring offenders to justice." "It is always open however to the opposite side to prove malice either by express evidence or by circumstances attending the accusation, or by others that are collateral; as for example, that the accuser had a particular grudge against the accused, and knew the accusation to be unfounded. It is, therefore, the question in all such cases whether the party acted *bona fide* in making the complaint, or from a wicked and malicious mind." These remarks were made in a case where the defendant spoke the words, for which the action was brought, before a magistrate to whom he had applied for a warrant charging the plaintiff with theft, but he did not take it out either then or afterwards. It is manifest then, that if his application for the warrant was not an honest one with a view to a criminal prosecution, his words could not be protected as having been made in the course of a judicial proceeding. In this view, the language of the Chief Justice may be justified without in any degree impugning our principle. It may be sustained also by supposing that he referred to the kind of action spoken of by HOLROYD, J., in the extract which we have made from his opinion in the case of *Flint* v. *Pike*, to wit: "A special action on the case, in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously and without probable cause." However this may be, and however it may be held with respect to the responsibility of a counsel or party uttering words against the character of a witness, or the opposite party, in the course of a trial, not *relevant* to the cause, we think that we have shown by abundant authority, that a counsel or party is entirely protected against an action of slander for whatever he may choose to say relevant and pertinent to the matter before the court, and that no inquiry into his motives will be permitted. Our conclusion in this case, therefore, is, that if the defendant's counsel had prayed an instruction that the action for slander could not, upon the facts proved, be sustained at all, it ought to have been given; but as the counsel did not ask for so strong and

decisive an instruction, the Judge committed no error in not giving it; neither would he have erred had he given the very instruction prayed, to wit, that *express* malice must be proved, because the defendant could not have complained of an instruction which he himself had requested. But as his Honor did not give that instruction, but on the contrary told the jury that malice might be *inferred* from the repetition of the words and the profane language with which they were accompanied, he did thereby commit an error, which the defendant has a right to have corrected on another trial. The rule in relation to instructions to a jury is, that "although it be not error to refrain from giving instructions unless they be asked, yet care must be taken, when the Judge thinks it proper, of his own motion, or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury." *Bynum* v. *Bynum*, 11 Ire. Rep. 632.

With respect to the profane language used by the defendant, it may not be improper for us to say, that it was a contempt of the magistrate's court, for which he might have been punished by fine and imprisonment; but it did not alter the relation in which he stood to the cause. What he said of the plaintiff was *relevant* and *pertinent* to the defense which he had a right to set up for his slave, and no malice could be inferred from it.

PER CURIAM. Judgment reversed.

BENJAMIN GRICE *vs.* SARAH WRIGHT.

Where it appears that there are trees fit for making turpentine, which are not fit for tun timber, an exception of tun timber from a lease declaring the general purpose to be for making turpentine, is not inconsistent with the granting part of the lease.

ACTION of trespass QUARE CLAUSUM FREGIT, tried before his Honor Judge BAILEY, at Spring Term, 1855, of Robeson Superior Court.

From a general lease of the defendant's lands to one James Grice, for the purpose of *making and distilling turpentine*, there was a reservation to herself (deft.) of the privilege of using the *tun timber*. The plaintiff entered under James Grice, and afterwards the defendant entered and cut *tun* timber which was also good for making turpentine; indeed it appears that all pine trees fit for timber are also fit for turpentine; but there are trees fit for making turpentine which are not so for tun timber.

It was insisted by the plaintiff that this reservation of the privilege of using tun timber was inconsistent with, and repugnant to, the granting part of the lease, and as such, was void.

His Honor charged the jury that the exception was not repugnant to the granting portion, and that the exception was good, and that if they believed the defendant cut such trees only as were suitable for timber, she had a right to do so, and the plaintiff could not recover. To which instruction the plaintiff excepted.

Verdict for the defendant. Judgment and appeal to this Court.

Banks and *Shepherd*, for plaintiff.
Strange, for defendant.

BATTLE, J. We cannot perceive any reason for doubting the correctness of the opinion expressed by his Honor in the court below. The exception of the trees fit for tun timber did not embrace all the trees fit for turpentine, and, therefore, was not repugnant to the grant in the lease under which the plaintiff claimed. The cases of *Robinson* v. *Gee*, 4 Ire. Rep. 186, and *Whitted* v. *Smith*, *ante* 36, are both cases in which the deeds contained exceptions as much, if not more, liable to objection than this, and yet no doubt was expressed as to their sufficiency, and the only questions raised on them were as to their extent: An exception necessarily excludes from a grant a part of the whole of what would otherwise be contained in it, and that is all the effect it has in this case.

PER CURIAM. Judgment affirmed.

JAMES F. McREE *vs.* WILMINGTON & RALEIGH RAIL ROAD COMPANY.*

A franchise, granted in 1766, to one and his heirs and assigns, to erect and keep up a toll bridge over a stream, and forbidding the erection of any other bridge or ferry within six miles, and imposing a penalty of *twenty shillings* for every passenger "set over" in violation of such act, is not violated by a rail road company, (incorporated by a modern act,) who carried passengers along their road, and as a part of the road over their bridge, though the latter was within less than six miles of the other.

Quere. Whether the owner of a toll bridge, who claims for a penalty for "setting over" persons and property does not have to aver that he was able and ready to carry all persons, &c., offering themselves, with reasonable promptness and safety?

APPEAL from the Superior Court of New Hanover, tried at the Fall Term, 1854, before his Honor Judge MANLY.

THIS was an action for a PENALTY, commenced before a justice of the peace by warrant, and brought to the superior court by an appeal, for the violation of an act of Assembly passed in 1766, entitled "an Act to encourage *Benjamin Herron* to build a bridge over the North East branch of the Cape Fear River." Among other things it is therein enacted as follows:

"*Section first.* "That when the bridge is built, the benefit thereof shall be vested in him, his heirs and assigns for ever."

Section 3rd. "That after the said bridge is built and completely ended as aforesaid, provided it be completed in four years after the passage of this Act, it shall not be lawful for any person whatever to keep any ferry, build any bridge, or set any person or persons, carriage or carriages, cattle, hogs, or sheep, over the said river, for fee or reward, within six miles of the same, under the penalty of twenty shillings proclamation money, for each and every offence, to be recovered by warrant by the said Benjamin Herron, his heirs, executors, administrators, and assigns before any magistrate of the coun-

*Judge Battle, being a stockholder in the Rail Road Company, took no part in the consideration and decision of this case.

ty of New Hanover, to be applied to the use of the proprietor of the said bridge at the time of the offence being committed."

It is admitted that the franchise granted by this act, was transmitted according to law, and was vested in the plaintiff at the time the acts complained of were done by the defendant.

The bridge was erected within the time prescribed by the act, and, with various intermissions, has been kept up as a toll bridge by B. Herron, and those claiming under him, until this time. Whenever the bridge was down, the proprietor kept a ferry-boat at the place which served as a means of transit in the absence of the bridge.

The bridge was not standing when the defendants erected their bridge, but was afterwards re-built, and was used till the year , when it was washed away, and since that time has not been re-built, and was not standing when this warrant issued.

The defendants pleaded specially the charter of the Wilmington, &c., Rail Road Company of 1833, with its various amendments, applicable to the case, by which the defendants were authorised to make a rail road over this tract of country, and it is admitted that the bridge in question was erected by virtue of this charter, and as part of the rail road, and that this bridge is less than six miles of the bridge site of the plaintiff. The complaint is for carrying a passenger over the rail road bridge in the common passenger cars, for which twenty-five cents was charged and received by the company. Besides passing the bridge the passenger went nine miles on the train and no specific charge was made for passing the bridge. Nor was any specific charge ever made for persons passing the bridge as such.

It was agreed by the parties upon this state of the case, that if his Honor should be of opinion that the plaintiff is entitled to recover, judgment might be entered for the sum of two dollars; but if he should be of opinion with the defendants, that a judgment of non-suit be entered.

His Honor on considering the case agreed, gave judgment

of non-suit against the plaintiff, from which he appealed to this Court.

J. H. Bryan and *Strange*, for plaintiff.
Wm. A. Wright, for defendant.

PEARSON, J. The broad question is, had the legislature power to authorise the company to build a bridge across the North East branch of the Cape Fear river, *in continuation, and as a part of the rail road*—charging for persons and property carried along the road and making no charge for persons or property set over the river as an act of itself, i. e. (making no separate charge for setting persons or property over the river, and making no higher charge on that part of the road by reason of the river,) notwithstanding the franchise claimed by the plaintiff under the act of the Governor, Council, and Assembly of the colony of North Carolina, in the year 1766?

Admit that the act of 1766 is to be considered as a contract, by which the Governor, Council and Assembly of the Colony on the one part, agree to and with Benjamin Herron on the other part, that in consideration of the work and labor of the said Benjamin in building a bridge across the river, and keeping the same in repair, "the benefit thereof should be vested in him, his heirs and assigns forever," and they should forever have the right to take certain toll from all persons and property passing over the bridge, and *that it should not be lawful for any person whatever to keep any ferry, build any bridge, or set any person or property over the river for fee or reward within six miles of the bridge*, and for any violation of the rights of the said Benjamin, his heirs or assigns a penalty of twenty shillings proc. should be recoverable by them, &c.

The first question is, was the meaning of the parties, and of course, the scope and operation of the contract, confined to the ferries, bridges, and other modes of setting persons and property over the river *at that time known and in use?* Or, was

it the meaning of the parties, and was it in their contemplation to confer upon Herron, his heirs and assigns, a perpetual monopoly of setting persons and property over the river by means of his bridge, so that it should never thereafter be in the power of the Governor, Council and Assembly, no matter what might be the change in the condition of things, either in reference to the increased necessity for transports across the river or the improved modes of transportation, to authorise any other mode of crossing the river?

We should hesitate long before bringing our minds to the conclusion that the latter is the true construction of the contract; because it was unreasonable on the part of Herron, in consideration of the services that he was to perform, to exact any such stipulation; and because it was unreasonable on the part of the Governor, Council and Assembly in consideration of building a bridge, to confer a perpetual monopoly, and take from themselves and their successors, for all time to come, the power of doing that for which all governments are organised,—promoting the general welfare, by adopting such measures as a new condition of things might make necessary and taking advantage of such improvements and inventions as after ages might originate, for the benefit of the public; in other words, it is unreasonable to suppose that they intended to surrender the means by which they and their successors might, thereafter, be enabled to effect the purpose for which they were created and formed into a government.

Suppose, for instance two cities had grown up, one on either side of the river, so that the necessities of the public should call for a dozen such bridges, or the progress of science had called for a tunnel under the river, or a line of balloons over the river, or a rail road car rushing by steam from one extremity of the continent to the other, across the river, was it the meaning of the parties that the government tied its own hands, and disabled itself, for all time to come, from doing its duty? so as to exclude all idea of progress, in such-wise that the steam car must stop at the North East branch of the Cape Fear river, and all persons and property must be transported

over the bridge of Benjamin Herron, after the manner, and in the way, such things were done in 1766!! A construction of the contract leading to this conclusion, is against reason. The truth is, it is just as impossible that the Governor, Council and Assembly of the province of North Carolina, by the act of 1766, contemplated on their part, and that of their successors forever, a surrender of the power to incorporate a rail road company, as it is, that Benjamin Herron contemplated on his part, and that of his heirs and assigns forever, an obligation to carry over "his bridge" a rail road car under the description of a "wheeled carriage," and that a passenger in the car was to be paid for, as a foot traveller, at the rate of "four pence"!!

We are not, however, under the necessity of putting the Decision upon the mere question of construction, for our declaration of rights, at once, puts an end to any such unreasonable pretension or claim to an *hereditary* and *perpetual* monopoly, as that set up by the plaintiff. "Declaration of Rights," sec. 3, "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Sec. 22, "That no hereditary emoluments, privileges, or honors, ought to be granted or conferred in this State." Sec. 23, "That perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed."

By this solemn declaration "the people" who were then exercising the highest act of sovereignty—that of making a government for themselves, forbade the creation of monopolies and put an end to all such as then existed.

The meaning and purpose was to forbid and abolish all hereditary and perpetual monopolies as "contrary to the genius of a free State," and to put in motion the "new State" they were then organising, as a *free representative republican government*, relieved from all fetters and trammels previously existing by which its action might be cramped or circumscribed, and fully authorised to do every thing necessary and proper to accomplish its mission, i. e. promote the general welfare.

We are not now to decide whether the "franchise" or "monopoly" granted to Herron, his heirs and assigns, by the colonial government, was entirely abolished by the declaration of rights and the formation of the State government or not. It may be that the franchise still exists, so far as it confers a right to keep up a bridge and take toll, and possibly so far as to prevent any other person from "setting any person or thing over the river" in the way of a ferry or an ordinary bridge; that is a different question: we decide now, that, notwithstanding the colonial act of 1766, the Legislature in 1833 had the power to grant to the defendants a right to construct a rail road, and in doing so, to cross the South East branch of Cape Fear, and to consider "the transit" over the river as a part of the road.

As the act of 1766 imposes upon Herron, his heirs and assigns the duty of keeping up the bridge, it might be a question whether this was not a *concurrent* part of the contract, so as to make it necessary for the plaintiff to aver that his bridge was up, and in good repair at the time the defendant was guilty of the wrong, &c., and that he was then and there, ready and able, by means of his bridge, to carry all persons and things across the river. It would seem to be unreasonable, apart from what we have said above, that the plaintiff should have a right to stop the whole line of travel from north to south, unless he avers and is able to prove, that he was prepared to set all persons over the river in reasonable time and with reasonable safety. Without this averment he would be allowed to take advantage of his own wrong—to recover *twenty shillings* for every person set over the river by any one else, whereas if he had done it himself the price was *four pence!*

In reply it is said by the act of 1766 the plaintiff is liable to the pains and penalties imposed by law, on other keepers of public bridges and ferries, if he failed "to keep the same in good order and fit for passing over": This is true, but it would hardly be considered satisfactory by a traveller who is stopped at the bank of the river and finds that the plaintiff

is not prepared to set him over, and it is unlawful for any one else to do so.

PER CURIAM. Judgment affirmed.

ROWLAND H. MANN *vs.* SAMUEL KENDALL.

Although one may waive a tort so as to be able to sue in assumpsit in certain cases, yet no new jurisdiction can be acquired in such cases so as to give a single magistrate the power of trying the case.

Where the plaintiff has an election to sue either in tort or contract, no court can hold jurisdiction of the assumpsit but one which can give a remedy on the tort itself; for the reason that the same questions of law arise in each.

THIS was an action of ASSUMPSIT, commenced originally by a warrant before a magistrate and brought by successive appeals to the Superior Court of Stanly, and there tried before his Honor Judge BAILEY, at the Spring Term, 1855.

The suit was brought for the price of a quantity of walnut plank which had been made by the defendant at his mill out of the plaintiff's saw logs. It appeared that the logs had been sawed on shares, and the plaintiff's share was set apart for him and piled in the defendant's mill-yard, and that the defendant, without the plaintiff's knowledge, took some of these planks and worked them up into furniture.

The plaintiff waived the tort and declared in the common count for goods sold and delivered.

The defendant's counsel asked the court to instruct the jury that the plaintiff's remedy was in trespass or trover and not in assumpsit; that he could not waive the tort, and that having done so he could not recover.

The court declined giving the instruction asked and told the jury that if they believed the evidence, the plaintiff was entitled to recover. To which instruction defendant excepted.

Verdict for the plaintiff. Judgment and appeal by the defendant.

H. C. Jones, for the plaintiff.
Kelly, for the defendant.

NASH, C. J. A careful examination of the acts of Assembly under which single magistrates out of court administer justice, will show that it was not the intention to give jurisdiction in any cases but where "the matters are liquidated between the parties, or might be reduced to certainty by some standard furnished by them or one of familiar application," *Tyer* v. *Harper*, 1 Dev. Rep. 387. The defendant there had employed the plaintiff to haul for him a certain amount of goods from Petersburg at a stipulated price per hundred. The plaintiff went to Petersburg, but could not get from the defendant's agent more than one-half of what had been agreed upon. This court decided that the magistrate had not jurisdiction, because what was the proper estimate of the damages sustained by the defendant, is a subject peculiarly fit for the consideration of a jury.

In this case the court was requested by the defendant to charge the jury that the plaintiff could not waive the tort, that his remedy was in trespass or trover, and upon the facts disclosed by the testimony he could not recover: This the court declined, and instructed the jury that the plaintiff could recover. In this there is error.

The right of a party in certain cases to waive a tort and sue as in contract, is not denied; the cases referred to by the counsel of the plaintiff fully show it; but none of them meet this case; none of them recognise the principle that by waiving the *tort* a new jurisdiction can be acquired. This is decided in *Clark* v. *Dupree*, 2 Dev. Rep. 411. Assumpsit cannot be maintained by a single magistrate, upon an implied promise where the plaintiff has an election to sue either in tort or contract. No court can hold jurisdiction of the assumpsit but one which can give a remedy on the tort itself; for the reason, that the same questions of law arise in each. Supposing the plaintiff in this case could have waived the trespass, it is clear that in so doing he must have brought an action in court. In

ruling that the plaintiff was entitled to recover in this case, his Honor erred.

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

STATE *vs.* PINCKNEY WILLIAMS.

The possession of stolen goods is a circumstance to be left to the jury in estimating the guilt or innocence of the accused, and however slight it may be, the court cannot disregard it.

It is no violation of the duty of a Judge to speak of things as facts where they are treated as facts in the progress of the trial, and are not questioned by either side.

INDICTMENT for PETTY LARCENY and for TRADING WITH SLAVES, tried at the Spring Term, 1855, of Rockingham Superior Court.

The State introduced, as a witness, Col. *R. B. Watt*, who testified that, on returning home from a journey on Monday evening, he learned that tobacco had been taken out of one of his barns: he went early next morning and discovered that a considerable quantity had been taken; there having been a considerable rain on Sunday night, he plainly saw the tracks of two persons which he followed to the plantation of his neighbor, J. W. Neal; he thence, in company with Mr. Neal, followed the tracks to the fence of the defendant, thence through his wheat-field to his house, finding on their way two leaves of tobacco. Before leaving the plantation of Mr. Neal, they made an examination of his slaves, and found that the shoes of two of these slaves, *Iverson* and *Henry*, exactly fitted the track, and upon being charged, these slaves confessed that they had stolen the witness's tobacco. On meeting with the defendant near his own house, the witness proceeded in these words: "I asked him if he was aware that it was contrary to law to trade with negro slaves, for property which was their own, without a written permission from the owner or mana-

ger?" he replied, "he did, and had not traded with any, he had quit that thing." I then told him that the tobacco he got on Sunday night was my tobacco, and not the negroes'. He said "he had got no tobacco Sunday night; that he could prove by some of his relations, who staid at his house on that night, that he was not out of his house that night." "I then stated to him the evidence I had to satisfy my mind that he had my tobacco. I informed him that I had tracked the thieves from my barn to his house, and found two or more pieces of tobacco, inside of his premises, that I thought were mine;" to which he replied that "he could track persons beyond his house, and that he had found a bundle of tobacco near his spring on Monday morning." "I asked him to let me see it. He brought it out, and I compared it with a sample which I had in my pocket, when he said, he thought it was my tobacco, but still denied getting any. I then told him that two of the negroes, *Iverson* and *Henry*, had confessed stealing it, and that they carried it to him and delivered it to him at his kitchen, which he denied. I then told him that the boy Iverson said he was at the house on the first Sunday in May to get some liquor. To which he replied, "he did not get any." I told him Iverson also stated he did not get any. I then said, "you admit Iverson was here at that time?" he said "yes." I then told him I would tell him all the negro said besides; he (Iverson) said defendant asked him if he had any tobacco to sell, that it was easy to get good tobacco and that he would give a good price for good tobacco; to which defendant replied that "it was an infernal lie." After talking with him some time, I said to him if I had thought I was to have any difficulty I would have brought an officer, and had him arrested and his premises searched, but I had supposed when he learned the tobacco was mine, he would give it up. He said "if he had any tobacco of mine he would give it up." Mr. Neal then asked him if he would let us see his barns. He said he would. I told him that was useless, for I did not know whether my tobacco was in his barns, or hid out; that I had no doubt he had got it on Sun-

day; that I was fatigued and hungry, and was going home, but that I thought the testimony was sufficient and should be compelled to prosecute him. He then asked Mr. Neal to go into the house and requested me to go up the road with him; we went some hundred yards or so, and came to a barn in the woods, on the side of the road. He unlocked the door and opened it. I said "Williams, that is my tobacco, pointing to a pile on the right of the door." He said "yes, and that over there," pointing to some which he had hung on sticks. We then sat down in the door and talked for some little time. He remarked to me that the negroes had told me a lie; for he did not see them that night; that they brought the tobacco and put it down by his barn, and that he got it the next morning. He said the boy Iverson owed his wife for making him a shirt, and was to pay for it in tobacco, but he supposed with his own tobacco, and had no idea they were going to bring so much. After some further conversation, we returned to the house when the defendant paid me for my tobacco and asked me not to prosecute him."

In commenting on this testimony, the solicitor asked the jury how it was that the defendant knew whose tobacco it was, and that it was taken to his barn, and who took it there, unless he had some previous concert with the persons who took it, inasmuch as he said he was not out of his house that night and did not see them?

The defendant's counsel asked the court to charge the jury that there was no evidence to sustain the count for petit larceny.

The court declined so to charge, but told the jury there was some evidence on that count, the force and effect of which they alone had to determine; that if they were satisfied that the defendant had seduced the defendant's slaves, or either of them, to take Col. Watt's tobacco, they should find him guilty; but if they were not so satisfied, they should acquit him on that count. In recapitulating the testimony, his Honor said to the jury "that it had been properly asked by the Solicitor how it was that the defendant knew who took the tobacco

to his barn and whose tobacco it was, unless there had been some concert between him and the slaves, Iverson and Henry, or one of them?" To this charge the defendant's counsel excepted.

Verdict of guilty for petit larceny: and not guilty on the other count. Judgment and appeal.

Attorney General, for the State.
Miller and *Morehead*, for the defendant.

BATTLE, J. The defendant, in his bill of exceptions, presents two objections to the proceedings on his trial, either or both of which, he contends, entitle him to have the verdict set aside and a *venire de novo* awarded. The first is, that the presiding Judge submitted to the jury the question of his guilt on the count for petit larceny, without any testimony to sustain it; and *secondly*, that the Judge expressed his opinion upon a fact in the cause, contrary to the inhibition of the statute upon that subject.

We are clearly of opinion that neither objection is sustainable.

It is very certain that, if *Col. Watt*, the principal witness for the State, is to be believed, the tobacco was stolen on Sunday night, and, on the following Tuesday morning, was found in a barn of the defendant, of which he had the key. This was of itself, as has been often decided, some evidence that the defendant was the thief, and required explanations from him to afford a satisfactory account how he became possessed of the stolen article. Unfortunately for him, his account, while it tends to remove the supposition that he took the tobacco with his own hands, makes it almost certain that he did it through the agency of Mr. Neal's two slaves, Iverson and Henry. Among other circumstances of suspicion in his account, was that which is mentioned as having been particularly brought to the attention of the jury by the Solicitor for the State.

The remaining objection is, that the Judge violated the statute by the manner in which he noticed that circumstance.

Now, with regard to that, the Judge could have erred in either, or both of two ways: *First*, by expressing his opinion that the fact was proved; but as to that there seemed to be no dispute, for there is not the slightest intimation in the case, that the veracity of Col. Watt was called in question, or that his testimony was, in any respect, incorrect. The Judge committed no error, then, in assuming to be true what the defendant himself did not question. *Secondly*, by calling to the attention of the jury, as material, a circumstance neither proving, nor tending to prove, the defendant's guilt. We think the circumstance was material, and very material, to show that the tobacco was stolen by Neal's slaves at the instigation of the defendant. He had said that he could prove he was not out of his house during the night in which the theft was committed, and that he had not seen the slaves that night; and yet, in another part of the conversation, between him and the witness, he stated that the slaves had brought the tobacco to his barn that night, and he had put it into it the next morning, he having acknowledged, as soon as he had opened the door of the barn, that the tobacco belonged to the witness: It was certainly a very pertinent question how he could have known all this, unless he had had a previous concert with one, or both of the slaves. In alluding to this, in his summing up to the jury, the Judge cannot, upon any fair construction of his charge, be understood as having done anything more than to call their attention to the circumstance, as one material and fit to be considered by them, in making up their verdict as to the guilt or innocence of the defendant. Indeed there was not only no impropriety in the allusion made by the Judge to the circumstance in question, but it was made his positive duty to do so, by the position taken by the defendant's counsel—that there was no testimony to be submitted to the jury upon the count for larceny, and by his asking his Honor so to instruct them. In response to that prayer, he was bound, if there were such testimony, to state what it was; and he did so, remarking that it was for them alone to determine the force and effect of it. See *McRae* v. *Lilly*, 1 Ire. 118.

Upon a full consideration of his case, we cannot find anything to show that the defendant was not fairly tried and fairly convicted, and he must abide the consequences.

PER CURIAM. Judgment affirmed.

WILLIAM F. STRAYHORN *vs.* JAMES WEBB.

If a debtor hands money to a third person, who promises to hand it to the creditor, the right to the money does not vest in the creditor, so as to make it his property, until he is notified of the transaction, and agrees to adopt the act of the third person in receiving the money as his own act, whereby the debt is extinguished.

THIS was a GARNISHMENT, tried before his Honor Judge DICK, at the Spring Term, 1855, of Orange Superior Court.

An attachment had been taken out against one Cheek, and the defendant was summoned as garnishee, who stated on oath, before the magistrate before whom the proceeding was returned, that "Cheek was indebted to Long & Webb, and to Long, Webb & Co., upwards of $200; and had frequently promised to pay them; and that, shortly before he made this affidavit, Cheek had told Webb, who was a member of both of these firms, and principally attended to the business of both, that he had sold to one Putzell, in Virginia, two carriages, and that as soon as he should be paid for them, he would pay these two debts: that on the day before making this garnishment, one William McCauley handed him $190, which he said had been handed to him by Putzell for Cheek, and he left a receipt to be signed by Cheek as an acquittance of the debt from Putzell: that Webb told McCauley what had passed between Cheek and himself, and applied the money to the payment of the above-named debts, due the firms of which he was a member: that this application was made on the day on which he was garnisheed, but before he was served with process, and after he had heard that Cheek had left home."

The justice of the peace who tried the matter, gave judgment against Cheek and against Webb as garnishee, who appealed to the Superior Court of Orange. On the trial in the Superior Court, Putzell applied to the Court to interplead, which was refused. Webb then moved that an issue might be submitted to a jury, to try the facts of the case, alleging that "he could then make positive proof that McCauley was not the agent of Cheek in the transaction, and that a few days after the $190 was left for him with Webb, he had demanded and received his debt from Putzell."

The Court declined such an issue and proceeded to adjudge that the $190 in question, was the money of Cheek, and accordingly condemned it to the satisfaction of the debt of the plaintiff. From which judgment Webb appealed to this Court.

Graham, for the plaintiff.
Norwood, for the defendant.

PEARSON, J. His Honor did not consider it material to be determined, whether McCauley received the $190 as the agent of Cheek or not. According to the view we take of the case, this was a very material matter, and was, in fact, the point upon which the liability of Webb, as garnishee, depended. If McCauley received the $190 as the agent of Cheek, then the debt of Putzell to Cheek was extinguished, and the $190 was the property of Cheek, which Webb was liable to be called upon to account for, at the instance of the plaintiff, who was a creditor of Cheek. If McCauley did not receive the $190 as the agent of Cheek, then the debt due by Putzell to Cheek was not extinguished, and remained as a subsisting debt, until Cheek did some act whereby to ratify and adopt the act of McCauley in receiving the money, so as to extinguish the debt and make the money his own.

This principle is settled in *Carroway* v. *Cox*, Busb. Rep. 173. If a debtor hands money to a third person, who promises to hand it to the creditor, the right to the money does not vest in the creditor, so as to make it his property, until he is notified of the transaction and agrees to adopt the act of the

third person, in receiving the money, as his own act; whereby the debt is to be extinguished.

There was error in giving judgment against Webb in the absence of proof that McCauley had received the $190 as the agent of Cheek.

PER CURIAM. Judgment reversed.

STATE *vs.* LORENZO D. CAIN.

There is no error in a Judge refusing to state a conclusion of law upon a state of facts not established by the evidence in the cause.

INDICTMENT for ASSAULT and BATTERY, tried before his Honor Judge BAILEY, at the Spring Term, 1855, of Bladen Superior Court.

The violence was alleged to have been committed upon the person of Mary C. McDuffie, who was sworn in the case, and testified that she was spending the night with a female neighbor whose husband had gone from home; that some time in the night, after she had gone to bed and was asleep, she was waked up by the defendant—that he got upon the bed where she was lying and put his arms around her neck—that she told him to let her go, but he would not; she repeated her demand that he should let her go, but he still continued on the bed with his arm around her neck; and that this continued for some five or ten minutes.

The witness was asked by the defendant's counsel, if she did not assent to his lying on the bed and putting his arms around her neck? She said that "she did not, but his putting his arm around her neck was against her will." There was other evidence not material to be stated. There was also evidence of the good character of the witness.

The defendant's counsel asked his Honor to instruct the jury "that if, from the evidence, they believed that Miss McDuffie

connived at the act of the defendant, or in any way consented thereto, or remained on the bed with the defendant and was not kept there by him, or if the defendant intended no insult or rudeness, that he was not guilty."

The Court told the jury that it was a question of credibility; that the defendant's counsel had contended that the witness had not told the truth; that the least touching of the person of another in a rude, angry or insulting manner amounted, in law, to a battery; that if she consented to what was done, they should acquit; but if they believed the evidence of Miss McDuffie, the defendant was guilty.

The defendant's counsel excepted to the charge of the Court as well for refusing to instruct as asked, as for the instructions which he did give.

Verdict of guilty. Judgment and appeal.

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

NASH, C. J. Two points are made in the defense: *first*, that the prosecutrix consented to the act of the defendant for which he is now indicted; and *secondly*, that the Court violated the act of 1794 in the charge to the jury. The charge as required was substantially given with the exception of the last clause. How the Court could be required to tell the jury that if the defendant intended no rudeness or insult, he was not guilty, in the absence of all evidence to show that such was the fact, is somewhat strange. His Honor's charge was as favorable to the defendant as it could have been. The case was one of mere credibility.

The charge did not violate the act of 1794. The credibility of the State's witness was impeached by the cross examination: she denied that she assented to his lying on the bed, but that he put his arm around her neck against her will; that when he got upon the bed she was asleep. The Judge instructed the jury that if they believed the witness, the defendant was guilty; in other words, if they believed from her

testimony that the defendant committed the acts complained of, in the way the witness swore they were committed, that they amounted to an assault and battery. The act of Assembly forbids a Judge on the trial of a cause "to give an opinion whether a fact is fully or sufficiently proved;" but it does not forbid him to tell the jury if, from the evidence, they believe the fact to exist, what the law is upon the point and to apply the law to the facts; which is in substance what the Judge charged here.

PER CURIAM. Judgment affirmed.

MASON PARKER *vs.* JOHN DUNN.

A covenant for quiet enjoyment of land is broken, if the covenantee is entered upon and dispossessed by one having superior title, though this entry is not made under process.

ACTION of COVENANT, tried before his Honor Judge BAILEY, at the Spring Term, 1855, of Montgomery Superior Court.

Bartholomew Dunn was seized of a tract of land containing 640 acres, of which he conveyed 300 to his son Thomas, by deed, dated 17th December, 1841; and 300 to his son John, by deed, bearing date 23d of February, 1842.

It turns out that the deed to Thomas, includes 22 acres of the land described in John's deed.

John sold to the plaintiff, by deed of bargain and sale, dated 24th February, 1842, according to the description in his father's deed to him; of course including the same 22 acres covered by Thomas' deed, with the usual covenant for quiet enjoyment.

Neither party had been in possession of the lapped part until after the plaintiff entered; then Thomas took possession of the lappage, and commenced cultivating it; upon which entry this action was brought.

Upon this state of the facts, his Honor instructed the jury

that the plaintiff was entitled to recover. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

No counsel appeared for the plaintiff.

Kelly, for the defendant.

NASH, C. J. The opinion of the Court in *Coble* v. *Wellborn*, 2 Dev. Rep. 388, is decisive of the question raised in this case. A disturbance of the possession is a breach of a covenant for quiet enjoyment, if made by a person holding the superior title. Such a covenant does not guarantee the title—that a superior one is not in another, but that if it is, he will not disturb the covenantee's possession. The case referred to, expressly states that an eviction may be with or without legal process; no matter how made, if made under a superior title, it is sufficient. In the present case, the brothers, Thomas and John Dunn, claimed title under their father, who was the owner of the whole tract, of which the portions conveyed to the brothers were component parts. Thomas' conveyance was the elder; that to John lapped over that of Thomas, covering about twenty acres. Each brother took possession of the portion conveyed to him, but neither was in the actual possession of the lappage. John conveyed to the plaintiff, with a covenant for quiet enjoyment. Subsequently, Thomas Dunn took actual possession of the part covered by both deeds. This was an eviction for which an ejectment might have been brought by the present plaintiff against Thomas Dunn. It was, therefore, a breach of the covenant of quiet enjoyment, it being an actual disturbance of the possession of the present plaintiff; and we have seen from the case of *Coble* that the eviction need not be under legal process. Why bring an action in which the plaintiff knows he must be defeated? Why unnecessarily increase costs? It is sufficient if, upon the trial of the action upon the covenant, he is able to show that the eviction was under a superior title. Here Thomas Dunn had the superior title.

PER CURIAM. Judgment affirmed.

THOMAS C. MOORE *vs.* HENRY C. FULLER.

Interest, being an incident to a bond, cannot be recovered in a separate action for it alone after the principal of the bond has been paid.

THIS was an ACTION of DEBT on a bond, brought by appeal from a justice of the peace to the Superior Court of Rockingham, and there tried before his Honor Judge DICK, at the Spring Term, 1855, of that Court.

The bond declared on was for $552, due the first day of May, 1852, on the back of which was endorsed a credit in the following words and figures, viz: "September 7th, 1852. Rec'd. of the within note five hundred and fifty dollars of the within note." The plaintiff introduced a witness who testified that the parties came to his house on the day of the date of the above credit, and the bond and money were laid down before him, and he was requested to count the money and examine it. He did so, and found the amount to correspond with the principal. The plaintiff then called on the defendant for the interest, which he refused to pay. After some conversation on the subject, it was agreed between the parties that the principal of the bond should be paid, and that they should refer the question to arbitration, whether defendant was liable to pay interest. Subsequently, one Ellington was agreed on as the arbitrator, who gave his award that the defendant was liable for the interest. The defendant still refusing to pay, the plaintiff brought this suit by warrant.

The defendant's counsel asked the Court to charge the jury, that, in this action, if they were satisfied that at the date of the credit the defendant paid, and the plaintiff accepted the said sum of $550 in full of the principal of the said bond, he, the plaintiff, could not recover anything for interest, whether the same accrued before or after the payment of the principal.

His Honor declined giving the charge asked for, but instructed the jury that on these facts the plaintiff was entitled to recover the interest that had accrued before the plaintiff received the principal. Defendant excepted, because his Honor

refused to give the instruction asked, and for error in the instruction given.

Verdict for the plaintiff. Judgment and appeal.

Morehead, for the plaintiff.
T. Ruffin, Jr., and *J. H. Bryan*, for defendant.

NASH, C. J. In the charge of his Honor, we think there is error, and that he ought to have charged as requested by the defendant's counsel. The defendant was indebted to the plaintiff by a bond for $550, which, after maturity, he paid to the plaintiff in discharge of the principal. The action is in debt, and the declaration on the bond. The action cannot be sustained.

The general principle is, that where the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties, all its incidents go with it. Thus, in an action of ejectment, if the plaintiff, pending the suit, takes possession of the premises, upon the plea of the defendant or upon its being shown, the plaintiff will be non-suited, *Johnston* v. *Swain*, Busb. Rep. 335. So, in an action of detinue, if the plaintiff takes possession of the property claimed, he can recover no damages, for they are consequential upon the recovery of the thing sued for, *Morgan* v. *Cone*, 1 Dev. & Bat. Rep. 234. This is an action of debt on a bond to recover the interest, the principal having been paid by the defendant before the bringing of the action: by that payment, the bond was discharged, and by analogy to the cases referred to, the plaintiff cannot recover the interest, which is but an incident to the principal—the bond. A jury gives the interest in an action on a bond, by the way of damages, for the detention of the principal; that being gone, every thing founded on it, must go with it, *Dixon* v. *Parks and others*, 1 Esp. Rep. 111. That was an action on a *respondentia* bond. The bond was payable twenty-one days after the arrival of the vessel at Canton, but if not then paid, there was reserved an increase of interest. The ship arrived at Canton, but the bond was not paid for three months after the expiration of the twenty-one days, when the principal and

interest, up to the twenty-one days was paid, the defendant refusing to pay the increased interest for the three months, for which the action was brought. Lord KENYON ruled "that the plaintiff could not recover:" "If he had intended to demand the increased interest he ought not to have received the principal." The same principle is stated in the case of *Tillotson* v. *Preston*, 3 Johns. Rep. 229, *Pate* v. *Eddie*, 15 Wend. 76, and in 8 Blackf. Rep. 328.

When the principal was paid, the defendant, for some cause, refused to pay any interest, and it was agreed between the parties to refer that question to an arbitrator, who decided that the defendant should pay the interest. He refused to stand to the award; this does not affect the question now before us; the plaintiff may have a cause of action against the defendant upon the award, but not upon the bond.

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

ALEXANDER WATSON *vs.* PETER A. McEACHIN *et al.**

Where College buildings, the title of which is in the Trustees, are partly occupied for College purposes by the students and teachers of the College, a Steward who occupies another part of these buildings, without showing a lease, must be considered as the mere servant of the proprietors and liable to be expelled by force.

ACTION of TRESPASS, tried before his Honor Judge PERSON, at the Spring Term, 1855, of Robeson Superior Court. Pleas: General issue; and Justification.

The plaintiff produced *Dr. Smith* as a witness who testified: "That the plaintiff was in the possession of a building in Robeson county, known as "Floral College building;" that he had

* The Chief Justice, from personal considerations, declined to take any part in this and the next following case.

beds and furniture of other kinds in the upper rooms of the building, and that he had the control and management of the rooms; that they had been occupied, and two of them were still occupied, as sleeping apartments, by the teachers at *Floral College*, who boarded with the plaintiff about the 10th of January, 1854, and the others were locked; that the pupils made up their own beds and kept their rooms in order; that plaintiff's servants swept the passages, and that he saw them putting the beds, &c., in the rooms in the early part of the year. On that day, the plaintiff sent for the witness: he went to the building and saw beds and other furniture in the yard, and upon the stairs. Witness went up stairs and found there the defendants, Peter A. and Jesse, and some of the slaves of the defendants and two other persons. Defendant, Jesse, said witness had not seen them break any door, but if he would wait a little he would; whereupon he and McEachin proceeded to break open several doors, wrenched off several looking-glasses, and broke them; tore down window curtains and otherwise injured the furniture. Witness remonstrated, when defendant replied, "he would not take them away and we are able to pay for them. McEachin said if the plaintiff would wait till they got through, they would put him down also. He stated that some of the lower rooms of the building were used for recitation and other exercises of the College."

The same facts were proven in substance by other witnesses.

The defendants then offered in justification, a proceeding had before a justice of the peace, and showed that under it the plaintiff had been put out of possession of the steward's hall building, some days before, and that it was a separate building from that called the College buildings; that they were trustees of Floral College, and had been appointed a committee to take steps to get the plaintiff out of possession. A Mr. McInnis was called, who stated the lease of the plaintiff began on the first of January, 1853, and ended 1st of January, 1854.

The proceedings before the magistrate are not set forth, because it was conceded that they were irregular and invalid.

His Honor charged the jury that possession in the plaintiff was necessary to sustain his action—that there was evidence of a lease of the steward's hall to the plaintiff, and that he went into possession by virtue of that lease, and if they were satisfied that the rooms, in which the alleged trespass was committed, formed a part of the premises which were the subject of the contract with the trustees, and that contract was a lease for one year; that occupation of the rooms by the students and teachers, who were boarding with him, was the plaintiff's possession and not the possession of the trustees; that there might be two distinct possessions in the same building, and if the jury were satisfied that the plaintiff had the possession of the upper rooms, that although the defendants entered the lower rooms peaceably, and went up stairs under the circumstances stated by the witnesses, that did not deprive plaintiff of his possession; that there was no evidence that the plaintiff was occupying as the mere servant of the trustees; and that all the evidence on that point tended to show a lease, and that it was for the jury to say whether it was a lease, and whether it embraced the rooms where the trespass is alleged to have taken place.

The Court further told the jury, that if they were not satisfied that there was a lease, yet if they found that the plaintiff had the control and management of the rooms; that the furniture in them was his property; that two of them were occupied by his boarders, and that the others were locked and the keys in his possession, and that these had also been occupied by his boarders until a short time before, this would amount to a possession in the plaintiff which would enable him to sustain this action.

His Honor charged also that the magistrate's proceeding was not a justification. Defendant's counsel excepted to this instruction.

Verdict for the plaintiff. Judgment and appeal.

Troy and *Strange*, for the plaintiff.
Banks and *McDugald*, for the defendants.

BATTLE, J. It is admitted by the counsel for the defendants that the proceedings on the inquisition for a forcible detainer, were not, on account of certain defects apparent therein, any justification for their act in turning the defendant out of the rooms in the Floral College building. But they contend that, in occupying those rooms, the plaintiff was the mere servant of the trustees of Floral College, under whose authority they acted, and that, therefore, they had a right to expel him from the rooms upon his refusal to leave them. The plaintiff insisted that he had rented the steward's hall, attached to the College, and the upper rooms of the main College building itself; and that he had possession of them under his lease, which, as he contended, had not expired when the wrong complained of was committed by the defendants; and that, at all events, even if his lease had expired or did not embrace the rooms in question, he was in the actual peaceable possession of them, and that consequently the defendants were guilty of a trespass in turning him out of them. His Honor instructed the jury that, in either view in which the plaintiff had presented his case, he was entitled to recover, and the propriety of those instructions is brought before us upon the appeal of the defendants.

The terms of the alleged lease are not very distinctly shown by the testimony which is set forth in the bill of exceptions, but that is not of much consequence in the determination of the case, because his Honor held that if the plaintiff had the control and management of the rooms, and the furniture in them was his property, and some of them were occupied by his boarders, and others were locked, and the keys in his possession, after having been recently occupied by his boarders, he had such possession of them as entitled him to maintain the action against the defendants. In this opinion of his Honor, it is assumed that the legal title of the College buildings was in the trustees of the College, of whom the defendants were a committee, and that they were in the actual occupation, for College purposes, of the lower rooms: under these circumstances, we cannot see how this case can be dis-

tinguished from that of the *State* v. *Curtis*, 4 Dev. & Bat. 222. That was a case where the proprietor of a school employed a person named Pope, as a steward and servant in the establishment, and assigned, for his lodging, rooms in a house situated within the curtilage, but not connected with the dwelling house of the proprietor by any common roof or covering, and for which lodging rooms the steward paid no rent. The Court decided that the house occupied by the steward was not, in law, *his* dwelling house, but was the dwelling house of the proprietor of the school, and that no indictment would lie against the proprietor for an entry and expulsion of the steward from such house, provided there was no injury to his person, or other breach of the peace.

Now in the absence of any lease for the rooms in question in this case, the plaintiff must have occupied them as the mere servant or agent of the trustees, and he could not have any possession distinct from theirs. He could not, therefore, maintain an action against them, or the defendants, as their committee, for removing his furniture from the rooms after a demand and refusal to surrender them, provided they used no unnecessary violence in doing it. He certainly has no right to complain of their breaking the doors of their own rooms.

The subject is fully discussed in the case to which we have alluded, and we deem it unnecessary to repeat the reasons given for the decision. See also *State* v. *Pridgen*, 8 Ire. Rep. 84.

Our conclusion, then, is that his Honor erred in the latter part, at least, of the instructions which he gave the jury, and for this there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

ALEXANDER WATSON *vs.* TRUSTEES OF FLORAL COLLEGE.

In inquisitions under the statutes of forcible entry and detainer, it is a general rule to award writs of re-restitution upon quashing the proceedings, and the courts, upon a motion for this purpose, will not suffer the merits of the controversy to be examined into.

But this writ is not demandable *ex rigore juris*, and where the case itself shows that its issuing would work manifest oppression and injustice, it will be refused.

RECORDARI directed to certain justices of Robeson to bring up the proceedings of an inquisition, under the statutes of forcible detainer. At a Special Term of Robeson Superior Court, May, 1855, his Honor Judge PERSON presiding, the matter was brought up for consideration.

Counsel of the plaintiff in the Superior Court moved to quash the proceedings below, on account of irregularity; which motion was allowed, and the proceedings ordered to be quashed.

The same counsel moved for a writ of re-restitution for the purpose of replacing the plaintiff (the defendant below,) in possession of the College buildings: this motion was opposed by the defendants' counsel, but allowed by the court; from which orders an appeal was taken by the defendants to this court. The defendants' counsel in this court withdrew their opposition to the motion to *quash*, but insisted that the writ of re-restitution should not have been awarded. The facts upon which the opinion of the court is based, sufficiently appear from the opinion.

Strange and *Troy*, for plaintiff.
Banks and *McDugald*, for defendants.

BATTLE, J. The present defendants, on the 3rd day of January, 1854, instituted proceedings, before a single magistrate, against the present plaintiff for a forcible detainer of a building called "Steward's hall" of Floral College, and on the 6th day of the same month, an inquisition was taken in which the jury found the defendant therein guilty of a forcible detainer, as charged against him, and thereupon he was put out of, and the present defendants put into, possession of the building in question, under a writ for that purpose. He subsequently applied, by petition, to a Judge of the Superior Court for a writ of *Recordari* to have the proceeding removed to the Superior Court of Law, for the County of Robeson, with a view to have them quashed for irregularity and illegality.

In his petition, the present plaintiff stated that "on the 1st day of January, A. D. 1853, he rented the said Steward's hall from the trustees of Floral College, and had continued in the peaceable possession of the same until the 6th day of January, A. D. 1854, when" certain of the trustees of said College violently, forcibly and unlawfully dispossessed him. The petition then stated that the inquisition did not find that the present defendants "had either a fee simple, a free-hold, or a term for years, or any estate in the premises" of which the petitioner was dispossessed.

Upon the return of the writ of *recordari*, it appeared that the inquisition contained, among other facts proved, that the present plaintiff had taken possession of the Steward's hall in question, under a lease for one year, commencing on the 1st day of January, A. D. 1853, and ending on the 1st day of January, A. D. 1854; and that after his said lease had expired, he forcibly and unlawfully withheld the possession from the present defendants; but it did not set forth what estate the said defendants had in the premises. Upon the cause coming on, upon a motion to quash the proceedings, and thereupon to award to the petitioner a writ of re-restitution, his Honor, Judge *Person*, at a Special Term of the court, held in May last, ordered the proceedings to be quashed, and that a writ of re-restitution should issue, from which orders the defendants appealed.

The counsel for the defendants have, in this Court, abandoned their opposition to the motion for quashing the proceedings before the magistrate. It is admitted that for the defects in the inquisition of the jury, pointed out in the plaintiff's petition for a *recordari*, it cannot be sustained, *Mitchell* v. *Fleming*, 3 Ire. Rep. 123. But they insist that the plaintiff is not entitled to a writ of re-restitution, because it appears that the plaintiff has not now, and had not, when he was turned out of the Steward's hall, any right to the possession thereof; that the inquisition found expressly that he had a lease for one year only, and that it had expired when he was evicted; they insist that he did not deny it in his petition, nor indeed show

therein that he had anything more than a bare tenancy at sufferance, and that the writ prayed for, is one, not of right, and, therefore, ought not to be granted, where it is manifest that it would be unjust and oppressive to the other party. In support of their position, the counsel have referred us to 1 Hawk. Pl. Cr., Bk. 1, ch. 28, sec. 64, in which it is said that "neither can a defendant in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict for him on a traverse thereof, &c.; for the power of granting a restitution is vested in the King's Bench only by an equitable construction of the general words of the Statutes, and is not expressly given by those Statutes, and is never made use of by that Court, but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof be lost by the restitution granted to the prosecutor." See also 1 Russ. on Crimes, 293, and the cases cited by Mr. Hawkins as authority for the extract which we have made from his work. In opposition to the argument made for the defendants, the plaintiff's counsel contend, that when the proceedings on an inquisition for a forcible entry and detainer, or for a forcible detainer alone, have been quashed for irregularity, it follows, as a matter of course, that the defendant therein must be restored, by a writ of re-restitution, to the possession of the premises of which it is ascertained he has been illegally deprived; and for this they cite the following cases as authority: *Rex* v. *Jones*, 1 Strange's Rep. 474. *The King* v. *Wilson*, 3 Adol. and Ell., 817, (30 Eng. C. L. Rep. 228—238,) and *Mitchell* v. *Fleming*, 3 Ire. Rep. 123.

The first of these cases is so very shortly reported, that all we can learn from it is, that the conviction was quashed for a mere technical error, and upon a motion for a writ of re-restitution, it was suggested that the lease of the defendant had expired during the litigation, and the court refused to enquire into it, saying "that they had no discretionary power in the case, but were bound to award restitution on quashing the conviction." In *The King* v. *Wilson*, the conviction by the

magistrates was quashed on the most substantial grounds, one of which was, that it did not appear that the defendant was summoned, or had otherwise an opportunity to defend himself; and a subsequent inquisition by a jury was also set aside as being founded and dependent upon the conviction. A writ of re-restitution was prayed, and being opposed, the court said, "on looking into the authorities, we find that the court has been in the habit of awarding that, when it has quashed the conviction for a forcible entry; otherwise the whole proceeding here, would be nugatory; and the practice is said to have grown out of an equitable construction of the Statutes. It has been said that the court will not do this unless the party unlawfully dispossessed should appear to have title to the premises; a most inconvenient enquiry upon affidavit, and a course full of danger to the public peace, as protecting the execution of a lawful sentence."

The case of *Mitchell* v. *Fleming*, decided in this state, that the proceedings were quashed because the inquisition was defective in not finding of what estate, in the land, the prosecutrix was seized or possessed. The motion to quash was resisted, but that being done, the order for the writ of re-restitution seems not to have been opposed, but to have passed *sub silentio*. In that case, too, it appeared from the proceedings that Mitchell, the person convicted, claimed to have entered under a lease which, he alleged, was unexpired at the time of the inquisition.

From these cases, we are satisfied that the general rule has been to grant the writ of re-restitution upon quashing the proceedings on a conviction under the statutes of forcible entry and detainer; and that the court will not suffer the merits of the controversy to be gone into and examined upon *affidavits*. But we are equally satisfied, that the writ is not demandable, *ex rigore juris*. That it is not so demandable, follows as a necessary consequence, from the cause and manner of its origin. It is not given by the express words of the statutes, but by an equitable construction of them. Surely it is not a principle of equity to do that, which will, in the particular

case, be manifestly oppressive and unjust. Of such oppression and injustice a stronger instance, than the one we have now under consideration, can hardly be imagined. The defendants, as trustees of a literary institution, had, as they alleged, leased the Steward's hall to the plaintiff for one year only, upon the expiration of which he refused to deliver up the hall, detaining it unlawfully and by force. They, thereupon, institute proceedings against him under the statute, for a forcible detainer, and a verdict of guilty is rendered against him by a jury. But the inquisition failed to set forth the estate which the trustees had in the premises, which is the only error of which he particularly complains. The plaintiff applied for a writ of *recordari* for the purpose of having the proceedings on the inquisition removed to the Superior Court of Law, and there quashed for the defects above stated. But, in his petition, he does not deny the defendants' allegation that he had entered into the Steward's hall, under a lease for one year only, and that, at the time of his conviction, his lease had expired. On the contrary, he states, merely, that he entered under a lease, and was in the peaceable possession of the premises until he was violently, forcibly and unlawfully dispossessed, without giving him any notice to quit. He does not say whether his lease was for years or at will; and yet he now asks that the institution, of which the defendants have charge, as trustees, shall be thrown into confusion by putting him into possession of one of their buildings, to which, it is apparent to us, he has no right. There would be no equity in such a course, and we cannot adopt it. The order for quashing the proceedings, on the inquisition, must be affirmed, but that, for awarding the writ of re-restitution, must be reversed; all which must be certified as the law directs. The plaintiff must pay the costs of the appeal to this Court, as the judgment has been reversed in part. See *Satterwhite* v. *Carson*, 3 Ire. Rep. 549. *Harris* v. *Lee*, 1 Jones' Rep. 225.

PER CURIAM. Judgment reversed.

STATE TO USE OF JACOB SHUSTER AND WIFE MIRANDA *vs.* E. H. PERKINS, *et al.*

The plea of *former judgment* contains an averment that it is for the same cause of action, and between the same parties: a judgment, therefore, against one of several obligors, to a joint and several bond, is no bar to an action against other obligors on the same bond, and not even a bar in favor of the one against whom a former judgment was rendered, if he join in a plea with those not formerly sued.

ACTION of DEBT on a guardian bond, tried before his Honor Judge PERSON, at the Spring Term, 1855, of Pasquotank Superior Court.

The plaintiff declared against E. H. Perkins, N. S. Perkins, and J. H. Pool, adm'r. of Wilson, on the official bond of Perkins, the guardian, which is in the usual form, and assigned as breaches thereof, the failure and neglect of Perkins to improve and maintain in repair his ward's lands, and suffering the same with the buildings thereon, to fall into decay and dilapidation.

The defendants pleaded, "conditions performed and not broken—former judgment—accord and satisfaction."

The defendant, to sustain his plea of former judgment, showed a record of the County Court of Pasquotank, setting forth a suit, &c., as follows, viz: "State to use of M. Taft, jr. Guardian, against Edmund H. Perkins—Debt. Report made and confirmed and judg't. accordingly for $1330 16, with int. on $1053 88, from Sept. 1847, and on $277 28, from Jan'y. 1848, if not then paid. Clerk allowed $30 for report. Each party to pay one-half cost of report. "Sept. 20, '47. Received from E. H. Perkins payment in full for this judgment. R. B. Creecy."

This testimony was objected to by pl'tff. but received by his Honor. Plaintiff excepted.

Plaintiff offered to show that the damages now sought to be recovered were not included in the report and judgment thereupon, set out in the transcript. This evidence was objected to and ruled out by the Court. Exception by plaintiff.

The Court having intimated an opinion that the plea of former

judgment was a bar to the present suit, and that the action could not be sustained, the plaintiff submitted to a non-suit, and appealed.

Smith, for plaintiff.
Pool, for defendant.

PEARSON, J. The plea of "former judgment" contains an averment, that it was for the same cause of action and between the same parties. The judgment relied on to support the plea in this case, assuming it to be for the same cause of action, is against Perkins alone; so the averment, that it was between the same parties, is not proven.

A judgment against one of the obligors, in a joint and several bond, is no bar to an action against another obligor, and the obligee is at liberty to go on and take judgments against all of the obligors.

Perhaps the defendant, Perkins, might have supported a several plea of "former judgment" against him; but here, the plea is joint, and the former judgment was not between the same parties.

"Accord and satisfaction" differs from the plea of "former judgment" in this: the one avers a former judgment, between the same parties for the same cause of action, and relies on that fact as an estoppel of record; the other avers a judgment for the same cause of action, and that the judgment has been fully paid off and discharged, whereby the cause of action has been *extinguished* without reference to the parties.

Whether upon the trial of the issue, taken upon the plea of "accord and satisfaction," the plaintiff was not at liberty to show that the cause of action, or breach assigned in the former suit, was for monies received, whereas the breach, now assigned, was for negelect on the part of the guardian to keep the plantation of the ward in repair, we are not now at liberty to decide; because as there was error in regard to the first point,

the plaintiff is, on that ground, entitled to a *venire de novo*, and a decision of the second is not called for.

PER CURIAM. Judgment reversed.

JOSIAH COWLES, ADM'R. *vs* THOMAS ROWLAND.

Where one of two administrators covenants that a certain slave "belongs to him, and that the sole right of the said slave is in him as the administrator of A," it is no breach of the covenant that the title of the slave is in the two administrators.

