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REPORTS

OF

CASES AT LAW

ARGUED AND DETERMINED

IN THE SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM, 1855, TO AUGUST TERM, 1856,
BOTH INCLUSIVE.

VOL. III.

BY HAMILTON C. JONES.

SALISBURY:
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1856.

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. III.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT OF N. CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1855.

WILSON MADRE *et al vs.* ROBERT J. SAUNDERS.

A stipulation in a contract of hiring a slave, that he *was not to be employed on water*, is not broken by sending the slave to water horses at a shallow part of a deep stream, with instructions not to ride into deep water, although he did ride into deep water, and was thereby drowned.

ASSUMPSIT, tried before his Honor Judge SAUNDERS, at the Fall Term, 1855, of Perquimons Superior Court.

The plaintiff declared for a breach of a contract of hiring, wherein it was agreed between the parties that the defendant was to have the boy *Davy* for one year, from the 2nd January, 1852, and to return him to the guardian of plaintiff, Madre, at Bethel store, on the 3rd of January, 1853; that he was to furnish certain specified clothing, and that *the boy was not to be employed on water, nor at any fishery, and not to be carried out of the county.* The following facts were agreed by the parties and submitted for the judgment of his Honor, viz: The slave, Davy, during the term for which defendant

hired him, was drowned in Perquimons River, near the town of Hertford, where the defendant lived. He had gone to the river with defendant's horse, with his knowledge, but was directed by him not to ride into deep water. When first seen, the horse he had ridden had got away from him in some way not explained, and was wading in shallow water near the shore, and the boy himself was sitting on the shore. The boy then proposed to one Lewis Richardson, to let him ride his horse into the stream and wash him until the boys should come down and help him catch Saunders' horse; this Mr. Richardson permitted him to do, but cautioned him not to ride into deep water, as his horse was blind. He did, however, ride into the deep water, and was in consequence thereof drowned. The boy was obedient, and at the time he was drowned (June, 1852) was worth $850. Perquimons river is a deep navigable stream at the town of Hertford, but at this point, was shallow for a considerable distance from the shore. The boy's employment was to work about the lot of defendant and take care of the horses, (the defendant being the keeper of a Hotel in the town) and it was his practice to ride into water sometimes so as to wet the horses sides, at other times merely to wet their legs; this was with the knowledge and approbation of the defendant, but the boy at the same time had his general instruction not to ride into deep water.

Upon this state of facts, his Honor being of opinion with the defendant, gave judgment accordingly, from which plaintiff appealed.

Smith, for plaintiff.
Hines and *Jordan*, for defendant.

BATTLE, J. We are unable to discover any ground upon which the action can be sustained. It is not pretended that the boy *Davy* was carried out of the county, or employed at any fishery. It seems to us to be equally clear that he was not employed on water. Whatever extent of signification may be given to the words, "employed on water," we cannot see how they can embrace a case like the present, where the

boy's only business in connection with water, was to carry horses to drink where the river was shallow some distance from the shore, with express instructions from the hirer not to ride them into deep water. The boy's life was lost by his own folly or imprudence while he was, at his own request, and without the knowledge or consent of the hirer, engaged in the service of another person.

The engagement to return the boy to the guardian at the end of the year, cannot be brought to the aidof the plaintiff. The defendant did not, upon any fair construction of his contract, become the insurer of the boy's life. His obligation was nothing more or less than that of every bailee, to return the article at the expiration of the bailment, should it not be lost or destroyed without any default on his part. We hold that the hirer was not guilty of any default in this case, and consequently that the judgment of the Court below in his favor, must be affirmed.

PER CURIAM. Judgment affirmed.

ELISHA NASH *vs.* EUGENE MORTON.

Where a Judge, in the trial of a cause, undertakes to state to the jury the remarks of counsel on one side, and does so in such strong and emphatic language as to give additional force to the counsel's positions, and afterwards says to the jury, "it is a plain case, and that if they do not agree he will detain them until Saturday night." *Held* that this is such a leading of the jury to a conclusion, as to amount to a violation of the Act of 1796.

ACTION on the case for a FALSE WARRANTY and for a DECEIT in the sale of a cask of French Brandy, tried before his Honor Judge SAUNDERS, at the Fall Term, 1855, of Pasquotank Superior Court.

On the trial, it appeared that the cask of brandy in question, had been shipped from New York for some southern port, on board of a vessel which was wrecked on our coast and

sunk in the water. The cask remained several days under water, but was finally removed from the vessel and carried on the beach.

John Etheridge, a witness for the plaintiff, testified that when the cask was brought out of the vessel, it was leaking badly in two places, and he plugged them up. That he examined the liquor and found it so much adulterated with salt water, as to be entirely worthless. That the defendant was there several times while they were getting up the cargo, acting as agent for a company who had insured the vessel, but did not know whether he was present when the cask in question was taken out. That the witness was present at the sale of the wreck-property by the commissioner of the district when this cask was sold among the other articles saved. That it was put up, and one *Spencer* bid about eighty dollars, when witness said to him in an audible voice—loud enough to be heard by the by-standers, "do not bid, the brandy is salted and good for nothing," whereupon he stopped bidding. Soon after this, defendant remarked, "I cannot let this article go at this price, I will sooner bid it in for the Insurance Companies," and thereupon it was knocked off to him for seventy-three dollars. The witness could not say whether the defendant heard his remark to Spencer, but knew that he was in the group.

The cask was afterwards forwarded by the defendant to Elizabeth City, and sold by his agent to plaintiff, for $265: being the New York cost, deducting 10 per cent. Plaintiff did not see or examine the brandy previously to his purchasing it.

The agent of defendant, who made the sale to plaintiff, thinks from looking at the bills handed to plaintiff, that he represented it as good brandy.

The brandy was proved to be entirely worthless. Several witnesses for the defendant, proved that plaintiff was present on some of the days of this sale, but did not remember that he was there when the cask was sold. Some of them were in the group when the cask was sold, but did not hear the remark of Etheridge as to the quality of the liquor.

There was evidence going to show that plaintiff was present at the sale on the beach, and had equal opportunity with the defendant of ascertaining the condition of the brandy.

The plaintiff's right to recover was resisted:

1st. Because defendant had no knowledge of the condition of the brandy; nor reasonable ground to suppose it had been injured.

2nd. Because if he had any knowledge or information on the subject, the sources of such knowledge and information were equally open to the plaintiff, and that in point of fact, plaintiff had as much knowledge and information of this fact as the defendant, and he contended, upon either view he was not entitled to recover.

His Honor told the jury, that if the remark made by the witness, Etheridge, was heard by the defendant, and without disclosing it to plaintiff, he had, by his agent, sold the brandy as good brandy, plaintiff would be entitled to recover. But that if the defendant did not hear the remark, or if he did hear it, and the plaintiff heard the same, and had all the information which the defendant possessed, then, in either such event the defendant would be entitled to their verdict. And his Honor proceeded to say, "It had been insisted for plaintiff that he could not have been aware of the condition of the brandy previously to the purchase, and been guilty of the folly of giving a fair price for a good article for one which was worthless. But that defendant's counsel replied to that, 'do you believe defendant, either, would have been such a fool as to buy for his principal, and make himself personally liable for practising a fraud, and that too, in a matter wherein he had no interest.' That in another form of action, had the plaintiff given notice to the defendant not to pay over the purchase money, he might have recovered, as the article purchased was without value."

The defendant's counsel had not used the language referred to, though he had pressed that view of the matter in argument.

The jury withdrew, and after having been absent some

time, two of their number came from the jury-room into Court and announced that they could not agree, nor were likely to agree. Whereupon, his Honor remarked in a strong tone of voice, "If you cannot agree one way or the other, in as plain a state of facts as this is, I don't say which way, it is useless to try causes in courts of justice." He said further, that he should not discharge them if they stayed till Saturday night. (This was on Wednesday.) The same jury had been discharged on the day before, because they could not agree in another case. The two jurors withdrew, returning to the rest of the panel, and after being together a short time, they all came in with a verdict for the defendant. For this charge, and for the remarks on the return of the jurors, plaintiff's counsel excepted. Judgment for defendant and appeal.

Smith, for plaintiff.
Pool, for defendant.

NASH, C. J. It is objected in this case, that his Honor, the presiding Judge, in his charge to the jury, violated the provisions of the Act of 1796. We are constrained to say that, in our opinion, the objection is well founded. It is often difficult for a Judge to avoid so expressing himself, as not to intimate to a jury, what his opinion on the evidence is; and it is extremely difficult, very often, to say where duty stops and wrong begins. Nor is it possible to lay down, upon the subject, any distinct rule but that contained in the Act itself—"to state in a full and correct manner the facts given in evidence and to declare and explain the law arising thereon," Rev. Stat. ch. 31, sec. 35. A charge, therefore, which indicates to a jury what is the opinion of the court upon the evidence, violates the Act. We all know how earnestly, in general, juries seek to ascertain the opinion of the Judge trying the cause, upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the Act was to guard against such results—to throw upon the jurors themselves the

responsibility of responding to the facts of the case. Nor is it proper for a Judge to lead the jury to their conclusions on the facts. In the case, the *State* v. *Shule*, 10 Ire. Rep. 153, the Court say, "there are the same objections to leading juries as to leading witnesses, and in fact, those apply with more force. The Judge is prohibited from intimating to the jury his opinion upon a question of fact." We are not ignorant of the difficulty, under which a Judge on the circuit often labors, in charging the jury, to avoid trespassing on the Act. But it is his privilege, if he becomes satisfied that he has so trespassed, to take back what he has said, and if he cannot, by so doing, restore the parties to their rights, he ought to grant a new trial.

Upon a careful examination of the charge in this case, we are constrained to say, the Act of 1796 was violated. To the first part of the charge there is no exception. After stating the legal points in controversy, his Honor proceeds to state the grounds mainly urged, both for the plaintiff and defendant—that the plaintiff's counsel contended that the plaintiff could not have been aware of the condition of the brandy before he purchased, and been guilty of the folly of giving the full price of a good article for one that was worthless; "but that the defendant's counsel replied to that, do you believe the defendant, either, would have been such a fool as to buy for his principal, &c." The case states that the defendant's counsel did not use the language attributed to him. Now, we do not intend to say that, in stating the argument of counsel at the bar, it is the duty of the Judge to use the very language in which it was clothed, but he should not state it in terms stronger and more emphatic. Here such language was used by his Honor. The question propounded in the charge was not that of the counsel but of the Court, and was calculated, not to mislead, but to *lead* the jury—an indication of what was the opinion of the Court upon the fact then in controversy, to wit: the knowledge of the defendant as to the worthlessness of the article sold.

Again, when the two jurors came into Court and stated the

jury could not agree, his Honor, in a loud tone of voice, observed, "If you cannot agree one way or another in as plain a state of facts as this is, I don't say which way, it is useless to try causes in courts of justice." And added that, "he would not discharge them if they stayed till saturday night." Whether the case was a plain one or not, is not before us. His Honor had no right to tell them it was a plain one. Our enquiry is, whether he intimated in his charge, on which side it was plain. His disclaimer came too late. He had already asked the jury, if they thought the defendant such a fool, &c. In stating the argument of the plaintiff's counsel, he used no such strong language as when stating that of the defendant. Neither counsel had used the strong word 'fool,' as applicable to his client Why this difference? Was it not a clear intimation of the opinion of his Honor and was it not well calculated to lead the jury? We think it was.

For this error there must be a *venire de novo*, and the judgment is reversed.

PER CURIAM. Judgment reversed.

JOHN J. GRANDY *vs.* JOHN SMALL.

Where it was agreed between A and B, that B was to deliver a quantity of corn at a given place and price "whenever called for," *It was held* that an action would not lie for the non-delivery of the corn, if it appeared that no offer had been made to pay the price, and that when it was sent for, the agent to receive the corn had no money to pay for it.

And further, that B's denying A's right upon an untenable ground, did not exonerate him from showing such ability and readiness to perform his part of the contract (*Grandy* v. *McCleese*, 2 Jones' Rep. 142, cited and approved.)

ASSUMPSIT, tried before his Honor Judge SAUNDERS, at the last Superior Court of Pasquotank.

The plaintiff declared for the non-delivery of a quantity of

corn at Little River Bridge, and offered the following as the contract declared on, which is in writing, and is as follows:

"This is to certify, that I have this day sold John J. Grandy five hundred bbls. corn at three 25–100 dollars per bbl., to be delivered at Little River Bridge in clean and sound order, when called for.

Jan. 18, 1854. JNO. SMALL."

Which was proved.

On the 31st of the same month, (January) the plaintiff gave notice to defendant, in writing, that he was ready to receive and pay for the corn, and demanded that it should be delivered according to the contract. This writing was sent by a *Mr. Newbold*, who left it at defendant's dwelling, he not being at home; but he saw the defendant that day, who admitted he had received the paper, but said he did not intend delivering the corn, because the plaintiff had not sent for it according to the contract. This witness said further, that he was not furnished with any funds to pay for the corn. There was no evidence that what the defendant said to this witness was communicated to the plaintiff. On the next day, (Feb. 1,) plaintiff sent his vessel to Little River Bridge for the corn, with one Palee as his agent, to demand and receive the same; but the defendant again refused to deliver it, alleging the same reason as before. Neither had this agent any funds to pay for the corn, or for any part of it.

The plaintiff proved that on the last day of January, 1854, he had to his credit in the Farmers' Bank of Elizabeth City, more than $2000, which he was entitled to draw, and that corn was then worth at Elizabeth City $4 per barrel, also that plaintiff could raise this amount of money at any time.

The defendant read in evidence another writing, which was signed by plaintiff and delivered to defendant at the same time with that of the one declared on, which is as follows:

"This is to certify, that I have this day purchased of John Small, five hundred barrels of corn at three dollars and twen-

ty-five cts. per barrel—cash on delivery. To be delivered at Little River Bridge clean and sound. Jan. 18, 1854.

Signed, JNO. J. GRANDY."

Defendant's counsel insisted that plaintiff could not recover, 1st. Because he had not given reasonable, nor indeed, any previous notice, to the defendant, of the time when he would be prepared to receive the corn. 2nd. Because he had not paid, nor offered to pay.

The Court charged the jury, that if they believed the evidence the plaintiff was entitled to recover. To this charge defendant's counsel excepted.

Verdict for the plaintiff. Judgment and appeal.

Hines, for plaintiff.
Pool and *Smith*, for defendant.

NASH, C. J. We can see no essential difference between this case and that of *Grandy* v. *McCleese*, decided at the June Term, 1855, of this Court, (2 Jones' Rep. 142.) The facts in the two cases are substantially the same, and the principle there declared is identical with that which must govern this. Each was a simple contract, not evidenced by deed, for the future delivery of corn, and in each, when the corn was demanded by the plaintiff's agent, the agent had not the money, agreed on as the price, to pay for it. In McCleese's case the Court decide that, "the contract was simply an executory one; the legal effect of which was to bind the parties to concurrent acts. The plaintiff was to send for the corn and to pay for it on delivery, and the defendant was to deliver it on receiving payment." The contract in that case was not reduced to writing; in the one we are now considering, it was, and in the hand writing of the plaintiff; in which he states "cash on delivery." Now it is admitted that neither at the time when the first demand was made, nor on the day following, when the vessel of the plaintiff came to Little River Bridge, where the corn was to be delivered, and where the corn was again demanded, was the agent furnished with the money to pay for

the corn. Neither demand, therefore, was sufficient to put the defendant in the wrong.

In the argument before us it was urged, in behalf of the plaintiff, that there was an essential difference between the contract in the case of McCleese and the one in this case:— that the former was *executory* and the latter executed. Justice BLACKSTONE, in the 2nd vol. of his Commentaries, page 443, says, "a contract may also be executed; as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together; or it may be executory, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed conveys a chose in possession; a contract executory only a chose in action." If this were an executed contract, then the legal title to the corn passed to the plaintiff, and he could have maintained trover for it, which we presume would not be pretended.

The declaration of the defendant, that he would not deliver the corn, put it into the power of the plaintiff to rescind the contract; but could not discharge him, if he still claimed its performance by the defendant, from showing, when he did demand it at Little River Bridge, that he was ready to pay for the corn, or from making a tender of the money.

There is error in the charge of the Court, that if the jury believed the evidence, the plaintiff was entitled to their verdict.

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

R. R. GERKINS *vs.* ISAAC WILLIAMS.

One is not guilty of a fraudulent concealment, so as to subject him to an action for a deceit, who fails to disclose information which he has received as to unsoundness in the article sold, if he disbelieves such information.

ACTION on the case for a FALSE WARRANTY AND DECEIT, in the

sale of a negro woman and child, tried before his Honor Judge SAUNDERS, at the Fall Term, 1855, of Camden Superior Court.

Doctor Nixon, a witness for the plaintiff, deposed, that about a month before the sale to plaintiff, he had attended as a physician for about two weeks, the woman in question, while she was owned by the defendant, and that she had the dropsy. He said he told the defendant that the woman was unsound, but did not tell him what her complaint was. He advised him to get clear of her as soon as he could. He did not know of any thing being the matter with the child. He said that afterwards, and before the sale to the plaintiff, the woman got better and was able to go about.

The defendant's counsel asked his Honor to instruct the jury that, "although Dr. Nixon had told the defendant the negro was unsound, he was not bound to communicate it to plaintiff, unless he believed it to be so."

The Court declined giving the instruction asked by the counsel, but charged the jury, "that if the evidence of the Doctor was to be believed—that he attended the negro for two weeks, and told defendant she was unsound, and advised him to sell her, and defendant did sell her without disclosing the fact which the Doctor had communicated to him, he would be liable; and that, whether he believed it or not, unless the condition of the negro was such as to render her unsoundness apparent to a common observer, or the plaintiff otherwise had notice of it."

Defendant excepted to this part of the charge, and a verdict and judgment having been rendered for the plaintiff, defendant appealed.

Smith and *Pool*, for plaintiff.
Jordan and *Hines*, for defendant.

NASH, C. J. To support this action the defendant must be guilty of a fraudulent misrepresentation, or a fraudulent concealment—must be guilty of a moral falsehood. A person cannot be said to conceal that which he does not know to ex-

ist or does not believe to exist. If he does not believe it to exist, he is not bound to declare it to a purchaser. *Hamrick* v. *Hogg*, 1 Dev. Rep. 350. In this case there was no misrepresentation; but it is alleged that the defendant was guilty of a fraudulent concealment. On the trial below, the defendant insisted by his counsel, "that although Doctor Nixon had told the defendant that the negro woman was unsound, he was not bound to communicate it to the plaintiff, unless he believed it to be so." Upon this point his Honor instructed the jury, "that if the evidence of the Doctor was to be believed,—that he attended the negro for two weeks, and told the defendant that she was unsound, and advised him to sell her, and the defendant did sell her without disclosing the fact which the Doctor had communicated to him, he would be liable, *and that, whether he believed it or not.*"

In this there is error. It is directly in conflict with the case above referred to. His Honor converted into a question of law that which was a question of fact for the jury. It ought to have been left to the jury to say, whether the defendant did, or did not believe the negro to be unsound, with appropriate remarks upon the Doctor's testimony. In Hamrick's case, the charge to the jury was substantially as in this. The negro there had been hired out, the year before the sale, to another person, who, on returning her to the defendant stated to him, that her health, for part of the time, had been very bad, and that she was unable to work. His Honor charged the jury that the defendant's disbelief as to the truth of the information, would not exonerate him from liability. This Court declared that there was error and reversed the judgment.

We have not deemed it necessary to look into the other points raised in the case. For the error noticed, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

ROBERT ETHERIDGE *et al. vs.* WILSON CORPREW'S EX'RS.

The probate of a will in *common form* is a temporary measure, for the protection of estates, and any person interested in the estate, either by force of the will, or by consanguinity, may, of common right, institute proceedings to have a probate in *solemn form.*

This right may be forfeited by a long acquiescence in the probate in common form.

Where more than ten years had elapsed from the death of the decedent to the filing of a petition for a probate in solemn form, it appearing, that for nearly all that time, the petitioners had been under the disabilities of coverture, absence beyond seas, residence in another State and lunacy, it not appearing when petitioners had actual notice of the death of their kinsman or of the will or probate, *Held,* that the delay to institute proceedings under these circumstances, did not work a forfeiture.

Where actual notice is relied on as a ground of such forfeiture of right, *it must be alleged and proved by the party seeking to take advantage of it.*

PETITION for the probate of a will in solemn form, heard before his Honor Judge SAUNDERS, at the last Superior Court of Currituck.

The petition was filed in the County Court, whence it was brought by appeal of defendant to the Superior Court. It sets forth that the petitioners are the next of kin of John Wheatly, who died in 1843, as they say, intestate. That a few days after his death, defendant's testator exhibited a paper-writing, purporting to be the last will and testament of the said John, to the County Court, and had the same proved in common form, without having cited the petitioners, or any of them, to witness the proceedings, or caveat the same. The petition alleges that the paper-writing in question, was all in the hand writing of Corprew, the defendants' testator; that it was written in his, decedent's, last moments, when no white person was near, and all his estate is given to Corprew, who is also appointed executor; that said John Wheatly was at all times a man of feeble intellect, and that at the time the will was written, he was very old, and his mind so much impaired as to subject him to the entire control of his slaves; that when the will was witnessed, their kinsman, said John,

was too weak, from old age and sickness, to know what he was doing, or to be intelligible to the subscribing witnesses.

The petitioners allege that immediately after the death of John Wheatly, the defendants' testator took possession of his whole estate, real and personal, which was a very large one, and claimed and used the same as his own, up to the time of his death, which occurred in July, 1854. That during nearly all that time they were under disabilities to sue for their rights in the premises; that the petitioners, Nicholas and Robert Etheridge, were residents of another State, and still are; that Fanny Etheridge, his sister, who lived with him, was insane for several years before his death and continued so up to her death; that she died about a year before the filing of this petition, and that administration was not taken as to her, until the term it was filed; that petitioner, Caleb Spann, was, until within a few months of filing the petition, beyond sea, and that the other petitioner, Sarah, a feme covert, was incapable of suing in her own name. They all allege that they are uneducated, and were not informed of their rights until very recently, and that they are also all quite poor and unskilled in the forms of litigation.

They pray that an order may be made to have the said script re-propounded, to the end, that they may be able to show that the allegations above set forth are true; that the same was not the last will and testament of the said John Wheatly. Philip Northern and Miles Wilson, the executors of Wilson Corprew, are made defendants.

The answer of the defendants admits that plaintiffs are the heirs and next of kin of Wilson Corprew; that their testator did take probate of the last will and testament of John Wheatly in common form, without notice to the petitioners. They further answer, that they have no personal knowledge of any of the circumstances under which the will was drawn, but have understood that it was drawn up and executed by a competent person, and duly witnessed by two witnesses. They further say in their answer, "that they now understand and believe that some of the parties were res-

ident out of the State; that one was a lunatic; another a feme covert, and that one of the next of kin is dead, and administration was granted as charged. That they know nothing of their education or knowledge of their rights, or condition as to estate." They further admit, that their testator had possession of the estate of the said Wheatly, from the death of said Wheatly till his own death, which was, as alleged in the petition, from 1843 till 1854.

Much testimony is filed in the cause, but as none of it pertains to the disabilities of the parties, or the causes of the delay to petition for probate in solemn form, it is not deemed important to set it forth.

Upon the hearing in the Superior Court, his Honor being of opinion with the petitioners, affirmed the order of the County Court, and awarded a *procedendo*; from which judgment the defendants appealed to this Court.

Smith, for plaintiffs.
Hines, *Jordan* and *Pool*, for defendants.

PEARSON, J. As a matter of common justice, no one should be deprived of his rights without an opportunity of being heard. Hence, no order, sentence or decree, made *ex parte*, is conclusive; and all persons affected by it are entitled, 'of common right,' to have it set aside.

The exigence of the estates of deceased persons, sometimes requires that probate of wills should be taken before there is time to serve notice upon the next of kin, because of a present necessity that some one should represent the deceased, take charge of the estate, collect debts, pay creditors, &c. For this reason a probate in 'common form,' that is, without citation to the next of kin, or others who may be interested, is allowed. This probate is valid until it is set aside, and cannot be impeached collaterally; wherein it differs from the *ex parte* probate of a deed for the purpose of registration; because the Ordinary in England, and the County Court here,

have exclusive jurisdiction of the subject matter, and the proceeding is *in rem.*

But such probate is not conclusive. To have that effect the probate must be in "solemn form;" that is, after citation, *per testes;* or under our statute, in case of a *caveat, by the verdict of a jury.* If the executor wishes to conclude the matter, he may, after probate in "common form," proceed to have citations issued and propound the will in "solemn form." Or the next of kin are entitled, of common right, to have such probate set aside, so as to give them an opportunity of contesting its validity, and having a probate *per testes*, or by the verdict of a jury. *Bell* v. *Armstrong*, 1 Addams 365, 2 Eng. Ecc. Rep. 139, *Ralston* v. *Telfair*, 1 Dev. and Bat. Rep. 482.

This right of the next of kin may be acted upon at any time, unless it be forfeited, which may be done in two ways, i. e., by acquiescence, or by unreasonable delay after notice of the former probate.

Where the next of kin knew of the existence of the will and of the executor's intention to take probate, and accepted a legacy after it was proven, he was allowed two years thereafter, "upon bringing in the legacy," to have the probate set aside and the script propounded in solemn form. Sir John Nicholl held these facts did not amount to such an acquiescence as would "bar the exercise of this common right of the next of kin," *Bell* v. *Armstrong, supra.*

Where the next of kin resided abroad, and had no notice of the will, or of the probate,until after it was taken, and then filed a bill in Equity, seeking to establish a trust of the personal estate in his favor against the executor of the will, it was held this did not amount to an acquiescence. *Ralston* v. *Telfair. Supra.*

Where a widow not only had knowledge of the probate and contents of the will, but was active in procuring both its execution and probate, so that the probate was taken *at her instance*, and she took possession, under the will, of the estate, consisting of lands, slaves, and other chattels, all of which were given to her during widowhood, and held possession for

two years, at which time she married and filed her petition to have a probate in solemn form, it was held that these facts did amount to such an acquiescence as barred her right; especially as the re-probate was asked for, not under the expectation of defeating the will, but to get an opportunity to dissent. *Armstrong* v. *Baker*, 9 Ire. 109.

Where a will was executed the day on which the testator died, and was admitted to probate in common form on the day after, and the next of kin were several in number, living at a distance from each other, and some of them were under disabilities of coverture and infancy, it was held that a delay of more than nine years was not so unreasonable as to bar their right to call for a probate in solemn form. *Gray* v. *Maer*, 3 Dev. and Bat. 47.

It is true, there is some conflict in the "general remarks" made by the Judges who delivered opinions in these cases; but the *decisions* all stand well together and settle the law, so as to show beyond doubt, that the petitioners in our case, have a right now, to call for a probate in solemn form, so as to have the validity of the alleged will passed upon by a jury —a test to which it has not before been subjected.

A marked distinction is taken where probate has passed in *common form*, and where the will has been propounded and proved in *solemn form*, *per testes*, or upon issues submitted to a jury upon a *caveat* entered by some of the persons interested, either upon citation or of their own accord. In the former, as we have seen, the next of kin are entitled, of common right, to have the probate set aside and the script propounded in solemn form. In the latter, as the script has already been proven in solemn form *per testes*, or by the verdict of a jury, one who has an interest, although he may not have been regularly made a party in the first proceeding, is not entitled, as of common right, to have the will proven in solemn form a second time, and the court will exercise a discretion in regard to his application. For instance, the former sentence will not be set aside on the petition of a legatee, or of one for whom the executor holds as trustee, because he was repre-

sented by the executor. *Redmond* v. *Collins*, 4 Dev. Rep. 430. So, where a caveat was entered by some of the next of kin, and by the father of three others who were infants, after verdict in favor of the will, the Court refused to set aside the probate upon the petition of the latter, filed seven years afterwards, although there was no citation on file for them, and their father had not been regularly appointed their guardian; but had acted *bona fide* in endeavoring to defeat the will, *McNorton* v. *Robison*, 9 Ire. Rep. 256. So, "If an executor proves the will in solemn form, against certain of the next of kin, not having cited them *all*, the others, even although uncited, if to a certain extent privy to, and aware of, the suit, shall not put the executor on proof of the will, so once already proven, a second time." *Newell* v. *Weeks*, 2 Phill. 224. These cases are all put on the ground, that the will has once been proven in solemn form. The distinction is plain, and may reconcile the general remarks above referred to. But, however that may be, the decisions, as we have said, settle the law in reference to our case.

The supposed will was executed on the same night that the testator died, and the probate was taken in common form a few days afterwards.

There is no allegation that the petitioners, or any of them, knew of the existence of the will before, or at the time of, the probate; so, the idea of acquiescence is out of the question.

An interval of more than ten years elapsed between the probate and the present application, during which time the executor, who was also the universal legatee, had possession of the estate. He died a short time before the petition was filed. The question is, does this delay, under the circumstances, operate as a forfeiture of the right of the petitioners?

There is no direct allegation on either side as to the time when the petitioners received information of the death of their kinsman, the supposed testator, the existence of the supposed will, or of the fact that probate had been taken.

It is alleged by the petitioners that two of them were non-residents at the time of the death of their kinsman, and have

been ever since. Another was beyond seas, and remained abroad until a few months before the petition was filed. Another was under coverture, and is still so. And the other was *non compos mentis* for many years before the death of her kinsman, and continued so until her death, which occurred about a year before the filing of the petition, and no administration was taken upon her estate until the time at which the petition was filed. And there is a general allegation, that they were "poor, uneducated, and have been uninformed of their rights until very recently."

The respondents make no allegation as to the time when the petitioners were informed of the death of the testator, of the existence of the will, or of the fact that probate had been taken. They content themselves by averring, that "they know nothing of the education of the petitioners, or of their condition as to estate, or their knowledge of their rights." So, the proceedings furnish no data by which to fix a date, from which the time should begin to run. Certainly, delay cannot be considered as amounting to *laches* until the petitioners are fixed with notice; and as they are entitled of common right to have the script propounded for probate in solemn form, it was for the respondents to allege and prove all the facts necessary to establish a forfeiture of this right.

But the case does not stop here. The respondents admit that two of the petitioners were non-residents, one was beyond seas, one a *feme covert*, and the other *non compos mentis*, as alleged in the petition; so that if it had been alleged and proved, that the petitioners had full notice the very day after the probate, these circumstances and disabilities are sufficient to account for, and do away with, the effect of the delay. It was not unreasonable, and does not operate as a forfeiture of their rights.

The fact that the executor and universal legatee died in the mean time, has no bearing. *Laches* may rather be attributed to him for allowing the matter to stand so long upon a probate in common form, when it was in his power to have a

probate in solemn form, if he wished to conclude the matter by giving the petitioners an opportunity of contesting it.

The counsel on both sides seem to have attached much importance to the allegations as to the execution of the will and the capacity of the testator. Much proof was taken in reference to them, which was heard in the Court below, and was read and commented on before us. It is proper to say, that the counsel have acted under a misconception in this respect. We presume it was caused by the "general remarks" above referred to, in *Armstrony* v. *Baker*, and for the sake of correcting it, have entered into a more full discussion than would otherwise have been necessary.

A moment's reflection is sufficient to show, that the Court cannot be expected to try these questions in order to see whether they should be sent to a jury for trial. As is said in *Gray* v. *Maer*, "upon the merits of the controversy we have neither formed, nor have a right to form, an opinion." It is sufficient for us to say, the petitioners are entitled to have these questions tried by a jury. In this proceeding, a consideration of them is incidental merely, the main question being, have the petitioners forfeited their right by acquiescence, or unreasonable delay? Consequently, the allegations in regard to the former, should rest simply upon the affidavit of the parties; whereas, proof should be taken in regard to facts tending to establish acquiescence or the time of notice, or the disability of the petitioners, or any allegation tending to account for the delay, if not admitted; because these matters are to be passed on by the Court.

PER CURIAM. Judgment affirmed.

NANCY MIDGETT *vs.* WILLOUGHBY McBRYDE.

The provision of the Statute, "All free base-born children of color are liable to be bound out as apprentices by the County Courts, although their pa-

rents do habitually employ their time in some honest and industrious occupation," applies only to the legitimate children of free negroes.