Where an administrator of an estate, in order to get possession of the assets, makes a covenant with one found in possession of a slave, that the slave is his as administrator, in a suit on this covenant, the next of kin of the intestate are not liable for any part of the costs, and are not, on that account, disqualified to testify in his behalf, as they were in no wise liable for breaches of his personal covenant.

ACTION of COVENANT, tried before his Honor Judge DICK, at the Spring Term, 1855, of Forsyth Superior Court.

The plaintiff declared on the following covenant: "State of North Carolina, Surry County, August 2nd, 1842. This is to certify that I, Thomas Rowland, did find in the possession of Philip Holcomb a negro woman by the name of Mary, formerly the property of Mary Rowland, dec'd., and the said negro Mary now belongs to him: and the sole right of said Mary is in him as administrator of Mary Rowland, dec'd., and no other person; and if the said right proves not to be so, the said Thomas Rowland agrees to deliver the said negro Mary and increase, to the said Holcomb, or his order, or pay the value of said negro to the said Holcomb, his heirs or assigns: the above given under my hand and seal, this the day and date above written.

(Signed) THOMAS ROWLAND, [SEAL.]
his
Witness, Wm. X Mony.
mark.

The plaintiff assigned the following breaches:

1st. That the sole title was not in the covenantor, for that there was a co-administrator with the defendant on the estate of Mary Rowland, who had a joint interest with the defendant, to wit, on Thomas Rowland, Sen'r.

2nd. That at the time of the execution of this covenant, the title was in the plaintiff's intestate, Philip Holcomb.

3rd. That some time after the defendant got possession of the slave Mary, she was taken out of his possession, by the children of Edith Mann, and that one or more law-suits were commenced, and, after several years' litigation, were compromised by the parties, the slave and her offspring sold, and the money arising from the sale, divided between the parties to the suit.

To establish the first breach, plaintiff introduced proof of letters of administration by the County Court of Montgomery County, to Thomas Rowland, Sen'r., and that he was alive at the date of the covenant, living in the State of Tennessee.

On the second breach, the plaintiff read in evidence a deed of conveyance, made by Mary Rowland, on 29th of June, 1839, to her daughter Edith Mann, for the slave in question; also a deed for the same from her to her son, Rowland Mann, dated 11th of November, 1841; also, a deed for the same, from him to Philip Holcomb, dated 14th of November, 1841.

On the third breach assigned, the plaintiff offered evidence of suits, brought by defendant against some of the children of Edith Mann, who asserted title to the slaves, which were compromised by the parties, the slaves sold, and that the money was divided between the parties.

The defendant offered testimony to show that the deed from Mary Rowland to Edith Mann, for the want of mental capacity in the bargainor, was void.

The defendant further offered in evidence a deed for the same slave, from Edith Mann, to himself and Thomas Rowland, Sen'r., administrators of Mary Rowland, dated 4th of March, 1840, releasing to them all her right in the slave in question.

There was evidence, also, that Thomas Rowland, Sen'r., de-

fendant's co-administrator, lived in the State of Tennessee when these letters were taken out, had resided there ever since, and had never interfered in the management of the property of Mrs. Rowland.

Much testimony was offered by both parties as to the mental capacity of Mary Rowland.

On the part of the plaintiff, it was alleged that the deed from Edith Mann to the defendant and Thomas Rowland, Sen'r., was void, because the said Edith did not know the contents of the deed when she signed it, and evidence to that effect was heard.

Among the witnesses offered by the defendant, were two of the grand-sons of Mary Rowland, whose father was dead, and who were interested in the estate of Mary Rowland. These witnesses executed releases to the defendant. The plaintiff still objected, as they were liable for costs, but they were admitted; for this plaintiff excepted.

The Court charged the jury, that their first inquiry was as to the validity of the instrument executed by Mary Rowland to Edith Mann; and if they should believe that Mrs. Rowland had not capacity to make a valid instrument, they should find for the defendant as the title to the slave still remained in her and passed to her representatives, so that, in that case, there would be no breach.

But if they should find that Mary Rowland had capacity to make the instrument, then the next enquiry would be, as to the deed made by Edith Mann to the administrators; and as to this, his Honor charged, that, if Edith Mann did not know the contents of the paper, or that she was imposed on by false representations, and executed one paper, when she thought she was executing another, they should find for the plaintiff, and give him damages for the value of the slaves in controversy; otherwise they should find for the defendant.

The Court further charged the jury that the point of enquiry between the parties was this: at the date of the covenant, on the 2nd of August, 1842, was the title to the slave in question, in the personal representatives of Mary Rowland, deceased?

If it was, there was no breach, although at that time the co-administrator of defendant was living. Nor was there a breach of the covenant although the defendant compromised his suits with the children of Edith Mann. Plaintiff's counsel excepted to this charge.

Verdict for defendant. Judgment and appeal.

Gilmer and *Miller*, for the plaintiff.
Morehead, for the defendant.

PEARSON, J. There is no error. We concur in the view taken of the case by his Honor, and believe the several points made, were correctly decided for the reasons given by him.

In regard to the question of evidence, the witnesses were, in no event, liable for any part of the costs. The action was against the defendant individually, upon a covenant made by him, after the death of the intestate; so, the witnesses had no such "direct legal and certain interest" as rendered them incompetent.

PER CURIAM. Judgment affirmed.

DOE ON DEM. OF WILLIAM GAUSE *vs.* CHURCHILL PERKINS.

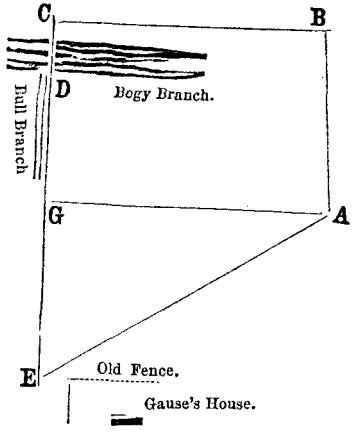
A marked line of another tract, which can be established by its memorials when called for in a conveyance, must be run to, disregarding distance: but where such memorials cannot be established and there is no sufficient proof to establish it, the fact, that in the original survey, the surveyor ran to a given point near the plantation fence of the tract named, is no reason why course and distance shall be disregarded, and that point again recognised.

ACTION of EJECTMENT, tried before his Honor Judge BAILEY, at the last Term of Brunswick Superior Court.

The controversy in this case turns upon the following description in a deed, dated 23rd of February, 1819, from James Cheers, to the lessor of the plaintiff, viz: "Beginning at a light-wood tree" (which is established at A in the diagram,)

"running North 2 degrees West 172 poles to a pine," (established at B,) "thence West 300 poles to a stake 'in Bogey's branch,'" (established at C,) "thence South across the swamp to the mouth of Bull-branch 175 poles to William Gause's line to a stake; thence East 300 poles to the beginning."

[DIAGRAM.]



The lessor of the plaintiff called one *Thomas F. Gause*, who stated that he was one of the chain-carriers when the original survey of the Cheers tract was made: William Gause was living on a tract of land near E: that there was a house upon the land surrounded by a field, which was fenced in, and that William Gause owned no other land in that neighborhood; that when the surveyor was making his survey, he ran from C across the swamp to the mouth of Bull-branch D, then up Bull-branch, about a south course, to a point a little west of the field in which William Gause was then living, in a line with the fence which ran on the north side of the field at the edge of a pond, where he planted a stake, E. He further proved that he was with *John Phelps*, the surveyor, when he made the survey in this case, and pointed out to him where the fence, on the north side of the Gause field, stood at the time of the original survey, and they found there were some traces

of the old fence, and where he placed a stake. On cross examination, he stated that there are not now, and were not then, any known or marked lines or corners on the tract on which William Gause lived in 1818.

John Phelps, the surveyor, was then introduced: he stated he made the survey in the case, and made the plat annexed: that, after running across the swamp to D, he ran to the point showed him by the witness Gause, where he said he had placed a stake, not far from a pond: that the witness Gause pointed out where the old fence had been, and he saw some traces of it still remaining: he said that the point to which he ran, which is at E on the diagram, is on a line with the old fence. He further stated, that he saw no marked trees or corners of the tract where Wm. Gause lived; that the distance called for in the deed, from D, gave out 170 poles short of E, terminating about G; that the course from that point to the beginning at A, is east, whereas the course from E to A is north of east.

His Honor charged the jury that, as the witness for the plaintiff could not point out the Wm. Gause line in locating the grant to Cheers, they must stop at the point where the distance gave out, although a witness stated where the line was actually run at the time of the original survey, and where he planted a stake as a corner thereof. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Strange, for plaintiff.
No counsel for defendant.

NASH, C. J. The controversy in this case, turns entirely upon the termination of the third line of the conveyance from Cheers to the plaintiff. The call in that deed for the third line, is "thence south, across the swamp to the mouth of Bull-branch, one hundred and seventy-five poles, to William Gause's line." The closing line is, then east three hundred poles to the beginning. The second line of the Cheers deed and Bull-branch, for the purposes of this case, are ascertained, and the question is, where is the terminus of the third line?—is it

where the distance, called for in the deed, gives out, or is the line to be continued to the letter E in the diagram? The distance gives out where that line leaves Bull-branch, and to go to E extends it one hundred and seventy poles further than the call of the deed. The plaintiff insists he is entitled to go to E, because William Gause lived in a field designated in the plot, and had a fence around it.

It was in evidence, by the surveyor, that when he ran this third line, Thomas F. Gause, who was one of the chain-carriers when the Cheers tract was originally surveyed, pointed out the terminus at the letter E, and also the place where an old fence stood, enclosing the field where William Gause lived. The surveyor further testified that there was no marked line of William Gause to be found, either in running from the point where the distance gave out, or from the latter to E; nor was there any line marked from E to the beginning. He further stated that, in running from the point where the call of the deed gave out, the course to the beginning was due east as called for, but that, in running from E, the course to get home was north-east.

Upon the point, as to the terminus of the third line, his Honor instructed the jury "that, as the witnesses could not point out the William Gause line, in locating the grant to James Cheers, they must stop at the point at which the distance gave out, although the witness stated where the line was actually run at the time the original survey was made, and where the stake was planted." In this opinion we concur.

Very few subjects have occupied more of the time of our Courts, or been more carefully examined than that of boundary. Connected with the possession of the most valuable portion of property, the establishment of fixed principles, whereby disputes concerning the ownership of land might be, in part, governed and controlled, became at an early day, in the settlement of the country, a matter of great importance. In the administration of justice on this subject, our Courts were compelled, in many instances, to depart from the rules of the common law, and to build up a system suited to the situation of

the country. Among these rules or principles are the following: Natural objects of a permanent kind, called for in a grant or deed, will control both course and distance, ——— v. *Beattie*, 1 Hayw. 376. Where a junior grant or deed calls for a line of an elder grant or deed, the line shall be extended to it, regardless of the distance or course, provided the lines be sufficiently established, *Cherry* v. *Slade*, 3 Murph. 82. But if they were not marked, then the call should be disregarded and the course and distance pursued, *Carson* v. *Burnett*, 1 Dev. & Bat. 516, *Reed* v. *Shenck*, 2 Dev. 415. The terminus of a line must be either the distance called for in the conveyance, or some permanent monument, which will endure for years, the establishment of which was cotemporaneous with the execution of the deed. A stake is not such a monument, and evidence of its being made and fixed at the time the land was surveyed, is not admissible to control the course and distance, 3 Dev. 65, *Shenck* v. *Reed*. The distance called for in a deed, must govern, unless there be some other description, less liable to mistake, to govern it, *Kissam* v. *Gaylord*, Busbee 116.

These are some of the rules or principles governing questions of boundary. The deed from Gause to the plaintiff calls for no natural object as a boundary after passing Bull-branch; the third line, the terminus of which is the point in dispute, calls for a course and distance to Gause's line to a stake. Here there is something which, if it existed, would control the course and distance, but it is not shown that that line ever existed. Thomas F. Gause, a chain-carrier, in locating and surveying the Cheers grant, states that the line was actually run from Bull-branch to the point designated in the diagram, and that at that time William Gause was living in the field where the stake was planted, but he does not say that a single tree was marked, and the surveyor states that he discovered no lines either on the line, after leaving Bull-branch, or in running from E to the beginning; he further states that he ran the line from Bull-branch to the spot, at which the other witness stated was the place where the stake was planted in the original survey. If that line had been marked, in the original

survey, it would have controlled the course and distance, provided the line of Gause, which was called for as its terminus, could have been established :—but in the absence of any natural boundary, or marked line in the establishment of the Gause line, there is nothing to control the course and distance. But there is another consideration, the call for the fourth, or home line is, from the termination of the third line, east to the beginning; the surveyor states that running from the point where the distance gave out, to the beginning, answers to the call in the grant, while running from E the course is north-east. There is no evidence that William Gause owned any land above the east line.

There is no error, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

DAVID RAY, ADM'R. *vs.* JOHN IVOR McMILLAN.

A promise to endorse a note held on a third person, which had been sold to the promisee at less than the sum called for in its face, is founded on an usurious consideration, and, therefore, cannot be enforced.

THIS was an action of ASSUMPSIT for the breach of a contract, tried before his Honor Judge BAILEY, at the Spring Term, 1855, of Cumberland Superior Court.

The contract alleged in the plaintiff's declaration was, that the defendant had agreed with plaintiff's intestate to endorse a note made payable to him, (the defendant,) six months after 8th of August, 1848, by John S. Pearson, for the sum of $540, and on demand had refused to do so. It is admitted by the counsel that John S. Pearson was in good credit in 1848, but died insolvent in April, 1849.

A letter from the defendant to the plaintiff's intestate, dated 5th of September, 1848, was adduced in evidence, the body of which requests the person to whom it is addressed (Mr. Fuller's agent,) to send him a sum of money by the next mail, but does

not state on what account the money was to be sent, to which letter there is the following *postscript:*

"N. B. I forgot, as I was in such haste when I sent you the note, to endorse or transfer it, but will do so at any time; let not that be any objection to it at this time." (Signed by the defendant.)

The defense relied on by the defendant was, that the agreement alleged by the plaintiff, was usurious and void, and to establish that position, he read the following letter from plaintiff's intestate (Fuller,) to the defendant, dated 31st May, 1849:

"Yours is at hand, and contents noted. I herewith hand a statement as I understood the matter:

Note on Campbell, due 6th of January, 1847,	$100
Int. 2 years and 5 mo's.	14 50
	114 50
dis'ct. off of note, 15 per cent.	17 17
	$97 23

The note of $500, of which you speak as being due 1st December next, would be at a discount of 16⅔: say $417 *cash* for it: your endorsement in each case would be required. It is true as to the Pearson note, but that did not have a long time to run, and Pearson being here made some difference, although it is not yet paid: yet at that time it was looked upon as good when due: besides money at this time is better than it was then; I am buying paper at 20 per ct. here, tho' not in as large sums as $500." (Signed by plaintiff's intestate.)

His Honor charged the jury that, if Fuller took the note from the defendant, at an amount less than the sum named in the face thereof, then the promise on the part of the defendant, to endorse the same was void, because founded on an usurious consideration, and plaintiff could not recover.

The plaintiff's counsel asked the Court to charge the jury that "there was no evidence of any usurious consideration," but his Honor refused so to charge, and instructed them that there was some evidence to that effect. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Winslow, for plaintiff.
Shepherd, for defendant.

BATTLE, J. We concur in the opinion of the presiding Judge upon all the points made in the Court below. If the transaction was, as the defendant alleges, that the plaintiff's intestate took Pearson's note at a discount, then the contract made by the defendant to endorse it, was, as between him and the intestate, founded upon an usurious consideration. The note bore interest from its date, and the taking it at any discount, made it a loan between the parties at a rate of interest greater than that which the statute allows. This is fully established by the case of *Collier* v. *Neville*, 3 Dev. Rep. 30. But the plaintiff's counsel contends that a contract, though for a loan at a greater rate of interest than six per cent. is not usurious unless there be a corrupt intent to violate the law, which is a question of fact to be submitted to the jury, and which, therefore, it is error for the Judge to decide, and for this he relies upon the case of *Kerr* v. *Davidson*, 13 Ire. Rep. 454.

It is true that when the excess of interest may have been taken, because of a mistake in a matter of fact, as, for instance, upon an erroneous calculation, there the testimony must be submitted to a jury, for them to find how the fact was—whether there was, in truth, a mistake or a usurious taking by design. This, and nothing more, was the decision in *Kerr* v. *Davidson*. But where the contract is for the discount of a bill or note, at a rate exceeding that fixed upon by the statute, it is of itself, and in law, an usurious loan.

The difference between the two cases is thus expressed in the case of *Collier* v. *Neville*. "It is said, *non constat*, that these parties knew the endorsers were bound thereby, without which there was no corruption. It is to be taken they knew it, and that the endorsement expresses their contract until the contrary, as a mistake in the writing, or the like, be shown. If a person misconstrue the statute or the law, he must abide by his error. If he mistake the fact, as the amount reserved, he may show it. But here, there was no attempt to show even

a misapprehension of the liability created by the endorsement." So, in the case now before us, there was no attempt to show any mistake in fact.

But the plaintiff's counsel contends that there was no evidence to prove an usurious discount. In that we think he is mistaken. The letter from the plaintiff's intestate to the defendant, which form a part of the statement of the case, affords more than a mere conjecture that the Pearson note was taken at a discount. It was manifestly written in reply to one from the defendant, relative to the terms upon which the plaintiff's intestate would buy certain notes which the defendant wished to dispose of. The terms stated were not so favorable as those upon which the Pearson note had been bought, and the reason assigned was, that the latter had not so long a time to run as the $500 note spoken of, and that the maker resided in the same town with the intestate; with this additional reason, that "money at this time is better than it was then." The jury were, in our opinion, fully justified in finding, from this testimony, that the Pearson note was taken at a discount, and any discount was, as between the parties, greater than the law allowed.

Supposing that the contract for the endorsement was founded upon an usurious consideration, as between the parties, the plaintiff's counsel still contends that it was not usurious as between the intestate and Pearson, the maker of the note, and that he had a right to insist on its performance to enable him to sue the maker in his own name. It is true that if the endorsement had been made, the case of *Collier* v. *Neville* shows that the maker could not have availed himself of the defense of the usury committed by the endorser and endorsee. It does not follow from this, however, that the plaintiff can sustain an action for damages for the non-performance of the contract. To allow him to do so, would not only violate the maxim that *ex turpi contractu non oritur actio*, but enable him to recover in this way what he could not have recovered in a suit on the endorsement, had one been made. It is certainly going far enough to hold, as was done in the case referred to,

that an endorsee, claiming through an usurious endorsement may sue the maker and recover the full amount of the note. No authority has been cited to show that an action of any kind can be sustained against the party to the illegal contract, and we do not feel at liberty to set the first precedent.

PER CURIAM. Judgment affirmed.

JAMES MAYO *vs.* WM. H. WHITSON AND ABNER PEARCE.

Upon a question, before a court of record, whether its own minutes, of a former term, shall be amended so as to set forth *truly* its own transactions, it is not bound by the ordinary rules of evidence, but may resort to any proof that is satisfactory to it.

An ex parte affidavit, in such a case, therefore, taken before a justice of the peace, is not improper.

In a question, whether a court shall enter, *nunc pro tunc*, an order made at a former term (but not then entered) the propriety of such former order cannot be enquired into in this Court.

THIS was an APPEAL from the Superior Court of Orange, from a judgment of his Honor Judge DICK, at the last term of that court, affirming an order of the County Court of Orange to amend a former order of that court.

The applicants for this amendment are free persons of color. They had been the slaves of Major Absolom Tatom, but supposing they were duly emancipated by his will, and by the action of the court at Feb. term, 1803, of that county, they have, ever since that time, acted as free persons, and have been taken and accepted as such, in the community where these transactions occurred.

Not long before the date of this application, it was discovered that no order for the emancipation of the slaves, mentioned in the will, had been entered on the minutes, or on any other record of Orange county; and several of the descendants of these persons were seized as slaves by the assignees of the next of kin of Absolom Tatom.

Thereupon, the plaintiff filed his petition and gave notice to Pearce and Whitson, and the next of kin and legatees of Absolom Tatom, that he would apply at the May Term, 1854, of Orange County Court, for an amendment of the record, *nunc pro tunc*, so as that it should set forth, at February Term, 1803, the decree emancipating George, Cate, Sally and her child, young George, and Jack, slaves directed to be emancipated and set free, by the last will and testament of the said Absolom Tatom. Upon a motion in court to make the amendment of the minutes of February Term, 1803, the following affidavit of Duncan Cameron was offered in the case, and opposed by the defendants.

"Statement made by Duncan Cameron, of the city of Raleigh, this 26 of September, 1851.

"Affiant saith that he wrote the will of Major Tatom in the city of Raleigh, in the month of December, 1802, he said Tatom being, at that time, a member of the General Assembly, and having died at or about the close of the session.

"Affiant was aware, from frequent conversations with said Tatom in his life time, of his intention to emancipate his slaves by his will; and accordingly, by his will, as will be seen by reference thereto, he directed said slaves to be emancipated for meritorious services, rendered to him.

"The said will was admitted to probate at February Term, 1803, of Orange County Court; and the executors, therein named, qualified thereto: and at the same term, or at some subsequent term, soon thereafter, the executors united in an application to the county court to emancipate said slaves; the court sanctioned the application, and ordered the said slaves to be emancipated. This affiant drew up the decree emancipating said slaves, and handed it (to) John Taylor, then Clerk of the said court, and directed it to be entered on the minutes, as a record of said court.

"Affiant always supposed such entry was made, as it ought to have been. The said negroes were thereafter, and always have been, recognized as free persons, and have acted as such in the community ever since. Affiant, who was one of the

executors, never regarded them as assets and was never called upon to account for them as such.

"Test—J. H. Bryan. DUN. CAMERON."

The following probate was affixed to the same:

"State of North Carolina, }
Wake County. } On this, 10th day of October, 1851, Duncan Cameron came before the undersigned, a justice of the peace, in and for the county aforesaid, and made oath that the matter contained in the foregoing affidavit, is true, according to the best of his recollection (and) belief.

"Subscribed and sworn to before me, day and year above mentioned. C. B. ROOT, J. P."

To which is added the certificate of the clerk of Wake County Court, with the seal of office, that *C. B. Root* was a justice of the peace of that county.

The will of Absolom Tatom was also put into the case as evidence, of which, the following extract only is material to the question: "I give and bequeath to my friends, John Hogg, Catlett Campbell, David Ray, William Kirkland and Duncan Cameron, my negroes, George, Cate, Sally and her child, with their future increase, young George, and Jack, to them, their heirs, executors and administrators, in trust and in confidence, that they will use their best endeavors to procure them to be emancipated and set free, for meritorious services rendered me."

Samuel Goodwin, John Hogg, Catlett Campbell and Duncan Cameron were appointed executors. The will was duly proven at February sessions, 1803, of the county court.

At the May Term, 1854, aforesaid, upon proof of the facts recited in the same, the following Order was made and entered on the minutes of the county court of Orange, viz:

"In the matter of George, Cate, Sally and her child, young George, and Jack, claiming to be free negroes, formerly the slaves of Absolom Tatom, deceased—on motion, and on the affidavit of Duncan Cameron, deceased, herewith filed, and upon the admission that the aforesaid negroes and their de-

scendants have always been reputed free negroes, and have always acted as such, since the decree of emancipation mentioned in said affidavit, until the capture of James Mayo, in 1853, one of the descendants of the said slaves, who instituted suit therefor, which is now pending in the Superior Court of Orange, and that the estate of said Tatom was settled by suit in Equity, commencing in 1816, and ending in 1825, without any claim on account of said slaves, and it appearing that Catlett Campbell, Duncan Cameron and Samuel Goodwin, qualified at February Term, 1803, and that John Hogg, remaining executor, qualified at May Term, 1803: It is ordered and adjudged by the Court, that the records of this Court, at May Term, 1803, be amended by the entry, *nunc pro tunc*, of the decree for the liberation of said slaves, which will appear on reference to the record of that term."

Paul Cameron, the surviving executor of Absolom Tatom, appeared in court and assented to this amendment.

From this order of the county court of Orange, an appeal was taken to the superior court of that county, and the case heard *de novo*, when the foregoing will of Major Tatom, with the certificate of probate, and of qualification of the executors, was adduced in evidence. The foregoing affidavit was also produced, authenticated as before stated, and moreover, in the superior court, proven by *J. H. Bryan*, the subscribing witness thereto: this affidavit was objected to by the defendants' counsel, but admitted by the court; for which the defendants excepted. The plaintiffs also showed that the negroes in question, ever since the year 1803, were taken and accepted as free persons in the county of Orange, where they resided. The record of the suit for the settlement of Major Tatom's estate, the material portion of which is recited in the order of the county court, appealed from, was also put in as evidence.

No demand was ever made of the executors for these negroes, nor in any way were they treated as assets of the estate.

The defendants showed that they had assignments of their rights in these negroes from the next of kin of Absolom Tatom.

Upon consideration of the case, his Honor was of opinion

that the record of the county court ought to be amended, as ordered and directed by the said county court, and that a writ of *procedendo* issue to that court.

Appeal, by defendants, to the Supreme Court.

Norwood, *Graham* and *Bryan*, for plaintiffs.
Winston, *Senr.*, and *Bailey*, for defendants.

NASH, C. J. In the case of *Pillipse and others* v. *Higdon*, Busb. 380, the doctrine of amendment of records, was fully examined by this Court. It is an important subject of practice; questions of the kind occurring upon almost every circuit of the superior courts. With a view to settle, as well as they can be, the questions arising in practice upon the subject, and to furnish the profession, with what was considered by this Court, the true principles upon which amendments of records are to be regulated, the doctrine was carefully considered. The opinion filed, divided the subject into three classes. The second announces the power of a court to amend its records after a suit determined, and is in the following words: "Every court of record has ample power, after a suit is determined, to amend its own records, that is, the journal or memorial of its own proceedings, kept by the court or its clerk, by inserting what is omitted, or striking out what may have been erroneously inserted; for every court of record is entrusted with the very responsible duty of keeping it faithfully and making it speak the truth, as it imports absolute verity, and cannot be collaterally called in question; and the record, so amended, stands as if it never had been defective." Under this class, the present application ranges itself.

The petition alleges, that the late Major Tatom, of Orange county, by his last will, directed his slaves to be emancipated by his executors, of whom the late *Duncan Cameron* was one: That at the May term, 1803, of Orange county court, the executors brought into court the will of the testator, which was then duly admitted to probate, and made application to the court to liberate said slaves, which was granted, and the ex-

ecutor, Mr. Cameron, then drew up the decree of emancipation and handed it to the then clerk, John Taylor, and directed it to be entered on the minutes of said court, as a record thereof. It then states that upon an examination of the records of that term, it is discovered that the clerk neglected, or omitted to make any entry upon his minutes, of the proceedings; and the object of his petition is to have the records of the Februruary term, 1803, of Orange county court, amended, so that the proceeding of that court, on the application for the emancipation, may be entered on it, *nunc pro tunc.*

To show the fact of the order or decree for emancipation, the examination or affidavit of the late Duncan Cameron, taken before a justice of the peace, was offered in evidence on the part of the plaintiff. Its reception was objected to. The objection was overruled, and the affidavit was heard.

When the object of the petition is considered, it will at once be seen, that the testimony was competent. It is the duty of the court to see that their records speak the truth, and their general power to do so is not questioned. The court, in discharging its duty in this particular, may hear any testimony which is calculated to satisfy its judgment. It is not deciding a question of property between litigating parties, but one touching the correctness of its officer, in the performance of his clerical duties. It was inquiring whether its records speak the truth? Whether its order has been obeyed? It is entitled to draw evidence from any pure source. Mr. Cameron was dead, and of all men, living or dead, he was the most likely to know the truth. He was one of the executors of Major Tatom, and the counsel who conducted the business in court, and if the facts had been engraved in adamant, they would not have been in a firmer grasp than in his memory. Where could the court have looked to find testimony more satisfactory? It would have been at liberty to receive his declaration or statement of what had been done. Most fortunate for the ends of justice was it, that his valuable life was spared until this controversy arose. His affidavit was properly received.

But it is further objected, that at the time it is alleged that this order of the county court of Orange was made, slaves could be emancipated only for meritorious services, rendered to the owner, and there is nothing to show the county court that such services had been rendered.

The first answer to this suggestion is, that we are not now sitting in judgment upon the action of that court in making the order of emancipation, but whether they did make it? If they did, the parties interested have a right to have the order spread upon the records of the term when it was made. If we are to look, however, behind the order itself, we think there was testimony, in the will of Major Tatom, to authorize the declaration that the slaves had performed meritorious services to him. Of this fact, cases might occur, in which the master alone *could* testify; as in passing a solitary wood, the servant may have saved his master's life, either from an assassin, or from drowning, and no one else present. Many such instances might be supposed. But I see no reason, in law, why the court should not hear the master, when asking to confer a favor upon a favorite slave, when he was thereby stripping himself of valuable interests.

It has been further argued, that every amendment supposes something to be amended, and something to amend by; that the petition is, in substance, not to *amend*, but to *make* a record. This idea is founded in mistake. The petition is not to amend the record of the order to emancipate, but to amend the *records of the Feb. term*, 1803, of Orange county court, by now causing to be put upon it, *that* which was, at that time, ordered by the court, but omitted by the clerk. It is true, the court must now have something to amend by, and they have it in the statement of Mr. Cameron, and the length of time, during which, the community, in whose midst the slaves of Major Tatom have lived, has received and counted them as free. The court has it in the additional fact, that fourteen years after the death of Major Tatom, a bill was filed by his next of kin, against the executors, for a settlement of the estate, and in no part of the proceedings were the negroes claimed as a part of

the estate, nor was any account asked for as to them or their hires. All this is strong evidence that the order of emancipation was made at the time alleged.

It is further urged that the court will not allow an amendment of a record to the injury of third persons, who have acquired an interest under it. The principle is misapplied here. The court is not called on to amend any process whatever, but to amend its own records, so as to make them show the truth. The record so amended can work no greater injury to any one than would arise if the order had been committed to the records at the time it was made, for it must speak as of that time.

The question we are now considering is one of great importance to every man. Every citizen is interested in the principle, that the records of these courts of justice should import absolute verity. The security of property, and much of the peace of society depend upon it. As it is but the evidence of what has been transacted by the court, it should show the truth upon its face. To do this, the court must see that nothing is put upon it not ordered by it, and nothing omitted, which they have ordered.

An old act of the General Assembly directed that upon the opening of court each morning, the record or minutes of the preceeding day's transactions, should be read by the clerk in open court. If this practice had been observed on this occasion, much trouble and expense would have been spared.

Finally, it is said that too long a time has elapsed, since the neglect occurred, to remedy it now; the petitioner ought to have applied sooner. I know of no rule which the court lays down in such a case as this, as to any lapse of time. It is to be recollected, that to have the records amended, so as to set forth the truth, is a matter of right in him who is interested in having it done, and a matter of duty in the court, when sufficient evidence is laid before it; and the lapse of time is in no way important, further than it increases the difficulty of procuring adequate testimony.

Neither can any laches attach to the delay in the filing of this petition. Mr. Cameron states that he was not apprised of

the omission of the clerk to make the necessary entries, until the setting up of the claim by these defendants.

No case can be presented, more emphatically exhibiting the necessity of the rule of law we are examining, than the one now before us. An aged man without children, or any descendants of such, is about to descend to the grave. Between him and his slaves exists a tie which is unknown to the master and the hireling: on the one hand, the proud consciousness of power and protection, and on the other, the consciousness of humble submission and gratitude for kindness, which, in sickness and in health, has known no wavering. This tie is about to be sundered; no creditor claims them; the aged man looking around him, asks himself, "then, whose shall these be?" He does what he can to confer upon them the boon they hold most dear! Half a century passes away; for that time, the slaves and their descendants have enjoyed their freedom; at length it is discovered that the records are silent on the subject; immediately, the birds of prey are upon the wing, and they are seized as slaves, and the demand is made upon them to *prove* their freedom. It would indeed be a reproach to the law, if there was no way in which it could correct the evil, growing, in a measure, out of its negligence.

PER CURIAM. The judgment of the Superior Court is affirmed.

DOE ON DEM. OF KENNETH B. MURCHISON *vs.* JOHN McLEOD.

The contents of a paper writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession, to produce it on trial.

This rule is not varied by the fact that the paper writing in question, is a will which was proven and recorded according to law, but the record destroyed by the burning of the court house where it was deposited.

EJECTMENT, tried before his Honor Judge BAILEY, at the last Term of Moore Superior Court.

The plaintiff's lessor claimed as a purchaser at a sheriff's sale under a judgment and execution against one Neil McLeod. In order to show that the defendant claimed under Neil McLeod, he called the clerk of Montgomery county court to prove the contents of the will of said Neil, and the following facts were relied on as a foundation for that evidence: A will was made by Neil McLeod in 1841, and duly proved and registered in the clerk's office of Montgomery county: in 1843, the court house of that county was destroyed by fire, and all the records and papers were then consumed. The plaintiff proved that the defendant, in 1841, had this will in possession, and the clerk, who was a witness, stated, that his impression was after the will was proven he gave it to the defendant; the proof of the will by parol evidence was objected to; the objection sustained by the court and the evidence excluded. Plaintiff excepted. Verdict for the defendant. Judgment and appeal.

Winston, *Sen'r.*, for the plaintiff.
Kelly, for the defendant.

NASH, C. J. The secondary evidence was properly rejected by the court. The evidence, to let it in, was not sufficient. The plaintiff claimed title as a purchaser, at the sale made by the sheriff of Moore county, under an execution against Neil McLeod, but was unable, or did not produce, what was considered the necessary evidence to authorise the sale of the premises in question.

The defendant claimed that he went into possession as the heir of Neil McLeod; the evidence showed he was illegitimate and could claim nothing as heir. On the part of the plaintiff it was alleged, that Neil McLeod did not die intestate, but that he left a will, which had been admitted to probate in the county court of Montgomery, and that by that will the premises were devised to the defendant, and that therefore he was estopped to deny the title of the testator. He then offered evidence to show that the records of Montgomery county

had been burnt, with the court house. It was further proved, that after the destruction of the records of Montgomery county, the will was in the possession of the defendant, and it was alleged, that by it, the land in queston was devised to him. This secondary evidence was rejected by the court, and we entirely concur in the opinion.

The will having been traced to the possession of the defendant, it was the duty of the plaintiff to have given him notice to produce it on the trial; without such notice, the secondary evidence was not admissible. The rule is well established and of familiar use. Mr. Phillips, in his valuable treatise on evidence, vol. 1, page 409, says; in general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit; for no man, in a court of common law, can be compelled to furnish evidence to his adversary. To let in the secondary evidence, the opposite party in possession must be regularly notified to produce the original writing required. If he refuse to produce it, as he may, the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of its contents. This rule as to notice, does not apply to cases where the action is for the paper, or where the action itself is notice, except cases provided for by our act, Rev. Stat. ch. 31, sec. 86. Here the action itself was not notice to the defendant to produce the will, and the secondary evidence was properly rejected.

PER CURIAM. Judgment affirmed.

STATE *vs.* RICHARD L. BORDEAUX.

Where one who is not on friendly terms with the owner of a dwelling house, comes there, armed with a gun, a revolver and a knife, and immediately after

entering, uses violent and threatening language, (the owner being present,) and on being forcibly ejected by an inmate of the house, again comes to the outer door and forces it open, against the owner, who is struggling to keep it closed, he is guilty of a forcible trespass, although the owner may not have forbid him, in terms, from entering.

INDICTMENT for a forcible trespass, tried before his Honor, Judge BAILEY, on the last circuit, at New Hanover.

The defendant and Daniel Bordeaux were not on friendly terms. The defendant came to the dwelling house of Daniel Bordeaux in a wagon or carriage, with a shot gun in the carriage, and a five barrel revolver about his person, each barrel being loaded. He left his carriage at the gate, with the gun in it, and as he proceeded to the house he met J. W. Wagstaff, who went with defendant into the house. The door, at which they first entered, opened into the sitting room: Daniel, the proprietor of the house, was at home, but had gone into an adjoining room where his family were, when the defendant entered. The defendant was much intoxicated, and said he would kill or be killed—that he had as lief die as live. He took hold of Wagstaff and pushed him as far as the front door: Wagstaff then pushed defendant out of the door and fastened it. Daniel Bordeaux, about this time, came into the sitting room; and opening the front door a little, to look after the defendant, the latter violently pushed the door back against him and entered the room a second time, he (Daniel) opposing his entrance. As to this part of the case, Daniel Bordeaux, the witness, stated he had not forbidden the defendant to enter, nor made any objections to it; but he would have done so, if he had not been a relation of his own and of his wife: still, he said, he had entered the house with force and against his will.

After getting near the fire place, on this second entry, Daniel seized a piece of wood and was in the act of striking, when the defendant put his hand on his pistol: Wagstaff caught his arm, at that moment, and took the pistol and a knife from him without any difficulty.

Daniel then laid aside the piece of wood which he had in his hand, and fell upon the defendant with his fists and beat

him quite severely. The defendant then went off threatening to return with a double barrelled gun.

The witness, Wagstaff, after describing the facts as above stated, gave it as his opinion, on a cross examination, that the second entry of the defendant was peaceable.

The Court charged the jury that if, at the time he entered the room a second time, the defendant supposed that he had the consent of the owner to enter, (as he had not forbidden his entry before, nor had he ordered him out of his house,) and pushed the door back with force, as he entered, although it struck against the person of the owner, he would not be guilty of a forcible trespass: but if he went there with an evil design, for the purpose of doing mischief, knowing at the time he entered, or having good reason to believe, that his entry would be against the will of the owner, and pushed the door open by force and violence, and this was done against the will of the owner, he would be guilty, although the owner did not forbid his entry. Exception by defendant. Verdict of guilty. Judgment. Appeal to Supreme Court.

Attorney General for State.
No counsel for defendant.

BATTLE J. The testimony given on the trial, fully justified the charge of his Honor to the jury, and we can discover nothing in it, of which the defendant has a right to complain. The unfriendly feelings which had previously existed between him and the owner of the house, his rude behavior when he first entered, to say nothing of his being armed with deadly weapons, and the violent manner in which he entered the second time, clearly made out a case of forcible trespass. It was not necessary that the owner should, in words, have forbidden the entry, if his acts were sufficient, as we think they were, to indicate to the defendant that his entry was resisted. The opinion of the witness, Wagstaff, expressed upon his cross examination, that pushing open a door and rushing into a house, was a peaceable entry, cannot alter the law upon the subject.

The question, whether the entry, in the manner in which it was made, was against the will of the owner, was left to the jury as favorably for the defendant as the law allowed, and he must abide their verdict. The case is quite as strong as that of the *State* v. *Toliver*, 5 Ire. Rep. 452, which was held to be a forcible trespass.

There is no error in the record, and this will be certified as the law directs, to the end that the superior court of the county of New Hanover may proceed to pronounce judgment upon the defendant.

PER CURIAM. Judgment affirmed.

DOE ON DEM. OF JOHN BAKER *vs.* ANGUS McDONALD.

From thirty years actual possession of land according to known metes and boundaries, the law presumes, not only a grant, but every thing else that is necessary to complete the title.

Where neither of the proprietors of two interfering tracts of land, has actual possession of the part common to both titles, the law adjudges the right to him that has the elder.

ACTION of EJECTMENT, tried before his Honor Judge BAILEY, on the last circuit at Moore Superior Court.

The plaintiff introduced a grant from the State, dated in 1767, for the land in question, and a regular succession of conveyances for the same, down to the year 1785. On 27th of July, in that year, (1785) it was sold by the sheriff of Cumberland county, as the property of one Angus McDonald, and purchased by one Farquhar Campbell, who took a sheriff's deed, but no judgment and execution was produced or proven to authorise the sheriff's sale.

The lessor of the plaintiff then regularly deduced title from Farquhar Campbell to himself for the land contained in the sheriff's deed, and in the demise in the declaration, by a suc-

cession of mesne conveyances, and proved possession accompanying them, from that time till the present.

The defendant proceeded to show a grant, dated in the year 1787, for a tract of land, a part of which lapped on the land above described, (for which lappage this suit is brought) and showed a chain of title for the tract from Stephens, the grantee, to himself, of which these successive claimants had had possession of some part, from that date to the present, but no person had possession of the part common to both deeds, until the entry by the defendant, for which this suit was brought.

The defendant insisted that whether his title was good or not, the plaintiff could not recover in this suit, for that he had shown the title granted in 1767, to be in Angus McDonald, and had not shown it out of him, and prayed his Honor to instruct the jury that according to the case presented in the evidence, the title of Angus McDonald was still in him, or if he be dead, in his heirs, and that therefore the plaintiff could not recover.

The Court charged the jury that if the land, covered by the courses in the plaintiff's declaration, and claimed by him, was granted in the year 1767, and if they believed it had been in the continued possession of the plaintiff, and those through whom he claims, thirty, forty, or fifty years, under color of title, the original grantee and his heirs had lost their right of entry, and the plaintiff would be entitled to recover. The defendant excepted. Verdict for the plaintiff. Judgment and appeal.

Kelly and *Strange*, for the plaintiff.
No counsel for the defendant.

NASH, C. J. No error has been shown to exist in the charge of his Honor. The plaintiff claims under a grant issued in 1767, and by regular deeds down to 1785 from the grantee and those claiming under him: in that year one Scroggins, sheriff of Cumberland county, sold the land in controversy, as the property of one Angus McDonald, who was then the owner,

(but no judgment and execution were shown) and Farquhar Campbell became the purchaser and received a deed from the sheriff, and immediately took possession. A regular train of conveyances from him to the lessor of the plaintiff was shown, and possession was continued from 1785, by Campbell and those claiming under him, to the time of bringing this action.

The defendant claimed under a grant from the State, dated in 1789. These two grants interlapped, neither the lessor of the plaintiff, nor the defendant was ever in the actual possession of the part so covered by the two grants, until the possession taken by the defendant just before the action was commenced, although each was in the actual possession of other parts of the land covered by their respective grants.

The presiding Judge instructed the jury, that if the land covered by the demise, and claimed by the lessor, was granted in 1767, and if they believed it had been in the continued possession of the plaintiff, and those through whom he claimed, thirty, forty, or fifty years, under color of title, then the original grantee and all those claiming under him, had lost their right of entry, and the plaintiff would be entitled to recover.

A long course of decisions in this Court has established the doctrine, that from thirty years continuous possession of land, the law presumes, not only a grant, but every thing else that is necessary to complete the title. *Wallace* v. *Maxwell*, 10 Ire. Rep. 110; *Reed* v. *Earnhart*, ibid 516, and others.

The question before the Court was, whether the lessor of the plaintiff had such a title to the land in question as would enable him to maintain the action?

It was admitted that the grant of 1767, covered the tract of land claimed by the lessor of the plaintiff, including the lappage, and if the title was not in him, it was in the grantee or in his heirs. But says his Honor, if the lessor of the plaintiff and those under whom he claims, have been in the continuous possession for thirty, forty or fifty years, the title cannot be in the grantee or in any one claiming under him, for they have lost their right of entry, and the lessor of the plaintiff by his

long continuous possession has acquired the title; because the law will presume from such possession every thing necessary to perfect his title: this is the substance of the charge. The plaintiff having title to the land covered by the grant of 1767, that title drew to it the possession, until the defendant, by taking actual possession of the lappage, gave him a right to bring this action.

PER CURIAM. Judgment affirmed.

STATE *vs.* JACOB JOHNSON.

A mere grudge or malice, in its general sense, is not sufficient to bring a case within the rule laid down in *Madison Johnson's* case, 1 Ire. Rep. 354; (referring the motive to antecedent malice rather than an immediate provocation;) to have that effect, there must be a *particular and definite intent to kill:* as if the weapon, with which the party intends to kill is shown, or the time and place are fixed on, and the party goes to the place at the time, for the purpose of meeting his adversary with an intent to kill him. These facts create a presumption of malice till rebutted by the accused.

But where A bears malice against B, and they meet by accident, and upon a quarrel, B assaults A with a grubbing hoe, and thereupon A shoots B with a pistol, the rule of referring the motive to the previous malice will not apply.

INDICTMENT for murder, tried before his Honor Judge BAILEY, on the last Spring circuit at Cumberland Superior Court.

The prisoner was indicted for the murder of one Jacob Stewart.

Jacob Williams, a witness for the State, deposed that the neighbors had assembled at the house of one Daniel Stone, to assist him in log-rolling and grubbing: that the prisoner came to the new ground, where they were at work, and spoke to the crowd: a little before sunset the deceased started home accompanied by the witness: they proceeded about eighty yards and stopped, when the prisoner came up: witness turned back in the direction of Stone's house, and when he had proceeded about forty yards, heard the deceased and prisoner quarrelling. Pri-

soner cursed the deceased, and told him if he would come two steps, he would do something, which the witness did not understand: deceased replied, "if that is all you want you can have it," and advanced about that distance, when the prisoner leaned back or gave back a little, and he heard the pistol fire: deceased raised his grubbing hoe and said, "you have killed me and I will kill you." The prisoner fled, and the deceased pursued him some eight or ten steps and threw the grubbing hoe after him, but did not hit him: the deceased then came towards the company and said, "I am killed, I have got it in my breast, and he did it." Some of the company called to Johnson and told him to stop, when he did so and came back: the deceased, in this time had fallen, and died in about fifteen minutes after the discharge of the pistol: witness said, when the quarrel began, he turned back, and had got within thirty yards, at the time the pistol was fired. He further swore, that about a week before this occurrence, he was at the house of the deceased, and there met with the prisoner: they remained till after night, when the deceased told the prisoner he could not stay there that night, for that he had the chicken pox and might give it to his children: deceased opened the door and told him to go, whereupon, prisoner went out. After getting into the piazza, he cursed the deceased, and told him if he would come out he would kill him: deceased did not go out and prisoner went off. On cross examination he said when prisoner told deceased, "if he would come back, &c.," he was about 8 or 10 feet from the prisoner, and deceased advanced "pretty peart," with his grubbing hoe in his left hand: that the hoe was not raised higher than a man's knees: the pistol fired as he was advancing, and the bullet struck just above the left pap: said that there was ill blood between him (the witness) and the prisoner.

Daniel Stone, another witness for the State, testified that he was about sixty yards off when the pistol fired: did not see the prisoner raise the hoe, but immediately after the pistol fired, saw him raise it: prisoner fled, and deceased pursued him some eight or ten steps and threw the hoe at him: de-

ceased then walked a few steps and fell down. The prisoner had run off a short distance, but upon being informed that he had killed Stewart, returned to where deceased was lying. This was not more than five minutes after the firing of the pistol. Stewart died in about fifteen minutes after the wound was given. On cross examination, said, that at his house that evening, the two *appeared friendly*. He saw no evidence of hostility whatever. The wife of the witness washed for the prisoner: both this witness and the other (Williams) were brothers-in-law to the deceased.

Nancy Spence saw the prisoner on the morning of the day of the conflict, he then had two pistols and a bowie knife: she asked him what he intended to do with them, and he answered that he intended to kill somebody.

Cynthia Stewart, widow of the deceased, stated that the prisoner came to their house on the evening before the homicide, enquiring for the deceased: she told him where he was, (only a quarter of a mile off,) prisoner said he was going to Daniel Stone's any how, and would see him. Prisoner said he wanted to see deceased and another man, and know what they were mad with him about: said he wanted to talk friendly. Prisoner then showed her a bowie knife, which from curiosity she requested to see. She asked him what he had such a knife for? Said he would like to give the old man two or three cuts with it. Said he would cut if they would rush on him. Witness remonstrated with prisoner about carrying arms: prisoner listened to her and then got up, remarking that "when he was young they tried to keep him down, and couldn't, and now before they should, he would shoot and hang." Prisoner sat eating potatoes with the witness: seemed friendly: was not at all excited, and witness had no apprehensions that prisoner would do mischief to her husband or any one else; if she had thought so, she would have gone to Stone's and warned him.

Elihu Stone, (for the defendant,) swore that he was sixty or seventy yards off when he heard the parties quarrelling; they were both angry; witness advanced towards them, and when

within about twenty yards of them, he stumbled and looked down to the ground, instantly, he heard the report of the pistol; he looked up and deceased was in two or three feet of the defendant; saw him raise his grubbing hoe; heard the exclamation, you have killed me. States about the flight and pursuit and the casting of the hoe. This witness being further questioned as to the conduct of the parties at the beginning of contest, said that "when he stumbled the deceased and prisoner were eight or ten feet apart, that when he raised his eyes from the ground, and heard the report of the pistol, deceased was in two or three feet of the prisoner raising his hoe, that it was the deceased who advanced, for the prisoner had not changed his position. After a few minutes prisoner came up to where the deceased was lying and made an observation which was ruled out of the evidence.

Mary Anne Stone, wife of Daniel Stone, (for the defendant,) stated that when the prisoner came, he went into the house and enquired for a shirt, which she was to have washed for him, but it not being ready, he said he would wait for it that night; that he wanted to go to a party next day. Witness also stated that she saw prisoner and deceased together that evening and they appeared friendly, she had no reason to suppose there was ill blood between them.

Elizabeth Stone, (for defendant,) stated that she passed by the parties when they were standing in the path, seventy or eighty yards from the house, and she heard prisoner say to deceased, "Jacob, I want a word with you," which was spoken in a kind and friendly manner: she passed on and before she had proceeded far, heard the report of a pistol: she saw the two together at the "spell" that evening, and they appeared to her as friendly as most persons.

Larry Smith, (for defendant) stated that he was in the jail when the prisoner was brought there; that the same day, or the next, he saw a bruise on prisoner's arm about two or three inches wide, and of a blueish purple color.

Upon the above evidence, the prisoner's counsel asked the Court to charge the jury, that if they believed the deceased

was rushing on the prisoner with his grubbing hoe in such a position, as to induce the prisoner to believe that he would be immediately stricken with that weapon, and if the onset was so sudden and fierce that the prisoner could not fly without endangering his life, then that he was guilty of nothing, but it was a killing in self defense.

Secondly: that if the deceased rushed upon the prisoner with his grubbing hoe in such a position, as to induce the prisoner to believe that he would be immediately stricken, and the prisoner could have made his escape, and did not, but drew and shot the deceased, it would be but manslaughter.

His Honor declined giving the instruction asked for, but charged "that if they believed the prisoner bore malice towards the deceased, and there was no reconciliation between them, (and this was on the prisoner to show) then, although the deceased might have given what, under other circumstances would have been a legal provocation, as if he had assaulted prisoner with the hoe, or had actually struck him with it, it would be murder if the prisoner killed him: for the law would refer the killing to the malice and not to the provocation." Prisoner's counsel excepted to this charge. Verdict, guilty of murder. Judgment and appeal.

Attorney General, for State.
Banks and *Kelly*, for defendant.

PEARSON, J. The Judge charged—"if the jury believed the prisoner bore malice towards the deceased, and there was no reconciliation between them, (and this lies on the prisoner to show,) then, although the deceased might have given, what, under other circumstances, would have been a legal provocation—as if he had *assaulted the prisoner with the hoe or had actually stricken him with it*—it would be murder: for the law would refer the killing to the malice, and not to the provocation."

To this the prisoner excepts. There is error. His Honor, no doubt, gave these instructions upon what he conceived to

be the principle settled by *State* v. *Madison Johnson*, 1 Ired. 354. We have heard that the decision in Madison Johnson's case was not concurred in, by the profession. If it is supposed to have established and settled, as a general principle, the doctrine laid down by his Honor, the disapproval of the profession is not at all to be wondered at. But in point of fact the decision in that case does not announce or settle any such general principle. Owing to the very wide range taken by the judges in delivering their opinions, and because both opinions are very long, it is rendered difficult to determine what general principle is announced and settled; in fact, the circumstances under which any homicide is committed, are so numerous, and the details, in any one instance, differ so much from those attending any other case that has occurred, or that will hereafter occur, as to make it impossible to lay down any general rule or principle in regard to it. For this reason, the law does not attempt to trammel the action of the jury by any artificial or general rule, and it is left to their good sense to say, from the evidence, whether the act of killing was done because of the present provocation, or because of a deliberate intent to kill, previously formed, and then and there carried into effect, the provocation being a mere circumstance collateral to this wicked intent, which the prisoner would have carried into effect any how, or being a mere pretext, sought for as a cover to the wicked intent, previously formed and then acted on.

In *Madison Johnson's* case, a witness swore that at dinner time of the day on which the homicide was committed, the prisoner said, "he had bought powder and shot and intended to kill a man that night before the bell rang, and showed the pistol." He did, with the pistol, kill a man that night before the bell rang, (9 o'clock.) The judge, in the court below, charged, if the jury were satisfied that the deceased was the object of this threat, and the prisoner went to the shop with the intention to provoke a quarrel with the deceased, in order to gratify his avowed vengeance, the killing was murder, notwithstanding the provocation offered at the time. The

charge was approved by this Court. GASTON, J., in concluding his opinion, says, "In the case before us there is one thing which we can pronounce with certainty: If the prisoner did go to the place where he killed the deceased, *with intent to kill him*, (so the jury have found, and so, in our opinion, they were warranted to find,) there was no evidence, however slight, showing or tending to show, that this intention was abandoned before the act was done."

The principle settled by this decision, if the subject matter be susceptible of any principle, is this: if A says he will kill B, with a weapon which he then has, before a certain time, and the jury are satisfied, that in pursuance of this intent to kill, A goes to a place where he expects to meet B, and there kills him with the weapon, at the time named in his previous threat, the killing is murder, notwithstanding B gave to A a legal provocation just before the killing, unless A offers some evidence, showing or tending to show, that he had abandoned his intention to kill. The point about which the judges differ, is whether there is or is not a presumption, in the absence of any evidence except the provocation, that the intent to kill had been abandoned?

There can be no sort of question as to the correctness of the principle thus stated: in fact, it would suggest itself to the good sense of every juror without any instruction from the presiding Judge. But this is altogether a different principle, from that laid down by his Honor in the case before us, viz: "if A bears malice towards B, and they meet by accident, and upon a quarrel, B assaults A with a grubbing hoe, and actually strikes him with it, and thereupon A shoots B with a pistol, the killing is murder, because the law refers it to the *previous malice*, and not to the present provocation, unless A can prove that there had been a reconciliation."

A mere "grudge," or malice, in its general sense, is not sufficient to bring a case within the principle acted on in *Madison Johnson's* case: there must be a *particular* and *definite intent to kill*—as if the weapon with which the party intends to kill is shown, or the time and place are fixed on, and the

party goes to the place, at the time, for the purpose of meeting his adversary and with an intention to kill him; so that the provocation is a mere collateral circumstance, and the intent to kill existed before and independently of it.

For this error in the charge of his Honor, the prisoner is entitled to a *venire de novo*.

We express no opinion in regard to the alleged repugnancy in the two counts, because we take it for granted the objection will be removed by sending a new bill.

PER CURIAM. Judgment reversed.

PETER REEVES *vs.* JOSEPH S. BELL, ADM'R.

Under the act of 1789, an administrator, who has made advertisement for creditors to present their claims within two years, but who has not taken refunding bonds from the next of kin, on paying the surplus to them, is not protected against the action of a creditor, brought after such advertisement and payment over.

Whether a surety, who pays a debt (not due by specialty) after the action of the creditor is barred by the Act of 1715, can maintain an action against a co-surety for contribution. *Quere?*

ACTION ON THE CASE in assumpsit, submitted to his Honor, Judge CALDWELL, at the Spring Term, 1855, of Pitt Superior Court, upon the following case agreed, viz:

"Whitehard, with John Bell and Peter Reeves as sureties, gave his bond to Hanrahan, in 1845, for $200, on which Whitehard paid the accruing interest until January, 1852, when he became insolvent. The plaintiff, by compulsion, paid to Hanrahan the whole bond on the 1st of January, 1853, and having given noticed to the defendant, the administrator of his co-surety, brought this action for contribution.

John Bell, the co-surety, died intestate, in the year 1848; and the defendant, having duly qualified as his administrator,

at February term of Pitt county court, advertised for creditors to present their claims.

It is agreed, that before the plaintiff made this payment to Hanrahan, defendant had settled the estate of Bell, and paid over the residue to the next of kin, having advertised as above stated; but he took from them no refunding bond.

It was agreed, that if the court should be of opinion that the defendant was protected by the statute of limitations, judgment of nonsuit should be entered; but that if the court should be of a different opinion, judgment should be rendered for the plaintiff for $100 and costs.