APPEAL from a judgment of the Superior Court of Currituck, affirming an order of the County Court of that County for binding out certain children of color. SAUNDERS, Judge.

The appellant, Nancy Midgett, is a white woman, but her two children are mulattoes begotten by a negro father. The County Court made an order that these children should be bound to the defendant, who, it appeared, was a proper person in every respect to take such charge of them.

The appellant, the mother, showed to the Court, by evidence, that for the last three years she has been living near her father, in a house built by him for her; that he has during that time taken charge of her children, and kept them diligently and industriously employed; that he is himself an honest, respectable and industrious man, well able to take care of her and her children, and willing to do so, and that she herself has, during the last three years, behaved orderly and industriously.

Upon this state of facts, it was contended by plaintiff's counsel, that the children in question did not fall within the description of those liable to be bound out by the County Court, and that, therefore, the order made by that Court was erroneous; but his Honor being of a contrary opinion, affirmed the judgment of the County Court, and ordered a *procedendo;* from which judgment plaintiff appealed.

Heath, *Pool*, and *Smith*, for plaintiff.
Jordan and *Moore*, for defendant.

PEARSON, J. The County Court, under the Statute, (Rev. Code, ch. 5, sec. 1,) has power to bind out *all* free base-born children of color, without reference to the occupation or condition of the mother. That provision of the Statute which relates to the occupation or employment of the parents is confined to cases of free negroes and mulattoes whose children are legitimate. In such cases, if the parents have no honest

or industrious occupation, the children may be bound out. These considerations do not arise when the child is a bastard.

PER CURIAM. Judgment affirmed.

WILLIAM CAROON *vs.* SANDFORD E. DOXEY.

The owner of a tract of land, who does not reside on the same, nor has cultivated, fenced, or in any wise improved any part of it, but has only used it as a range for cattle, is not entitled to a private way over the adjoining land, under the Act of Assembly, Rev. Stat. ch. 104, sec. 33.

APPEAL from the Superior Court of Currituck.

This was a petition for a private way, heard before his Honor Judge SAUNDERS, at the Fall Term, 1855. The petitioner alleges that he is "settled upon, using and possessed of a tract of land in said State and County, adjoining the lands of the defendant and others, and that there is no public road leading to the same, and no way to go to or from the same, without crossing the lands of others." He, therefore prays the Court for an order for a private way over the lands of the defendant, to the public road. The defendant, being duly notified, appeared and opposed the granting of the order, and the case having come up to the Superior Court by appeal of plaintiff, it appeared by the evidence that the petitioner had no way to get to or from the land in question, except by crossing the lands of other persons. That there was no public road leading to or from the same. That the land was granted to him in 1853, and he has had his cattle upon the same. That it is swamp land, not fenced or cultivated on any part of it, and that there is no improvement upon it; also, that the cattle of other persons in the neighborhood, commonly resorted to the same as a range. Upon this state of facts his Honor was of opinion against the application and dismissed the petition, and the plaintiff appealed.

Pool, for the plaintiff.
Jordan, for the defendant.

PEARSON, J. The allegation that the petitioner "is settled upon the land," brings the case within the words of the Statute, but unfortunately for the petitioner, this allegation is not sustained by the proof. It is a tract of swamp land, and the petitioner has his cattle upon it; but there is no fence around it, and it is a range for the cattle of other persons as well as those of the petitioner. He does not live upon it or cultivate any part of it, or use it except as a range for his cattle. This does not sustain the allegation that he is "settled upon it." As is said in *Lea* v. *Johnston*, 9 Ire. Rep. 15, "the case, therefore, does not come within the words of the Act, and if we depart from the words, there is no stopping short of an unlimited discretion, by which the land of one man may be taken for the use of another. To authorise this, there should be a plain expression of the legislative will. In the absence of such provision, individuals must be left to depend upon the courtesy of good neighborship or the acquisition, by grant, of the right of private ways."

The doctrine of a right of way of *necessity*, as laid down in *Hetfield* v. *Baum*, 13 Ire. 395, is not applicable to this case. There is no error.

PER CURIAM. Judgment affirmed.

THOMAS JONES *vs.* TIMOTHY WARD.

The notes of an attorney, taken on the trial of a cause, which he swears are correct, may be read on a subsequent trial of the same cause, as evidence of what a witness, since dead, swore on the former trial, although the attorney taking the notes, professes to have no recollection of such evidence independently of his notes.

ACTION on the CASE, tried before his Honor Judge CALDWELL, at the Fall Term, 1855, of Martin Superior Court.

The action was brought for the recovery of a quantity of shingles, and the only question brought to this Court is, whether the testimony of a deceased witness, given on a former trial of the same suit, could be proved by the notes of one of the attorneys in the cause? *Mr. Hawks*, the attorney mentioned, deposed that he took notes of the testimony of the deceased witness *Page*, on the former trial of the cause, and that those notes contain the substance of the testimony of that witness on the trial referred to. He said he had "no recollection of the testimony of the deceased witness, other than that furnished by his notes." He said "he did not take down every word, but what he did take down was correct, and it contained the substance of all that was stated by the witness for the plaintiff and for the defendant."

This testimony was objected to by the defendant, but was received by the Court, and the defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

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

BATTLE, J. The precise question which is presented in this case, has not, we believe, been heretofore decided in this State. In the case of *Ballenger* v. *Barnes*, 3 Dev. Rep. 460, it was held that the testimony given by a witness, on a former trial between the same parties, who has since died, might be proved by any person who heard it, and could state its *substance*, and not merely its *effect*. The same rule was adverted to by GASTON, Judge, *arguendo* in *Ingram* v. *Watkins*, 1 Dev. & Bat. Rep. 444. Whether a witness who had taken full notes of the testimony given on the former trial would be permitted to state from them what the deceased witness had sworn, does not appear from either of these cases. The report of the former shows that the witness had taken notes, and that he produced them, but it does not set forth what use he made of them. In the absence of the authority of any decided case to settle the practice here, we must resort for guides, to the

established principles of evidence, and to the adjudications of the country whence our common law is derived.

In attempting to supply the loss of the testimony of a deceased witness, the secondary evidence ought, manifestly, to be as full, and as nearly the same as that for which it is offered as a substitute, as possible. The very words which the deceased witness spoke would be the best, and were formerly supposed to be necessary, see *King* v. *Joliffe*, 4 Term Rep. 290; but that strictness, having made the rule impracticable, has long since been abandoned. The secondary witness may now give the *substance*, but not the mere *effect*, of the former testimony. To allow him to state the latter only, would be to permit him to decide upon the effect of the testimony, instead of submitting it to the jury to whom it properly belongs. But suppose that the witness took full notes of the former testimony, and is willing to swear that they contain the substance of every thing testified by the deceased witness, because he is certain they were correctly taken, though he cannot recollect the testimony independently of them; what principle is there to prevent his giving his statement from them? His recollection of the testimony at a subsequent time, cannot be more perfect than it was when such testimony was given. He may remember distinctly that he took down on his note-book the substance of all that was said, and yet have ceased to be able to recall it to his memory; just as he might remember that he had copied a written instrument correctly, without being able afterwards to state the words, or even the substance of the instrument. He would undoubtedly be permitted to prove the copy of the writing by swearing that it had been truly and correctly taken; and we can see no reason why his notes may not be admitted as a copy, so to speak, of the substance of the words employed by the deceased witness. It is true that the notes would not of themselves be evidence, whether the person who took them were living or dead, because the Court would not have the sanction of an oath that they were taken correctly. The case is very different where the taker is present, swearing to their

correctness, and, as a test thereof, submitting himself to the cross-examination of the opposite party. This appears to be the rule in England. In the *Mayor of Doncaster* v. *Day*, 3 Taunt. Rep. 362, MANSFIELD, C. J., said, "What a witness, since dead, has sworn upon a trial between the same parties, may be given in evidence either from the Judge's notes, or from *notes that have been taken by any other person who will swear to their accuracy;* or the former evidence may be proved by any person who will swear, from his memory, to its having been given." The clause which we have marked in italics seems to us to be directly in point, particularly as it is stated as an alternative to the testimony of a witness who swears from his memory. What the rule is in the different States of the Union, it is difficult to ascertain, as any one may see by referring to the numerous cases collected by *Cowen* and *Hill*, in their notes to *Philips on Evidence*, vol. 2, note 442.

We are aware that the rule is liable to abuse, but we know of none upon the subject which is less so; and as we believe that its operation is generally beneficial, we approve it.

PER CURIAM. Judgment affirmed.

CHARLES LATHAM, TRUSTEE, *vs.* S. S. SIMMONS.

The purchaser of firm-goods at a sheriff's sale, under an execution against one of two individuals composing a firm, constitutes him a tenant in common, of the goods, with the other member, and of course, with the trustee or assignee of the firm. But if such purchaser take all the goods away, and sell them, the trustee may have assumpsit for the part of the money arising from the sale, to which he is equitably entitled.

ACTION OF ASSUMPSIT, tried before his Honor Judge SAUNDERS, at the last Superior Court of Washington County.

The following facts were submitted to his Honor as a case agreed: The plaintiff is trustee, under a deed in trust, execu-

ted by Pender & Carstarphin, partners in the business of merchandising. Prior to the execution and registration of this deed, the defendant recovered judgment against Carstarphin, upon which an execution was issued, and was levied by directions of defendant, on Carstarphin's interest in a stock of goods belonging to Pender & Carstarphin. The goods were, under this authority, sold by the sheriff, and defendant becoming the purchaser, took the whole into his possession, and afterwards made sale of them, and appropriated the proceeds of the same to his own use. Pender & Carstarphin were insolvent, and largely indebted on partnership account. The judgment against Carstarphin, was upon an accommodation endorsement by Pender & Carstarphin, on which Carstarphin alone was sued, and Pender was not named in the execution. The deed in trust was *bona fide*, and executed upon a valuable consideration.

It is further agreed, if his Honor shall be of opinion with the plaintiff, that he shall have judgment for the sum of $295, with interest from 29th January, 1855.

Upon consideration of the facts, his Honor being of opinion with the plaintiff, gave judgment according to the case agreed, and defendant appealed.

Winston, Jr., for plaintiff.
J. H. Bryan, for defendant.

NASH, C. J. The doctrine of the liability of the goods of a firm, to be taken in execution to pay the individual debts of a member of the firm, is now fully established in this State; that an execution against one of the members may be levied on the goods by a sheriff, and that it is his duty to seize them and to sell the interest, which the defendant, in the execution has in them. Nor can any action at law be maintained, either against the officer for seizing and selling, or against the purchaser for taking possession of them. *Tredwell* v. *Rascoe*, 3 Dev. 50; *Blevins* v. *Baker*, 11 Ire. 291; *Price* v. *Hunt*, 11 Ire. 42; *McPherson* v. *Pemberton*,

1 Jones 378; *Vann* v. *Hussey*, 1 Jones 381. Such also is the law of England, *Parker* v. *Pistor*, 3 Bos. and Pul. 288. Collier on Partnership, 474.

These authorities also establish the principle, that when the goods of a firm are sold under an execution, to satisfy an individual debt of a member of the firm, "the vendee of the sheriff becomes tenant in common with the other copartners," *Pope* v. *Haman*, Comb. Rep. 217. In the case before us, Pender and Carstarphin were copartners in trade. An action was brought against the latter for his individual debt, by the present defendant; a judgment obtained, and an execution levied upon the stock of goods of the firm. At the sale, the defendant became the purchaser of the whole, took them into possession, sold them, and appropriated the proceeds to his own use. After the rendition of the judgment, and the test of the execution, the partners conveyed the whole of their stock in trade to the plaintiff, in trust, to pay the debts of the firm. The legal title to the goods passed to the plaintiff, subject to the execution lien. Upon the sale and purchase by the defendant, of the goods, he became tenant in common of them with the plaintiff. One tenant in common cannot, in general, bring an action against his co-tenant for the possession; each being equally entitled to it. But where one tenant in common of a personal chattel sells it, and thereby converts it into money, the joint interest is destroyed, and each has a separate interest for a sum certain, and may support an action for money had and received. Willes' Rep. 209, 8 Term, Rep. 146; *Selden* v. *Hickirk*, 2 Caines' Rep. 166; 1 Chit. on Plea. 45.

There might have been some difficulty, as this is a partnership concern, in ascertaining to what amount the plaintiff was entitled; but the difficulty is removed by the parties themselves. In the case agreed, it is stated, that if the plaintiff can maintain his action, he is entitled to recover the sum of $295, with interest from 29th Jan., 1855; for which sum, his Honor gave judgment. The only question referred to this

Court is, whether the plaintiff can maintain his action. We are of opinion that he can.

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

BURBANK & WILLIAMS *vs.* WOOD.

Where a vendee, in due time demanded an article contracted to be delivered, and says, "I have the money here with me to pay for it," and is able to prove that he had some money, but none was produced, and nothing further is said about the money, as the vendor refused to deliver the article, and denied the vendee's right to it; *Held* that there was some evidence of the vendee's readiness to pay, and that it was not error in the Court below to leave the question, upon these facts, to the jury.

ACTION OF ASSUMPSIT, tried before PERSON, Judge, at the Fall Term, 1855, of Wayne Superior Court.

The plaintiffs declared for the non-delivery of 600 barrels of corn according to the terms of the following contract between them. The corn was to be delivered on board of a boat on Neuse River, for which plaintiffs were to pay $2.75 per bbl. There was no time fixed for the delivery of the corn, but it was to be done when either party could get one of the boats plying on the river to stop for it. A boat was procured by the defendant, who proceeded to load and send it to New-Berne. While the boat was still at the river shore, receiving the corn, one of the plaintiffs, Williams, went to the defendant and demanded the corn; but the defendant declined letting him have it, saying, that he had not come according to the contract, and he had made other arrangements. He admitted that Williams said, when he demanded the corn, that he had the money to pay for it. He further said, that some of the neighbors informed him, he (Williams) had some money and a check, but that he did not show him any.

The defendant's counsel insisted that plaintiff was bound to show that he was able to perform his part of the contract at the time of the demand and refusal; i. e., that he had the money wherewith to pay, if the corn had been delivered, and insisted that there was no evidence of that fact at all, and therefore, the question ought not to be left to the jury. But his Honor being of a different opinion, left the question of fact to the jury, for which the defendant excepted.

Verdict for the plaintiffs. Judgment and appeal by the defendant.

W. A. Wright, for plaintiffs.
J. H. Bryan, for defendant.

NASH, C. J. The action is on a special contract for the sale and delivery of corn. In the argument of the case below, it was contended on behalf of the defendant, that although a demand was made, and a willingness to pay for the corn expressed by the plaintiff, yet he could not recover, unless there was a *present ability* to pay on delivery; and the Court was requested to charge the jury that there was no evidence of such ability. The only question presented to our consideration is, whether there was any evidence upon that point. There is no fault found with the charge upon any other point, for it was in exact accordance with the ground of defence assumed. This case differs materially from those of *Grandy* v. *McCleese*, 2 Jones' Rep. 142, and *Grandy* v. *Small*, decided at this term (ante 8.) In each of those cases the present inability to pay at the time of the demand, was admitted. Was there, then, any evidence in this case to go to the jury upon that question? Where there is no evidence upon a particular fact, the jury should be so told by the court, and it is error if the fact is submitted to them. The case states, that the defendant admitted that Williams, one of the plaintiffs, when he demanded the corn, said he had the money, and was ready to pay for it; but that defendant refused to deliver it, saying he had made other ar-

rangements. It was also shown, that Williams had some money, but what amount does not appear.

The defendant admits then, that Williams had some money at the time of the demand, and that he declared he was prepared to pay for the corn. This, surely, was some evidence of the fact. It is said that Williams ought to have produced the money to enable the defendant to see that he was prepared to pay for the corn. This would have been plenary proof of the fact. We are enquiring whether there was any evidence to go to the jury upon the point.

But again, it may be asked, *cui bono*—to what purpose produce the money, when the defendant declared he would not deliver the corn or receive the money? The defense has likened the case to that of a plea of tender and refusal. The analogy does not exist. There is a material difference between an averment in a declaration, of a readiness to perform a condition precedent and a plea of tender. In the former case, it is not necessary to aver an actual tender of the money: an averment of readiness is sufficient. 7 *Taunt.* 314, 1 Chit. on Pleading, 319. A plea of tender must be accompanied with *uncore pres;* the money must be produced and brought into court. Any legal evidence which can warrant the jury in inferring the fact in question, is properly left to them. Here the plaintiff demanded the corn at the proper time, and Williams tells the defendant he is ready to pay for it. The defendant's reply is, "I will not deliver the corn, because I have made a different disposition of it." He does not question the present ability of Williams to pay. Surely, these were facts having some tendency to support the plaintiffs' allegation in his declaration, of his present ability. All the plaintiffs were called on to do, was, to produce such evidence as would satisfy the jury, of their ability to pay for the corn on its delivery.

PER CURIAM. There is no error in the judgment of the Court below, which is affirmed.

RULE & HALL *vs.* JOHN T. COUNCIL.

Where a party in a suit is guilty of *laches*, in failing to enter a defense to the note sued on, which he alleges to be a forgery, and in failing to attend the County Court, in which the judgment is taken, and to take an appeal, he is not entitled to have the case brought to the Superior Court by *certiorari*.

PETITION for a CERTIORARI, from Cumberland Superior Court.

Upon the facts set forth in the petition, writs of *certiorari* and *supersedeas* had been issued in vacation, directed to the County Court of Cumberland, and to the sheriff of Bladen, and on being returned at Fall Term last, his Honor Judge ELLIS presiding, a motion was made to place the cause on the trial docket, to be tried *de novo*, which was met on the other side, by a motion to dismiss the petition, on the ground, that there was no sufficient cause set out for this extraordinary interference with the course of the Court. The facts as set forth in the petition, are as follows: Rule & Hall, who are merchants, living in the city of New York, obtained a judgment against the petitioner, in the County Court of Cumberland, for about $480, with interest, and took out execution thereon, which was placed in the hands of the sheriff of Bladen, in which county petitioner lived. The judgment was founded on a note purporting to be signed by "John T. Council, by Council, Cain & Co." Previously to March Term of Cumberland County Court, several writs were served upon this petitioner, as a member of the firm of Council, Cain & Co. of Fayetteville, to which he gave bail for his appearance at the return term, and wrote to Mr. Banks, an attorney practicing in the court, "to enter dilatory pleas in the cases where he, Council, was concerned." In pursuance of this instruction, Mr. Banks entered pleas not affecting the cause of action, commonly called *dilatory pleas*, in all the cases against the defendant returned to that term of the court, including that of Rule & Hall; and final judgments were entered in all of them at the next term of the Court. He sets forth further, in his petition, that he never purchased goods, or had any dealings with the plaintiffs, Rule & Hall; never made, or authorised any one

else to make, a contract for him with the firm of Rule & Hall, or with either of them, and never signed the note upon which judgment was obtained, and never gave authority to any firm or individual to sign it for him. He denies all knowledge of the transaction, and "declares that he never knew or suspected he was sued individually, until the sheriff of Bladen came to him with the execution. He declares his willingness and ability to pay all the judgments obtained against the firm of Council, Cain & Co., although he is only a silent partner; but in relation to this debt, he says, he does not owe it; never did owe it, nor does the firm of Council, Cain & Co. owe it; and he adds, that said firm did not sign his name to the note in question, or deliver the same to plaintiffs, and that the members of that firm know nothing concerning it."

Upon considering the facts set forth in the petition, his Honor, being of opinion that there was not sufficient matter therein to authorise the *certiorari*, refused the motion to put it on the trial docket, and ordered the petition to be dismissed. From which judgment, the petitioner, Council, appealed to this Court.

Shepherd, for plaintiffs.
Banks and *McDugald*, for defendant.

NASH, C. J. *Vigilantibus non dormientibus servat lex*, is an old and valuable maxim of the law. For almost any supposable grievance or wrong, the law has provided a remedy. But this remedy must be availed of in proper time, and in an apt manner. Men must take care of themselves. If they will not, they must take the consequences. The defendant was a member of a mercantile firm doing business in Fayetteville. He lived in the County of Bladen, and says in his petition that he was a sleeping partner. Truly he was a sleeping partner!

The firm became embarrassed, and the defendant being sued in several cases as a member of the firm, instructed an attorney of the Court to which the writs were returnable, "to en-

ter dilatory pleas in the cases where he, Council, was concerned." The plaintiffs were merchants of New York, and creditors of the firm of Council, Cain and Co., and brought their action on a note to which the name of the present defendant purports to have been signed by Council Cain & Co. When, therefore, the writ was returned, the attorney, obeying strictly his instruction, entered dilatory pleas alone. March Term of Cumberland County Court was the return Term of the writ, and judgment upon the note was rendered at June Term following. The defendant denies that he ever signed the note, (that is evident from the face of the note)—and that *he* ever authorised any person to sign it for him; and that he was told by the other members of the firm that they never signed his name to it, and knew nothing of the note—in other words, that the note was a forgery out and out. Whether he authorised the firm to sign his name is not material. If the note was given for a firm debt, the firm had a right to bind him for its payment, by an instrument not under seal. But this is beside the mark. The defense now set up by the defendant was open to him at the return of the writ. He did not avail himself of it by a proper plea entered at the proper time. This case is much stronger against the defendant, the petitioner, than that of *Baker* v. *Halstead*, Bus. Rep. 41. There, the petitioner had entrusted one Lake, one of the defendants, who was also on the paper, to enter his pleas for him. This he failed to do, and judgment was rendered against him. The *recordari* was dismissed, upon the ground that the petitioner was guilty of *laches* in not attending to his own business. There, he gave directions to an agent to have a full defense made. Here, the agent received instructions to enter only dilatory pleas. There, the agent proved faithless. Here, he obeyed the instruction received.

In the argument, it was insisted that the defendant did not know where to go to get information as to the nature of the instrument upon which he was sued, as the plaintiffs lived in New York, and he in Bladen county, some distance from Fayetteville. If the plaintiffs did live in New York, he must

have known that the note was in this State; and by an application to his own counsel, he could easily have found out who was the attorney of the plaintiffs. The writ informed him he was sued alone. It was returnable to March Term when the pleas were entered, and judgment was entered at June Term. Here was a period of three months, during which he makes not the slightest effort to ascertain the nature of the claim against him. The petitioner admits his knowledge of his legal responsibility for the firm debts, but does not state whether the note in question was, or was not, given for such a debt, or whether, if it was not, the goods purchased ever came into the firm. Indeed he puts his whole claim to the relief he seeks, upon the ground that the note is a forgery, out and out. Be this as it may, he had the right to bring that question before the proper Court. He failed to do so, and must abide the consequences of his own negligence. In this case the defendant was entitled to an appeal to the Superior Court. He was absent from Court when the cause was tried, from no inability to attend, and made no application for an appeal. Where the law provides a particular mode, by which a cause may be removed from an inferior, to a higher tribunal, that mode must be pursued. Where the proceedings of the Court are according to the course of the common law, if the party has been denied this privilege by the Court, or he has been deprived of it by fraud or accident, or is unable at the time to comply with the requirements of the law, he may procure a *certiorari*. The petitioner has not placed himself on any of these grounds, *Brigman* v. *Jervis*, 8 Ire. Rep. 45I, *Satchwell* v. *Rispess*, 10 Ire. Rep. 365.

In the Superior Court, the petition for the *certiorari*, on motion, was dismissed, and a *procedendo* to the County Court of Cumberland ordered. In this judgment there was no error and it is affirmed.

PER CURIAM. Judgment affirmed.

PATRICK MURPHY *vs.* MARY MERRITT.

A provision in a deed of gift of slaves, "reserving unto myself and to my wife M., the use of the said granted negroes, during the term of our natural lives," does not reserve an estate during the *joint* lives of the donor and his wife, but gives it to the husband for life, then to the wife for life, and then to the ulterior donee; such donee, therefore, is not entitled to the property until both these lives are extinct.

ACTION of DETINUE, tried before ELLIS, Judge, at the Fall Term, 1855, of Sampson Superior Court.

The action is brought by the Administrator of the donee, Catharine Merritt, to recover the slaves mentioned in the following deed of gift, viz:

"Know all men, that I, Daniel Merritt, of the State of North Carolina and county of Sampson, for and in consideration of the natural love and affection which I have and bear unto my grand-daughter Catharine Merritt, daughter of Bradley Merritt, of the same state and county, and divers other good causes me hereunto moving, and more especially for the better promotion and maintenance of my said grand-daughter, have given, granted, aliened, and conveyed, made over, and confirmed, and by these presents, do give, grant, convey, make over, and confirm, unto her the said Catharine Merritt, her heirs and assigns forever, my two little negroes, William and Kitty; William, aged between two and three years; Kitty about six or seven months—to have and to hold the aforesaid negroes, unto the said Catharine Merritt, her executors, administrators, and assigns forever; and I, the said Daniel Merritt, do hereby warrant and forever defend the aforesaid granted negroes, unto her the said Catharine Merritt, her heirs, executors, administrators, and assigns, from and against me, the said Daniel Merritt, my heirs, executors, administrators, and assigns; also from and against the lawful claim or claims of all and every person, or persons whatsoever, reserving nevertheless unto myself, and to my wife Mary, the use of the said granted negroes during the term of our natural

lives. In witness, I, the said Daniel Merritt, have hereunto set my hand and seal, this 10th day of February, 1839."

The donor, Daniel Merritt, was dead at the time of the bringing of this suit, and the defendant is his widow, the said Mary, mentioned in the above deed. Catharine Merritt married one Oliver Sellers, and was also dead when this suit was brought, and the plaintiff is her administrator. The plaintiff also gave in evidence a bill of sale from Oliver Sellers to him for the said negroes.

It was contended in behalf of the defendant on the trial, that the deed reserved a life estate to her; but if this reservation was not good, yet the said Catharine took no estate until after the death of the defendant Mary. His Honor intimating an opinion that the plaintiff could not recover, he took a non-suit and appealed to this Court.

Reid, for plaintiff.
Shepherd, for defendant.

PEARSON, J. We concur with his Honor in the opinion, that according to the proper construction of the reservation, the plaintiff, who claims under the donee, is not entitled to the slaves until after the death of the defendant Mary, the wife of the donor. The reservation is, not of an estate during the *joint* lives of the donor and his wife, but an estate is reserved to the donor and his wife; so that they are to have the use, that is, the enjoyment of the slaves, as property, during the term of "our natural lives," meaning the natural life of both himself and his wife. This is clear.

PER CURIAM. Judgment affirmed.

RICHARD PARISH, ADM'R. *vs.* MARY MERRITT.

In a deed of gift of slaves from a grand-father to his grand-child, after the granting clause, occurs the following, viz: "reserving nevertheless, unto myself and unto my wife M., the use of the said granted negroes during

the term of our natural lives," *Held* that the legal effect of the instrument was to vest an estate in the grantor for his life, then in his wife for her life, and then in the grand-daughter.

THIS was an action of DETINUE, tried before his Honor Judge ELLIS, at the Fall Term, 1855, of Sampson Superior Court.

The questions presented in this case arise upon the construction of the deed of gift from Daniel Merritt to Catharine Merritt, which is set out at length in the case preceding this, against the same defendant. The suit is brought by the administrator of the donor against the widow of the donor to compel her to surrender the slaves.

It was contended on behalf of the plaintiff, that the reservation of the life estate to the wife, was a reservation to himself of the property, for her life, and that he having died leaving her surviving, the interest thus reserved belongs to him as the administrator of the said Daniel, and that the wife could take nothing. His Honor being of that opinion, so instructed the jury, who, accordingly, found a verdict for the plaintiff. Judgment and appeal.

Reid, for plaintiff.
Shepherd, for defendant.

PEARSON, J. The estates reserved to the donor and *his wife* are "good and effectual in law," by force of the Act of 1823, Rev. Stat. ch. 37, sec. 22. So, our question is one of *construction:* what estate vested in the wife according to the legal effect of the deed?

We think it clear that the intention of the donor was to make a substantive gift to his wife, and the introduction of her name was not intended as a word of limitation, but to designate *her* as one of the objects of bounty, and to give her the ownership of the slaves during her life-time; which gift or bounty, of course, would not take effect unless she survived her husband.

We have, then, this case: a life estate is reserved to the husband, then to the wife (if she survives him) with limitation

over. The husband dies, and his administrator sues for the slaves.

For the plaintiff it is urged: if a gift is made to a wife for life, the husband takes *jure mariti*, although the husband be the donor, and the legal effect is to defeat the gift.

Such is the law, and hence the necessity for interposing a trustee where a *present* estate is given to the wife. See *Garner* v. *Garner*, Bus. Eq. 1.

For the defendant it is urged: by the true construction and legal effect of the deed, the wife does not take a present estate; her estate *does not vest in possession* until after the estate of the husband terminates—that is, at his death; so the wife had no such estate as the husband could reduce into possession during coverture; consequently the doctrine of *jus mariti* has no application.

It is settled, a husband is not entitled to a remainder or reversionary interest of the wife, unless the *particular estate* determines in the life-time of the husband, *McBride* v. *Choate*, 2 Ire. Eq. 610. Here the suit is in the name of the personal representative of the husband; consequently all the learning in regard to the effect of an assignment by him, or a sale under an execution against him, has no bearing, and the only question is, does *the deed*, by its legal effect, give the husband an estate for his life?

In regard to this, the words are plain, for, as we hold in Murphy v. same defendant, decided at this term, (ante 37) in construing the same deed, it evidently was not the intention to reserve an estate during the joint lives of the husband and wife, so as to vest the property in the grand-child, *at the death of thedonor*. Clearly, it was *then* to belong to his wife.

The legal effect of the deed vested an estate in the husband for his life, *then* to the wife for her life, and then to the grand-child.

We do not concur with his Honor. *Venire de novo.*

PER CURIAM. Judgment reversed.

EDMOND WHITE *vs.* JOHN STANTON AND WIFE.

The jurisdiction of the Supreme Court, in relation to amendments in the Courts below, is confined to the question of *power*. Where the Court below has the power to make an amendment, this Court cannot inquire how it has exercised that power. This Court will not interfere with, or question, the right of a County Court to amend a *sci. fa.* against heirs-at-law, to subject land to the satisfaction of a judgment against the Administrator, so as to recite the judgment and execution more fully. *Green* v. *Cole*, 13 Ire. Rep. 425. *Campbell* v. *Barnhill*, 1 Jones' Rep. 557, and *Pendleton* v. *Pendleton*, 2 Jones' Rep. 136, (cited and approved.)

APPEAL from a judgment of the Superior Court of Perquimons County, affirming an order of the County Court of that county, allowing an amendment of a *scire facias* issued from a former term, SAUNDERS J., presiding.

The amendment proposed to be made, was of a *scire facias* to the heir-at-law of one Chalkley Evans, to show cause why a certain judgment in favor of one Nathan Elliott's administrator, against the executor of Chalkley Evans, should not be satisfied out of the lands descended, and why the execution should not go against the same. The land of the heirs had been sold under a judgment upon this *sci. fa.*, and the plaintiff was the purchaser. The *sci. fa.* was correct, except that the cause was set forth as follows: "then and there to show cause, if any, why Nathan Elliott's administrator shan't have his judgment in a certain matter of controversy in said court depending, and then and there to be tried, wherein—rendered to him against the lands of the deceased, in the hands of said heir for $8.67½ besides interest and cost."

The amendment proposed to be made is, to substitute as follows:—"then and there to show cause, if any, why Nathan Elliott's administrator shall not have execution against the lands and tenements of the said Chalkley Evans, in the hands of the said Margaret Evans, on a certain judgment heretofore to wit, at August Term last of said court, recovered by the said Nathan Elliott's administrator against the said Chalkley Evans' executor for $8.67½ his debt, $2.56 his damages and

interest on said debt, &c., of which he is convict as appears to us of record."

The amendment was allowed in the County Court, and thereupon William Stanton and his wife Margaret, (the abovementioned Margaret Evans,) prayed an appeal to the Superior Court, which was allowed, and in that court the judgment of the County Court was affirmed, whereupon the said William Stanton and wife appealed to this court.

Jordan and *Smith*, for plaintiff.
Hines, for defendants.