Upon consideration of the case, his Honor, being of opinion with the plaintiff, rendered a judgment for him, according to the case agreed; from which the defendant appealed.

Attorney General, for plaintiff.
No counsel for defendant.

PEARSON, J. It is an interesting question, whether a surety who pays a debt (not due by specialty) after the action of the creditor is barred by the Act of 1715, can maintain an action against a co-surety for contribution? On the one hand, the cause of action, on the part of the surety, does not accrue until he pays the debt, and he may say, the statute did not begin to run as against him, until his cause of action accrued: On the other, the co-surety may say, the cause of action of the creditor having accrued when the debt fell due, which is more than three years before you commenced your action, the creditor was barred by the statute, and you were under no obligation, and of course had no right to pay the debt and thereby subject me to the payment of one half: your payment was not made at my instance and request, so you cannot charge me as for money paid to my use. The facts in the case do not present this question, and we are not at liberty to give our opinion in regard to it.

This case turns upon the construction of the Act of 1789. Executors and administrators are required to make advertise-

ment for creditors to present their claims within two years; and at the expiration of two years, executors and administrators are required to pay over the surplus, after deducting the necessary charges, and the amount of debts paid within two years after administration granted, to the legatees or next of kin, taking a refunding bond, payable to the State, for "the use and advantage" of the creditors of the deceased, to be proceeded on by *sci. fa.* &c. And it is further provided, that if a creditor shall fail, within two years after administration granted, to bring an action against the executor or administrator, who has made advertisement as required, the action of such creditor shall be barred. If the action of the original creditor was barred, we are inclined to the opinion, that a surety, who afterwards pays the debt, can stand in no better situation; so the question is, was the action of the original creditor barred?

The administrator had made advertisement as required by law, but he had neglected to take the refunding bonds as required by law; could he, if sued by the original creditor, have barred the action, on the ground that it was not commenced within two years after administration granted, without an averment *that he had taken refunding bonds?* We think this averment necessary in order to bar the action.

For the ease of executors and administrators and for the convenience of legatees and distributees, the former are required to pay legacies and distributive shares, at the end of two years, taking refunding bonds "for the use and advantage of the creditors" who may not have been paid. And executors and administrators, provided they have made advertisement, may bar the action of all creditors who have neglected to sue within two years.

These several enactments, according to well established rules of construction, are all to be taken together, and the amount of it is, that an executor or administrator, may, after two years, bar the action against himself, provided he has made advertisement, and has taken a refunding bond "for the use and advantage of the creditors," so that he may say, here is a

bond payable to the State, upon which you may recover your debt. I was required by law to take it for your "use and advantage," and thereby relieved myself from all further liability.

For the sake of illustration, take the case of a debt due by specialty: there is no general statute of limitations; the executor or administrator cannot protect himself, except by the presumption of payment, or by the act of 1784, (called the seven years bar:) the creditor sues after the two years; it is admitted that he cannot maintain his action against the executor or administrator, provided advertisement has been made and refunding bonds have been taken as required by law; but most assuredly, the *specialty creditor* does not forfeit his debt by neglecting to sue within two years after administration granted; and the meaning of the act of 1789, is simply to enable the executor or administrator to "ward off" the action against himself, provided he has taken the proper step to provide the creditor with an action upon the refunding bond.

We fully concur with his Honor, who decided the case below, as to the construction of the Act of 1789.

PER CURIAM. Judgment affirmed.

STATE *vs.* JOSEPH T. WILLIAMS.

The maxim "*falsum in uno, falsum in omnibus*," is, in a common law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the Judge may withdraw the evidence from their consideration, or direct them to disregard it altogether.

BATTLE, J. Where a witness has wilfully perjured himself in the oath taken on the trial then in progress, in any one particular, the Court should instruct the jury, as a rule of law, that his whole testimony should be disregarded.

INDICTMENT for MURDER, tried before his Honor Judge DICK, at the Spring Term, 1855, of Person Superior Court.

On the trial, a witness by the name of *Jordan Motly*, having been examined on behalf of the prosecution, was asked,

upon his cross examination, whether he had made as full a disclosure to the grand jury (before whom he had been sworn) as he had done on this trial? He answered that he had not: that some of the acts and declarations of the prisoner, he had never disclosed heretofore, except to the State's counsel: that his motive for making this suppression was to favor the prisoner: that in certain communications, which had passed between them, the prisoner had appealed to him, and said a full disclosure would go hard with him, and he had promised the prisoner not to testify against him, any further than he was compelled: that in pursuance of this promise, he proposed to the grand jury, on his examination before them, that he would answer such questions as they might think proper to ask him; to which they acceded: so far as he was interrogated, he stated before that body every thing truly; but as to the things that had been added in his present statement, he was not questioned, and so he avoided giving them in evidence.

The prisoner's counsel called on the Court to instruct the jury, that as the witness stood convicted, by his own confession of a perjury, in wilfully suppressing the truth before the grand jury, they should not take his evidence into consideration in making up their verdict.

His Honor declined giving the instruction, as asked; but told them that "the objection taken, went to the credibility of the witness, and they were at liberty to take into consideration his evidence, in connection with the other evidence and to say what it was worth."

To which the defendant's counsel excepted. Verdict of guilty. Judgment and appeal.

Attorney General, for the State.
Morehead and *Miller*, for defendant.

PEARSON, J. The instruction was asked for upon the authority of *State* v. *Jim*, 1 Dev. 509. Conceding that perjury is committed, as well by the corrupt suppression of truth, as by the suggestion of falsehood, and that the matter suppressed

by the witness before the grand jury was material, the question is presented, does the decision in that case settle, as a rule of evidence in the Common Law Courts, the doctrine contended for by the prisoner's counsel?

This question has been fully discussed: we have had the aid of two arguments at this term, for it so happened that the same point was made in *State* v. *Alfred Woodly*. (See next case.) There, the examination of the principal witness on the part of the State, taken in writing by the committing magistrate, varied from his testimony before the jury, and his Honor, Judge PERSON, held that if the jury were satisfied that any material part of his testimony, given before them, was corruptly false, the whole must be rejected: but that if perjury was committed upon his examination before the magistrate, "the rule" did not apply, and the evidence was to be weighed by the jury.

The *Attorney General* insisted that this was the proper limit of the rule, and that it had no application unless a false oath was taken before the jury who were trying the issue. He admitted this distinction was not taken in *Jim's* case—there the variance was between the testimony given to the jury who were trying the issue, and that given to a jury on a former trial; but he contended that without this distinction, trials would become so complicated as to render it impossible to reach the merits, and cases would turn, not upon the question of guilt, but upon the conflict of testimony. He suggested as a further ground in support of the distinction, when the false oath is taken *before* the trial, there is *locus penitentiæ*, and reason to suppose, more or less probable in proportion to the interval of time between the two oaths, that the witness has reformed and become a better man: whereas there is no room for reformation when the false oath is taken presently—before the jury who are trying the issue.

The *first* ground may have some force as an objection to the rule itself; but it has no tendency to fix the limit of the rule, because it rests entirely upon the *degree* of inconvenience, which, having no limit of its own, can make none for the rule.

The *second* is too narrow to be made the foundation of a rule of law: For that purpose, it would seem, something broader is necessary than the possibility that one who committed perjury yesterday, had, by to-day "reformed and become a better man." Besides, it is opposed to the analogy of the rule of evidence, of which the rule under consideration is a corrollary. One convicted of perjury, is an incompetent witness, although the offense was committed ten years ago. No regard, whatever, is paid to the length of time during which there was room for reformation, and the possibility that the witness "had seen the error of his ways."

The proper limit of the rule must depend on the reason on which it is founded: The reason given for it is, that "there is no difference in principle and should be none in practice, between a person heretofore *judicially* convicted of perjury and one who stands convicted, before the jury who are trying the issue, of a perjury committed in the case."

The reason includes any perjury committed during the progress of the case, of which the *evidence before the jury* is sufficient to convict the witness: of course the rule must be equally broad in its operation.

The notion, that the operation of the rule is limited to cases where perjury is committed before the jury who are trying the issue, is not supported by any authority or even a *dictum* to be met with in the books; on the contrary, it is opposed by the only two cases in which the existence of the rule is supposed to be recognised and acted on by a court of Common Law. In *Jim's case*, the false oath was supposed to have been taken upon a former trial, or rather it was considered immaterial to ascertain upon which trial the false oath was taken, it being sufficient for the jury to be satisfied from the evidence before them, that a false oath had been taken, of which the variance between these two oaths was plenary proof. In *Dunlap* v. *Patterson*, 5 Cow. 243, (the only other case to be met with where the rule is acted on) the false oath had been taken in the trial of an action between different parties, although in regard to the same subject matter.

We are satisfied there is nothing in principle, analogy or authority, to restrain the operation of the rule to cases where perjury is committed before a jury who are trying the issue: on the contrary, the authorities, the analogy and the principle, upon which it is founded, bring within its operation, every case in which the jury, from the evidence before them, are satisfied that a witness has committed perjury. The rule gives to the conclusion of the jury the effect, and treats it as tantamount to a judicial conviction of perjury, and is put upon the single point, are the jury satisfied that the witness has committed perjury? If so, he is just as unworthy of belief as if he had been judicially convicted of it, without reference to the fact whether the perjury was committed upon a former trial of the issue, or before the committing magistrate or the grand jury, or the jury who are then trying the issue.

So the broad question is, does *Jim's case* settle any rule of evidence, to be acted on by a Court of Common Law where a jury is interposed for the trial of all cases of fact?

The point decided in *Jim's* case is this: the Judge, in the court below, charged the jury that "evincing a sound discretion, they might reject part of a witness' testimony which they did not believe, and act on such part as they did believe." To this the prisoner excepted, and this Court award a *venire de novo* for error in the charge. *Mr. Badger*, *amicus curiæ*, suggested that if the jury thought a witness had sworn corruptly false, in any particular, they should disregard the testimony of such witness *in toto:* He stated "the reason of the rule to be, that the jury had, *quoad* the particular case, judicially ascertained the corruption of the witness, and therefore as to *that case* the result was the same, as in all other cases, where the corruption was judicially ascertained by a conviction for perjury." *Mr. Devereux*, in place of the Attorney General, admitted the rule to be as stated by Mr. Badger. HENDERSON, Judge, adopts the reasoning of Mr. Badger, and comes to the conclusion that the Judge below erred: he says, "I can see no difference in principle, and if so, there should be none in practice, between a person heretofore convicted,

and one who stands convicted before the jury in the case they are trying. Hence the maxim *falsum in uno, falsum in omnibus.*"

TAYLOR, Ch. Justice, also comes to the conclusion that the Judge below erred: but he puts his opinion upon a different ground, to wit, "our faith cannot be *partial* or *fractional*, the maxim being *falsum in uno*, &c.:" and the Judges agree, that as the jury may have been misled by the charge, and the case affects the life of the prisoner, there should be a *venire de novo.*

No authority is cited by the counsel, or by either of the Judges, and the question is, was it their intention and the scope of the decision, merely to say that the Judge erred in telling the jury that they might reject part of a witness' testimony, which they believed to be corruptly false, and act on such part as they did believe? Or, did the Judges intend to import and make a part of the Common Law, a maxim of the Civil Law, which is not applicable to a trial by jury, and for which there is no authority, analogy or principle?

After much reflection, we have come to the conclusion that the decision in *Jim's case* was misunderstood; and this accounts for the fact (which we have by tradition) that it was not concurred in by the profession, or the Judges on the circuit. This misconception grew out of the inference, that as the decision in *Jim's case* prevented the Judge from encroaching upon the province of the jury by telling them they might act upon the testimony of a witness, whose evidence they believed to be corruptly false, it followed that the Judge had a right to encroach upon the province of the jury by withdrawing from them the testimony of a witness, upon the hypothesis, that the jury unanimously agreed that he had, in some part of the case, or the proceeding thereon, sworn corruptly false, so that they would convict him of perjury, if he was then on trial, from the evidence before them. This is evidently a *non sequitur.* In either case the question is one for the jury, and the Judge has no right to interfere by any artificial or fixed rule of Law.

We shall believe our proposition established if it appear that there is no authority, legal analogy or principle, in regard to the trial by jury, which will sustain any such rule of evidence as a matter of law, to be given in charge by the Judge to the jury. It cannot be assumed that the court in *Jim's case* intended to make a new rule of evidence.

Any one, upon the first blush, after reading *Jim's case*, would suppose that he could hardly open an English law book without meeting with the general rule "*falsum in uno, falsum in omnibus*," yet, strange as it may seem, he will not be able to find the rule laid down in any English book of reports or by any writer upon evidence. This is not merely full negative proof against the existence of any such rule, but there is full positive proof that there is no such rule. *King* v. *Teal and others*, 11 East Rep. 307, (decided in 1809) was an indictment, in the King's Bench, for conspiring falsely to charge the prosecutor with being the father of a bastard child, born of the body of Hannah Stringer, one of the defendants. A *nol. pros.* was entered as to her, and she was called as a witness for the Crown. She swore that *Teal* was, in fact, the father of her child: and that he had procured her to swear falsely, that the prosecutor was the father of it. Teal and another were convicted. *Cockell*, sergeant, was heard, as upon a rule for a new trial. The train of his argument was much the same as that of Mr. Badger. He urged that if the witness had been convicted of perjury, she could not have been examined at all, unless restored to credit by the King's pardon—that it was not the *punishment* that worked the infamy, but the *crime*, and it made no difference whether the infamy was found by a verdict, or by the confession of the party tendered as a witness. Being asked by the Court, "what he had to say to the common case of an accomplice giving evidence, though admitting himself guilty of a fact such as treason, which, if convicted of it, would render him incompetent?" he answered that there the accomplice did not admit himself guilty of the very *crimen falsi* which showed him unworthy of being believed. He then insisted much upon the case of

Titus Oates, 4 St. Tri. 47, where the evidence of a witness, that he had before perjured himself, at the suggestion of the defendant was rejected, though the witness had not been convicted of perjury, and said this decision was approved of in *Canning's case*, 10 St. Tri. 390. "Upon the same principle," he said, "one who admits himself to be an infidel is disqualified to be a witness." Lord ELLENBOROUGH, Ch. J. "An infidel cannot admit the obligation of an oath at all, and cannot, therefore, give evidence under the sanction of it. But though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath though it may be a good reason for the jury, if satisfied that he had sworn falsely upon the particular point, to discredit his evidence altogether. But still that will not warrant the *rejection of the evidence* by the Judge. It only *goes to the credit of the witness* on which the jury are to decide." *Cockell* resumed his argument. Lord Chief Baron GILBERT says, "another thing that derogates from the credit of a witness is, if upon oath he affirm directly contrary to what he asserted. This takes from the witness all credibility inasmuch as contraries cannot be true:" and again he says, "if the mother of a bastard charges two persons, she looses her credibility and cannot charge either of them." Lord ELLENBOROUGH observed that these passages, contrasted with others, pointed at the distinction between competency and credibility and then called on Cockell to state his other objection. At the next term, Lord ELLENBOROUGH said the court had considered the objections, and were of opinion, "that there was no foundation for either of them."

From that time up to the present, the law in England has been settled: "settled" is not the proper term, for it never was unsettled; but from that time up to this, there has not been even a suggestion, that the rule *falsum in uno*, &c., existed as a rule of evidence, to be enforced by the court in the common law courts.

We have not, of course, looked at every English case, but

we have the concurring testimony of all the writers that such is the fact. Phillips, Starkie, Chitty Crim. L., and Greenleaf, all treat the fact, that a witness, who contradicts himself, or confesses that he had sworn falsely, or when it is proven that he has made contradictory statements, either when on oath or not on oath, as tending to impeach his testimony before the jury, who are to weigh it, and to give to it the degree of credit to which they may think it entitled, just as they do the evidence of an accomplice, in which connection they treat of the subject; and the idea that the evidence must be withdrawn from the jury by the court under the rule *falsum in uno*, &c., never is heard of.

Dunlap v. *Patterson*, 5 Cowen 243, was decided by the Supreme Court of New York in 1825. The action was trover, for the conversion of a boat: To prove that the boat was his property, the plaintiff called one *Fuller*, who swore that he purchased the boat for the plaintiff, as his agent. Upon cross-examination, Fuller acknowledged that he had, in an action for the boat between other parties, sworn that the boat belonged to him, and that he had purchased it for himself, and not as the agent of the plaintiff. A motion was made to *non-suit* the plaintiff, on the ground that Fuller's testimony should be rejected, and so, the plaintiff had offered no evidence of title. The court below refused the motion, and charged the jury that "Fuller was a competent witness, whose testimony should go to the jury, who might *give it that weight which they thought it deserved.*" In the court above, WOODWORTH, Judge, who delivers the opinion, says this part of the charge is "manifestly erroneous," and the court decide that there was error in leaving the evidence of Fuller to be weighed by the jury instead of directing the plaintiff to be non-suited: on the ground, that the "unsupported testimony of a witness, who swore at one time in direct contradiction to the testimony given by him at another, in relation to the same transaction, was not entitled to credit, and ought not to be regarded." Although in reference to another point, he cites many cases, yet, in regard to this, the learned Judge cites none, and contents himself with

some general reasoning, such as ought to influence the tribunal which is to try the issue of fact, but he gives no reason why the court should invade the province of the jury, and tell them what should regulate their belief. This case, is like a witness who proves too much: for it goes beyond the rule supposed to be laid down in *Jim's case*, and includes a false oath taken by the witness in an action between other parties. We leave it with the single remark, that the court does not seem to have apprehended the distinction between matter which affects the competency of a witness, and that which affects his credit, although the distinction had been well taken in the court below.

Ingram v. *Watkins*, 1 Dev. and Bat. Rep. 442, was decided in 1836. One *Joseph Colson*, a witness, called by the defendant, swore, among other things, that his father (under whom defendant set up title) had claimed a certain house as being upon his land, *but had never lived in it.* For the purpose of discrediting this witness, the plaintiff offered to show, that on a former trial, between the same parties, he had sworn that his father claimed and had *occupied* the house. This evidence was objected to, unless the witness could undertake to state, in substance, all that the witness, whom it was the object of the plaintiff to impeach, had sworn to on the former trial: which it was admitted he was unable to do. The evidence was received, and for this the defendant excepted. The exception was not sustained. GASTON, J., in delivering the opinion remarks, "It was the purpose of the plaintiff to bring the former testimony of the witness to the notice of the jury, as conflicting with his testimony on the present trial, and thereby *satisfy them* that the witness was not a man of veracity. "*To impeach the credit of a witness*, one clear and advised contradiction is sufficient, since it is the rule of law, and of good sense, that he who falsifies himself in one point, is undeserving of belief in all—"*falsus in uno, falsus in omnibus:*" no more, therefore, of the witness' former declaration is necessary to be heard, than what is charged to be repugnant to his present statement."

This case was cited, we are told, for the purpose of showing that there is such a maxim as *falsum in uno, &c.* It is agreed on all hands, that there is such a maxim, which addresses itself with more or less force, according to circumstances, to the tribunal which is to dispose of the issues of fact: but the question is, has this maxim been adopted as a rule of evidence to be acted on by the court, by which evidence is to be withdrawn from the jury, and treated as if the witness was incompetent? Was that the decision in *Jim's case?* We apprehend that this case is directly opposed to the inference that such was the decision. In the court below, it was offered to show that the witness had contradicted himself, for the purpose of discrediting him before the jury: the evidence was admitted. Why did not the plaintiff's counsel then insist that the testimony of the witness must, *by a rule of law*, be withdrawn from the jury upon the authority of Jim's case? In the court above, the evidence to contradict was held to have been properly admitted, as tending to satisfy the jury that the impeached witness was not a man of veracity, and the maxim *falsum in uno*, &c., is referred to as a rule of law, and of good sense, whereby the credit of a witness may be impeached before a jury. No reference whatever is made to *Jim's case*, or to the idea that the evidence was to be withdrawn from the jury by the court, by force of a rule of law; so that Jim's case is passed by in silence and disregarded, and thereby impliedly overruled, unless we suppose that the court considered that case as having decided no more than that the maxim, *falsum in uno*, was a matter that might be suggested to the jury as fit for their consideration.

State v. *Peace*, 1 Jones' Rep. 226, (1854.) A witness for the State, on cross-examination, said she could not tell whether a tree standing in the yard was a quarter of a mile or less from the house. It was held, that supposing the rule to be as expounded in *State* v. *Jim*, it did not apply, because the matter was immaterial. The court did not feel at liberty to go out of its way in order to discuss the decision in Jim's case; so this has no force on either side.

In re Sanctissima Trinidad, 7 Wheaton 338, was in the admiralty court, and has no bearing on account of the difference between a court where the facts are decided by a *fixed tribunal*, and courts where it is the province of a jury to decide the issues of fact, as we shall take occasion to show below.

The result is, that the construction put on *Jim's case*, has no other support but *Dunlap* v. *Patterson*, and that stands by itself as the only instance in which a court of common law has converted the maxim, "*falsum in uno*, &c.," into a rule of the law of evidence, to be enforced by the court, and is opposed by all the decisions that have ever been made in any other common law court!!

Next as to analogy. If a witness admits that he has committed murder or burglary, *State* v. *Valentine*, 7 Ire. Rep. 225, or felony in stealing a slave, *State* v. *Haney*, 2 Dev. and Bat. 390, he is nevertheless a competent witness, and his testimony is to be *weighed by the jury*, and they may *convict upon it*, provided it "carries to their minds full and entire conviction of its truth." Where is the difference between a witness who confesses that he has been guilty of these crimes and one who confesses that he has committed perjury? The idea that the latter was a confession of the *crimen falsi* is suggested by Cockell in *King* v. *Teal:* but the court said there was nothing in it; because murder, burglary, &c., are crimes of a higher nature, and include, not merely a disregard of truth, but a disregard of all obligations and a total depravity and wickedness of heart: consequently a system of law would not be true to itself, which permitted the testimony of the former to be weighed by the jury, but required the testimony of the latter to be withdrawn from their consideration. This must be so, according to the maxim, "the greater includes the less." All the writers upon evidence treat of the evidence of an accomplice and the impeachment of a witness, by his confession, or by contradictory statements, in the same connection. So the analogy of the law is opposed to the construction which has been put on *Jim's case.*

Next, as to the principle or reason upon which such a rule

of evidence is based. Without discussing the relative merits of a fixed tribunal for the trial of facts, and the trial by jury, suffice it, that the common law prefers the latter, and considers it safer in the investigation of facts, to depend upon the *good sense of a jury*, than upon the *knowledge of a judge;* for the reason, that juries take a common sense view of every question, according to its peculiar circumstances; whereas a judge generalises, and reduces every thing to an artificial system, formed by study. Best on the principles of evidence, 66 vol. Law Library sec. 78. Jurors are not lawyers, or men acquainted with formal proceedings, but they are supposed to be men of ordinary good sense, somewhat acquainted with human nature, and with the motives and views that usually influence parties, and witnesses, and it is presumed that if the question to be decided is pointed out to them, and all incompetent evidence is excluded, they are more apt to arrive at the truth, than any other tribunal.

The charge of the Judge directs the attention of the jury to the question to be decided; his control over the *admissibility of evidence* excludes all that is incompetent, and the jury are relied on to find the truth. It is the exclusive province of the jury to decide issues of fact, and to pass upon the credit of witnesses; when the credit of a witness is to be passed on, each juror is called on to say, whether he believes him or not; this belief is personal, individual, and depends upon an infinite variety of circumstances; any attempt to regulate or control it, by a fixed rule, is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury, and calculated to take from it the chief excellence, on account of which it is preferred by the common law to any other mode of trial and to adopt in its place the chief objection to a fixed tribunal. "Do I believe what that witness has sworn to?" is a question for each juror. The statement may be more or less probable, and in accordance with the way in which men act and things occur. It may be more or less corroborated by the testimony of other witnesses and the attendant circumstances. The manner of the witness, even his looks, may impress my

mind, more or less favorably, and this is the reason every witness is required, by the common law, to be examined in the presence of the jury. Is it practicable to frame a general rule by which my belief must be regulated? Take the case of a witness, whose testimony upon a former trial, varies in a material particular from that he now swears to, which is *Jim's case:* if the jury come to the conclusion that the oath now taken is false, they, of course, will give no credit to him; and a rule of law to that effect would be useless; but if they are satisfied that what he now swears is true, from which it follows that what he swore to on the former trial is false, then this rule of evidence excludes the truth; or rather, that which must be taken as true, before the rule can be applied.

Again: a witness denies that he made a different statement on the former trial, and it is proved that he did (as in *Jim's* case) by direct testimony; or it is proven by the written examination taken by the committing magistrate, in regard to which it is urged that the magistrate puts down the testimony in his own language, and does not adopt the very words used by the witness, which may account for the discrepancy, as in the *State* v. *Woodly* at this term; or the witness may confess that he had sworn differently before, and give as a reason, that he was induced so to swear, on account of threats that had been made against him; or that he was induced to suppress the truth by an undue influence exerted over him by the prisoner, or from motives of pity and with a view to favor him, (as in the present case,) and then there may be a question, whether this alleged favor to the prisoner was real, or a mere pretext adopted by the witness in order to have its effect with the jury? Is it practicable to frame a fixed rule to cover all of these different phases which the case may present?

Again: according to the supposed rule, the testimony of a witness is not to be excluded unless the jury, if he was then upon his trial, would convict him of perjury from the evidence before them; so the jury are to stop their enquiry as to the guilt of the prisoner, and put the witness on trial for perjury: if they *all* agree that he is perjured, the rule is useless. But

suppose eleven of the jury believe he has committed perjury and one dissent; then the supposed rule has no application, for it is not "the same in principle or practice, as if he had been *judicially* convicted of perjury," because this informal trial to which the jury are to subject the witness, has not resulted in his conviction by the *unanimous* verdict or conclusion of the jury; so the rule cannot be applied; each juror is left to give such weight to the testimony of the witness as, in his opinion, it is entitled to, and the only effect is, to introduce *a trial within a trial*, and thereby make the matter more complicated and difficult of solution.

For these reasons we are satisfied the decision in *Jim's case* has been misunderstood. It is *indecent* to suppose that the very learned counsel and the eminent Judges could have intended, without, or rather in defiance of authority, analogy or principle, to introduce a new rule as a law of evidence in a trial by jury, and more particularly that they should intend to do so in an opinion overruling the decision below, because the Judge did not allow the jury to weigh, without the influence of his opinion, the credibility of a witness.

Should it be asked, how did it happen that the counsel and the Judge, who took part in the trial of Jim's case, all used language which, it is assumed, did mislead the profession? we would venture to suggest this answer: it was the result of a misconception, whereby a maxim or "general rule," which had been adopted and acted on by the fixed tribunals for the decision of facts, according to the civil law and by the Judges in the Ecclesiastical Courts, and the Courts of Admiralty, and the Courts of Equity, which are fixed tribunals, for the decision of questions of fact, and mere emanations from the Civil Law, was assumed to be a rule of evidence in the courts of Common Law, without referring to the authorities or the legal analogy, or to the principle and "reason of the thing" growing out of the difference between the trial of facts by a jury, "a casual tribunal" selected for that particular trial, and the trial of facts by a fixed tribunal, the tendency of which is to generalise and reduce every case to an artificial system or rule formed by study.

So we are satisfied that nothing in *Jim's* case, when properly understood, nor any rule of evidence in the Common Law Courts, made it error in the presiding Judge to refuse to charge the jury, that if they believed that the witness had made a different statement before the grand jury, or had omitted to make the same he had made to them, they ought to acquit: and we think the Judge did his duty in leaving the whole matter as a question for the consideration of the jury.

In regard to the objection that upon the arraignment, the prisoners being asked how they would acquit themselves, said "they were not guilty;" which, as is contended, is a *joint* plea, and put upon the State the *onus* of proving that both of them were guilty: it is decided, in *State* v. *Smith*, 2 Ired. 402, that the general issue is always a several plea, and in this case it was so treated; for the other prisoner continued the case and this prisoner removed his for trial to the county of Person.

In regard to the objection that it does not appear from the record that the prisoner was asked "if he had any thing to say why sentence of death should not be pronounced against him?" it appears from the record that the prisoner was in court—moved for a *venire de novo*—was sentenced and prayed an appeal to this Court. It is true, according to the authorities read by the prisoner's counsel, it was held in England by many old cases to be error, unless the record showed that the prisoner, before sentence pronounced, was asked "if he had any thing to say, &c.;" for it may be that he might have had ground for a motion in arrest, or might have pleaded a pardon. These cases have no application to the condition of things under which the law is administered in this State. Here the prisoner is in court, and before he is sentenced has a right to urge any objection that he pleases to make. He is entitled to have the benefit of counsel, who may urge in his behalf any ground in arrest. A pardon will avail him at any time before execution done; and having prayed an appeal, he has a right *here now*, to make any motion in arrest, that he could have made in the court below, if he had been asked after his motion for a *venire de novo* was refused, if he had any thing further to say why sentence of death should not be pronounced.

BATTLE, J. I concur in the decision that the prisoner is not entitled, either to a *venire de novo* or to an arrest of judgment. Upon one only of the questions discussed by my brother PEARSON, do my views differ so much from his, as to require from me a separate opinion. Upon the maxim of "*falsum in uno falsum in omnibus*," I think that the charge of the presiding Judge in the court below was in precise accordance with the decision of this Court at June Term, 1828, in the case of the *State* v. *Jim*, 1 Dev. Rep. 508, and that we are not called upon to question the propriety of that decision in the slightest degree. As a solemn adjudication of this Court, it demands my respect: as the announcement of a safe and valuable rule of evidence for the guidance of juries, it receives my approbation. I am aware that, practically, its observance by the jury cannot always be enforced by the court: for instance, if a witness testifying for a prisoner, were guilty of the most apparent perjury in a material part of his testimony, and the court should instruct the jury in the strongest manner that the testimony of the witness was to be disregarded altogether, there would be no way of correcting a wilful error committed by the jury in acquitting the prisoner in defiance of the charge; but the doctrine, that a rule, whose general operation is beneficial, is to be discarded because it may sometimes be ineffectual, or even baneful, has long since been exploded. The argument, if available to destroy the present rule, will be equally so against that which makes it the duty of the court, and not the jury, to decide questions of law in a criminal case. We gave our sanction to that important rule in the case of the *State* v. *Peace*, 1 Jones' Rep. 251, and yet it is well known that juries will sometimes bring in verdicts of acquittal, in capital cases, without any sufficient evidence to support them, and against the most decided instructions from the court. Thinking, as I do, that the maxim of "*falsum in uno falsum in omnibus*" affords a most salutary conservative rule of evidence, especially in capital trials, I will proceed to show that it was established in *Jim's* case, just as it was understood and applied by his Honor who presided at the trial of the case which is now before us.

Jim, a slave, was indicted under an act of Assembly which made it a capital felony for a colored person to assault a white female, with the intent to commit a rape upon her. After a former trial and conviction, a *venire de novo* was awarded to him, and he was put upon his trial again, when the only witness called to prove the assault, was a female, whose moral character was shown to be bad: to impeach her still further, a gentleman of the bar, who had been present at the former trial, was introduced as a witness, and stated several material particulars in which her testimony varied, on the latter, from what it had been on the former examination. The Judge, in commenting upon her testimony, and stating what degree of credit ought to be attached to it, told the jury that "they might, exercising a sound discretion, reject part of a witness' testimony, which they did not believe, and act upon such part as they did believe." The prisoner was found guilty, and moved for a new trial, assigning as a ground for it, error in the above instruction. This motion was overruled and judgment pronounced, from which he appealed. Now, in order to understand the decision of this Court, it is necessary that we should ascertain the precise point ruled by the court below. The question before the court and jury was whether the testimony of the female witness was at all to be relied on for any purpose? The charge of his Honor assumed that a material part of it might be false and another part true. False and true when? Of course, on the trial then in progress: for if the Judge had adverted to the fact that the false part of it had been given on the former trial, and that all she swore on the latter was true, it would not have admitted of the distinction of parts. The important enquiry for both the court and the jury was, "is she speaking the truth now? is she to be believed now—on this trial?" The proof of false swearing on a former occasion, if found, was assumed as proof of false swearing, at least in part, on the latter. It was on this supposition that the charge was given. It applied to the belief of the jury as to the testimony as they heard it, and they were told, in effect, that though they might think the witness had then perjured

herself in stating some material fact, yet they were at liberty to rely on other material facts testified to by her. I think it almost certain that the counsel, who acted as *amicus curiæ* in this Court, so understood the charge. Had he referred to a perjury, committed by the witness on a former trial, in court, or before the grand jury, or before an examining magistrate, he would no doubt have distinctly so stated: instead thereof "he stated the reason of the rule to be, that the jury had *quoad* the particular case, *judicially* ascertained the corruption of the witness, and therefore, as to *that* case, the result was the same as in all other cases where the corruption was judicially ascertained by a conviction for perjury." Now that he meant that the jury must find the perjury to have been committed on the trial then going on, and not on any former occasion in the previous stages of the cause, is manifest from the consideration that the first position is a reasonable and proper one, and the other, in most cases, involves an absurdity. There are various reasons which may induce a jury to come to a conclusion that a witness has perjured himself in his testimony before them: among these reasons one is, that he has sworn differently on a former trial of the case, and another that he has made contradictory statements out of court: if, in any way, the jury believe him corrupt, they ought not to rely on him. In a capital case they ought not to put a man's life in peril by attempting the difficult operation of separating the sound from the unsound part of a corrupt witness' testimony. The first position then, is but the establishment of a safe and conservative rule of evidence of great value. But the second, as I have said, in most cases involves an absurdity. If the jury believe the witness swore willfully false on a former occasion, they must come to that conclusion by finding that she swore truly on the trial, and then they are bound to acquit the prisoner just at the moment, when by believing the testimony, they are convinced of his guilt.

From these views I am satisfied that the *amicus curiæ* understood the charge of the Judge in *Jim's* case as I do: if so, it cannot be denied that both TAYLOR, C. J., and HENDERSON J.,

who delivered opinions in this Court, may have understood it in the same light, and thereupon intended to lay down the rule in the very terms for which I am contending. The following language extracted from the opinions of these eminent Judges, seems to me to be hardly susceptible of any other interpretation: "I believe that all the writers on the law of evidence lay down the rule, that a witness who gives false testimony as to one particular, cannot be credited as to any, the maxim being *falsum in uno falsum in omnibus.* And it is very reasonable that it should be so; for the general presumption that a witness will tell the truth, is overthrown when it is shown that he is capable of perjury." "I can see no difference in principle, and if so, there should be none in practice, between a person heretofore convicted, and one who stands convicted before the jury in the case they are trying. Hence the maxim *falsum in uno falsum in omnibus.*" These expressions seem to me to point directly to the testimony given on the trial, and apply to its falsity *then* and not elsewhere or otherwise. So understood, they established a rule under which I acted while I had the honor of a seat on the superior court bench—a rule of which the Judge who presided at the trial of the case which we are now considering, gave the prisoner the benefit, and for refusing to extend which, as required by his counsel, the prisoner has no just cause of complaint.

PER CURIAM. Judgment affirmed.

STATE *vs.* ALFRED WOODLY.

Every material averment, necessary to constitute a substantive offense, must be charged in the indictment and proved on the trial, by the State.

Therefore, where it is alleged in an indictment, that the defendant *did carry, convey and conceal* a slave, *without the consent in writing of the owner* of such slave, with the intent he should escape beyond the limits of the State, it is incumbent on the State to prove that such notice in writing was not given.

THIS was an INDICTMENT, tried before PERSON, Judge, for car-

rying, conveying and concealing a slave, in order that he might escape; at Spring Term, 1855, of Bertie Superior Court.

The first count in the indictment was as follows, viz:

"State of North Carolina, } Superior Court of Law, Spring
Bertie County. } Term, 1855.

The jurors for the State, upon their oath present, that Alfred Woodly, and Richard Wynns, free persons of color, late of said county, with force and arms, at and in Bertie county aforesaid, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and fifty-five, did, wickedly, wilfully and feloniously, carry, convey and conceal a certain negro slave, named Anthony, the property of one Tristram L. Skinner, executor of Joshua Skinner, deceased, he the said Tristram L. Skinner, then and there, being a citizen of this State, to wit, North Carolina aforesaid, without the consent in writing of the said Tristram L. Skinner, the owner of said slave, previously to the felonious carrying, conveying and concealing aforesaid of the slave aforesaid, obtained, with the intent, and for the purpose, then and there, of carrying and conveying said slave, Anthony, out of the limits of the said State, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State."

There were various other counts: the 2nd, charging that the defendants "feloniously, wickedly and wilfully, did take and conceal, and then and there, did permit and suffer the same to be done, without the consent in writing of the said Tristram," &c., "with the intent of *carrying* and *conveying* the said slave, &c."

The 3rd count is like the 1st, only it charges the property as belonging to Tristram L. Skinner, without naming him as executor, and alleges the *intent* to be "for the purpose then and there of enabling said slave, Anthony, to effect an escape out of the State."

There were other counts varying the allegation of ownership, and somewhat varying the other allegations, but substantially charging as in one or another of those noticed, each one

containing the allegation that the acts were done *without the consent in writing* of the owner.

Upon the trial, much evidence was adduced to show that the principal witness had sworn falsely, both before this trial, and upon it, and the defendant's counsel called on the court to charge the jury that they were bound to disregard his testimony entirely.

But his honor laid down the rule to be, that if they believed the witness (Anthony) had sworn corruptly false, in a matter material to the issue "here, upon this trial," it was their duty to discard his testimony entirely: but if the false oath was taken formerly, in another part of this proceeding, to wit, on the trial before the examining magistrate, it went only to the credit of the witness. For this defendant's counsel excepted.

Among other instructions to the jury, (which are not excepted to,) his Honor charged, that it was not incumbent on the State to prove, affirmatively, that the taking and concealing were done without the consent in writing of the owner, but that the prisoners, if they relied on it, must shew such consent in writing. For this defendant's counsel again excepted.

The jury returned the following verdict, viz: "That the prisoner, Alfred Woodly, is guilty of the felonious carrying, conveying and concealing in manner and form as charged in the bill of indictment, and that the defendant, Richard Wynns, is not guilty."

The counsel for the prisoner moved in arrest of judgment: *First*, because the bill of indictment was defective in not stating that the prisoners intended to deprive the owner of Anthony of his property, or some words of similar import. 2ndly, "because it is not stated to what State or country they intended to carry him, and to which, to enable him to make his escape." This motion was overruled, and his Honor having also refused a new trial, the judgment of the court was pronounced, and the defendant appealed to this court. In this court, a further reason for arresting the judgment was urged on account of the insufficiency of the verdict.

Attorney General, for the State.
Winston, Jr., for the defendant.

BATTLE, J. The counsel for the prisoner has urged several objections to the legality of the proceedings on the trial, which, as he contends, entitle his client to a *venire de novo*, and if that be not granted him, he has insisted, for several reasons, that the judgment shall be arrested.

Two of the alleged errors are of the same import with some of those which were assigned, and have been overruled by us, in the case of the *State* v. *Joseph T. Williams*, decided at the present term, (ante 257.) Of the remainder, it will be necessary to notice with much particularity only one, and upon that we are of opinion that the prisoner is entitled to another trial.

The act of Assembly upon which the indictment is framed, makes the want of the written consent of the owner, or owners, necessary to complete the offense therein prescribed. This requisition is embraced in the enacting clause of the statute and does not come in by way of proviso or by a distinct enactment. It is therefore properly negatived in each count of the indictment.

An important question arises; upon whom is imposed the burden of proving it? In the present case no proof of it was offered on the part of the State, and the court held that such proof was unnecessary: that it was a matter of defense which the prisoner was bound to make out; and to this ruling of the court, the prisoner has excepted. The question thus raised would be an important one in a case of less magnitude than the present, but when it comes to involve the life of the prisoner before us, and of every other person who may hereafter be indicted upon the same statute, it acquires a momentous interest, which may well make us approach it with the utmost caution and deliberation. The opinion of the court below is sought to be sustained by the general rule, which is said to be founded on convenience and common sense, that the affirmation of every allegation must be proved. "He who alleges a fact to be, is naturally expected to show its existence, and not he who denies it, to show that it is not."

This is a rule of pleading and evidence: which, it is contended, extends to criminal, as well as civil cases; and as an authority in support of it, the case of the *State* v. *Morrison*, 3 Dev. Rep. 299, is strongly relied upon. We admit the general rule, and do not intend to question the authority of the case referred to, and yet we cannot sanction the application of the principle to the case now under consideration. We believe that it is opposed to another fundamental principle, that every person charged with a criminal violation of the laws of his country, is to be presumed innocent until the contrary is shown, and in aid of that principle, that all the facts necessary to constitute the offense must be averred in the bill of indictment, and every substantial averment must be proved on the part of the prosecution.

If there be any exception to the general rule which requires such proof, it must arise from necessity, or that great difficulty of procuring the proof, which amounts practically to such necessity; or, in other words, where the prosecutor could not show the negative, and where the defendant could, with perfect ease, show the affirmative. The case of the *State* v. *Morrison* comes within the exception, while, as we shall endeavor to show, the case before us is governed by the general rule.

The difficulty in the various cases which have been brought before the court has arisen from the conflict of the two general rules to which we have adverted, and the question in each case has been, which of these rules must give way, when it becomes manifest that they cannot both be sustained? It will not be disputed that the one which supports the presumption of innocence ought to be predominant; and ought not to yield to the other, unless it impose no hardships upon the defendant, and be necessary to prevent a serious practical difficulty in the execution of the law. In such a case the proof of a negative averment in the indictment, may be required of the defendant, upon the ground that his failure to produce what, if he has it, is so easy for him to produce, is evidence of his guilt. Upon this ground the case of the *State* v. *Morrison* was ultimately put. It was an indictment against the defendant for retailing spiritous

liquors by the small measure without a license. The indictment contained the negative averment of a want of license, and after a conviction without any proof on the part of the State that the defendant had no license, the question was, upon whom lay the burden of proving that fact. The court held that it lay upon the defendant; and the judge who delivered the opinion, after some remarks about the rule of proving a negative averment, and the exception, where the fact "was not within the knowledge, or peculiarly within the knowledge of the defendant," proceeded as follows: "But the principle applies much more forcibly, where the point in dispute is the existence of a single and simple written document, which, if it exist at all, must be in the possession of the defendant. In such a case, the failure to produce the paper is, according to all experience of the motives and actions of men, proof that there is none such; which consideration induced me to say, that the question was rather, whether there was legal proof of the defendant's guilt, than whether the proof should come from one side or the other. The refusal or omission to exhibit written evidence which the party alleges to exist and to be in her exclusive power and possession, containing a plain authority for her acts, creates a legal and plenary presumption against her. It seems, in and by itself, to be conclusive proof." The learned judge then went on to show that Lord MANSFIELD assumed the same ground in deciding the case of *Rex* v. *Smith*, 3 Bur. Rep. 1473. Similar decisions have been made, in two at least of our sister States, upon similar statutes. See *Shearer* v. *the State*, 7 Black (Ind.) Rep. 99, and the *State* v. *Crowell*, 25 Maine Rep. 171. The principle upon which all these cases have been sustained, is a plain, practicable and intelligible one. It imposes no hardship upon a defendant to require him to produce a written document, which his interest, as well as his duty, requires him to keep as a justification for acts which he may do every day, and many times every day. It may well be taken as conclusive proof against him that he has no such document when he fails to produce it. It is true that he may by accident have lost it, but such instances are so rare

that they ought not to affect the rule, especially when it is considered that he can, by proper application, procure another license, or prove its loss and give satisfactory evidence of its contents. These, and similar cases, may then well be admitted as exceptions to the general rule, that every material averment necessary to constitute a substantial offense, must be charged in the indictment, and proved on the trial, by the State; or rather they may be admitted to come within the rule, upon the ground that a failure by a defendant to produce proof which is necessarily within his exclusive possession, is to be deemed positive proof against him on the part of the State. So understood, the great conservative principle, so essential to the security of those charged with crime, that they shall be presumed to be innocent, until the contrary is shown, will be preserved in all its integrity. Where no necessity can be shown for departing from such general rule, it must embrace an averment though negative in its character. This is not only consonant to principle, but will be found to be supported by the highest authorities. Thus in the case of *Williams* v. *the East India Company*, 3 East's Rep. 192, it was held by Lord ELLENBOROUGH, and the whole Court of King's Bench, after an elaborate argument by very able counsel, and after an *advisari* by the Court, that where the plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity (by which a loss happened) without due notice to the Captain, or any other person employed in the navigation of the ship, it lay upon him (the plaintiff) to prove such negative averment.

The ground of the decision was, that as it was an imputation of criminal negligence upon the defendants, to charge them with putting an article of a dangerous quality on board the ship, without giving due notice thereof to those concerned in the management of her, the presumption was in favor of their innocence, until the plaintiff could show their guilt.

A still stronger case is *Rex* v. *Rogers*, found in 2 Camp. Rep. 654. The defendant was indicted upon the statute of 42 Geo. 3 ch. 107 sec. 1, which makes it felony for any person

to hunt deer in an enclosed ground, *without the consent of the owner.* LAWRENCE, J., before whom the case was tried, decided "that it was necessary on the part of the prosecution, to call the owner of the deer, for the purpose of proving that he had *not* given his consent to the prisoner to course them." The owner did not appear as a witness, and the prisoner was acquitted. This case, it is true, was decided at *Nisi Prius*, but it was before a very able judge, and was referred to with approbation by this Court in the *State* v. *Morrison.* If we admit the authority of this case of *Rex* v. *Rogers*, it seems to us that it must govern the one now under consideration. The only perceptible difference between them, is, that in our case, the consent of the owner is required to be in writing, but that cannot, we think, alter the principle, particularly as in our case, the statute takes away from the felony the benefit of clergy. The owner can be as easily called by the State to prove the want of his written consent, as by the prisoner to prove its existence. It is manifest that the latter cannot be expected to preserve such written consent, so as to have it always ready to produce in his defense. There is no statute of limitation against a prosecution for a capital (or indeed any other) felony, and it would be requiring too much of a person charged under the statute in question, to hold him bound to keep a small piece of writing an indefinite number of years, at the peril of his life.

Our conclusion then is, that the State was bound to prove the negative averment that the alleged offense was committed without the consent in writing, of the owner of the slave.

In coming to this conclusion, we are gratified to find that the principles upon which our argument is based, are sustained, not only by the authorities to which we have already referred, but by the Supreme Court of Massachusetts, in an able opinion delivered by SHAW, C. J., in the case of the *Commonwealth* v. *Thurlow*, 24 Pick Rep. 374.

As the prisoner is entiled to a *venire de novo* for the error committed by the presiding Judge upon the question which we have already considered, we will not notice the other ques-

tions presented in the bill of exceptions, because one of them has been determined in another case, and the other will not necessarily arise on the next trial.

Of the objections urged on the motion to arrest the judgment, there is only one which seems to be well founded, and which it is necessary for us at all to consider. The counsel for the prisoner contends that the verdict is insufficient to authorise the judgment of death which was pronounced upon him; and that such judgment must not only be arrested, but the prisoner cannot be put upon his trial again, and is therefore entitled to be set at liberty. To show that the verdict is fatally defective, the counsel has referred us to the case of the *State* v. *Edmund*, 4 Dev. Rep. 340. And he contends that as the jury were discharged without having rendered a sufficient verdict, it is the same as if they were discharged without returning any verdict at all. It is true, that if a jury be empannelled in a capital case, they cannot be discharged *before* returning the verdict, at the mere discretion of the court and without the prisoner's consent. To justify such a course, there must be some evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control. *Spier's* case, 1 Dev. Rep. 491; *State* v. *Ephraim*, 2 Dev. and Bat. Rep. 162. In the present case, the jury did return a verdict, and were then permitted by the court to separate and go at large, without any objection from the prisoner; which makes it a very different case from those referred to. So, supposing that the verdict is entirely insufficient to support the judgment which was pronounced upon it, we cannot yield to the argument of the prisoner that he cannot be tried again for the same offense. The case of the *State* v. *Edmund*, upon which the counsel relies to show that the verdict is defective, decides that the proper course is to reverse the judgment, and order a *venire de novo*. But the Attorney General contends that the verdict is not fatally defective, and he has made a very ingenious argument, to show that there is a substantial difference between it and that which was rendered in the *State* v. *Edmund*. It would

not answer any good purpose for us to decide the question, because there is very little probability of its occurring again, and we have already, upon another ground, granted to the prisoner all the advantage which he could have from a decision in his favor upon this.

This opinion must be certified to the Superior Court of law for the county of Bertie, to the end that a *venire de novo* may be awarded by that court.

PER CURIAM. Judgment reversed.

JOSEPH MARTIN *vs.* JOHN MARTIN.

The mere appointment of a deputy on the nomination of the creditor, does not discharge the sheriff from liability for the wrongful act of the deputy, (as in failing to levy and sell under an execution) unless there be collusion or a want of good faith in making the nomination.

ACTION on the CASE, tried before his Honor Judge DICK, at the Spring Term, 1855, of Stokes Superior Court.

This was an action brought for a false return made by one Pringle in the name of the defendant, who was the sheriff of Stokes county. The plaintiff having a *fi. fa.* against one Charles T. Martin, who lived in the State of Virginia, took it to the defendant and instructed him to appoint one Pringle, a deputy, to execute it, which the defendant did. The plaintiff made an arrangement with Pringle, that the next time Charles Martin came into the county, one New was to give him, P., information of the fact, and he was to proceed to make a levy. New, who lived near a certain mill, where Charles Martin was in the habit of coming, did give the requisite information, and Pringle seized a wagon, two horses, and a barrel of flour, but, upon some assurances of Charles Martin, let go the wagon and horses, and only returned a levy on one barrel of flour, which did not satisfy the debt. One of the horses, at least, belonged to Charles T. Martin.

Pringle, the deputy, was released by the defendant, and was examined as a witness for him.

The Court charged the jury, that if the defendant appointed Pringle a deputy to execute the *fi. fa.* at the special request and nomination of the plaintiff, he could not recover. Plaintiff excepted. Verdict for defendant. Judgment and appeal.

Gilmer and *Miller*, for plaintiff.
T. Ruffin, Jr., for defendant.

PEARSON, J. When the plaintiff put the *fi. fa.* into the hands of the defendant, he had a right to say to him, "the defendant in this execution, lives just over the line, but, he is in the habit of coming occasionally into this county with his wagon and horses to mill, so you must see to it, and have the property levied on." But instead of thus requiring the defendant to discharge his duty as sheriff at his peril, the plaintiff, being anxious no doubt to get his money, and with a view to assist the sheriff, in having the writ executed, which under the peculiar circumstances, he foresaw might be attended with more trouble than usual, mentioned to the sheriff that Pringle, who lived in that neighborhood, would be a fit person to do the business as deputy, and after the sheriff had deputed Pringle, the plaintiff told him to call on one New, who would let him know when the defendant, in the execution, might come to the mill. The arrangement is carried out, and the wagon and horses are levied on. The plaintiff has nothing further to do in the matter. Pringle makes a return in the defendant's name as sheriff, in which he accounts for one barrel of flour, but does not account for the wagon and horses, and one of the horses, it is admitted, was the property of the defendant in the execution.

There can be no doubt that Pringle was liable to the defendant as his deputy, and there is as little doubt that he was not liable to the plaintiff, because there was no privity between them; and if the plaintiff had sued him, the action would have been defeated under the maxim *respondeat superior*.

As the deputy was so manifestly in default, it will occur to every one as strange, that the sheriff did not at once hold him responsible for the benefit of the plaintiff. Instead of that, he suffers himself to be sued, and then releases his deputy in order to make a witness of him!!

In the absence of any suggestion of collusion between the plaintiff and defendant's deputy, or of any suggestion that the plaintiff, in bad faith, recommended to the sheriff a person whom he knew was irresponsible and not fit for a deputy, "the reason of the thing" certainly is, that the plaintiff should hold the sheriff liable and let him have recourse over against the deputy, notwithstanding the plaintiff had, for sufficient reasons, suggested the name of the deputy, and he was appointed, in the language of his Honor, "at the special request and nomination" of the plaintiff.

We learn upon the argument, that his Honor felt himself bound by the authority of *Demiranda* v. *Dunkin*, 4 Term Rep. 119. That was a peculiar case. The Attorney of the creditor applies to the sheriff to deputise the *Attorney's own clerk* to execute the writ, assigning as a reason that the under-sheriff (or regular deputy as we call him) was interested on the other side. The sheriff, after making several objections, granted a warrant to the Attorney's own clerk; the debtor was arrested under the *ca. sa.* and escaped, and the plaintiff sought to charge the sheriff for the escape. Lord KENYON, C. J. "The plaintiffs say because a bailiff, nominated by them at their special request, has misconducted himself, the sheriff shall be answerable for his misconduct." BULLER, J. "The plaintiffs have acted wrong throughout:" "the application was for a favor to indulge the plaintiffs with the nomination of their own bailiff, who, perhaps, suffered the party to escape in order to charge the sheriff, and now the plaintiffs contend that by this *contrivance*, they are entitled to maintain an action against the sheriff, for the purpose of driving him to bring another action against their own agent."

Hamilton v. *Dalziel*, 2 Black Rep. 952, is to the same effect. Afterwards, in *Taylor* v. *Richardson*, 8 Term Rep. 505,

where the sheriff had appointed a special bailiff at the instance of the plaintiff's attorney, these cases were cited and much considered, and the court decide that the sheriff *is liable.* Lord KENYON, C. J., said, "This is very distinguishable from the two cases cited, where probably it was owing to the misconduct of the plaintiff himself that the sheriff did not do his duty."

Taylor v. *Richardson* explained *Demiranda* v. *Dunkin* and *Hamilton* v. *Dalziel*, and since then, the law has been considered settled, that the mere appointment of a deputy, on the nomination of the plaintiff, does not discharge the sheriff from liability, unless there is collusion or a want of good faith in making the nomination. Dalton's sheriff, 7 Law Lib. 35.

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

THE INTENDANT AND COMMISSIONERS OF RALEIGH *vs.* JOHN KANE.

The proceedings of inferior tribunals, which are subject to revision in a higher Court, must be of a *judicial* nature, and, it would *seem*, must be such as are not merely discretionary.

An order of a County Court, granting a license to retail spirituous liquors is either an act, merely ministerial, or if judicial, discretionary in its character, and therefore not the subject of review by appeal or *certiorari.*

The Act of 1850, which makes it necessary for an applicant for a license to retail within the City of Raleigh, to produce the written permission of the Commissioners, leaves it discretionary with the Court to grant or refuse a license, even though the applicant has produced the permission required. *Held*, therefore, that the exercise of this power in such a case, is not the subject of review by appeal or *certiorari.*

THIS was a petition for a writ of CERTIORARI and motion, predicated thereon, to quash an order of the County Court of Wake granting a license to the defendant to retail spirituous liquors in the city of Raleigh, heard before his Honor Judge CALDWELL, at the last Term of Wake Superior Court.

The petition for the certiorari sets forth as follows: "That at the February term, 1855, of the county court of Wake, the said John Kane was licensed by the said court to retail spirituous liquors by the small measure, within the limits of the city of Raleigh, contrary to the act of the General Assembly, passed 28th of January, 1851, for the government of the same: the said John Kane not having produced to the said court the permission in writing of your petitioners (who were the board of commissioners at the time of the application) to make the same, to the said court."

That "when the said John Kane made the above application, your petitioners interposed and objected thereto, whereupon the said John Kane exhibited to the said court a permission in writing by a board now, and at the time of the said application, out of office, to wit: the board of commissioners elected to serve for the year 1854. Thereupon, your petitioners filed in said court, a certified copy of the resolution of the board of commissioners of Raleigh, subsequently passed, refusing to permit the application to be made—revoking and repealing the former order, and certifying the same proceeding for the information of the court."

"But so it is, may it please your Honor, notwithstanding the objection and remonstrance of the board of commissioners of the city of Raleigh, &c., the said court, seven justices being present, did order and adjudge that the said John Kane was entitled to retail spirituous liquors within the city of Raleigh, and did license him accordingly."

"Your petitioners, being then advised, and believing the said judgment, order and decree to be unlawful, respectfully prayed an appeal therefrom to the superior court of Wake county, at the same time tendering a bond for the costs of the appeal with security; but the said prayer and the said bond were both rejected."

The prayer of this petition is for a writ, commanding the county court of Wake to certify the proceedings in the premises to the next superior court. The order was made, and the

writ having issued, the proceedings of the county court were certified accordingly.

The answer of the defendant admits the facts above set out and insists that the same are insufficient, in law, to authorise the extraordinary writ of *certiorari*, and prays that the petition be dismissed.

Upon consideration of the whole matter, his Honor adjudged that the petition be dismissed.

Whereupon the petitioners prayed an appeal to this court, which was granted.

Cantwell, for the plaintiffs.

1. I maintain that the remedy is by certiorari: the object of that writ is simply to bring up the proceedings, to the end they may be quashed if unlawful. The remedy is not confined to cases *quasi* appeal, but to all cases of usurped power in the county court, *Brooks* v. *Morgan*, 5 Ire. 484–5, bottom of the last page, and cases there cited; see also Jacobs L. D. Error, sec. 2; Dr. Groenwelt's case, 1 Salk. 144, s. c. 263. *Allen* v. *Williams*, 1 Hayw. 17; *Perry* v. *Perry*, (Nash now C. J. arg.) N. C. T. R. 175, 4 Bl. C. 272, to show that wherever the court acts by virtue of an act of Assembly, and not according to the course of the common law, the remedy is by certiorari and not writ of error, as in the case of Highways, 2 Hawk. P. C., c. 27, sec. 38; *Comms.* v. *Combs*, 2 Mass. 489; S. P. 8 Pick. 440; 13 Pick. 195, 7 Mass. 158; *Parks* v. *Boston*, 8 Pick. 218.

2. All judicial acts, the subject of review in this way. *Parks* v. *Boston* (ubi supra) *State* v. *Marley*, 8 Ire. 48; *State* v. *Bill*, 13 Ire. 373; *Matthews* v. *Matthews*, 4 Ire. 155.

3. A judicial act is one which involves the exercise of a discretion; and a ministerial act is one which does not. The grant of a license is the exercise of *judicial* power to determine, and adjudge the power of the court, and the merits of the application; wherein the court passes upon *both*. The order

for license is reviewable *ex debito justitiæ*, *Fay and others*, 15 Pick. 243; *Regina* v. *Salford*, 14 E. L. and E. 145.

G. W. Haywood Lewis and *Moore* for defendant.

BATTLE, J. The writ of *certiorari* is ordinarily and commonly used in this State as a substitute for an appeal, when the latter has been lost without any default of the party entitled to it. Its effect in such a case is to give to the party a right to a trial *de novo*; or a re-hearing in the appellate court.

But though this is the ordinary and most common, it is not the only use of the writ. It may be, and often is, employed as a writ of false judgment, to correct errors in law, and then it is the means whereby the superior court, which is the highest court of original jurisdiction in this State, can, and in a proper case, always will, control inferior tribunals, in matters for which no writ of error lies, by bringing up their judicial proceedings to be reviewed in the matter of law. In such case, the certiorari is in effect a writ of error, as all that can be discussed and determined in the superior court, are the power and sufficiency of the proceedings as they appear upon the face of them. *Matthews* v. *Matthews*, 4 Ire. Rep. 155; *Brooks* v. *Morgan*, 5 Ire. 481; *State* v. *Bill*, 13 Ire. 373.

It appears then, that the proceedings of inferior tribunals which are subject to revision in a higher court, must be of a *judicial* nature; and it would seem must be such as are not merely discretionary. "For," say the court, in the case of *the Attorney General* v. *the justices of Guilford*, 5 Ire. 329, "it is the nature of a discretion in certain persons, that they are to judge for themselves, and therefore, no power can require them to decide in a particular way or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the court under whose mandate they give it."

This rule was applied in the case of *Pratt* v. *Kittrell*, 4 Dev. Rep. 168, where it was decided by the court that the

grant of a special administration *pendente lite* was discretionary in the county court, and that therefore its order, making such a grant, could not be revised in the superior court, either by appeal or upon a writ *certiorari*. These principles are decisive of the case which we have now under consideration.

The order of the county court in granting the defendant a license to retail spirituous liquors, was either an act merely ministerial, or, if judicial, discretionary in its character. If the former, as from the case of *Regina* v. *the overseers of Salford*, 14 Eng. Law and Eq. Rep. 145, it would appear to be, then the writ of certiorari would not lie, because the order was not of "*a judicial nature.*" If the latter, then the writ would not lie, because it would be contrary to a discretionary power to have it reviewed by way of appeal, "*or by any proceeding in the nature of an appeal.*"

But it is said that the fifth section of the act of 1850, entitled, "An act, to amend an act, passed in the year 1803, entitled an act for the government of the city of Raleigh," takes from the justices of the county court of Wake, the discretionary power to grant a license to any person to retail spirituous liquors within the limits of the city, without the permission of the board of commissioners, and that therefore such grant is against law, and may be reviewed upon a writ of *certiorari*, used as a writ of error. A slight consideration will show the fallacy of this argument. The justices are not bound to grant license to every person who can obtain the permission of the board of commissioners of the city of Raleigh. They still have the right, and it is their duty to exercise a sound discretion in deciding upon the necessity of such grant, and the fitness of the person who makes application for it. Should the board, for the purpose of raising revenue for the city, give their permission to fifty or one hundred applicants, would the justices be bound to license them all? Would they not be guilty of a gross dereliction of public duty if they did? Surely then, their discretionary power is not taken away; and besides, when they make a grant, their records need not show any thing more than that the applicant had produced before them the

permission in writing of the board, and had in a proper manner proved his good moral character; so that in a case like the one now before us, the writ would be totally ineffectual, because the alleged error in law would not appear upon the record. This proves conclusively that it is not the proper remedy. What that remedy is, the act itself points out by declaring that the license shall be void, and the person acting under it shall be liable to a penalty as well as to an indictment.

In the case of *Regina* v. *the overseers of Salford* above referred to, which was a rule, calling upon the Board of Inland Revenue, to show cause why a license for the sale of beer, granted by a supervisor of excise to one Hague, in the borough of Salford, which had been brought up to the court of Queen's bench by *certiorari*, should not be quashed, on the ground that it had been granted without the production of the certificate of the overseer, as required by the statute of 3 and 4 Vict. ch. 61, sec. 2. The court held that the writ would not lie, intimating that the question might be raised by proceeding under the 13th section for the penalty therein prescribed.

Our conclusion then, is, that the plaintiffs have mistaken their remedy, and that there was no error in the order of the superior court by which their petition was dismissed. We have not thought it necessary to consider particularly whether the plaintiffs, who certainly were not parties to the record in the county court, had such an interest in the order, granting a license to the defendant, as authorised them to have such order reviewed in the superior court upon an appeal, or upon any proceeding in the nature of an appeal. We mention the objection only to prevent the conclusion being drawn from our silence that we deemed it untenable.

PER CURIAM. The order of the superior court is affirmed.

COMMISSIONERS OF RALEIGH *vs.* JOHN KANE.

Under the charter of the City of Raleigh, the power of the Commissioners to

grant permissions to apply to the County Court, for a license to retail, and to collect a tax for such permission is to be exercised but once a year by the set of Commissioners in office, and can be acted upon only by a Court sitting within the same year.

No consent of a citizen, can authorize such permission otherwise, or oftener: *Held* therefore that a license, granted by a County Court of Wake, under a permission given by, and paid for, to a Board, not in existence at the time of its session, is void, and subjects the retailer to the penalty given by the charter.

THIS was an action of DEBT, tried before his Honor Judge CALDWELL, at the Spring Term, 1855, of Wake Superior Court, brought before him by appeal from the judgment of the Intendant of the city of Raleigh.

The action was commenced by a warrant, for a penalty of twenty dollars, given by an Act of Assembly of 1803, and amended in 1850, entitled "an act for the government of the city of Raleigh." The warrant is as follows:

"State of North Carolina, }
City of Raleigh. }

"To any lawful officer of the county of Wake, (to execute and return within thirty days from the date hereof, Sundays excepted,) Greeting:

"Whereas, by the fifth section of an Act of the General Assembly of the State of North Carolina, ratified on the 28th day of January, 1851, entitled "an act to amend an act passed in the year 1803, entitled "an act for the government of the city of Raleigh," it was enacted as follows, to wit: "That it shall not be lawful for the justices of the county court of Wake, to grant any license to retail spirituous liquors within the limits of the city of Raleigh, without the permission of the board of commissioners first had; and if any license shall be granted without such permission in writing, attested by the clerk of the board of commissioners, first filed with the clerk of the county court, such license shall be void and of no effect, and the person obtaining such license, shall be liable to indictment as in other cases of retailing without license, and to a penalty of twenty dollars, for each and every offense, to be recovered by warrant, before the Intendant of Police, or any justice of

the peace, in the name of the commissioners of the said city, for the use of said city.

"And whereas, complaint hath this day been made to me, that John Kane, late of said city, on the second day of April, 1855, did retail spirituous liquors within the limits of the city of Raleigh: that is by a measure less than a quart, unto William Wythe of said city, without the permission of the board of commissioners first had, and under a license granted by the justices of the county court of Wake, without such permission in writing, attested by the clerk of the board of commissioners first filed with the clerk of said county court, contrary to the form of the fifth section of the act aforesaid, whereby and by means of the premises, and by force of the statute aforesaid, an action hath accrued to the commissioners of the city of Raleigh, for the use of said city, to have and demand the said penalty of twenty dollars: These are therefore, to command you to take the body of the said John Kane, so that you have him before me, or any justice of the peace of the said county, at the city of Raleigh, within &c., to answer the above complaint. And have you then and there this warrant.

"Witness, the signature of our Intendant of Police, at the city of Raleigh, this second [SEAL OF THE CITY.] day of April, 1855, and the seal of the said city.

W. D. HAYWOOD, Int'nt."

To which warrant, the defendant pleaded the general issue, license, and permit to retail spirituous liquors before, and at the time of issuing said warrant, also that he exhibited the same duly proven in open court upon the trial.

Upon this warrant, there was a verdict for the plaintiffs, subject to the opinion of his Honor, upon the following statement of proceedings of the county court upon the granting of the license aforesaid:

"Court of Pleas and Quarter Sessions, February Term, 1855.

"John Kane, of the city of Raleigh, applies for a license to

retail spirituous liquors in the city of Raleigh by the small measure. The board of commissioners of the said city, by *Edward Cantwell, Esq.*, city attorney, objects to the said application, that he has not the permission of the said board to apply for the same. The said John Kane, thereupon, exhibits in open court a paper writing, previously filed with the clerk of said court, in the words following:

"Raleigh, January 6, 1855.

"Ordered by the board of commissioners of the city of Raleigh, that Mr. John Kane, be recommended to the county court of Wake, as a suitable person to have a license, to retail spirituous liquors by the small measure, at his old stand, in the city of Raleigh."

(Signed,) "J. J. CHRISTOPHERS, Clerk."

He proved the grant, and due issue of the same.

The board by whom this permission was granted, were elected in January, 1854, to serve for one year, and went out of office on the 15th January, 1855, when a new board was elected in conformity with the city charter. On the 17th January of that year, the newly elected board at their first meeting, passed the the following order:

"*Resolved*, That the permission in writing, granted by the late board to John Kane and to John Sugg, to apply to the county court, at its next February Term, for licenses to retail spirituous liquors be, and the same is hereby rescinded, and that it be certified to the county court, that the said John Kane and John Sugg, have not the permission of the board to apply for a license to retail spiriuous liquors in the city of Raleigh."

This proceeding of the then board was duly certified to the county court, and notice thereof given to the said Kane and Sugg. The commissioners, by their attorney aforesaid, contended, 1st, That the power of the board of commissioners elected in 1854, expired with their term of office in January, 1855, and that they could not grant a permit to take effect in February, 1855, when they would be and were out of office.

2nd. That if this was not so, then that under the charter, the present board, having tendered back the tax paid by Mr. Kane for his permit, had a right to revoke, and did revoke the same; therefore that Mr. Kane had no recommendation from the board and was not entitled to a license.

The court, however, was of a contrary opinion, and thereupon ordered that he should receive a license, and accordingly, he was licensed to retail for one year in the city of Raleigh from the 3rd Monday of February, 1855, which is the same license pleaded by him. Upon the foregoing case it was agreed by the counsel on both sides, that if his Honor should be of opinion that the action of the county court was legal, that judgment should be entered for the defendant, but otherwise, for the plaintiff for the penalty and costs.

And upon consideration of the said case, his Honor being of opinion with the plaintiffs, gave judgment accordingly; whereupon the defendant appealed to the Supreme Court.

Cantwell, for the plaintiff.

1. Unlawful to license the defendant without plaintiff's consent, A. A. 1803, L. L. Raleigh, sec. 21, p. 24; Ib. 1851; Ib. sec. 5, p. 57. These acts amount to a prohibition in the county court to license without the permission of "the board," *State* v. *Moore*, 1 Jones' Rep. 276.

2. The permit exhibited, not the permit of "the board" but of individuals who *once* composed it. The powers of each board expire with the year, *Coms. of Wil.* v. *Roby*, 8 Ire. 250, and the commissioners of Raleigh cannot bind their successors, L. L. Ral. 1814, sec. 1, p. 36; Ib. 1803, sec. 1, p. 17; Ib. sec. 3, p. 18.

G. W. Haywood Lewis and *Moore* for defendants.

BATTLE, J. The record in the present case brings fairly before us, for revision, the order of the justices of the county court of Wake, made at the last February Term, by which they granted a license to the defendant, authorizing him to

retail spirituous liquors for one year within the limits of the city of Raleigh; which order we have decided in another case, against the same defendant, cannot be reviewed by the writ of *certiorari*. If the license granted by the said justices be for the reasons assigned by the plaintiffs "void and of no effect," then the defendant is liable to them for the penalty claimed in this suit under the plain provisions of the 5th section of the act of 1850, entitled an act to amend an act passed in the year 1803, entitled "an act for the government of the city of Raleigh."

The plaintiffs contend that the grant of the license in question was void, because it was made without the permission of the board of commissioners then in existence; and the question is whether the persons who composed the board prior to the 15th January, 1855, and whose term of office expired on that day, or those who succeeded them and who therefore composed the board when the grant was made, were the board of commissioners whose permission was to be first had, before the grant could be lawfully made within the meaning of the act referred to.

We deem the question an important one, affecting, as it does, the power of the justices of the county court of Wake, the rights of the defendants and the good and orderly government of the city of Raleigh, and we have therefore given it our attentive consideration. The result of our reflections is that the board of commissioners, whose term of office had expired before the sitting of the county court, had no authority to give the permission upon which the justices acted, and that consequently their order, granting a license to the defendant, was void. The reasons which have brought us to this conclusion, we will now proceed to state.

The act of 1850 was passed, as appears from its title, to amend the act of 1803; and may, therefore, legitimately receive aid from it, whenever such aid may be necessary to ascertain its meaning. The fourth section of the amending act authorizes the commissioners of the city "to levy and collect a tax, not exceeding twenty-five dollars on every billiard table, nine

or ten pin alley, victualing house or restaurant, and upon every permission granted to retail spirituous liquors within the limits of the said city." The act does not prescribe in express terms, whether these taxes may be levied and collected annually, semi-annually, or bi-ennially. How then are the city authorities to know how often they have the power to assess and collect them? The answer is to be found by referring to the 8th section of the act of 1803, by which the taxing power is conferred upon them in the following words: "In order to raise a sufficient fund for repairing the streets of the city, and for effecting other useful and necessary purposes, the said commissioners are hereby authorized to lay, levy and collect annually a tax." &c. We are then satisfied beyond a doubt, that the taxes authorized by act of 1850, are to be levied and collected *annually*. But when is the tax upon permissions to retail to be paid? As to that, the act of 1803 cannot furnish any information, because the grant of a permission to retail is not of a nature to be listed like the taxable property and polls therein specified. The tax then may, in the absence of any provision to the contrary, be demanded when the permission is given. And it is reasonable that it should be so, because the permission may be applied for and obtained at any time during the year, with a view to apply for a license from the justices of the county court, provided the members of the board which gave it, shall continue in office until the court shall sit. Such too is the public law relative to the payment of the tax on the license which the sheriff receives as a part of the public revenue. (See 1 Rev. Stat. ch. 102, sec. 20, and Act of 1854, ch. 37, sec. 23, par. 14.) And such we learn is the practical construction which has been placed upon the said 4th section of the act of 1850. Having thus ascertained that the commissioners of the city of Raleigh have the power to levy and collect a tax upon the grant of their permission to retail every year, and not oftener, and to demand payment when the grant is made, we are prepared to understand the meaning of the Legislature in the enactment of the 5th section of the act. The words are, "that it shall not be lawful for the justices of

the county court of Wake, to grant any license to retail spirituous liquors within the limits of the city of Raleigh, without the permission of the board of commissioners first had, and if any license shall be granted without such permission in writing, attested by the clerk of the board of commissioners first filed with the clerk of said county court, such license shall be void and of no effect." The question is, what board?—one, the members composing which had gone out of office when the license was granted? or one whose members are then in official existence? "The commissioners of the city of Raleigh" are a political corporate body having perpetual succession; but that succession is to be kept up by the annual election of competent persons to fill the office. The board of commissioners is the name by which they are more particularly called when met for the transaction of official business. That too is a body having perpetual succession, but the members composing it change every year; for though the same individuals may be re-elected for successive years, yet they have to qualify, by taking the prescribed oaths, before they can act; just as any other persons would have to do. Hence we find the distinction between the "existing" and a "former board," as will be seen by a reference to the 16th section of the act of 1803.

It follows from this, that all such taxes as are *annual*, can be levied and collected once only, during the official existence of any one set of members composing the board of commissioners. We have seen that the board, or the members composing the board, which gives the permission to retail, may demand an immediate payment of the tax. The power to give the permission and the power to tax are thus shown to be co-extensive and must therefore begin and terminate at the same time.

Now, let us see how all this applies to the case before us. No person will deny that the members who come into office, and compose, what we will call a new board, in the month of January in any year, have power to give a permission to one who wishes to apply at the next succeeding county court for a license to retail within the limits of the city, and to demand the payment of the tax for the same. If so, their power, be-

ing a limited and special power, as in its nature must be, is exhausted and gone. As to that, the board is *functus officio*, and any further attempt to exercise the power, must be a nullity. But perhaps it may be said, that it does not appear that the board which granted the permission in the present case had ever before exercised the power, and that therefore the grant was valid. The clear and decisive answer is, that the Legislature did not confer the same power, which is necessarily limited to one year, upon two sets of commissioners to be exercised during the same year. Yet such would be the case if the action of the members who composed the board of 1854 could be sustained. Their power to grant a permission to the defendant for a license, and to tax it, commenced with their entry into office. They did, or might have authorised him to apply for a license at the February term, 1854, and for their permission have made him pay a tax. Their successors must have the same power for 1855. And unless the power of the former set be confined to their official term of existence, it must necessarily trench upon that of the latter, which the Legislature certainly never intended. But it may be argued that the defendant was, for certain reasons satisfactory to himself, willing to take and pay for a permission from the board of 1854, and that he might, if he choose, waive the objection to the payment of the double tax. The reply is, that the question is one of *power* in the board, and his consent cannot confer what the Legislature has withheld.

Viewing the case in every light in which it can be presented, it appears to us that the late board of commissioners did an act which amounted to the exercise of power, which properly belonged to their successors, and not to them, and that therefore, their act was null and void.

In favor of this construction too, an obvious policy may be urged. It is that the license, which the court may grant, must be in force, for a part, greater or less of the time during which the members of the board who gave the permission are in office; and they will, of course, feel a deeper interest in seeing that the retailer does not abuse his privilege.

The objections to the sufficiency of the warrant are all untenable.

It sets forth every fact necessary to show that the penalty given by the act, had been incurred. It states that thereby an action had accrued to the "commissioners of the city of Raleigh," which is the name in which the act directs the penalty to be recovered.

PER CURIAM. Judgment affirmed.

JACOB BROCK *vs.* REUBEN KING.

A Sheriff to whom a runaway has been delivered, but not under or by virtue of the warrant of a Justice of the Peace, is not liable for the escape of such runaway from the Jail of the county under the act of Assembly, Rev. Stat. Chap. 111, Sec. 11, 12, 13.

Whether if the Sheriff had received a slave as a runaway, to be kept in the common Jail of the County, and the slave escaped, the Sheriff would be liable at common law without reference to the Statute—*Quere.*

ACTION on the CASE for an escape of a runaway slave, tried before his Honor, Judge PERSON, at the last term of Robeson superior court.

The plaintiff showed that he was the owner of the slave George in question; that he escaped from on board a steam boat on the Pee Dee river, in the month of January, 1853; that soon afterwards he was apprehended in the county of Robeson and delivered as a runaway to the defendant, who was the sheriff of that county, who committed him to the jail of the county.

It was also proved that the body of the slave, George, was found, about two weeks after being delivered to the defendant, in a well in the same county, with marks of violence upon it, which produced the death of the slave.

The defendant's counsel contended that as the slave had been delivered to the sheriff without the warrant of a justice

of the peace, adjudging him to be a runaway, the sheriff was not liable for the escape.

His Honor held that having received the slave as a runaway, and having put him in the jail as such, he was bound by his own act, and was liable for the escape. He held further that the measure of plaintiff's damages was the value of the slave. Defendant excepted to these instructions. Verdict for plaintiff. Judgment and appeal.

Strange, for plaintiff.
Shepherd, for defendant.

BATTLE, J. The action is founded on the following provisions in the 11th, 12th and 13th sections of the 111th chapter of the Revised Statutes: "If a negro who shall be taken up as a runaway, and brought before any justice of the peace, will not declare his or her owner, such justice shall in such case, and he is hereby required, by a warrant under his hand, to commit the said negro slave to the jail of the county wherein he or she shall be taken up." "Where any runaway slave shall be brought before a justice of the peace, said justice shall commit the said runaway to the constable of his district by his warrant and therein order such constable to convey the said runaway to his house, or the public jail, &c." "If any sheriff or his under-sheriff, or any constable into whose hands any runaway shall be committed by virtue of this act, shall negligently or wilfully suffer such runaway to escape, the said sheriff, under-sheriff, or constable, shall be liable to the action of the party grieved, for recovery of his damages at the common law, with costs."

The question is, can the plaintiff recover, without showing that his slave was committed to the custody of the defendant as sheriff of Robeson county, by a warrant under the hand of a justice of the peace of that county?

The act from which we have extracted the above-mentioned clauses, is, with regard to them, manifestly penal, and must be construed strictly; at least, it must not be extended by

construction beyond the clear intent of the legislature. That intent was to place a slave when taken up as a runaway, under the guardianship and protection of the law, to be thereby preserved for the use of the owner. With that view, certain duties and liabilities are imposed upon the judicial and ministerial officers of the county wherein the slave may be taken up. In order that it may be certainly known that the slave is a runaway, the judicial officer, to wit, the justice of the peace is required so to adjudge, and to signify it by committing the slave by a warrant under his hand. The ministerial officer, sheriff or constable, can then know with certainty that the slave is in his custody, that he holds him in his official capacity, and must securely keep him, at the peril of being compelled to pay all such damages as the owner may sustain by his escape.

If the slave be delivered to the sheriff as a runaway, without such warrant, or upon an insufficient warrant, he will be no more responsible for his escape, under the act, than he would be for the escape of a debtor committed in execution under insufficient process. The cases are very analogous, and it is perfectly well settled, that under the twentieth section of the 109th chapter of the Revised Statutes, the sheriff is not liable for the escape of a debtor committed to jail upon a paper purporting to be a *ca. sa.* but which is void for the want of some of the essential parts of that process. See *Walker* v. *Vick*, 2 Dev. and Bat. Rep. 99. That case certainly would not have been more favorable for the plaintiff therein, had there been no semblance of a process.

Whether the defendant would have been bound by his act of receiving the slave as a runaway, had he been sued at common law, without reference to the statute, it would be improper for us to decide; but we are clearly of opinion that he is not so bound, when sued upon his statute liability. In that case he cannot be called upon for his defense until the plaintiff has shown that the statute liability had been incurred by the commitment of the slave under the warrant of the justice.

PER CURIAM. The Judgment is reversed and a *venire de novo* granted.

JOHN W. BRYAN *vs.* JOSEPH H. BURNETT.

A dam erected below a steam-mill, for the purpose of floating timber to the mill and not for the purpose of driving the machinery of the mill, by which water is ponded back upon the land of another, does not come within the meaning of the Act requiring the proprietor of land overflown, *first* to apply by petition to the County Court.

ACTION on the CASE to recover damages for ponding water back on the land of the plaintiff, and overflowing it, tried before his Honor Judge CALDWELL, at the last Term of Martin Superior Court.

It appeared in evidence, that the defendant erected, on Conaho creek, a steam-mill for the purpose of sawing timber into plank, &c., and shingles; and for the purpose of grinding corn; and to enable the owner of the mill to float timber to the mill, he erected a dam across the creek just below the mill, which backed the water upon the plaintiff's land and overflowed it; for this injury to his land the plaintiff brought this action.

His Honor was of opinion that the plaintiff ought to have proceeded by petition for damages, under the act of Assembly, before bringing this suit: and that therefore the action could not be sustained. In submission to which opinion, plaintiff took a non-suit and appealed.

Winston, Jr., for the plaintiff.
Attorney General, for the defendant.

PEARSON, J. At common law, if A, by the erection of a mill and dam on his own land, ponded the water back upon the land of B, and injured him to an amount, say, not exceeding one dollar, during any one year, B could to-day, issue a writ in case for the damage done on yesterday, and to-morrow he could issue another writ for the damage done to-day, and the day after, another writ for the damage done on the day preceding, and so on *ad infinitum;* and in all of his several actions he would be entitled to judgment for one penny and

costs of suit, and in this way A could be forced to take down his mill-dam.

For the protection and encouragement of persons erecting "a public grist mill, or mill for domestic manufactures or other useful purposes," it is provided, by statute, that any person who may conceive himself injured by the erection of any such mill, *shall apply* by petition, to the court of pleas and quarter sessions, &c. If, upon the proceeding thereupon had, the petitioner's damages per annum, are assessed to less than twenty dollars, he shall be therewith content, for five years; but if the annual damages are assessed as high as twenty dollars, "Nothing contained in this act shall be so construed as to prevent the person so injured, his heirs or assigns, from sueing, as heretofore usual in such cases."

This statute is in restraint of the remedy at common law, and the question is, whether the erection of a dam, by which water is ponded back, the dam not being necessary in order to furnish the motive power to work the mill, and being in fact made *below the mill*, for the purpose of making a head of water in order to float over the saw logs, is a case within the meaning of the statute? In other words, can such a dam claim the protection of the statute, as being *a part* of a public grist mill?

A plain statement of the facts decides the question.

The dam is not necessary for the working of the mill, and is a mere adjunct, which particular localities make highly convenient, in order, not to work the mill, but to float saw logs to the mill.

Suppose the locality was such, that the owner of the mill by making a dam across a stream, some half mile from his mill, could pond the water back for some miles, and thus float down saw logs to his dam, and from there take them on timber wagons to the mill, will any one say such a case falls within the meaning of a statute which abridges the common law remedy of one who is injured by the erection of the dam? If such is the law in regard to a dam distant one half mile, the same law must be applicable to a dam adjoining the mill, but

which is not necessary for the working of the mill, and the purpose of which could be answered by *tressle work* or an ordinary road, if it suited the convenience of the owner of the saw mill to make one.

It is clear this dam is no part of the mill, the erection of which is protected and encouraged by the statute.

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

JAMES DAVIS *vs.* ROBERT LANIER.

A record showing that "A was appointed a Guardian to B upon entering into bond with C and D as sureties" and that A only executed a bond, in consequence of which A took charge of the ward's estate, is a sufficient "committing of an orphan's estate to the charge or guardianship" of a person, to render the magistrates making such entry liable for not taking good and sufficient security upon the default of A. The entry in the above case does not mean, that A was to be guardian if he gave B and C as sureties, but that he was already appointed guardian and was to, or would give the persons as sureties, who were tendered to the Court and accepted.

One of the several Justices of the Peace who are on the bench when an appointment is made of a guardian without taking security, may be sued alone under the Act of Assembly Rev. Stat. ch. 54, sec. 2.

The measure of damages in such a case is the amount of the principal and compound interest on the principal up to the time of the plaintiff's arrival at full age, but nothing can be allowed as damages for the interest accruing after that event.

ACTION on the CASE to recover damages for failing, as a Justice of the Peace, to take security of a Guardian on committing the estate of a ward to him: Tried before his Honor, JUDGE CALDWELL, at the Spring Term, 1855, of Martin Superior Court.

At April sessions, 1839, of Martin county court, the following entry appears of record: "Ordered that E. G. Hammond be appointed guardian of James Davis instead of Thomas Howell, upon entering into bond with Hardy Brown and John Hyman as sureties in a bond of $10,000: Robert Lanier, H. Eason,

and John Long, Esquires, on the bench. Bond executed by E. G. Hammond alone." At January session, 1841, of the same court, the following entry appears of record: "Present on the bench, E. G. Hammond, William Slade and Harmon Eason. E. G. Hammond surrendered the guardianship of James Davis: ordered that it be committed to N. F. Hooker, and that he give bond, &c." The bond executed by Hammond was found among the papers of the county court office.

Hooker, who was appointed to succeed Hammond in the guardianship, testified that the latter was insolvent when he resigned the said guardianship, that he ran off and went out of the State a short time thereafter, and that he never could collect any thing out of him.

It further appeared that Howell, who had preceded Hammond in the guardianship, had paid over to him in guardian notes $334 74, and took his receipt for the same. Howell had given a good and sufficient bond, which was still good when he relinquished the guardianship.

Defendant's counsel contended that the above recited entry did not amount to evidence of Hammond's appointment as guardian, that it only meant that he was to be guardian, if he gave bond with the persons named as sureties, and never having complied with that condition, he had no authority to receive the ward's estate from Howell, the former guardian, and that the former guardian and his sureties ought to have been sued on their guardian bond for parting with the estate without looking to the sufficiency of Hammond's appointment, and prayed that his Honor would so charge the jury.

The court declined giving such instruction, but advised the jury that the plaintiff was entitled to a verdict, if they believed the facts in evidence. Defendant excepted. Verdict for the plaintiff $920, of which sum $334 74, is the amount received by Hammond of the plaintiff's money in 1837, and the sum of $338 83, the compound interest thereon, till the plaintiff arrived at full age; and the residue, to wit, $246 43, is the simple interest on the said two sums, from that time up to the commencement of this Term.

Judgment according to the verdict, and appeal by the defendant.

Besides the positions taken below, the defendant, here, further contended that under the act of Assembly, the action could not be sustained against one alone of the justices on the bench when the guardian was appointed.

It was further contended, that the defendant was not liable for damages on account of interest accrued after the ward came to his full age.

Moore, for plaintiff.

Rodman and *Attorney General*, for defendant.

NASH, C. J. The defendant was one of the justices of the county of Martin, and was one of the presiding magistrates at April term, 1839. At that term of the County Court, it is alleged by the plaintiff, that one E. G. Hammond was appointed by the Court, the defendant Lanier with two other magistrates being on the bench, his guardian; and that the Court took no security from him. The action is in case, and brought to recover damages for this neglect. The Act of 1836, ch. 54, sec. 2, provides, "if any court shall commit an orphan's estate to the charge or guardianship of any person or persons without taking good and sufficient security for the same, the justice or justices appointing such guardian, shall be made liable for all loss and damages sustained by such orphan, &c. to be recovered by action at the common law, &c."

On behalf of the defendant it is insisted that Hammond never was appointed guardian of the plaintiff; and secondly, if he was, the defendant could not be sued alone, but that the other magistrates on the bench when the appointment was made should have been joined. As to the first objection, being a matter of record, it must be proved by it. The following entry appears upon the records of April term, 1839, of Martin County Court: "Ordered that E. G. Hammond be appointed guardian of James Davis, instead of Thomas Howell, upon entering into bond with Hardy Brown and John Hyman

as sureties in a bond of $10,000. Robert Lanier, H. Eason and John Long, esquires, on the bench. Bond executed by E. G. Hammond alone." It is insisted by the defendant's counsel that by the entry no appointment of a guardian was made by the Court, as the giving of the bond with the specified sureties, was a condition precedent never complied with by Hammond.

The contrary was ruled in the case of *Spencer* v. *Cahoon*, 4 Dev. 225. The question arose in that case, upon the sufficiency of the appointment of one Gibbs as an administrator. To show *that* appointment, the records of the Court making it, was given in evidence; it is as follows: "November session, 1816. It is ordered that Stephen Gibbs be appointed administrator of the estate of Jeremiah Gibbs, *on his entering into bond* in the sum of $4,000, with John C. Bonner and William Selby, his sureties." No bond, as required by law, was given by Stephen Gibbs. Both he and his sureties executed a paper writing in blank which was accepted by the Court as the administration bond of Stephen Gibbs, and he, thereupon, qualified as administrator. The Court declared the bond to be invalid, but that the appointment was valid, and though voidable, was not void. In the case of *Spencer*, administrator *de bonis non* of *Jeremiah Gibbs* v. *Cahoon*, 1 Dev. and Bat. 27, the question arose as to the validity of this appointment, under the same order as in the preceding case. The Court declared, that under that order Stephen Gibbs was duly appointed the administrator of Jeremiah Gibbs: that the words "on his entering into bond with the sureties specified," were not, taken in connection with the subject matter, a condition precedent: "such an order," says the Court, "would be so absurd, that the intention to pass it cannot be presumed, unless the terms will not admit of any other construction. It would not bind the Court or any body else." The full meaning is, "that on his entering into bond, the appointment was then made." In conclusion, the Court declare that the administration, for the defects pointed out, might probably be revoked by the Court making it, but that no other court can declare it void; "for it was granted by the

competent Court although committed without taking bond or administering the oaths." The same point was decided in *Miller* v. *Hoskins*, 2 Dev. 360. The words of the record were, "administration upon the estate of Richard Miller, granted to William Taylor, giving bond in six hundred pounds with J. M. and D. B. as sureties." The Court decide that the words "granted" and "giving" plainly mean, "is now granted" and "is now given." These authorities decide the present question. By the order of the April term, 1839, of the County Court of Martin, Hammond was appointed the guardian of the plaintiff, and by virtue of it, was entitled to take into his possession, the property of his ward. No security was taken by the appointing Court, of which the defendant was one, and for such omission, the members of the Court were liable to the plaintiff in damages.

The second objection cannot be sustained. We were at first struck with the force of the objection, this being an action of *tort*, arising under an Act of Assembly, rendering all the appointing magistrates liable, it was thought unjust that one should be selected and made to bear the whole burden, when the delinquency was shared by him with two others.

Upon reflection, however, we are of opinion that the action is properly brought against the defendant alone. The Act declares "that the justice or justices appointing the guardian, &c., shall be made liable, &c." The Statute, therefore, evidently contemplated a case, in which the action might be brought against one alone of the appointing justices, in view, likely, of the remedy given, namely, an action on the case at common law. It is a doctrine of the common law, no doubt familiar to those who passed the act, that in *torts*, the party injured may bring his action against the whole of the *tort-feasors*, or against any one. The action is, therefore, well brought against the defendant alone.

The remaining question is as to the amount of damages, to which the plaintiff is entitled. The plaintiff insisted that he was entitled to the amount received by Hammond from the preceding guardian, Howell, with compound interest from the

time he received it, up to the time when he came of age, and to simple interest on the amount of said principal and interest, up to the term of the trial, and so his Honor instructed the jury. The plaintiff is clearly entitled to compound interest to the time when he came of age, but not to any interest after that time. The argument upon the latter point is, that the Act makes the appointing justice liable "for all loss and damages" which the ward has sustained by their default and that the simple interest was occasioned by their default. Not so. As soon as the ward came of age, he had a right to bring his action. If he had done so he would have recovered his compound interest and had all that was justly due him. The simple interest then was the result of his own negligence in not bringing his action soon enough, and we cannot punish one man for the negligence of another.

We are pleased that the jury have so found their verdict as to enable the Court to rectify the error without sending the parties back to another jury. The verdict gives to the plaintiff $920 in damages, of which $334 74 is the sum received by the guardian Hammond, from the former guardian. $338 83 is the compound interest on that sum to the period when the plaintiff arrived at full age, and the balance $246 43 is simple interest on those two sums, from the time when the compound interest stopped, to the commencement of the term. The compound interest upon the sum received by Hammond, together with the principal sum, compose the true amount to which the plaintiff is entitled, to wit: the sum of $673 57. The judgment below is reversed as to the sum of $246 43, and judgment will be entered for the sum of $673 57, the amount of three hundred and thirty-four dollar sand seventy-four cents, with compound interest thereon to the time when the plaintiff came of age. It may be that the defendant could have been entitled to a deduction on the score of commissions, but the point was not made and we give no opinion upon it.

PER CURIAM. Judgment reversed, (in part.)

JOHN B. THOMPSON *vs.* ENGLISH G. FLOYD.

Where by an Act of Assembly, Jury trials are abolished in the County Courts of a particular County, and an issue of *devisavit vel non* was made up in such County Court, there being no provision in the Act for removing the issues into the Superior Court: Held that the proper mode would be by *certiorari*, but that a removal by consent of parties would render the issuing such writ unnecessary.

Held further, that an order of removal simply, is to be taken as a removal by consent.

It is not an unconstitutional exercise of power in the Legislature, to make it discretionary in a County Court to abolish Jury trials in such Court.

ISSUE of DEVISAVIT VEL NON, removed under the act of Assembly abolishing jury trials in the county courts of Robeson, into the Superior Court and tried before his Honor, Judge PERSON, at the Special Term of that Court in May last.

The record in the County Court shows that the paper writing in question, was offered as the last will and testament of *William Thompson*, by John B. Thompson, and that it was opposed by William P. Floyd, an infant, by English G. Floyd, his guardian.

An issue of *devisavit vel non* was made up in the case, and being duly set down on the docket for trial, the cause was removed to the Superior Court of Robeson by the following order: "Removed for trial to the next term of the superior court for this county"; which entry appears immediately after the statement of the issue. The issue was submitted to a jury in the Superior Court, and a verdict taken by consent in favor of the will, subject to the opinion of the Court on a question reserved, with an agreement that in case his Honor should be of opinion with the caveators, that the Superior Court of Robeson could not, in this way, take cognizance of the matter, the verdict should be set aside, and the proceedings dismissed. His Honor being of opinion with the caveators, the verdict was ordered to be set aside and the suit dismissed; from which judgment the propounders prayed and obtained an appeal to this Court.

The Act of Assembly under which the question of jurisdiction is raised, is substantially set out in the opinion of the Court and, therefore, need not be stated here.

Winston, Sr., and *Shepherd*, for propounder.
Troy and *Banks*, for caveator.

BATTLE, J. After the issue of *devisavit vel non* was made up in the county court, the only way in which it could be disposed of was by a trial by jury; and if the jurisdiction to have causes tried in that mode had been taken away from the County Courts of Robeson, and vested exclusively in the Superior Courts of that county, either party had a right to remove their cause to that Court, by a writ of *certiorari*, for the purpose of having the issue tried there. In the case of the *State* v. *Jacobs*, Busb. Rep. 218, we held that by consent, the parties might remove a cause under similar circumstances, without the trouble, delay, and expense of that writ; and that when an order appeared upon the records of the County Court in the following words, "Ordered that this cause be transferred to the Superior Court for the trial of the issue"; it would be taken as having been made by consent. The order in this case, following immediately upon the making up of the issue "Removed for trial to the next term of the Superior Court of this county," is one of equivalent import with that in the *State* v. *Jacobs* and must be governed by the same rules. Indeed the counsel for the defendants have not, in this Court, relied much upon the ground of objection to the jurisdiction of the Superior Court; but have sought to sustain the judgment of that Court, dismissing the cause, for the want of jurisdiction, by contending that in the second section of the Act of 1850, entitled "an Act to repeal an Act entitled an Act to give exclusive jurisdiction to the Superior Courts of Robeson in all cases where the intervention of a jury shall be necessary" is unconstitutional, and therefore void.

The first section of the Act, by repealing the act of 1820, restored jury trials to the County Court, and then the second

section provides as follows: "That if a majority of the acting justices of the peace for the said county shall, at any time hereafter, deem the restoration of the jurisdiction of pleas to the said Court inexpedient, they shall have power to abolish the same; first giving thirty days notice of their intention upon the court-house door in the town of Lumberton, and in the event of the happening of the same, the clerk of the Court of pleas and quarter sessions shall, within five days thereafter, transfer to the office of the Superior Court clerk of the said county, all books, papers and process in his office wherein the intervention of a jury shall be necessary, and the said Superior Court clerk shall enter the same upon his docket in the same manner and under the same rules and regulations as if the original process had issued from his office." It is admitted that the justices of the County Court had abolished jury trials therein, prior to the time when the issue in this case was made up. The counsel for the defendant contend that after the jurisdiction to try issues of fact by a jury had been conferred upon the County Court by law, the power to abolish it was exclusively a legislative power, which the General Assembly alone could exercise; and which, therefore, it could not delegate to the justices of the County Court.

In the discussion of the question of constitutional power, which is thus raised, it is not necessary for us to enter upon an examination of the nature and extent of the power of the Legislature. It is not denied that the law-makers "May order and enact what to them may seem meet and useful, upon all subjects, and in all methods, except those on which their action is restrained by the Constitution," either of the United States, or of the State—(See *Hoke* v. *Henderson*, 4 Dev. Rep. at p. 7.) Neither is it necessary for us to consider the general question whether the General Assembly can delegate any portion of its legislative functions to any man or set of men, acting either in an individual, or corporate capacity. That it may, has been too long settled and acquiesced in by every department of the government and by the people, to be now disputed or even discussed. The taxing power is unquestionably a legislative

power and one of the highest importance: and yet it has, ever since the adoption of the Constitution, been partially delegated to the justices of the county courts and to every incorporated city, town and village, throughout the State. The power to pass laws and ordinances for the government of the members of a corporation is a legislative power, and yet no person has ever yet thought it an infringement of the Constitution for the Legislature to confer the power of making by-laws upon the corporation itself. The power of prescribing rules for the orderly conduct of business in a court of justice, is a legislative power, and yet it has often been intrusted to the courts themselves, with the approbation of every body. The truth is, that in the management of all the various and minute details, which a highly civilized and refined society requires, the General Assembly must have, and are universally conceded to have, the power to act by means of agents; which agents may be either individuals or political bodies; most generally the latter. Without such power the Legislature would be an unwieldy body, incapable of accomplishing one-half of the great purposes for which it was created.

When the act is done by the agent, its efficacy is derived, not from the agent, but from the Legislature itself, the source of the power. Hence, the Legislature has, through its agents, run off and marked the boundaries of counties, and located and established their seats of justice. It has often appointed agents, and conferred upon them authority to ascertain the existence of certain facts, declaring what the law shall be if the facts be found to exist; and yet no one ever thought of doubting that the law went into operation immediately upon the ascertainment of the facts, in the manner designated. Of this a remarkable instance is to be found in the act of 1834, ch. 1, entitled, "An Act concerning a convention to amend the Constitution of the State." That Act employed the agency of many of the executive and ministerial officers of the government, to ascertain whether it was the will of the people of the State that a convention should be called for the purpose of amending the Constitution, and declared that if a majority

of the voters of the State, should have been found to have cast their votes in favor of the measure, that delegates should be elected, and the convention should be held. It is well known that, without any further legislation on the subject, upon a majority of the votes having been ascertained to be in favor of the calling of the convention, it was called, met, and proceeded to adopt and propose to the people certain amendments, which were ratified by them, and now form a part of our fundamental law. That Convention was composed of many of the ablest lawyers and statesmen of the State, and though a few of the members doubted of the legality of the restrictions which the act imposed upon them, not one was heard to question its validity in any other respect. Time would fail us to enumerate all the instances of a like partial delegation of power. The celebrated one to which we have just adverted is alone decisive of the case before us.

The Legislature, in substance and effect, appointed the justices of the County Court of Robeson to ascertain the fact, whether a majority of them were in favor of surrendering the jurisdiction of having jury trials in Court: and in the event the fact being thus found, enacted that thereafter such jurisdiction should be taken from them and vested exclusively in the Superior Court of the county. The jurisdiction was transferred, not by the justices of the County Court, but by the Legislature; just as the Convention of 1835 was not called into existence by the authority of the Governor, who ascertained and proclaimed the fact that a majority of the voters of the State were in favor of it, but by the act of the Legislature of 1834, which prescribed the time, manner and circumstances, at, in and under which, it was to meet and perform its important duties. The justices were the mere instruments of the Legislature to perform a certain act, and ascertain a certain event, which, in its wisdom, that body deemed proper to be performed and ascertained, before its will, in relation to a certain matter, should go into operation. Should it be now held that a subsequent declaration of its will is necessary before it can be carried into effect, it will unsettle many laws which

have, ever since the foundation of our government, been received and universally acted upon as valid. Not to multiply instances: the 29th sec. 31st ch. Rev. Stat., which authorizes the justices of the county court to dispense with the attendance of jurors at two of their terms, affords an apt illustration of the subject. That Act, under a somewhat modified form, was passed originally in the year 1806.—(See Rev. Code of 1820, ch. 693, sec. 9.) It has been acted upon in some of the counties of the State for many years, without question, and we think it is now too late to attempt to bring it into doubt. To dispense with the attendance of jurors at two of their terms, is, in effect, to abolish jury trials at those two terms: and is as much a legislative power, as to abolish them at the four terms, or altogether. The cases are alike and cannot be distinguished from each other in principle, and they must both stand or fall together. In our opinion both can stand upon the ground that it is the Legislature, and not the justices, which enacts the law by which the jurisdiction is taken away in part or in whole.

It would be difficult, and it certainly is not necessary, for us to attempt to define the precise boundary between what the General Assembly, in its legislative capacity, is bound to do in and of itself, and what it may do by and through the agency of others. Whatever that dividing line may be, it is clear that the justices of the county court of Robeson, in performing the act which they were authorized to perform by the legislature of 1850, were not, in a proper sense, legislating upon the subject. As soon as they had done what it was entrusted to them to do, they were *functi officio* and had no further power over the matter. They could not repeal, alter, or amend the law in the slightest particular. They had simply, under the authority of the Legislature, ascertained a fact, and then the legislative declaration of the will of the law-makers attached a law to that fact. The partial and limited power of the justices is extinguished and gone forever. The universal and unlimited power of the Legislature, within the bounds of the Constitution, is still existing, and still upholding the

law which took away the jurisdiction of trying jury cases from the County and transferred it to the Superior Court. Under that law his Honor, in the latter court, ought to have entertained and disposed of the present cause, and it was erroneous to dismiss it.

For this error the judgment must be reversed, and this must be certified to the superior court, to the end that it may proceed to have the issue tried, and the cause disposed of according to law.

Judgment reversed.

PER CURIAM.

ARCHIBALD McLAUGHLIN *vs.* JOHN J. McLAUGHLIN *et al.*

Where upon the appearance of an insolvent at the County Court, a suggestion of fraud is made, but no specifications are filed in that Court, *Held* that the cause was not in a state to be carried to the Superior Court by appeal, *certiorari* or otherwise.

MOTION for judgment on a *ca. sa.* bond, heard before his Honor Judge PERSON, at the Special Term of Robeson Superior Court, May, 1855.

At February term, 1854, of Robeson County Court, the following is the entry in this case: "Defendant not allowed to take the oath; fraud suggested. Transferred to the superior court." This transfer was intended to be in pursuance of an Act of Assembly passed in 1850, concerning the County Court of Robeson. There were no specifications of fraud filed in the County Court, but specifications were filed in the Superior Court, at spring term, 1854, and the cause was continued till this term when, the defendant not appearing, a motion was made for judgment by default against him and his sureties. The motion was opposed, on the ground, that the cause had been sent to the Superior Court prematurely, not having been put at issue; and his Honor being of that opinion, ordered it to be dismissed, from which judgment plaintiff appealed.

Shepherd, for plaintiff.
Troy, for defendant.

BATTLE, J. The question which has been discussed before us, and decided at the present term in *Thompson* v. *Floyd*, (ante 313) does not arise in this case. Here no issue was, nor as matters then stood, could have been made up when the cause was transferred to the Superior Court. The 10th section of the Revised Statutes ch. 58, entitled "An Act for the relief of insolvent debtors," provides that when a debtor, after having taken the necessary preliminary steps, applies to the county court for permission to take the benefit of the act, any creditor may suggest fraud: whereupon the court shall direct an issue to be made up and tried by a jury. The Act of 1844, ch. 31, sec. 2, (Ire. Dig. Man. p. 118,) prohibits the court from permitting such an issue to be made up and tried, unless the creditor, his agent or attorney, shall file his suggestions of fraud in writing.

From the record it appears that no suggestions were filed, and no issue made up until the cause was docketted in the Superior Court. It was not therefore, while in the County Court, in a condition to be taken to the Superior Court by way of appeal, writ of *certiorari*, or otherwise, and his Honor did right in dismissing it for want of jurisdiction.

PER CURIAM. The judgment is affirmed.

THOMAS SUTTON AND WILLIAM LONG *vs.* JOSEPH MADRE.

Circumstances that raise only a *possibility or conjecture*, ought not to be left alone, to a jury as evidence of a fact which a party is required to prove.

ACTION of trespass *quare clausum fregit*, tried before his Honor Judge PERSON, at the last Spring Term of Perquimons Superior Court.

Title to the *locus in quo* was proved to be in the plaintiff,

Sutton: it had been cultivated by one Thach, under whom Sutton claimed title in 1851, but by no one in 1852, until the fall of the year, when it was proven that both of the plaintiffs were seen there, with their respective horses and hands, ploughing and putting the land in wheat. Both of these repaired the fences, including the dividing fence between the field in question, and that of the defendant, upon which they put some new rails, and they gathered and shipped the wheat crop the ensuing year.

There was evidence as to the defendant's entry, also to plaintiff Sutton's title and as to boundary; and there were questions raised as to the admissibility of evidence, which are all stated in the defendant's bill of exceptions; but from the view taken of this case, by the Court, it is not material for them to be set forth.

The defendant's counsel insisted that the plaintiffs could not recover, because the legal title being in the plaintiff, Sutton, and he being in actual possession, that possession was exclusive; and that there was no evidence of any such possessory right or possession in the plaintiff, Long, as to admit of an action being sustained by him, and called upon his honor so to instruct the jury.

But the Court declined so to instruct, and left it to the jury to say, whether "they were satisfied from the evidence, that Long was there under a contract of renting or some like agreement, by which he acquired an interest in the land.

To this the defendant excepted. Verdict for the plaintiff. Judgment and appeal.

Heath, for plaintiff.
Smith and *Jordan*, for defendants.

BATTLE, J. It may be a matter of regret that the judgment in this case must be reversed and a new trial granted upon an objection which applies to the parties, and not to the merits of the suit. We say it *may be* a matter of regret because, apparently, the law has been correctly administered in the Court

below, in every thing except in submitting to the jury the question of the joint possession of the *locus in quo* by the plaintiffs, without any proper evidence to support it. The title of the land was shown to be in the plaintiff, Thomas Sutton, and the only testimony offered to show that the other plaintiff was in possession with him, was that the two were seen together ploughing in a crop of wheat, with their respective hands and horses: were also seen to repair the fences and to gather and ship the wheat the ensuing year. No written lease, from Sutton to the other plaintiff was produced, and no oral letting was shown by any direct proof, and it was left to be inferred from the testimony just above stated. Was that testimony sufficient to be left to the jury for that purpose? We think that under the circumstances it was not. The burden of proof, it will be remembered, lay on the plaintiffs. The evidence they offered could raise a conjecture only of a fact which they were bound to establish. It was just as consistent, if not more so, with the supposition that the plaintiff, Sutton, permitted the other plaintiff to crop with him upon shares, as that he had rented him the land. Such a case comes directly within the rule laid down by GASTON, J., in delivering the opinion of the Court in the case of *Cobb* v. *Fogleman*, 1 Ire. Rep. 440, "Where the law does not presume the existence of a fact, there must be proof, direct or indirect, before the jury can rightfully find it: and although the boundary between a defect of evidence and evidence confessedly slight, be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture of a fact, never can amount to legal evidence of it." See also *State* v. *Revells*. Busb. Rep. 200. The rule may, perhaps, be better illustrated by the following example: suppose the plaintiff in a cause was bound to show the existence of a fact within twenty years, and the only testimony he offered was that of a witness who stated that it existed either nineteen or twenty-one years, and he could not remember which: could the Judge leave that isolated statement to the jury as testimony, from which they were at liberty to find the issue in favor of the plaintiff? Certainly not; and

yet the case would be as strong in his favor as the present. Here the testimony tends to prove a fact against the plaintiffs as much as it does one for them. Hence it can, at most, raise only a possibility or conjecture, which, as Judge GASTON says, is not legal evidence of the fact.

For the error in this single particular the judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Doe on the demise of JEREMIAH BASON *vs.* JOHN HOLT.

The words of a will "to the only proper use and behoof of my daughter, Margaret," who is a *feme covert*, do not of themselves secure to such *feme covert* a sole and separate estate, so as to deprive the husband of his marital rights.

ACTION of EJECTMENT, tried before DICK, Judge, at the last Term of Alamance Superior Court.

The lessor of the plaintiff claimed title under the will of Joseph Bason, which contains the following clause, that is, "I give and bequeath and demise to my son, Jeremiah Bason, his heirs and assigns, a mare and colt, cow and calf, and wheel, one bed, household and kitchen furniture, sheep, cattle, hogs, and all the personal property bought by me as belonging to Martin Whitsett, placed by me in the possession of my daughter, Margaret; also a negro girl, named Mary, and her increase, born or to be born; also the tract of land bought by me from the said Whitsett, whereon he resides, to have and to hold the said property, real and personal, to the only proper use and behoof of my daughter, Margaret, and at her death, equally divided among her children then living."

The defendant claimed the tract of land mentioned in the above extract, by virtue of a sheriff's sale, under a judgment, &c., against Austin Whitsett.

The case sent to this Court, concludes in these words, "The

only question was, whether Austin Whitsett, who is the husband of Margaret mentioned in the will, has such an interest in said land as could be sold under execution for his debts. His Honor, Judge Dick, was of opinion, that he had not such an interest." To which instruction the defendant excepted.

Verdict for the plaintiff. Judgment and appeal by defendant.

Graham, for the plaintiff.
Norwood, for the defendant.

NASH, C. J. The question arises under the will of Joseph Bason, deceased. The clause of the will is as follows: "I give and bequeath and demise unto my son Jeremiah Bason, his heirs and assigns, a mare and colt, &c., property bought by me as belonging to Martin Whitsett, placed by me in the possession of my daughter, Margaret, &c.; also, the tract of land bought by me from said Whitsett, whereon he resides, to have and to hold said property, both real and personal, to the only proper use and behoof of my said daughter Margaret, and at her death, equally divided among her children." The land thus devised was sold under an execution against Whitsett and purchased by the defendant. Do the words, "to the only proper use and behoof of my said daughter Margaret, &c." deprive her husband, Martin Whitsett, of his marital right? We think that of themselves they do not. That a separate estate both in real and personal property may be so conveyed, by either a deed or will, to a female, as to secure it from the control of her husband, and put it beyond the reach of his creditors, cannot be denied; but such disposition is not favored by the law, and the words used in a will or deed, to have such effect, must be "unequivocal and expressed in unambiguous terms." No words of art are, however, necessary: it will be sufficient, if, as above stated, the intention of the donor is expressed in terms sufficiently plain. The word "separate" is the appropriate word, but any others will do which express the whole legal idea belonging to the first. See Levin on Trusts, page 150.

This subject has several times been before this court. The case of *Rudisell* v. *Watson*, 2 Dev. Eq. 430, was a devise; the words were, "all to be for her and her heirs' proper use:" the Court decided they were not sufficient to deprive the husband of his marital rights. In *Ashcraft* v. *Little and others*, 4 Ire. Eq. 236, which arose under a deed, the words were, "but the said gift to extend to no other person;" it was decided they did not amount to a separate estate in the daughter, the donee. In Rudisell's case the doctrine is gone into largely, and the English authorities examined; among them, *Willis* v. *Sayres*, 4 Mad. 409, and *Roberts* v. *Spicer*, 5 Mad. 491; this Court says "it was held that upon the force of the particular words "her use" or "her own" use, &c., no separate use could be implied; for her own use and her proper use meant the same thing, &c. I think no person can find a difference between her *own* and her *proper* use." In our case the words are, "*to the only proper use and behoof* &c." In Ashcraft's case, the strong words "to extend to no other person," were not sufficient. Between the words "to her *own proper* use" and the words "her proper use," there is no difference, they mean the same thing, and we have seen that the latter are not sufficient to convey a separate use to the female.