BATTLE, J. The judgment of the Superior Court is sustained fully by the recent cases of *Green* v. *Cole*, 13 Ire. Rep. 425. *Campbell* v. *Barnhill*, 1 Jones' Rep. 557, and *Pendleton* v. *Pendleton*, 2 Jones' Rep. 135, where the subject is sufficiently discussed and explained. It only remains for us to say, therefore, that the judgment is affirmed.

PER CURIAM. Judgment affirmed.

DOE *on dem.* GEORGE SPRUILL *et al. vs.* JOSHUA DAVENPORT.

A sale of land by a guardian, under an order of a County Court, which was made without ascertaining that there were debts against the ward, which made the sale necessary, and which did not designate with certainty the land intended to be sold, is void, and no title passes.

ACTION of EJECTMENT, tried before his Honor Judge DICK, at the Fall Term, 1854, of Washington Superior Court, on the following

CASE AGREED.

Aaron Spruill died seised in fee of the land described in the declaration, leaving seven children, his heirs-at-law, upon whom the lands descended, and two of whom are the plaintiff's lessors. The defendant was in possession at the service of the declaration.

The defendant claims title as follows: At February Term, 1833, of the County Court of Washington, Alexander H. Davenport, who had been appointed guardian to the lessors of the plaintiff, who were infants, filed a petition in writing to the said court, of which the following is a copy: "The petition of Alexander H. Davenport, guardian to Zepeniah, Henry, Eunice, Evan Horace, Andrew Burton, George, and Nancy Spruill, infant heirs of Aaron Spruill, dec'd., represents to your worships that there are claims against his said wards to the amount of $400, or thereabouts, and that they have no personal property liable to the said claims, but are seised of about 600 or 700 acres of land liable thereto. Your petitioner therefore prays your worships that you will, agreeable to law in such cases made and provided, grant him an order to sell one hundred acres of said land, adjoining the lands of Elias Oliver's heirs, and your petitioner, and others, it being the east part of said tract of 600 or 700 acres, more or less, sufficient to satisfy the claims against his said wards."

At February Term, 1833, this entry was made: "Prayer of the petition granted; sale to take place at Cool Spring; the guardian giving notice at three public places and court house door, and take bond and security, at a credit of six months." The guardian, on 27th of March, 1833, sold the land in question to Jos. W. Tarkington, for $161,66, at public sale, and executed to him a deed. At May Term of the County Court, the cause was continued. At August Term, 1833, is this entry, "Report made and confirmed." Tarkington afterwards conveyed the premises to Alexander H. Davenport, the guardian, under whom the defendant claims as heir-at-law.

There were outstanding, at the filing of the petition, against R. B. Davis, the administrator of Aaron Spruill, a judgment in favor of W. A. Dickson for $99,83, with interest from 26th of September, 1832, on which $52 had been paid by the administrator on 16th of November, 1832, also, a judgment in favor of John Peck for $12,20, with interest from January, 1826, amounting to $17,32, also, a judgment

in favor of W. C. Warren for $9 and costs. There were no assets, to pay these judgments, in the hands of the administrator, which was found by a jury at February Term, 1833, and a *sci. fa.* ordered against the heirs-at-law to May Term, 1833.

It is agreed that if the sale of the guardian passed the title to the purchaser, the plaintiff shall be nonsuited; if not, he shall recover his term and sixpence damages.

His Honor, being of opinion with the defendant, gave judgment accordingly, from which the plaintiffs appealed to the Supreme Court.

Winston, Jr., and *Smith*, for the plaintiff.
Heath and *Hines*, for defendant.

BATTLE, J. We cannot distinguish this case from that of *Leary* v. *Fletcher*, 1 Ire. Rep. 259. The principle there decided, and which was sanctioned subsequently in the case of *Ducket* v. *Skinner*, 11 Ire. Rep. 431, was, that the 11th section of 63d chapter of the Revised Statutes, taken from the Act of 1789, (ch. 311, sec. 5, of the Revised Code of 1820,) "does not confer on the court a *general power* to make orders of sale, but confers a power limited in its terms, and restricted in its objects, to make orders to sell designated parts of an orphan's estate, to pay ascertained debts against such an estate." "It is obvious," say the court, "that the Legislature intended, and therefore we hold that the Legislature required, that the judgment of the court should be exercised in deciding whether there were any debt or demand against the estate of the ward, to render a sale of his property expedient; and if so, then in selecting the part or parts of his property, which could be disposed of with least injury to the ward." It is manifest, that, in the cas before us, the county court no more exercised its judgment in ascertaining that there were debts against the estate of the ward, than was done in *Leary* v. *Fletcher*. Nor is the land ordered to be sold, designated with sufficient certainty; one hundred acres *more or less*,

without any definite boundaries, is a description giving a greater latitude to the guardian than was intended by the Legislature.

Upon the whole, then, we may say, that the order, if valid, "authorises the guardian to sell any part he pleases of the ward's land, which he may deem necessary for the payment of debts against the father's estate. The court, instead of exercising its own discretion on the subjects, whereon the Legislature required it to act, has undertaken to delegate that discretion to the guardian. This cannot legally be done; *delegatus non potest delegare.*"

The judgment below must be reversed, and according to the case agreed, a judgment must be entered in favor of the plaintiff for sixpence damages.

PER CURIAM. Judgment reversed.

JACOB BROCK *vs.* REUBEN KING.

Where a jailor received a runaway slave without a warrant of commitment, and without chaining him, locked him up in a dungeon in the common jail of the county, appropriated for slaves and criminals, from which no person had ever escaped, though the jail generally was very insecure, and such runaway escaped by breaking the door and by making a hole in the wall of the prison; *Held*, in an action at common law, that such jailor acted with due care, and was not liable for the escape.

The question of diligence and care in the relation of bailor and bailee, is one of Law, and ought not to be left to the jury. But if it is left to the jury, and it appears to this court that they decided correctly, it is not sufficient ground for a *venire de novo.*

ACTION on the CASE for an escape of a runaway slave, tried before his Honor, Judge SAUNDERS, at Fall Term, 1855, of Robeson Superior Court.

This case was before the court at the June Term, 1855, (2 Jones' Rep. 302,) and a *venire de novo* having been awarded, on this trial plaintiff declared for a breach of the contract of

bailment at common law. He showed that he was the owner of the slave, George, in question; that he escaped from on board a steamboat 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 that county.

It was further 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 his death.

It was further proved, that the jail was, at the time the slave was committed, in such condition, that prisoners had repeatedly escaped, both before and after the commitment of the slave; that he did escape in a few days after he was put in, and that this insecurity was known to the defendant. The next morning after the escape, the door of one of the cells was found to have been forced. An opening had been made through the wall of the jail by means of an iron spike or other piece of iron; the slave had gone out through it, and by means of blankets tied together, he had let himself down from the upper passage of the jail. The cell in which the slave had been confined was a dungeon, set apart for the confinement of slaves; it was in the upper part of the jail, and George had been put in there by himself; it had two doors in the same frame, one of oak and the other of iron. There was no evidence that the slave was chained, or any other means used to secure his safe keeping, than shutting him up in the prison; nor was there any evidence that any prisoner had ever escaped from this particular room, or that this room was less secure than any other in the prison. It was proven that the defendant, as jailor, was in the habit of receiving pay for keeping runaways. The value of the slave was $700.

The plaintiff's counsel asked his Honor to charge the jury, that the defendant did not use due care in keeping the runaway.

The court charged the jury, that as the slave had not been

committed as a runaway, under the statute, the defendant, as sheriff, was not bound to receive him; but, having done so, he was bound for his safe keeping. At the time he was delivered to defendant, nothing was said as to how he should be kept, nor as to pay. The manner of keeping him was left to defendant's discretion, and the law would give him for such service, what was just. The defendant, therefore, was a bailee for reward, and was bound to take such care for the safe keeping of the slave, as a prudent man would have taken for the safe keeping of his own property, and to have exercised reasonable diligence and care. Plaintiff says such was the state and condition of the jail, that defendant ought to have chained the slave, in order to his security. Defendant says the slave was a mere runaway, not charged with any crime, and his confinement in the common jail of the county, was such care as he had a right to suppose would insure his safety. The court said he would leave it to the jury, as a question of fact, to pass on the condition of the jail. If they should find it so very insecure, as to render the chaining of the slave necessary and proper, under the circumstances, for his safe keeping, and common prudence would have suggested such a course, their verdict should be for the plaintiff. But if they should find such to be the condition of the jail, that a man of ordinary prudence would not have deemed it necessary, then their verdict should be for the defendant.

To this charge plaintiff's counsel excepted.

Verdict for the defendant. Judgment and appeal.

Strange, for plaintiff.

Shepherd, for defendant.

BATTLE, J. The cases to which the counsel for the plaintiff has referred, show very clearly that the presiding Judge erred in not deciding the question of negligence himself, instead of submitting it to the jury. It is a question of law, and not of fact. Thus in the case of *Herring* v. *Wilmington & Raleigh Rail-Road Co.*, 10 Ire. Rep. 402, it is distinctly declared by

the Court that, "what amounts to negligence, is a question of law." So, in *Biles* v. *Holmes*, 11 Ire. Rep. 16, it is said, "what amounts to *ordinary care* is a question for the Court. The Judge below erred in leaving it to the jury." Again, in *Heathcock* v. *Pennington*, Ibid 640, RUFFIN, C. J., in delivering the opinion of the Court says, "It was, however, erroneous to leave the question of due care to the jury, since it is the province and duty of the Court to advise them on that point, supposing them to be satisfied of certain facts." In *Avera* v. *Sexton*, 13 Ire. Rep. 247, the Court found it necessary to repeat, that "what amounts to negligence is a question of law." Again, in *Hathaway* v. *Hinton*, 1 Jones' Rep. 243, the counsel for the defendant admitted that the Judge had erred in submitting the question of negligence to the jury, but contended that the error was corrected by the proper finding of the jury, whereupon the Court said, "there can be no doubt the Judge ought to have decided the question himself, as has often been decided by this Court." After these repeated decisions, so recently made, we may well adopt the language of the Court in *Beale* v. *Roberson*, 7 Ire. Rep. 280, upon an analagous subject, "It would seem, then, that making a question on this subject, must be regarded as an attempt to move fixed things, and cannot be successful."

But though his Honor erred in submitting the question of negligence to the jury, it is well settled by the cases to which the defendant's counsel has referred us, that if the error be corrected by the finding of the jury, no advantage can be taken of it by the plaintiff. See *Smith* v. *Shepperd*, 1 Dev. Rep. 461, and *Biles* v. *Holmes*, *Heathcock* v. *Pennington*, and *Hathaway* v. *Hinton*, cited above. The question then remains, was the defendant guilty of such negligence in keeping the runaway, placed in his custody, as to make him liable as a bailee at common law? The bailment was one, from which both parties were to derive benefit, and therefore, the position of the plaintiff's counsel, that the defendant was bound to use ordinary care, and was responsible for ordinary negligence, is well founded. We approve too, of his defini-

tion of ordinary care, taken, we believe, from the case of *Heathcock* v. *Pennington;* "ordinary care is that degree of care, which, under the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own; and the case will be varied according to the nature of the thing bailed, the purpose for which it was bailed, and the particular circumstances under which it was bailed." Let us apply this rule to the case now before us. Considering that the slave was delivered to the defendant as a runaway, and received by him as such, though not under such circumstances as to make him officially responsible under the Statute, (see S. C. 2 Jones' Rep. 302) he was bound to use means, and exercise care, sufficient under ordinary circumstances, to prevent an escape. Did he do so, is the question now to be decided; and from the testimony, we are led to the conclusion, that he did use every precaution for the safe keeping of the slave, which could reasonably be required of him. He placed the slave in the dungeon, from which no prisoner had ever been known to escape, though persons had broken out from the other rooms of the jail. He could have done nothing more, unless he had placed a guard around the jail, or had put the slave in irons. The first course would have been too expensive, and the second cruel, and we do not think he was bound to adopt either. A man of ordinary prudence would have deemed the means which he did adopt, sufficient for the purpose, and that is, as we have seen, the measure of his liability. See *Boyce* v. *Anderson*, 2 Peters' Rep. 150; *Turrentine* v. *Faucett*, 11 Ire. Rep. 652.

The proper finding of the jury, on the question of negligence, having corrected the error of the Court, in submitting it to them, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN S. KITCHEN *vs.* WILLIAM S. PRIDGEN.

B is found cutting timber on the land of A, who threatens to stop him unless

he pays for what he has cut; B pays him up to that time, at a certain rate per cord, and A tells him he may cut as long as he chooses at the same rate; B continues the business of cutting wood a few months longer, occupying a small house as a cook-house for his hands, when he is entered on by a purchaser of the land from A: *Held* that these facts do not amount to a tenancy from year to year, and that B was not entitled to a notice to quit.

ACTION of TRESPASS *quare clausum fregit*, tried before his Honor, Judge BAILEY, at the Spring Term, 1855, of New Hanover Superior Court.

The plaintiff claimed that he was in possession of the *locus in quo* under one Herring, in whom was the title to the premises at the time of his conveyance to the defendant hereinafter mentioned. To prove his possession, plaintiff introduced one *Bordeaux*, who stated that about the last of February or the first of March, 1847, he and two or three negroes were engaged in cutting pine wood on the land in question, for the plaintiff, and while so employed, the defendant came to him and forbade him from cutting any more wood on his land, or he should sue him; whereupon the witness quit cutting. He further stated, that on the day, or about the time, he received this warning from defendant, he was present at a house on the same tract of land when the defendant took a trunk and some tools, belonging to the plaintiff, and sent them over to the house of a neighbor, about a quarter of a mile off. The witness further stated, that he had been cutting wood on this land for a month or two before this conversation with defendant took place, and that a house on the land was occupied by a woman who was employed by the plaintiff to cook for the hands engaged in cutting wood.

Plaintiff then introduced one *Lovin*, who stated, that in the month of December, 1846, he was present at an interview between the plaintiff and Herring, the then owner of the land; Herring told the plaintiff that he had failed to pay him the rent which he had agreed to pay, and unless he did so, he should forthwith stop cutting. The price, as witness understood, was 25 cents per cord for every cord of wood which he

might cut on the land. Plaintiff then paid Herring seven dollars, and Herring said to plaintiff, "you can go on and cut wood as long as you choose, upon paying 25 cts. per cord."

Defendant showed a grant from the State, covering the land in dispute, and mesne conveyances from the grantee to one Lewis; from Lewis to Herring, and from Herring to defendant. This last conveyance is dated 15th February, 1847.

Dr. La Motte, a witness for the defendant, stated that on the day of the date of the deed from Herring to defendant, he was present at the dwelling house on the land in question, in company with Herring and defendant; that no one was living in the house; that they all went in; and Herring said to defendant, "I put you in possession of this house according to your deed."

His Honor charged the jury that, from these facts, the plaintiff was a tenant from year to year, and accordingly, was entitled to six months' notice to quit; and as there was no evidence of any such notice, the plaintiff was entitled to recover. Defendant excepted to this charge. Verdict for plaintiff. Judgment and appeal.

Reid, for plaintiff.

W. A. Wright and *Strange*, for defendant.

BATTLE, J. A tenancy from year to year is a species of term for years, from which, however, it is distinguished, inasmuch as the duration of the term is not limited. It is distinguished from a tenancy at will, inasmuch as it is raised only by construction of law as a substitute for an estate at will; therefore, although *prima facie*, all leases for uncertain terms create a tenancy at will, Courts of Law have for a long time construed such leases to constitute a tenancy from year to year, especially where an annual rent is reserved. Thus, where land was leased to A for a year, and so from year to year as long as both parties should agree; so, a general parol demise at an annual rent; so, where the occupier, under an agreement for a lease at a certain rent, pays the rent; so, where a tenant for life, under a limited power of leasing, granted a lease exceeding his power, but the remainder-man

accepted the rent; so, a tenant who holds over after his term has expired and the lessor accepts rent; so, a parol demise for a longer term than three years, which is void by the statute of frauds. 2 Crabb on Real Estate, 416, 417, (55 Law Lib. 265, 266.) All these are cases where the law will, by implication, raise a tenancy from year to year; and it will be seen, that in them all, there is a reference to an annual occupation of the premises and a corresponding payment of rent. The mode of determining this tenancy by a notice to quit, is what properly distinguishes it from an estate at will; for, although this latter estate cannot, as a rule, be determined without a demand of possession, yet, this is for the most part all that is necessary; though there are cases still occurring, where the estate is so strictly at will, that even a demand of possession is not required. 2 Crabb on Real Estate, 418.

A tenancy from year to year can be put an end to, only by either party's giving a regular notice to quit, which must be given half a year previous to the expiration of the current year of tenancy, so as to expire at the period of the year at which the tenancy was commenced. Ibid, 423. Tenancies from year to year do not determine by the death of the tenant, but devolve on his personal representative, who must have half a year's notice to quit. 1 Cruise's Dig. Tit. Estate at will, page 285; *Doe* v. *Porter*, 3 Term R. 13.

Such being a tenancy from year to year, we shall look in vain for any thing in the testimony set out in the bill of exceptions, which shows, or has a tendency to show, that it existed in the present case. Neither of the plaintiff's witnesses says a word about a lease, an annual occupation, or the payment of an annual rent. One of them does indeed state that Herring (who then owned the land, and from whom the defendant soon afterwards purchased it,) complained that the plaintiff had not paid him "the rent which he had agreed to pay;" but this, we soon afterwards learn, was not for the occupation of the land, but for wood which Herring had permitted him to cut at twenty-five cents per cord; and then, upon his paying seven dollars, Herring told him he might cut

as long as he chose upon the same terms. This agreement certainly did not constitute a lease for a year, or a tenancy from year to year, even of the trees which were to be cut into wood. No particular time is mentioned at which it had commenced, or was to commence. There was no reference to a year, or a number of years, for its continuance, or for the payment of an *annual* rent. It did not seem to be contemplated that the plaintiff should be compelled to continue the business, until he had given half a year's notice of his intention to quit; and we can hardly think that he had such an interest as would, upon his death, have devolved on his executor or administrator. In the absence of these qualities, the agreement between Herring and the plaintiff, could not create a tenancy from year to year. If this be so, the purchase of the land by the defendant did not alter the nature of the transaction. At most it was but a tenancy at will of the trees, and such portion of the land as was necessary to enable him to cut them; and it may well be doubted whether it was any thing more than "a mere personal contract, not attaching to the land, or passing, or intending to pass, any estate in it, but resting entirely in contract." See *Mhoon* v. *Drizzle*, 3 Dev. Rep. 414. It is sufficient for us to say, that it was not a case of tenancy from year to year; which puts an end to the action, without reference to any other question. The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

WILLIAM R. STINSON *vs.* ANDERSON S. MOODY.

An instrument under seal, in which the obligor "agrees and binds himself to dismiss a suit he has pending, and to pay the costs", though it also contains a deed for the land in controversy between them, and a covenant to surrender a bond for title to the same land, is nevertheless a *release* of the cause of action pending, and may be pleaded to that suit *puis darein continuance.*

Stinson *v.* Moody.

ACTION of DEBT on a penal bond, tried before his Honor, Judge ELLIS, at the last Fall Term of Moore Superior Court.

The plaintiff declared on the following bond, viz: "Know all men by these presents, that I, Anderson S. Moody, am held and firmly bound unto W. R. Stinson in the sum of two hundred and fifty-eight dollars, to make him a good and sufficient title to one hundred and twenty-nine acres of land, lying and being in the county of Moore, on the branches of Bear creek, adjoining the Davis one hundred acres, and John Dunlay's three hundred acres, which I bind myself, my heirs and assigns and administrators to make him a title, when the whole of the purchase money is paid within 1852. The conditions of the above obligations is such, that if the purchase money is paid within two years, 1852, and if not, to be null and void and of no effect. This 2d day of January, 1850." Then follows a more minute description of the land to be conveyed.

The defendant pleaded the general issue, conditions performed and not broken, and in apt time afterwards, pleaded release since the last continuance.

The purchase money stipulated to be paid by plaintiff, was satisfied by an order drawn by a third person on a merchant in Asheborough, which was accepted in full satisfaction of that debt, and a note which had been given for the same was surrendered to plaintiff. He then demanded a deed for the land set out in the bond, and defendant having refused to make the same, this suit was brought. The order for the money had not been paid, and it was contended in the court below, that there was no breach of the bond, as the money called for in the order had not been paid when the suit was brought. This point, however, was abandoned in this court.

To sustain the plea of "release," the defendant put in the following sealed instrument of writing, viz:

"Contract, compromise, and re-conveyance between W. R. Stinson and A. S. Moody. It is agreed on the part of said Stinson, to dismiss a suit he has pending in Moore Superior Court of Law against Moody, and pay the costs. And in consideration of ten shillings, the said Stinson hereby bar-

gains, sells, and transfers to said Moody and his heirs, one hundred and twenty-nine acres of land in Moore county, and all the interest, equitable or otherwise, which the said Stinson has, and holds, in and to said lands, which heretofore he contracted to buy of said Moody, and for which he holds said Moody's title bond, and which title bond, the said Stinson agrees, and binds himself, to surrender and deliver up to said Moody. This 31st of March, 1854."

His Honor charged the jury that the evidence, if believed, established a payment of the purchase money: also, that the deed offered in evidence did not sustain the plea of release. To this charge the defendant excepted.

Verdict for plaintiff. Judgment and appeal.

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

BATTLE, J. The counsel for the defendant has, in this court, abandoned, and very properly abandoned, the objection, that the purchase money for the land which he had bound himself to convey, had not been paid prior to the commencement of the suit. He might, with equal propriety, have given up the objection, that the defendant had, under his bond, the whole of the year 1852, within which to convey the land to the plaintiff. The stipulation for time was inserted for the benefit of the plaintiff, and the true meaning of the contract evidently is, that upon the payment of the purchase money by the plaintiff, within the stipulated time, the defendant should immediately execute to him a deed for the land.

The last objection urged against the plaintiff's right to recover, is of a different character, and we are unable to discover any ground upon which it can be resisted. We lay no stress upon that part of the instrument pleaded *puis darein continuance*, which purports to be a reconveyance of the plaintiff's interest in the land, but we do not see how the agreement under seal to dismiss the suit, pay the costs, and surrender the bond sued upon, can be construed to be any thing else than

a release. A release is said to be "when a man quits or renounces that which he before had." 7 Com. Dig. Tit. Release, Letter A. It may be by express words, or by act in law. When it is by express words, it does not require any particular word; so that "remise," "quits claim," "renounces," "acquits," &c., will have the same effect as the word "release." Co. Lit. 264 b. If a lessor grants that his lessee shall be discharged of his rent, this amounts to a release of the rent. So, if a man acknowledges himself to be satisfied and discharged of all bonds, &c., by the obligor, it amounts to a release of the bond. So, if one covenant that he will never sue for a debt, this amounts to a release. See 7 Com. Dig., *ubi supra*, and the cases there cited. In *Dean* v. *Newhall*, 8 Term. Rep. 168, it was decided that where an obligee covenanted not to sue one of two joint and several obligors, and that if he did, the deed of covenant might be pleaded in bar, he might still sue the other obligor. But it was said, in the same case, that a covenant not to sue a single obligor might be pleaded as a release, to avoid a circuity of action. This principle must necessarily embrace our case. An agreement under seal to dismiss a suit then pending, to pay the cost, and to surrender up the bond upon which the action is brought, must, to avoid circuity of action, be construed to be a release of the action. The judgment of the court below is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

HENRY HARRINGTON, ADM'R. OF THOMAS LANGLEY *vs.* WEDIGON MOORE.

Slaves advanced to a daughter on her marriage, and remaining in the possession of her husband until the death of her father, intestate, are an advancement at the time of the marriage, and belong to the husband, notwithstanding the death of the wife before her father.

The issue of a female slave (one of above-mentioned) thus remaining, belong to the husband, though the mother was returned to the father.

ACTION of DETINUE, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Pitt Superior Court.

Shortly after the marriage of defendant with Mary, the the daughter of plaintiff's intestate, in the year 1839, the latter placed in the possession of defendant and his wife, several slaves, to wit: Nicey, Orange, Silvey, and Harriet. In 1843, Mary, the wife of the defendant, died, and shortly afterwards, Silvey, after having had seven children, returned to the possession of the plaintiff's intestate, and there remained until his death in 1855: the other three, Nicey, Orange, and Harriet, together with the seven children of Silvey, remaining in the possession of defendant, up to that time.

The plaintiff administered on the estate of the intestate, and made a demand of the defendant for these ten slaves, which being refused, this action was brought. The foregoing facts were agreed upon, as a special case, and submitted to his Honor, with the further agreement, that if he should be of opinion with the plaintiff, he should have judgment for the sum of $7,500, to be discharged by the delivery of the slaves, and judgment for costs. But in case he should decide for the defendant, judgment of nonsuit was to be entered.

His Honor being of opinion with plaintiff, gave judgment for him according to the agreement, and defendant appealed.

Donnell, for the plaintiff.
Rodman and *Singletary*, for defendant.

BATTLE, J. The case of *Hinton* v. *Hinton*, 1 Dev. & Bat. Eq. Rep. 587, referred to, and relied on, by the defendant's counsel, is a direct authority in his favor. It was there held, that slaves advanced by parol to a daughter, by her father, upon her marriage, and remaining in the possession of her husband until the death of her father, intestate, were, under the act of 1806, (1 Rev. Stat. ch. 37, sec. 17,) an advancement at the time of the marriage, and belonged to the husband, notwithstanding the death of the wife before her father. This being so, with regard to the slaves which were put into the

husband's possession, and which remained there until the father's death, their issue, born during that period, must also belong to him. Indeed the plaintiff's counsel has not contended that any distinction can be made between the original stock and the issue, and we are clearly satisfied that none such exists. See *Stallings* v. *Stallings*, 1 Dev. Eq. 298.

The judgment in favor of the plaintiff must be reversed, and according to the case agreed, a judgment of nonsuit must be entered.

PER CURIAM. Judgment reversed.

NORTH CAROLINA MUTUAL INSURANCE COMRANY *vs.* JAMES A. HICKS.

A warrant and judgment against J. F. J., President of a corporation, and an execution conforming thereto, do not authorise an officer to take the property of the corporation of which J. F. J. was the president.

This was an action of TROVER, tried before his Honor Judge CALDWELL, at the last Fall Term of Alamance.

The plaintiff claimed the property in question, (two mules,) as assignee, in trust to secure the debts of the Manteo Manufacturing Company, by a deed executed on 3d of November, 1855. The defendant claimed by virtue of an execution sale, and insisted that plaintiff's deed in trust was not registered until after the levy of his execution; and that was one of the questions discussed by the counsel; but as the decision of the court proceeds upon the irregularity of the defendant's proceedings, the facts in relation to the registration need not be stated.

The sale of the property to the defendant was under a judgment rendered by a justice of the peace of Wake county, in his favor, and an execution issued thereon. The warrant was "to take the body of James F. Jordan, President of the Manteo Manufacturing Company, to answer the complaint of Jas. A. Hicks, for the non-payment of the sum of ninety dollars,

due, &c. 3d Nov. 1855." On the same day, judgment was rendered for the sum of $62.60, in favor of the plaintiff, and endorsed on the warrant. An execution is also made out on the back of the warrant, and signed by the magistrate, as follows: "The officer is commanded to execute, and sell, so much of the goods and chattels of the defendant as will satisfy this judgment."

The property in question was levied on and sold under this execution, and the money paid to defendant.

It is admitted that the deed in trust was duly registered before this suit was brought.

The only question in the case is, whether the officer was justified in seizing the property of the Manteo Manufacturing Company, under this proceeding.

The foregoing facts were put into the form of a case agreed, and submitted to his Honor below, with a further agreement, that in case he should be in favor of the defendant on the questions submitted, he should enter a nonsuit against plaintiff; otherwise a judgment was to be entered for the plaintiff, for the sum of $230.

His Honor, *pro forma*, gave judgment for the defendant, and the plaintiff appealed.

Fowle and *Moore*, for plaintiff.
Winston, Sr., for defendant.

NASH, C. J. The property in question had belonged to the "Manteo Manufacturing Company," and by it was conveyed, by deed of trust, to the plaintiff, to secure a debt due the plaintiff. The Manteo Company was also indebted to the defendant, who caused a warrant to be issued by a single magistrate, against James F. Jordan, who, in it, is called the "President of the Manteo Manufacturing Company." This warrant commanded the officer to *take the body* of James F. Jordan, &c., and judgment was rendered in favor of the plaintiff. The execution directed the officer to levy it on the goods and chattels, lands and tenements of the defendant. Several questions

were raised on the argument here, as to the priority of the lien between the execution, and the deed of trust under which the plaintiff claims, embracing the registration of the latter. From the view which has been taken here, it is not deemed proper to express any opinion upon them.

The warrant directed the officer to arrest the body of James F. Jordan, to answer the complaint of James A. Hicks, for the non-payment of the sum of ninety dollars, due by account. The warrant, then, was against James F. Jordan, individually, and the judgment was for the plaintiff. The execution was in conformity with the warrant and judgment, and was levied, not on the property of James F. Jordan, but on that of the Manteo Manufacturing Company, or rather, on that of the plaintiff in the hands of their trustee. The debt upon which the proceedings were had, was, no doubt, due from the Manteo Company, and the object was to subject their property to its payment; but the parties, instead of proceeding under the Act of the Assembly, have proceeded against the presiding officer of the Company, to make him personally responsible. It is possible he may have made himself personally responsible. But the Manteo Company surely, could not be made responsible under these proceedings. The Manteo Manufacturing Company is a corporation, and the Act of 1836, ch. 26, in the 2d and 3d sections, points out the mode by which corporations are to be proceeded against. The 2d section provides: "that in all actions or suits which may be instituted against any corporation, it shall be sufficient to issue a summons to the sheriff, or other proper officer, reciting the cause of action, and summoning the said corporation to appear and answer the same, &c., which summons shall be returnable in like manner, and subject to the same rules and regulations, as other original process."

The 3d section provides how this summons shall be served, to wit: on the president, &c., "shall be deemed sufficient service", and "the return of such service, &c., shall be sufficient, and on the return of such *summons*, &c., the same proceeding to a final judgment shall be had against *such corporation*, &c."

This, then, is the mode established by the Legislature, as that by which a creditor of a corporation is to proceed to recover a claim against it. It is manifest, in the case before us, that it has not been pursued. The Manteo Company was no party to the proceedings, and had no appearance in court. Their property, therefore, could not be taken to satisfy the execution. The case agreed states "if the Court should be of opinion that the officer was justified in levying the execution on the property of the Manteo Manufacturing Company, then, judgment of nonsuit should be entered; and if the Court should be of a contrary opinion, then judgment is to be entered for the plaintiff for $230. His Honor, being of opinion that the officer was justified, gave judgment of nonsuit against the plaintiff. In this there is error. The judgment is reversed, and a judgment is given for the plaintiff for $230. See Story on agency.

PER CURIAM. Judgment reversed.

EDWIN DENTON *vs.* JACOB STRICKLAND *et al.*

A agrees to permit B to cultivate the pine trees where he, A, lives, for a year, (that is, make and save turpentine,) and as a compensation, B is to have one-half of the turpentine, scrape, &c. that he may save; *Held*, that this is not a lease of the land, or of the pine trees, and that B cannot maintain trespass *q. c. f.* against one who enters and collects turpentine from the trees.

THIS was an action of QUARE CLAUSUM FREGIT, with a count for trespass *vi et armis*, tried before DICK, Judge, at the last Fall Term of Nash Superior Court.

It was proved that the plaintiff worked turpentine trees on the *locus in quo*, under the following agreement between himself and one Bryant, viz: "This indenture, made and entered into on 1st day of January, 1853, by and between Andrew Bryant, of the one part, and Edwin Denton, of the other part, witnesseth: that the said Andrew Bryant has rented a certain

piece, or parcel of land, lying and being in the county of Nash, State of North Carolina, adjoining the lands of Gideon Strickland, Hilliard Mitchell and others, containing about three hundred acres more or less, the present year, unto the said Edwin Denton, for the purpose of getting turpentine; and agrees to give said Denton one-half of all the turpentine he may procure and save from the pines standing on all the land in possession of said Bryant, and by him heretofore worked; and the said Edwin Denton, on his part, doth covenant and agree to and with the said Bryant, that he will alter, change, and re-box all the pines of said Bryant, and work the same to the best advantage, for the benefit of said Bryant, during the year, or until the crop is saved, and dip out and place in the barrels of the said Bryant, by him to be furnished at or near the different positions found convenient for filling barrels, &c., the one-half of all the turpentine, scrape, &c., by him saved."