But this case differs from those cited in this, that here the legal title was in a trustee by the terms of the will. What would have been the decision of this Court, if, at the time of the making of the will, the devisee, Margaret, had been shown to be the wife of Whitsett, we do not consider. We have looked carefully through the will to find if the fact were so, and the case sent here is silent on that point. The only indication upon that subject is contained in the opinion of the court below, in which it is stated "Arthur Whitsett, who is the husband of Margaret, &c." It does not say he *was*, at the time the will was made, and we cannot, as was said by the Court in Rudisell's case, be governed by a meaning so defectively expressed.

As this fact did not appear, so far as the record shows, his

Honor erred in holding that Whitsett had no such interest as was the subject of an execution.

Judgment is reversed for the error pointed out, and a *venire de novo* is awarded.

PER CURIAM.

STATE *on rel. of* ISRAEL BROOKS *vs.* WILSON GIBBS *et al.*

A defendant in an execution paid the money to the sheriff who had the writ in his hands; the sheriff failed to make return of the money or process; a second execution issued upon which the defendant therein (the present relator) paid the money again: *Held* that he could not bring an action against the sheriff on his official bond for failing to make the proper return; that remedy inured to the plaintiff on the execution, and the relator's remedy was to have the second execution set aside on motion, or sue plaintiff in the execution for money had and received as having been paid under a mistake.

ACTION of DEBT, tried before his Honor Judge CALDWELL, at the Fall Term, 1854, of the Superior Court of Hyde county.

A verdict was taken by consent, subject to the opinion of his Honor upon the case which is recited in the opinion of this Court. The Court below, upon consideration of the case, being of opinion with the defendants, ordered the verdict to be set aside and a non-suit to be entered.

Shaw, for plaintiff.
Donnell, for defendant.

NASH, C. J. There is no error. In 1850, an execution came to the hands of the sheriff of Hyde, on whose official bond the defendants were sureties, at the instance of one Young, against the relator, who thereon paid the sheriff three hundred dollars. The writ was never returned, nor the money paid into the office, nor to the plaintiff in the execution. The sheriff of Hyde died, and after his death, another execution was

issued against the relator, upon which he again paid the money. The action is on the official bond of the deceased sheriff; the breaches assigned, that he did not pay to the proper person the money received, nor return the writ. The relator has misconceived his action; he might have maintained an action against Young, the plaintiff, for money had and received to his use as having been paid by mistake. When the sheriff of Hyde received the money on the execution, the latter was discharged and he had no further claim upon the relator, in relation to it, and Young committed a tort or wrong in having issued the second execution. If a sale of the relator's property had taken place under the second execution, the sale would have been void and the purchaser would have acquired no title under it. *Murrell* v. *Roberts*, 11 Ire. 424.

The first execution was discharged and the debt paid. The relator paid the amount the second time in his own wrong. When it issued, he might have stopped it by a motion in the Court from which it issued, or by *audita querela*, which is the appropriate remedy where the party has no claim. He has no claim against these defendants. Such an action might have been brought by Young, for it was an injury to him, that the sheriff made no return to Court, nor paid the amount received, to him.

PER CURIAM.. Judgment affirmed.

WILLIAM H. WINDER *vs.* PENELOPE SMITH *et al.*

Where one construction can be put on words in a will (in themselves extremely vague and indefinite) which will give operation and effect to the intention of the testator, that construction will be adopted, rather than the whole purpose of the will should fail.

ACTION of COVENANT tried before his Honor, Judge CALDWELL, at the Spring Term, 1855, of Wake Superior Court.

The following case was agreed and submitted to the Superior Court.

The defendants, by their deed of bargain and sale, executed on 20th of April, 1854, bargained and sold to the plaintiff, his heirs and assigns, certain lands and real estate lying in the county of Wake, being the same mentioned in the plaintiff's declaration, and in, and by the said deed did covenant, among other things as follows: "That they, the said Penelope Smith and Mary A. Smith, or one of them, at and immediately before the time of the sealing and delivery of these presents are or is lawfully, absolutely, and rightfully seized of a good, sure, perfect and indefeasible title and estate in fee simple, in possession of and in the premises herein before by these presents granted and sold, or mentioned, or intended so to be, and every part thereof, without any manner of remainder or remainders over or other matter or thing whatever," and also as follows, that is to say "that they the said Penelope and Mary, or one of them, now have or hath a good right and title and lawful power and authority to grant, bargain and sell the said premises, and every part thereof, unto and to the use of the said Winder, his heirs and assigns, according to the true meaning of these presents."

The only title claimed or set up by the defendants, or either of them at the date of these covenants, was as devisees under the will of Richard Smith, the late husband of the defendant Penelope, and father of defendant Mary, which is as follows:

"I, Richard Smith, of the city of Raleigh, county of Wake, and State of North Carolina, being of sound mind and memory, do make and ordain this to be my last will and testament, as follows, viz: to wit:

"Item, 1st. It is my will and desire that the whole of my estate, both real and personal, be divided between my wife and daughter Mary Ann Smith, as the laws of the State have and are made and provided, believing that those laws make as equitable and fair a division as I can make, with the following proviso and exceptions, to wit:

"It is my will and desire that my wife, Penelope Smith,

who will be entitled to one-third of all the personal estate to her and her heirs forever, and her third, or dower, of all the real estate during her natural life.

"Item 2nd. I also give and bequeath to her, to do as she pleases with, one equal half of all the nett profits of my estate both real and personal, for her maintenance and support as long as she lives and may require it.

Item 3rd. I give and bequeath to my daughter Mary Ann Smith, who will be entitled to the other two-thirds of all my estate, both real and personal, the other one equal half of all the nett profits of my estate both real and personal, for her maintenance and support. The care and management of which, and collections of the same, is to be made by her mother, and not to be paid over to her until it is collected, unless her mother chooses to do so; which I leave to her discretion.

"Item 4th. I give and bequeath to my daughter, Mary Ann Smith, all the rest and residue of my estate, both real and personal, as the laws of the State allows, and not given away in either of these items of my will above; with the following proviso and exceptions, intended by me for her special benefit and protection: that is, she is to have the one-third of her portion, if she requires it, for her support and maintenance and to do as she pleases with; the other two-thirds only I lend her, in trust, to be managed by the County Court of Wake, and Superior Courts, and Courts of Equity of said county, as trustees for her and her heirs forever, allowing to her and her heirs the nett income of the said two-thirds aforesaid, after the decease of her mother: and if the Courts aforesaid should not act in the capacity of a trustee, as before desired, then it is my will and desire for either of the said Courts to appoint some safe and competent person or persons, from time to time, to act as trustee, and the Court is to make such order and decree as to them may appear fair and proper, and may require such securities of the said trustee as to them may appear proper; and if such trustees are appointed they are not permitted to diminish but is to remain as a separate and special and trust fund for her benefit and her heirs forever, (she re-

ceiving the nett profits after the decease of her mother, as mentioned in another clause of the will) for and during her natural life, and then to such of her child or children as she may have or leave surviving her. I do not make this provision to deprive her or her husband, if she marries, from the free use and enjoyment of the fruits of my labor and industry, but to provide, as far as I can, for her and her children against any misfortune that might happen, and which I am legally advised is proper.

"Item 5th. The whole of my estate I wish to be kept as much together as the nature of the case will admit; though I make no positive item to that effect, and the whole of my servants to be treated well and provided for, except such as may become refractory and unruly, and if so they may be sold. It is my first request that all my just debts be first paid, out of the first avails of my estate: having been careful to keep out of debt, it is my wish to owe little or nothing at my decease: but no doubt some small charges, or debts, will have to be paid, which may be paid out of any monies I have at the time of my decease. Written by myself and pronounced by me to be my last will and testament, and signed in my own proper hand-writing, and preferring not to have any subscribing witnesses, as the law provides as good or better proof of any person's hand-writing making a will. And I file this, my will, among my most valuable papers, revoking and disannulling all, or any other will made by me, if any should appear, and pronouncing this to be my last and my only will and testament. Given under my hand and seal, 10th Oct. 1851," &c. "SIGNED AND SEALED."

"CODICIL TO THIS MY WILL:

"It is my wish and desire, that the black lead plumbago mines, which I own now one-half of, may never be sold but kept in perpetuity for my estate; but some small part or parts of the land that may not be material to keep, may be sold, if necessary, but no part or parts of the mines. Oct. 10, 1851.

"SIGNED."

"*Item.* I hereby appoint my wife executor to this my last will and testament, and request her to call in such friends to aid her as she may find desirable. Oct. 10, 1851.

"SIGNED AND SEALED."

And it is agreed "that if, by the above will, a good and indefeasible estate in fee simple was devised to the said Penelope and Mary, or either of them, so as to amount to a performance of the covenants, then a judgment of non-suit be entered, otherwise, judgment to be for the plaintiff, and an inquiry of damages to be awarded as upon a judgment by *nil dicit*, or *non sum informatus*."

Upon consideration of the premises, his Honor, being of opinion with the defendants, gave judgment of non-suit.* From which plaintiff appealed.

Badger, for plaintiff.
Miller, for defendants.

BATTLE, J. The question presented by the case agreed, depends for its solution upon the construction of the will of the late Richard Smith. The devisor was manifestly *inops concilii*, and his will requires all the aid which can be derived from that consideration, to enable us to carry out his presumed intention.

Looking at the whole will, and endeavoring to give effect to every part of it, as it is our duty to do (*Owen* v. *Owen*, Busb. Eq. 121. *Cheeves* v. *Bell*, 1 Jones' Eq. 234) we are led to the conclusion that by the fourth clause the devisor has given to his daughter, Mary Ann, an estate in fee in all his real estate, subject to the dower of her mother therein, with an executory devise in fee, in two-thirds thereof, to her children, should she marry and die leaving issue. The devise is, in form, rather a gift to her for life, with a contingent remainder in fee to her

* It is due to his Honor, Judge Caldwell, to say that this judgment was strictly *pro forma*, and was rendered at the urgent request of both counsel, without there being the slightest opportunity for examining the case.

children, and upon default of children, remainder to her and her heirs; but the legal operation and effect of it is as we have above stated. The construction which gives an executory devise to the children of his daughter is admissible, and is adopted, because it is the only means by which the manifest intention of the devisor to provide for them, can be carried into effect. The alternative, contended for by the defendant's counsel, of declaring that the latter portions of the clause in question are too vague and uncertain to be allowed to operate, we do not feel at liberty to adopt, while effect can in any way be given to them. Amidst their darkness and obscurity we can yet see light enough to enable us to fasten upon the estate given to the daughter, a provision for her children, should she ever marry and die leaving any surviving her.

Our opinion therefore, is, that there was a breach of the covenant contained in the deed under which the plaintiff claims. The judgment of the Superior Court must be reversed, and judgment given here for the plaintiff, according to the case agreed, and this must be certified to the end that he may have an enquiry of his damages.

PER CURIAM. Judgment reversed, and judgment for plaintiff.

CASES AT LAW

ARGUED AND DETERMINED

IN THE SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1855.

THE STATE *vs.* MARION WOODY *et al.*

An indictment for an affray which simply charges that defendants *did make an affray*, without stating in what manner or by what acts, is defective.

THIS was an INDICTMENT for an affray, tried before his Honor Judge MANLY, at the Spring Term, 1855, of Ashe Superior Court.

The sole question in the case, arose upon the sufficiency of the following bill of indictment:

"State of North Carolina, } Superior Court of Law,
Ashe County. } Fall Term, 1855.

"The jurors for the State upon their oath present, that John King, Marion Woody, and Alvis Blevins on the 1st day of September, A. D. 1853, with force and arms, at and in the county of Ashe did unlawfully assemble together to disturb the peace of the State, and being so then and there unlawfully assembled together, did make an affray, to the terror and disturbance of divers of the good citizens of the State and its laws, to the evil example of all others in like case offending and against the peace and dignity of the State.

"SIGNED."

One of the defendants submitted and was fined at a former

term: the others were regularly put upon their trial at this term and being found guilty, a motion was made in arrest of judgment for the defects on the face of the indictment.

His Honor refused to arrest the judgment, and having pronounced the same, the defendant Woody appealed to this Court.

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

BATTLE, J. The question arising upon the appeal of the defendant, is whether the indictment, upon which he was convicted of an affray, is sufficient to sustain the judgment which was pronounced against him. "Every offense consists of certain acts done, or omitted under certain circumstances, and in an indictment for the offense, it is not sufficient to charge the defendant generally with having committed it, as that he murdered J. G. or stole the goods of J. S., or committed burglary in the house of J. S. or the like; but all the facts and circumstances constituting the offense must be specifically set forth." Arch. Crim. Plea. 41.

There are some exceptions to this rule, founded upon the nature of the offenses: Thus, "1. A man may be indicted for being "a common barretor" without detailing the particulars of the barretry. 2. A woman may be indicted for being a "common scold," without detailing the particulars of her conduct. 3. A person may be indicted for keeping a common gambling house, or bawdy house, without stating the circumstances which it may be necessary to give in evidence to show that it is a house of that description. 4. In an indictment for the soliciting or inciting to the commission of a crime, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or the aid or assistance. In all other cases, every fact or circumstance, which is a necessary ingredient in the offense, must be set forth in the indictment." Ibid 41, 42.

An affray is defined to be a fighting of two or more persons

in a public place to the terror of the citizens: *State* v. *Allen*, 4 Hawks' Rep. 356. This definition does not include every instance of an affray, as one person alone may be guilty of it by publicly riding or going armed offensively, to the terror and alarm of the peaceable citizens of the State. See 1 Hawk. P. C. ch. 63, sec. 2, 4; but it is sufficiently comprehensive to embrace the case now before us. An essential ingredient in the offense, as thus described, is that it is committed in a public place. If the fighting be in a private place, it is an assault and battery merely, and not an affray; *State* v. *Allen ubi supra.* Arch. Crim. Plea. 451, citing 1 Hawk. P. C. ch. 63, sec. 1.

It appears from this, that the indictment must charge a fighting or a being arrayed in a warlike manner in some public place, as in a public street or highway, and so are the precedents. Arch. Cr. pl. 450.

If the indictment charge that the parties "to, with and against each other, did fight and make an affray to the nuisance of the citizens," without stating that it was in a public place, they may both, or one alone, be convicted of assault and battery: See *State* v. *Allen ubi supra.* It follows from this that the present indictment cannot be sustained, because it omits to charge the facts and circumstances necessary to constitute the offense either of an affray or of a mutual assault and battery.

Judgment arrested.

PER CURIAM.

STATE *vs.* B. W. BELL.

The sale of a quart of spirituous liquor, under an agreement that the seller was to retain it in a separate vessel, and the buyer to have access to it when he pleased, under which agreement the buyer drank the whole at various times, (there being no finding that it was an artifice to evade the Statute) is not within the Act of Assembly.

INDICTMENT for retailing spirits by the small measure, with-

out a license, tried before his Honor Judge SAUNDERS, at the last Superior Court of Macon county.

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

NASH, C. J. The defendant is indicted for selling spirits by the retail without having a license therefor. Cunningham purchased of him a quart of spirituous liquors, for which he paid him the price, and it was agreed that the spirituous liquors should be put into a decanter for the purchaser, who should be at liberty to drink it by the glass as he might call for it, and under this arrangement Cunningham drank up the quart. His Honor was of opinion that the defendant violated the Act under which he was prosecuted. In this opinion we do not concur.

The Act creating the offense provides against retailing "spirituous liquors by the small measure, that is to say in quantities less than a quart without a license." In the case, *State* v. *Kirkham*, 1 Ire. Rep. 384, the Court said, if the contract between the parties had been that the seller should deliver a quart of spirits, *which particular quart* should thereupon become the property of the purchaser, although the seller, by agreement, was to retain it *for the purchaser*, so as to be used by the latter, from time to time, as he might require, we suppose that such a contract (unless perhaps it were found by the jury that there was an intent thereby to evade the statute) must have been held to be a contract for the sale of a quart. In the case now under consideration, the particular quart became the property of the purchaser upon the price being paid: it was placed in a decanter separated from the rest of the spirits, to be used by the purchaser at his pleasure, and he might at any time have taken away the whole without the consent of the seller, and either carried it home or deposited it elsewhere. His Honor below did not avail himself of the doubt expressed by the Court in Kirkham's case: he did not leave it to the jury to say whether the contract between the parties

was made with a view to evade the statute: that question is not before us, and we express no opinion upon it: but his Honor held that the facts proved in the case brought it within the operation of the statute. In this there is error, and a *venire de novo* is awarded.

PER CURIAM. Judgment reversed.

STATE *to the use of* A. C. SUTTON *vs.* J. B. ALLISON *et al.*

A sheriff by his return that *he has levied upon the property of the defendant* in a *fi. fa.* is estopped to deny the truth of such return.

A sheriff can, and when necessary should summon the *power of the county* to aid in the execution of final process.

ACTION of DEBT upon the official bond of the sheriff of Haywood, tried before his Honor Judge PERSON, at the last Fall Term of Macon Superior Court.

The breach assigned in the declaration was the failure of Allison, the sheriff, to collect a debt of the plaintiff. The plaintiff had in due time placed in the hands of Allison a *fieri facias* in his favor, against one Hunter, which was returned by the defendant, that he had "levied upon a horse and wagon." The defendant proved by a witness, that the property was not present when the entry was made, but was then in the county of Macon: that Hunter had assented to the levy and gave the sheriff a forth-coming bond, for the delivery of the property on the day of the sale, which was forfeited.

The defendant's counsel insisted, that a levy, made under these circumstances, did not vest the property in the sheriff, and did not make him liable to the plaintiff for its value. But the Court held the return was conclusive against the sheriff as to the levy. To which the defendants excepted.

It was in evidence, that Allison and Hunter and seven other persons, were present together in the county of Haywood

while this *fi. fa.* was in the hands of the defendant, Allison, and that Hunter had with him there, horses and other property, liable to execution: but there was evidence tending to show that the sheriff could not, alone, have seized the property and taken it out of the possession of Hunter, without endangering his life or exposing himself to great personal harm.

The Court charged that Allison had a right, and it was his duty, to summon the by-standers to assist him, and if with their assistance he could have seized the property, without endangering his life or incurring the risk of great bodily harm, he was bound to do so, and his failure to summon the by-standers was a want of diligence, which made him liable to the plaintiff. To which the defendant again excepted. Verdict for the plaintiff. Judgment and appeal to this Court.

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

PEARSON, J. We concur with his Honor, for the reasons given by him, upon both the questions presented in the case. The legal effect of a return, made by the sheriff "levied upon property of the defendant," is to preclude the plaintiff from taking any further action, because the judgment is satisfied by the levy, unless the debtor afterwards has the use and benefit of the property: such being its legal effect, and being a solemn official act made on oath, it amounts to an *estoppel* which, as Lord COKE expresses it, "shutteth a man's mouth from speaking the truth." An officer may sometimes obtain leave to amend, or to strike out the return, and make another, as when the property levied on turns out not to belong to the debtor, and is judicially ascertained to be the property of a third person. But while the return stands, and affects the plaintiff as stated above, it is proper that the sheriff shall not be heard to say, or to prove, that, in fact, he did not do what by his return he said he had done. In this point of view, the fact that the sheriff holds a forthcoming bond, to which he may resort for an indemnity, has some force: should he sue

on the bond, he, in his turn, will have the benefit of the doctrine of estoppel, and may "shut the mouth" of the obligors by their own deed, and prevent them from saying, "there was no levy, inasmuch as the property was not in the sheriff's county, and could not be levied on." They are concluded as to this matter by their deed.

The authorities cited upon the second point establish, that a sheriff is not required on mesne process, in a civil suit, *i. e.*, a *capias ad respondendum*, to summon the *posse comitatus*, or call out the power of the county. The reason is, that as the party is allowed to give bail, it is presumed the officer will have no occasion for the aid of the power of the county: for this reason "rescue" is a sufficient return to mesne process. Upon mesne process in criminal proceedings, and upon final process in civil suits, the law is otherwise; for the same reasons do not apply. *State* v. *Armfield*, 2 Hawks 246, decides that upon a *fi. fa.* the officer has no right to force open an outside door of the defendant's dwelling house: this is put on the ground that it is his castle; and the decision in no wise tends to prove, that upon a *fi. fa.* the sheriff is not required, if it becomes necessary, to call out the power of his county, as in other cases of "final process." Upon a *ca. sa.* a sheriff has no right to force open an outside door of the defendant's dwelling house, but he is required, if the defendant resists, to call out force enough to arrest him.

PER CURIAM. Judgment affirmed.

GEORGE W. MILLER *vs.* R. A. BLACK.

An action may be maintained in this State, though both plaintiff and defendant are citizens of other States.

A plea in abatement that the plaintiff is a citizen of one of the States of this Union other than North Carolina, and that the defendant is not a resident of the county where the suit is brought, but is a citizen of another State, it not

being alleged in the plea that the contract sued on was not made in North Carolina, on demurrer, will be overruled.

APPEAL from the Superior Court of Cleaveland, at Fall Term, 1854.

PLEA IN ABATEMENT to a writ to which the plaintiff filed a general demurrer—Joinder in demurrer.

The facts of the case appear from the opinion of the Court. On the argument of the demurrer below, his Honor, Judge PERSON, being of opinion that the plea was insufficient, sustained the demurrer and adjudged that the defendant answer over. From this judgment defendant prayed an appeal which was allowed.

Lander and *Baxter*, for plaintiff.
Guion and *Hoke*, for defendant.

NASH, C. J. The plea in abatement sets forth, that at the time the writ in this case issued, the plaintiff was a citizen of the State of Tennessee, and that he so continues, and that the defendant was, and is a citizen of the State of South Carolina.

The case presents simply the question, whether one citizen of the United States can sustain an action against a citizen of another, in a State where neither lives?

The Act of the General Assembly of this State, regulating the bringing of actions, has no relation to a case such as this; but is confined, mainly, to actions between citizen and citizen. To many purposes, the citizens of one State are citizens of every State in the Union: they are not aliens, one to the other; they can purchase and hold, and transmit by inheritance, real estate of every kind in each State. It would be strange indeed if a citizen of Georgia, meeting his debtor, a citizen of Massachusetts, in the State of New York, should not have a right to demand what was due him, nor be able to enforce his demand by a resort to the Courts of that State.

It is said that the Federal Court is open to him: That is so, provided the sum claimed is to an amount authorizing the interference of the latter court, to wit, $500. What is to be-

come of those numerous claims falling short of that amount? Must a citizen of California, to whom one, a citizen of Maine, owes a debt of $490, go to Maine, and bring his suit there, or wait till he catches him in California? We hold not; but that the courts of every State in the Union, where there is no statutory provision to the contrary, are open to him to seek redress. We possess one common country, and, to many purposes, one common government. The case of *Stramburg* v. *Heckman*, 1 Busb. Rep. 250, to which our attention has been drawn, was between two foreigners; the Court in sustaining the demurrer to the plea in abatement, state, that it did not appear in the plea, where the contract, sought to be enforced, was entered into, whether in a foreign country, or in this State, and thereupon the demurrer was sustained. If the principle enforced there, between foreigners, is to be applied to the citizens of different States of the Union, when seeking to enforce a contract in the courts of a third, then the plea here is defective: there is nothing in it to show that the contract was not made in North Carolina.

In England a contract made in a foreign country may be enforced in the courts there, by the parties to it. *Delavidge* v. *Vianna*, 1 Barn and Adol. 284. Story's Conf. Laws, sec. 538 to 542 and to 554. There is no error.

PER CURIAM. Judgment affirmed.

F. A. WEAVER *vs.* J. M. HAMILTON.

A Justice of the Peace who grants an appeal to Court, from a judgment which he has rendered, and takes the required security, but afterwards defaces the appeal bond and fails to return the papers to the Court to which the appeal is taken, although guilty of a misdemeanor, is not liable to be punished for a contempt of the Court.

Costs cannot be adjudged on a rule for a contempt, unless there be a judgment finding the defendant guilty of such contempt.

RULE served upon the defendant to show cause why he

should not be held in CONTEMPT of the Court: Heard before his Honor, Judge PERSON, at the Fall Term, 1854, of Rutherford Superior Court.

The rule was granted on the following affidavit:

"F. A. Weaver maketh oath, that on 8th day of February, 1854, or thereabouts, he recovered a judgment before J. M. Hamilton, one of the Justices of the Peace for the said county, against Robert Dobson for the sum of $15, or thereabouts: that thereafter, on or about the 18th of February, 1854, the defendant, within ten days after the rendition of said judgment, being dissatisfied with the said judgment, prayed an appeal to the Superior Court of Law, of said county of Rutherford, which was allowed, and gave as his sureties for said appeal, A. J. Hamilton, Thomas Green and Wm. H. Foster; who became bound as such in due form of law; that said judgment and appeal were then left in the possession of the said J. M. Hamilton, justice as aforesaid, whose duty it was to return the same at this term of this Honorable Court, to which the same is returnable. This affiant further swears, that said appeal has not been returned by the said J. M. Hamilton, but he retains the same in his hands, and refuses, as affiant is informed and believes, to return the same into this Court and have it entered of record: That affiant is informed and believes that the said J. M. Hamilton, justice, &c., has permitted and allowed the names of the said sureties to the appeal, to be stricken out and erased, after they had became bound as sureties, and has permitted, and allowed the said judgment, to be defaced and entries to be made thereon, contrary to law, and against the consent of affiant."

Plaintiff filed another affidavit affirming the facts set forth in the above.

The rule was granted by DICK, Judge, at Spring Term, 1854, and continued over to the Fall Term, 1854, of the same Court, when the defendant, having been served with notice, appeared and made the following return:

"This respondent answering thereto, saith that it is not true, as alleged in the affidavit of the said Weaver, that he recov-

ered a judgment against Dobson, but on the 25th of February last, this respondent, as a Justice of the Peace in and for this county, rendered a judgment in favor of John Dill, to the use of the said Weaver, against Robert Dobson for $9 50 principal, with interest from 8th of January, 1852, and 40 cents costs. From this judgment said Dobson prayed an appeal to this Court (which was allowed by this respondent) and gave for security A. J. Hamilton, Thomas Green and W. H. Foster. This being done, it was the purpose of respondent to return the said appeal, but being satisfied, from the representations of said securities, that they had signed the same under a misapprehension, they supposing that they were only bound for said Dobson's appearance two week's thereafter, respondent, in accordance with his convictions of duty, struck out the said appeal. In doing so, respondent thought he was acting within the limits of his judicial power, and intended only to measure out justice to the parties; he intended no contempt of this, or any other court: he acted from a sense of duty only, and from a desire to do justice to all; and he respectfully submits whether the rule made upon him, at the last term, is not only a reflection upon his judicial integrity, but in violation of all precedent, and a dangerous innovation upon the rights of an independent tribunal, bound under as high obligations to discharge its duties as this Honorable Court? He admits the superior supervisory power of this Court, but the mode and manner of exercising this power, he humbly concludes, has been misconceived in this case. As a Justice of the Peace he is advised and insists that he has as ample power to amend, alter or modify the judgments and entries made by him, as this Honorable Court, and if he errs, as he may have done in this case, from his anxiety to mete out justice to all concerned, by writs well defined, and whose offices are well understood, his acts may be brought up and revised and corrected here. As an illustration: parties litigating here, have a right of appeal in many instances, to the Supreme Court: suppose a judgment rendered by your Honor appealed from and an appeal bond executed, and afterwards cancelled, because of a

misapprehension of the sureties as to the nature of the liability incurred by them, or even from corrupt motives, to favor one of the parties, would this Court be answerable to this higher tribunal for a contempt? Respondent ventures the opinion that such a course would not be thought of, much less resorted to. The usual remedy by *certiorari* would be adequate for purposes of justice; it is the course marked out by law, practiced by every one and approved by the wisdom of ages, as the best mode of preserving the independence and integrity of separate tribunals. So in this case: If respondent has erred, the writ of *recordari* might have been sued, which would have sufficed to bring this error, legitimately, before this Court for revision: and if his error proceeded from corruption, he could be reached by indictment or impeachment, and not by a summary proceeding for contempt, to be inflicted at the discretion of one man, without the benefit of a trial of his peers, or the constitutional right of confronting his witnesses; but upon *ex parte* affidavits—the punishment restricted by no law, but resting solely on the arbitrary whim of the Court: Under these considerations respondent submits, that this Court has overleaped its powers, and usurped a jurisdiction, dangerous in its tendency, and violative of respondent's rights.

"Again: by the act of 1846, the power of this Court, to attach for contempt is defined and restricted: Your respondent has not been brought within its provisions by a single allegation made in plaintiff's affidavit or rule: on the contrary, the facts upon which this rule was granted, show, as he is advised, that he is not amenable to this Court in this proceeding. Wherefore, he prays to be hence dismissed, with costs, for this illegal proceeding against him.

"JOHN BAXTER, Attorney."

"Sworn to by the defendant."

Upon argument of the case the Court adjudged that "the defendant pay the costs in this case, to be taxed by the clerk, and that he be discharged."

From which judgment the defendant appealed.

Avery, for plaintiff.
Baxter, for defendant.

NASH, C. J. The doctrine of contempt is regulated in this State by statute. Before the year 1846, they were undefined, and left very much to the discretion of the court presiding. Under such circumstances, it is not at all to be wondered at, that many acts were considered as contempt, and punished as such, which, in the eyes of the public, were looked upon as harmless in themselves, but as exhibiting an arbitrary spirit in judicial officers. The necessity of this power, however, is felt and acknowledged by every one, who values the independence of the judiciary, or its wholesome action. If it were not in the power of the court to punish individuals, who, by noise or otherwise, interrupt its proceedings, its business would be impeded—the majesty of the law defied, and the court ultimately brought into contempt. Needful, then, as the power to punish for contempt is, to every court, mixed up as it is in its very being, it is proper and right that the courts should have, as far as possible, some sure guide to regulate their course. No well-minded judge desires to be burthened with discretionary powers: at least, no further than is necessary to the proper transaction of the business before him. In the year 1846, the Legislature of the State turned its attention to the subject, and defined the limit within which the power to punish for contempts should be exercised by courts of justice. In the 1st sec. of the 62 ch. it is enacted that "The power of the courts to inflict summary punishment for contempt of court, shall not, hereafter, extend to any causes except the misbehavior of any person or persons in the presence of the said court, or so near thereto, as to obstruct the administration of justice, the misbehavior of any of the officers of said court, in their official transactions, and the disobedience, or resistance by any officer of the said court, party, or juror, witness, or any other person or persons, to any lawful writ, process, order, decree or command of the said court." In the case before us, a judgment had been obtained by the plaintiff,

Weaver, before the defendant, who is a Justice of the Peace of Rutherford county, from which the defendant in the judgment prayed an appeal to the next term of the Superior Court, and entered into bond with sureties according to law. The appeal was not returned to Court, and a notice was regularly served on the defendant, to show cause why he did not return it, and also to show cause why he should not be held in contempt for refusing and neglecting to make return as required by law. In his return, the defendant states that a judgment to the use of Weaver was obtained before him against one Dobson, who being dissatisfied, prayed an appeal to the Superior Court of the county and gave three sureties, who, together with Dobson, executed an appeal bond. The return then states that the defendant being satisfied by the representation of the sureties, that they executed the said bond under a mistake, erased their names from it, fully believing he had a right to do so; and believing, that the defendant Dobson had not complied with the law, in giving bond and security thereto for his appeal, he considered the appeal incomplete, and that he had no right to return it to Court.

It will be readily perceived that the cause or foundation for the charge against the defendant, here, for contempt, does not come within any of the classes enumerated in the Act of 1846. The act complained of was not committed in the presence of the Court, or near thereto: the defendant is not an officer of the Court, nor has he refused obedience to any lawful writ, process, order, decree, or command of the Superior Court of Rutherford, where he was held in contempt. It is true, that the magistrate strangely mistook his duty, in striking from the appeal bond the names of the sureties. The bond was an official one, in his custody, as an officer of the law, and he had, after it was duly executed, no more power to alter it, than he had to alter or erase the judgment, or to erase any private bond which had been entrusted to his custody by the owner of it. The present plaintiff had acquired, by its execution, an interest in it, of which the defendant could not, by his officious and unauthorized alteration of it, deprive him. After the erasure

by the defendant, it still remained an appeal bond, and the papers ought to have been returned by him to the Court: the violence, perpetrated by him upon the official papers in his hands, was a misdemeanor, and may, under circumstances, be punished by indictment, but not as a contempt. The case was likened at the bar, to that of a sheriff, who, having collected money under an execution, fails, or refuses to pay it into the office of the court: in such a case the officer has violated his precept, which commands him to return it to the clerk of the court, one of the classes enumerated in the Act of 1846.

On behalf of the plaintiff, and in support of the allegation of the existence of the contempt, it is insisted that the plaintiff could not support an application for a *recordari*, for an appeal had been prayed for and granted. So far as enforcing the claim against Dobson and his sureties, was in question, the proper course was pursued by serving a notice upon the defendant to return the papers. His Honor considered the conduct of the defendant to amount to a contempt of court, and that the costs of the proceeding were a sufficient punishment. As there was no contempt of court, the defendant, under the general law regulating costs, was entitled to his costs.

PER CURIAM. Judgment reversed and judgment for the defendant for costs.

L. M. WILEY & CO. *vs.* W. L. McREE *et al.*

Simply advising a debtor to run away, though the advice be given to delay, &c., is not equivalent to *aiding* and *assisting*, and will not sustain an action under the Statute against the fraudulent removing of debtors.

ACTION ON THE CASE for the fraudulent removal of a debtor, tried before his Honor Judge PERSON, at the Fall Term, 1854, of Caldwell Superior Court.

In March, in 1849, J. O. Roberts & Co., owed a debt due by note, to the plaintiffs, who were merchants, living and do-

ing business in the city of New York. The plaintiffs had sent their note for collection to an attorney, residing in the county of Burke.

The plaintiff's attorney had made a verbal arrangement to receive from Roberts, claims on third persons, in lieu and satisfaction of this claim, but had only received such claims for a small part of the debt. At the time of the transaction, hereinafter stated, the attorney had gone from the county of Burke on a temporary journey. Roberts, at this time, was residing in the county of Burke, and had been so residing for six months.

About the 26th of March, in the year 1849, Roberts removed from the county of Burke, secretly, and fraudulently, much indebted to others living in said county, as well as to the plaintiffs. He was entirely insolvent. He had, at this time, no remunerating occupation, and no prospect of successful employment in said county.

It appeared in evidence, that shortly after he had absconded, one of the defendants, who knew of his indebtedness, said in a conversation with the above mentioned attorney, who was complaining of Roberts' course, that Roberts had been dissipating and doing no good, and that all his friends thought it was best for him and his creditors, that he should go to California and acquire the means of paying his debts, and remarked, "if you had been here, and seen how he was doing, you would have advised that course too."

Upon this the plaintiffs counsel insisted that he had made out a case under the Statute, and called upon the Court so to charge.

But his Honor refused to give such instructions, and charged that "merely advising Roberts to go, although with the intent to delay, hinder or defraud his creditors, was not sufficient to make the defendants liable under the Statute. To which plaintiff's counsel excepted. The verdict was returned for the defendants.

There was another exception to the charge of the Court, upon the question, whether the plaintiffs were creditors in the

county of Burke? which, not being considered by this Court, need not be further noticed. Judgment for the defendants, and appeal.

J. W. Woodfin, *N. W. Woodfin* and *T. R. Caldwell*, for plaintiffs.

Gaither, *Guion*, *Bynum* and *Avery*, for defendants.

PEARSON, J. The only point presented to us, is upon the exception to the charge. His Honor held, merely advising a debtor to leave the county, although with an intent to delay, hinder or defraud his creditors, did not make the defendant liable under the Statute. The words of the Statute are, "if any person shall *remove*, or *shall aid*, or *assist* in removing, any debtor out of the county in which he shall have resided for six months, with an intent by such removing, aiding, or assisting to delay, hinder, or defraud his creditors, &c." The question is, does *advising* a debtor to remove out of the county, come within the meaning of the Statute, if the advice is given with an intent, that by such removal, his creditors are to be delayed, &c.? In other words, I know that A. is much indebted, and say to him, "you can do no good for yourself or any body else by staying here, were I in your place, I should leave the county and go some where else, although my creditors should be thereby delayed, &c., and could not have their writs executed, so as to take judgments upon the ordinary process:" in plain language, "were I in your place, I would run away, and let my creditors take care of themselves," do I thereby *aid* or *assist* A. in running out of the county?

Most persons are willing to give *advice*: some do it officiously; but if called on to give aid or assistance, the subject is looked at in a different point of view. Advice costs nothing: it is but *words*. *Aid* or *assistance*, is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. If a debtor's object be to remove out of the county, and I let him have my horse, or carry him, or his family, or his property

some distance on the way to the county line, in my wagon, so as to make his removal the more easy, it is settled that this is giving aid and assistance. We suppose letting a debtor have money, whereby to enable him to hire a horse, or a wagon for these purposes, would amount to the same thing. But we have never before heard it suggested, that mere words of advice, no matter with what intent they are used, can amount to giving aid or assistance in removing out of the county, within the meaning of this Statute, by which a third person is made liable to the creditor, not only for the damage which he actually sustains, but for the whole debt, without reference to the amount of the damage.

In the absence of any direct authority, the plaintiffs' counsel referred to the doctrine of accessories in criminal cases; according to which, one who advises the commission of a crime, is liable as an accessory before the fact. The analogy does not support the position, in aid of which it was referred to; on the contrary, it tends to prove that mere advice is not embraced by the words 'aid and assist:' for the averment in regard to accessories is, "*did then and there* advise, counsel, abet, *aid* and *assist*;" and as the Statute uses only the last two words, the inference from analogy is, that the operation of the Statute was not intended to be extended to all whom the rule of the common law made liable as accessories before the fact: for if so, the *formula* as well as the final words of averment would have been used.

In regard to the question reserved, whether the plaintiffs could, under the circumstances, maintain the action within the meaning of the words, "shall be liable to pay all debts which the debtor may justly owe *in the county* from which he is so removed," we are not at liberty to give an opinion, as a verdict in favor of the defendants on the first point, there being no error in the charge, puts an end to the case.

PER CURIAM. Judgment affirmed.

MILLS HIGGINS *vs.* GEORGE W. GLASS.

A sheriff who has taken a bail bond, but fails to assign it, in consequence of which he is held as special bail, and compelled to pay the recovery had against the defendant, may sue on the obligation thus taken, as a common law bond, and recover from the obligor (the intended bail) the amount recovered out of him.

ACTION of DEBT on a penal bond, tried before his Honor Judge SAUNDERS, at the Spring Term, 1855, of McDowell Superior Court.

Upon the case stated in the opinion below, his Honor instructed the jury that the plaintiff was entitled to recover; to which defendant excepted. Verdict for plaintiff. Judgment and appeal.

Avery and *Baxter*, for plaintiff.
Gaither, for defendant.

NASH, C. J. The plaintiff, as sheriff of McDowell county, had in his hands a writ against Wesley Barrett, at the instance of one Hiram Taylor, which he duly executed, and took from said Barrett a bail bond according to law, with defendant, Glass, as surety. This bond the plaintiff neglected to assign to Taylor. Judgment was obtained against Barrett by Taylor, and the latter, having fixed the plaintiff as special bail of Barrett, a judgment under a *sci. fa.* was obtained against him, which he duly paid. The action is brought against Glass, the surety on the bail bond of Barrett, to recover the amount of the judgment so paid by the plaintiff.

By the Act of 1836, ch. 10, sec. 1, Rev. Stat., every officer, who executes a writ, is required to take a bail bond from the defendant and to return it with the writ; and by the 2nd section, he is required to assign it to the plaintiff; in the same section it is enacted, "every sheriff, or other officer, failing to make such assignment, shall be deemed, held and taken as special bail, in the same manner as if no bail had been returned. The plain-

tiff then, by his neglect in assigning the bail bond to Taylor, made himself special bail, and was bound to pay to Taylor the amount of the judgment against Barrett. This failure, however, did not nullify the bond given by the defendant, as the surety of Barrett, but simply rendered it a common law bond. By it, the defendant bound himself to plaintiff, that if Barrett did not discharge such judgment as Taylor should recover against him, he, defendant, would pay it.

The action is brought on this bond as a common law bond, and there is nothing shown by the defendant why he should not pay to the plaintiff the amount of the judgment recovered by Taylor, the condition of the bond being broken by defendant.

PER CURIAM. Judgment affirmed.

Den on demise of JAMES MORRISON *vs.* JOHN LAUGHTER.

Where there is a description of land in a petition for sale for a partition, which does not embrace any particular lands, and a decree in a Court of Equity for the sale of the lands "mentioned in the petition," such decree is not sufficient to estop one of the parties claiming by a deed from the ancestor; and a deed filed by the defendant in that suit, under an order of the Court, (not in any way incorporated into that proceeding) will not render the description or the decree more certain.

EJECTMENT, tried before SAUNDES, Judge, at the Spring Term, 1855, of Henderson Superior Court.

The plaintiff claimed title under a decree, a sale and a deed, made to him by the clerk and master of the Court of Equity of Buncombe county. The petition, offered in answer, set forth that James Laughter died seized and possessed of a large real and personal estate: that the petitioners did not know the quantity, but believed it to be 800 acres or more, that Bird Laughter took and kept the title deeds, and that they could not set forth the contents of the said deeds, or give copies of them. They pray, that the said Bird Laughter may be com-

pelled to answer and set forth or exhibit the said title deeds, and also for a sale. Bird Laughter, without answering otherwise, filed certain deeds in the office of the clerk and master, which embraced the land in question. A decree was made "that the lands mentioned in the complainant's bill, be sold on a credit, &c."

The defendant was a party defendant in this proceeding in the Court of Equity

The defendant produced in evidence a deed from his father, James Laughter, dated before these proceedings. He also proved, that at the sale by the clerk and master, he appeared and forbid the same.

On behalf of the plaintiff it was contended; that the land in question, was included in the proceedings of the Court of Equity; that the defendant was a party to the same, and that he was thereby *estopped* to set up any other title than that exhibited in the pleadings in that suit: and his Honor being of that opinion so instructed the jury, who gave a verdict for the plaintiff. Defendant excepted to the instruction, and on judgment being given against him, appealed to this Court.

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

BATTLE, J. The record of the proceedings of the Court of Equity of Buncombe county, in the suit of Wm. H. Ledbetter *et al.* v. the present defendant and the other heirs at law of Jas. Laughter, dec'd., for a sale for partition of the lands of the said James Laughter, shows that the lands were not otherwise decribed, than as the lands of the said deceased. Now, if the defendant had obtained a good title from his father, for the land in controversy, by a deed executed in his father's lifetime, we cannot see how he could be estopped from setting it up by any thing which was done in the suit in Equity. If such were the case, the land in question was not embraced in the bill, nor the order of sale, and of course the clerk and master had no authority to sell, and no title passed by his

deed to the purchaser. The filing of the deeds by Bird Laughter certainly could not enlarge the description of the lands as given in the bill: though it might have enabled the plaintiffs therein to have had it amended, and thereby, to have included the land in question. The case states that when the land was offered for sale by the clerk and master, the defendant objected to the sale: but if he had not done so, we are not aware of any principle which would have excluded him from claiming it. The legal title to land cannot be thus transferred by a parol estoppel.

We are of opinion that his Honor erred in holding that the decree of the Court of Equity, and the sale under it, gave the plaintiff a title conclusive against the defendant.

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

JOSHUA BEAN, ADM'R., *vs.* PETER BAXTER.

Where a payment had been made on a note, which was originally for more than $100, which reduced it below that sum, but which payment was not entered on the note, nor known to the plaintiff when the suit was brought, although the note was over-due when the assignment was made, it was *Held* that the plaintiff could not be non-suited.

ACTION of DEBT, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1855, of Cleaveland Superior Court.

The action was brought in the Superior Court by the assignee of a note, which note is as follows:

"On or before the 1st day of January, 1853, I promise to pay John Carpenter, or order, two hundred and seventy-five dollars, with interest from date. March 31, 1852.

"PETER BAXTER, Seal."

On which is endorsed as follows, viz: "April 1st, 1853. I assign the within note to Aaron Bean, for value received.

"JOHN CARPENTER."

The cause was submitted to a jury, who for their verdict, say "they find the instrument declared on, to be the act and deed of the defendant; that there was a payment on 12th of December, 1852, of $226 25, and that the balance due thereon is $69 39, of which sum $64 44 is principal." This credit was not inserted on the note, nor did it appear that plaintiff knew of it.

The defendant moved the Court, under the Statute, to nonsuit the plaintiff, which was refused by his Honor, who gave judgment according to the verdict, from which the defendant appealed.

Lander and *Thompson*, for plaintiff.
Baxter and *Guion*, for defendant.

BATTLE, J. The 40th section of the 31st chapter of the Revised Statutes provides, among other things, that no suit shall be originally commenced either in the county or superior court "for any sum of less value than one hundred dollars, due by bond, promissory note, or liquidated account signed by the party to be charged thereby." The mode by which the defendant may protect himself against a suit brought contrary to this provision, is prescribed in the 41st and 42nd sections of the same chapter. If the suit shall be commenced in the county court for any sum of less value than one hundred dollars, due by bond, promissory note, or liquidated account, signed by the party to be charged thereby, the 41st section declares that the same shall be dismissed by the court. From the construction placed upon this section, in the case of *Clark* v. *Cameron*, 4 Ired. Rep. 161, it seems that the county court cannot dismiss the suit unless it appears from the *writ* and *declaration* that the sum demanded is less than $100, and that the verdict of a jury, finding a less sum does not bring the case within the provision of this section. When the suit is originally commenced in the superior court, contrary to the 40th section, the defendant may have it dismissed, though the sum demanded in the writ and declaration be greater than

$100: for the 42nd section declares that "if any person shall demand a greater sum than is due, on purpose to evade the operation of this Act, and by the verdict of a jury it shall be ascertained that a less sum is due to him, in principal and interest, than by the provisions of the said 40th section said superior court has jurisdiction of, then, and in that case, it shall be the duty of the court to nonsuit the plaintiff; and he shall pay all costs;" with a proviso for the plaintiff's showing on affidavit, that the sum for which his suit was brought, was really due, though not recovered; and thereby avoiding the nonsuit. It is manifest that this provision differs materially from that prescribed in the 41st section, for the county court; and it is expressly so held in the case of *Clark* v. *Cameron*, where the subject is fully discussed and explained. If, then, in the present case, the suit had been brought by John Carpenter, the payee of the note, the defendant would have been entitled to the judgment of non-suit for which he moved. But it appears upon the record that the note was due on the 1st day of January, 1853, and was assigned to the plaintiff's intestate, on the 1st day of April following. The payment of $226 25 was found by the jury to have been made on 12th day of December, 1852, but it does not appear to have been endorsed on the note, nor that the assignee had any notice of it: The question is, does the endorsee, who is bound by the payment made to the endorser, because he took the note after it fell due, come within the provisions of the 42nd section of the Act, which we are now considering? After much reflection we are satisfied that he does not. And we have been brought to this conclusion by the following reasons. The purposed evasion of the Act by demanding a greater sum than is due, is the mischief contemplated; and the person, who knowingly attempts it, is very properly punished by having a judgment of non-suit entered against him and paying all the costs, when the verdict of the jury ascertains his illegal purpose. Now it is manifest that the endorsee of a bond, or promissory note, who takes it, though after due, without any payments endorsed upon it, and without knowing that any

have been made in part discharge of it, cannot be said, in suing upon it in the superior court, to have a purpose to evade the operation of the Act. Besides, if he be within the Act, he cannot avail himself of the benefit of the proviso; for he cannot safely make affidavit that the sum for which suit was brought, was really due, in opposition to the finding of the jury that a payment had been made to his endorser. He cannot warrant before a single magistrate upon his bond or note, because it is apparently above a magistrate's jurisdiction; and while ignorant of the payment, he cannot know that a credit ought to be entered upon it. If the Act be applicable to him, then he will be placed in the singularly unfortunate predicament, that he cannot recover what is really due him, until after he has incurred the trouble and expenses of a suit in court. It is true, as we have already stated, that, by taking the bond or note, after it has become due, he takes it subject to all the payments which have been made on it to the endorser, and, indeed, to all the equities to which it was subject in the hands of the endorser. (See *Haywood* v. *McNair*, 2 Dev. and Bat. Rep. 283.) This is said to be reasonable, because "the assignee of an over-due paper should hold it as his assignor did, as the state of the paper is notice that there is a defence, unless the maker hold out to the contrary." We can see no reason why this disability should be extended further, and prevent an innocent assignee from suing in the court which apparently had jurisdiction of his cause. The debtor by neglecting to have the payment endorsed, as is usual, when it is made on a bond or note, is surely as much in fault, so far as the question of jurisdiction is concerned, as is the assignee by taking over-due paper. The assignee, in such a case, cannot be said to demand a greater sum than is due *on purpose to evade the Act:* and he does not, therefore, come strictly within its letter; and he is clearly not within its spirit. We think his Honor did right in refusing to non-suit the plaintiff, in this case, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* JAMES SHELTON.

Dying declarations must be restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*.

INDICTMENT for MURDER, tried before his Honor Judge SAUNDERS, at the Spring Term, 1855, of Buncombe Superior Court.

The offense was charged to have been committed on the body of Drury Norton, by the prisoner, and that Tilman Landers and Lewis Shelton were present, aiding and abetting the prisoner in the felonious act. The bill was found in the county of Madison, and the cause removed for trial, on the affidavit of the prisoner, to the county of Buncombe.

The declarations of the deceased, after receiving the blow, were offered by the State, and received by the Court under the following circumstances: The witness by whom it was proposed to prove the declarations, said he saw him the day after receiving the wound, that he appeared to have received a severe blow in the forehead; he complained very much—had a severe spell: the witness said, he (witness) expressed a hope that he would get well, to which the deceased said, "he must die." Another witness said he was there the same day spoken of by the other witness—the day after the transaction: he found the wound in the forehead very severe: he examined it and found the skull fractured, (as he thought) done apparently with a stone: deceased said, "he did not think it possible for him to live after such a wound:" He (deceased) then spoke to his wife about his boys making a crop, as "he did not expect to be able to assist them:" he became delirious that night, and died on the following Sunday. (This was on Thursday.)

The first witness was then permitted to state the declarations of the deceased; which were as follows: "Deceased said he had been at work in his new ground; that his father-in-law and Lewis Shelton (one of the accused) had been at work with him: that he had drunk freely in the morning, but that after his day's work and eating his dinner, he had become sober: that on going home in the evening he found the two

prisoners, James Shelton and Landers, there: that some words passed between them: that he ordered them off, as he did not want them to eat any of his supper: that after some further words Landers spit tobacco juice in his eyes, and he threw spirits in his face: that he was about to tell James Shelton he could stay, when he (Shelton) threw him out of the door: He (deceased) drew a maul, Shelton jumped over the fence and drew his axe: He (deceased) went into the house; Shelton struck at him with the axe as he jumped in at the window but hit the facing: that after this, they threw stones at each other. Deceased saw James throw stones, but did not see either Landers or Lewis Shelton throw, but heard stones as if thrown by others: that he threatened to go and get a warrant, and went to his stable to get a horse, when he was driven off by their throwing stones: that he then went to the house of one Gunter, half mile off—got into the house and tried to find his gun, but did not: that he asked Gunter to lend it to him, and go home with him, but he refused: that he then set off to go home; did not think it safe to go back the way he came, and went round through the orchard: that he trod on a stick, which broke and made a noise, and shortly afterwards received the blow; did not know by whom it was given, and remembered nothing further until after he got home."

Gunter testified to Norton's coming to his house and about the gun, and his going off: that he tracked him next morning to the orchard; saw signs of blood there: he also found the knife of the deceased, shut: in the ploughed ground, about fifty yards off, he saw signs of two or three persons making towards where the blood was, and where they had stopped. He saw signs of stones about the house. This witness said further, that Norton was at his house about a quarter of an hour, and that the distance from his house to where the blood was found, was more than half a mile.

Lewis Shelton, was then introduced as a witness for the prisoner, (a verdict having been taken in his favor by direction of the Court:) he testified that he was the brother of James, and of the wife of the deceased: that he had been working

that day with the deceased, and on getting to the house saw the two prisoners there. The deceased seemed to be in a bad humor—threw spirits in Landers' face and cursed and damned him: did not see Landers do any thing. Deceased ordered James to leave his house before supper and put his hand on him, when James pushed him out of the porch: they got a maul and an axe: deceased had his knife, and threw a stone at James. Here, the witness said he became alarmed, and got out of the way: saw deceased throwing stones, but did not see James throw any: heard the sound of stones: Landers' hand was disabled, and he did not see him throw any. Deceased then went off, and said he was going after a *red jacket;* after this they set off to go home, and went more than a hundred yards, when they stopped. Landers proposed to go back and get some more liquor, as he didn't think Drury would hurt them; James objected, and started home: his father and sister came along the path with a light; he heard them speak to Norton, who had thrown stones at them; Norton came running past them: he, witness, then got behind a tree; Norton ran on after James with his hand up, but witness did not see what was in it. After this he heard the sound of a blow: James hallooed that he had knocked deceased down, and for him to go and tell his wife; he did so, and they found him crawling along near the place in the orchard, where the blood was found: James and Landers then went off.

The father was then examined, and he stated the occurrences at the house, nearly as stated by the last witness; that on going with his daughter to find out what had become of the parties, the deceased threw stones at them: witness spoke to him when he went off after James. Witness returned to the house, and then heard the cry as to what had occurred.

The State introduced a witness to discredit Lewis Shelton, by showing that shortly after the homicide, he had given a different account of the circumstances.

The counsel, for the prisoner, objected to the declarations of Norton, the deceased, as to what occurred in the first rencounter: and these declarations having been stated, they asked

his Honor to withdraw that much of them from the jury; but the Court refused, and the defendant's counsel excepted.

The charge of his Honor to the jury, and the various exceptions thereto, are omitted as being unnecessary, the opinion of this Court proceeding entirely on the exception above stated.

The prisoner, James, having been found guilty of murder, and the prisoner, Landers, of manslaughter, and judgment having been pronounced on both, the former appealed.

Attorney General and *Baxter*, for the State.
N. W. Woodfin and *J. W. Woodfin*, for defendant.

PEARSON, J. If the fight was a continuous act, from its commencement at the house, until the fatal blow was struck in the orchard, although the throwing of stones and other offensive acts was not kept up incessantly, but was suspended at times, as the parties saw proper to change their position or seek other weapons, the killing was but manslaughter: because the assault with the axe and maul, and by throwing of stones, was not only a legal provocation on both sides, but was a provocation of a highly exciting character, by which the lives of the parties were mutually put in danger, and each was impelled, by blind fury, to kill his adversary, if he could.

If the first fight ended at the stable, so that the matter was over and done with, and there was "cooling time" before the parties met in the orchard, and the prisoner then struck the fatal blow, the killing was murder, unless there was some fresh provocation.

Considering all the occurrences as constituting but one act, the dying declarations were all properly admitted as evidence, being a full narration of the whole fight; but then, the Judge should have instructed the jury, that in this point of view, the killing was manslaughter only.

Considering the occurrences as constituting two separate and distinct acts, only so much of the dying declarations as related to the second act, ought to have been admitted, and there was error in admitting that part of the declarations which

related to the first fight. In this point of view, the Judge ought to have withdrawn from the jury all the declarations, except that part which related what took place in the orchard when the fatal blow was struck. The better course would have been to require the Solicitor for the State, to set out what he expected to prove the dying declarations were; and as from them it is manifest that the first fight and the rencounter in which the fatal blow was given, were too separate and distinct acts, he should only have allowed that part which related to the last act, to go to the jury.

According to the general rule, no testimony is admissible unless it is subjected to two "tests of truth," an oath and a cross-examination. A sense of impending death is as strong a guaranty of truth as the solemnity of an oath; but dying declarations cannot be subjected to the other test: there is no opportunity for cross-examination, and there is nothing to meet this objection and answer as an equivalent for the want of cross-examination: hence, the exception, in respect to dying declarations, rests solely upon the ground of public policy and the principle of necessity. As in many cases, the knowledge of the facts attending the killing, is confined to the party killed and the perpetrator of the crime, there is a public necessity for admitting dying declaration as evidence, "in order to preserve life by bringing manslayers to justice;" but, as the exception can only be sustained on the ground of necessity, it is restricted to cases of indictment for homicide, and it is further restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestæ*. If it can be extended to a separate and distinct act, occurring half an hour before, it will extend to any act done the day before, or a week, month, or year. As soon as the limit fixed by absolute necessity is passed, the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing, but to make every homicide murder by proof of some old grudge.