During the year specified in the agreement, and while the plaintiff was carrying on the business of making turpentine, the defendants entered upon the *locus in quo*, dipped from the boxes, and carried off some of the turpentine; which is the trespass complained of. Bryant resided on the land in question, prior to the date of this agreement, and continued so to reside during this year.

On the part of defendants it was contended, that plaintiff could not maintain the action on either of the counts.

But the court held that the action was properly brought, and that he was entitled to recover. Defendant excepted.

Verdict for plaintiff. Judgment and appeal.

Cantwell and *Lewis*, for plaintiff.
Miller and *Rogers*, for defendants.

PEARSON, J. There is no doubt that turpentine trees are the subject of lease; and it is equally clear the lessee may maintain trespass *quare clausum fregit*, if the trees are injured.

The distinction between a "lessee" and a "cropper" is fixed by a series of cases. The latter acquires no *estate*—has

merely a right of action *on the contract*, and for that reason, cannot maintain either trespass or ejectment. See *Rooks* v. *Moore*, Busb. 1.

So, our question is one of construction merely, in regard to the legal effect of the deed set out in the record.

The words "Bryant has *rented* a certain piece of land, lying, &c., the present year unto Denton, for the purpose of getting turpentine," might import a lease, and, indeed, such would seem to be the meaning, if they were not explained; but the words "and agrees *to give* said Denton one-half of all the turpentine he may procure and save," put the idea of a lease out of the question.

It is of the essence of a lease, that the tenant should pay rent (from the word *redditus*) to the landlord. Here no rent is to be paid by Denton, but Bryant is to give him one-half of the crop. This shows that the intention was to make an agreement, by which Denton was to work the trees on the land described, *during the year, or until the crop was saved*, and was to receive from Bryant, one-half of the crop, as a compensation for his services.

We put no stress on the fact that the parties term it "an agreement" and not a "lease:" nor is any importance to be attached to the fact that the instrument is called an "indenture;" as no more formality is necessary to make a lease for a year, than to make an agreement as to the cultivation of the land.

Our conclusion being, that the plaintiff was only a cultivator of the turpentine trees, that is, "a cropper," it follows, the action cannot be maintained upon either count of the declaration.

As there is so much difference between a lease, and a contract to work for a share of the crop, in the legal consequences and rights conferred, it is singular that the parties to contracts do not express their intention more clearly than is usually done in such instruments as that under consideration. A *venire de novo* must be awarded.

PER CURIAM. Judgment reversed.

WALTERS AND WALKER *vs.* JOHN A. BREEDER.

Citizens of other States may sue one another in the courts of this State, on personal causes of action.

ACTION of ASSUMPSIT, tried before his Honor, Judge ELLIS, at the Fall Term, 1855, of Columbus Superior Court.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiffs were citizens of the district of Charleston, in the State of South Carolina, at the time of the issuing of this writ, and that he, defendant, was a citizen of the district of Marion, in the same State, and that neither of them did, at the time, or before, or since, reside in the county of Columbus in this State, when this suit was brought.

To this plea the plaintiffs demurred.

On argument of the case below, his Honor sustained the plea in abatement, and gave judgment for defendant, from which judgment plaintiffs appealed.

Shepherd, for plaintiffs.

McDugald and *Troy*, for defendant.

PEARSON, J. We think it settled, that a citizen of South Carolina may sue another citizen of that State, in the courts of our State, upon a personal cause of action originating in South Carolina. *Miller* v. *Black*, 2 Jones' Rep. 341.

The distinction suggested in the argument that, in this case, both the parties are residents of the same State, can make no difference.

There is error. The plaintiff was entitled to a judgment of *respondeat ouster*.

PER CURIAM. Judgment reversed.

JOHN B. SMITH *vs.* JOHN E. FORTISCUE.

The lessor of a tenant at will cannot maintain an action of trespass *quare clausum fregit* against one for an entry upon the premises, unless there was some actual injury done to the land, besides the mere technical injury of treading down grass, &c.

ACTION of trespass QUARE CLAUSUM FREGIT, tried before his Honor, Judge PERSON, at the last Fall Term of Hyde Superior Court.

The plaintiff was the owner in fee of the *locus in quo*, and the trespass complained of was, that the defendant went on the land and removed a quantity of sawed timber left there by one Goff. There was evidence tending to show that at the time of this entry, one Sawyer was in possession of the land in question as a tenant at will of the plaintiff. And among other things, it was insisted by defendant's counsel that this action could not be maintained by him during the occupation of such tenant.

But his Honor charged the jury "that although Sawyer might have been there as a tenant at will of the plaintiff, that fact did not debar the plaintiff of this action." To this charge the defendant excepted.

Verdict for plaintiff. Judgment and appeal.

Donnell, for plaintiff.
No counsel for defendant.

PEARSON, J. If a stranger breaks the close of one having the particular estate, and besides injuring him *by treading down his grass*, taking away his crop, &c., also commits an injury to the inheritance, by cutting timber trees, tearing down houses, &c., the particular tenant may have trespass *quare clausum fregit* for the injury done immediately to him, and the remainder-man, or reversioner, may have an action of trespass on the case, in the nature of waste, for the injury to the inheritance. This doctrine is discussed and settled by *Williams* v. *Lanier*, Busb. Rep. 30.

In the case of a tenant at will, there are many authorities for the position, that although his action must be *trespass quare clausum fregit*, still the action of the lessor may also be *trespass quare clausum fregit, provided an injury is done to land*, as by tearing down houses, "subverting the soil," &c. In 2 Rolle's Abrigt. 551 and 49, it is said, "if a man subverts land which is under a lease at will, the lessee may have trespass against him, and shall have damages for the profits, and the lessor may have another action of trespass, and shall recover damages for the *destruction of the land.*" This authority is relied on by Chief Baron Comyn who lays down the same position in his Digest 7 vol. Title Trespass, B. 2. Such is also the opinion of Hargrave Co. Lit. 57a, note 2, and of Serjeant Williams, 1 Saunders 322a, in note 5; and the doctrine is traced back to a case in the year-books in the time of Henry VI; but it is distinctly confined to cases where damage is done to *the land*, and not merely to the possession, as by treading down grass, &c.

On the contrary, there are many authorities for the position, that even in a case of a tenancy at will, the lessor can, under no circumstances, maintain an action of trespass *quare clausum fregit;* because the gravamen of that form of action is an injury to the possession, and that "case" is the only action which the lessor can maintain; among the number is Chitty, in his pleading, and he has been followed by many of our sister States.

It is not necessary for us to take sides in this controversy, because, taking it either way, there is error in the decision below. There was *no damage to the land*, for which the lessor has a right to complain. The act committed was, "the defendant went on the land and removed a quantity of sawed lumber which had been put there by one Goff." If any one had a right to complain of this act of the defendant, it was the tenant at will; there is no authority, and no principle, upon which the lessor can be allowed to maintain an action of trespass *quare clausum fregit* in regard to it; for, although we may be disposed to concur with the doctrine, that inas-

much as the estate of a tenant at will is not sufficient to support a remainder, his possession may, in a great degree, be considered as the possession of the lessor, still, all of the cases and authorities, from the year-books down, agree that if the lessor can maintain trespass *quare clausum fregit* at all, it is only where *damage is done to the land.*

This subject is discussed fully in *Starr* v. *Jackson*, 11 Mass. Rep. 520, and it is apparent, that, although the weight of "the old authorities" is in favor of the right of the lessor to maintain the action of trespass *quare clausum fregit*, yet, the position, taken by Chitty, that trespass *quare clausum fregit* can never be maintained unless the plaintiff is in possession, and that it is absurd to suppose that a tenant at will may maintain that action on his possession, and the lessor may also have the same action, pressed hard on the court. With this, however, we are at the present not concerned, for as no damage was done to the land, the action cannot be maintained. There is error.

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

THOMAS LOWE, EXECUTOR, *vs.* JESSE SOWELL *et al.*

Payments made by one of several obligors to a bond, in the absence of the other, before the expiration of the time necessary to create the presumption of payment, will prevent such presumption from arising, as well in respect of the absent obligor, as of him that made the payment.

ACTION of DEBT, tried before his Honor, Judge DICK, at a Special Term of Moore Superior Court, November 1855.

The plaintiff declared on a bond, payable one day after date, to his testator for $276.90, dated 8th of January, 1835, purporting to be executed by the two defendants. The execution of the instrument was not denied, but the defendants

put in the plea of payment, and relied on the presumption created by the lapse of time. The action was brought in 1853.

In 1841, a credit of $20 was entered on the back of the bond, and on the 19th of September, 1845, another credit of $308.90 was also entered on the bond upon a payment made by Jesse Sowell, in the absence of the other defendant.

His Honor charged the jury "that although more than ten years had expired from the time the bond was due, until the time the credit was entered on 19th of September, 1845, if the defendant Jesse Sowell then admitted the bond, or any part of it, to be due, such admission would take the case out of the operation of the statute, and the plaintiff would be entitled to recover the balance due on the said bond. Whether he had made such admissions on 19th of September, 1845, was for them to decide."

"The Court further charged the jury, that as there was no evidence that E. Q. Sowell had ever said, or done, anything to take the case out of the operation of the statutes, the law raised the presumption of payment for him, and he was entitled to their verdict."

To this charge the defendant excepted.

The jury found a verdict against Jesse Sowell for the unpaid remainder of the bond, and a verdict in favor of E. Q. Sowell.

Judgment, and appeal by plaintiff.

No counsel appeared for plaintiff.

Kelly and *Haughton*, for defendants.

PEARSON, J. The distinction between barring an action by the "statute of limitations," and by the plea of "payment," on the presumption created by the Act of 1826, is plain.

In regard to the former, it is an old and well settled doctrine, that in *actions on promises*, the bar of the statute of limitations may be met by proof of a new promise, or admis-

sions equivalent thereto; so, it may well be, that while the statute is a bar as to one defendant in an action upon a joint and several promise, it may not be a bar as to another, who by admission, or otherwise, has put it in the power of the plaintiff to prevent the operation of the statute as to him. In regard to the latter, this cannot be so; for the action is *debt* on *specialty*, the plea is payment, and the question is as to the proof relied on to rebut the presumption. In an action on a joint and several bond, the idea that a plea of payment can be true as to one, and not true as to another defendant, necessarily involves a contradiction; because payment by one obligor discharges the debt, and in the very nature of things must support the plea as to all of the obligors.

An action may be barred as to one defendant, and not as to another; but a debt cannot be paid as to one defendant, and be unpaid as to another.

Upon the face of the record now before us, there is this repugnancy: the jury find that the bond sued on has been paid by one of the obligors, and still that it remains unpaid as to the other!!

In 1841, while on the Superior Court bench, on the supposition that there was evidence to repel the presumption of payment in regard to one of the defendants, I instructed the jury, if the presumption was not repelled also in regard to the other defendant, they should find the issue on the plea of payment in favor of both; for if the presumption held as to one, payment by him discharged the debt. This ruling was approved by the Supreme Court, and the distinction is taken between matter which extinguishes the debt, and that which is only a bar to the remedy. *Buie* v. *Buie*, 2 Ire. Rep. 87.

In our case, before the expiration of the time necessary to raise the presumption, one of the defendants made, not a colorable, but a substantial, and very considerable, payment. Such a payment, according to *McKeethan* v. *Atkinson*, 1 Jones' Rep. 421, takes the case out of the rule of presumptions, as to all the defendants, and of the reason on which it is founded; for, as all of the defendants are discharged if

there is a presumption of payment by one, the result would be that if the principal debtor makes payments on the debt, and pays up the interest annually, after the expiration of ten years the sureties may insist the law raises a presumption in their favor that the entire debt has been paid, whereby they are discharged, and as a consequence the principal debtor also. Such cannot be the Law!!

We suppose his Honor's attention was not called to the case of *McKeethan* v. *Atkinson.*

The late Act of the Legislature, which was read at the bar, applies only to the plea of the statute of limitations, and has no bearing on this case. *Venire de novo.*

PER CURIAM. Judgment reversed.

JOHN H. NEAL *to the use of* CHARLES CRAIG *vs.* JOHN B. HUSSEY, ADM'R. OF JOHN E. HUSSEY.

"Judgment final by default, according to specialty filed, for $124.28, and costs, of which $120 is principal money," is a proper judgment in *assumpsit*, and is not the proper form for a judgment in *debt.*

SCIRE FACIAS to subject a sheriff as special bail, tried before his Honor, Judge PERSON, at the last Fall Term of Duplin Superior Court.

The *scire facias* recited that a writ came to the hands of Edward E. Hussey, Sheriff of Duplin county, commanding him to take the body of one George Gwyer, and to have him, &c., to answer plaintiff of a plea of *trespass on the case*, &c., and that the said Edward, as sheriff, executed the same on the body of the said George Gwyer, and returned the same, but took no bond, whereby, and by force of the statute in such case made and provided, the said Edward became the special bail of him, the said George Gwyer, &c., and that "a judgment was rendered against the said Gwyer for $124.28, as damages, &c., with interest on $120 as principal money,"

with the usual clause for the sheriff to show cause why execution should not issue against him to satisfy the said judgment, &c.

The case against Gwyer is stated on the docket as one in "debt," and the following is the entry of judgment against him:

"Pleas withdrawn, judgment final by default, according to specialty filed, for one hundred and twenty-four 28-100 dollars, and costs, of which one hundred and twenty dollars is principal money."

The defendant insisted that the plaintiff was not entitled to judgment, for the reason that the writ was in *case*, and the judgment was in *debt*. *Secondly*, that the *sci. fa.* does not recite the cause of action in the suit, in which the judgment against Gwyer was obtained. His Honor overruled the objections, and gave judgment for the plaintiff, from which the defendant appealed.

W. A. Wright, for plaintiff.
Reid, for defendant.

BATTLE, J. The only objection which has been urged before us, against the propriety of the judgment in the court below, is, that the cause of action set forth in the *scire facias* is that of *trespass on the case*, while the judgment produced on the trial was one in debt. Without stopping to inquire whether such a variance, if it existed, could be taken advantage of by the bail, we have only to say that none such exists. The judgment is a proper one in the action of assumpsit, because it sounds altogether in damages, and it was properly entered up by the clerk, upon a default, and the principal money distinguished from the interest, under the ch. 31, sec. 95 and 96 of the Rev. Stat. A proper judgment in debt would have been for the principal sum, one hundred and twenty dollars, and four dollars and twenty-eight cents for damages. The entry by the clerk of the word "debt," opposite to the

names of the parties, and the words "according to specialty filed" in the memorandum of the judgment, cannot alter its nature. It is still in substance, and effect, a judgment in assumpsit, and therefore conforms to the writ.

PER CURIAM. Judgment affirmed.

WILLIAM B. FIELDS *vs.* WILLIAM J. ROUSE.

An action in deceit for a false representation as to the quality of a thing, will not lie if the same sources of information were open to the buyer as well as to the seller.

THIS was an ACTION ON THE CASE for a deceit, tried before his Honor, Judge PERSON, at the Fall Term, 1855, of Wayne Superior Court.

The plaintiff had bought of the defendant a steam saw-mill at the price of 2,075, and was to pay him therefor in notes of the defendant, to be taken up by plaintiff. Notes of the defendant were taken up to the amount of $565, and the parties met in the town of Goldsborough, to adjust the matter as to the remainder. Here the plaintiff entered into a penal bond of $2,000, with sureties, conditioned that the plaintiff should settle a note given by the defendant to the clerk and master in Equity of Wayne county, for the same saw-mill that he had sold to plaintiff, and which said note was represented as being for about $1,510, and not being yet due, could not then be taken up. It turned out that the amount of the note and interest due, and owing, when the said penal bond was given, was $, instead of $1,510, and there was evidence tending to show that the defendant fraudulently represented said note to be $1,510.

The counsel for the defendant prayed the court to instruct the jury that the action could not be sustained, because the plaintiff, by reasonable diligence, could have ascertained the

amount of the note. This question was reserved by the court, with leave to enter a nonsuit in case the court should be of opinion against the plaintiff.

Verdict for plaintiff.

Afterwards, on consideration of the question reserved, the court gave judgment of nonsuit, and plaintiff appealed to this court.

Dortch, for plaintiff.

No counsel for defendant.

NASH, C. J. We concur in opinion with his Honor who tried the cause. The plaintiff was indebted to the defendant for the purchase of a saw-mill; the price to be paid in the notes of the defendant, which the plaintiff was to take up. The plaintiff took up notes of the defendant which were delivered to him, to an amount which left still due, and unpaid, the sum of $1,510, for which the plaintiff gave his note, or bond, in double the amount, conditioned to be void if the plaintiff should pay up a certain note of the defendant then in the hands of the clerk and master in Equity of Wayne county, which was represented by the defendant to be for $1,510, or *thereabout*. This note, or bond, had been given by the defendant upon the sale of the same saw-mill, and which had been sold under a decree of the Court of Equity of Wayne county, and was not due at the time plaintiff executed his bond. When the plaintiff paid off this bond, he found it was larger in amount, in consequence of the accruing interest, than what it was represented to be by the defendant. The action is brought to recover damages for the alleged false representation of the defendant, as he must have known the amount of the bond given by himself.

An action of deceit will not lie for a false and fraudulent misrepresentation, if the plaintiff, by reasonable diligence, could have informed himself of the truth of the matter. If he could have ascertained the truth by reasonable diligence, it was his own folly to trust to the representation made. Judge KENT,

in the 2d volume of his Commentaries, p. 487, in speaking of frauds in sales, says, the true rule is "if a seller misrepresent the quality of the thing sold, in some particulars, in which the buyer has not equal means of knowledge with himself, or if he do so in such a manner as to induce the buyer to forbear making the inquiry which, for his own security, he otherwise would have done, he is liable." In *Fagan* v. *Newson*, 1 Dev. Rep. 20, Chief-Justice TAYLOR says, "the misrepresentation must be of a kind, the falsehood of which was not readily open to the other party."

Test this case by these principles. The contract was made in the town of Goldsborough, where the court house was situated, in which the Court of Equity for the county was held, and where its records were kept, and he was told the bond was there. He was further put upon his guard by the information, not that the amount of the bond was $1,510, but that it was that amount, or *thereabout*. By going a few steps, it was in the power of the plaintiff to have ascertained the true amount of the bond in principal and interest; in not doing so he took upon himself the responsibility of the correctness of the defendant's representation; the means of ascertaining the act were open to him equally with the defendant.

Upon the point reserved, the court rendered judgment of nonsuit against the plaintiff; in this there is no error, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* REUBEN SAMUEL.

For a husband to slay one taken in the act of adultery with his wife, on the spot, is manslaughter; but to slay one because he had, before that time, committed adultery with his wife, or because he believed he was going off with her to commit that act, is murder.

State *v.* Samuel.

INDICTMENT for Murder, tried before CALDWELL, Judge, at the last Fall Term of Rockingham Superior Court.

The proof showed that the prisoner, in the month of April, 1854, killed the deceased, in the night time, with a wooden mallet, an instrument calculated to produce death, and that he afterwards concealed it. He struck the deceased one blow with the mallet, which caused him to fall to the ground, and then gave him two other blows, with the same instrument, while prostrate. All three of these blows were inflicted on the head, and each one fractured the skull. There was evidence that the prisoner had made previous threats against the deceased.

There was also evidence tending to show that the deceased was in the habit of committing adultery with the prisoner's wife. On the night in question, the prisoner, his wife, the deceased, and other persons, were together at the house of a neighbor. There were two rooms to the house, to each of which there was a door opening outwardly, but none between them. About ten or eleven o'clock, the prisoner's wife, his mother and sister, started for the prisoner's residence, and passed the door of the room in which the prisoner was, without speaking to him; the deceased followed on immediately behind the prisoner's wife, and as he passed the door bade him *good night.*

The prisoner took up a wooden mallet, and, following the deceased, at the distance of some fifteen steps from the house, struck him the blows, as above stated, of which he died on the next day.

The prisoner's counsel asked the Court to instruct the jury, that if they believed from the testimony, that the prisoner struck the deceased under an honest conviction that he was going off with his wife for the purpose of adultery with her, they might find him guilty of manslaughter.

The Court told the jury that had the prisoner caught the deceased in adultery with his wife, it would have been manslaughter had he then immediately killed him; but only

declined giving the instructions asked, and instructed them, that if they believed the testimony, the prisoner was guilty of murder. Prisoner's counsel excepted.

Verdict—"guilty of murder."

Judgment, and appeal to the Supreme Court.

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

NASH, C. J. In his charge to the jury, by the presiding Judge, the law upon the homicide in question was correctly stated. If the prisoner had caught the deceased in the act of adultery with his wife, and had slain him on the spot, the crime would have been extenuated to manslaughter, the provocation being considered in law a legal one, as producing that *brevis furor*, which, for the moment, unsettles reason. But if the adulterer is not slain on the spot, and sufficient time has elapsed for the passions to cool, the crime is not extenuated to manslaughter, but the slayer is guilty of murder. Such has been the law from the time of Lord HALE. See his Pleas of the Crown, page 486. Justice FOSTER, in his crown law, page 296, after speaking of killing the adulterer on the spot, uses this language: "had he killed the adulterer *deliberately* on *revenge* after the fact, and sufficient cooling time, it had been undoubtedly murder." Justice BLACKSTONE, 4 vol. Com. 192, states the same principle, and it is affirmed by this Court in *State* v. *John*, 8 Ire. Rep. 330.

Here, the prisoner did not find the deceased in the act of adultery. The case states that he was in the habit of adulterous intercourse with the prisoner's wife, and we are to understand that the prisoner knew or believed it. There is, then, nothing in law to extenuate the offence to manslaughter. The crime was committed deliberately, and from revenge. The prisoner, the deceased, the wife of the prisoner, his mother and sister, were all at a neighbor's house, which was divided into two rooms without any door between them. The prisoner sat in one, the other parties in the other. Between the

hours of ten and eleven o'clock, the party broke up to return to the prisoner's house. As they passed the outer door of the room in which he sat, no notice was taken of him, except by the deceased; no invitation given him to accompany them. These were circumstances well calculated to rouse his passions, and particularly that of revenge, but they did not amount to a legal provocation. The prisoner armed himself with a deadly weapon, pursued them, and gave the deceased a blow upon the head, which felled him to the ground, and then with the same instrument struck him two more mortal blows. This was murder; for, as Justice FOSTER remarks, "let it be observed that every possible case of homicide upon the principle of revenge, is murder."

We have looked carefully through the record, and find that it is correct.

PER CURIAM. Judgment affirmed.

A. B. MARSH *et al.*, PROPOUNDERS, *vs.* JOHN A. MARSH *et al.*, CAVEATORS.

Where a will is duly executed, the execution of a second will which is afterwards destroyed, is held by the common law courts, not to affect, in any degree, the validity of the first.

In the Ecclesiastical Courts, the effect of the execution of the second will is made to depend upon the question of intention.

Whether the principle is absolute, or modified, need not be decided where proof of the intention is full and satisfactory.

ISSUE of DEVISAVIT VEL NON, tried before his Honor, Judge CALDWELL, at the last Fall Term of Chatham Superior Court.

The will of William Marsh, dated in 1835, with various codicils, all proved by the subscribing witnesses, there being two to each, was propounded. It was admitted that the supposed testator was of sound mind.

It was proved, in behalf of the caveators, that subsequently

to the making of the will offered for probate, and to the codicils, to wit in 1850, the supposed testator made and executed another will, inconsistent with the one now offered, and revoking the same in terms. As to this, it was further proved, that, supposing the will propounded to have been lost, the decedent sent for a neighbor and had another will drawn and executed, as nearly identical with the former (he said,) as he could make it. Afterwards, the same neighbor was sent for, with directions to bring the will in his possession with him, which he did; he was then told by the decedent that the former will was found, and the same was produced. He requested his neighbor to read over both the wills, which he did distinctly, and he then deliberately declared in favor of the former,—said he liked it better than the other, which he ordered to be destroyed, which was accordingly destroyed, and the one of 1835, by his direction, was taken care of.

It was contended by the caveators, that though the second will was destroyed, yet, being inconsistent with the former, and having contained a clause of revocation, the will of 1835 was revoked and annulled, and was not the last will and testament of the decedent, and asked his Honor so to instruct the jury.

The Court declined giving such instructions, but told the jury that if the decedent made the will of 1850, under the impression, and belief, that the will of 1835 was lost, and if, after the latter was found he recognised it as his will, and had the other burnt, it would be his will, and the will of 1850 did not revoke it.

To this charge the Counsel for the caveators excepted.

The jury found the script propounded, to be the last will and testament of decedent.

Judgment, and appeal by the caveators.

Haughton and *Manly*, for the propounders.
Bryan and *Graham*, for the caveators.

PEARSON, J. As wills are ambulatory, and have no opera-

tion until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can, in anywise, affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact, that the second contained a clause of revocation, can alter the case; because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is cancelled. This principle is settled in the common law courts in England, in regard to devises. *Goodright* v. *Glazier*, 4 Burr. 2512, *Harrod* v. *Goodright*, Cowper 92, 1 Jarman 123. But in the Ecclesiastical Courts, in regard to wills of personalty, the principle is modified to some extent, and the validity of the first will is made to depend upon the question of intention which, however, may be established by parol evidence of declarations and other circumstances tending to show an intention to restore the first will. *Moore* v. *Moore*, 1 Phill. 292, *Ustick* v. *Bowden*, 2 Add. 125. 1 Wms. Exrs. 88. It is not necessary, however, for us to enter into the controversy, as to whether the principle giving validity to the first will, is absolute or modified, for, in our case, there is plenary proof as to the intention, which has been passed on by the jury. The motive for making the second will was, because the testator thought the first was lost. As soon as it is found, he destroys the second will, expressly declaring that he preferred the first, and giving directions that it should be taken care of. There is no error.

PER CURIAM. Judgment affirmed.

LOVETT MALPASS *vs.* OWEN FENNELL.

In a *sci. fa.* to subject a sheriff as special bail, by reason of his having failed to take a bail-bond, it is not necessary to describe the suit in which the default is alleged to have occurred, by setting out the declaration.

But it is necessary, in such a *scire facias*, to set out how the sheriff became bail.

The courts below have power to amend a *sci. fa.*, to subject bail.

SCIRE FACIAS to subject a sheriff as bail, tried before his Honor, Judge ELLIS, at the last term of New-Hanover Superior Court.

The *scire facias* first returned was as follows:

"TO THE CORONER, &C.

"Whereas, Lovett Malpass, lately in our Superior Court recovered against Daniel Highsmith the sum, &c., in a suit then and there prosecuted against the said Daniel Highsmith: also, the further sum of, &c., for costs, whereof the said Daniel Highsmith was convicted, and though judgment be thereof given, yet execution thereof still remains to be made; and as Owen Fennell, high sheriff, became special bail, and liable, by virtue of an act of Assembly of this State, &c., as special bail to abide by, and perform therein the judgment of our said court, or to surrender the said principal into our prison, or the Court aforesaid on that occasion, or in case he fails so to do in discharge of the said bail which, hitherto in all things on that occasion, both principal and bail aforesaid have failed to do. As to us, the said plaintiff Malpass insinuated, as well as supplicated, to provide in that behalf a fit remedy for him, so we on our part, &c., do command you to make known to the said Owen Fennell, as aforesaid that he appear, &c., to show cause why execution shall not issue against him on said judgment "by reason of the premises," &c."

Defendant pleaded to the *sci. fa.* various pleas which were found by a jury, but as the only point involved in the decision is the validity of the *sci. fa.*, these are omitted.

At a subsequent term, the plaintiff got leave to amend the *sci. fa.*, and the following is a copy of it as amended:

"Whereas, Lovett Malpass, lately in our Superior Court of Law, held, &c., recovered, &c., in a suit then and there prosecuted against the said Daniel Highmith *of trespass on the case*, whereof the said Daniel Highsmith was convicted, as,

by the record of said court, manifestly appears; and though judgment be thereof given, yet execution thereof remains to be made, or surrender the said principal into prison: Which, hitherto, in all things, both principal and bail aforesaid, have failed to do." Then follows the command to the sheriff to make known to the said Owen Fennell, bail, to appear, to show cause, &c.

The defendant objected in the Superior Court,

1. That the Court could not allow the *scire facias* to be amended.

2. That in its amended form it was defective; because it did not set forth the declaration in the action against Daniel Highsmith, and did not sufficiently show how the defendant became liable as bail for the said Highsmith.

3. That there was no declaration filed in the case against said Highsmith, (the same not having been required), and the Court could not, consequently, see whether that was the same record referred to in the *scire facias*.

4. The record in the said case, *Malpass* v. *Highsmith*, was incomplete and defective. So that the Court could not pronounce it to be a record such as was recited in the *sci. fa.*

The Court overruled these objections, and gave judgment for the plaintiff; from which the defendant appealed.

No counsel appeared in this Court for the plaintiff.

Reid, and *W. A. Wright*, for defendant.

BATTLE, J. The objections to the plaintiff's recovery, taken by the defendant in the Court below, will be considered by us in the order in which they are stated.

The first is, that the court could not allow the *scire facias* to be amended. That the Court had such power, is too well settled by repeated adjudications of this Court, to be now questioned.

The second is, that in its amended form, the *scire facias* was defective, because it did not set forth the declaration in the original action, and did not sufficiently show how the

sheriff became liable as bail for the defendant in that action. The first part of this objection is not well founded. It is not necessary to set out in the *scire facias* the declaration in the action, in which it is alleged that the defendant became bail. The only thing required in that particular is to state the *cause of action*, and that is done in the amended process in this case, where it is said that the judgment was obtained in "an action of trespass on the case." It may be that this part of the objection is supposed to be supported by the case of *Smith* v. *Shaw*, 8 Ire. Rep. 233. If so, it is a mistake. In that case the declaration, spoken of, is the declaration which has to be filed upon the *scire facias*, when the pleadings are drawn out in full, and not the declaration in the original action.

The second part of this second objection is well founded. The *scire facias* ought to show how the defendant became bail, that is, by stating that the writ, in the original cause of action, came to his hand as sheriff, that he arrested the defendant therein, and failed to take bail, whereby, and by force of the statute in such case made and provided, he became special bail, &c. The original and the amended *scire facias* are both defective in this particular, and being a defect for the want of a substantial averment, it is fatal, *Smith* v. *Shaw*, cited above. See, also, the case of *Neal* v. *Hussey*, decided at the present term ante 70, where the *scire facias* is unobjectionable.

The third and fourth objections apply to defects in the pleadings and the entry of the judgment in the original action, which, from the indulgence shown by counsel to each other, we suppose would not now be insisted on, even if it were necessary. But our opinion upon the latter part of the second objection, makes it useless for us to consider them any further.

The result is, that there being no cause shown for a *venire de novo*, the defendant is not entitled to one. But for the fatal defect in the *scire facias*, apparent upon the record, we must do as we did in *Smith* v. *Shaw*, reverse the judgment of the Court below, and arrest the judgment in this Court.

PER CURIAM. Judgment reversed.

JAMES CAMERON *vs.* THE BRIG MARCELLUS.

In a proceeding *in rem* under the act of 1854, against a vessel, for repairs, &c., an interplea of a third person, claiming the property to be his, will not be allowed.

But a person interested in the *thing* can make himself a party to the proceeding, and may thus have an opportunity of contesting the justness of the claim.

ATTACHMENT against the brig Marcellus, tried before his Honor, Judge ELLIS, at the last Term of New Hanover Superior Court.

This was an attachment sued out under the act of 1854, against the brig Marcellus, by the plaintiff, for work and labor done by him on said brig, as a ship-carpenter, at the instance of C. S. Ballance, claiming to be owner, and having the said brig in possession.

The writ was returned to the County Court of New Hanover. At the last term of the Court, Joseph Crandon filed a petition to be allowed to interplead; setting up title to the said brig in himself. The County Court refused to allow Crandon to interplead, and from that judgment he appealed to the Superior Court.

His Honor being of opinion that Crandon had a right to interplead, so adjudged, and the plaintiff Cameron appealed to this Court.