That the exception is restricted in the manner above stated,

is clear from the reason of the thing, and is settled by authority; *Barfield* v. *Britt*, (ante 41) 1 Greenleaf, sec. 156, and cases cited. Cowan and Hill's notes, Phil. on Ev. Pt. 1, 610.

The prisoner excepted on other grounds: several of them, we are inclined to think, are well founded, but it is not necessary to notice them, as they may be prevented in the next trial.

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

SARAH EDNEY *vs.* WILLIAM BRYSON.

An Executor may lawfully assent to a specific legacy before the debts of the estate are paid.

The assent of an executor to a specific legacy may, under circumstances, be legitimately implied.

ACTION of TROVER, for the conversion of a slave, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1855, of Henderson Superior Court.

The plaintiff claimed title to the slave in question, under the will of Asa Edney, by which, it was given to plaintiff for life, and, after her death, to be sold by the executor, and the proceeds divided among his next of kin. The testator died in the spring of 1842, and the will being caveated, was not admitted to probate till the spring of 1844. Immediately after the death of the testator, the plaintiff was in possession of the slave, claiming him under the will, and exercising acts of ownership over him (sometimes hiring him out) up to the levy in 1849, without any claim by the executor, to wit, for about seven years.

The defendant claims under a sale, by virtue of a judgment and execution, against the executor for a debt of the testator. The execution was levied in the fall of the year 1849, and the sale made shortly thereafter.

It was insisted on behalf of the defendant, that it was not

competent for the executor to assent to legacies before the debts were paid.

Again: that the executor had not assented to the legacy. And that, at any rate, the plaintiff was only entitled to damages for the conversion of the life estate.

The Court charged the jury that if the executor had assented to the bequest, the title of the plaintiff was established, and she was entitled to recover, notwithstanding the existence of unsatisfied debts at the time of the assent, and he left it to the jury upon the evidence, whether there was such an assent. That the measure of damages would be the value of the plaintiff's life estate. Defendant excepted. Verdict for plaintiff and appeal.

Baxter, for plaintiff.

N. W. Woodfin and *Bynum*, for defendant.

BATTLE, J. An attentive examination, aided by the argument of counsel, has not enabled us to discover any error in the bill of exceptions, of which the defendants have any just cause of complaint. An executor may, if he think proper, assent to a specific legacy before he has paid the debts of his testator, of which the case of *Allston* v. *Foster*, 1 Dev. Eq. 337, may be cited as an instance.

There can be no doubt that the assent of an executor to a specific legacy "may be legitimately implied, as well as expressly proved;" *Cheshire* v. *Cheshire*, 2 Dev. and Bat. Rep. 254. And the facts proved in this case were certainly proper to be left to the jury for that purpose; *White* v. *White*, 4 Dev. and Bat. Rep. 401. Whether the testimony was fully sufficient to justify the verdict, we have no right to inquire. If it were not, the Judge in the Court below, might have granted a new trial: but that is a matter of discretion in him, with which we cannot interfere.

Upon the question of damages, the charge of the Court seems to us to be subtantially the same as was prayed by the defendants, and of course they cannot complain of it.

PER CURIAM. Judgment affirmed.

M. M. PLUNKETT *vs.* DANIEL PENNINGER.

Where a judgment has been rendered in a County Court upon a *ca. sa.* bond, the defendant has a right to appeal to the Superior Court, and the case will be considered *de novo* in that court.

APPEAL from the Superior Court of Cabarrus, at the Spring Term, 1855, his Honor, Judge MANLY, presiding.

A *capias ad satisfaciendum*, with a bond for the appearance of the defendant, were returned into the County Court of Cabarrus, whereupon an issue of fraud was made up, and tried by a jury on Tuesday of the term, which issue was found in favor of the defendant. On a subsequent day the defendant was called, and failing to appear, on motion of plaintiff's counsel, a judgment for the debt and costs was rendered against him and his sureties. Afterwards, on Saturday of that term, the defendant appeared in open court, and moved to be permitted to take the oath for the relief of insolvent debtors, also, that the judgment theretofore rendered, be set aside; both which motions were refused by the court, whereupon the defendant appealed to the Superior Court.

In the Superior Court the judgment below was reversed and a *procedendo* ordered to issue, from which judgment the plaintiff appealed to this Court.

V. C. Barringer, for the plaintiff.
H. C. Jones, for the defendant.

BATTLE, J. After the judgment was rendered against him in the County Court, the defendant had an undoubted right to appeal from it at any time during the same term. Rev. Stat. ch. 4, sec. 1. That right was not at all affected by the attempt of the defendant to have it vacated in the County Court. The effect of the appeal was to vacate the judgment in the County Court, and to constitute the cause as it stood in that Court to be disposed of *de novo* in the Superior Court. In the judgment of the latter Court we cannot discover any error. After the

issues of fraud were found in his favor, the defendant had a right to be allowed to take the oath for the relief of insolvent debtors and to be then discharged, and in the order of the Superior Court to that effect, there is no error. This opinion will be certified, to the end that the Superior Court may proceed to enforce its judgment.

PER CURIAM. Judgment affirmed.

DOE *on demise of* NATHAN DRAKE AND LITTLETON PATILLO *vs.* ALEXANDER MERRILL.

A fact, required to be proved by a record, can only be proved by an exemplified copy of the record itself, and no certificate by the clerk of its substance or effect will do.

Before a will can be received by our courts as having been established before a tribunal in another State, it must appear by the record made by such tribunal, that such will was judicially passed on by it.

A devise of land, lying in this State, by a citizen of another State can have no *validity or operation*, unless it be proved by the oath of witnesses before the proper court in this State, to have been properly executed according to the laws of this State.

Where a father, in consideration of five shillings and *love* and *affection* for his daughter, makes a deed for land to her husband, and the husband, by his will, devises and bequeaths to his wife *all the property to which he became entitled by his marriage with her*, in lieu of her dower, (there being no express disposition of the same in any other part of such will) it was *Held* that such land was embraced in this devise.

EJECTMENT, tried before SAUNDERS, Judge, at the Spring Term, 1855, of Henderson Superior Court.

The plaintiffs' lessor adduced a succession of conveyances from the State, through several persons, to himself, and amongst them a devise from David Myers to his wife Phalby, and from her to himself. The questions considered by this Court arise

under the will aforesaid. The part of the will material to this case is as follows:

"I give to my wife Phalby Myers twenty negroes, to be chosen from my estate, of the average value: also, a carriage and pair of horses, and I give and restore to her, all the property, of every description, to which I have become entitled to by our marriage; and all and every part of the foregoing bequest, I give to my said wife in lieu of dower." The testator died in 1835, making no disposition of this land unless it passed by this clause.

Phalby Myers, the devisee in the above will, was the daughter of William Mills, and after her intermarriage with David Myers, her father, the said William Mills, by a deed of bargain and sale, reciting that "for and in consideration of five shillings to me in hand paid, and love and affection which I have unto my daughter Phalby, the wife of David Myers," conveyed the land in question to David Myers in fee simple.

The widow, Phalby Myers, immediately entered into the possession of the land after the death of her husband, and in 1849 conveyed it to the lessors of the plaintiff.

The first question submitted to the court below, was, whether the land in question passed to the said Phalby by the deed and devise above recited? and his Honor held that it did; and so instructed the jury; to this defendant's counsel excepted.

The next question was, whether the will of David Myers was admissible as evidence in the cause, in the shape in which it was offered? In support of this devise a copy of the will of David Myers was offered, authenticated and certified, as follows:

"State of South Carolina—Richland District.

"Before me personally appeared *Judah Barrett*, who being duly sworn, made oath that he saw David Myers sign, seal, publish, pronounce, and declare the foregoing instrument of writing to be his last will and testament, and that he was then of sound and disposing memory and understanding, to the best of this deponent's knowledge and belief; and that he, with Gispard Chapman and James Chestney, at the request

of the testator, in his presence, and in the presence of each other, witnessed the due execution thereof.

"JUDAH BARRETT."

"Sworn to, before me, 9th of March, 1835.

"JAMES GUINYARD, *Ordinary.*"

"South Carolina—Richland District.

"I, James Guignyard, *Ordinary* in and for the District aforesaid, do hereby certify that the foregoing is a true copy of the original will now on file in my office: In witness whereof, I have hereunto set my hand and the seal of my office, this 6th day of August, Anno Domini, one thousand eight hundred and forty-nine, and the 74th year of the sovereignty and independence of the United States.

"JAMES GUINYARD,
"*Ordinary.*" [SEAL.]

"North Carolina—Henderson County.

"I, R. W. Allen, Clerk of the Court of Pleas and Quarter Sessions, September session, A. D., 1854, do hereby certify that the foregoing will and certificate is duly recorded in the will-docket of our said Court on pages 38, 39, 40, 42 and 43, this 16th of October, 1854, in compliance to an order of court made at said court, which is on the minutes of September Term, 1854.

"Certified by me, R. W. ALLEN, C. C. C."

The defendant's counsel objected to the introduction of this copy, but the Court admitted it, and defendant further excepted.

The statement of the case sent to this Court concludes in these words, "By agreement, the several questions were reserved, with leave to the Court to set aside the verdict and enter a non-suit, if, in point of law, the evidence was incompetent, and ought not to be received; the Court however, *pro forma*, refused to set aside the verdict, and gave judgment for the plaintiff; with which judgment the defendant being dis-

satisfied, prayed an appeal to the Supreme Court, and the same is allowed."

N. W. Woodfin, *Bynum* and *Edney*, for plaintiff.
Baxter, for defendant.

PEARSON, J. Prior to the year 1803, William Mills was in possession of the land in question, claiming under Spruce McKay: in that year, Mills executed a deed to David Myers, his son-in-law, conveying the land to him in fee simple, in consideration of *five shillings* and *love and affection for his daughter Phalby, wife of the said Myers.* Myers held possession until his death in 1835: his will contains this clause: "I give to my wife Phalby, twenty negroes, a carriage and pair of horses, and *I give and restore to her, all the property of every description to which I have become entitled by our marriage: and all and every part of the foregoing bequest, I give to my wife in lieu of dower.*"

The will contains bequests and devises of negroes, land, &c., to his several children and grand-children, but makes no express disposition of the land in controversy, unless it be embraced in the above recited clause: The widow took possession of the land and held it until 1849, when she conveyed to the lessors of the plaintiff.

His Honor was of opinion, that the above recited clause embraced the land in controversy. For this the defendant excepts. We concur with his Honor. The words "by our marriage," taken by themselves in their ordinary sense, would seem to be synonymous with "in consequence of," "by reason of," "on account of" our marriage. The land in controversy, was conveyed to Myers in consequence, or on account of his marriage. That is clear: for the deed sets out as its consideration, the fact, that his wife is the daughter of the donor, and the consideration of five shillings, is a mere nominal one, for the purpose of raising a use, so as to give effect to the deed as a "bargain and sale."

But the words do not stand alone, and the inference, that

they were intended to have a broad and liberal meaning, is confirmed by the connection in which they are used, and by these facts: If the land is not embraced, the will makes no express disposition of it—it is left to fall into the residuary clause, the office of which, usually is, to convey small or contingent matters that may have been overlooked, and not to pass large and valuable tracts of land: this provision for the wife is expressed to be in lieu of dower: there is no proof that the testator became entitled to any property whatever *jure mariti* or by marriage; taking the words in the narrow and restricted meaning contended for by defendant's counsel, this does not conform to or chime in with the words, "*all the property of every description*," or with the idea of giving all and every part as a compensation for the wife's dower.

The defendant objected to the introduction of the copy of the supposed will, on the ground that its execution was not proved; 1st. Because there is no sufficient evidence that the will, and the affidavits taken by the ordinary in South Carolina, were exhibited to the County Court of Henderson, allowed and ordered to be recorded. 2nd. James S. Guinyard, before whom a person, whose name is set out as one of the subscribing witnesses to the said will, personally appeared, and made the affidavit which he certifies, and before whom two persons, whose names are set out as subscribing witnesses to the codicil, personally appeared and made the affidavit which he certifies, did not (supposing him to have jurisdiction and his identity to be established) judicially pass upon, decide, or declare the fact to be, that the paper writing was duly proved by the affidavits aforesaid so as to be the will of David Myers. 3rd. As a devise of land, situate in this State, its due execution according to the laws of this State, must be proved by the oaths of the witnesses taken before the proper court in this State, and cannot be established by affidavits taken before an ordinary in South Carolina.

Each one of these grounds supports the objection to the evidence: 1st. The Clerk of Henderson County Court certifies "that the foregoing will and certificate is duly recorded

in compliance to an order of court, made at said court, which is on the minutes of September term, 1854." The fact that the will and affidavits were "exhibited, allowed, and ordered to be recorded" by the County Court of Henderson, can only be proved by an exemplification or certified copy of the record; the recital, or reference made to the minute docket as containing an order that the will be recorded, is manifestly not proper evidence in regard to the matters necessary to be proved.

2nd. In 1835, Guinyard takes the affidavit of certain individuals whose names are set out as subscribing witnesses. In 1849, he certifies, under his hand and seal of office, as ordinary, that a paper writing is "a true copy of the original will now on file in my office." There does not appear to have been any judicial proceeding before him in regard to the will.

3rd. The question is as to the mode of proving the execution of a devise of land situate in this State, by an inhabitant of another State, which devise is contained in a will that has been admitted to probate in the courts of the domicil.

There is a marked and well settled distinction between a will of personal property and a devise. Personal property is supposed to attend the person, and although in this State, it is presumed to be in the possession of the owner at his domicil for the purpose of devolution, in the event of his death, to those who are entitled to it according to the law of the country of the domicil, this fiction is acted on by the comity of nations, and according to it, a will executed and proved in pursuance to the law of the domicil is held by our courts, when offered for probate here, to be valid, and is admitted to probate, although not executed and proved in the manner required by our law in regard to the will of one domiciled here, our law adopting in respect to it, the law of the domicil. *Alvany* v. *Powell*, 2 Jones' Eq., 51. In regard to real estate, this doctrine, based upon the comity of nations, has no application, and its devolution and transfer must be according to the law of the country where it is situate; consequently, although a will of the citizen of another State, which contains a bequest

of personal property, and a devise of land situate here, may be admitted to probate and will be held valid, in regard to the personal property, in accordance to the law of the domicil, yet, in regard to the land, it can only operate as a devise upon proof made before our Courts, that it was executed with the solemnities, and in the manner, required by our law.

In England, the probate of wills of personal property, is made before the ordinary; if the instrument also contains a devise of real estate, such probate before the ordinary has no effect in regard to the devise, and the execution of the instrument as a devise, must be proved before a jury, upon an issue involving the question of title, in the same way as the execution of a deed, or other conveyance of land is proved.

By the Act of 1777, Rev. Stat. ch. 122, sec. 4, the Court of Pleas and Quarter Sessions are empowered to take the probate of wills in respect to personal property. *By the Act of* 1784, Rev. Stat. ch. 122, sec. 9, it is provided, "all probates of wills in the County Courts shall be sufficient testimony for the devise of real estate, &c.," with a proviso for the production of the original will, upon the suggestion of any fraud in obtaining its execution, &c., before the Court, where any suit is depending, &c., in reference to the land. By the Act of 1835, Rev. Stat. ch. 122, sec. 7, it is provided, where a will has been made out of the State, disposing of land situate within the State, the court of pleas and quarter sessions, before which the will is offered for probate, may issue commissions and take the examination of witnesses touching its execution, &c.: Under this Act it was necessary to have the original will before the Court. Where the will, executed in another State, or country, contained bequests and devises of personal and real estate, situate there, and also bequests and devises of real estate situate here, it was found inconvenient, and oftentimes impossible to produce the original paper before our Courts; in consequence thereof, it is provided by the *Act of* 1844, ch. 83, sec. 6, "where any will made by a citizen of any other State, or country, shall have been, or shall be, duly proven in such State or country, according to the laws thereof, *a copy of such will* duly

certified, &c., when exhibited before the Court of Pleas and Quarter Sessions, shall be by such Court allowed, filed and recorded, &c." "Provided, that when such will contains any devise of land, situate in this State, such devise shall not have any validity, or operation, unless said will shall have been executed according to the law of this State, and the Court in which the same may be exhibited, shall have power to issue commissions for taking proof touching the execution thereof, to make up an issue, &c., and to take all other proceedings according to law, and the course of the Court in like cases."

Thus, it is seen, that a devise of land situate in this State, can have no *validity or operation*, unless it be executed and proven by the oath of witnesses, before the proper court in this State; a probate in the court of any other State or country, to the contrary notwithstanding; to this end, the Act of 1835 authorises the court to issue commissions to take the depositions of witnesses; and the Act of 1844 allows a certified copy, in certain cases, to be exhibited for probate in place of the original.

It follows that the paper, purporting to be a copy of the supposed will of David Myers, ought not to have been received as evidence.

We have discussed the several grounds upon which the objection to the admissibility of the evidence is based, the more fully, because the subject has not been heretofore presented for the consideration of this Court. In *Ward* v. *Hearne*, Busb. Rep. 184, the Acts of 1784 and 1835 and of 1844 are examined and discussed, but it was not necessary to notice the distinction between the provisions, in regard to the probate of wills respecting personal property, and wills containing devises of land.

The plaintiff's counsel insisted that a certified copy of the will could be read, independently of any action of the county courts, under the provisions of the Act of 1802, ch. 44, sec. 8. It is sufficient to say the paper was not offered for probate in the courts of this State, until after the passage of the Act of 1844; and if the Act of 1802 admits of the broad construc-

tion contended for, it is superseded and repealed by the Act of 1844, so far as the two Acts make provision for the same case and cover the same ground.

We are not however to be understood as assenting to the proposition that the Act of 1802 had this broad meaning, and sweeping operation. If a deed executed by a citizen of South Carolina contains a tract of land situated in this State, and also a tract situated in that State, and the deed is admitted to probate, recorded, registered, or enrolled there, according to law, such action is only *quoad* the tract situate in that State, and before it can be read in evidence here, it must be proven and registered in the manner prescribed in our own Act of 1776: So if a will executed by a citizen of South Carolina disposes of personal property there, and also contains a devise of land in this State, although under the act of 1802, the probate before an ordinary there, will be considered sufficient here, in respect to personal estate, *Knight* v. *Wall*, 2 Dev. and Bat. 125, yet it will not be considered as having been proven there QUOAD *the land situate here*, and it cannot operate as a devise of the land situate here, until it is proven in the manner prescribed by our Statutes; or is proven before the County Court, or before a jury trying an issue involving the question of title as at common law.

Plaintiff's counsel also insisted that as adverse possession was held by Mrs. Myers for more than seven years, the will, if not proven so as to give it operation as a devise, would be color of title. The objection is to the *competency* of the evidence; and it is the plaintiff's misfortune not to be able to prove the execution of the supposed will. In the absence of such proof, the existence of a will cannot be assumed for the purpose of making it color of title, or for any other purpose. The fact not being proved, does not exist according to the maxim "*de non apparentibus et de non existentibus eadem est ratio;*" so the point as a color of title is not presented.

Owing to the manner in which the case, sent to this Court, is stated by his Honor, we had some difficulty in deciding whether the effect of the error is to entitle the defendant to a

venire de novo, which is the usual result of a successful objection to the ruling of the Court below, or to give him a right to ask for a judgment of non-suit, so as to entitle him to recover his costs, and go without day. The latter position is put on the ground of a special agreement to this effect. His Honor says, "by agreement, the several questions were reserved, with leave to the Court to set aside the verdict, and enter a *non-suit*, if, in point of law, the evidence was incompetent." The meaning seems to be, that a non-suit should be entered, if the Judge should afterwards come to the conclusion that the evidence was incompetent. His Honor refused to set aside the verdict and enter a *non-suit*, in other words, he held that the evidence was competent; for this the defendant excepts. We are to presume that the object of the agreement was to put the parties in the same condition as if the Judge had, in the progress of the trial, made a decision in accordance to the opinion which he should ultimately arrive at: if so, then we are to take it as if the Judge had admitted the evidence; to this the defendant excepts, and therefore moves for a *venire de novo*. There is error, and there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

STATE *on rel. of* J. J. EVANS *vs.* TILMAN BLALOCK *et al.*

A sheriff is liable on his official bond for the non-payment of a judgment obtained against him on a *sci. fa.* to subject him as special bail, for not having taken a bail bond from the defendant in a writ executed by him.

ACTION of DEBT on the official bond of a sheriff, tried before his Honor Judge SAUNDERS, at the Spring Term, 1855, of Yancy Superior Court.

The suit was brought against the defendants as the sureties of Thomas Wilson, sheriff of Yancy county, upon his official bond. The plaintiff assigned for breach of the conditions of

the bond, that the plaintiff had sued a writ against Abner Holcomb and Henry S. Holcomb, directed to said Wilson as sheriff of Yancy, who executed the same, but failed to take bail bonds for their appearance, whereby he became special bail for the Holcombs: that a judgment was obtained by the plaintiffs against the Holcombs, upon which a *ca. sa.* issued, which was returned "not to be found;" that a *sci. fa.* issued against Wilson, the sheriff, as special bail of the Holcombs, and a judgment thereon rendered against him for the debt and costs, and that the said sheriff has failed to pay such judgment. The evidence in the case fully supported these allegations, but the defendants' counsel contended that they did not make out a cause of action, and called upon his Honor so to instruct the jury: this his Honor refused, and told the jury, that if the facts alleged by the plaintiff were proved to their satisfaction, the plaintiff was entitled to recover. Defendant excepted. Verdict for plaintiff. Judgment and appeal.

J. W. Woodfin and *Edney*, for plaintiff.
Avery and *Gaither*, for defendants.

NASH, C. J. The action is brought on the official bond of Thomas Wilson, as sheriff of Yancy county. The defendants are sureties on the bond. The only question submitted to us is, whether the defendants, as sureties, are answerable for the neglect of Wilson in not taking a bail bond from a defendant whom he had arrested under a writ issued at the instance of the present relator. The relator had issued a writ against Abner Holcomb and Henry S. Holcomb, returnable to the County Court of Yancy, tested the 23d of April, 1840, which was placed in the hands of Thomas Wilson, the sheriff, and was by him duly executed. No bail bond was taken. At January term, 1844, of said Court, a judgment was rendered against the defendants, the Holcombs, in favor of the plaintiff; on this judgment a *ca. sa.* issued against the defendants, which was returned "not found." A *scire facias* was then issued against the sheriff, Wilson, as special bail, and at Fall term,

1848, a judgment was rendered against him, and this action was commenced the 15th of December, 1851.

Upon this state of facts, the defendants contended that they were not liable to the action. His Honor was of a different opinion, and so charged the jury. In this opinion we concur. It is the duty of a sheriff when he executes a writ, to take a bail bond from the defendant and return it with the writ to the proper court; if he does not, the law declares him to be special bail, and for this neglect, his sureties on his bond are liable to the party injured. This principle is settled by the case, the *Governor, &c.* v. *Montford and others*, 1 Ire. 155. That was an action of debt on the official bond of Brice Fonville, as sheriff of Onslow, against the defendants, his sureties. The sheriff had neglected to return an execution which had been duly placed in his hands, for which he was amerced at the instance of the plaintiff in the execution, and the action was against the sureties, to subject them to the payment of the amercement. In their opinion, the Court say, "the bond of a sheriff would not, in itself, oblige the sureties to answer amercements and fines on their principal, but the Act of 1829, chap. 33 Rev. Stat., ch. 109 s. 15, makes them, by express enactment, liable for them *as for other deficiencies in the official duty of the sheriff*." Here it is seen, that it was the official duty of the sheriff, Wilson, to have taken a bail bond which he omitted to do.

PER CURIAM. There is no error in the judgment below and it is affirmed.

STATE *on rel. of* J. R. SILER *et al. vs.* ELI McKEE *et al.*

To render a Sheriff liable for the escape of an insolvent, surrendered in open Court, it is necessary to show that such insolvent was committed to the Sheriff's custody by an order of the Court. A mere prayer to that effect will not be sufficient.

ACTION of DEBT on the official bond of the Sheriff, tried before his Honor, Judge SAUNDERS, at the Superior Court of

Macon county, Spring Term, 1855. Judgment for the plaintiff and appeal.

The facts are recited in the opinion of the Court.

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

BATTLE, J. Upon the trial, the defendants urged several objections against the right of the plaintiff to recover: but upon which of them his Honor gave judgment, the record does not show. There is one, which is so plainly fatal to the action, that it is unnecessary to consider any other. The record of the proceedings against J. M. Angel, does not exhibit any order of the County Court committing him to the custody of the sheriff, and without such order, the sheriff certainly had no authority to arrest or detain him. The only entry which is relied upon as an order, is, that "John M. Angel came into Court and surrendered himself in open court, in discharge of his security, and was prayed into custody of the sheriff." A prayer made, is by no means a prayer answered, and where the liberty of the citizen is concerned, we cannot infer that the court did what it was asked to do. As without such order, the sheriff had no right to arrest and detain the party, his subsequent arrest and discharge of him, after taking a bond with an insolvent surety from him, could not alter his responsibility, and make him and his sureties liable for an escape. The debtor was never lawfully in his custody, and in such a case, no act, or admission, of his, could make him liable to an action for an escape. If an officer seize a debtor upon a defective precept, intended to be a *ca. sa.*, and afterwards permit him to go at large, he cannot be held responsible for an escape, as was decided many years ago in the case of *Walker* v. *Vick*, 2 Dev. and Bat. Rep. 99, much less can he be made liable where there is no precept or order of the Court to authorize the arrest and detention of the debtor.

PER CURIAM. The judgment is affirmed.

B. R. DUNLAP, EX'R., *vs.* JOHN J. HALES.

Where an infant, who was sued on a note given for two old slaves, after he comes of age proposes, in writing, to give them back and pay half of the note, and adds, "if they will not accept of the above offer I will have to pay them I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part," it was *Held* that this was no such new promise as would avoid the plea of infancy.

ACTION of DEBT, on a sealed note, tried before MANLY, Judge, at the Spring Term, 1855, of Union Superior Court.

The defendant pleaded infancy, and the plaintiff relied on the replication of a new promise after he came of age.

The sole question in the case was, whether the following letter was sufficient to establish the replication:

"The legatees of Uncle E. holds against me a note to the amount of four hundred dollars, for two old negroes not worth ten cents. I will give them two hundred dollars to take them back, as they will not hire for anything, and they are always sick. If they will not accept of the above offer, I will have to pay them I *suppose*, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely valueless. I will be in N. C. next fall and will try to settle the business."

Upon committing the case to the jury, his Honor gave it as his opinion, that the plaintiff was not entitled to recover, for which plaintiff excepted. Verdict for the defendant, and appeal to this Court.

No *Counsel*, for the plaintiff.
Osborne and *Lowrie*, for the defendant.

NASH, C. J. The case comes before us under the plea of infancy: the action is to recover from the defendant a sum of money alleged to be due to the plaintiff's testator by bond; the defendant relied on the plea of infancy, which was established, and the plaintiff on a promise to pay the debt by the defendant made after arriving at full age. To support his

replication, the plaintiff gave in evidence a letter written by the defendant after his arriving at the age of twenty-one years. This letter does not sustain the replication. The distinction between an acknowledgment which would take a case out of the operation of the Statute of limitations, and one which would repel the plea of infancy, was established at an early period. While in the books it was held that the slightest acknowledgment was sufficient for the former purpose, nothing but an *express* promise, made after reaching maturity, would deprive an infant of the protection thrown around him by the law. 2 Esp. Rep. 628: *Alexander* v. *Hutchison*, 2 Hawks 535. This distinction is founded in good sense: for although there is, under recent decisions of our Courts, less difference between the promise, or acknowledgment, necessary to take a case out of the operation of the Statute, and one needed to repel the plea of infancy; in other words, though the former has gradually approximated the latter, there has been, from the earliest decision, no change in the promise of the latter to have the effect of depriving him of the plea of infancy. The promise must be express, voluntary, and with a full knowledge that the party making it is not bound by law to pay the original obligation. Chief-Justice TAYLOR in Hutchison's case observes, "whether an infant be under a moral obligation to pay a debt, must depend on the circumstances under which the contract was made; and if it can be clearly collected from them, that advantage has been taken of his inexperience, for the purpose of imposing on him, he may very justly shelter himself under his privilege." But be the moral obligation what it may, the nature of the promise, to bind him, is the same. The defendant in writing the letter relied on by the plaintiff, seems to have been fully apprised of the position he occupied; he had the whip-hand, and does not appear to have been willing to surrender it: he nowhere in his letter promises to pay the note now sued: on the contrary, his words are, after offering to the plaintiff that he should take back the negroes, for the purchase of whom the note, or bond, was given, upon receiving from him $200, he says "if they will not accept of the proposition I

will have to pay for them *I suppose*, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely valueless." Now this, so far from being, on the part of the defendant, an express promise to pay the bond or note, is simply an acknowledgment that he made the purchase and gave the note or bond, coupled with a declaration that if he does pay it, it will be a gift of so much money, to be given by him when he chooses. This letter, under the modern decisions of our Courts, would scarcely be considered sufficient to take a simple contract debt out of the operation of the Statute of limitations, certainly not, in an action upon a speciality debt, where the action is on a new promise.

PER CURIAM. Judgment affirmed.

ROBT. B. CHAMBERS *by his next friend vs.* ALLEN WHITE.

In an action for words spoken, charging the plaintiff with the commission of a crime, it is not necessary for the plaintiff to aver or prove that he was physically able to commit the crime.

ACTION ON THE CASE for SLANDER, tried before SAUNDERS, Judge, at the Spring Term, 1855, of Madison Superior Court.

The words complained of in the declaration, charged the plaintiff, a boy under fourteen years of age, with bestiality, and in his instructions to the jury his Honor charged, that they were not only to be satisfied that the words were spoken, but that the plaintiff was physically capable of committing the crime.

In deference to this opinion of his Honor, the plaintiff took a non-suit and appealed to the Supreme Court.

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

PEARSON, J. His Honor charged "that the jury had not

only to be satisfied of the speaking of the words, but that the plaintiff was physically capable of committing the crime; that is, was fourteen years of age:" for this the plaintiff excepts. There is error. There is no averment in the declaration, of the plaintiff's age or physical ability to commit the crime. The averment is, that the defendant charged him with its commission; a party is never bound to prove more than it is necessary for him to aver.

Had the words spoken by the defendant conveyed the idea, that the plaintiff was not physically capable of committing the crime, he would not have had a cause of action; as if the defendant when he made the charge had added, "and but for his being under the age of fourteen, his life would pay for it:" because this explains away the legal effect of the charge, and relieves the plaintiff from all fear or apprehension of his being prosecuted, which is the gound for making words, charging the commission of an infamous crime, actionable, without proof of special damage. We suppose his Honor, in coming to the conclusion, that the plaintiff must prove that he was fourteen years of age, and physically capable of committing the crime, had some vague reference to this doctrine, and did not attend to the distinction between words which positively charge the commission of a crime, and words which explain away the charge, and show that in fact no crime had been committed; so as not to subject the party to any fear or apprehension of a prosecution.

In *Sugart* v. *Carter*, 1 Dev. and Bat. 8, it is held, that the plaintiff may recover for words charging murder, although the defendant on the trial shows that the person alleged to have been killed is still alive. This case is in point; for it was physically impossible for the crime to have been committed: but that fact was not made known at the time the words were spoken, and proof of it on the trial, was not allowed to defeat the action, because the injury had already been inflicted. The "actionable quality of words must depend upon the fact whether the hearers were aware that the person alleged to be murdered was really alive."

McDonald v. *Murchison*, 1 Dev. Rep. 7, is also in point: in an action for words, charging the plaintiff with perjury in a particular suit, he is not bound to produce the record of that suit, because his declaration does not aver its existence, and it makes no difference whether there ever was any such a suit or not; as the words make a positive charge of the commission of a crime, and it is not necessary for the plaintiff to produce the record, in order to show that the commission of the crime was physically possible.

PER CURIAM. *Venire de novo.*

CHARLES HENSON *vs.* ROBERT KING.

Evidence given before a jury, to contradict a witness, and which is only competent for that purpose, ought not to be left to them by the Court as tending to establish the main allegations of the issue.

ACTION ON THE CASE for A FALSE WARRANTY and for a DECEIT, tried before his Honor Judge SAUNDERS, at the last Superior Court of Cabarrus.

Wilson, for plaintiff.
Barringer, for defendant.

NASH, C. J. The action is in case for a false warranty, and a fraud, in the sale of a horse. No exception is taken as to the principles of law governing the case, as by the Court stated to the jury; but the exception is to the charge upon the evidence. The fraud alleged against the defendant was, that the eyes of the horse transferred by him to the plaintiff, were unsound within his knowledge, at the time of the sale. Most of the controversy turned upon the *scienter*. The defendant introduced a witness by the name of Black, who swore that the defendant sent him for the horse when he first traded for her, that he brought her home on Saturday, and defendant sold her

to plaintiff on the following Monday, and that he, witness, did not believe her eyes were unsound. He was then asked by the plaintiff's counsel if he had not, on a certain occasion, said to one Weddington, that he (witness) had advised the defendant to sell the mare, because he thought her eyes unsound—that the defendant asked $125, and he advised him to take $100?" The witness stated he recollected having no such conversation. Weddington was then called by the plaintiff, who swore that Black had told him, he had advised the defendant to sell the mare, because her eyes were not good; that the defendant asked for her $125, and he advised him to take $100. Black being called back, reiterated his former statement, and that he never had any such conversation with Weddington; that he never told the defendant that the mare's eyes were defective: that he had never believed they were.

In commenting on this testimony after stating it to the jury, his Honor observes, "these witnesses being admitted to be respectable, it was the duty of the jury to reconcile the testimony if they could: the one swore *affirmatively* to the fact of the conversation, the other *negatively*, that he had no recollection of it. The Court then leaves the testimony of these witnesses, without directing the attention of the jury to the legitimate effect of the discrepancy. The only effect the testimony of Weddington could properly have, was to discredit Black, but it was no evidence in itself to show that the defendant knew of the unsoundness of the horse's eyes, and the charge places it before the jury as evidence upon the point in issue. Stated as it was, it must have misled the jury: for, take away the testimony of Weddington, and there is none to show that the defendant knew that the eyes of the mare were unsound, if the fact were so. The jury, therefore, were misdirected as to the effect of the testimony of Weddington, and for this error there must be a *venire de novo.*

PER CURIAM. Judgment reversed.

COUNTY COURT OF MECKLENBURG *vs.* ED. H. BISSELL.

A County Court upon its own mere motion can institute and carry on proceedings to revoke letters testamentary, which they believe have irregularly issued.

THIS was an APPEAL from the Superior Court of Mecklenburg, MANLY, Judge presiding, which had been carried to that Court from the County Court of that county.

William S. Miller qualified, and at a subsequent term, Edward H. Bissell also qualified, as executor to the last will and testament of J. H. Bissell.

An order to show cause was made by the County Court, which was duly served and returned, and upon argument of counsel on the respective sides, the Court adjudged that the letters testamentary which had issued to Edward H. Bissell on the estate of John H. Bissell, be revoked.

From this judgment the said Edward H. Bissell prayed and obtained an appeal to the Superior Court, and in that Court the following clauses of the last will and testament of John Humphrey Bissell, were adduced and relied on by the parties respectively in support of their views: "In order to render most available my property, or proceeds thereof, I make and appoint the said E. H. Bissell sole executor, unless William S. Miller, Esq., wishes to act jointly, or in case of the death of the said E. H. Bissell, I advise that William S. Miller would act; and I authorise him or them to take possession and sell, &c."

Afterwards he made and published the following *codicil:* "I have made William S. Miller my sole executor: the will is with Edward, in Charlotte." Again; "I revoke any part of my former will that may be inconsistent with this arrangement, except the discontinuance of Edward as my executor; I have never entertained the smallest unkindness to Edward or Henry."

The case being considered by his Honor below, the Court approved and confirmed the judgment of the County Court,

ordering the revocation of the letters testamentary to Edward H. Bissell, from which judgment he appealed to this Court.

Wilson and *Osborne*, for the plaintiff.
Boyden, for the defendant.

NASH, C. J. The proceedings in this case were instituted by the County Court of Mecklenburg to revoke letters testamentary, granted by it at a previous term, to the defendant upon the will of Humphrey Bissell, deceased. By his will the testator appointed the defendant, E. H. Bissell, together with William S. Miller, his executors; the will was published in , and subsequently the testator made a codicil, wherein he appointed William S. Miller his sole executor. In the codicil is this clause, "I revoke any part of my former will that may be inconsistent with this arrangement, except the discontinuance of Edward as my executor." The will was proved by William S. Miller, and letters granted to him; at a subsequent term, E. H. Bissell applied for letters testamentary which were granted to him. It does not appear that any person, claiming an interest in the estate of Humphrey Bissell, had moved in this matter, but that the proceedings were instituted by the County Court *mero motu*. The sole question upon which our opinion has been required is, as to the power of the Court to move in the matter without the application of some person claiming an interest in the property; in other words, whether the County Court, having discovered that the letters testamentary had been irregularly granted to the defendant, has the power to revoke them, without incitement thereto by any one. His Honor below decided that they had, and in this we concur.

Proceedings in the probate of wills, are *in rem*, there are, strictly speaking, no parties—no plaintiff and no defendant: The issue to try the validity of the will is made up by the Court, or under its direction. The whole proceeding is under the judicial control of the Court. Here, by the codicil to the will of Humphrey Bissell, William S. Miller is appointed, in

express terms, sole executor; and that his meaning may be not misunderstood, he revokes any part of his will which is inconsistent with this arrangement. Now, to suppose that he intended that the defendant should continue in the appointment made by his will, is entirely inconsistent with the sole appointment of William S. Miller, and the will, in that view, is inconsistent with the codicil. That he did not intend the exception in the codicil to have that effect, is evident from the apology to the defendant, which immediately follows the exception. Besides, he uses the word *arrangement* not *devises* or *legacies*. We are of opinion that there is no error in the judgment of the Superior Court, which is hereby affirmed.

PER CURIAM. Judgment affirmed.

STEPHEN MONDAY AND WM. H. ROANE *vs.* J. R. SILER.

An action of assumpsit for money had and received, will not lie in favor of the equitable owner of a chose in action against a legal owner who has received the money on it.

ACTION of ASSUMPSIT, tried before SAUNDERS, Judge, at the last Spring Term of Macon Superior Court. The suit was brought for money collected upon a note, due by J. M. Bryson for $150, dated December, 1851, payable to John Baxter, assigned by Baxter on 10th March, 1852, to J. R. Mounce, and by him to Jesse R. Siler, the defendant, by whom the amount was collected.

The plaintiffs produced a deed in trust conveying the effects of J. R. Mounce to them for certain purposes, and they contended that by it the equity in this note passed to them, and that the defendant, having got the money, was liable to them in this action. They showed that they had given notice to the debtor, as well as to the defendant, previously to the note's being collected, forbidding its payment to defendant.

His Honor charged the jury, that on this state of facts, the

plaintiff was entitled to recover. Defendant excepted. Verdict for plaintiff. Judgment and appeal.

N. W. Woodfin, *J. W. Woodfin* and *Gaither*, for plaintiffs.
Baxter, for defendant.

BATTLE, J. We cannot concur in the opinion expressed by his Honor in the Court below. He was misled, no doubt, by what has been often said of the action of assumpsit for money had and received—that it was in the nature of a bill in Equity, and would lie wherever the defendant had received money which he could not in equity and good conscience retain from the plaintiff. That may be true, wherever the defendant himself has not the *legal* title to the money, but cannot apply to a case where the plaintiff is only the equitable, while the defendant is the legal owner of the sum received. To permit a recovery at law, in such a case, would be confounding the distinctive jurisdictions of the Courts of Law and Equity. Accordingly it was decided in the case of *Smith* v. *Gray*, 1 Dev. and Bat. Rep. 42, that where a person who was entitled to a distributive share in an estate, assigned it to the plaintiff, and afterwards collected and used it himself, assumpsit for money had and received, would not lie against him by the assignee. "Whatever operation," say the Court, "the assignment may have in Equity, *at Law* it did not transfer a title to the distributive share, nor to the money decreed upon it. At Law it could operate only as authority to the plaintiff to collect the money, and perhaps justify him in retaining it after it should have been collected. When therefore, the defendant received the money, he received what in Law belonged to him, and we do not see therefore how the law can infer, upon this receipt, an undertaking to pay over the money to the plaintiff."

This reasoning applies directly to the case before us; the deed executed by Mounce to the plaintiffs, transferred to them the equitable title only in the promissory note in question, while his endorsement of it passed the legal title to the de-

fendant. When, therefore, the latter collected the money from the maker of the note, he received that, to which in law he was entitled, and the law will not infer an undertaking by him to pay it over to the plaintiffs. The case of *Hoke* v. *Carter*, 12 Ire. Rep. 324, to which we were referred by the counsel for the plaintiffs, decides nothing in opposition to this principle. It holds that if an agent of the equitable owner of a *chose in action* receive the money, he may be sued in assumpsit by the latter for it, and that he is not protected from the suit by paying over the money to the legal owner; but it does not decide, and there is nothing in it which goes to show, that assumpsit for the money had and received could be sustained against such legal owner.

PER CURIAM. The judgment is reversed and a *venire de novo* awarded.

HOLMESLY *vs.* HOGUE.

In a question of a fraudulent conveyance of a slave the plaintiff may go into the particulars of a trade for land, and a modification of that trade afterwards, in order to show that he was a creditor.

It is not competent for a creditor, in order to establish the fraud in question, to show that the debtor had made a fraudulent transfer of other property to another person.

ACTION of TROVER to recover the value of a slave, tried before his Honor, Judge SAUNDERS, at the last Spring Term of Cleaveland Superior Court.

Guion and *Lander*, for plaintiff.
Baxter and *Hoke*, for defendant.

NASH, C. J. We are not sure that we have been able rightly to understand the case sent us in this record, or the intended bearing of the testimony excepted to. This obscurity may be the effect of haste in drawing up the exceptions, (which should

ever present the point in contest with clearness and brevity,) or of imperfect chirography, rendering it sometimes impossible to read or transcribe it. To whatever cause it may be owing, we have had much difficulty in satisfying ourselves that we have arrived at a just conclusion in endeavoring to read the case.

The action is in *case* for the recovery of a negro woman *Esther.* The plaintiff purchased the negro from one Joseph Hardin: his bill of sale is dated on 12th of July, 1853, and the defendant caused an execution to be levied on her on 14th July, 1853, under which she was sold. In this execution the present defendant was the plaintiff, and to justify his proceedings, alleged that the sale to the plaintiff was void, being made to defraud the creditors of Hardin, of whom he was one. To make out his defense on this point, he gave in evidence several notes, executed by Hardin to himself, on one of which, a judgment had been obtained, and on which the execution above referred to was issued; and to show, as we presume, that the note was a *bona fide* one, and for a valuable consideration, he was permitted by his Honor to prove that he had, in March preceding, taken from Joseph Hardin a deed for a tract of land for 330 acres, one hundred of which were claimed by the present plaintiff: and the parties having got together, it was agreed that the conveyance should be cancelled, and a new one executed for two hundred and thirty acres, which was done. To make good to the defendant the loss of the hundred acres, Hardin executed three several notes, of which, the one above stated was one. This testimony was objected to by the plaintiff. If, as we suppose, the evidence was offered for the purpose of showing that the defendant was a *bona fide* creditor of Joseph, it was properly received.

To make out his allegation of fraud, the defendant was suffered to prove that the plaintiff sold the one hundred acres, so claimed by him, to another person, and that he had no right or title to it. If this evidence was not offered with this view, we confess our inability to gather from the case what purpose it was to answer. To this object it is palpably incompetent.

Whether the plaintiff had defrauded his vendee in the sale of the land, had no more bearing upon the issue before the jury, than to prove that in the sale of a horse to another person he had committed a fraud, or to prove he was in the habit of committing frauds. That A has made an usurious contract with B is no proof that his contract with C is usurious. Such evidence is irrelevant and mischievous, having a direct tendency to mislead the jury. This effect it must have had in the present case, for without it, there is no evidence of fraud in the purchase of the slave. A justice's execution has no lien on property until levied. Before such levy the owner may honestly sell it, or with it pay another debt. In the present case the sale is two days before the levy. *Beasley* v. *Downey*, 10 Ired. Rep. 284; *Bumgarner* v. *Manney*, 10 Ired. 121; *State* v. *Arnold*, 13 Ired. 184; Starkie on Ev. 61.

PER CURIAM. For the error pointed out in the reception of the evidence of the sale of the land by the plaintiff, the judgment is reversed and a *venire de novo* awarded.

DOE *on dem. of* DANIEL HALFORD AND ELIZABETH HIS WIFE *vs.* JOSHUA TETHEROW.

(The first point in this case is the construction of a will arising upon its peculiar phraseology.)

One tenant in common cannot sue his fellow, unless there is an actual ouster either proved or admitted by the pleading.

Coverture is not a saving against the operation of the Statute of limitations, unless the wife *must* be joined with the husband in order to sustain the action Where he *may sue alone*, or where he *may* join the wife with him at his election, the Statute bars.

Where the eviction takes place *during the coverture*, the husband may sue alone, or may join his wife with him at his election; in such a case, therefore, he is barred by the Statute.

EJECTMENT, tried before BAILEY, Judge, at a Special Term of Buncombe Superior Court, July, 1855.

The land in question, had been granted to John Lakey, who died in 1835, seized of the same in fee, leaving the plaintiff Elizabeth, Hiram Lakey, and Anne Lakey his only children and his heirs at law. To avoid the application of the Statute of limitations the plaintiffs put in the will of John Lakey, and it was insisted by them, that the land in question was devised to Jincey Lakey, his widow, during her life or widowhood; and that she having died without marrying, only about two years before the bringing of this suit, they were within time. The will of John Lakey is as follows: "In the next place, I allow my just debts to be paid out of my estate; then in the next place, I allow the plantation where I now live on, and all my household furniture, and stock of cattle and horses and hogs to the use and benefit of my wife Jincey, during her life, or as long as she remains my widow; and if she should marry, I allow all my property to be sold, and my wife to have the third of all the perishable property. Also, I allow my land to be sold and divided as follows: if John Alloway stays and works with his grandmother, I allow him to have three months schooling and fifty dollars out of my estate when sold: next, I allow when my property, that is, the balance after the sale, to be equally divided between my son Hiram Lakey, Anne Lakey and Elizabeth Halford: next, the place of mine that Jesse Watkins now lives on, after his lease is up, I allow to be rented out and go to the use of my son Hiram, and Anne Lakey and Elizabeth Halford, to be equally divided betwixt them, until sold: next, I appoint Hiram Lakey and John Young, Executors."

The defendant offered in evidence a sheriff's deed for the land in dispute, dated in 1840; also a levy and sale under a judgment and execution against Hiram Lakey, and proved a sole possession, under this purchase, for more than seven years before the commencement of this action. The defendant also offered in evidence a bond, executed by John Lakey to Hiram Lakey, conditioned that he should make title to the said Hiram, when the purchase money therein mentioned, should be paid: he also proved that Hiram Lakey was living on that part of

the land claimed by him, at the time of the death of John, and continued so to do until 1840, when the defendant went in. It had been part of the tract on which John Lakey lived, but on the making of this contract of sale, John, and Hiram, his son, made a dividing fence between them, which has ever since been observed and regarded as the line of separation between Hiram's part, and the original tract; and was especially so regarded and observed by the widow of John Lakey, up to the time of her death. The *feme lessor* had inter-married with the other lessor, David Halford, before the death of John Lakey.

A verdict in favor of the plaintiff was returned, subject to the opinion of the Court upon the points reserved, viz:

1st. Whether the Statute of limitations formed a bar to the plaintiff's recovery?

2nd. Whether the will conveyed a life estate to the widow in that part of the land, claimed by the defendant as bargained to Hiram Lakey?

Upon consideration of the questions reserved, his Honor, being of opinion with the plaintiff, gave judgment accordingly, from which, the defendant appealed to this Court.

Gaither and *Williams*, for plaintiff.

N. W. Woodfin, for defendant.

PEARSON, J. It is too clear for argument that the will does not give the widow a life estate, in that part of the original tract, which is claimed by the defendant. The testator had sold this part to his son Hiram, who was living on it, and cultivating up to the cross fence, which was the dividing line, while the testator lived upon and cultivated the other part. The words "I allow the plantation where I now live on, and all my household furniture, &c., for the use and benefit of my wife, during her life," embrace only the latter part. Besides, it is not reasonable to suppose that the testator could have intended to encumber with a life estate, the part which he

had sold to his son, and for which he had executed a bond to make title.

The remaining question is as to the effect of the sheriff's deed to the defendant, and his possession under it. Upon the death of the testator, the legal title to the land in controversy, not being disposed of by the will, descended to his three children as his heirs at law. Hiram, under his contract of purchase, had not such an equitable estate, or trust, as was liable to be sold under execution, by force of the Act of 1812; so the defendant, by the sheriff's deed, acquired only the legal estate which had vested in Hiram as one of the heirs at law.

If the effect of this deed was to vest Hiram's legal estate in the defendant, as a tenant in common with the other two heirs, then the defendant's possession was not adverse; and although he had the sole possession for more than seven years, the estate of his co-tenants was not divested, and he did not acquire a title to the whole in severalty. In this view of the case, the plaintiff cannot maintain his action, for one tenant in common cannot sue his fellow, unless there is an *actual ouster*, either proven or admitted by the pleading. The record sets forth that the defendant pleaded *not guilty;* his entering into the common rule is not set out, and we are not at liberty to assume that he admitted an "actual ouster."

If the effect of the sheriff's deed, and the defendant's sole possession under it, was to divest the estate of the other two heirs, and amounted to an actual ouster, then the defendant's possession was adverse, and being continued for more than seven years, ripened his title to the whole in severalty. In this view of the case, the plaintiff cannot maintain his action, unless he can bring his case within the saving of the Statute of limitations, by reason of the *coverture* of the *feme* lessor.

In *Williams* v. *Lanier*, Busb. 30, the rule is said to be, "where the wife must be joined, the Statute does not bar: where the husband must sue alone, or may, at his election, join the wife, the Statute does bar." It is also said in that case, where the eviction is *before the coverture*, the wife must be joined: when the eviction is *during the coverture* (as in our

case) the husband may sue alone or may, at his election, join the wife."

This seems to be conclusive: the husband cannot prevent his right of entry from being *tolled* by joining his wife, and she, or her heirs, have seven years, after his death, in which to sue.

A husband, without joining his wife, can make a lease for years. Bac. Abridgt. "Leases and terms for years": consequently he may bring ejectment without joining the wife. "It is considered as settled, that although the husband may join the wife, yet it is not necessary that the husband and wife should join in a lease to try the title to her estate: he alone may make a lease for that purpose." Bac. Abr. "Ejectment." Several cases are there cited in which the husband has maintained ejectment on his own demise. The Statute 32 Hen. 8, *enables* husband and wife to make a lease which is binding on her after coverture, but this in no wise affects his right at common law to make a lease alone which is valid during the coverture. In *Williams* v. *Lanier*, this doctrine is fully discussed and it is unnecessary to repeat it. In that case there was issue born, and the *decision* in respect to the action in the nature of *Waste* is confined to the facts there presented; but the general remarks and reasoning of the Court, in respect to the Statute of limitations, is equally applicable to a case where there is no issue; for although the birth of issue is required to make the husband "tenant by the curtesy initiate" and may be necessary to give him a seizin or free-hold in severalty, or in his own right, yet it has no bearing on his right to the sole possession, by force of which he sues alone in trespass *quare clausum fregit* for an injury to his crop, or may make a lease for years, and of course may bring ejectment to recover possession if he is evicted.

Taking our case in either point of view, the plaintiff cannot maintain his action, and the judgment in his favor must be reversed; and upon the questions reserved, the verdict, being rendered subject thereto, must be set aside and a non-suit entered.

Upon the argument our attention was called to *Burton* v. *Murphy*, N. C. Term Rep. 259, where it is held that one who holds sole possession under a deed from one tenant in common for the whole tract has an adverse possession, which in seven years will ripen his title as to the whole. And our attention was also called to *Cloud* v. *Webb*, 3 Dev. 318; and particularly to the very full and learned argument of *Mr. Winston*, (*P. H.* Sr.,) who controverts the decision in *Burton* v. *Murphy*. As in either point of view, the case under consideration is against the plaintiff, we are not at liberty now to decide what is the effect of a conveyance of the whole by one tenant in common, and a sole possession for seven years by the purchaser.

PER CURIAM. Judgment reversed.

MARY PINNER *vs.* NANCY PINNER *et al.*

Upon the question of the *bona fides* of a deed, alleged to be in fraud of a contemplated marriage, what the husband, the grantor, said in favor of the deed, even before the marriage, is not admissible: because the wife claims by act of law paramount to the husband.

THIS was a petition for DOWER, tried before his Honor Judge BAILEY, at the Special Term of the Superior Court, held for the county of Buncombe, July 1855.

This case was before the Court at the August Term, 1853, (Busbee's Report 475,) and the same issue of fact was submitted as at the former term, to wit, "whether the husband of the petitioner, William Pinner, was seized of the premises?" On this trial, as on the former, it was alleged by the defendant, (his daughter Nancy) that previously to his intermarriage with the petitioner, the said William Pinner had made to her a conveyance for the land in question. A deed was produced by her, bearing date in 1827, which was attacked on the ground, that it was in fraud of the petitioner's right to dower, and defendants' counsel offered to prove by the witness, that

previously to William Pinner's intermarriage with the petitioner, he told the witness he had made his daughter a deed for the land. This testimony was ruled out by the Court, for which the defendant excepted.

A verdict was rendered for the plaintiff, and an appeal taken by the defendant to this Court.

N. W. Woodfin and *Bynum*, for plaintiff.
J. W. Woodfin, for defendant.

NASH, C. J. The case as now presented to us differs from the one formerly here, in one particular only. The witness, Lanning, upon that occasion, stated that the declaration of William Pinner, as to his gift of the land to the defendant, was made about a month before his death, and consequently after his marriage with the plaintiff. See the case in Busbee 475. In the present case the defendant offered to prove the same declarations made before his marriage, which were ruled out by the Court. In the former case, this Court decided that the evidence of Lanning, of declarations of the husband made at the time of the delivery of the deed, was competent as part of the *res gestæ*, but that no declarations then made of what he had done at a prior period, as to the making of a title to the defendants were admissible. The reason assigned was, that the widow claims her right of dower, not under her husband, but under the law. If the reason assigned by the Court for its decision be correct, then it makes no difference at what time the husband's declarations were made as to the prior delivery; they cannot affect his widow, as she does not claim under him. Her claim to dower is above and beyond him; and so sedulously does the law guard her right, that it makes void all conveyances made by the husband with the fraudulent intent to deprive her of her dower, and places her dower beyond the reach of her husband's creditors.

PER CURIAM. His Honor committed no error in rejecting the evidence. Judgment affirmed and this opinion will be certified.

NELSON A. POWELL *vs.* JAMES L. JOPLING.

Mere office judgments are under the control of succeeding terms of the same Court after that at which they are entered, and can be modified or set aside upon sufficient cause shown to such succeeding Court.

Where a Superior Court, having an absolute discretion to pronounce upon a matter decided in the County Court, gives a judgment, not in the exercise of such discretion, but in obedience to a supposed principle of law, in which the Court was mistaken, an appeal will lie to this Court, and such judgment will be reversed.

THE record in this case shows that a *ca. sa.* and bond was returnable to the County Court of Caldwell; that defendant failed to appear and judgment was rendered against him and his sureties.

At the next term of that Court, the defendant showed to the Court, that before the *ca. ca.* was returned at the former term, the plaintiff told the defendant that he need not appear, for that he did not intend to have the *ca. sa.* returned, and thereupon moved that the judgment of the former term be set aside, and that he be permitted to take the benefit of the act for the relief of insolvent debtors, which motions were allowed by the Court, and the plaintiff appealed to the Superior Court.

At the Spring Term, 1855, SAUNDERS, Judge, this judgment is rendered. "The Court being of opinion that the County Court had no power to vacate the judgment rendered at a previous term, directs that a procedendo issue to the said Court, that the said order be reversed and that plaintiff have execution for his original judgment and costs of Court," from which the defendant appealed to this Court.