Reid, for plaintiff.

W. A. Wright, for defendant.

BATTLE, J. The second section of the act of 1854, (Revised Code, ch. 7, sec. 28,) declares the mode by which any person, who builds, repairs, furnishes or equips a steamboat, or other vessel, shall enforce the lien upon such steamboat, or other vessel, which is given to him by the first section of the same Act, (Rev. Code, ch. 7, sec. 27.) The proceeding is to be by causing the boat or vessel to be "seized and held

for the satisfaction of his debt, as in other cases of original attachment; and the proceedings in such case shall be thenceforth conducted as in other attachment causes; *provided*, that the presence of the owner, or master of any such vessel, shall not prevent the proceeding by attachment, as in case of absence." The right of the petitioner Crandon, who claims to be the owner of the vessel in this case, to be allowed to interplead, for the purpose of having his alleged title tried, is founded upon the provision in the attachment law, which gives to the person who claims the property attached, the right to interplead with the view to establish his title. (Rev. Code, ch. 7, sec. 10.) At first view this might seem to be proper, and to be sanctioned by the very words of the Act, which we are considering; but a very little reflection will satisfy us, that it cannot be done without defeating the whole purpose of the Act. That purpose, as is admitted by the counsel for the petitioner, is, to give to the creditor the power to proceed *in rem* against the vessel for the recovery of his debt. Now, it is manifest that any construction of the Act which will defeat that purpose, must be inadmissible. In the case of an original attachment, if, upon an interplea, the title be found to be in the person who claims the property attached, the attachment will necessarily be defeated, because the defendant in the attachment is no longer in court, either in person or by his property. *Deaver* v. *Keith*, 5 Ire. Rep. 374. Such a result, in the case before us, would entirely defeat the sole object of the first section of the Act, which is to give the creditor a preferable right to satisfaction out of the vessel itself.

But it is said, that if the right to interplead be denied him, how can the real owner of the vessel contest, either the existence, or the amount of the alleged debt, as in common justice it would seem that he ought to be allowed to do? The answer is, that for such a purpose he has a right to come in and make himself a party to the suit. The proceeding, as we have already seen, is *in rem*, and being so, any person who has an interest in the thing, "may intervene to protect his

interest while the thing continues *sub judice.*" *Benjamin* v. *Teel*, 11 Ire. Rep. 49. The claim to be allowed to interplead, is a very different matter. In that, nothing can be tried but the title of the property levied on. *McLean* v. *Douglas*, 6 Ire. Rep. 233. That certainly cannot be at all material in a proceeding under an Act which gives to the creditor a right to have his debt satisfied out of the thing seized, let it belong to whom it may.

The order of the Superior Court is reversed, which will be certified to the end that a *procedendo* may issue to the County Court to proceed in the original cause.

PER CURIAM. Judgment reversed.

JAMES GARRISON *vs.* WILLIAM BRICE.

A voluntary conveyance of personal property, in trust for the donor's wife and children, is void as to *creditors* under the Stat. 13 Eliz., but passes the title as to *subsequent purchasers.*

The Stat. 27 Eliz. annulling voluntary conveyances, as to subsequent purchasers, only extends to conveyances of land.

This was an action of DETINUE for slaves, tried before his Honor, Judge ELLIS, at the last Superior Court of Duplin.

The plaintiff declared for three slaves, and the following *case agreed* was submitted for the judgment of the Court. "The slaves were the property of one Robert Carroll, which he had acquired by his marriage with his wife Margaret. On 28th of March, 1853, Robert Carroll, for a consideration of ten dollars, conveyed the said slaves to the plaintiff "In special trust and confidence, however, that he shall keep and use the same to the following intents and purposes, viz: that he shall hold the aforementioned slaves, as trustee for Margaret J. Carroll, wife of the said Robert Carroll, during the life-time of the said Margaret, or during her coverture with said Robert, and after her said life-time is expired, or at the termination

of the said coverture by other means, for the infant children, heirs of their two bodies already born, and for any other children which may be born to them, during legal coverture." This deed was duly registered in the May following. In the year following, Robert Carroll sold and delivered the same slaves to the defendant for a full and valuable consideration, he, the said Robert, having never been out of possession of them, from the making of the above recited deed. The plaintiff made a demand for these slaves, previously to bringing this suit, which was refused. It is agreed that the amount set forth in the writ as the value of the slaves, be the amount to be recovered, in case judgment is rendered for the plaintiff, to be discharged by delivering the slaves; and should the Court be of opinion against the right of the plaintiff to recover, judgment of nonsuit is to be entered."

His Honor was of opinion with the plaintiff, and gave judgment accordingly.

From this judgment the defendant appealed.

W. A. Wright, for plaintiff.

Bryan and *W. B. Wright*, for defendant.

PEARSON, J. Upon the first point, there can be no question; the Statute of 13 Eliz. avoids voluntary conveyances of personal property, as well as land, as against *creditors;* but the 27th Eliz. avoids conveyances of *land* only, as against subsequent *purchasers.* So, although the defendant is a purchaser for a full and valuable consideration, yet the deed previously, executed by his vendor to the plaintiff, although voluntary, and in trust for his wife and children, vested the title in the plaintiff, and was valid, not only as against the husband, but as against the defendant, who is a subsequent purchaser. *Hiatt* v. *Wade*, 8 Ire. Rep. 342, cited at the bar, does not apply; for although *grass* was the subject of the conveyance, yet the grass was *growing in the meadow*, and was for that reason treated as part of the land, so as to bring the conveyance within the operation of 27 Eliz.

The second point is this: a husband conveys to a trustee certain slaves and other personal property, in trust for his wife and the children of the marriage "for their exclusive benefit and maintenance, separate and apart from any claims of her said husband;" does this secure to the wife a separate estate, or can the husband dispose of it?

The question, it seems to us, is too plain for argument.

PER CURIAM. Judgment affirmed.

DOE *on dem. of* FERDINAND McLEOD *vs.* DUNCAN McCALL.

A sheriff cannot, lawfully buy, as agent for another, at a sale made by him under execution; and a deed made by him on such a purchase passes no title.

EJECTMENT, tried before ELLIS, Judge, at the last Fall Term of Richmond Superior Court.

The lessor of the plaintiff in this case, showed that he had leased the land in question to the defendant for a year, and at the end of the term demanded possession, which he refused to surrender.

The defendant gave in evidence a sheriff's deed, made to him during the term for which he had leased the land, upon a sale under an execution against the lessor of the plaintiff; which sale was also made during the term aforesaid. It appeared that the defendant had furnished the sheriff, making the sale, with money to buy the land for him, he not being present, and that the sheriff did so, and made the deed in question in pursuance of such purchase.

The plaintiff contended, among other objections to the validity of the sale, that it was void, and passed no title to the defendant, because the sheriff had bid it off at his own sale, as agent for the defendant, and asked his Honor so to instruct the jury, which he declined to do; but charged them that the sheriff "might, properly, knock off the land to the defendant, there being no higher bid, and he being so requested

by the defendant to do." Plaintiff excepted to this charge.

Verdict for the defendant. Judgment, and appeal to this Court.

Banks and *Kelly*, for plaintiff.
Miller and *Rogers*, for defendant.

NASH, C. J. The 4th exception disposes of this case for the present; the others have not been taken into consideration by us. The defendant had leased the premises in question, from the lessor of the plaintiff, for one year. At the end of his term he refused to deliver up the possession, upon the ground, that in the meantime, since the lease commenced, an execution against the lessor had been levied on the land, and that he had purchased it at the sale, and produced a sheriff's deed for it. Upon the subject of the sale, the facts were: the defendant, before the day of sale, placed in the hands of the sheriff, money to purchase the land, and requested him to buy it for him. This the sheriff did, the defendant not being present. The question is, did the defendant acquire any title under the sheriff's deed? We have no hesitation in saying *he did not.*

The office of sheriff is one of high antiquity—coeval with civil society—of high dignity and of great importance to the community. This officer is clothed with large powers, and exercises them under severe responsibilities; and while the law protects him in the due discharge of his duties, it holds him to severe accountability. Being the servant of the public, he should be impartial and just to all in exercising his powers. When an execution comes to his hands, he is the agent of the law to execute its commands, and when he levies it on property, and takes it into his possession, he is the trustee of the parties, or stands in that relation to them; as such, he has no power to buy in the property after being put up to sale. Hill on Trustees, 480. Neither can he retain the goods to his own use, on satisfying the plaintiff out of his own money, 1 Lutw. 589. Nor can he deliver them to the plaintiff,

in satisfaction of his debt. *Thompson* v. *Clerk*, Cro. Eliz. 504. Watson on Sheriffs, 7 Law Lib. 189. The above doctrine has been recognised in this State since 1791, *Anonymous*, 1 Hayw. Rep. 2. See *Ormond* v. *Faircloth*, Con. Rep. 530, and 1 Murph. 35, and *Gordon* v. *Findlay*, 3 Hawks' Rep. 239. In the case in 1st Hayw., SPENCER, Justice, said it was a misdemeanor for a sheriff to purchase at his own sale, and he ought to be indicted. Lord ELDON, in *ex parte Bennett*, 10th Vesey, p. 394, gives the true reason of the rule we are discussing. He says it is, that it would not be safe, with reference to the administration of justice in the general affairs of trust, that a trustee should be permitted to purchase; for human infirmity will, in very few instances, permit a man to exert against himself that providence, which a vendor ought to exert in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. In other words, as it is the duty of a sheriff, or trustee, so to conduct the sale as to make the property bring the highest price, he shall not be purchaser, because it is the interest of the purchaser to get the property at the lowest price. Let the doctrine be established, that an officer, conducting an execution sale, may legally purchase, and what security would the defendant in the execution have of a fair sale? Competition is said to be the life of a public sale. If the sheriff can close the sale just when he pleases, the defendant will be at his mercy.

It has been held, and such is the law, that a sheriff is bound to sell if there be but a single bidder. *State* v. *Joyce*, 1 Hayw. Rep. 43. The sheriff would always be there and of course one bidder. The danger of the principle might be illustrated by a variety of instances. If it be illegal then, for a sheriff to purchase at his own sale, it is equally so for him to act as an agent for another to make the purchase. The danger is equally great, if not greater, in suppressing competition. In the case *Ex parte Bennett*, before referred to, the Chancellor, Lord ELDON, says, "upon the general rule, both the solicitor and commissioner, (one of whom had acted as an agent for a third

party,) have duties imposed upon them that prevent their buying for themselves. And if that is the general rule, it follows, of *necessity*, that neither of them can be permitted to buy for a third person; for the Court can with as little effect discover whether that was done by making an undue use of the information received in the course of their duty in the one case, as in the other. No Court could institute investigation to that point effectually, in all cases, and therefore, the safest rule is, that a transaction which under circumstances should not be permitted, shall not take effect under the general principle, as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases." Cut up the danger by the roots. Suffer no man occupying a fiduciary station to purchase at his own sale—for himself—or for another. To the same point, and equally strong, is the case of *Davoue* v. *Fanning*, 2 John, Ch. R. 252, and that of *Jackson* v. *Dalfsen*, 5 John. R. 43. Hill on Trustees 536.

Upon reason and authority then, the rule is well established, that a sheriff, or other officer, cannot purchase at his own sale under an execution which he is enforcing as a public officer; nor can he purchase for another.

Upon this exception his Honor instructed the jury "that the sheriff might properly, at the auction, knock the property off to the defendant, he having requested him so to do." In this there is error. It was unlawful for the sheriff to knock the property off to the defendant, and the sheriff's deed conferred no title on him in the land. For the error on this point the judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

WILLIS P. MOORE *vs.* CALVIN J. AND BENJAMIN ROGERS.

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to

him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the Statute. Rev. Code, ch. 50, sec. 14.

ACTION ON THE CASE for fraudulently removing a debtor out of the county; tried before his Honor, Judge SAUNDERS, at a Special Term of Robeson Superior Court, December, 1855.

The plaintiff declared on two counts. *First*, under the Statute; *secondly*, at common law; for fraudulently removing one Daniel W. Rogers from the county of Robeson.

The plaintiff proved that he was a creditor of D. W. Rogers by a bond, due on 1st of October, 1853; also, that plaintiff and D. W. Rogers, both resided in the county of Robeson for several years previously to February, 1854—that in that month, the said D. W. Rogers went to Wilmington, on business, and was there arrested and committed to prison, under a criminal charge;—that the defendant, Benjamin Rogers, procured the witness, (William A. Rogers,) as his agent, to go to Wilmington and obtain the release of his son, by giving bail for his appearance at court; and promised the witness to indemnify him for becoming his bail. The witness gave a bond for the appearance of the said D. W. Rogers, to answer to the criminal charge, which was accepted for that purpose; but the said D. W. Rogers was still detained in prison under writs for debt, served upon him while in jail. This witness further proved, that the defendant, Calvin J. Rogers, stated to him, that he went to Wilmington a short time after the bond had been given, and having settled and compromised the debts for which he was held in custody, procured his discharge; that the two then got into the cars of the Wilmington and Manchester Rail-Road, at night, and travelled from Wilmington to Whitesville in the county of Columbus; that the defendant, Calvin, said to him that Daniel had acted very foolishly, for that he wished to return to Lumberton—that he discovered, on the cars, that Daniel was without money, and he gave him a hundred or a hundred and twenty-five dollars;

he, Calvin, proceeded thence immediately to Lumberton, and endeavored to prevail on the witness to send the trunk of the debtor to some point on the rail road, which witness declined doing. The witness also stated, that shortly thereafter, at the instance and request of said Calvin, he sent his, Daniel's, trunk to Raleigh, to his brother J. C. Rogers, who resided in Tennessee. Plaintiff offered to prove by this witness, further, that Calvin J. Rogers stated to him that all he had done in procuring the discharge, settling the debts, and aiding in the escape of the debtor, D. W. Rogers, was done as the agent, and by the direction of the defendant Benjamin Rogers. This evidence was objected to by the defendants' counsel, and rejected. The plaintiff offered to prove by the witness further, that soon after D. W. Rogers left the country, the defendant, Calvin J. Rogers, as agent of defendant Benjamin, sold a negro in Robeson county, the property of defendant Benjamin, that had been in the possession of D. W. Rogers, and stated he was his (Benjamin's) general agent, but the court ruled that the declarations of the defendant Calvin, were inadmissible, to prove that he acted as the agent of the defendant Benjamin. The witness further proved, that Benjamin Rogers knew of the indebtedness of D. W. Rogers to witness, and at the time he procured the witness to go Wilmington, he assumed the payment of this debt; that at the time of the arrest of the said D. W. Rogers he had the control and management of an estate and property about him, in Robeson county, more than sufficient to pay plaintiff's debt.

The defendants then put in evidence two deeds of trust, executed by D. W. Rogers, to secure certain debts, one in November, 1853, and the other in February, 1854, which included all the property owned by him in Robeson county. It was admitted that this property had all been sold by the trustee, and that there would probably be a small balance after the debts were paid.

The Court charged the jury "that the plaintiff had failed to establish the liability of either of the defendants, under the first count in the declaration, and that the plaintiff was

not entitled to recover against either of the defendants on the count on the Statute." That if they believed the evidence, the plaintiff was entitled to recover nominal damages on the count at common law against the defendant Calvin J. Rogers, but was not entitled to recover anything against the defendant Benjamin. Plaintiff excepted to this charge.

The jury found a verdict against Calvin J. Rogers for sixpence, and in favor of the defendant Benjamin.

Judgment. Appeal by plaintiff.

Troy, for plaintiff.
Miller and *Rogers*, for defendant.

PEARSON, J. One aids or assists a debtor, who is temporarily absent, on business, from the county of his residence, to abscond, or go to parts unknown, for the purpose of defrauding his creditors: to this end, he supplies him with money to enable him to pay his travelling expenses, goes a part of the way with him, persuades him not to go back home, and to prevent the necessity of his doing so, promises that he will go there, and forward his property to him, which he accordingly does; is the party liable within the meaning of the statute?

His Honor thought he was not; putting his opinion on the ground that the statute only applied to cases where the debtor was in the county of his residence, at the time the aid and assistance were rendered. We do not concur. The words are, "shall remove, or aid and assist in removing any debtor out of the county in which he resides." The question turns upon the meaning of the word *remove;* for it is clear, if the debtor had been at home when these matters occurred, or gone back before he started away, the case would have come within the meaning of the statute.

Did the debtor in common parlance, remove from the county of his residence, or from the county in which he happened to be when he started? One removes when he changes his domicil. The word does not mean simply going out of, or leaving a county. In our case the debtor went out of the

county of Robeson to the county of New Hanover, but that did not amount to a removal. He removed when he changed his domicil. In common parlance, he *ran away* from the latter, but he *removed* from the former. Suppose he is asked in Texas, "from what county of North Carolina did you remove?" His answer would be, "from Robeson."

A consideration in support of this construction is suggested by another part of the statute; actions are given to creditors to whom debts are owing in the county from which the debtor is *so removed.* Does this mean the creditors of the county in which the debtor happens to be when he takes his departure? Certainly not. His being there is accidental. He may have no creditors there, and if he has, they have no particular right to complain if he goes out of the county. Whereas his creditors are apt to be in the county of his residence, and they have a special right to complain if he fraudulently changes his domicil. So, it is clear the object of the statute was to protect them. Now the injury to them is just as great if the debtor is enabled, by aid and assistance rendered to him, to take his departure from a county where he happened to be, as if he had started from home. The case falling within the mischief intended to be remedied, comes within the meaning of the statute. Can any reason be suggested why the creditor shall lose his remedy, because of the accident that his debtor is absent from home when he forms the resolution to abscond?

There is another view of the statute tending to support the construction we put on it. The words *remove, or aid and assist in removing a debtor*, in a narrow sense, might be restricted to the *person* of the debtor; and it may be asked, how can one assist in removing a debtor out of the county in which he resides, if he is already out of it? That would be so, if the statute means carrying or assisting to carry the *body* of the debtor in a carriage, or the like. But it has never been doubted that the statute extended to his property. If the debtor rides his own horse, or walks, and the party carries his property for him, this is aiding in removing the debtor. So, if the party waits until the debtor crosses over the county line, and

then carries his property to him, it would make him liable under the statute. We can see but little difference between these cases and ours, where the debtor, being temporarily out of the county, is aided by a supply of money to leave the country, and induced not to return to the county of his residence by a promise to forward his property to him, which is accordingly done.

The question of construction now under consideration, is new, but there are two cases involving a construction of other parts of the statute which shed some light. *Godsy* v. *Bason*, 8 Ire. Rep. 264: "A person who helps a debtor by carrying him or his property a part of the way, in order to assist him in getting out of the county, becomes bound for his debts, although he did not carry the debtor or his property entirely out of the one county into another. The statute is remedial—for the prevention of frauds on creditors, and is entitled to a liberal interpretation. It would be a fraud on it to allow it to be evaded by carrying the debtor to the county line." It would be equally a fraud on it, to allow it to be evaded by furnishing a debtor, who happens to be over the line, with money to enable him to run away, and then sending his property to him. *Wiley* v. *McRee*, 2 Jones' Rep. 349: simply *advising* a debtor to run away, is not aiding or assisting, within the meaning of the statute. But the Court say, "if the 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 that 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."

As his Honor, in respect to the first count, put the case upon a point of law, there being error, the plaintiff is entitled to a *venire de novo* as to both the defendants. It may be the jury would have found for the defendant Benjamin upon the facts, but the plaintiff was entitled to have the matter passed on by the jury, provided there was any competent or relevant

evidence, and we think there was some evidence tending to connect him with the transaction. Its sufficiency was a question solely for the jury. Besides, we must assume the exceptions (i. e. the case sent) to have been made up in reference only to the point upon which the case turned.

It is unnecessary to say any thing in regard to the second count, except that it may be doubted whether the injury was not too remote and the damages too uncertain and indefinite to sustain it. *Gardiner* v. *Sherrod*, 2 Hawk's Rep. 173; *March* v. *Wilson*, Bus. Rep. 143; *Booe* v. *Wilson*, 1 Jones' Rep. 182. *Venire de novo.*

PER CURIAM. Judgment reversed.

Den on Dem. of PENELOPE PENDLETON *vs.* BENJAMIN TRUEBLOOD.

An order of Court, authorizing a guardian to sell the land of his ward under the Act of 1789, (Rev. Stat. ch. 63, sec. 11,) must find and adjudge that there are debts against the ward that render a sale necessary; but the amount of such debts, to whom due, or other particular description is not essential to the validity of the order.

An order "to sell the land of the ward named in the petition, adjoining the lands of John Bailey and others, containing about one hundred and ten acres," (it appearing that the ward had no other land) is a sufficient specification of the land under the Act of Assembly.

ACTION OF EJECTMENT, tried before SAUNDERS, Judge, at the last Term of Pasquotank Superior Court.

The lands described in the plaintiff's declaration, formerly belonged to one Hugh R. Pendleton, who died intestate and much involved in debt, leaving the *lessor* of the plaintiff his only child. After the death of the said Hugh R., one G. W. Pendleton was appointed administrator on his estate, and guardian of the child. At the December term, 1840, of the County Court, he filed a petition as guardian of his infant ward, setting forth, "that the estate of his ward was so much indebted as to make a sale of her real estate necessary," and he

prayed an order "to sell her land adjoining the lands of John Bailey and others, containing about one hundred and ten acres."

The following is the order of the Court upon the above petition: "This cause coming on to be heard upon petition, evidence, &c., and it appearing to the satisfaction of the Court, that there are debts to a large amount due by the ward of petitioner, (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 date; that he take bond with approved security from the purchaser, and make report to the next term of the Court."

Pursuant to this decree, the guardian sold the land to one D. B. Pendleton for six hundred dollars, and made a report to the March Term, 1841, of the said Court, which was duly confirmed, and an order made at that term, that he make title to the purchaser, which he accordingly did by deed properly executed to pass the fee; under which title the defendant defends; and it was agreed by counsel on both sides, that if the proceedings above set out, and the sale pursuant thereto, are sufficient in law to divest the title out of the said infant heir, then judgment shall be rendered for the defendant, otherwise judgment is to be rendered for the plaintiff.

Upon consideration of the case, his Honor being of opinion with the defendant, gave judgment accordingly, from which plaintiff appealed to the Supreme Court.

Pool, for plaintiff.
Smith, for defendant.

BATTLE, J. We have already decided at the present term, in the case of *Spruill* v. *Davenport*, (ante 42), following that

of *Leary* v. *Fletcher*, 2 Ire. Rep. 259, that the County Court, in proceeding under the Act of 1789, (Rev. Stat. ch. 63, sec. 11), authorising a guardian under certain circumstances to sell the land of his ward, must first ascertain and adjudge that there are debts due by the ward, and must then specify what particular land is to be sold for the payment of them. In those cases the orders of sale were defective in both particulars. The question is whether the order in the present case is liable to the same objection. It is clearly not so with regard to the land directed to be sold. It specifies the whole of the ward's land adjoining the land of John Bailey and others, containing about one hundred and ten acres. It does not appear, and it is not suggested, that she had any other land in that locality, nor indeed any where else. Such a description would be sufficient to distinguish and identify lands levied on by a constable under a justice's execution; and we think it must be so in a case like the present, see *Ward* v. *Saunders*, 6 Ire. Rep. 382.

It remains for us to enquire whether the order is sufficient in ascertaining the debt due from the ward. It is obviously so, unless it be necessary to set forth to whom the debt is due, or to otherwise describe it, or to state its amount. This point is not so clear as the other, but we think that upon a proper construction of the statute, nothing more is necessary than that the County Court should find and adjudge that there is a debt or demand against the estate of the ward, without specifying it. The Act speaks of "any debt or demand," and it may often be difficult, if not impracticable, to state the exact amount of it, or to specify all the debts or demands, if there be more than one. But the language is varied with regard to the land to be sold, as to which "the Court shall particularly specify what property shall be sold." It may be true that the Court ought to ascertain, as near as it can, the amount of the debt or debts, so that it may be the better able to specify what property shall be sold; and if the property had to be sold, like land sold for taxes, to the purchaser who would take the smallest quantity for the debt, then we should hold that

the precise amount of the debt ought to be stated in the order of sale. But it is not so; and it is evident that the Legislature contemplated that there might be other creditors besides those of whose debts the guardian had notice at the time of his application; because it directs that the proceeds of the sale shall be assets in the hands of the guardian, for the benefit of the creditors, without specifying what creditors. In the present case, the Court not only ascertained and adjudged that there were debts against the ward's estate, but found that some of them had been reduced to judgments, and that execution had been issued thereon, and had been levied on the land in question. Our conclusion then, is, that the County Court did exercise its judgment "in deciding whether there were any debt or demand against the estate of the ward to render a sale of her property expedient," and did exercise it also "in selecting the part or parts of her property, which could be disposed of with the least injury to the ward;" neither of which was done in the cases to which we have referred. The judgment of the Court below is affirmed.

PER CURIAM. Judgment affirmed.

MOSES A. BLEDSOE *vs.* THEOPHILUS H. SNOW.

Where a *certiorari* is sought as a substitute for an appeal, the party seeking it must give an explanation or excuse for not having appealed.

Where the party applying prays an appeal, and the Court refuses to allow it, or where, after praying an appeal, he is unable to give security, a *certiorari* is a matter of course.

But where an appeal is not prayed, a *certiorari* is not a matter of course; the allegations in the petition must account for the fact that an appeal was not prayed, and there must be an affidavit stating affiant's belief that he has merits, and must set out the facts upon which his belief is founded. The allegations accounting for the fact that no appeal was prayed, must be sustained by proof. The allegation as to merits need not be proved.

Where the parties to a suit agreed at the trial term that the matter should be left to arbitration, and a day was appointed, after the term, for the arbi-

trators to act, and the defendant left Court under an impression that the matter was not to be taken up at that term, but the plaintiff got two out of three of the arbitrators to sign an award, pretending that the matter had been compromised and settled between the parties themselves, and by exhibiting such award to the defendant's counsel, induced him to withdraw his opposition to a judgment which was entered, and the defendant had no knowledge of such judgment being entered until after the term, it appearing, from the facts stated, that petitioner had merits, a *certiorari* was granted, and a new trial ordered.

PETITION for CERTIORARI, heard before his Honor, Judge DICK, at the last term of Wake Superior Court.

Moses A. Bledsoe as the surviving partner of a firm, Nixon and Bledsoe, sued out his writ returnable to the County Court of Wake, February Term, 1855, against the petitioner, and declared against him in assumpsit upon an account against Nixon, Snow & Co. for an engine, saw-mill, &c., amounting, with interest, to $4880.45, with a credit of $2637.50, which made the sum demanded $2244.95.

Jeremiah Nixon and Moses A. Bledsoe were copartners in the business of sawing lumber with a steam saw-mill, under the name of Nixon & Bledsoe. In January, 1854, this firm made a sale of the mill &c. to another firm, Nixon, Snow & Co., composed of the said Jere. Nixon and the said Moses A. Bledsoe and the petitioner Theophilus H. Snow. Nixon died shortly after the formation of this latter firm, and the suit was brought by Bledsoe as surviving partner of Nixon & Bledsoe, against Snow as one of the surviving partners of Nixon, Snow & Co. for a balance due by this latter firm for the mill and fixtures.

The petitioner in his petition alleges, that early in the week of the Court at which the suit was to be tried, to wit, at May Term, it was agreed to refer the suit to E. B. Freeman, Jesse Brown, and William R. Poole; that it was further agreed that the time for the arbitrators to meet and decide the matter, should be the next Saturday after the week of the Court then sitting; that resting assured upon this agreement, he left the Court and went to his mill, some twenty miles distant, and

there staid during the remainder of the week; that in his absence the said Bledsoe, by misrepresentation and fraud, obtained the signatures of two of the arbitrators, Messrs. Freeman and Brown, to a statement that both parties had acknowledged the amount due to Nixon & Bledsoe to be $2242.95; that the petitioner had no notice of this application to the two arbitrators, and that the third arbitrator, Poole, was not notified to attend, and in fact that the other two arbitrators did not even know that Poole was an arbitrator at all; that Mr. Freeman and Mr. Brown were both informed by Bledsoe that the matter had been arranged and settled between the parties, but that as they were named arbitrators he wished them to sign the statement as *a mere matter of form;* that relying on the statement of the said Bledsoe, that it was a mere matter of form, without any evidence, or seeing any vouchers, they signed the statement, and that both these gentlemen have said they did not consider themselves as making an award between the parties. The petitioner further states that Bledsoe took this pretended award to the court-house while Court was sitting, and exhibiting the same to the petitioner's counsel, told him that *all had been agreed upon and settled, and that he was to take his judgment for the amount awarded*, and that his counsel, misled by the names of the referees and by the assurances of the plaintiff, withdrew the pleas, and permitted judgment to go against his client. He says he did not know of this judgment until after the Court, else he would have appealed.

The petitioner further alleges that, before the death of Nixon, Bledsoe had sold out his interest in the saw-mill to Nixon, and that thereby the partnership between Nixon and Bledsoe was dissolved and terminated, and that therefore said Bledsoe has no right to sue as surviving partner. He further alleges in the petition, that in the formation of the firm of Nixon, Snow & Co., he, petitioner, put in nearly as much of the stock, as Nixon and Bledsoe together; and if a fair account could be taken of the affairs of this company, it would show his liability to be much less than the sum pretended by Bledsoe to be due.

For these causes he prays for a *certiorari* to carry the case to the Superior Court of Wake.

The answer of Bledsoe denies that he ever sold out his interest in the firm of Nixon & Bledsoe; that in May, 1854, he sold his interest in the firm of Nixon, Snow & Co. to said Nixon, who sold a part of his interest to Eldridge Smith, and that thus the said Eldridge became a partner with the said Snow. He says, on Tuesday of May Court, finding that Smith and Snow had left town, he immediately wrote to Smith, informing him that Thursday was the day for the arbitrators to meet, and that Smith accordingly made his appearance on that day; that he presented to him the account of Nixon & Bledsoe against Nixon, Snow & Co., which was $4508.50 and interest $371.95, and requested Smith to produce the credits to which the latter firm was entitled, which he did, and having calculated interest thereon, and made the deduction, the said sum of $2242.95 was ascertained by them to be due to Bledsoe, as surviving partner of Nixon & Bledsoe, and that for this amount the judgment was agreed to be taken; that he and Smith agreed to go to the arbitrators and get their signatures to this statement, which after explaining the circumstances, was obtained from them; that he then went to the counsel of Snow and showed him what had been done, and explained the same to him, and thereupon permitted him to take the judgment which is complained of. He denies emphatically that the agreement was for the arbitrators to meet and act in the matter on the Saturday after Court, but says it was the understanding between him and Snow that the arbitrators were to act that week, and that he was to have his judgment at that term. He denies all fraud, &c., but says the transaction with Smith was fair and without collusion, and that he, Smith, had authority to bind the firm of which Snow was a party.

Affidavits were filed on both sides.

For defendant:

Eldridge Smith, in his affidavit says, that being informed that

the matter in question between Snow and Bledsoe was left to arbitration, he left for the country; that he was sent for by Bledsoe in a day or so, on account of this arbitration; that he told Snow, who was with him, that Bledsoe had sent for him; that Snow said the arbitration was not to be till the next week, and he should not go. He, Smith, went to town, and Bledsoe submitted to him a statement of the dealings between the two firms, and asked his opinion about it, he replied he thought it was correct. Bledsoe told affiant that he wished him to appear before the arbitrators; affiant asked him what for; the reply was, "I only wish you to state the amount you paid in the State Bank for me." He went with said Bledsoe before the arbitrators, and being referred to, as to the correctness of the statement produced, stated that he thought it was correct. This affiant says he was not the agent of Snow on this occasion, and did not suppose he was so regarded by either Bledsoe or the arbitrators; that he had no authority at all to bind him in this matter or to act for him. The first time he met Snow after the judgment was entered, he expressed great surprise, and repeated, that the arbitration was not to be held until the Saturday week after.

H. W. Miller stated that he was counsel for Snow in the suit above referred to; that at the trial term of the Court (May) he was informed by Bledsoe that the matter had been settled and adjusted before the arbitrators, and that the balance was so much, (stating it), and he was shown the statement signed by Messrs. Brown and Freeman, which, together with the assertion of Bledsoe, induced him to believe that the matter had been fairly heard and settled with the knowledge of his client, wherefore he made no opposition to the judgment's being taken against him.

Mr. Brown stated, Bledsoe came to him with E. Smith, and told him that he and Mr. Freeman had been appointed arbitrators to settle accounts between him and Snow, but that as the parties interested had agreed on the balance, he wished affiant to sign the statement thus agreed on. Mr. Smith assented to this statement, and as he was understood to be a

partner, he supposed he had power to act in the premises, and therefore signed it. Affiant was not informed that the matter was a suit pending in Court, nor was he informed that William R. Poole was also appointed an arbitrator. Affiant says he made no investigation nor enquiry into the merits of of the matter in question, but signed simply for form's sake, believing that it had been settled between the parties.

Mr. Freeman's affidavit is substantially the same as Mr. Brown's, and he concludes his statement thus, "my signature having been so obtained is not my act as a referee; I never saw a voucher, heard any evidence, or passed upon any item of the account." He also supposed Smith had authority to act in the premises.

For the plaintiff:

Mr. S. H. Rogers stated that he appeared as counsel for the plaintiff in the County Court of Wake; that during the term his client came to him expressing much anxiety, and stated that he and Snow had agreed to leave their matters to arbitration; that the arbitrators were to act during the week, and he was to have judgment, for the amount they decided on, at that term; but that Snow and Smith who was interested in the matter, had both left town, and he feared he should be disappointed. He also stated, that he wished to get a judgment in order to meet one which he expected would be taken against him at the same term. On this being stated to the counsel on the other side, he understood him to say, that Bledsoe should have his judgment whether Snow came or not.

Wm. H. High says, he was sheriff of the county, and after the execution came into his hands, he heard a conversation between Snow and Bledsoe, in which Snow complained that the arbitration was to have taken place after the Court, and that he was entitled to certain credits which had not been allowed him, whereupon Bledsoe told him he should have any credit which he could show, and authorised him (High) to allow any credit on the execution which he could show.

The affidavits of Messrs. Freeman and Brown were also taken by the defendant, but are in substance as above stated.

On consideration of the allegations and proofs, his Honor granted the prayer of the petition, and ordered the cause to be transferred to the trial docket, from which order plaintiff appealed.

Busbee, for plaintiff.
Miller and *Winston, Sen.*, for defendant.

PEARSON, J. One of the purposes of the writ of *certiorari* is to answer as a substitute for an appeal. As the regular mode of taking cases up from a lower to a higher tribunal is by appeal, the writ of *certiorari* does not lie unless the party gives an explanation, or excuse, for not having appealed; otherwise the substitute would supersede the principal.

If a party *prays an appeal*, and the Court refuses to allow it, or if he is unable, after praying an appeal, to give security, in such cases the *certiorari* is granted as "a matter of course."

But where an appeal is not prayed for, the *certiorari* is not a matter of course, and the Court will exercise a discretion in regard to the application. In such cases the allegations of the petition must account for the fact that an appeal had not been prayed for, and there must be an affidavit of merits to satisfy the Court that the petitioner would have prayed an appeal had he been present when judgment was rendered, and that the appeal would not have been taken for the purpose of delay, but because he believed he had a good defense.

The allegations accounting for the fact that no appeal was prayed for must be proven, but in regard to the affidavits of merits, no proof is required; for, as is said in reference to an application for the re-probate of a will, *Etheridge* v. *Corprew*, decided at this term (ante 14) "the Court cannot be expected to try a question, in order to see whether it ought to be submitted to a jury for trial." So, this averment must rest upon the affidavit of the party that he believes he has merits, *setting out the facts upon which his belief is founded.*

This distinction and these general conclusions are sustained by many cases in our reports, all of which are referred to in the Digests.

In our case, the allegations accounting for the fact that an appeal had not been prayed for are full and satisfactory, and the proofs sustain these allegations. We have no doubt that the petitioner left Court and went home under the belief that, as the matter was referred to arbitration, no judgment would be taken at that term. We are also satisfied, that the actings and doings of the plaintiff in procuring the signatures of two of the arbitrators to a statement which he had made out, purporting to show the balance due "upon the concurrent statement of both parties," and in taking judgment upon the basis thereof, were in direct contravention of the agreement; so, there is a full and satisfactory explanation of the fact that no appeal was prayed for.

The affidavit of merits avers that the petitioner believes he has a good defense, and the matters set out as the ground of his belief show that he has, at least, probable ground, and support the conclusion that if he had been present, he would have prayed for an appeal; not for the purpose of delay, but because he wished to insist upon his defense to the action.

Upon the plaintiff's own showing, (although not now at liberty to decide the question) we may say there is much reason to doubt whether he can maintain an action at law, and whether his remedy is not by a bill in Equity, for a settlement of the several copartnerships in which the parties were interchangeably concerned.

The account stated by the plaintiff, upon which he took judgment (omitting the names of the firms) sets out a debt contracted by Jere. Nixon, Moses A. Bledsoe and Theophilus H. Snow, with Jere. Nixon and Moses A. Bledsoe. So that three persons contract a debt with two of themselves; in other words, a man contracts a debt with himself. This cannot be. According to the principles of the common law, such dealings require the intervention of a Court of Equity to do complete justice. If the original contract be not valid at law, of course an action cannot be maintained by a survivor of two against

a survivor of the three, although they happen to be different individuals. There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH WALDO & CO. *vs.* BENJAMIN F. HALSEY.

B agreed to deliver A, a certain number of bags capable of holding two bushels each, at a certain price; B did deliver bags, though not of the proper size, to A's agent, who filled them with peas and sewed them up; six or eight days thereafter A seeing, the first time he had an opportunity, that they were two small, emptied and sent them back to B, who refused to receive them; *Held* that B could not sustain an action either on the agreement or on the common count.

The use that a vendee makes of an article which is sold to him, not according to contract, to make him liable on the common count must be a substantial and beneficial, and not a mere temporary use.

THIS was an action of ASSUMPSIT, tried before DICK, Judge, at the last Fall Term of Martin Superior Court.

The plaintiffs declared on a special agreement, which was, that the plaintiffs were to deliver to defendant in the town of Hamilton, Martin county, 510 bags suitable for holding peas, for which defendant was to pay fifteen cents each. Plaintiffs averred that they had delivered the bags according to the contract, and that the defendant had refused to pay for them. They also declared on the common count, for goods sold and delivered.

The facts material to the issues involved are that the defendant was collecting a cargo of peas which he intended shipping. For the purpose of handling and transporting the peas more conveniently, he engaged of the plaintiffs 510 bags, which were to be sufficient to contain two bushels each, at 15 cts. a bag. In the absence of the defendant, plaintiffs delivered to one Whitaker, as agent for defendant, a number of bags, which on being filled were found to be too small. He (the agent) imme-

diately informed the plaintiffs of the fact, and the remainder of the bags were made larger. Whitaker received 497 bags which he filled at the different points where the peas were, sewed them up, and carried them to a ware-house on the river whence they were to be shipped. There they remained some six or eight days, when the defendant for the first time saw them. He then notified the plaintiffs that the bags were not of the proper capacity, and that he should not take them at that price. Plaintiffs told the defendant if he would return them that day, they would take them back. Defendant said nothing in reply to this, but did offer them back (except two which were mislaid) a little after sun-down the same day. The plaintiffs refused to receive them, alleging that he (defendant) was to bring them back that day, but that "it was then night and not day." Whereupon the bags tendered back, together with the other two afterwards found, were stored in a neighboring ware-house, where they have been ever since, subject to the order of the legal owner.

It was conceded that the bags varied from the requisite size, some more and some less.

The Court charged the jury that, as the bags had not been made according to the agreement, the plaintiffs could not recover on the first count; but that as the defendant had received and used the bags, the plaintiffs were entitled to recover the value. The Court further charged, that nothing had been shown by the defendant to discharge him from paying the value of the bags. Defendant excepted.

Verdict for the plaintiffs. Judgment and appeal.

Miller, for the plaintiffs.

No counsel appeared for defendant.

PEARSON, J. Any one who will read *Caldwell* v. *Smith*, 4 Dev. and Bat. Rep. 64; *Dickson* v. *Jordan*, 11 Ire. Rep. 166; *Dickson* v. *Jordan*, 12 Ire. Rep. 79; *McEntyre* v. *McEntyre*, *Ibid*, 302, will be convinced of the fact, that notwithstanding the many encroachments and innovations upon the common

law which have been attempted of late years, and which have to some extent, been sanctioned and effected in several of the States, this Court has steadily adhered to the maxim *caveat emptor*, and held the law to be, as to title, a fair price implies a warranty, but as to soundness or quality, there is no warranty implied, and unless the purchaser takes an express warranty, he can claim damages only on the ground of deceit.

In *McEntyre* v. *McEntyre*, it is said, "If one, not having seen them, orders goods of a certain description at a certain price, and the goods sent do not answer the description, he may return them, or offer to return them, within a reasonable time, and rescind the contract."

This is on all hands admitted to be law. Whether it should be considered as an exception to the general rule above stated, in which light it is treated by Kent, 2 Com. 379, or as a substantive principle of the common law, we need not now investigate. Such is the law. It is based on this ground: the vendor cannot maintain an action on the contract, because he has not performed his part of it, and is driven to the common count for goods sold and delivered. Now, if the vendee has refused to accept the goods, or within a reasonable time returns them, or notifies the vendor that he may come and take them, this rebuts the implication of a promise to pay for the goods, which would otherwise arise from the fact that the vendee had made use of them, or derived benefit therefrom; in other words, the implied assumpsit, upon which the common count is based, falls to the ground.

Apply the principle to our case. The bags were to be of a size to hold two bushels of peas each, the price, fifteen cents; so, there is a certain description of the article, a fixed price, and the vendee had not seen them until they were sent. The bags do not answer the description; so, the vendor cannot maintain his count on the contract, and when he falls back on the common count, the vendee meets him with the objection, "the bags were of no use to me; I notified you within a reasonable time, that I would not have them." On the same day the vendee took the trouble to send all the bags except two (that

were overlooked) to the vendor, who refused to take them, and the whole number have been ever since lying *un-used*, and the vendor might at any time, and still may, go and get them. This occurred within six or eight days after the bags had been sent to the agent of the vendee. The offer to let the vendor have them back was within a reasonable time; the use of them did not put it out of the power of the vendee to return them in as good order and condition as they were in when sent; nor did the vendee receive any substantial benefit by the temporary use his agent had made of them; in fact the trouble of filling and then emptying them was about equivalent to the use. When one has had the benefit of an article, he ought, *de bono et equo*, to pay such a price for it as it is reasonably worth, although it does not answer the description, and he is not liable on the contract; but as the plaintiff's right to recover on the common count is based on conscience, the use and benefit derived by the defendant must be substantial. It is trifling to say that there was any use made of the bags, within the meaning of the rule.

This case offers an illustration that the principles and learning in regard to the forms of actions, and the special and common counts, tend to the advancement of justice and fair dealing between man and man. Here, the bags were not of the description ordered, and the variance was in a particular directly affecting the interest of the purchaser, so as to form part of the essence of the contract. As the peas were intended for shipment, it is reasonable to presume that the object of the purchaser was to have all the bags of a size to hold *two bushels*, so that his consignee might sell by the bag without the necessity of *breaking the bulk* and having the peas measured a second time,—an operation that probably would have cost as much as the whole price of the bags. When, therefore, he discovered that the bags would not answer his purpose, and that if he took them he must submit to this expense, or subject himself to a strong suspicion of fraud if he sold by the bag, when one would fall short of the measure by a gallon, another by a quart, &c., he was at liberty to refuse to

take them, and this being done within a reasonable time, the plaintiff had no right of action on the common count.

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

TEMPERANCE HYMAN *vs.* LITTLETON CAIN.

The law will imply a promise on the part of infants, having no legal protectors, to pay for necessaries furnished them.

THIS was an action of ASSUMPSIT, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Edgecombe Superior Court.

The declaration was for goods, &c., furnished to defendant. Plea "infancy" and a replication "that the articles furnished were necessaries."

The material facts were agreed on by the counsel, and submitted as a special case; they are as follows: "The defendant who was an orphan about nine years old, without father or mother, and without a guardian, boarded with the plaintiff from March, 1852, until about the time a guardian was appointed, which was in August, 1854, and the only question made below, was whether the infant could be made liable for this boarding, &c. It was agreed that if his Honor should be of opinion with the plaintiff, judgment should be rendered for $144.16, which is admitted to be a reasonable charge; but if the Court should be of a contrary opinion, a non-suit should be entered.

Upon consideration of the case, his Honor was of opinion adverse to the plaintiff who submitted to a non-suit and appealed.

Rodman, for plaintiff.

No counsel for defendant.

BATTLE, J. The case agreed presents the single question, whether the law will imply a promise on the part of an infant to pay a reasonable price for necessaries furnished to him; and of that we think there can be no doubt.

In the case of *Richardson* v. *Strong*, 13 Ire. Rep. 106, it was held that a promise by a lunatic to pay for services rendered to, and necessaries furnished for, him, during a temporary fit of insanity, would be implied, and that he might be compelled, after his recovery, to pay what they were fairly worth. In the course of the opinion the Court say, "there is no absurdity in the case of lunatics, more than in that of infants, in implying a request to one rendering necessary services or supplying necessary articles, and implying, also, a promise to pay for them." In this extract, it is seen that the responsibility of infants is assumed as settled, and is made an argument in favor of the responsibility of lunatics.

The cases of *Hussey* v. *Rountree*, Bus. Rep. 110, and *State* v. *Cook*, 12 Ire. Rep. 67, which are referred to on behalf of the defendant, were decided upon the ground that the infants had guardians whose duty it was to furnish them with necessaries, and who were prohibited, ordinarily, from exceeding their income. Under such circumstances no other person had a right to interpose between the guardians and their wards, by supplying the latter even with necessaries.

The principle in these cases has not destroyed the salutary rule of the common law, that infants, having no legal protectors, had better be held liable to pay for necessary food, clothing, &c., than, for the want of credit, to be left to starve.

The judgment must be reversed, and, according to the case agreed, judgment must be entered in favor of the plaintiff for the sum of $144, 16-100, which is admitted to be a reasonable charge for the defendant's board.

PER CURIAM. Judgment reversed.

JOSEPH BURNETT *vs.* JOHN THOMPSON.

Terms for years in land being, by law, only chattels, deeds for them are not required to be registered; therefore if that should be done voluntarily, a copy of such a deed certified by a register is not evidence.

The act of 1824, converting the long terms granted by the Tuscarora Indians into real estate, and making it transmissible as such, does not make good a registration made before its passage. And a certified copy of a deed entered on the register's book before that act, cannot be read as evidence.

THIS was an action of TRESPASS, tried before his Honor, Judge SAUNDERS, at the Fall Term, 1855, of Washington Superior Court. The case has been before this Court twice, formerly, and new trials granted. Vide 13 Ire. Rep. 146 ; *Ibid* 379.

On the trial below, the plaintiff claimed title under a deed made by two Indian Chiefs, *Sacarusa* and *Longbord*, executed in January, 1805, and conveying the land in question to John McCaskey for a term of years, ending in July A. D. 1916. This deed was executed in their names by Jeremiah Slade, their attorney in fact, under a power made by them to him in 1803. This power of attorney was proved and ordered to be registered at February Term, 1805, of Bertie County Court. The deed named above was proved and ordered to be registered at the November Term, 1805, of the same County Court. The plaintiff further claimed title through a deed made by John McCaskey in March, 1805, conveying the same term of years to Thomas Spiller, which deed was proved in Bertie County Court, and ordered to be registered at May Term, 1813.

Certified copies of these deeds from the register's books were offered in evidence, without accounting for the originals, and were objected to, upon the ground that they were conveyances of mere chattel interests, and that there was no authority given to the register, to put such deeds upon his books, or, having done so, to give authenticated copies thereof. In reply, an Act of the General Assembly, passed in the year 1824, was produced, converting the leasehold interests conveyed by the Tuscarora Indians into real estate for the terms for which they were conveyed, and providing that the conveyance, and devise of such estates, should thence forward be

governed by the same rules as are now prescribed in the case of real estate held in fee simple.

The evidence was received by the Court, and the defendant excepted.

There were many other exceptions brought up to the Court, but as the above was the only one considered by their Honors, the others are omitted.

Moore, for plaintiff.
Rodman, for defendant.

NASH, C. J. The second exception made to the plaintiff's recovery is decisive of the case now before us.

The plaintiff claims under long leases made by the Tuscarora tribe of Indians, conveying the premises in question. Those leases were made in the year 1805, and prior thereto, and were proved and registered in 1813, and the plaintiff offered in evidence, copies from the register's book. Their reception was objected to by the defendant. The objection was overruled and the copies admitted.

At the time those leases were made and registered, up to the year 1824, they were considered mere chattel interests, and there was no Act of Assembly authorising their registration. The registration in 1813, was of no effect, and, as a necessary consequence, copies from the register's book were not competent evidence, without pursuing the course pointed out for giving in evidence copies of any other private deeds or paper writing. The Act of 1824, ch. 13, converted these chattel interests, thereafter, into real estates for the term for which they were originally granted, investing them with all the incidents of such estates, and concludes by saying, "and its conveyance and devise shall be governed by the same rules as are now prescribed in the case of real estate held in fee simple." All conveyances of real estate are required to be proved and registered in the county where the land lies, and copies from the register's book, properly certified, when the original is lost, are made evidence. Here, the deeds were put upon the register's book in the year 1813. The Act of 1824, has no retro-

spective operation. It is all prospective so far as the registration is affected. They might, and ought to have been proved and registered since the Act of 1824. See S. C. 13 Ire. 379.

His Honor erred in admitting the copies of the leases in evidence.

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

Doe on dem. of D. FREEMAN *et al. vs.* HASTINGS HATLEY.

Generally, there is no Statute which requires the register to put on his books the fact that a deed was *duly proved*, or which authorises him to give a certificate in regard to such probate.

There is no mode provided by the Statute, of proving that a deed was duly proved, when the deed itself is lost, and the record that should establish the fact has been destroyed; in such a case, therefore, the proof must be made according to the rules of the common law.

In the latter case, proof that the deed was registered, and the oath of the officer who made the registration, that he had been the register from the time the deed was made, up to the time of the trial, and that during that time no deed had been registered, which had not been duly proved, were *Held* sufficient to authorise the presumption that it had been duly proved.

Where the grantor, or the subscribing witness resides abroad, and a commission issues to take the acknowledgment or probate of the deed, the Statute requires the *dedimus* and *certificate of probate or acknowledgment*, as well as the deed itself, to be registered.

ACTION of EJECTMENT, tried before his Honor, Judge CALDWELL, at a special Term, June, 1855, of Stanly Superior Court.

On the trial of the cause, the plaintiff offered in evidence a copy of a deed from one Carson to William Thornton, dated in 1811, as part of his title, with the following endorsement by the register of Montgomery county, viz:

"Montgomery County, No. Ca.

"I, James M. Lilly, Register of the county aforesaid, do hereby certify, that the within is a true copy of a deed from

J. K. Carson to William Thornton, and that the original has been duly registered in said county.

JAMES M. LILLY, *Register.*"

The plaintiff then offered in evidence the affidavit of Anna Maria Thornton, one of the lessors of the plaintiff, as to the loss of the original deed. Several witnesses testified that the court-house, in Montgomery, was burned in March, 1843, with all the books and papers belonging to the clerk's office, also those belonging to the register's office.

The above mentioned *James M. Lilly* testified that he was register at the date of the deed, and had been ever since, and that he never registered a deed unless it had been proved.

The plaintiff offered in evidence, also, as a part of his title, a copy of the last will and testament of Dr. William Thornton, in the first clause of which are these words: "I give and bequeath to my beloved wife Anna Maria Thornton, and her beloved mother Anne Brandeau, during their joint and separate lives, all that I possess of real, personal, and mixed estate, or property whatsoever, a schedule of which is hereunto annexed, and to which reference is now made." In the same will, after making various provisions for emancipating his slaves and their increase during the lives of his wife and mother-in-law, the will further provides as follows: "I hereby appoint my beloved wife, Anna Maria Thornton, sole executrix of this my last will and testament, hereby giving her full power and authority to sell and dispose of all my estate, real and personal, so as to enable her to carry into effect all the dispositions of this my last will and testament." "And I hereby authorise and empower my executrix to make and execute any deed or assurance which may be necessary, &c."

The defendant objected to the admission of the copy of the deed, because it did not appear that the original had been duly proved, and because such probate ought to have been registered and constituted a part of the register's certificate, so that the Court, and not the register, should judge that the same had been properly proved.

The defendant further objected to the copy of Dr. Thorn-

ton's will, because it had not been fully copied, for that the schedule, which was a part of it, was not embraced therein.

These questions were reserved by the Court with the consent of counsel.

The cause was submitted to the jury with instructions, (not excepted to by either party,) and a verdict was found in favor of the plaintiff.

Afterwards, on consideration of the questions reserved, his Honor, being of opinion with the defendant, set aside the verdict and ordered a non-suit; from which judgment, the plaintiff appealed.

Bryan and *Moore*, for plaintiff.
Winston, Sen., for defendant.

PEARSON, J. We do not concur with his Honor in his opinion, either in respect to the deed, or the will. *As to the deed*, the objection is the want of proof that it had been duly proven and ordered to be registered.

The proof is: the original deed is lost. In 1843, the court-house of Montgomery was burnt, together with all the books and papers belonging to the clerk's office, and also those of the register's office. A paper certified to by James M. Lilly, register of the county of Montgomery, which purports to be the copy of a deed that had been duly registered by him from J. K. Carson to William Thornton. This copy and certificate were made many years before the court-house was burnt, and James M. Lilly swears that at the date of the deed (viz., in 1811) he was the register of that county, and has been so ever since, and that no deed was ever registered unless the same had been properly proven, during the time that he has been register.

It is said for the defendant, "that there is no evidence that the original deed had been duly proven and the probate ought to have been registered and constituted a part of the register's certificate, so that the Court, and not the register, should judge that the same had been duly proven."

In reply to the second position taken in this exception, it is

enough to say, there is no Statute which requires the register to put on his books or which authorises him to give a certificate in regard to the probate of deeds executed by a party resident in this State. When the party resides abroad, or when a commission issues to take the examination of the subscribing witness who resides out of the State, there is a provision in these words: "whereon such *dedimus* and *certificate* of *probate* and *acknowledgment*, and the deed itself, shall be admitted to registration, &c.;" but the general provision is, "that no conveyance of land shall be valid, unless it be acknowledged by the grantor or proved upon oath, either before one of the Judges of the Supreme Court, or of the Superior Court, or in the Court of the county where the land lieth, and registered by the public register of the county," &c.

The main purpose for which registration is required, is to give *notoriety* to the transfer, in lieu of that given at common law by a feofment and livery of seizin. A secondary purpose seems to have been, to aid the party in case the original deed, after being registered, should happen to be lost; but whether it may be deemed a *casus omissus*, or from whatever other cause, so it is, that the Statute does not require the fact of probate to be registered.

The regular course is, when a deed is proven or acknowledged in the County Court, to make an entry of the fact in the minutes, and for the clerk, by the way of identifying the deed, to endorse on it "proved and ordered to be registered;" but there is no Statute which requires the register to put this endorsement on his books; and if the original be lost, we suppose the most plenary proof would be a certified copy from the register, and also a certificate of the clerk of the County Court, that the deed had been proved and ordered to be registered. When the deed has been proved before a Judge of the Supreme or Superior Court, he enters his certificate of probate and fiat for registration on the deed, but there is no Statute requiring the register to put this certificate of probate and fiat for registration upon his books; and there is no provision by which, in the event of the loss or destruction of the

original deed, upon which this certificate of probate and fiat for registration are entered by the Judge, secondary evidence can be offered, except upon the principles of the common law, the most prominent of which in regard to this subject is, *omnia præsumuntur rite acta.*

The first position taken in the exception was not so easily disposed of, but, after much consideration, we have come to the conclusion that the proof set out above, with the aid of the maxim *omnia præsumuntur*, &c., is sufficient to show that the original deed had been "duly proven and ordered to be registered." From the fact of its having been registered, and the oath of James M. Lilly, who, fortunately for the plaintiff, has been register during the whole time, we think there is a clear presumption (the loss of the original deed being satisfactorily established) that it was proved and ordered to be registered.

If this probate and fiat was done in the County Court, the absence of proof as to it, is fully accounted for by the fact of the burning of the court-house in 1843. If the probate and fiat was done before the Judge, the absence of proof as to it is fully accounted for by proof of the loss, or destruction, of the original deed; so, taking it either way, we are at liberty to presume that the County Court, or the Judge before whom the deed was proven, and by whom it was ordered to be registered, *did the thing rightly;* on the same principle that when a subscribing witness is dead, proof of his hand writing authorises a presumption that the deed was duly signed, sealed and delivered in his presence, otherwise he would not have signed his name as a witness; and by the way of analogy, we refer to *Joiner* v. *Falconer*, 2 Ire. Eq. 386; *Etheridge* v. *Ferribee*, 9 Ire. 312; *Beckwith* v. *Lamb*, 13 Ire. 400, by which it will appear that the maxim has been acted on more liberally of late years, than in some of the old cases, and the rule now is to uphold the maxim "*ut res magis valeat quam pereat*" by the aid of the maxim *omnia præsumuntur*, &c.

As to the will: the schedule of property therein alluded to, is not annexed or referred to, so as to form a part of the in-

strument. The testator gives to his wife, who is one of the lessors, and to his mother-in-law, the *whole* of his estate, real, personal and mixed, so that there can be no question, if he owned the land now sued for, that it was included in the devise, and the schedule is mentioned, not as restricting his gift, but simply by way of reference or information for the benefit of the devisees.

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

BUCKNER L. HILL *et al., vs.* HATCH WHITFIELD *et al.*

A sheriff's deed is not made void at law by the fraudulent conduct of the plaintiff in the execution, (as, by suppressing competition at the sale and thereby getting the property at an undervalue,) *there being no collusion between the sheriff and the purchaser.*

In such a case, the deed passes the title to the purchaser, and the defendant must seek his remedy in a Court of Equity.

Action of EJECTMENT, tried before his Honor, Judge BAILEY, at the Spring Term, 1855, of Sampson Superior Court.

The land in question was sold at sheriff's sale, under an execution upon a judgment in favor of Wm. A. Whitfield as relator, against the defendant Hatch Whitfield, who had been his guardian, and Lemuel Whitfield, and bought by Wm. A. Whitfield. The judgment was for the sum of $2,300, taken in the County Court of Wayne, and duly proved by the transcript of the record of that Court. The execution, the levy and sale by the Sheriff were also proved, and the plantiff produced the sheriff's deed for the land in question. It was admitted on the trial, that this land was the property of the defendant in the execution, Hatch Whitfield, who is also the defendant in this action, and that he was in possession at the beginning of this suit. There were several coterminous tracts conveyed in the deed, amounting in all to about six thousand acres, and the whole was worth $12,000. The price bid and credited on the execution was $2,000.

The defendant resisted a recovery, upon the ground, that the sale was made void by the fraudulent conduct of the lessor of the plaintiff, Wm. A. Whitfield, in suppressing competition, and that the deed made in pursuance thereof was void, and passed no title. To support these positions, he examined several witnesses, viz:

Kedar Raiford, who stated that on Wednesday of the term of Wayne County Court, the Sheriff, at the instance of Wm. A. Whitfield, sold the land *en masse*, he (witness) requesting him to sell in separate tracts, or sell the negroes, if he must have money; that Wm. A. Whitfield, before the sale of the land, in the presence of a number of persons there assembled, said he did not want any person to bid for the land, that he only wanted to bring his brother, Hatch Whitfield, (who was then in Mississippi, where he resided,) to a asettlement; and he feared if any other person bid off the land, he would not let him have it back; that he wanted Hatch to have the home place, and would sell the outskirts of the land to pay his debts. All this was said in the presence of the sheriff, and loud enough for him to hear it; but witness could not say whether or not he did hear it. He further testified, that Wm. said, Lemuel had put money in Hatch's hands to pay this debt, and he did not want Lem.'s property to be sold. The land was put up, and he, (witness,) who was the son-in-law of Hatch Whitfield, bid $3,500; but he could not raise the money, and the land was resold, and bid off by Wm. A. Whitfield at $2,000, no person bidding against him. He further stated, that Hatch Whitfield had four or five slaves on the land, worth $1,500, besides stock, and other property; and that Lemuel Whitfield, the other defendant in the execution, owned several slaves, but was in failing circumstances.

William K. Lane, stated that he attended the sale for the purpose of buying the land, and would have paid more for it than it was sold for, but did not bid, in consequence of the declarations made by Wm. A. Whitfield, as proved by the other witnesses.

John Everett, stated that he heard Wm. A. Whitfield say,

before the day of sale, and at the time of the sale, that he did not want any one to bid for the land; he only wanted to buy the land to bring his brother to a settlement, and that he would let him have it back. Lemuel H. Whitfield, the other defendant in the execution, begged Wm. not to sell the land; that if he must have money, to send for one of his negroes and sell him. He (Lemuel) further stated he had placed money in Hatch's hands to pay the debt.

Calvin Coor, stated (in a deposition) that he was the sheriff that sold the land; that he advertised it, and sold it at the court house in Wayne County; that there were many persons present, and that the sale was a fair one as far as he knew; that he did hear Wm. A. Whitfield say, in one part of the transaction, that he would bid off the land as a brotherly act to bring Hatch to a settlement.

There was no evidence of fraud or collusion on the part of the sheriff, or of combination with the purchaser.

It was proved that about one-third of the land in question had been sold to the lessor of the plaintiff, B. L. Hill, by Wm. A. Whitfield, and that he had paid in cash for it $——.

Upon these facts, his Honor charged the jury that, if Wm. A. Whitfield, the plaintiff in the execution, made representations at the time of the sale of the land, so as to induce persons who attended for the purpose of buying, not to bid, and thereby suppressed the bidding, and the representations were false, and in consequence thereof, persons did not bid, and he was enabled to buy the land, greatly under its value, for himself, and not for the defendant, Hatch Whitfield, the sale would be fraudulent and void, and the deed would pass no title to the lessors of the plaintiff. To this charge the plaintiff excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

Bryan, with whom were *W. A. Wright*, *Shepherd* and *Winslow*, argued for plaintiff as follows:

The remedy of the defendant if he have any, is in Equity. The sale here is under valid process, and there is no fraud or collusion between the sheriff, who is the authorised vendor,

and Wm. A. Whitfield, the purchaser. The execution of the official deed of the sheriff, therefore, conveys the title at law.

It is contended that Wm. A. Whitfield committed a fraud, inasmuch as he did not comply with his promise, which promise prevented competition at the sale. But that title either passed or it did not, at the instant of the sale, and the subsequent conduct of the purchaser could not reflect back and change the character of the sale.

The title of Hill is good, both at law and equity. It is conceded that he was not privy to the fraud, if any there was; and being a *bona fide* purchaser, for value, and without notice, he is protected.

Reid, *Strange*, and *W. B. Wright*, for defendant.

PEARSON, J. There is no doubt that William A. Whitfield did suppress competition at the sale made by the sheriff, and that, in consequence of his representations that his object was to buy the land merely to compel Hatch Whitfield to come to a fair settlement, several persons who were present, willing and able to buy the land at a fair price, were induced not to bid, whereby he was enabled to bid off the land at a sum greatly below its value. Upon this ground, the sheriff might have refused to make him a deed and offered the land for sale again; but the sheriff recognised him as the last and highest bidder, and executed a deed, the effect of which was to vest in him the legal title. There is no proof of collusion between the sheriff and William A. Whitfield; so, there is no ground upon which, in a Court of law, the deed can be considered void and of no effect. Consequently, the legal title passed, and the lessor of the plaintiff having acquired that title, the defendant could not, in a Court of law, resist a recovery.