Avery, for the plaintiff.
Lenoir, for the defendant.

NASH, C. J. The defendant had been arrested at the instance of the plaintiff upon a *ca. sa.* returnable to the County Court of Caldwell, and had given bond and surety for his appearance during the term. Before the return of the process,

the plaintiff told the defendant he need not make his appearance at Court, as the *ca. sa.* should not be returned. Contrary to his promise, he caused the writ to be returned, and the defendant was called out and judgment taken against him and his sureties on the bond. At the next term of the Court, the defendant having heard that he had been called out, applied to the Court to have the judgment set aside and be permitted to take the oath of insolvency, which was granted, and the plaintiff appealed to the Superior Court, where the decision of the County Court was overruled, upon the ground that the County Court had not power to set aside a judgment rendered by them at a previous term. In this opinion we do not concur.

With the exercise of the discretionary powers of the Superior Courts we have no right to interfere, and if his Honor had placed his decision upon that ground, the judgment would have been affirmed. But when he declines to act, upon the ground, that he has *in law* no power so to do, or when he bases his action, as in this case, upon the want of *legal power* in the County Court to take the action in the case which he is called on to revise, his judgment becomes matter of law and subject to the revision of this Court.

His Honor decided that the County Court had no power to set aside a judgment rendered at a previous term. As a general rule this is true; but where the judgment is by default, or interlocutory, or not taken according to the course of the Court, they are always under the control of the Court; because "such a judgment is in no sense the judgment of the judge; and it belongs to him as a right of his own, to make the record speak the truth, by vacating the entry of what purports to be his act, but was not his act in reality." *Winslow* v. *Anderson* and *Duckworth*, 3 Dev. and Bat. 13.

It is of the essence of judicial justice that every man, before he is condemned for a crime, or deprived of his property by sentence of a Court, shall have a day in Court—shall have an opportunity to defend himself. Even Turkish justice, as it is called, acts upon this principle: no man there, is deprived by their Courts, of life or property, without being called on for

his defence. In the case we are considering, a shameful fraud was practised upon the Court and upon the present defendant. The latter, arrested under a *ca. sa.* at the instance of the plaintiff, had, under the insolvent laws, given a bond for his appearance at the next succeeding term of the County Court: the plaintiff, conscious that, he (the defendant,) was entitled to discharge himself as an insolvent, tells him he need not appear at Court—the papers would not be returned—and confiding in his honesty, the defendant did not appear, was called out, and a judgment taken in his absence and that of his surety, for the amount of the debt claimed. Substantially, the defendant had no day in Court, and the judgment taken against him, was irregularly taken—against the course of the Court. He has then *ex debito justitiæ*, a right to claim of the County Court, the exercise of its power to vacate the judgment so obtained. The judgment here is what is called an office judgment. In *Bender* and *Askell*, 3 Dev. Rep. 150, Judge RUFFIN defines such a judgment, to be one, "signed by a plaintiff in the course of the Court without any actual adjudication by the Court," one, where, by the force of some statute, the party is entitled, as a matter of course, to his judgment, as in an insolvent's case. The act provides, that if the defendant does not appear according to the requirement of his bond, judgment shall be entered up against him and his surety, *instanter*, without any action of the Court. Such judgments, say the Court in Askell's case, "must necessarily be held to be under the future control of the Court," "as to them, the authority of the Court is not confined to the term in which they are rendered." In that case, a judgment by default final had been taken by the defendant, Askell, against the plaintiff, upon whom the writ had never been served. An execution issued and the property of Bender sold. At a *subsequent* term of the Court, the judgment against Bender was vacated on motion.

In *Crumpler and others* v. *the Governor*, 1 Dev. 52, the same doctrine was acted on. A judgment had been taken against McAlster, sheriff of Duplin, and his sureties, of whom Crumpler was one, upon the certificate of the Public Treasurer and

Comptroller for the non-payment of taxes. This judgment was taken at Spring Term, 1823, of Wake Superior Court, before BADGER, Judge, and at *Fall Term succeeding*, it was set aside, and that judgment, upon appeal, was affirmed by the Supreme Court. This doctrine is finally settled by this Court in the case of *Williams* v. *Beasly*, 13 Ired. 112, where the Court say judgments taken, as of course, are from necessity always under the control of the Court whose judgment they purport to be; also, of an appellate Court, who can treat the matter *de novo*.

His Honor's attention was not drawn to this difference between an office judgment, which is not rendered according to the course of the common law, and one rendered according to it. The latter is not within the power of the Court at a subsequent term, in a summary manner to disturb it; the former is always under the control of the Court rendering it, or of an appellate Court. To the former, the cases referred to by the defendant relate.

PER CURIAM. There is error in the judgment of the Superior Court, which is reversed.

PEMBERTON WHITE *vs.* MICHAEL BROWN & SON.

A promise "to pay for three slaves, ten dollars per month, until we finish our contracts on the Rail Road," is an entire contract, and cannot be recovered upon, unless the slaves were continued until the finishing of the Rail Road contracts.

ACTION of DEBT, tried before his Honor, Judge MANLY, at the Spring Term, 1855, of Rowan Superior Court.

The action was brought on the following instrument: "We promise to pay Pemberton White for three boys, Milas, Elam, and Stanhope, Ten Dollars per month, from 4th of January, 1853, until we finish our contracts on the Rail Road: the said White agrees to pay Dr.'s Bills, clothe them and make good lost time in sickness. M. BROWN & SON."

It was in evidence that the slaves, in pursuance of the contract, went into defendants' possession on 4th of January, 1853, and worked through that year, at the end of which, and before the defendants' rail road contracts were completed, plaintiff took the slaves home, against the will of the defendants, and refused to deliver them afterwards on demand of defendants' agent.

Defendants' counsel contended that the plaintiff was not entitled to recover, inasmuch as he had not allowed the slaves to remain until the Rail Road contracts were entirely fulfilled.

The Court, however, placed a different construction on the instrument, and held that the plaintiff was entitled to recover for the time the slaves had worked, deducting for lost time for sickness. Defendants excepted. Verdict for plaintiff, judgment and appeal.

H. C. Jones, for plaintiff.
Boyden, for defendants.

BATTLE, J. We do not concur in the construction which his Honor, in the Court below, put upon the contract between the parties. The agreement on the part of the plaintiff was, that his three boys should work for the defendants on their Rail Road contracts until they should be finished: in consideration of which, the defendants on their part, agree to pay him ten dollars *per month*. It seemed to us that plaintiff's agreement was an entire one for the service of his slaves, during the whole period mentioned in the written contract. It must be so, unless the stipulation for payment at "ten dollars per month" makes it otherwise. If that be taken to be a promise by the defendants to pay ten dollars at the end of each month, it may have the effect supposed; but we cannot believe that such was the intention of the parties. Had it been, it would have been expressed in plainer terms, as by the insertion of the words "to be paid at the end of each month," or some other words of equivalent import. As it

stands, the more obvious meaning of the expression is, that the whole amount which the defendants were to become liable to pay, was to be ascertained by calculating for the whole time at that rate per month. As the term of service was left indefinite, this was essential, to enable the parties to determine how much one was to receive and the other to pay. But it is contended for the plaintiff, that the present agreement is similar to that upon which the action in *Withers* v. *Reynolds*, 2 Barn. and Adol. 882, was brought, and must be governed by the same rule of construction. That agreement was as follows: "John Reynolds undertakes to supply Joseph Withers with wheat-straw, delivered at his premises, till the 24th June, 1830, at the sum of 33s. per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight; and the said J. W. agrees to pay the said J. R. 33s. per load, for each load so delivered, from this day till the 24th June, 1830, according to the terms of this agreement." The Court held that the seller had a right to demand payment, *toties quoties*, on the delivery of each load of straw. Had the above stated contract terminated at the close of the first clause of it, its resemblance to the one before us, would have been nearer, and then the Court would probably have adopted a different construction; but the latter clause seemed to be inserted for the purpose of enabling the seller to demand payment for each load when he delivered it. The absence of any such clause in the present contract, precludes the interpretation insisted on for the plaintiff. If the construction of the contract between the parties, which we have adopted, be correct, then there is a clear principle of law well established by authority, and well founded in reason, which prevents the plaintiff's recovery in the present action. It is that where there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he cannot recover anything either in general or special assumpsit. *Winstead* v. *Reid*, Busb. Rep. 76, and see Am. Ed. of Smith's Leading Cases, vol. 2, p. 1, and the notes containing the English and American cases, where

the subject is fully discussed and explained. The bill of exceptions shows that the plaintiff, after having performed a part only of his contract, refused to complete it, against the will of the defendants, and without any default on their part. He therefore, cannot recover in assumpsit upon either his special or general count. But if our construction of the contract be not the proper one, and the plaintiff had, under it, a right to demand pay for his slaves, before the expiration of the whole term of service, that cannot avail him, because it does not appear from the bill of exceptions that any such demand was made, or that he had, or pretended to have, any cause for withholding his slaves from the defendants. Having thus wilfully refused to complete his contract, without any legal excuse and against the consent of the defendants, he cannot maintain assumpsit against them.

PER CURIAM. The judgment must be set aside and a *venire de novo* awarded.

STATE *vs.* WILLIAM GENTRY.

Where killing, which would have been manslaughter by reason of having been done on legal provocation, is nevertheless insisted to be murder because of the *unusual manner* in which the killing was done, if there be several aspects in which this unusual manner may be viewed as qualifying the motive of the prisoner, some of them favorable and some unfavorable, it is error in the Court to present to the jury only the view unfavorable to the prisoner.

Where the *unusual* circumstance relied on as varying the case from manslaughter to murder, was that the prisoner *put his knife open in his pocket*, and the Court left it to the jury to say whether he thus disposed of his knife to use it again in the fight, he ought at the same time to have submitted the enquiry whether he thus put away the knife in order to draw on the fight, and afterwards to use it *unfairly by giving a fatal blow unawares;* or whether, in fact, he had formed any definite purpose as to the use of the knife at all?

INDICTMENT for MURDER, tried at the Spring Term, 1855, of Buncombe Superior Court, before his Honor Judge SAUNDERS.

State *vs.* Gentry.

The prisoner was indicted for the murder of one Mastin Gosnall. The evidence was, that the prisoner, the deceased, James Gunter (the half brother of the deceased,) and others, were at the house of the father of the deceased on the day of the alleged murder, and that the prisoner and the deceased were apparently friendly, and that the deceased had mended the shoe of the prisoner; that during the day the prisoner and Gunter had a quarrel, when the former drew his knife on the latter, and the latter drew a loaded pistol on the prisoner. In the evening of the same day, the deceased and Gunter were in the house, and the prisoner and the wife of the deceased were in the yard, when insulting language passed between the two latter, which was heard by the deceased: thereupon the deceased pulled off his coat and came out of the door into the yard, in a threatening attitude, throwing down his hat, and saying to the prisoner, "if you have any thing to say, I am your man," and advanced towards the prisoner in a menacing manner, with his half brother close to him, with his pistol in his possession: the mother of the deceased caught hold of him, saying, that the prisoner would kill him, when one Norton, the father-in-law of the deceased, pulled her away, saying, "let Mastin alone."

The prisoner, at the time the deceased came out of the house, was standing at the fence, about ten or twelve steps from the house, whittling with his knife, and as the deceased was advancing on him, turned around and advanced two or three steps towards the deceased: the father of the prisoner got between them and said, "boys, there shall be no fight here;" then both struck: the prisoner, with his knife, giving the mortal blow; and the deceased fell and died in a few minutes. It was likewise in evidence, that immediately upon the fatal blow being struck, the sister of the deceased hit the prisoner with a stone, the father of the deceased knocked him down twice with a board, and Gunter snapped his pistol at him. There was conflicting testimony as to who struck the first blow. The mother of the deceased swore, that when the prisoner turned "round from the fence, *he put his knife open in*

his pocket, and advanced two or three steps, meeting the deceased, when his father got between them: that the deceased raised his arm, and may have struck over his father at the prisoner, but if he hit him, it was a very slight blow, and the prisoner, being a left handed man, reached round the father and stabbed the deceased, giving the mortal wound.

The Court after explaining what constituted the different grades of homicide, and reciting the testimony on both sides, charged the jury that "if the deceased and the prisoner met each other in a threatening attitude and the deceased struck the prisoner, and he in turn struck with the knife and gave the mortal blow under a passion, it would be such a legal provocation as to reduce the case from murder to manslaughter."

"But if the prisoner saw the deceased approaching him in a threatening way, put his knife open in his pocket, and advanced to meet the deceased with a view to a rencounter, and with the intent and purpose of using the knife, not in self-defence, but with the design of taking away the life of the deceased, and did use it at the time, and in the manner as described by the mother of the deceased, it would be a case of murder." For this the prisoner's counsel excepted.

The verdict of the jury was for murder. Judgment and appeal.

Attorney General and *Baxter*, for plaintiff.

Gaither, *Edney*, *N. W. Woodfin* and *J. W. Woodfin*, for defendant.

PEARSON, J. "If two 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. *State* v. *Currie*, 1 Jones' Rep. 283.

In the case now under consideration, the quarrel was sudden, and the death was caused by the use of a deadly weapon: so,

it falls within the general rule, and is but manslaughter, unless the killing was in an *unusual* manner; showing *evidently*, that it was the effect of wickedness, *i. e.* malice, not passion.

The question is, what unusual circumstance attended the killing in this case, so as to show, *evidently*, that it was the effect of wickedness, *i. e.*, malice, not passion; and make it a case of murder from malice *implied?*

An assault "is a legal provocation; the party need not wait till he receives a blow, for the act of offering or attempting to give a blow, "the rushing upon him for that purpose" is the beginning of the fight. *State* v. *Davis*, 1 Ire. 125. When he sees that a fight is inevitable or impending, when the fight is commenced by the overt act of rushing upon him with an intent to strike, his passions are aroused and the *furor brevis* takes possession of him before he receives a blow.

The common law is based upon an intimate knowledge of human nature. Does not every one, who has ever observed the parties just as a fight begins, know, that at the instant the parties rush at each other, and before a blow is actually struck, the fight in fact begins, the passions are aroused, the parties are no more under the sway of reason, than after blows are actually passed?

In the case under our consideration, when the deceased, hearing what had been said by the prisoner to his (deceased's) wife, pulled off his coat and came into the yard in a threatening attitude, throwing down his hat, and said to the prisoner "if you have anything to say I am your man," *and advanced towards the prisoner in a menacing manner, with his half brother close to him, with a pistol in his possession*, he (the dec'd.) committed an assault on the prisoner, and the killing being upon a sudden quarrel, although done with a deadly weapon, was but manslaughter, unless done in an unusual manner, showing evidently a wickedness of heart, from which the law would imply malice, within the meaning of the terms "malice aforethought."

So the question is, was the killing done in an unusual manner, showing this wickedness?

If, when the deceased committed the assault, by rushing towards the prisoner "in a menacing manner, with his half brother close to him, with a pistol in his possession," the prisoner had, with a stick or a stone, or a pistol, given the deceased a mortal wound, the killing would have been manslaughter, because of the legal provocation by reason of "the assault." If the prisoner had "held the knife up in his hand," no distinction could be taken between the knife and a stick, or a stone, or a pistol, being all of them deadly weapons. So, if the killing amounted to murder, it was an exception to the general rule, by reason of the unusual manner in which the knife was used.

This makes the case turn upon the testimony of the mother of the deceased; and such is the effect given to her testimony by the manner in which the case is put to the jury. She swore "when the prisoner turned around from the fence he put the knife *open in his pocket*, and advanced two or three steps meeting the deceased."

This, taken in connection with the other testimony, and the doctrine of homicide distinguishing manslaughter from murder, above stated, made it the duty of the presiding Judge to charge the jury that as it was a killing upon a sudden quarrel, and the assault made by the deceased was a legal provocation, it was a case of manslaughter, unless there was some circumstance, showing evidently that the prisoner did the act from pre-conceived malice; or unless the manner of killing was so unusual as clearly to show that the prisoner acted, not from the present provocation, by reason of the assault, but from wickedness of heart, which furnishes a ground from which the law implies malice.

There were three points of view in which the case ought to have been presented to the jury, admitting the testimony of this witness to be true:

1st. If, when the deceased came out of the house, and made the assault by *rushing towards the prisoner*, who was standing at the fence, whittling with his knife, the prisoner, in the hurry of the moment, when intent only upon meeting the ad-

vance of the deceased, put his knife into his pocket, *open*, without then thinking of the circumstance, or of the use he would make of it in the rencontre, the killing came under the general rule and was manslaughter.

2nd. If, when the deceased came out of the house and made the assault, the prisoner *put his knife open in his pocket*, on purpose, with an intent to use it if what occurred afterwards should make its use necessary, or should prompt or impel him in self-defense to make use of it, still, there being a *legal provocation*, the killing was but manslaughter: because there was nothing from which the law would imply malice.

3rd. If, when the deceased came out of the house, the prisoner had put his knife in his pocket *open, with an intent to conceal the fact of his being thus armed and thereby drawn* on the deceased as if they were to have an ordinary fight, he having the purpose of taking an *undue* advantage and giving *a fatal blow unawares*, then, notwithstanding the apparent provocation, the law implied such a "wickedness of heart, and a disposition fatally bent on mischief," as amounted to malice aforethought, and made the killing *murder*.

In this connection, his Honor might have called the attention of the jury to the fact, that it is not usual for one to put his knife into his pocket without shutting it, (because of the danger of being cut:) but then, in all fairness, he ought to have given the prisoner the benefit of the fact, that the "assault" was not an ordinary one "where two, upon a sudden quarrel, agree to fight;" but the fight was *begun* by the deceased: "his rushing upon the prisoner with an intent to strike him," was an assault—a "legal provocation:" and he was *backed*, (using a common but expressive word) that is, had the presence and support of his half brother with a pistol in his hand, and he had other aiders, &c., after the fact; for, upon the instant, a sister of the deceased *hit* the prisoner with a *rock:* the father of the deceased knocked the prisoner down twice with a board, and the half brother of the deceased, who had just before attempted to use his pistol, with an intent to kill the prisoner, snapped his pistol at him: so the prisoner

was in the "midst of enemies." See *State* v. *Hill*, 4 Dev. and Bat. 491.

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

Doe on demise of ROBERT THOMPSON *vs.* MATILDA RED.

The commencement of an action of ejectment is the service of the declaration. If the plaintiff's title is complete at that time he may recover.

The defense that the lessor of the plaintiff has taken possession of the premises sued for, must be pleaded in some form, or will not be noticed by the Court.

EJECTMENT, tried before SAUNDERS, Judge, at the Spring Term, 1855, of Henderson Superior Court.

The defendant in this suit had recovered in a former action of ejectment a moiety of the land in question, under which recovery, she, by her agent, took possession thereof. Before she entered, the lessor of the plaintiff had put a declaration in the hands of the sheriff which left the date of the demise blank, with directions to fill it up and serve it upon the person who should take possession, as soon as any one should do so. Possession was taken by McMinn, on 5th of March, 1851, and on the same day the blanks were filled up with that date and with the name of the agent, McMinn, as tenant in possession, and the process returned as being served on him on that day.

Defendant, Matilda Red, at the return of the declaration, gave the bond required by law, and by leave of the Court was permitted to defend in lieu and stead of McMinn as his landlord, and entered into the common rule confessing lease entry and ouster and pleaded not *guilty*.

The defendant's tenant abandoned possession immediately after the commencement of this suit, and the plaintiff's lessor occupied the whole premises, from that time down to the trial of the suit. The case was tried on issues not necessary to be noticed, and resulted in a verdict and judgment for the plain-

tiff. The defendant's counsel contended, 1st, that the suit had been brought before the plaintiff had any cause of action, and therefore was not entitled to recover.

2nd. That having taken possession of the land for which suit was brought he could not recover, and called upon the Court so to instruct the jury; this was declined by his Honor. For which defendant excepted, and, upon judgment being rendered against her, appealed to this Court.

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

BATTLE, J. The declaration in this case was served upon the tenant in possession, on the fifth day of March, 1851, which was also the day on which the demise was laid. It had been placed in the hands of the sheriff, a short time before and prior to the time when the defendant's agent entered, with directions to serve it upon him as soon as he should enter upon and take possession of the premises in dispute. The defendant's counsel insist that the action was commenced too soon—before he had any cause for it. In making this objection he does not advert to the difference between the manner of commencing a suit in ejectment and in the other forms of action. The commencement of an action of ejectment is by the service of the declaration upon the tenant in possession, while in the other forms of action, it is the taking out the writ from the proper office, or its being filled up by the plaintiff's attorney. *Haughton* v. *Leary*, 3 Dev. and Bat. Rep. 21. But if there were any irregularity in this respect, the defendant precluded herself from taking any advantage of it, by coming forward and procuring herself to be made a party defendant upon entering into the common rule, to confess lease, entry and ouster. *Fuller* v. *Wadsworth*, 2 Ire. Rep. 263.

The remaining objection is directly opposed by the recent case of *Johnson* v. *Swain*, Bus. Rep. 335. The defendant's agent was undoubtedly in possession when the suit was commenced, and she was then upon her affidavit, admitted to de-

fend as landlord. If the lessor afterwards took possession of the premises, that fact ought to have been alleged by a plea since the last continuance, and that not being done, she cannot avail herself of it upon the plea of not guilty.

PER CURIAM. The judgment is affirmed.

STATE *vs.* TOM.

In a charge against a person of color for an assault with an intent to commit a rape, it is not necessary in the bill of indictment, to allege that the accused is a *male*, nor is it necessary to allege that the female assaulted was of the human species.

An indictment charging that an assault was made with an "intention" to ravish, &c., instead of "intent," is good under the Statute of 1811.

INDICTMENT for ASSAULT WITH AN INTENT TO RAVISH, tried before MANLY, Judge, at the Spring Term, 1835, of Iredell Superior Court.

The following is the indictment upon which the prisoner was charged.

"State of North Carolina, Mecklenburg County, } Superior Court of Law, Fall Term, 1853. }

"The jurors for the State upon their oath present, that Tom, a person of color and a slave, the property of Robert F. Davidson, late of the county of Mecklenburg, on the tenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, with force and arms, at and in the county aforesaid, in and upon one Mary A. Gribble, (a white female) in the peace of God and the State then and there being, violently and feloniously did make an assault, and her, the said Mary A. Gribble, then and there, did beat, wound and ill treat, with intention, her, the said Mary A. Gribble, violently and against her will, then and there, feloniously to ravish and carnally know, and other wrongs to the said Mary A. Gribble, then and there did, to the great damage, of the said Mary A.

Gribble, contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

"LANDER, Sol."

Upon affidavit filed, the cause was removed to the county of Iredell for trial, where the prisoner was tried and convicted.

A motion was made by the defendant's counsel in arrest of judgment for several reasons, which fully appear in the opinion of this Court: the motion was overruled, and the defendant appealed.

Attorney General and *Avery*, for the State.
Osborne and *Edney*, for the defendant.

BATTLE, J. No bill of exceptions has been sent up with the record, and we are therefore confined to the objections urged against the sufficiency of the bill of indictment, upon the motion in arrest of judgment. These objections are:

1st. That the prisoner, Tom, is not alleged to be a male.

2nd. That Mary A. Gribble, though stated to be a white female, is not alleged to be a white female of the human species: and

3rd. That the felonious assault is charged to have been made with an "intention" instead of "intent" to commit the rape.

In the first two particulars objected to, the present indictment, conforms to that in the case of the *State* v. *Jesse*, 2 Dev. and Bat. Rep. 297, which came before this Court, upon a motion to arrest for a defect in the indictment. The motion was sustained, because the bill of indictment did not charge the assault to have been felonious, but neither of the objections, now urged, were noticed by the counsel or the Court.

Certainty to a certain extent in general is all that is required in an indictment; and we think, to that extent the present indictment is sufficiently certain. Arch. cr. pl. 44. If that be not so at common law, we cannot doubt that under the Act of 1811, (1 Rev. Stat. ch. 35, sec. 12) it would be deemed a refinement to say, it did not sufficiently appear that Tom, who is charged with an intent to commit a rape, was a man, or

that Mary A. Gribble was a white female of the human species.

The remaining objection is, that the word "intention" is used instead of "intent," which is the word mentioned in the Statute creating the offense: 1 Rev. Stat. ch. 111, sec. 78. In favor of this objection, the case of the *State* v. *Martin*, 3 Dev. Rep. 329, is mainly relied upon. There the charge in the bill of indictment, founded on the same Statute, was, that the prisoner "did feloniously *attempt* to ravish," &c. In all other respects it was like the one now under consideration; which tends further to show that it has not been usual, and is not necessary, to state expressly the sex of the prisoner or the species of his victim. In deciding to arrest the judgment for the substitution of the word "attempt" in the place of "intent," the Court uses the following language: "It is a safe rule, therefore, to follow the words of the Statute; and because it is safe, the courts have adopted it. If one departure be allowed, it cannot be told how far astray it may lead us. But independently of that consideration, it is the duty of the Court to require all pleadings to be expressed in terms as brief and apt as possible. There can be none to denote the intent more apt than that word *intent* itself. It is the language of the common Law—of Statutes—of pleading. It is perfectly understood and ought to be retained. It is said by Lord ELLENBOROUGH, in *Rex* v. *Phillips*, 6 East 472, to be the proper word to convey the specific allegation of intent. It is found in all the precedents within our reach; and there is no other term so expressive and precise. Here the word *attempt* has been used in its stead. We should be justified in rejecting it upon the sole ground, that it is not the word of the Statute. But it is not even synonomous. *Intent* referred to an act, denotes a state of the mind with which the act is done. *Attempt* is expressive rather of a moving towards doing the thing, than of the purpose itself. An attempt is an overt act itself. An assault is an 'attempt to strike,' and is very different from a mere intent to strike. The Statute make a particular intent, evinced by a particular act, the crime. That purpose and

that act cannot be so well, nor sufficiently described, as by the words of the Statute itself." Were we at liberty to decide the present case, upon the principles of the common law alone, unaffected by any Statute, we might, *in favorem vitæ*, feel ourselves bound by the above adjudication, or rather, by the course of reasoning by which it is supported, as an authority which we could not disregard. We might, therefore, rest upon it, and hold that no word, not even one of the same meaning, could be substituted, in an indictment upon the Statute in question, for the word *intent*. But we cannot shut our eyes to the fact, that the Act of 1811, to which we have already referred, declares that "no bill of indictment or presentment shall be quashed, or judgment arrested, for or by reason of any informality or refinement, where there appears to the court sufficient in the face of the indictment to induce them to proceed to judgment." What is meant by an informality, we are informed by the Court in deciding the case of the *State* v. *Gallimore*, 2 Ire. Rep. 372. It is there defined to be "a deviation in charging the necessary facts and circumstances constituting the offense, from the well approved forms of expression, and a substitution in lieu thereof of other terms, which nevertheless make the charge in as plain, intelligible and explicit language. Such a deviation is always dangerous, but, by means of such a substitution, it may be rendered a mere informality which is cured by the Statute." The deviation in the case now under consideration, consists solely in the substitution of the word "intention" for the word "intent." In Walker's dictionary the two primary definitions of these words are the same, to wit, "design," "purpose." Can the Court say, then, that a charge of a felonious assault made with the "intention" to commit a rape, i. e., with the design or purpose to commit a rape, is different from a charge of an assault made with the "intent" to commit a rape, i. e., with a design or purpose to commit a rape? The bare statement of the proposition shows its absurdity.

We are, therefore, constrained to declare, that we cannot discover any error in the record, and our opinion must be cer-

tified to the Superior Court of the county of Iredell, to the end that that Court may proceed to pronounce the sentence of the law upon the prisoner.

PER CURIAM. Judgment affirmed.

STATE *vs.* ALFRED W. NOBLETT.

It is not error in the trial of a capital case, to permit witnesses, who have been previously examined, to be recalled and re-examined after the jury have retired to consider of their verdict.

It is not error for the judge to refuse to tell the jury, that the evidence of a witness, who has made a mis-statement, must be rejected altogether.

Where a simple enumeration of circumstances leads to an irresistible conclusion of fact, the Court cannot be considered as expressing an opinion upon such fact, contrary to the Act of Assembly, in merely making such enumeration, there being no peculiar significancy of voice or manner in making it.

It is not a ground for arresting a judgment upon a conviction for murder that the word *blow* is used throughout the indictment for *wound*, there being other words used in the same context, which show that a wound was given, and what kind of a wound it was. The informality is cured by the Act of 1811.

NASH, C. J., dissented from the Court, on the question of arresting the judgment, believing that the substitution of *blow*, for *wound*, was a matter of substance, not cured by the Act of 1811.

THIS was an INDICTMENT for murder, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1855, of Burke Superior Court.

The indictment charged the defendant with the murder of one John Davis, and was in the common form, with the two exceptions pointed out in the reasons given in arrest of judgment, and which need not be noticed here.

As all the material evidence in the case is interspersed in his Honor's statement of his charge to the jury, and as that statement was elaborately criticised at the bar, and is cautiously reviewed in the opinion of the Court, the Reporter deems it but just to give it entire, in the words of his Honor. It is as follows, viz:

"The Court charged the jury, that to sustain the indictment against the prisoner, it was for the State to show that a murder had been committed, the manner and time of doing it, and that the prisoner was the perpetrator of the crime: that being a case of circumstantial evidence, it was necessary for the State to establish every fact relied on as material to the prisoner's guilt, by testimony producing moral certainty in the minds of the jury, to the exclusion of every rational doubt, so as fully to satisfy their consciences. The jury were to decide as to what facts were established to their satisfaction: what were the just, fair, and legitimate inferences, and whether they produced in their minds, the necessary conclusion, that the prisoner was the murderer: that in a case of this kind, the jury should reject all doubtful testimony, and take no fact as proved, about which there was any just ground to doubt.

"First: as to the killing. Did John Davis come to his death by violence or by natural causes? Unfortunately, there was no grounds to doubt the fact of his death: that his death was produced by the hand of violence, the State relies on the testimony of the *widow*, and of *Eliza Davis*, the daughter: that the deceased left his house on Sunday evening, the 4th of September last, then in his usual health, about half hour by sun, saying that he was going to his hog-pen, some hundred yards from his mill: that he was searched for that night and not found till next morning: that he was then found in the bed of the creek, dead, with several marks or bruises on the left side of the neck and head, as described by the witnesses—some saying three or four, and one (*Harkey*) four or five, any three of which, in his opinion, was sufficiently severe to produce death: the opinion of the witness was worth nothing, but it was for the jury to say, whether from the wounds described by the witnesses, they were satisfied such was the result. They had stated these wounds were so severe, that on pressing with the finger on the side of the face, or head, the blood would gush out of the nose and ears. The gentleman who had been examined gave it as his medical opinion that, from the statement of the witnesses as to the character of the

wounds, death would necessarily have followed: whether these several matters were true, was the province of the jury to decide. So the State relied on the other facts, as testified to by the witnesses, that blood was found in several places along the path near the bank of the creek, near to the place where the body was found—that there was hair, corresponding with that of the deceased, and his hat lying some five yards off: that a large club, as if freshly cut, and corresponding with the sapling from which it was supposed to have been cut, was found in the bed of the creek within a few steps of the body: taking these facts as true, and that was for them, could there exist any rational grounds to doubt as to the fact of killing? The prisoner's counsel had argued, that the deceased might have come to his death by falling into the creek and drowning, or by apoplexy; so he might, but it was for the jury to say whether such a death, under the circumstances was reasonable, or even probable.

"As to the manner of killing, it was not incumbent on the State to show that the blow if given, had been inflicted with the stick, as appeared in evidence, but any other thing calculated to inflict wounds of a similar kind, would support the indictment.

"As to the time when the deceased was killed, if killed at all, you have no direct evidence; the testimony of the old lady and daughter is, that he left home a half hour by sun; that he was missing that night, and that he was found in the creek next morning; from the signs of blood near the path, and other discoveries, the jurors, who were on the inquest, and who were examined as witnesses, concluded he might have been killed, and probably was, about, or before sun-down; but on this point there was no direct evidence; it might have been at the time supposed, or during that night, as the witnesses, who made the examination on Sunday evening, say they found no signs until the next morning: the murder, by whomsoever perpetrated, from this evidence must have been done between the half hour by sun, when he was last seen alive, and sun-rise

the next morning, when he was found dead: at what precise time it took place the State was not bound to show.

"If the jury entertained any doubts on either of these points—the killing, or the manner of the death—their inquiry would stop, and they should acquit the prisoner. But if they were satisfied on these points, they would proceed to the important inquiry, so far as the prisoner was concerned, was he the perpetrator of the foul deed? In prosecuting this inquiry as before stated, the jury should reject every doubtful circumstance, and then say whether the facts they considered as proved, established the guilt of the prisoner, and that beyond all doubt?

"*First.* The State says the prisoner had the opportunity of committing the murder: to establish this, the State relies on the fact as stated by the witnesses, that the prisoner lived within one mile of the place where the deed is supposed to have occurred, and that he was absent from home at the time, as testified to by the old lady, who, as she says, was living in the same house, and, as it is insisted, if the several witnesses are to be believed, was still in the neighborhood.

"*Secondly.* The State says if the witnesses are to be believed, the prisoner had a motive for doing the act;—a difficulty had occurred between the deceased and the prisoner, in July previous to the alleged murder: the prisoner had been bound over to the Superior Court, and he applied to the witness, *Logan Burgin*, to be his security, and the witness swears that in the conversation, the prisoner said, if Davis swore that he struck him with a stick he swore to a lie, and added if he fools with him he would fix him so he could not swear again. The witness says he admitted he had struck him with his fist. The two witnesses, *Bicknell*, were examined as to what they had heard the prisoner say the day after the trial before the magistrate. The first says, he told him Davis had sworn he struck him with a stick, which he denied, and said, that man had better mind or he would put him where he would do no good. The other *Bicknell* heard prisoner say damned old pup, better not let him get hold of him: would kill him. On his wife repro-

ving, said he had told deceased so. *Vaughn* swears he met the old man in the field soon after the offense occurred; that he was bleeding—told him that prisoner had struck him with a stick—told this to prisoner—he denied it, and said if deceased swore it he would kill him. This witness' testimony had been strongly objected to in the argument, because he had sworn falsely in swearing he had not been examined before the committing magistrates, and therefore, was not to be believed. The Court charged that if the witness had knowingly and corruptly sworn falsely, the jury would reject his testimony; but if it was a mistake, and not through corruption, then they would decide as to what credit they would give the testimony; so if they rejected it, they would then consider the other testimony on the points of motive and threats. Then as to the prisoner's absence, and the signs of blood on his clothes. His Counsel argued that he was not bound to show where he was; and the witnesses were mistaken as to the signs of blood; and that he might have got the blood in some other way. It is true, the prisoner was not bound to account for his absence, but if he failed to do so when informed of the charge against him, and that recently after the murder was alleged to have been committed, it would be for the jury to draw their own inference. The witnesses swore, when asked when he left home? when he came over? where he had been? and where he had staid? he answered he left home on Saturday; came over on Monday; and that he had been nowhere, and had staid nowhere. It was for the jury to consider this statement and to draw their own conclusion. As to the signs of blood upon his pantaloons, the witnesses who were along when he was arrested, concur in swearing, that on the blood being discovered they got down and examined the pantaloons and the signs were blood; and one of them, *Lyttle*, swears he saw the prisoner, on the way, attempting to rub it out.

"These are the several circumstances relied on by the State to connect the prisoner with the crime, and to satisfy the jury that he did the deed—the opportunity—the motive—threats—absence, and signs of blood.

"To this the counsel for the prisoner replied, that the fact of killing might have been placed beyond doubt by a medical examination, and as this was not done, every inference is to be drawn against the omission; that as to the time and manner of killing, that it was next to impossible for the prisoner, alone, to have done the act, and concealed the body, in the short time allowed by the State's witnesses, without the almost certainty of detection: that if he did the act alone, it must have left on the clothes much stronger marks than those alleged to have been found: that the prisoner may have been absent and may be unable to show where he had been, yet the State had not shown his presence in the neighborhood: as to the riding of the horse, his being seen in the morning, was not proved to any degree of certainty: that the threats relied on, if made, was at a time of passion, and too remote to have any weight, and the witnesses may have misunderstood the expressions; that circumstances pointed to the witness Vaughn, with as much force as to the prisoner—his conduct in making the examination, the place he went to search, showed that he either did the act himself or knew who did, and that his manner on his examination, and false statements, were certain marks of guilt not to be mistaken: that the circumstances were too uncertain and inconclusive to justify a verdict of guilty in accordance with the known principles of our criminal law.

"In conclusion, the Court left it to the jury, to inquire first, as to the facts proved; and unless they left their minds free from doubt, it was their duty to acquit. On the contrary, if the facts admitted of no rational doubt, either as to their existence, or as to the identity of the prisoner, then it would be their duty, however painful, to convict.

"The jury having deliberated for twenty-four hours, and being unable to agree, addressed a letter to the Court, in which they say, 'the jury wish to re-examine the witnesses Nesbit and Vaughn, particularly as to the search; they would like to examine testimony as to Vaughn's character:' whereupon, the Court ordered the prisoner to the bar, when the witnesses

Nesbit and Vaughn, were re-examined. Nesbit related, in substance, what he had first sworn. Vaughn stated the same, except he said, that when asked if he had been examined as a witness on the trial before the magistrate, he understood the question to refer to the first trial and not to the last; and also that he returned home on Saturday night and slept one hour, when he got up early and went to Mr. Davis'. *Burgin*, who had been first examined, swore that Vaughn was a man of good character for truth. This examination was conducted by the Court, against the consent of the prisoner.

"The Solicitor moved the Court to instruct the jury, that even if they should believe Vaughn had aided, or assisted the prisoner in the murder, they should convict on this indictment.

"The prisoner's counsel moved the Court also to instruct, that if the jury should doubt whether the deceased was killed by Vaughn or the prisoner, they should acquit.

"The Court charged, that they would consider all the circumstances in evidence, and if they should think one person alone could not have done the act, but the prisoner had a hand in it, it would be their duty to convict on this indictment: but if they should think that it was the act of Vaughn, or any other person, or the act of the prisoner, and they doubted as to who did it, the prisoner was entitled to an acquittal." Defendant excepted to the instruction given the jury in the several particulars mentioned in the opinion of this Court. Verdict of guilty.

Motion in arrest of judgment. Motion overruled. Judgment and appeal.

Attorney General, for the State.
Bynum, *Baxter* and *Edney*, for the defendant.

BATTLE, J. An attentive examination, aided by able arguments of counsel, and by repeated discussion among ourselves, and stimulated by an anxious desire to come to a just conclusion in a case of such great importance, both to the State and to the prisoner, has not enabled us to discover any error, either

in the bill of exceptions, or upon the record, which entitles the prisoner to a new trial, or to an arrest of the judgment.

The errors assigned by the counsel for the prisoner, in his bill of exceptions, are the following:

"1. That the presiding Judge erred in permitting witnesses to be recalled and re-examined, after the jury had retired to consider of their verdict.

"2. That he erred because he declined telling the jury that they ought to reject, altogether, the testimony of the witness Vaughn.

"3. That he erred in expressing an opinion as to the truth of a material fact.

"4. That in responding to the prayer of the prisoner for a specific instruction, he erred in telling the jury that if they should think one person, alone, could not have killed the deceased, 'but the prisoner had a hand in it,' they must convict him.

"5. That in responding to the prayer of the prisoner for a specific instruction, he erred in not giving it in the terms required, but avoided the force of it, by making his charge too vague and indefinite."

1. With respect to the first error assigned, we are saved the trouble of an investigation, because we find that the question which it raises, has been settled against the prisoner by repeated adjudications of this Court. In the case of the *State* v. *Silver*, 3 Dev. Rep. 332, it was held that the Court, at the request of the jury, might in its discretion, permit a witness, who had been once examined, to be called again at any time before the verdict was rendered, notwithstanding the witnesses were separated before their first examination, and had since had an opportunity of speaking with each other. Again, in the *State* v. *Rash*, 12 Ire. Rep. 382, the Court said that it was a mere discretionary power in the Court below, to permit or refuse, the introduction of additional testimony, after the commencement of the argument of counsel to the jury. So in the *State* v. *Weaver*, 13 Ire. 491, it was stated that whether a witness,

who has once been examined, shall be re-examined, is a question of discretion for the presiding judge, and that from his decision no appeal would lie to this Court.

The principle decided in these cases applies to everything which was permitted to be done in the present case. No witness was examined who had not been examined before, and each witness who was recalled, testified to facts which had been previously examined and discussed.

2. The question raised by the second error was ably argued by the counsel, fully considered by the Court, and decided against the prisoner, in the *State* v. *J. T. Williams*, at the late term in Raleigh, and not yet reported. (Ante 257.) We have heard nothing in the argument here to change the conslusion to which we came in that case.

3. The third error assigned, is, that the judge expressed to the jury his opinion, that the deceased came to his death "by the hand of violence" and not by his own act. The imputation is, that his Honor, after recapitulating all the facts and circumstances, which had been given in evidence, and relied on by the solicitor to prove that the deceased did not commit suicide, but was killed by another, closed the enumeration thus: "taking these facts as true, and that was for them, (the jury,) could there exist any rational ground to doubt as to the fact of killing?" It is insisted that this question was put in such a manner, as to intimate to the jury that, in his opinion, there could be no doubt as to the killing. "Now it is certain," as the Court said in *McRae* v. *Lilly*, 1 Ire. Rep. 118, "that this question might have been proposed in such a tone and manner, as to manifest the clear conviction of the inquirer, how it ought to be answered; but we cannot intend any circumstances of this sort, and without some peculiarity of tone or manner, intimating the opinion of the speaker, and influencing, or tending to influence, the judgment of those addressed, the question submitted very properly directed the attention of the jury to a material inquiry of fact."

These remarks furnish, in our opinion, a complete reply to the argument in favor of the imputed error. We think that

so far from intending, in the question put by his Honor, any peculiarity of tone or manner injurious to the prisoner, we might justly infer the contrary, from the care which he took to caution the jury against relying upon any fact, or circumstance, adverse to the prisoner, unless it were proved by unquestionable testimony. The truth is, that the facts which bore upon the inquiry, then under consideration, could not well be called to the attention of the jury, without impressing the hearers, that the narrator and everybody else could have no other belief than that the deceased was killed by some other hand than his own. But yet, it cannot be doubted that the judge was strictly in the line of his duty, while recapitulating the testimony; and the question which he proposed to the jury was a very proper one, unless accompanied with the objectionable tone and manner, which, as has been shown, we have no right to infer. This subject was before the Court, at its late June term in Raleigh, in the case of the *State* v. *Pinckney Williams*, (ante 194) upon an indictment for larceny; and the very strong circumstances of suspicion against the defendant in that case, made a question propounded to the jury by the judge, quite as liable to objection as the one now under consideration; and yet, we held that there was no error. It is proper to remark further, in justification of his Honor's charge, that after calling the attention of the jury to all the facts and circumstances relied upon by the State to show the manner of the killing, he proceeded to state those relied on by the prisoner, together with the arguments of his counsel thereon, to show that the deceased's death was self-inflicted.

4. The instruction prayed by the solicitor, the answer to which gave rise to the fourth exception, was, that if the jury should believe the witness Vaughn "aided and assisted the prisoner in the murder, they should convict on this indictment." His Honor told the jury, in reply to this, "that they would consider all the circumstances in evidence, and if they should think one person alone could not do the act, but that the prisoner had a hand in it, it would be their duty to convict on this indictment." The prisoner's counsel except to this

charge, upon the ground that the expression "had a hand in it," was so indefinite in its meaning, that it was calculated to mislead the jury, and was, therefore, erroneous; that by *having a hand in an act* was commonly understood to mean the being in any way concerned in, or connected with it, by any person, whether present or absent, near the scene of it or at a distance from it. If this were the sense in which his Honor's language might fairly be understood, then it would be erroneous. But we cannot think that such is the fair construction of it. It was spoken with reference to the testimony given on the trial, and must be taken as having been applied to that testimony. The case does not show that anything was said by any of the witnesses tending to prove that the homicide had been procured to be done by some person not present at the time of the killing; and we cannot see, therefore, how the jury could have been misled by the expression to which the exception is taken. The counsel objected further, that the language was unusual, and never before heard of in a judicial proceeding; but in that they are mistaken, for on the trial of Lord Mohun for murder, before the House of Lords, in 1692, the solicitor-general, in his argument for the Crown, and the Lords, in a question propounded to the judges, use the same expression, in the same sense in which it was employed by his Honor. 4 State Trials, *Lord Mohun's case*, at pages 537, 545.

The fifth and last error assigned in the bill of exceptions, as the ground of a new trial, is, that his Honor did not give a proper specific instruction, which the prisoner's counsel prayed, but instead thereof, gave an instruction which was calculated to prejudice the prisoner's cause. The instruction prayed, was, "that if the jury should doubt whether the deceased was killed by Vaughn or the prisoner, they should acquit." The instruction given was, that if the jury should "think it was Vaughn, or any other person, or the act of the prisoner, and they doubted as to who did it, the prisoner was entitled to an acquittal." The objection is, that the instruction was in more general terms than was requested, whereby its force

and effect were weakened. The counsel for the prisoner insist that the testimony made out a very strong case of suspicion against Vaughn, and that they had a right to have the issue, whether he or the prisoner committed the homicide, presented singly to the jury; and that his Honor by introducing the supposition that "any other person" may have done it, withdrew the attention of the jury from such issue, and thereby prejudiced the case of the prisoner. We admit the prayer of the prisoner was a proper one, and that the judge would have done right in giving the instruction in the very words desired. We admit further, that if the charge, as given, was not substantially what was required, or was calculated to mislead the jury, it was erroneous. *Bynum* v. *Bynum*, 11 Ire. Rep. 632. *Shelfer* v. *Gooding*, ante 175.

But notwithstanding the strong reliance which the counsel seem to place upon the validity of this objection, we must confess that we cannot perceive its force. It appears to us, that the instruction given, included in express terms, that which was asked, and then added something which made it more favorable to the prisoner. The jury were told that if they doubted whether it was the prisoner, or Vaughn, or any other person who did the act, they must acquit the prisoner. Vaughn's case was certainly put before the jury, and the residue of the charge was in effect, (and the jury could not have understood it otherwise,) that if they had a reasonable doubt, whether the prisoner committed the murder, he was entitled to an acquittal. That reasonable doubt would necessarily be created by the supposition that Vaughn, or any other person, might have done the act. Unless the counsel wished the jury to be told that if they did not believe that Vaughn was guilty, then they must find the prisoner guilty, even though they suspected that some other person had committed the crime, we cannot see how the prisoner was injured, or could have been injured, by the instruction given.

In the event that a new trial should be refused, the prisoner's counsel moved in arrest of the judgment, assigning therefor two grounds.

1. That in the latter part of the bill of indictment, the word "oath" is omitted.

2. That the bill of indictment is fatally defective, in charging that the death was caused by a "blow" instead of a wound.

The first ground of objection is, in our opinion, untenable. In the commencement of the indictment it is expressly stated, in the usual form, that "the Jurors for the State upon their oaths present" &c., and that is sufficient, without repeating that the charge of murder was made upon their oaths. In the case of the *State* v. *Kimbrough*, 2 Dev. Rep. 431, it did not appear anywhere upon the record, that the grand jurors had been sworn; yet the Court held, that as the proceedings were in a court of superior jurisdiction, it would be intended that the bill of indictment was duly found upon the oaths of a requisite number of good and lawful men. In the present case, the record states expressly that the grand jurors were "drawn, sworn, and charged, as a grand jury." It follows, of course, that the bill of indictment, and every part of it, was found upon their oaths.

The second objection is one of much more importance and difficulty, and were we required to decide upon it according to the principles of the common law applicable to the subject, we might hold it to be a fatal one. But we are not at liberty to disregard the Act of 1811, (1 Rev. Stat. ch. 35, sec. 12) which declares that "In all criminal prosecutions which may be had by indictment or presentment, it shall be sufficient for all intents and purposes, that the bill shall contain the charge against the criminal, expressed in a plain, intelligible, and explicit manner; and no bill of indictment, or presentment, shall be quashed, or judgment arrested, for, or by reason of any informality or refinement, where there appears to the court sufficient upon the face of the indictment to induce them to proceed to judgment."

The counsel for the prisoner contend that this act, unless confined within narrow limits, will destroy everything like regularity and formality in criminal prosecutions, and thus

withdraw from the accused that protection which the free spirit of the common law secured to them; and that, therefore, it ought to be construed strictly. Indeed, one of the counsel, *Mr. Edney*, ventured to call in question the wisdom of the Act, and of the General Assembly which passed it. In that, however, he is opposed by the late distinguished CHIEF JUSTICE, who, in the case of the *State* v. *Moses*, 2 Dev. Rep. 452, used, in reference to this Act, the following language: "this law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of *form, technicality and refinement*, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had called nice objections of this sort, a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain nor perspicuous, than that which they were constrained to reject. In all indictments, and especially those for felonies, exceptions extremely refined, and often going to form only, had been, though reluctantly, entertained. We think the legislature meant to disallow the whole of them, and only require the substance, viz: a direct averment of those *facts and circumstances* which constitute the *crime*, to be set forth." We think that the wisdom and the beneficent operation of the Act, are by these remarks amply vindicated; and we shall not hesitate to give to it the effect to which the decisions of our predecessors have settled that it is entitled. The Act has not dispensed with the necessity of stating, in the bill of indictment, the *substance* of the charge, but it has required the courts to disregard what is merely *informality* or *refinement*. We must inquire then, what is an informality or a refinement? An informality (says Judge GASTON, in delivering the opinion of the Court in *State* v. *Gallimore*, 2 Ire. Rep. 372) is a "deviation in charging the necessary facts and circumstances constituting the offense, from the well approved forms of expression, and a substitution in lieu thereof of other terms, which nevertheless make the charge in as plain, intelligible, and explicit language. Such a deviation is always

dangerous, but, by means of such a substitution, it may be rendered a mere informality, which is cured by the Statute. A refinement is understood to be the verbiage, which is frequently found in indictments, in setting forth what is not essential to the constitution of the offense, and therefore, not required to be proved on the trial." "An informality," (says RUFFIN, C. J., in the case of the *State* v. *Moses*, case above referred to,) "can embrace, perhaps, only the *mode* of stating the fact. If the fact be one essentially entering into a crime, it must be set forth: but it need not be set forth in any particular words, if other words can be found which will convey the whole requisite legal idea. Pleaders are to be much commended for pursuing the ancient, settled and approved precedents. They are the best evidence of the law itself; and it is a becoming modesty in us, the emblem of merit, to evince a marked veneration for the sages who have preceded us. But it has pleased the Legislature not to require, as a matter of duty, in all cases, what is certainly a matter of prudence and propriety." Having thus ascertained the legal meaning of the terms "informality" and "refinement," it remains for us to inquire, whether the substitution of the word "blow" for the word "wound," in the indictment now before us, is such an informality as is cured by the Statute. The counsel for the prisoner contends that it is not—that, on the contrary, it is a defect in the *substance* of the averment of the means whereby the deceased came to his death, and, therefore fatal: that the word "*blow*" signifies the cause only of the *wound*, which is the effect of the *blow*, from which effect the death ensues: and that such wound, being the immediate cause of the death, must be stated, instead of the remote cause, which is the blow.

The language of the Court in the case of the *State* v. *Martin*, 3 Dev. Rep. 329, to which we have referred particularly in the *State* v. *Tom*, (decided at the present term, ante 414,) goes far to support this argument. But it is to be remarked, that the Act of 1811 is not at all alluded to in that case, and the decision seems to have been put upon the strict principles of the com-

mon law. We admit the force of the argument, provided the premises be true, that the word *blow* in the connection in which it is used does not convey "the whole requisite legal idea" of the means whereby the deceased was killed. The charge is, that the prisoner "with a certain club, which he, the said Alfred W. Noblett, in both his hands then and there had and held, the said John Davis, in and upon the left side of the head, cutting the left ear, and mashing the nose and left cheek bone of him the said John Davis, then and there feloniously, &c., did strike, giving to the said John Davis then and there with the club aforesaid, in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone, of him the said John Davis one mortal blow, of which said mortal blow the said John Davis on, &c., instantly died." Mr. Walker defines the word "blow," to mean a "stroke," and the verb "to mash" of which mashing is a participle, to mean "to beat into a confused mass." Now it seems to us that a blow or stroke with a club, which has the effect of cutting the left ear and mashing or beating into a confused mass, the nose and left cheek bone of the deceased, shows to the Court, as clearly, the means whereby the deceased was killed, as if the word wound had been used. The case of the *State* v. *Moses*, decides that the Act of 1811 dispenses with the necessity of stating the dimensions of a wound, and we think that it is equally effectual to dispense with the necessity of using the word wound, when other terms of equivalent meaning are employed.

The result of our opinion, is, that no error has been shown in the bill of exceptions, or in the record, to prevent the sentence of the law from being passed upon the prisoner; and to the end that such sentence may be pronounced, it must be certified that there is no error in the record.

NASH, C. J., *dissentiente*. I concur with my brethren in the opinion denying to the prisoner a *venire de novo*.

I do not concur with them in their judgment in overruling the motion in arrest of judgment. I believe that the indictment is substantially defective.

It is conceded, that by the common law it is so; but it is considered that the error is cured by the plastic effects of the Act of our Legislature, passed in 1811. By that Act it is declared, "that no bill of indictment or presentment shall be quashed, or judgment arrested, for or by reason of any informality, or refinement, where there appears to the court, sufficient, on the face of the indictment, to induce them to proceed to judgment." Believing, as I do, that sufficient does not appear on this indictment to authorise me to proceed to judgment against the prisoner, I am constrained to say, that in my opinion, the judgment ought to be arrested.

From the earliest period of our criminal law as contained in our books of precedents, the charge of the death is averred to be from the *fatal wound*, or *bruise*, as the case may be: no instance can be found, either before the Act of 1811, or since, in which this averment is omitted, or the death attributed to the blow inflicting the wound. This averment has ever been considered a substantial one, which must be laid in the indictment and proved as laid, so much so, that if in an indictment for murder by a wound or bruise inflicted, it appears in evidence that the death was caused, not by the wound, but by poison, the prisoner must be acquitted. Why is it that a physician or surgeon, who is called as a witness, is never asked if the *blow* was sufficient to produce death? but whether the *wound* inflicted was sufficient?

But I am not left without authority upon this point, and as with Lord KENYON, so with me, one decided case is of more worth than many theories.

The opinion of men of high judicial station, upon the point in issue, is ever most grateful to me in the discharge of my official duties. My brethren rely much upon the case of Moses to bear them out. I refer to the same case to sustain my position. Moses was indicted for murder, and in the indictment, the length and breadth of the *wound* was set out, but not its depth. The opinion is delivered by the late eminent Chief Justice of this Court. In commenting on the case in connexion with the objection, he says, page 466, "The sub-

stance is, that the prisoner gave the deceased a mortal blow of which he died. A stroke, *a mortal wound inflicted thereby* and *the averment of death by the wound* are essential." That this expression did not drop from him unadvisedly, at page 467, speaking of the relaxing effect of the Act of 1811, on bills of indictment, he states, "That the wound, its mortality and *its actually causing the death, are the substantial parts.*" This opinion proceeds from too high a source for me to disregard, because it was not necessary to the decision of the point immediately before the Court. The bench was at that time as strong as it ever had been, or has been, at any time since. The Court there use the words "essential" and "substantial," in relation to the averment of the death being occasioned by the wound. If that averment be a substantial part of the indictment, it must be so averred and so proved, because it is an essential fact to be found by the jury. This authority then sustains my position, that the omission in the bill of indictment of the material averment, that the death was occasioned by the mortal wound, is fatal to the indictment and not cured by the Act of 1811. The Act cures informalities. What is informality? It is nothing but want of form; a deviation from well established precedents or forms in matters of mere form. But the omission of the averment of which I complain, is matter of substance, so declared by the highest judicial authority known in our State, and not mere form. If the Act of 1811, is to have the effect contended for, I am persuaded it will prove the most mischievous of any ever enacted by our Legislature. The exposition it has received here, may be a sound one; I do not think so. Criminal proceedings will be stripped of all those forms, deemed by our ancestors so essential to the life, liberty and property of the citizen. A periphrastic mode of expression will be adopted in the place of those well known words, *murder, feloniously, burglariously* and others; for though they cannot be expressed by synonyms, they each may, by words equally plain and more comprehensible by common persons. Approved precedents are the best evidence of the law. Both, Judge GASTON, in the case of *Gallimore*,

and Judge RUFFIN, in that of *Moses*, point out forcibly the danger of abandoning precedents, and the latter, both in the case of Moses and that of Martin, says, that the words, *feloniously* and *murder* and *burglariously*, are necessary in indictments for the crimes designated. To my mind, it is apparent, that by the word "informalities" the Legislature intended to embrace those things which are strictly matters of form, and did not intend to extend the Act to matters of substance.

Neither is the objection to the indictment a refinement, in the language of the Act, for I cannot believe that what is deemed by the law a substantial averment, can in any sense amount to a refinement.

Being convinced that the indictment is fatally defective, I am constrained to say that sufficient does not appear upon its face to authorise me to say that judgment ought to pass against the prisoner. My opinion is, that judgment ought to be arrested.

PER CURIAM. Judgment affirmed.

JONAH BIVENS *et. al. vs.* McCALLUM PHIFER.

Where a declared general purpose of providing bountifully for one relative, would be defeated, and a very striking inequality produced among others standing in equal degree of relationship to the testator, by applying the rule of construction to make the division *per capita*, the other rule of dividing *per stirpes* will be adopted.

PETITION for the payment of legacies under the will of *David Phifer*, heard before MANLY, Judge, at the last Spring Term of Union Superior Court.

After giving his wife 250 acres of land, (describing it) and other property amounting in value to $850, with the liberty of taking $850 in cash for and in lieu of her *third of his real estate*, and a negro woman, and making other provisions which resulted in the accumulation of the fund in question, and are

not material to the question involved, the testator proceeds: "My will and desire is, that my executors hereinafter named, at my decease, shall sell my negro property in families, or at the discretion of my executors, and the balance of my property not above named: sale to be conducted as all executors' and administrators' sales are: and the proceeds of sale, together with what notes and cash may be on hand at the time of my decease, all to be disposed of as follows: Item, my will and desire is, that my son Matthew Phifer's heirs: my son David Phifer's heirs: my son Ezra Phifer's heirs: my son, McCallum Phifer: my daughter Rachel Biven's heirs: my daughter Martha Craig's heirs, each receive as much of my estate as the value of my land given to my wife; then beloved wife, Elizabeth Phifer, and the above named heirs, with the exception hereinafter named, to share and share alike."

"Item, my will and desire is, that if my grand-daughter, Mary Jane Phifer, should die before she comes of age to receive her part of my estate, it to be equally divided among my lawful heirs."

McCallum Phifer, and the widow Elizabeth, were appointed executors; the former only qualified.

In 1852, the testator added a codicil to the above will, which adds an additional amount to the fund "to be divided among my heirs as above directed."

Rachel Bivens died in the life-time of the testator, leaving six children.

Martha Craig	- - - -	four children.
Martha Phifer	- - - -	seven "
David Phifer	- - - -	three "
Ezra Phifer	- - - -	one child.

McCallum Phifer is still surviving. So, with the widow, there would be twenty-three individuals if reckoned by the *per capita* rule; and only seven classes, with the widow, if reckoned by the *per stirpes* rule. The suit was brought against McCallum Phifer by the grand-children, praying that their legacies should be paid them all equally, or *per capita*.

It was referred to a commissioner, *J. M. Stewart*, to take

an account of the estate of David Phifer, Sr., and report the amount of the estate and the part due each of the legatees under the will. He reported the sum of $34,059 01, which was divisible into seven parts, one, viz: $4,929 59, for McCallum Phifer; the like sum (with a small deduction) to the widow; and the like sum to each of the families of the deceased sons and daughters of the testator.

To this report an exception was filed in the County Court, insisting that the division should be made *per capita*. On consideration and argument in that Court, the exception was overruled and the report confirmed. And judgment being given for the petitioners, according to this report, they appealed to the Superior Court.

In the Superior Court it was proved that McCallum Phifer *was a man with a family of children*, and the only question in the cause, being whether the division under the will of David Phifer should be made *per capita* or *per stirpes*, his Honor, considering the above fact, in connexion with various clauses of the will, decided, that the intention of the testator was, that the division should be made *per stirpes*. He gave judgment that the report be confirmed, and that the parties recover accordingly, from which judgment the plaintiffs appealed to this Court.

Wilson, for the plaintiffs.
Osborne and *H. C. Jones*, for the defendant.

BATTLE, J. If that clause of his will by which the testator directed that his son Matthew Phifer's heirs, his son David Phifer's heirs, his son Ezra Phifer's heirs, his daughter Rachel Biven's heirs, his daughter Martha Craig's heirs, his son McCallum Phifer, and his widow Elizabeth Phifer, should take his estate after being converted into money, share and share alike, had stood alone, then according to the general rule, established by several adjudications of this Court, the legatees would take *per capita* and not *per stirpes*. *Ward* v. *Stowe*, 2 Dev. Eq. 509; *Harris* v. *Philpot*, 5 Ire. Eq. 324; *Cheeves*

v. *Bell*, 1 Jones' Eq. 234. But if there be any thing in the will, indicative of an intention that they shall take as families, the general rule will not apply, and the division shall be *per stirpes* and not *per capita*, *Spivey* v. *Spivey*, 2 Ire. Eq. 100; *Martin* v. *Gould*, 2 Dev. Eq. 305; *Henderson* v. *Womack*, 6 Ire. Eq. 437. The question then, is whether there be in the will before us, any indication of an intention to take the case out of the general rule. A careful examination of the different clauses of the will, comparing one with another, has satisfied us that there is, and that this appears from at least two circstances.

1st. It is manifest from every part of his will and codicil, that the testator intended to make a fair provision for his "beloved wife," so far as the amount of his estate and the just claims of his children upon his bounty, would allow. In construing his will, in order to ascertain what that provision was intended to be, we have a right to look to the condition of his estate as it was found to be at the time when his will was made. *Lillard* v. *Reynolds*, 3 Ire. Rep. 366; *Boys* v. *Williams*, 2 Russ. and Myl. Rep. 6 89; *Martin* v. *Drinkwater*, 2 Beavan 215. In the latter case Lord LANGDALE said, "I consider the rule as settled: you are at liberty to prove the circumstances of the testator, so far as to enable the Court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions." In the present case it appears that the will was written in 1848, the codicil in 1852, and that the testator died in March, 1853. It is not shown or suggested that the value of the estate had materially increased or diminished between the times when the will and codicil were executed, and the time when the account was stated by the referee in 1855. The whole estate may, then, be taken to have been worth about $35,000 when the will was made. Now, if the testator is to be supposed to have intended a *per capita* division among the legatees, in that clause of his will to which we first referred, his widow would get only about $1500, there being twenty-three claimants: but if a *per stirpes* division

were designed, then her share would be about $5000. We cannot hesitate in saying that the testator intended to make for her, the latter, and not the former totally inadequate provision; and that, therefore, the division between his son and his grand-children, should be by families, i. e. *per stirpes.*

2nd. The other circumstance which has aided in bringing us to this conclusion, is to be found in the fact which is stated by his Honor in the Court below, as the ground of his opinion. It was shown that the testator's son, McCallum Phifer, was "a man with a family of children," and it cannot well be supposed that the testator, in providing for his grand-children, was not willing to put McCallum's children upon the same footing with the others, by giving their father a share as a stock or root. That the state of the testator's family may be looked to, in fixing a construction upon his will, see the case of *Lowe* v. *Lord Huntingtower*, 4 Russ. Rep. 432.

Upon the whole, we are of opinion that his Honor was right in overruling the exception to the report of the referee and confirming the report, and that his judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

REUBEN HALL AND WIFE *vs.* CHANG AND ENG BUNKER, *the Siamese Twins.*

A deed, made by husband and wife to one who dies previously to the probate and privy examination of the wife, is good from the time of its execution and delivery to the bargainee, provided, after his death, it is duly acknowledged, and the privy examination of the wife taken, and the deed registered.

PETITION for DOWER, tried before his Honor, Judge MANLY, at the Fall Term, 1854, of Wilkes Superior Court.

The only question in this case was, as to the effect of a deed made in the life-time of the husband of the petitioner, by a *feme covert* (with her husband) but not acknowledged and re-

gistered until after the death of the bargainee. His Honor was of opinion that it took effect from its delivery, and, therefore, that he was seized, at his death, so as to entitle his widow to dower, and gave judgment accordingly, from which defendants appealed.

Boyden, for plaintiffs.
Mitchell, for defendants.

NASH, C. J. David Yates was the owner of several tracts of land, of which, one was the tract now in controversy in this suit. By their plea, the defendants admit that David Yates died seized and possessed of the other tracts, but deny he did die so seized and possessed of the one now in controversy. David Yates, by deed, conveyed the land in question to his daughter Jerusha Yates, wife of Robert Yates, and by a deed of conveyance, bearing date the 3rd of June, 1848, Robert Yates and his wife Jerusha, re-conveyed the land to David Yates. The privy examination of Jerusha Yates was informally taken by the County Court, before the death of David Yates, and subsequent to his death, her privy examination was duly taken before his Honor Judge Settle. On the part of the defendants, it was insisted that the last examination took effect, only from the time it was had, and could not refer back to the date of the deed of re-conveyance. It was proved that David Yates died in possession of the land in question.

In support of their position, the case of a Sheriff's deed, made upon the sale of land under execution, was cited, as having no relation back. The difference is obvious. The claim of a purchaser at a Sheriff's sale, is under the deed of the officer, which has no validity until its delivery. Here the deed was made some years anterior to the privy examination of the feme covert. The privy examination is evidence only of the wife's previous act, and was necessary under the law to its due registration: when taken, it validates the conveyance, and completes the title of the person to whom made, who has the legal title, not under the privy examination, but under

the deed. The efficacy of the deed, therefore, relates back to the time when it was executed and delivered. Half the deeds of conveyance of land, made in this country, are proved years after their execution; it has never been doubted but that, when so proved and registered as directed by law, they relate back to the time when executed. Nor does the statute requiring a privy examination limit any time within which it may be taken.

PER CURIAM. There is no error in the judgment below, which is affirmed.

DOE *on Dem. of* MICHAEL BROWN *vs.* JAMES KYLE.

Where it appears from the record sent to this Court, that on the trial below, a question of law was reserved by the Court, to which the verdict was subject, and that question was decided in favor of the appellee, the verdict set aside and a non-suit ordered, but the Judge fails to state what the question was, there must be a *venire de novo*.

EJECTMENT tried before his Honor Judge SAUNDERS, at the Fall Term, 1854, of Rowan Superior Court.

The record in this case sets forth that the case was submitted to a jury: that the jury found a verdict for the plaintiff and assessed substantial damages; then follows this entry:

"The Court being of opinion with the defendant upon the question of law reserved, directed the verdict to be set aside and a non-suit entered.

"From the above judgment the plaintiff prayed an appeal to the Supreme Court."

No case was sent up by his Honor.

Boyden, for the plaintiff.
H. C. Jones, for the defendant.

BATTLE, J. The case of *Dunett* v. *Barksdale*, 2 Dev. Rep.

251, to which the plaintiff's counsel has referred us, is a direct authority in favor of the new trial for which he asks in the alternative, provided we do not give him the judgment for which he first moves. That judgment we cannot grant, for the reason assigned by HALL, J., in delivering the opinion of the Court in the above-named case. From the records, says the Judge, "it appears that the rights of the parties litigant depended upon a question reserved; and that question was submitted to this Court for its decision. To decide for either of the parties, when that question cannot be understood, would be to decide in the dark without regard to their rights."

As no statement of the case, or bill of exceptions, accompanies the record proper, the defendant's counsel contends that the judgment of non-suit must be affirmed, upon the ground that every judgment is presumed to be right, unless it is shown to be erroneous, and that nothing appears upon this record to show that it is erroneous; and for this he has cited a great number of cases. *Picket* v. *Picket*, 3 Dev. Rep. 6, *Harry* v. *Graham*, 1 Dev. & Bat. Rep. 76, *Thomas* v. *Alexander*, 2 Dev. & Bat. Rep. 385, *Brooks* v. *Ross*, ibid. 484, *Honeycut* v. *Angel*, 4 Dev. & Bat. Rep. 308, *Stewart* v. *Garland*, 1 Ire. Rep. 470, *Fleming* v. *Halford*, 4 Ire. Rep. 268, *State* v. *Gallimore*, 7 Ire. Rep. 147, *State* v. *Ray*, 10 Ire. Rep. 279, *State* v. *Orrell*, Bus. 217, *State* v. *Lankford*, ibid. 436.

All these cases, and some others which we have examined, relate to the statement made or signed by the presiding Judge, which is, in our practice, a substitute for a bill of exceptions, wherein is set forth the errors complained of. They proceed upon the ground that it is the duty of the appellant to have his exceptions stated and sent up with the transcript of the record proper, and if there be no such case stated, or bill of exceptions at all, or none which shows that any error has been committed, the judgment will be affirmed. Hence, in the case of *Waugh* v. *Andrews*, 2 Ire. Rep. 75, it was held, that where deeds, records, &c., were referred to as making a necessary part of the bill of exceptions, it was the duty of the appellant to see that they were sent up, otherwise

the judgment, (no other error appearing) would, as a matter of course, be affirmed.

The objection, in the case, now under consideration, differs from all these in this, that it appears upon the record proper, and the question was reserved by the consent of one party as much as that of the other. In this respect, it more nearly resembles the case where the judgment in the Court below is rendered upon a case agreed but defectively stated. *Isbell* v. *Stone*, 3 Dev. Rep. 410.

The remedy is to reverse the judgment and award a *venire de novo*. That must be done in the present case.

PER CURIAM. *Venire de novo.*

WILLIAM A. McCORKLE *vs.* H. B. HAMMOND *et al.*

Where an insolvent debtor transfers his effects to an infant, upon an agreement, made *bona fide*, that the infant should pay certain debts contracted by them both, as a firm, without providing security for the performance of such stipulation, such transfer is fraudulent in law and void as against creditors.

ACTION of TRESPASS, tried before his Honor, Judge SAUNDERS, at the Fall Term, 1854, of Rowan Superior Court.

This action was brought by the plaintiff, W. A. McCorkle, for the seizure and sale, under an execution, of certain goods sold and transferred to him by his father, W. B. McCorkle, under the following circumstances:

William B. McCorkle, the father of the plaintiff, was engaged in the business of merchandise at Wadesborough and Monroe. In the spring of 1849 he established another store at Gold Hill, in Rowan county: the old and unsaleable goods on hand at Monroe, and part of those at Wadesborough, were put into this store at Gold Hill, and a small purchase of new goods added. The plaintiff, who had managed the business at Monroe, was admitted as a partner in this new establishment, upon the terms of attending to the business, and receiving

one half of the nett profits. This firm was called by the name of "Wm. B. McCorkle & Son." The goods sent to Gold Hill had cost about $2,700 and were invoiced at what they had cost. In the fall of 1849 and the spring of 1850, other goods, to the amount of $3,000, were purchased at the north, on the credit of the firm. It was in evidence that during the summer and fall of 1849, the son remitted to his father $2,700 in cash, and returned about $300 worth of the goods originally put in, making the amount paid the father $3,000. The purchases made in 1849 and '50 were mostly on a credit; and there was evidence that $600 were at one time advanced by the father to assist in renewing the stock.

About the last of May, 1850, Wm. B. McCorkle, the father, was indebted beyond his ability to pay, and was urged by one of his largest creditors to make a deed of trust: with the view and purpose of doing so, he went to Gold Hill to take an inventory of the goods and debts, and with a view of selling out his interest if he could. From an inventory then taken, and an investigation of the affairs of the firm, it turned out that they had made between $900 and $1,000, if all the debts should prove to be solvent. This inventory was taken about 1st of June, 1850. It was afterwards agreed between the father and his son, the plaintiff, that the former should sell to the latter his entire interest in this concern at Gold Hill, consisting of his share of the debts due and the capital advanced in goods and money; he, the son, paying all the debts of the firm. This sale was accordingly made, at a full price, and the son executed his notes to the father for the price thereof, at one, two and three years, with interest after one year. It was in evidence that previously to making this transfer, H. B. Hammond, the defendant, S. W. Cole and E. J. Waddell, the other trustees, were consulted about this arrangement, and that they approved of it. The said Wm. B. McCorkle, the father, then executed the deed of trust, dated 29th June, 1850, to Hammond and the other trustees, conveying all his property, including the notes taken from his son. The son was an infant

when these notes were given and had no other means, in the beginning, than those furnished by the father.

The son then continued the business at Gold Hill, till , when the defendants, having obtained a judgment against the father, seized all the goods that had belonged to the old firm, advertised and sold them for the father's debts.

The father swore that the sale to his son was at a full and fair price, and for more than he could have sold them to any other person; that the sale was approved of by the defendant, Hammond and the other trustees, and was made with the honest purpose of enabling him to discharge his debts, which were greater than his means: that he had great confidence in the integrity and capacity of his son, and that the credits of one, two and three years were given, the better to enable him to comply with his contract, and not with any purpose of hindering or delaying his creditors in the collection of their debts, or of benefitting himself; that though his son was an infant when the notes were given, yet it was his firm belief, that they, as well as all the debts of the firm, would be paid off, and he still believed they would have been, if the property for which they were given, had not been levied on and sold by the defendants, before they fell due; that as it was, his son had pleaded infancy to a suit brought on one of the notes, and had thus defeated a recovery on it: that suits had been brought on the other two notes which were still pending, and that the plea of infancy had been put in to them.

The seizure and sale of the goods were under a regular judgment and execution upon a debt, due and owing at the time of the transfer of the store goods, but the judgment and execution were after the purchase by the son from the father: this debt was for about $2,000, with the defendant H. B. Hammond and others as sureties, and had been included in the deed of trust.

The counsel for the defendant asked the Court to instruct the jury, that if the facts stated by the plaintiff's witness, W. B. McCorkle, were true, he was indebted to a much larger amount than his property was worth at the time of the sale to

his son; that the son was a minor and without means; that the sale was on time, 1, 2 and 3 years, without security, and that the sale was therefore fraudulent in law and void. And further, if not absolutely void, that these facts raised a presumption of fraud, and there was nothing as testified to by the witnesses in the cause, to repel this presumption, and their verdict should be for the defendant.

The instruction, as asked for by the defendant's counsel, the Court declined to give, but charged the jury: "That there was fraud in law and fraud in fact: that whilst it was the duty of the Court, in a certain state of facts, to pronounce the transaction void, yet, as the Court thought, it did not exist in the present case.

"So it was the duty of the jury to pass upon the intent and motives of the parties, which they were to collect from the facts and circumstances, and decide whether the transaction was fraudulent and void or fair and honest.

"*First*, As to the transaction of May, 1849: if the jury should believe that the father entered into this arrangement under the honest belief that it was to aid him in the discharge of his debts, and not with the view, or upon any secret trust or understanding with the son, in contemplation of his failure, that the son would hold any part of the property for the father's benefit, or to enable the son the better to provide for the future ease or comfort of the father, then the transaction would be valid and not fraudulent.

"*Secondly*, As to the sale of June, 1850: the Court charged that the father had the right, (though embarrassed in his circumstances, and the son a minor and without means,) to sell to the son: but that when this appeared, the presumption was against the transaction, and it was incumbent on the son to show that the sale had been at a full and fair price, and such a sale, as a prudent man, under like circumstances, would have made to a stranger. If the jury should believe that this sale had been made with an honest purpose, and not with an intent to defraud, hinder, or delay the creditors, in the collection of their debts, then the sale would be valid: otherwise void. If

the father was to be believed, in the fact he had stated, that he had reason at the time to repose confidence in the capacity and integrity of his son, that the concern was indebted for the new goods, and the old stock on hand was not saleable, he had the right to make the arrangement he did, provided the jury should believe such to have been the honest purpose of the parties: and the declaration of the father, that he had given the son the credit he had, the better to enable him to pay the liabilities of the firm, and discharge the balance due himself, would not vitiate the sale but it would still be valid." For these instructions defendant excepted.

Verdict for plaintiff. Judgment and appeal.

Boyden and *Osborne*, for plaintiff.
Wilson, for defendants.

PEARSON, J. One has a right to sell his property at any time, until a lien is created by force of an execution. But when a debtor finds that he is hopelessly insolvent, although he still has the power to sell and otherwise dispose of his property for the purpose of discharging his debts, he is required to act with perfect honesty and fairness, and to dispose of the property with a single eye to the benefit of his creditors; he is at liberty to make a preference among them, if he sees proper, but it must be a disinterested preference, and any stipulation for his own benefit, or of a member of his family, or of a stranger who has no claims as a creditor, will vitiate the transaction. *Rea* v. *Alexander*, 5 Ire. 694. *Hardy* v. *Simpson*, 13 Ire. 132.

We see no error in the general remarks set out in the charge, but we think the defendants had a right to insist that his Honor should be more specific, and that he ought to have charged that the father, being upon the eve of bankruptcy, the son being a *minor*, and with no means, the transfer to the son without taking any security, except his mere promise to pay off the debts of the Gold Hill concern, and his notes at one, two and three years for the amount agreed on between themselves,

was a violation of the rights of creditors and made the transaction void.

Had the father executed a gift of all this property to the son, it is yielded that the gift would be void as against creditors, and in *legal* contemplation, there is no difference between making a gift and letting a *minor* have property without surety, or other means of compelling the performance of the stipulations on the part of the minor, which can be made available, either in a court of law or of equity. The father in self-justification may say, "I had entire confidence in my *son's honor*, and believed it best for the creditors to let him go on with the management of that concern, and certainly I had a right to give him his own time." All this is no doubt true, but the creditors will say, "we don't choose to trust to the honor of *any one*, and under existing circumstances, if we were disposed to do so, we could hardly be expected to ask you to make the selection for us," and might be allowed to say besides, "this interferes with our legal rights; the fact of your selecting your son and putting in his power and control, a fund, to which we have the legal right to resort for our debts, may not be as entirely disinterested on your part as might at first sight appear, as it will keep him in business for a few years at least." But apart from this, we put the rights of the creditors on the broad ground, that the debtor had no right to transfer his property to one whom the law does not consider responsible, and against whom it gives no remedy.

The arrangement which McCorkle attempted to make in regard to the Gold Hill store, may have been a judicious one, and we suppose the jury thought it fairly meant by him, so as to come under the general terms "fair and honest," used in the charge, which in this point of view had a tendency to mislead, because these defendants, as creditors, had put themselves upon their legal rights, and the transfer of the property by their debtor was void as to them.

It is stated in the case, that Hammond, one of the defendants, upon being consulted before the arrangement was concluded, assented to it, and that the son's notes were inserted

in the deed of trust as a part of the fund. How far this consideration may affect Hammond, or the other defendants, is not now the question; it was calculated however to mislead, as are several other matters, set out in the case, which had no bearing upon the legal rights of the parties. There is error.

PER CURIAM. *Venire de novo.*

JOHN N. INGRAM *et al. vs.* S. J. McMORRIS.

When the Court below has the power to make an amendment, this Court cannot inquire how it has exercised that power.

THIS was a MOTION to amend the record of the County Court of Cabarrus, originally made in that Court and refused. From this judgment there was an appeal to the Superior Court of that county, which was heard by his Honor, Judge BAILEY, at the Special Term, June, 1855.

The motion in the County Court was, that the record of the probate of the last will and testament of William S. Alexander, should be amended and made perfect at January term, 1827, so as to show, that at that term such will was submitted for probate, and that a jury was empannelled and sworn, to try whether the paper writing offered was the will of the said Alexander, and that the jury did find that the paper writing which was set forth in the motion, *in totidem verbis*, was the last will and testament of the said Alexander, and was duly executed to pass his personal estate but not his realty: and further, to show that the executors qualified, &c.

Upon hearing the evidence, the County Court refused to make the amendment as prayed. Upon the appeal to the Superior Court, the evidence was again heard, and upon argument, it was adjudged that the decision of the County Court should be reversed; and it was further adjudged, "that the record of the probate of the last will and testament of the late W. S.

Alexander should be amended and made perfect, *nunc pro tunc*, so as to show at January term, 1827, as follows:" (The specific amendment which was required to be made is set forth in this judgment of the Court below, embracing the will, the probate, the qualification of executors, &c.) From which judgment the defendant appealed.

Boyden and *Wilson*. for the plaintiff.
V. C. Barringer and *Osborne*, for the defendant.

BATTLE, J. The judgment of the Court below, in favor of allowing the amendment asked for, is fully supported by, and must be affirmed upon, the authority of the cases of *Freeman* v. *Morris*, Busb. Rep. 287. *Phillipse* v. *Higdon*, ibid 380. *Pendleton* v. *Pendleton*, ante 135, and *Mayo* v. *Whitson*, ante 231, in which the subject will be found to be fully discussed and explained.

PER CURIAM. Judgment affirmed.

LOGAN N. WILSON *vs.* RACHEL PHARR.

Upon a plea "since the last continuance," pleaded in apt time, and found to be true, the plaintiff, under the Statute of 1836, (Rev. Stat. chap. 31, sec. 79,) must pay the whole costs of the suit.

ACTION of ASSUMPSIT, tried before MANLY Judge, Spring Term, 1855, of Cabarrus Superior Court.

The case at first stood on the plea of "non assumpsit."

At this term the defendant pleaded further, "*accord and satisfaction since the last continuance*," which plea the plaintiffs admitted to be true.

There were cross motions for the taxation of costs, but his Honor being of opinion that the plaintiff was entitled to costs, up to the time of entering the plea since the last continuance, gave judgment against the defendant, from which he appealed.

No Counsel appeared for the plaintiff.
Guion, for the defendant.

NASH, C. J. In the judgment below, there is error. By the 79th section of the Act of 1836, Rev. Stat. ch. 31, it is enacted: "the party in whose favor judgment shall be given, *or in case of a non suit*, dismission or discontinuance, the defendant shall be entitled to full costs, unless where it is or may be otherwise directed by Statute." We know of no subsequent Act altering this general provision, except in special cases.

In this case, the defendant, after the cause had been put to issue, pleaded, *since the last continuance, accord and satisfaction*, which was admitted by the plaintiff, and a judgment of non suit was rendered against him.

Chitty, in his work on pleading, vol. 1, pages 638 & '9, says, that a plea since the last continuance is a matter of right, if pleaded in apt time. If not so pleaded, its admission is a matter of discretion with the Court, to be granted on such terms as it may deem proper. Here the plea was offered in apt time, and upon its reception, judgment of nonsuit was rendered against the plaintiff. It is brought precisely under the restriction of the Act referred to. The question of costs in this State is regulated by Statute. In the case of *Gubbs* v. *Ellis*, 2 Car. L. Rep. 612, see also *Morgan* v. *Cone*, 1 Dev. and Bat. 234, where this point is also decided. In the first, the plaintiff, during the pendency of the suit, took possession of the premises in question, which being pleaded since the last continuance, "the Court held, the costs must necessarily be paid by the plaintiff, whose entry on the premises has destroyed the effect of his writ." In this case, the accord and receiving satisfaction, since the last continuance, by the plaintiff, destroyed the effect of his writ, and he could not recover any judgment against the defendant for the debt claimed.

PER CURIAM. Judgment below, in favor of the plaintiff, for his costs, is reversed, and judgment rendered for the defendant to recover his costs against the plaintiff.

ALEXANDER ZACHARY *vs.* ISAAC HOLDEN.

For the taking out a State's warrant which is void for the want of jurisdiction, *trespass*, or *trover*, is the proper action, and not *case*.

ACTION ON THE CASE for maliciously suing out a State's warrant, tried before his Honor Judge SAUNDERS, at the Spring Term, 1855, of Macon Superior Court.

The warrant upon which the plaintiff was arrested is as follows:

"Whereas information hath this day been made to me L. C. Hooper, one of the acting justices of the peace for the said County on the oath of Isaac Holden, that he has reason to believe, and does believe, that Alexander Zachary (and three others, naming them) did shoot an ox of Elisha Holden's on &c., at &c., against the peace and dignity of the State.

You are, therefore, commanded, in the name of the State, to arrest the said Alexander Zachary, &c."

Upon this warrant the plaintiff was brought before an examining magistrate; the facts disclosed, as the warrant had charged, but a civil trespass. The defendant (the present plaintiff) was discharged by the magistrate with costs.

The plaintiff offered testimony to show malice and a want of probable cause, but his Honor being of opinion that the action was misconceived, that it should have been trespass and not case, the plaintiff submitted to a non-suit and appealed.

N. W. Woodfin and *Baxter*, for plaintiff.
Gaither and *Williams*, for defendant.

PEARSON, J. *Allen* v. *Greenlee*, 2 Dev. 370, is a direct authority in support of the decision made in the Court below.

The same principle is applied to a converse state of facts, *Rodgers* v. *Pitman*, 2 Jones 56. The two cases settle the rule to be, that where process is valid and sued out maliciously, the proper action is case; where the process is void, as for

want of jurisdiction, the proper action is trespass *vi et armis* or trover.

PER CURIAM. Judgment affirmed.

ANDERSON DULA *vs.* J. AND C. COWLES.

Where a person who had contracted to sell and deliver a certain quantity of pork, delivers a part and refuses to deliver the remainder, he cannot recover for the part delivered.

ACTION of DEBT commenced before a justice of the peace for a balance due for pork sold and delivered, tried before MANLY, Judge, at the last term of Wilkes Superior Court.

The plaintiff agreed to deliver to the defendants 1500 lbs. of pork by the 1st January, 1853, at 6 cents per pound, to be paid for in demands which defendants already held against the plaintiff, and the balance, if any, one half goods the other cash.

No pork was delivered at the time stipulated, but on 6th and 24th of January of that year, two parcels were delivered, making together 1033 lbs., which were received by the defendants and appropriated by them.

Some short time afterwards, an attempt was made to ascertain and settle the balance due, when it was admitted $18 49 was due to the plaintiff for the pork delivered after deducting all the claims which defendants held against him, except a small judgment of two or three dollars, that was out in the hands of a constable: plaintiff was willing that this should be deducted from the $18 49, and to take an order for it, and demanded a settlement of the residue, saying that he was entitled to have the balance in cash, as he had taken up sufficient goods after the bargain was made.

The defendants refused to settle unless pork was delivered to make up the 1500 lbs., whereupon the plaintiff brought suit.

It appeared that the judgment for two or three dollars was afterwards paid off by the plaintiff.

His Honor instructed the jury that if *the obstacle to the settlement* was the demand for full 1500 lbs. of pork, made as stated above, the plaintiff was entitled to recover his $18 49 (admitted to be due) in cash. Defendants excepted.

Verdict for plaintiff and judgment.

The defendants appealed to the Supreme Court.

No counsel appeared for the plaintiff

Mitchell, for the defendants.

BATTLE, J. For the reasons given and upon the authorities cited, in the case of *White* v. *Brown*, ante 403, decided at the present term, the plaintiff cannot recover. He made a contract to sell and deliver to the defendants a certain quantity of pork for which he was to be paid in a particular manner. After performing part of his contract, he refused to perform the residue against the consent of the defendants and without any default on their part. The judgment must be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

JEREMIAH HUIE, EX'R. *vs.* JOHN McCONNELL AND WIFE *et al.*

The wife of one named as an executor in a will, is not a competent witness to prove the same, although her husband has entered a renunciation of the office of executor in open Court, and has made a release of his interest under the will.

CAVEAT to the probate of a will, tried before SAUNDERS, Judge, at the Fall Term, 1854, of Mecklenburg Superior Court.

The only question in this case was upon the competency of Isabella Hunter as a witness to establish the will, her husband, John Hunter, being named one of the executors. It was

shown to the Court, that the said John Hunter had formally renounced the office in the County Court and had the renunciation entered of record, a copy of which was produced, and that he had released all benefit under the will. The witness was thereupon admitted. To which ruling of the Court the caveators excepted.

Verdict for the propounder. Judgment and appeal.

Barringer, for propounder.
Osborne, *Wilson* and *Lowrie*, for the caveators.

NASH, C. J. The question presented in this case arises on the probate of a paper writing purporting to be the last will and testament of David Calloway. The attesting witnesses are John Kirk and Isabella Hunter. By the script, the plaintiff and John Hunter are appointed executors. One of the attesting witnesses, Isabella Hunter, is, and was at the time of her attestation, the wife of the executor, John Hunter. John Hunter, before his wife was called on to prove the will, came into Court where the will was offered for probate, and resigned his right to qualify as such executor, and also executed a release, releasing all his interest under the will. Thereupon, Isabella Hunter was admitted by the Court as a witness to the will.

The sole question presented to us, is as to her competency to testify. It is well settled law, that an attesting witness to a will, must be competent at the time of attestation, and that no subsequent release, where the objection is one of interest, can restore his competency. The leading case in this State is that of *Allison* v. *Allison*, 4 Hawks 141. This was followed by the case of *Tucker* v. *Tucker*, 5 Ire. 161, in which the case of Allison is cited and approved. And in *Morton* and *Ingram*, 11 Ire. 368. Both those cases are referred to as correctly decided, and in each it is decided, that the right to commissions which an executor under our Statute has, is such an interest as disqualifies a witness, and that a release does not remove the disqualification.

At the time, then, when Mrs. Hunter attested the script, she was disqualified by reason of the interest which her husband then had in the commissions secured to him as an executor. A wife cannot be a witness for or against her husband. Starkie, 4th part of his Treatise on Evidence, 709, lays it down as an invariable rule, that neither is a witness for the other who is interested in the result, and that where the husband is disqualified by his interest, the wife is also incompetent. In this case, Mrs. Hunter was disqualified as a witness to the script at the time she attested it, as her husband, John Hunter, was interested, and no subsequent act of his could remove the disqualification.

Our attention has been directed by the defendants' counsel to the case of *Daniel* and *Proctor*, 1 Dev. 428. That case has been substantially overruled, if not directly, by the cases herein before cited. How far the wife could be a competent witness to a will, where the husband is appointed an executor and afterwards renounces and releases, came directly before the Court. The case of Proctor places her incompetency upon an additional ground, to wit, public policy. We do not, however, concur in the reasoning upon which the Court there arrive at their conclusion. We hold that the wife had an interest in that case, which disqualified her as an attesting witness to the will. If a man is sued for a tract of land to which he derives title under a will, can the wife be a competent witness to establish the will, because the land belonged to him and not to her? Surely not. She has an interest, through her husband, in the land—such a one as precludes her from giving evidence as a witness.

PER CURIAM. His Honor erred in admitting her testimony, and there must be a *venire de novo*.

GEORGE REEVES *et al. vs.* OSBORNE EDWARDS.

Where an administratrix, who is appointed in the State of Virginia, and who is entitled by the law of that State, to a third of the slaves for life, removes to

this State, and on a final settlement of the estate it is agreed between her and the distributees, that she may have one-seventh of the slaves absolutely instead of one-third for life, such agreement is good without writing, and without any actual delivery of the property.

Where an administratrix, supposing she has a title to certain slaves of the estate by a contract with the distributees, makes a conveyance of such slaves, the next of kin of the intestate cannot maintain an action for them against her vendee.

ACTION of DETINUE, tried before SAUNDERS, Judge, at the Fall Term, 1854, of Ashe Superior Court.

The following is the case *verbatim* sent up by his Honor: "This was an action of detinue for a negro man slave named *Rich*. It appeared in evidence, that one Jane Reeves, afterwards Jane Edwards, who as the widow of one George Reeves, had become the administratrix of her first husband in the State of Virginia, in 1810, where the said husband resided at the time of his death; that the said intestate of the said Jane Reeves, resided at his death near the North Carolina border, and owned considerable real estate in North Carolina; that the said administratrix some years after the death of her intestate, removed to North Carolina, before any division of the real estate or any distribution of the personal estate; that the said administratrix brought all the personal estate to North Carolina, among which were some nine slaves, and held it all as administratrix until 1838; that by the laws of Virginia the said administratrix was entitled to a child's part of the personal estate, except the slaves; and that of the said slaves, the said administratrix was entitled to one-third for life.

"That in the spring of 1838, the next of kin of the said George Reeves met at the house of the widow, the said administratrix, for the purpose of having a partial division of the said personal estate of the intestate George Reeves, then in the possession of the widow. The defendant insisted that this meeting was for the purpose of having a complete division of the said estate. It appeared that before this meeting in 1838, the widow, as the children had married, or settled in life, delivered over to each child, a young negro. In this

way, she had delivered over six, that is, one to each child. After all the parties had met at the house of the widow, it was agreed that the widow should have the negro Rich, he being present as each child had previously received a negro. This negro Rich was then in the possession of the widow and then present, and continued in her possession until her death in 1851. In that year she conveyed the slave Rich to the defendant by bill of sale. No actual change of possession of this slave Rich took place. He had been in possession of the widow as administratrix ever since his birth and continued in her possession until her death in 1851. There was evidence tending to show, that at the time of the division in 1838, it was intended to be final and complete, and that the widow was to receive a child's part absolutely in the slaves, instead of a third thereof for life, as allowed her by the laws of Virginia. There was no written evidence of this settlement and division. All the rest of the slaves, except Rich, were put up to the highest bidder, and knocked down at their full value to some one of the joint owners, the widow bidding off a woman, Rena, at $500. Two of the distributees bid against the widow. Plaintiffs insisted that this sale was merely to ascertain the value, and that the heirs, or widow, to whom they were knocked down, were only to pay such portions of their purchases as would be necessary to make each one equal in the amount of property received, in value; and there was evidence that the widow paid one hundred and sixty dollars.

"Plaintiffs insisted that the widow was to retain in Rich, only an estate for life under the laws of Virginia, the place of her domicil at the death of her intestate; and there was some evidence to show this. Defendant insisted that a final settlement and division had been made, and that according to the agreement and understanding, the widow was to receive a child's part absolutely, instead of a third for life; and that after the sale, she held Rich under this agreement. Plaintiffs insisted that if such an agreement and understanding had been made, still that no such title could pass or vest in the widow to Rich, without writing. The Court was of a differ-

ent opinion and instructed the jury that if they found from the evidence, that such an agreement and understanding as insisted upon by the defendant, had taken place, and division in pursuance thereof, that the title thereto would vest in the widow without any writing and without any change of possession. In submission to this opinion, the plaintiffs submitted to a verdict. There was a rule to show cause why the verdict should not be set aside and a new trial granted for misdirection, which was refused, from which an appeal was prayed for and allowed.

"There was a motion to nonsuit the plaintiffs because it was brought in the name of the next of kin of the intestate George Reeves, when it should have been in the name of his administrator. This question was reserved by the Court and not decided."

Boyden, for the plaintiffs.
H. C. Jones, for the defendant.

PEARSON, J. To entitle the plaintiffs to recover, they must show they have the legal estate and a present right to the possession.

It is conceded, that the legal estate vested, upon the death of George Reeves, in his administratrix Jane Reeves, and the question is, did it pass from her to the plaintiffs, who are the children of said George; or did it pass from her to the defendant, by her deed executed in 1851?

Unless the legal estate to the slaves in question, which vested in the widow as administratrix was divested, prior to the execution of her deed to the defendant, it is clear that the plaintiffs cannot recover.

When the case was opened upon the argument, it occurred to us that the defendant ought to have the benefit of this point; but from the manner in which the case is made up, it seems to have been taken for granted on both sides, that the widow's title as administratrix, was divested by what took place in 1838, and that she no longer, after that time, set up

any claim except under the division. So much confusion is thrown over the whole statement, by an indiscriminate intermingling of "what appeared," and is set forth as "conceded," "what the counsel respectively insisted upon" in the progress of the trial, both in reference to positions of law, and positions assumed in regard to matters of fact; and "what facts the evidence tended to establish," that we have been put to a great deal of trouble in arriving at a conclusion, in reference to the point on which the case ought to turn. We feel at liberty to say to gentlemen who are concerned in making up cases for this Court, it is more important that the bill of exceptions (or case sent in place of it) should state in a clear and intelligible manner, what was the decision in the Court below, and the facts necessary to enable us to see the question that was presented in the case, than it is for the judge below to decide the points according to law. A recital of the evidence is in most cases unnecessary, and tends to confuse the statement. If there is a clear statement so as to present the points, our decision is uninfluenced by the decision below; consequently, the final attainment of justice does not so much depend upon the decision of his Honor, as upon a clear statement of the case. We frequently have more difficulty in deciding what a case means and what *construction ought to be put on it*, than in deciding a half-dozen points which are clearly stated.

The case before us, as we take it from *the statement*, is this: George Reeves died in 1810, domiciled in Virginia, intestate; his widow was appointed his administratrix; soon afterwards she removed from Virginia, bringing with her the six children and slaves (nine in number) and other property of her late husband, and settled in this State. As the children grew up and married, the administratrix gave to each of them a negro. In 1838, all the parties met at the house of the administratrix, to make some disposition of the slaves. "It appeared, that before this meeting in 1838, the widow, as the children had married or settled in life, delivered over to each child a young negro; in this way she had delivered over six, that is, one to each child, and it was agreed that the widow should have the

negro Rich (he being present), as each child had previously received a negro."

This preliminary being settled, and the parties being aware that according to the law of Virginia, the widow was entitled to a life estate in one-third of all the slaves, it was by them understood and agreed, that if she would surrender her claim to a life estate in one-third, the children would all agree, and did then and there agree, to let her have an absolute estate in a child's part, that is, one-seventh. Accordingly, and *in pursuance of this agreement*, the other slaves were put up and bid for by the widow and children, for the purpose of fixing the value, and the widow as administratrix, delivered over to the children as distributees of their father, all the slaves except two, Rich, and Rena whom she had bid off at $500, to fix the value; these two slaves she kept, in accordance with the agreement aforesaid, paying to the children $160, the amount which, according to the value fixed by the bidding, was due for "equality of partition," and, under this claim of title, held possession from 1838 up to 1851.

"Plaintiff insisted, that if such an agreement and understanding had been made, still no title could pass or vest in the widow to Rich, without *writing*. The Court was of a different opinion, and instructed the jury, that if they found from the evidence, such an agreement and understanding, as insisted upon by the defendant, had taken place, and division in pursuance thereof, that the title thereto would vest in the widow without any writing and without any change of possession, (she having the slave in possession at the time of the division)."

The question, upon which the Court below decided the case, and to which the plaintiffs except, is this; the widow and administratrix of one who was domiciled in Virginia, (where the widow is entitled to a *life* estate in *one-third* of the slaves) makes a parol agreement with the distributees, by which she surrenders her life estate in one-third of the slaves, in consideration of their releasing their reversionary interest in a seventh of the slaves, so as to give her an absolute estate in such seventh part. This parol agreement is executed; the widow,

in her capacity as administratrix, passes the legal estate to all the slaves, to the six legatees, except the two in which she is to have an absolute estate, and under this claim of title she holds possession from 1838 to 1851.

The question presented, is, have we a Statute which requires such an agreement, and distribution in pursuance thereof, between an administratrix having a claim to a part as a distributee, and the other distributees, to be in writing?

The Act of 1819 provides for *executory* contracts, or agreements, and evidently has no bearing where the contract is *executed* and the parties do all that the agreement requires, and leave nothing to be done.

The Act of 1806 provides, "all gifts of slaves shall be in writing" &c.; this has no bearing on the question. The Acts of 1784 and 1792, which are incorporated (the latter being inserted in the form of a proviso) by the Act of 1836, Rev. Stat. ch. 37, sec. 19, provide, that all "*sales of slaves*" shall be in writing, except sales accompanied by an actual delivery.

If tenants in common make partition of slaves, this has never been considered to be an executory agreement, under the Act of 1819, or a gift, under the Act of 1806, or a sale under the Acts of 1784 and 1792, consequently there is no Statute which requires such partition to be evidenced by writing. Such has been our understanding of the law in reference to the distribution of slaves by an administrator; it is neither an executory agreement, gift, or sale, within the meaning of the Statutes, and consequently need not be evidenced by any writing. By law, the legal estate is vested in the administrator; by the act of making distribution, he passes the legal title to certain of the slaves, to the distributees respectively; in satisfaction of their claim under the statute of distribution, and in consideration of his so doing, they, each respectively, release and surrender all claim to such of the slaves as are allotted to the others. In the same way as upon partition, each takes in severalty a part of the slaves and relinquishes all right and claim to such of the slaves as fall to the share of the others, so, when the admin-

istratrix is entitled to a share as distributee, if she retains the legal estate in certain of the slaves, in satisfaction of her claim to the rest, or if according to the law of the domicil, being entitled to a life estate in one-third of the whole, by agreement with the other distributees, all of whom are capable of acting, she delivers over to them all the slaves except one-seventh part, in consideration that she is to have such seventh part absolutely, instead of one-third part for life; in other words, if, having the legal estate as administratrix in the whole, and being entitled to a life estate in one-third as distributee, she, by express agreement, and without fraud, delivers over to the other distributees, all the slaves, except one-seventh part, in which, by said agreement, she is to have the absolute estate, in our opinion, such a "transaction," "transfer," "agreement," or "understanding," by whatever name called, does not fall within the meaning or purview of either of the Statutes, above referred to; and his Honor did not err in holding that the widow acquired title, although there was no memorial of the matter preserved in writing. The widow had the legal estate in all the slaves, and was entitled to a life estate in four of them as distributee. She delivers over all except *two* and pays $160, in consideration that by such payment and the surrender of her life estate in the other two, she is to have the two in question absolutely. After the enjoyment of the property according to this agreement from 1838 up to her death in 1851, the plaintiffs certainly now come forward with ill grace, to say she had only a life estate in the two which she retained, and the general statutes providing for agreements to sell, and for gifts and sales of slaves, have no bearing upon a case of this peculiar kind.

Mr. Jones, for the defendant, called our attention to the decisions in which it is held that the Acts of 1784, 1792 and 1806 are to be treated as statutes to prevent frauds, and not as invalidating the operation of parol gifts and sales *inter partes*. Owing to the omission of the preamble to those statutes in the Revised Statute (Act of 1836,) a grave doubt has been suggested (*State* v. *Fuller*, 5 Ired. 137) whether from

the enacting words, those Statutes are not to be treated as intended to prevent *perjury* as well as fraud, and as such, having operation *inter partes*. The question is not now presented, and we do not enter into its consideration.

PER CURIAM. Judgment affirmed.

GEORGE REEVES *et al. vs.* ARAS R. COX.

Same points decided as in the foregoing.

THIS was an ACTION of DETINUE for a negro woman, Rena, and children, tried before SAUNDERS, Judge, at the Fall Term, 1854, of Ashe Superior Court.

The question of actual delivery was made by the facts in this case, but in other respects, it is the same as the foregoing. His Honor charged that the plaintiff was not entitled to recover. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Boyden, for plaintiff.
H. C. Jones, for defendant.

PER CURIAM. For the reasons given in the case, *Reeves* v. *Edwards*, ante 457, the judgment is affirmed.

JOHN HALL AND MACON COUNTY *vs.* EBENEZER MORROW.

The penalty imposed by the Act of 1817 on the owner of a water-mill, for not keeping a bridge in repair, only applies to such bridges as constitute a part of the public road which runs over the dam itself, but not to a bridge which is erected over a mill-race on a road that crosses such race, near to a mill, but does not run over the dam.

Hall and Macon County *vs.* Morrow.

THIS was an ACTION for a PENALTY brought by a warrant, against a mill owner for not repairing a bridge, tried before his Honor, Judge PERSON, at the Fall Term, 1854, of Macon Superior Court.

The warrant avers that defendant was "the owner of a water mill on Watauga creek, situate near the public road, leading, &c., and whereas there is a bridge attached to, or near the dam of the said mill, *over which the public road immediately passes*, which bridge the said Ebenezer Morrow did fail to keep in such repair as the Court deemed sufficient over the road (not such bridge as the law requires) for the space of ten days, &c."

The evidence was, that the defendant was the owner of a water mill, and that he had obtained leave of the County Court to cut his mill race across the road, and was required by the order of that Court "to build a good bridge and keep it up." The evidence further was, that the bridge was less than fourteen feet wide and somewhat steep at one of the abutments, but that there was no difficulty in passing over it with teams and loaded wagons.

The Court instructed the jury, that mill owners were required only to make and keep up such bridges across their mill races, as the Court deemed sufficient; and as in this case, where only a *good bridge was to be made and kept up*, it was meant that such a bridge was to be built and kept up, as the wants and convenience of the public demanded, without reference to its width; and left it to the jury to say from the evidence, whether the defendant's bridge was such a one. Plaintiff excepted to these instructions.

Verdict for the defendant. Judgment and appeal.

Williams and *Baxter*, for plaintiffs.
Gaither, for the defendant.

PEARSON, J. The warrant was issued under the 24th and 25th sec. ch. 104 of the Rev. Stat. The draftsman evidently found it difficult to make the averment which the Statute re-

quires without making a variance from the facts of the case. The reason of this difficulty is, that the Statute does not apply to the case, and he was like a builder who attempts to force "a piece" into a place for which it was not made, and finds that it will not fit, any way he can fix it; for instance, the warrant avers, "the mill was situate *near* the public road:" The words of the Statute are, "whose mill is situate *on* any public road:" Again, the warrant avers, "there is a bridge attached to, or *near* the dam of the said mill over which the public road immediately passes." The words of the Statute are, "attached to his or her mill-dam." Here are two attempts to force in a piece because it nearly fitted the place. The words "over which the public road immediately passes," show a singular transposition of the words of the Statute, "immediately over which a public road may run." Here it is apparent the draftsman was pressed, because of the variance between the facts of the case before him and the words of the Statute. We give him credit for an ingenious transposition of the words of the Statute, by which, if taken in one sense, the words bring the offense within the meaning of the Statute, although if taken in another, the Statute has no application.

If the words "*over which* the public road immediately passes," refer to the mill dam, then upon the face of the warrant, there is no defect: but upon the trial there was a fatal variance, for, as the case states, "it was in evidence, that the defendant was the owner of a water-mill, and that he had obtained leave of the County Court to cut his *mill race across the road*, and was required "to build a good bridge and keep it up." So the evidence was, that the road did not run over the mill-dam, but crossed the *mill-race* by means of the bridge. If the words "over which the public road immediately passes" refer to *the bridge*, then on the face of the warrant, there is a fatal defect; for the words of the Statute are confined to cases of *mill-dams* immediately over which a public road may run.

No doubt, it will be a matter of surprise to many of the good citizens of the county of Macon, to be informed, that in the eastern portion of the State, mill-dams are embankments

of dirt, over which the public roads run in many cases: so that the dam, and a bridge attached to the dam, form part and parcel of the public road. In the mountains, mill-dams are constructed of rock, or plank, fixed upon a suitable frame-work, and the idea of a mill-dam made of dirt or sand, so as to be made use of as a public road, will be new; but such is the fact, and the Statute under consideration, is confined by its terms to dams of this description, "immediately over which a public road may run." In our case, the evidence shows a bridge across a mill-race over which the public road passes. The action cannot be maintained.

The case falls within that supposed in the opinion delivered, *State* v. *Yarrell*, 12 Ire. Rep. 130. The defendant is liable to indictment for a nuisance, in cutting a mill-race across a public road: he may justify, by showing a license of the County Court, provided he is able to prove a compliance, on his part, with the terms on which the license was granted.

His Honor was of opinion, that the bridge in question, might be sufficient within the terms of the order of Court, although it was only *thirteen* feet wide. This opinion was based upon the 24th sec. of the Statute, which, as we have seen, has no application to the present case. We refer to it simply for the purpose of excluding an inference, that in our opinion a bridge of that width would be sufficient, and need not be of the width which overseers of roads are required to make by the 14th sec. of the Act. In reference to this, we intimate no opinion, one way or the other. The judgment in favor of the defendant is affirmed upon the ground above stated.

PER CURIAM. Judgment affirmed.

STATE *vs.* HENDERSON CALDWELL.

Where a man of superior strength, goes to the dwelling house of another who is absent at the time of his arrival, and remains there against the will of the wife, wrangling with her and using insulting language, and then the husband returns

and he still remains in the house though ordered out, and then goes into the yard with a club in his hand, cursing and making threats, this is sufficient to support an indictment for a forcible entry in the presence of the husband, and a detainer.

INDICTMENT for a FORCIBLE ENTRY AND DETAINER, tried before MANLY, Judge, at the Spring Term, 1855, of Catawba Superior Court.

The bill was for a forcible entry into the dwelling house of the prosecutor, and a detainer, he being present forbidding the same.

The evidence was, that the defendant went to the house of the prosecutor (Clodfelter) in his absence, his wife and daughter being present. When the husband returned, the defendant was in a *wrangle* with his wife, and he heard the following colloquy:

Wife.—"If you do not intend to marry my daughter, you ought to let her alone."

Defendant.—"It is not my intention to marry her."

Wife.—"What do you want with her then?—to make her your prostitute?"

Defendant.—"Yes."

Upon this, the husband ordered the defendant out of the house; after refusing to go for some time, the defendant at last went out into the yard and procured a club, where he remained for some time—more than half an hour—using abusive language to the prosecutor, and challenging him out to fight: prosecutor was deterred from opposing him with force, by his violence and superior strength. The defendant had been previously ordered by the prosecutor not to come to his house, and this visit, when he was temporarily absent, was against his will.

The point was, whether these facts made a case of indictable trespass as charged. His Honor instructed the jury that they did. Defendant excepted. Verdict for the State. Judgment and Appeal.

Attorney General, for the State.
W. P. Bynum, for the defendant.

BATTLE, J. The counsel for the defendant admits that the testimony given by the prosecutor on the trial, was sufficient to support the conviction for a forcible detainer, but he contends that it did not support the charge for a forcible entry, at least, not for one in the presence of the owner of the dwelling house; and that, as the verdict of guilty was general, he is entitled to a *venire de novo*. The cases of the *State* v. *Ward*, 1 Jones' Rep. 293, and the *State* v. *McCauless*, 9 Ired. Rep. 375, upon which he relies, show the legitimacy of his conclusion, provided his premises be correct.

The question then arises, is the testimony sufficient to support the verdict upon the charge of a forcible entry in the presence of the owner? We think that it is, and that we are justified in so holding by the principles established in the adjudications of this Court. In the case of the *State* v. *Fort*, 4 Dev. and Bat. Rep. 192, it was said by the Court, not to be necessary in an indictment for a forcible entry into a dwelling house, to charge or show that the proprietor was in the house, or present at the time of the violent dispossession. In the *State* v. *Walker*, 10 Ire. 234, it was held that though the possession of a man's dwelling house by his family, was his possession, and might be so charged in an indictment for a forcible entry, yet, if it were alleged that the owner was personally present at the time of the injury complained of, the proof must sustain that allegation. The indictment in the present case does allege that the owner was personally present, forbidding the entry. So that the question is narrowed down to this, were the circumstances under which the defendant entered, sufficient to make his entry forcible, and was the owner present at the time?

The testimony shows that the defendant was a man of superior strength; that he had been forbidden by the prosecutor to visit his house; that he went there in defiance of the prohibition, and engaged in a quarrel with the prosecutor's wife,

declaring his purpose to make a prostitute of their daughter. Such an entry, against the owner's will and with such an intent, was undoubtedly unlawful, and it is equally clear, that it was much more than a bare trespass. And if there were any doubt about this, the defendant's conduct after he was ordered out of the house by the prosecutor, which was part of the same transaction, puts the matter beyond all question. His superior strength, his abusive language and his demonstrations of violence, had the same tendency, as numbers would have done, to alarm the prosecutor's family, and to cause him to commit a breach of the peace: and conduct having such a tendency was held sufficient, in the case of the *State* v. *Toliver*, 5 Ired. Rep. 452, to support an indictment similar to the present. The inquiry remains, was the owner present forbidding the entry? The acts of the defendant, from his first entrance into, until his final departure from the house, were one continuing transaction, and the presence of the owner during any part of it was sufficient to sustain the charge. If a man leave his dwelling house for a mere temporary purpose, as for instance to attend church, to visit a neighbor, or to work in his own fields, he cannot be said in law, to have left it, so as to make the unlawful entry of a trespasser an entry in his absence, and if he return while the trespasser is still in the house, the unlawful and forcible entry will, in contemplation of law, have been in his presence. In *State* v. *Walker*, *ubi supra*, the owner of the dwelling house was absent, and did not return until the day after the forcible trespass had been committed, and the defendant had gone, which makes it a very different case from the present.

We find no error in the record to prevent the judgment of the Superior Court from being pronounced against the defendant, and to that end this opinion will be certified as the law directs.

PER CURIAM. Judgment affirmed.

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TO THE PRINCIPAL MATTERS

OF

VOL. 2, JONES' LAW.