The judgment of a Court of law is absolute and positive, whereas the decree of a Court of Equity is pliable, and may be modified and shaped so as to mete out exact justice to both parties; hence, the former only looks to the legal title, and never interferes, except in cases when the conveyance is void and of no effect—e. g., if a sheriff, or other public officer, pur-

chase at his own sale—whereas the latter will carry the investigation beyond the legal title, and if the "actings and doings," although not void and of no effect, are tainted with fraud, will take jurisdiction, relying on its ability to see that justice is done to both parties. For instance, in our case, if the rough hand of a Court of law takes hold of it, and the deed is considered void, William A. Whitfield must lose his $2,000, which was applied to the satisfaction of the debts of the defendant in the execution; whereas, in a Court of Equity, the deed may be considered as valid, so as to pass the legal title; but, by reason of the fraud in suppressing competition, the purchaser will be converted into a trustee holding the legal title, first, as a security for the money which he actually paid in satisfaction of the debts of the defendant in the execution, and then in trust for him; so that in this way, the avowed purpose of William A. Whitfield to bring his guardian to a fair settlement,—which purpose was a legitimate one, and induced others not to bid,—will be effected without injury to either party. *Venire de novo.*

PER CURIAM. Judgment reversed.

JAMES W. WATT *vs.* ALEXANDER JOHNSTON.

A bond, taken by the sheriff on executing a writ, payable to him as sheriff in double the amount of the sum claimed in the writ, and conditioned for the defendant to appear at &c., "to answer the plaintiff *in a case of damages four thousand five hundred dollars*, and then and there to stand to and abide by the judgment of the Court," is a bail-bond.

The plaintiff having failed to except to a bail-bond or to notify the sheriff that he holds him liable as special bail, cannot subject him as special bail.

THIS was a *scire facias* against the defendant as sheriff of Cumberland, to subject him as special bail, tried before his Honor, JUDGE ELLIS, at the last Superior Court of Cumberland.

In a case in the County Court of Cumberland, wherein

James H. Watt was plaintiff, and Solomon McCullough and Taliaferro Hunter were defendants, returnable to March Term, 1851, the defendant, who was sheriff of that county, having taken the defendants, returned with the writ the following writing in the form of a bond, which he insisted, and still insists, was, and is, a bail-bond properly taken and applicable to the writ which he executed, viz:

"State of North Carolina, Cumberland County.

"We and each of us do acknowledge ourselves indebted to Alexander Johnston, sheriff, in the sum of nine thousand dollars current money of the State, to be levied on our goods and chattels, land and tenements, but to be void on condition that the above bounden Solomon McCullough and Taliaferro Hunter do make their personal appearances at the next Court of Pleas and Quarter Sessions to be held for the county of Cumberland, at the court-house in Fayetteville, on the first Monday in March next, to answer James H. Watt in a case to his damages four thousand five hundred dollars, and there to stand to and abide the judgment of the said Court, and not depart the same without leave; then the above to be void, otherwise to remain in full force and virtue."

Witness, &c.

Which was duly assigned by the sheriff to the plaintiff.

There was no evidence that at the term to which the original writ was returnable, which is the term to which the above bond was returned with the writ, the plaintiff excepted to the bond filed, or notified the sheriff that he would be looked to as special bail.

The foregoing facts were submitted as a case agreed by counsel, with the further agreement, that if the Court should be of opinion that the bond filed was not in law a bail-bond, and that it was not necessary for plaintiff to enter exceptions thereto, at the return term of the original writ, then judgment should be rendered against the defendant. But if his Honor should be of opinion that the bond filed was in law a bail-bond, or that it was necessary for the plaintiff to except there-

to at the return term of the original writ, then judgment should be rendered for the defendant.

Upon consideration of the case agreed, the Court, being of opinion with the defendant, gave judgment accordingly, from which the plaintiff appealed.

Haughton, for plaintiff.
Reid and *Shepherd*, for defendant.

NASH, C. J. This is a *scire facias* against the defendant as special bail for Solomon McCullough and Taliaferro Hunter.

Upon executing the writ in the original suit, the defendant took the bond, a copy of which is set forth in the case. That bond, in the opinion of the Court, under the cases of *Rhodes* and *Vaughan*, 2 Hawks. 167, and *Clark* and *Walker*, 3 Ire. 181, is a bail-bond. The plaintiff, at the return term of the writ, deeming it not a bail-bond, did not except to it, nor notify the defendant. The Act under which the proceedings are had requires, that when a bail-bond is taken, and duly returned, "upon exception taken and entered at the same term to which such process shall be returnable, the sheriff, or other officer, having due notice thereof, shall be deemed and stand as special bail." The plaintiff having failed to except to the bond in due time, and, not having notified the defendant, cannot subject him as special bail.

No exception has been taken to the *scire facias*.

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

THE WILMINGTON AND MANCHESTER RAIL ROAD COMPANY *vs.* JOHN A. SAUNDERS *et al.* EXECUTORS OF DANIEL SAUNDERS.

THE acceptance of a charter and the organization of a corporate body under such charter, may be proved by a witness who saw the alleged corporators in the use and exercise of the franchises and powers conferred by the Act of incorporation.

This was an action of ASSUMPSIT, tried before his Honor, Judge ELLIS, at the last term of New-Hanover Superior Court.

The plaintiffs declared on the following promissory notes:

"Wilmington, N. C., June 10, 1850.

"$500. One year after date I promise to pay to the Wilmington and Manchester Rail-Road Company, at the Wilmington Branch of the Bank of the State of North Carolina, Wilmington, five hundred dollars, being half of the balance of my subscription to the capital stock of the said company." (Signed by the defendant's testator.)

Also on another note for the same sum, identical with the above, except that the credit was eighteen months instead of twelve. The Act of incorporation was put in, and a witness was called to prove that the plaintiffs were a corporation, regularly organised, and exercising the franchises and powers granted by this Act. This evidence was objected to by the defendants, who insisted that the fact could not be proved by parol declarations of the witness, but that the books of the company should be shown for the purpose of showing their organization, but it was admitted by the Court; for which the defendants excepted.

Verdict and judgment for plaintiffs. Appeal by defendants.

Moore, for plaintiffs.
W. A. Wright, for defendants.

NASH, C. J. The action is in assumpsit upon two promissory notes, payable on their face, to the plaintiffs, and expressed to be, one, for "half of the balance of my subscription to the capital stock of the said company," and the other for the other half, and expressed in the same terms. In the course of the trial below, a witness was called to show that the plaintiffs were a corporation, regularly organised, and *exercising* the franchises and powers granted by the Act of incorporation. The testimony was objected to by the defendant, but received by the Court. In this the Court committed no error. When it is shown, in such a case, that a charter has been

granted, then, those in possession and actually exercising corporate rights, shall be considered as rightfully there, against wrong-doers, and all who treated or acted with them in their corporate character. The sovereign alone has a right to complain of the usurpation where there is one. *Tar River Navigation Company* v. *Neil*, 3 Hawks. Rep. 520; *Elizabeth City Academy* v. *Lindsey*, 6 Ire. Rep. 476. The Act incorporating the plaintiffs, forms part of the case; the parol evidence to show that they were acting under it, and enjoying the franchises granted to them, was competent evidence against the defendant. He had treated with them as a corporation. He was a subscriber to the capital stock; had paid a portion of the subscription, and gave the notes sued on for the balance. We can see no reason why he should not pay them. There is no error in the judgment below, and it is affirmed.

PER CURIAM. Judgment affirmed.

CHARLES W. BRADLEY *vs.* JAMES McDANIEL.

One coming in as under-lessee to the defendant in an action of ejectment, during the pendency of that action, is bound by the proceedings had therein, and, consequently, is liable to an action for *mesne profits*.

ACTION of TRESPASS *quare clausum fregit* for mesne profits, tried before ELLIS, Judge, at the Fall Term, 1855, of New Hanover Superior Court.

Plaintiff showed in evidence a deed conveying the premises from one Bowen to Messrs. Wright and Miller, and from them to himself. He then proposed to show the record of a recovery in ejectment, wherein he was lessor of the plaintiff, and said Bowen was defendant; but his Honor held that it was not competent, unless he first showed a privity between the defendant in this action and the defendant in the action of ejectment; whereupon the plaintiff showed, that after the said action of ejectment was instituted, and while it was pend-

ing, Bowen conveyed the premises, by deed, to one Johnston, who let the same to one Peterson, who let them to this defendant. The record was then received, (the defendant excepting,) and it appeared that the plaintiff in that suit had recovered his term, and had judgment for costs; also, that a writ of possession had issued thereupon, under which the defendant in this suit had been put out of possession and the present plaintiff put in, before this action was brought.

Defendant offered to show that Johnston, under whom he entered, had an older deed and a better right to the land in question than the plaintiff; but his Honor declined receiving the testimony. He instructed the jury that the plaintiff was entitled to the fruits of his recovery in ejectment, and that all persons coming in under the defendant, after the commencement of the action of ejectment, were in privity thereto, and bound by the recovery therein. To this instruction defendant again excepted. Verdict for plaintiff. Judgment and appeal.

Bryan, for plaintiff, with whom was *W. A. Wright*, argued as follows:

There was evidence to satisfy the jury that McDaniel came into possession under Johnston, who claimed under the defendant in the ejectment, and coming in "*pendente lite*," he is responsible in this action.

The action for mesne profits is a necessary consequence of the recovery in ejectment, and even if the defendant have the superior title, he is not permitted to shew it in this action, *Benson* v. *Matsdorf*, 2 Johns. Rep. 369.

The action is in form trespass *vi et armis* in which the possession is in controversy, and the judgment in ejectment conclusively establishes the plaintiff's title to the possession from the demise laid in the declaration.

The defense does not distinguish between ejectment and this action. If the defendant had, or claimed under, superior title, he might have applied to the Court, pending the action of ejectment, and upon a proper case being made, he might

have been permitted to defend, &c.; the plaintiff then could have determined whether he would proceed in his action.

Reid and *Banks*, for defendant.

PEARSON, J. The law is as it was laid down by his Honor, and for the reasons given by him. See 3 Phill. on Evidence, 814, and other text books, and the cases cited.

Plaintiffs in ejectment and detinue would be defrauded of the fruit of their recoveries, unless a third person, who, pending the action, takes the place of the defendant in regard to the possession of the property, (although he is no party to the action,) be considered so far a privy as to be bound by the proceedings in respect to the right of possession. Hence, when a writ of possession issues after a recovery in ejectment, all persons, as well those not parties, as the party defendant, are put off the land, so that the plaintiff may have the fruit of his recovery. This is every day practice. So, if, pending an action of detinue, the defendant puts the property into the possession of a third person, under the execution, the sheriff takes the property wherever he finds it, and delivers it to the plaintiff. This is also familiar practice.

The action of trespass for mesne profits is a continuation or elongation of the action of ejectment, introduced as a matter of convenience and for the purpose of saving time; *Miller* v. *Melchor*, 13 Ire. 439; consequently, one who takes possession of the premises, pending the action of ejectment, although he does not make himself a party of record, is a *privy* in respect to the *lis pendens*, and stands "in the shoes" of the tenant who was in possession when the action was brought. Whether it be necessary, in order to make the recovery in ejectment evidence against one who takes possession *lite pendente*, to show a connection between the defendant in the action of ejectment, and the person who takes possession *lite pendente*, we express no opinion. In our case, such a connection is shown; for the defendant in this action, is a sub-lessee of Johnston, to whom the defendant in the action of ejectment had convey-

ed the premises, and in regard to whom he held possession as a *quasi tenant* at will, or occupier by his permission; so it amounts to a mere shifting of the possession from one tenant of Johnston to another.

PER CURIAM. Judgment affirmed.

GEORGE W. BELL *vs.* WILLIAM M. HANSLEY.

One may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply.

THIS was an action of TRESPASS, ASSAULT AND BATTERY, tried before ELLIS, Judge, at the Fall Term, 1855, of New Hanover Superior Court.

The plaintiff proved the assault and battery; and there was evidence tending to show a mutual affray and fighting by consent.

The defendant called upon his Honor to instruct the jury, that if the parties mutually assented to, and participated in, a breach of the peace, the plaintiff could not recover.

But his Honor was of opinion, and so advised the jury, that notwithstanding the fact that the parties had mutually assented to an affray, the plaintiff was, nevertheless, entitled to recover; but that the fact relied on as a defense, was proper to be considered by the jury in mitigation of damages. The defendant excepted to these instructions.

Verdict for the plaintiff. Judgment and appeal.

Reid, for plaintiff.

W. A. Wright, for the defendant.

NASH, C. J. This case presents the question, whether, when two men fight together, thereby committing an affray, either is guilty of an assault and battery upon the other. Jus-

tice BULLER in his Nisi Prius, at page 16, says, each does commit an assault and battery upon the other, and that each can maintain an action for it. He refers to a case at Abingdon, *Boulter* v. *Clark*, when Serjeant Hayward appeared for the defendant, and offered to prove that the parties fought by consent, and insisted, that this, under the maxim *volenti non fit injuria*, applied. PARKER, Chief Baron, denied it, and said, "the fighting being unlawful, the consent of the plaintiff to fight would be no bar to his action, and that he was entitled to a verdict." Mr. Stephens in his Nisi Prius, 211, lays down the same doctrine—"If two men engage in a boxing-match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury."

PER CURIAM. Judgment affirmed.

ABRAM N. MATTHIS *vs.* HARMON MATTHIS.

Testimony that raises a mere conjecture, ought not to be left to a jury, as evidence of a fact which a party is required to prove.

ACTION of TROVER for the conversion of a negro man, Bartee, with a joinder of a count in case, for seducing a slave to run away, tried before ELLIS, Judge, at the Fall Term, 1855, of Sampson Superior Court.

The counsel agreed in writing upon the following as a statement of the case as tried below, viz:

"It was in evidence, that, in the year 1846, James Matthis, the father of the plaintiff, by parol, gave a slave named Bartee, to the plaintiff, who took him into possession. During the winter of 1846, Bartee was missing, and was thought to have run away, and plaintiff advertised him, and took out an outlawry before William L. Robinson and James D. Matthis,

(son of the defendant,) who were justices of Sampson county, which outlawry was posted in the county. James Matthis, father of the plaintiff, made his will in 1844, in which he bequeathed this slave, Bartee, to plaintiff, and made plaintiff one of his executors. He died in 1850, and soon thereafter, the will was proved. Bartee was not heard of till 1853, when plaintiff, hearing he was in Georgia, took a witness with him to Savannah, in order to reclaim him. He found Bartee there, in the possession of one McAlpin. Six months after this visit, he went again to Savannah, and returned with Bartee. The defendant was in Charleston in 1847, with Bartee, calling him Lewis, and sold him by that name to one McBryde, who sold him to one Oakes, who sold him to the aforesaid McAlpin in Savannah.

"The plaintiff, on his regaining possession of Bartee, brought this action. Plaintiff offered evidence of his expenses going and returning from Charleston, upon these visits to regain possession of Bartee. Defendant objected to the testimony, but the Court reeeived it.

"Defendant offered a bill of sale from James Matthis for the slave Bartee, dated July, 1847, witnessed by one Milton P. Matthis. Evidence was introduced on both sides, plaintiff insisting that the deed was a forgery, and defendant supporting it.

"Defendant contended that plaintiff could not recover upon the count in trover, because he had no right of property, and had shown the right of property to be in James Matthis at the time of the conversion. Of which opinion was his Honor.

"Defendant further contended, that *case* would not lie, and that if plaintiff had any cause of action, it was *trespass*. And that if case would lie, there was no evidence to be submitted to the jury that defendant had in any way interfered with plaintiff's possession. But his Honor was of a different opinion, and charged the jury, that the plaintiff's action on the case, if they believed the evidence, was well brought, and that there was evidence to be submitted to them, the weight of which they were to determine.

"If they believed the bill of sale was genuine, it passed James Matthis' title to the slave Bartee, in July, 1847. In that case, if, before that time, the defendant had seduced the slave or enticed him from plaintiff's possession, plaintiff was entitled to damages for the term of said seduction, or up to the date of the bill of sale.

"If, however, the bill of sale was not genuine, and not the deed of the said James Matthis, then, plaintiff was entitled to damages, up to the time of the death of the said James Matthis in 1850, including such expenses in and about the regaining of possession of the slave as were necessary.

"The jury found for the plaintiff $550 damages. A rule for a new trial was had, and discharged, and defendant appealed.

(Signed,) WINSLOW, for plaintiff.
D. REID, for defendant."

McDugald, for plaintiff.
D. Reid, for defendant.

BATTLE, J. There is one error apparent upon the bill of exceptions, which entitles the defendant to a reversal of the judgment and the award of a *venire de novo*. Supposing that the plaintiff was entitled to recover damages at all, for the seduction and detention of the slave from his possession, while he held him, as the bailee of his father, it became a question, from what time such damages should commence. The verdict was general, and therefore, if, in any view in which the case was submitted to the jury, the Judge misdirected them upon the question of damages, the defendant has a right to complain of it. The defendant claimed the slave by virtue of a bill of sale, bearing date in July, 1847, from the plaintiff's father, who was admitted to be the owner until his death in 1850. The genuineness of that instrument was disputed, and we refer to it at present for the date only. The Judge charged the jury, that they might give damages for a period prior to that time, if they should find that the defendant had, before such time, "seduced the slave, or enticed him from the

plaintiff's possession." The defendant contends, and, as we think, contends successfully, that there was no evidence to be submitted to the jury upon that point.

The only testimony which seems to justify the Judge's charge, is, that the defendant was seen with the slave Bartee, in Charleston, in 1847, calling him by a different name. It is not stated at what time of the year this was, whether before or after the date of the deed in July. The burden of proof was upon the plaintiff, and if his testimony raised only a bare conjecture that it was before that time, and it is manifest that it could do no more, then there was, in effect, no evidence of the fact. *Sutton* v. *Madre*, 2 Jones' Rep. 320. Such being the case, it is clear that the defendant may have been, and probably was, prejudiced by the instructions. We cannot tell from the record, whether the jury gave damages for the alleged injury prior to July, 1847, or not; and, as the defendant may have been prejudiced by the erroneous charge, he is entitled to a new trial.

PER CURIAM. Judgment reversed.

Doe on the dem. of CHARLES HARDIN *vs.* JOHN CHEEK.

Where the purchaser of land at a sheriff's sale is not the plaintiff in the judgment and execution at whose instance it is sold, no judgment need be shown.

The recitals in a sheriff's deed, of an execution, levy, and sale, are *prima facie* evidence of those facts. (*Owen* v. *Barksdale*, 8 Ire. Rep. 81, commented on.)

ACTION of EJECTMENT, tried before his Honor, Judge DICK, at the special term (Nov. 1855,) of Moore Superior Court.

The plaintiff showed a grant from the State to one John Tyson, dated 30th of September, 1748, for the land in controversy; also several mesne conveyances down to John Shearing, who, by deed dated 2nd of December, 1766, conveyed to

Charles Shearing. The lessor of the plaintiff proved that he was the heir-at-law of Charles Shearing.

The defendant claimed title to the land in dispute by a regular series of conveyances from Archibald McNeil to himself. In the year 1775, the sheriff of Cumberland, one Malcom McNeil, sold this land at public auction to Archibald McNiel, and made him a deed for the same. The defendant offered in evidence the transcript of a record of the County Court of Cumberland, setting forth a memorandum on the docket, of a judgment at July term, 1774, against Charles Shearing, for costs in a suit that he had brought against one David Stroud, and which at that Court was "discontinued;" also a *fieri facias* issuing on this judgment, which was returned to January term, 1775, endorsed, "satisfied by sale." The sheriff's deed to Archibald McNeil recites that, "whereas, by sundry executions issuing from the county of Cumberland against Charles Shearing, for the sum, &c., *directed and delivered*" to him as sheriff, he levied on the land in question, and sold it; also containing the usual and proper terms of a sheriff's deed for land sold at execution sale.

It was insisted by the plaintiff, 1st. That there was no sufficient judgment shown. 2nd. That there was no evidence that this land was levied on and sold; and that the recitals in the sheriff's deed were not evidence of those facts. There were various other questions presented in the bill of exceptions and argued in this Court, which, from the view taken of the case by their Honors, become immaterial.

Upon the questions above presented, his Honor below charged the jury, that it was not necessary for a purchaser at a sheriff's sale, not being the plaintiff in the judgment, to show any judgment at all; but if the evidence satisfied them, that the sheriff of Cumberland actually levied the execution against Charles Shearing, on the land in controversy, and sold it at public sale, and Archibald McNeil was a *bona fide* purchaser for a valuable consideration, the title passed to Archibald

McNeil, and defendant (claiming under him) was entitled to their verdict. Plaintiff excepted.

Verdict for defendant. Judgment and appeal.

Bryan, for plaintiff.
Kelly and *Haughton*, for defendant.

NASH, C. J. Several points are embraced in his Honor's charge. The first is decisive of the case, and renders it unnecessary to consider the others. The defendant claimed title to the land in dispute, under Archibald McNeil, who derived title under an execution sale made by the sheriff of Cumberland, by virtue of an execution against Charles Shearing, under whom the plaintiff claims title. The sale was made in 1775. Charles Shearing died in 1786, and in 1788 his widow and children abandoned the possession of the land. The defendant showed a regular chain of title from McNeil to himself. The plaintiff objected that there was no sufficient judgment to warrant the issuing of the execution under which the sheriff of Cumberland sold the land in controversy; nor was there any evidence that the sheriff either levied on the land or sold it. His Honor charged the jury, that it was not necessary for a purchaser at a sheriff's sale (not being the plaintiff in the execution) to show the judgment on which the execution was founded. But if the evidence satisfied them that the sheriff actually levied the execution against Charles Shearing, on the land in controversy, and sold it at public sale, for a valuable consideration, to Archibald McNeil, then the title passed to him, and the defendant was entitled to their verdict.

The first branch of the charge is in conformity with the decision in *Rutherford* and *Rayburn*, 10 Ire. 144. The evidence upon the second branch of the objection was the sheriff's deed to McNeil, in which he recites the levy and the sale. It was insisted that the recital in a sheriff's deed was no part of the deed, and was therefore no evidence of the fact recited. This objection was founded, we presume, on what fell from the Court in the case, *Owen* v. *Barksdale*, 8 Ire. Rep. 81, in

which the Court say, that a sheriff's deed is not evidence of the fact. If the Court intended to convey the idea that a *recital* in a sheriff's deed is not any evidence of the facts set forth in it, we do not concur in the opinion, but deem it an error. We hold that the recital in the deed, was *prima facie* evidence of the facts set forth, it being the act of a public officer in discharging his official duties, reciting how and by what authority he had made the conveyance, nevertheless open to proof that the fact did not exist. If a sheriff's deed have no recital, or sets forth in it an insufficient execution, the purchaser may prove, by any legal evidence, that the officer, at the time of the sale, had a sufficient execution, and for this purpose the sheriff is a competent witness; or it may be proved by other testimony. *Carter* v. *Spencer*, 7 Ire. 14, and *McEntyre* v. *Durham*, 7 Ire. 151. If, however, the Court intended to say that a sheriff's deed, not containing any recital, did not, of itself, prove that the sheriff at the time of the sale had any sufficient execution to warrant the sale, we see no error in it.[1] Charles Shearing, against whom the execution issued, died in 1786. At that time he had no seisin in the land in question, it having been duly sold, and could transmit to his heirs no heritable blood in it. The plaintiff, therefore, who claims under him by descent, or under his sons, has no title to the premises in dispute; but the title under the facts was in the defendant.

PER CURIAM. There is no error, and judgment is affirmed.

JESSE TAYLOR *qui tam vs.* ENOCH COBB.

Where the time of forbearance for the loan of money is stated in a *qui tam* action for usury, to be from 31st of March, to the first day of April, in the same year, and the proof that it was from 15th March to the 1st of April ensuing, the variance is fatal.

Taylor *v.* Cobb.

THIS was an action of DEBT *qui tam* to recover a penalty for violating the statute of usury, tried before his Honor, Judge ELLIS, at the Spring Term, 1855, of Duplin Superior Court.

The allegation in the plaintiff's declaration was, that the amount loaned and advanced, was so loaned and advanced on the 31st of March, and forborne till the 1st day of April in the same year. There were several counts in the declaration stating the sum loaned differently, the first states it at $600; the second at $500, and the third at $492,98–100.

The evidence was, that there were two executions in the hands of the sheriff, for the aggregate sum of $492,98–100, which defendant agreed to pay off, and it was agreed for so doing he was to have one hundred dollars. The money was paid by defendant on the 15th of March, and on the 31st of the same month the parties met, and a note with surety was given for the amount loaned, including the money agreed to be paid as usurious interest, payable one day after date.

His Honor instructed the jury on the above facts, "that there was a material variance between the allegations and the proofs; that it was necessary, in actions like this, that the sum loaned, the time of forbearance, and the interest paid for the forbearance, should be stated with precision, so that the Court may see from the declaration, that the interest taken is more than the legal rate, and all these facts must be proved as alleged. In this case the proofs did not sustain the allegation." In submission to which the plaintiff took a non-suit, and appealed.

Reid, for plaintiff.
W. A. Wright, for defendant.

BATTLE, J. In a *qui tam* action for usury, the declaration must state precisely, and accurately, the sum lent and forborne, the time of forbearance, and the excess of interest, "because these three points are indispensable to enable the Court to see on the record, that the interest received according to the sum lent, and the time, was at a rate forbidden by law; and the

proofs must sustain the allegations as laid." *Allen* v. *Ferguson*, 6 Ire. Rep. 17. Hence, it was *held* in that case, that, as the declaration was that the defendant had corruptly taken on 20th of April, 1844, twenty-five dollars usurious interest, on a contract for the forbearance of $175, from 21st of April, 1843, to the said 20th of April, 1844, and the proof was that the usurious interest was taken for the forbearance of $175 from the 21st of April, 1843, to the 21st of April, 1844, there was a fatal variance, though it was for but one day.

In the present case, the opinion expressed by his Honor, before whom the cause was tried, clearly announces the same principles, and shows that the action cannot be sustained. The time of forbearance is stated in all the counts as being from the 31st day of March, 1845, to the first day of April, in the same year. The testimony shows that the money was advanced on the 15th of March, 1843, and that it was forborne until the first day of April following. The variance between the allegation and the proof, in that particular, is fatal, and the judgment of non-suit must be affirmed.

PER CURIAM. Judgment affirmed.

MOYE & ADAMS *vs.* JOHN BEAMAN.

Upon an issue of fraud, under the insolvent debtors Act, where a debtor conveyed all his visible property in trust, and many circumstances tended to show, that by a fraudulent collusion with the trustee and another, a large amount of property had been transferred to his son, a youth of 18, without means, it was error in the Judge, after assuming that the deed and sale were fraudulent, to instruct the jury that they should not find the issues against the defendant, unless they *believed that the property was purchased for the defendant.* It should have been submitted whether the transfer to the son was *bona fide* and for value paid by him.

ISSUE OF FRAUD, under the statute for the relief of insolvent debtors, tried before his Honor, Judge ELLIS, at the Spring Term, 1855, of Greene Superior Court.

The plaintiff obtained a judgment against the defendant, in Greene County Court, for $142,67, and issued a *capias ad satisfaciendum* thereon. The defendant gave bond under the statute, and, at the return term, proposed to take the oath for the relief of insolvent debtors, when the defendant suggested fraud; whereupon an issue was made up. Among the specifications, it was alleged, that the defendant fraudulently concealed land and slaves; that he concealed money and notes, so that his creditors could not have satisfaction out of them.

The case was tried in the County Court, from whence it was taken by appeal to the Superior Court.

Upon the trial below, it was in evidence, that the defendant, before the issuing of the *ca. sa.*, was in possession of two tracts of land, several slaves, and notes to a small amount,—altogether valued at $15,000; that he was at the same time indebted beyond the value of his property. This was in 1848.

It was proved that he conveyed all his visible property, to his son-in-law, one Jones, in trust to satisfy certain debts set out in the deed; the plaintiff's debt not being included among them. That the defendant declared to one witness, he had enough to satisfy all his debts; and his object, in making the trust, was to avoid the payment of a certain debt he owed one Eason, by whom he had lost a claim theretofore. It also appeared that the trustee, Jones, sold all of said property at auction, in July, 1848, for cash. That when persons were assembled at the sale, defendant persuaded several of them not to bid, saying he did not know what would become of his family. It was also in evidence, that the day before the trust deed was made, the trustee, Jones, loaned the defendant $1000 of his own means, which was provided for in the deed of trust, and subsequently paid. It also appeared that, after the sale, and up to the time of the trial, the defendant and his family lived on the land. Several of the slaves still remained on the premises, together with other property, a part of which was claimed by a son of his, who was about eighteen years old at the time of the sale, and a part by Jones, the trustee.

The defendant introduced *Jones*, who testified that the de-

fendant married a sister of his, by whom he had several children, among whom was the son referred to. That he, Jones, with a view of providing a home for defendant's family, and assisting his son, purchased at the said trust sale, one tract of land, and other property now on the premises, for which he paid his own money. The purchase was made by others for him, he being informed that he could not buy at his own sale. That he left this property with the defendant's son, with an understanding that he should labor for it, and he (Jones) would make him a title to it. That the son had paid for a part of it, and the title was still in himself. He further testified, that the $1000 was loaned by him to the defendant, to enable him to pay some small debts, which he said he did not recollect when he made the deed in trust, and were therefore not included in it; but that a few days afterwards, and before this proceeding was instituted, he was informed that a large debt of this defendant existed, for which a deceased brother of witness' was the surety. That he, being the administrator on the estate of his brother, and finding that it was liable to this debt, went to the defendant, and took back from him the $1000, and subsequently applied it to that debt.

One *Williams* swore that he purchased a tract of land, and the slaves now on the premises, at the sale. That he and defendant's son then had an agreement, in which it was understood, that if the son would pay for the property, which he, Williams, had bought, and pay a debt his father owed him, he would make him a title to the property. That he at first took away the negroes, but afterwards let them go back; and that the son having complied with the terms of their agreement, he (witness) had made him a title to the property.

Some evidence was introduced to explain how the son had made the money to pay for this property, which was 6 or $7000.

The plaintiff then gave evidence, that the defendant had borrowed $1300, just before the trust deed was made, and had $85 due by notes. The defendant then introduced evidence to show the disposition made of these funds, and plaintiff contended that he only accounted for $885 of the amount.

The witness, *Jones*, further stated, that all the property sold by him as trustee, was paid for, and the proceeds paid out to creditors; that there were debts in the trust unpaid.

Williams further stated, that he did not pay for the property at the time he bought it; that he had claims against the defendant, provided for in the trust, and, at a subsequent day, had a settlement with the trustee, when he paid the balance.

The plaintiff insisted, that defendant did conceal as alleged: 1. Because the deed in trust was fraudulent, being made to a brother-in-law, to defeat a creditor. 2. The sale was for cash, in July, when money is generally scarce in that part of the country. 3. Jones and Williams did not pay cash. 4. A loan for $1000 was made the day before, and provided for in the trust. 5. The sale was fraudulently conducted, the defendant dissuading persons from bidding. 6. Jones bought at his own sale. 7. The defendant is still in possession of the property, as before the sale. 8. The notes and money not satisfactorily accounted for. 9. The defendant's son could not have honestly paid so large a sum as 6 or $7000 in so short a time.

The Court charged the jury, that the issue was, "did the defendant fraudulently conceal property as alleged?" and not whether the deed in trust was fraudulent. For, even if they should think it fraudulent, and yet, at the same time, believe that all of defendant's property had gone to pay his debts before this proceeding, then he would not be held guilty in this issue. They were also charged, that the defendant's dissuading persons from bidding at the sale, did not, of itself, condemn him; but both of these circumstances, with all the others relied on by plaintiff, as above enumerated, were evidences tending to show that the sale of property to the defendant's son, was not *bona fide*, but *covinous*, and for his benefit; in which case the verdict should be for the plaintiff. All the conduct of the defendant and his associates was submitted as evidence tending to the same end, together with all the incidents connected with the trust and sale. The jury were told,

that if Jones' testimony were true, the $1000 had been satisfactorily accounted for. Plaintiffs excepted.

Verdict for the defendant. Judgment and appeal.

Moore and *Dortch*, for plaintiff.
Rodman, for defendant.

PEARSON, J. We do not concur with his Honor, in the view taken of the question presented by the facts in this case. His charge, in substance, was: although the deed of trust executed by the defendant, conveyed all of his visible property, and was made with intent to defraud his creditors; and although the trustee had much of the property bid off by an agent, for the purpose of passing it to a son of the defendant, then under age, whenever he paid the amount of the bids, which conveyance had not been made, (the full amount of the bids not having, up to that time, been paid;) and although one Williams also bid off much of the property, and agreed to let the defendant's son have it upon the payment of the amount of his bids, which was arranged accordingly; and although, according to the testimony of the trustee and Williams, "this property, valued at some fifteen thousand dollars, was left with the son, with the understanding, that if he would *labor, and pay for it*, they would make him a title;" and although no proof was offered as to the *peculiar kind of labor* done by the son, whereby a youth, eighteen years of age, can realize as the nett profit of his *labor*, some $6,000 or $7,000, within less than one year; and although the defendant had, on the day of sale, persuaded people not to bid against the trustee, or Williams, "saying he did not know what would become of his family;" yet, the jury should not find against the defendant, upon the issues, unless they believed the property was purchased for the defendant! This of course was not the fact; because the defendant knew he could not hold property, and the object was to get the title in the son of the defendant. A more palpable case of fraud can scarcely be imagined.

We can only account for the error into which his Honor

fell, by supposing that he had taken up the idea that the oath which the creditor is required to take by the Act of 1844, changed the law in regard to the whole subject matter, so as only to make a debtor liable, if, at the time of the commencement of the proceeding, he held property, money, or effects, which could not be reached by a *fieri facias*, in a way to defraud his creditors. We do not consider that the Act of 1844, made so radical a change in the law, as to make it necessary for the creditor to prove, upon an issue of fraud, that the debtor, at *that time*, held property, money, or effects, which were concealed by him, so as to defeat the writ of *fieri facias*. We are satisfied that the intention was to leave open the question, as to whether the debtor had not, *before that time*, made a conveyance of his property for the purpose of defrauding creditors; and although the right of property, as between the parties, had passed out of the debtor, yet, if, as against creditors, the conveyance was void, the debtor cannot be allowed to take the oath and claim his discharge, unless he makes a full disclosure, and sets out in a schedule, the property so fraudulently conveyed; not *his right*, but the *corpus* of the property, as is held in *Adams* v. *Alexander*, 1 Ire. 501, where the subject is fully discussed.

So, in the point of view in which we look at the case, viz: assuming, as the Judge does in his charge, that the deed of trust, and the purchase under it for, and on behalf of, the son, were both fraudulent, we differ from him in the opinion that the creditor was not entitled to a verdict, unless the purchase was made for the debtor, so as to revest the property in him.

If a debtor makes a voluntary conveyance, with an intent to defraud creditors, and the donee sells *bona fide*, and for a valuable consideration, the purchaser can hold against the donor's creditors; because the valuable consideration, and *bona fides* on his part, are taken to supply the want of both those qualities in the first conveyance. This doctrine does not apply to our case; for the Judge assumes a want of *bona fides*, as well as a want of ability to pay a valuable consideration, on the part of the son, and makes the case turn upon the fact, did

the son purchase for the benefit of the father; whereas it ought to have been put on the fact of *bona fides*, and value paid by the son, so as to supply the absence of both of these essentials in the conveyance to the trustee.

PER CURIAM. *Venire de novo.*

WILLIAM B. TOOLEY, ADM'R., *vs.* HARRY LUCAS, ADM'R.

Parol evidence of the contents of a deed conveying a slave, is not admissible, if it was not proved and registered, although full proof has been made of the loss or destruction of the instrument, and proper notice given of the intention to offer secondary proof of its contents.

ACTION of TROVER, tried before PERSON, Judge, at the last Fall Term of Hyde Superior Court.

The plaintiff declared as the administrator of Elisha Tooley, also in the name of William B. Tooley, an infant, for the conversion of a female slave named Jane. It was proved that for fifteen years, or thereabouts, the said girl had been the property of William B. Tooley, the elder, in his own right. In that year, it was proved by one Harris, that he (W. B. Tooley, sen'r.) executed a bill of sale to Nathaniel Creedle, conveying to him the slave in question, with others, for a valuable consideration, and that he, Harris, attested the deed as a subscribing witness. It was further proved that, since the death of Nathaniel Creedle, this deed had been seen in the possession of either W. B. Creedle, or in that of defendant, witness could not, with certainty, say which. This witness was the administrator *de bonis non* of Nathaniel Creedle, and admitted that he had been notified, as such, to produce the instrument referred to above, but stated that he did not have the possession of that paper; never had seen it, and did not know where it was. It did not appear that this deed had ever been proved or registered.

Defendant's counsel opposed the admission of this evidence

to prove the contents of the conveyance; but the objection was overruled, and the evidence admitted. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Donnell, for plaintiff.

Rodman, for defendant.

NASH, C. J. The only question presented by this case is, as to the competency of the testimony offered by the plaintiff, to prove the bill of sale from Tooley to Creedle. The defendant objected to the evidence, upon the ground, that it did not appear that the deed ever had been proved and recorded. To the legislative department of the government, belongs the power to enact laws, by which the people are to be governed, and to the judiciary, the right to expound them. While acting within the scope of their legitimate authority, their will is to be obeyed; none have a right to disobey it. Where the language of an Act is plain and perspicuous, the Act must speak for itself, unless its enactment transcends the power of the legislature. In this case the legislature has left no doubt upon the question presented to us. "All sales of slaves shall be in writing, attested by at least one credible witness, or otherwise shall not be deemed valid; and all bills of sale of slaves shall, within twelve months after the making thereof, be proved in due form, and recorded; and all bills of sale, and deeds of gift, not *authenticated* and *perpetuated* in manner by this Act directed, shall be *void and of no force whatever*." Rev. Stat. ch. 37, sec. 19. I need not refer to the proviso in that section. In the succeeding section, provision is made for the registration of such conveyances. Here, there is no ambiguity; no room for construction. If not *authenticated and perpetuated* as directed, that is, duly proved and recorded as directed, the conveyance is declared not to be deemed *valid*, but to be *void* and of *no effect*. So important is this enactment, that from session to session of the Legislature, it is an invariable practice to pass a law enlarging the

time for proving all such conveyances. If a *hiatus* occurs in the link of this chain of Acts, and a subsequent Act should be passed, the deed may be proved and authenticated under the latter, but when so proved and authenticated, it has no relation back; so that an execution against the bargainor may be levied upon the property contained in it. *Scales* v. *Fewell*, 3 Hawks. Rep. 18. We are not unapprised of the decision of the Court in the cases of *Hancock* v. *Hovey*, Tayl. Rep. 104, and *Rhodes* v. *Holmes*, 2 Hawks. Rep. 193, but we do not think they govern this. Our decision turns upon a different state of the law since they were made. When they were pronounced, it was under the Statute of 1784, in which the preamble to the enactment was made. A preamble is no part of the law, though it is a guide to direct the Courts, as to the intention of the Legislature. We are governed by the Act of 1836, in which the preamble is omitted, and in which there is nothing to govern the construction of the general words, but the words themselves; and we do not feel at liberty to depart from them; and that, whether the preamble was omitted from inadvertence or design. That it was not this inadvertence, we are justified in concluding, from the fact, that "the Revised Code" which was passed at the session of the Legislature in 1854, ch. 37, sec. 19, enacts "that all written sales and conveyances of slaves shall, within two years after the making thereof, be proved in due *form and registered, or otherwise shall be void.*" It is true, this latter Act did not go into operation until the first of January in the present year, and it is only brought into notice here, to fortify the position we have taken in this case. See *Lambert* v. *Lambert*, 11 Ire. Rep. 162. *Carrier* v. *Hampton*, Ibid 307. The first of these cases was in relation to a conveyance of land, and we see in the Act little difference between conveyances of land and of slaves, as to the authentication of conveyances; and the latter was upon the sufficiency of the authentication of a conveyance of land and slaves.

The evidence offered by the plaintiff, to show the contents of the deed from Tooley to Creedle, was incompetent, and im-

properly received by the Court. For this error, the judgment must be reversed, and *a venire de novo* awarded.

PER CURIAM. Judgment reversed.

SAVAGE AND MEARES *vs.* JOHN B. HUSSEY, ADM'R.

A judgment exceeding the sum demanded in the writ, is irregular and erroneous, but not void; its validity, however, cannot be questioned collaterally. Therefore, where the writ demanded $300, and the judgment was for $309, it was *Held*, that a sheriff who had become bail, by failing to take a bail-bond from the defendant, could not avail himself of this variance as a defense upon a suit by *sci. fa.* to subject him as bail.

A *sci. fa.*, to subject a sheriff as special bail, by reason of his default, need not set forth the cause of action upon which the judgment against his principal was obtained.

SCIRE FACIAS against defendant's intestate as special bail of one George Gwyer, tried before his Honor, Judge PERSON, at the Fall Term, 1855, of Duplin Superior Court.

The following is the reciting portion of the sci. fa., viz: "Whereas, heretofore, a *capias ad respondendum* issued to the sheriff of Duplin, at the instance of Edward Savage and Gaston Meares, trading under the name and style of Savage & Meares, against George Gwyer, defendant, commanding the said sheriff to seize and take into his custody the body of the said George Gwyer, and him safely keep, so that he might have him before the justices of our court of pleas and quarter sessions, in and for the county of Duplin, at the court-house in Kenansville, on the 3rd Monday in October, 1851, then and there to answer the said plaintiffs of a plea of trespass on the case, to their damage three hundred dollars; and whereas the said *capias ad respondendum*, came into the hands of Edward E. Hussey, esquire, sheriff of the said county, and was by him executed, &c.; and whereas the said sheriff took no bail of the said George Gwyer, wherefore, and by force of the statute, the said Edward E. Hussey became special bail of

the said George Gwyer; and whereas, at &c., judgment was duly entered against George Gwyer, in favor of the said Savage & Meares, for the sum of three hundred and nine 56-100 dollars damages, with interest on $296,95, from the rendition of the judgment, till paid, &c., which said judgment remains altogether unpaid and unsatisfied, &c."

The writ in the case of Savage & Meares, was shown to have come to the hands of defendant's intestate; it was in *Case*, and demanded $300 damages. It was returned, "executed," but no bail-bond was returned, for, in fact, none had been taken by the sheriff. At January Term, 1852, plaintiffs took judgment against Gwyer, for $309,56-100, and $8,90-100 costs. The case came up to the Superior Court by appeal.

The defendant insisted, 1st. That the plaintiffs could not have judgment, for the reason that the writ against Gwyer was for $300, and judgment rendered against him was $309, 56-100, and costs.

2nd. That the *sci fa.* does not recite the cause of the action, in which the judgment against Gwyer was obtained.

His Honor, being of opinion with the defendant, gave judgment accordingly, from which the plaintiffs appealed.

W. A. Wright, for plaintiffs.
Reid, for defendant.

Pearson, J. The judgment, being for a sum exceeding that demanded by the writ, is irregular and erroneous; but it is not void, and has full force and effect until it be reversed. This must be done by a direct proceeding. Its validity cannot be impeached collaterally; consequently, the defendant cannot go behind the judgment, for the purpose of taking advantage of this variance.

Had the defendant taken a bail-bond, the penalty would have been $600, (double the amount named in the writ,) which is amply sufficient to cover the amount of the judgment rendered in this case. The defendant, by neglecting to take a bail-bond, made himself liable as bail, and of course his lia-

bility extended to $600. Had the judgment exceeded that amount, for instance, if it had been for $1000, it may be that the defendant might have gone behind the judgment, and had reference to the writ, for the purpose of fixing the extent of his liability. That question is not presented. The plaintiffs do not seek to charge the defendant beyond the amount of his admitted liability; that is, double the amount named in the writ.

As to the second question. If the sheriff takes a bail-bond, the *sci. fa.* must allege the execution of the bond, and the liability of the defendant by force and effect thereof, for the purpose of enabling him to deny the execution, or take advantage of a variance or the like, which he will do under the plea *non est factum.* If the sheriff has neglected to take a bond, the *sci. fa.* must allege that the defendant was sheriff; that a *capias ad respondendum* was put into his hands, which was returned executed; and that he had failed to take a bail-bond, wherefore, by force and effect of the statute he became liable as bail. It is necessary to make these allegations, for the purpose of enabling the defendant to traverse any one, or all of them.

So, it is necessary to allege a judgment against the principal, for the purpose of enabling the defendant to traverse that fact by a plea of *nul tiel record.* Before the late statute, it was necessary to allege that a *ca. sa.* had issued, and the return of *non est inventus*, for the purpose of enabling the defendant to traverse one, or both, of these facts. For what purpose, should the *sci. fa.* allege the cause of action in the suit in which judgment had been taken against the principal? It in no wise affects the liability of the defendant, and he can take no advantage of it, one way or the other.

PER CURIAM. Judgment below reversed, and judgment for plaintiffs according to *sci. fa.*

WILLIS PIPKIN, ADM'R. OF JESSE PIPKIN, *vs.* WM. ROBINSON.

Where A agrees to pay to a mechanic $100 of the deficiency in a public fund for building a school-house, *provided eight other responsible persons sign the agreement*, and eight other persons do sign the contract, after the work has been received by the trustees who made the contract with the mechanic, A cannot raise the question whether the work was done according to the contract, but must pay the $100.

ACTION of ASSUMPSIT, tried before PERSON, Judge, at the Fall Term, 1855, of Wayne Superior Court.

The plaintiff declared on the following written agreement: "Whereas, it has been found expedient to build a school-house at Goldsborough, suitable to the increasing educational demands of our flourishing town and county, and whereas $2500 is required to carry said school-house to completion, $1600 of which have been collected, leaving a balance of $900 to be secured by future subscription; and whereas a contract has been entered into with Jesse Pipkin to build and complete said school-house for the aforesaid sum of $2500: Now, therefore, fully believing that the remaining $900 can be easily collected from the friends of the enterprise in Wayne and the adjoining counties, who have not yet subscribed any thing, and in order to hasten it to a speedy and successful completion, we, whose names are hereunto subscribed, do become pledged to Jesse Pipkin for the said balance of $900, to be paid equally by each of us; provided always, that nine responsible persons become so pledged. And we further agree, to make good any balance that may fail to be subscribed, to secure said amount of $900; and it is well understood that this obligation is not to be used, nor will it be regarded as binding, unless subscribed by nine responsible persons as aforesaid, dated, &c;" which paper, plaintiff proved, was signed by the defendant and eight responsible persons, each of whom had paid $100, except the defendant.

There was evidence that Jesse Pipkin put up the house, but did not paint it, and that the defendant, Robinson, shortly

afterwards, by the authority of the trustees, went into the possession of it, and used it as a school-house, and also that he had it painted.

It was further in evidence, that Pipkin said he was to complete the building in every particular.

The Court charged the jury that the plaintiff, in order to entitle him to recover in this action, must satisfy them that he had built the school-house according to his contract, and left it to the jury, whether from all the evidence, the contract required him to paint it. If it did, then he could not recover. Defendant excepted to this charge.

Verdict and judgment for the plaintiff.

Dortch, for plaintiff.
W. A. Wright, for defendant.

NASH, C. J. We are somewhat at a loss to perceive upon what principle of law, the defendant refuses to pay the money demanded. The contract for building the school-house, was not made by him with the intestate, but by the trustees; whether, therefore, it was complete in all its parts, was a question in which he had no interest whatever. If the intestate failed to comply with his contract, he was answerable to the trustees, and not to Mr. Robinson. The building was to cost $2500. Of this sum, $1600 was raised by subscription. To secure the balance to the intestate, nine individuals entered into a written contract with him, to pay him $900, each one agreeing to pay $100, upon condition that nine responsible persons sign it. Nine did sign it, of whom the defendant was one. The house was built, and taken possession of by the trustees. Each one who executed the contract has paid his one hundred dollars, except defendant. The condition upon which he entered into the contract was complied with, viz: that eight others should execute the paper with him. We see no reason for disturbing the judgment below.

PER CURIAM. Judgment affirmed.

BRITTAN H. BOTTOMS, *propounder*, *vs.* RAIFORD KENT, *caveator*.

On the trial of an issue *devisavit vel non*, in reply to proof that the propounder had used threats of violence in procuring the execution of the script, *Held* that it was not competent for him to show that he was of an easy, quiet temper, and facile disposition, and therefore not likely to threaten violence.

ISSUE *devisavit vel non*, tried before his Honor, Judge CALDWELL, at the Spring Term, 1855, of Johnson Superior Court.

The script in question was offered for probate, as the last will and testament of one Mourning Kent, by Brittan H. Bottoms, her son-in-law, who is named therein as executor, and who, with his wife and children, are the universal legatees therein. The probate was opposed by Raiford Kent, on the ground, that the execution of the script was procured by threats of violence made by the propounder, and several witnesses were examined, whose testimony tended to show that fact. The propounder was then allowed to prove, that the deceased "was a woman of independent mind, and firm in her purposes." He also offered to prove that he was "a man of easy, quiet temper, and facile disposition, and therefore, not likely to exhibit the conduct charged." This latter testimony was rejected by the Court. For this the propounder excepted.

The jury found that "the script offered was not the last will and testament of the said Mourning Kent."

Judgment for the caveator. Appeal by the propounder.

Moore, *Dortch* and *Rogers*, for the propounder.
Miller, *Bryan* and *Lewis*, for the caveator.

PEARSON, J. This question is presented: upon an issue *devisavit vel non*, there is evidence tending to show that the propounder had procured the execution of the script, by threats of violence; ought he to be allowed to prove that "he was a man of easy, quiet temper, and facile disposition, and therefore, not likely to exercise, or attempt the exercise of, the influence charged?" And taking the question broadly, ought

the caveator to be allowed to prove that the propounder is a man of violent temper, and therefore, likely to make threats?

In an action for seduction, the defendant offered to prove that "he was a modest, retiring man." This evidence is held inadmissible, and the general rule is announced, "evidence of the character of a party is not admissible, unless it be put directly in issue by the nature of the proceeding." *McRea* v. *Lilly*, 1 Ire. Rep. 118.

On an indictment for murder, evidence of the temper and deportment of the deceased is inadmissible. *State* v. *Tilly*, 3 Ire. Rep. 424.

In an action for a malicious prosecution, evidence of the character of the defendant in respect to sobriety, is inadmissible; and *McRea* v. *Lilly*, is treated as settling the rule. *Beal* v. *Robeson*, 8 Ire. Rep. 276.

Again; it is decided that evidence of the general character of the deceased, as to temper and violence, is inadmissible. *State* v. *Barfield*, 8 Ire. Rep. 344.

The only opposing case is, *State* v. *Tackett*, 1 Hawk's Rep. 210. It is overruled by Tilly's case, or so emasculated as not to be able to generate a principle, and is expressly confined to its peculiar circumstances. See note of Cowen and Hill Phil. on Evidence, 461; note 345, and the remarks of RUFFIN, C. J., in *Barfield's case*. Indeed, *Tackett's* case is not supported by any authority, either in the English reports or our own, and the Judges yielded to the seeming hardship, in the application of the general rule. Had the case been reversed, so as to present the question, was it admissible for the State to prove the deceased was mild and submissive in his temper, we presume an exception would not have been made to the general rule.

Our question, therefore, is settled, unless there be some ground for a distinction in regard to the probate of wills. If evidence of the temper and disposition of the deceased, in a trial for murder, or of the defendant in a civil action, is inadmissible, it would seem to follow, it is alike inadmissible in a

trial *before a jury*, touching the execution of a will. *Goodright* v. *Hicks*, Bull. N. P. 294, is an authority to that effect. In ejectment by an heir-at-law, to set aside a will, because obtained by fraud, evidence of the good character of the devisor is inadmissible, see 2 Starkie on Ev. 215; 1 Phil. on Ev. 174, although, if of good character, it would *be less likely* that he had practiced the fraud imputed.

Mr. Moore attempts to get rid of these authorities on two grounds: 1st. The offer in this case was to prove the temper and disposition of the propounder *as facts*, not as character, or general character and reputation. 2nd. There is a distinction in regard to the probate of wills. He relies on *Davis* v. *Culvert*, 5 Gill and John. 271, and a passage from Swinburne, 452, 453.

This makes it necessary to examine the grounds upon which such evidence is held inadmissible, upon the trial of indictments and civil actions, so as to determine whether the principle is general, or restricted in its application.

This examination leads us to the conclusion, that the rule is based on two general grounds: 1st. It is too remote. 2nd. The objections to the mode of proof. Consequently, the principle is general, and the rule is applicable to all *jury trials*.

As to the *first*: it is a rule of evidence that no testimony is admissible, unless it be relevant and connected with the fact in issue, so as to have a tendency to aid the jury in finding with certainty, and not mere probability. This rule is based, among other considerations, upon the ground, that the admission of such testimony would render jury trials complicated, and tend to confuse and mislead, and induce juries to give their verdict upon conjecture, and not upon a conviction of the truth of the matter alleged, and would, in many instances, work further injustice, and take the opposite party by surprise, as he is presumed only to come prepared to disprove or explain matters relevant and connected with the issue joined, and not to go into collateral acts.

For the sake of illustration: upon a plea of usury, the defendant offers to prove that, shortly before the debt sued for was

contracted, the plaintiff had taken usurious interest from a third person, or from himself, or to prove that he was in the habit of lending upon usurious interest. This evidence is inadmissible. The fact, that the plaintiff exacted usury on yesterday, has no tendency to aid the jury in finding, with certainty, that he exacted it to-day, although it makes it more probable, and the jury would be more likely to find the issue in favor of the defendant, which is the very thing a plaintiff would have a right to complain of; because he is not presumed to come prepared to go into every transaction of his life. So, on a question as to the precise terms of an agreement to let premises, although it might assist the jury to make a guess, if evidence was admitted as to the terms on which the landlord had rented to his other tenants, the evidence is inadmissible as too remote. *Carter* v. *Pryke*, Peake's Rep. 95; *Spenceley* v. *De Willott*, 7 East, 108. So in Capt. Vaughan's case, who was indicted for adhering to the King's enemies by cruising on the King's subjects, in a vessel called the "Loyal Glencarty," the counsel for the crown offered to prove, that he had, some time before, cut away the custom-house barge, and had gone a-cruising in her; this evidence was rejected, for were it true, it was no sort of proof that the prisoner had cruised in the Loyal Glencarty. This case is cited, Foster's Crown Law, 246; and that very eminent Judge adds, "the rule of rejecting all manner of evidence in criminal prosecutions, that is foreign to the point in issue, is founded on good sense and common justice; for no man is bound at the peril of life or liberty, fortune or reputation, to answer at once, and unprepared, for every action of his life. Few, even of the best men, would choose to be put to it." "The common law, grounded on the principles of natural justice, hath made the like provision in every case."

I am here reminded of a case which occurred a few years ago in Paris. A woman was tried for the murder of her husband by poisoning. The evidence was circumstantial. The officer for the prosecution offered to prove, that ten years before, while a single woman, she *had stolen* some jewelry. The

evidence was admitted, on the ground, that it tended to show she was a person likely to commit murder, and thereupon she was convicted and executed for murder.

What a striking contrast this case presents in favor of the rule of the common law, by which a prisoner cannot be prejudiced by proof of his general character, much less by proof of particular acts!

The prisoner is permitted to rely on his good general character, and this, of course, lets in similar proof on the part of the prosecution, as the prisoner has made his character a part of the issue. But this is an exception to the general rule *in favorem vitæ*.

Best, on his "Principles of Evidence," makes these remarks: "The rule, that evidence which is too remote is inadmissible, may be stated thus: that as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires *an open* and *visible* connection between the principles and the evidentiary facts, whether ultimate or subordinate. This does not mean a *necessary* connection, that would exclude all presumptive evidence; but such as is reasonable, and not latent or conjectural." Sec. 85. It may perhaps be objected, and indeed, Bentham's Treatise on Judicial Evidence is founded on the notion, that by "exclusionary rules" like the above, much valuable evidence is wholly sacrificed. Were such even the fact, the evil would be amply outweighed by reasons already assigned for imposing a limit to the *discretion* of the tribunals.

According to the rule that testimony is not admissible if too remote, evidence of character is never received, unless, from the nature of the proceeding, it is involved in the issue; but when the very nature of the proceeding is to put in issue the character of any of the parties, it is not only competent to give general evidence of character, but to enquire into particular facts tending to establish it. Bull. N. P. 295. Thus, on an indictment for keeping a common gaming, or bawdy house, the prosecution may give in evidence any acts of the defendant, which support the general charge. In actions

for seduction or *crim con*, the character of the woman for chastity, being directly in issue, may be attacked, either by general evidence of her character in that respect, or by proof of particular acts of it. In indictments for rape, the prisoner may show the general character of the woman in respect to chastity, or show particular acts of criminal connection with himself. In *Clark* v. *Periam*, 2 Atk. 337, the Vice Chancellor says, "This is the practice in all cases where the general behavior, or quality, or circumstance of the mind, is the thing in issue; as for instance in *non compos mentis*, it is the experience of every day that you give particular acts of madness in evidence, and not general only, that he is insane. So, when you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined, in general, to his being a drunkard, but particular instances are allowed to be given." With respect to witnesses; the credibility of a witness is always involved, and his character or general reputation as a man of truth or of honesty, is admissible; but the individual opinions of witnesses, and particular facts, are excluded, on the ground, that the character of the witness is only involved incidentally; and although a man is presumed to be at all times prepared to prove his general reputation, yet he is not presumed to be prepared to go into a history of his life, unless the party chooses to take it from the witness himself; then his answer is conclusive.

There are but few instances in which the trait of character in regard to being of an easy or quiet temper and facile disposition, can be involved in the issue, because such matters do not often affect legal rights. Indeed, the instances seem confined to cases where a testator, or donor, is alleged to have been imposed on, and the instrument obtained by fraud and undue influence; there, the trait of character of the testator or donor, as being of a facile disposition, or otherwise easy to be imposed on, being involved in the issue, evidence in regard to it may be given; but no case is found where, on a *jury trial*, evidence has been admitted, in regard to these traits of

character of any one, other than the person alleged to have been imposed on.

2nd. As to the mode of proving character. The word has two meanings; to this may be ascribed the confusion of ideas met with in some of the cases. "CHARACTER: The peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute *real* character. The qualities which he is supposed to possess, constitute his estimated character or reputation." Webster's Dic.

Is a man honest; is he good natured; is he of a violent temper; is he modest and retiring, or impudent and forward; these all constitute traits of character, and *are facts;* but there is an essential difference between facts of this kind, and facts of the kind ordinarily dealt with on jury trials. The latter are known directly by the senses, as by seeing or hearing a thing. The former can only be known indirectly, and by inference from acts. A witness called to prove them, can only give the opinion which he has formed by his observations of the conduct of the person under particular circumstances; for instance, the witness will say, "the person is good-natured, or, has a violent temper, because I have seen him act with forbearance, or violence, under certain circumstances." Such traits of character being only susceptible of proof by the individual opinion of witnesses, formed from an observation of particular acts, which necessarily lets in the history of a person's whole life-time, evidence in regard to them is inadmissible on jury trials, except in a very few instances, and only where they are involved in, and form a part of, the issue, but never when they arise incidentally.

Has a man the estimated character or reputation of being honest, or of being good-natured, or passionate, or humane, or cruel; this general character, as it is called, is also a fact; it is the opinion which those who are acquainted with him have formed in respect to his several traits of character. There is also a mode of proving real character, which is the object in view; but it is objectionable, because it is a mere approximation, and does not arrive at the fact itself. The opinion of a

man's acquaintances, that he is honest, or good-natured, &c., does not prove that he is so; still, this mode of proof is less objectionable than that which depends on the individual opinion of witnesses, and leads to the history of a person's whole life; therefore it is admissible in more instances than the other, and is sometimes allowed when a trait of character becomes material, incidentally, and the inquiry is collateral to the issue. For instance, the estimated character, or the opinion which his acquaintances have formed of him in respect of his honesty, is admissible in regard to witnesses; and the least objectionable mode of proof as to their real character, is to show their general character or reputation.

Thus it is seen, from the authorities and the reason of the thing, that this exclusionary rule, as Mr. Best terms it, is based on general principles applicable to all jury trials; and evidence of character, whether in respect to honesty, or temper, or disposition, is inadmissible by either mode of proof, unless that fact constitutes a part of the issue, or unless it arises incidentally; in which latter case, the evidence is confined to proof of general character or reputation, in regard to the particular trait of character material to the investigation.

The remarks made above, anticipate, in a great measure, the answer to the position taken by *Mr. Moore*, based upon the supposed distinction between character in respect to honesty, and character in respect to being good-natured, or passionate, and so on. He admits that when evidence of the former is admissible, it must be by proof of general character, but contends that evidence of the latter traits of character, may be proved, as facts, by witnesses who know them. According to the conclusion drawn above, such evidence is not admissible at all. Of course the mode of proof cannot make it admissible; and from what is said above, it is seen, that the mode of proof he suggests, is more objectionable and more restricted in its application, than the mode which he admits cannot be resorted to. His only authority for the position is a remark of RUFFIN, C. J., in *Tilly's case*. After holding that evidence of the temper and deportment of the deceased

towards his overseers and tenants was inadmissible, because irrelevant, he adds, "besides, this is not one of those points of which character is evidence. Temper and deportment are not matters to be proved by reputation; but if they are evidence at all, they can be established as facts, only by those who know them." The evidence being inadmissible, that remark as to the mode of proof was uncalled for. How can a witness know a man's temper, except by inference from particular facts? No authority is cited, and the remark seems not to have been weighed by the learned Judge with his usual degree of consideration; because the Court, of which he was a member, in *McRea* v. *Lilly*, makes no objection to the mode by which the defendant proposed to establish the fact of his being a modest, retiring man, to wit, by proof of his general character in that respect. In *Beal* v. *Robinson*, the same mode of proof was offered, and in Barfield's case, he puts the objection to the evidence of the character of the deceased, as to temper and violence, on the ground of its irrelevancy, and does not allude to the fact, that the mode of proof was by general character or reputation, although he quotes the remark made in Tilly's case, for the purpose of showing that Tackett's case was doubtful. This objection to the mode of proof would have been decisive of Barfield's case, and presented a ground upon which there might have been a concurrence of opinion, provided he still thought it well founded. This silence in regard to it, although the reference to Tilly's case must have suggested it, shows that the Judges agreed, if the evidence was admissible at all, proof by general reputation was the proper and least objectionable mode.

As to *Davis* v. *Calvert*, 5 Gill and John. 271, it is there decided, upon a contest as to a will which the caveators alleged was obtained by falsehood and fraud, admissible, for the caveators to give in evidence that the testator, a man upwards of 86 years old, had been imposed on by a free negro woman, who lived with him as his mistress, and who made him believe that he was the father of her child, and to offer in evidence, facts and circumstances tending to show that the old

man was not its father. The decision rests upon the peculiar circumstances of the case, and has no bearing on the question before us. The general remarks are all referable to the passage cited from Swinburne.

"That testament is to be repelled, which is made upon a just fear; which conclusion is both diversely extended and limited. The limitations are: 1st. The testament made by fear is not void *ipso jure*, but voidable by the help of exception, &c. 2nd. When the fear is but a vain fear, (for a just fear only, that is, such a fear as may move a constant man or woman, maketh void the testament, as the fear of death, or of bodily hurt, or of the loss of all, or most part of one's goods, and such like fear,) whereof no certain rule can be delivered, but it is left to the discretion of the Judge, who ought not only to consider the quality of the threatenings, but also the persons, as well threatened as threatening; and in the threatened, the sex, age, courage or pusilanimity; and in the person threatening, the power, the disposition, and whether he be a mere boaster, or a performer of his threats." Swinb. 475, 476.

It has been often held in our Courts, that, upon the trial of an issue *devisavit vel non*, evidence of the age and temper of the alleged testator, that he was of a facile disposition, and easily influenced, or firm of purpose, is admissible. Indeed, such evidence was received upon the trial of the case now before us; but it has never been held admissible to prove the disposition of the "person threatening," or that he was "a mere boaster, or a performer of his threats." So, the latter part of the passage from Swinburne has never been approved or acted upon. It is true that Williams and Roper bring forward the whole of it; but neither Phillips, Starkie, nor Greenleaf, cite any such rule of evidence as obtaining in the common law courts; On the contrary, they all adopt the general conclusion to which we have arrived.

It may be further remarked, in reference to the latter part of the passage, evidence that the person threatening was a mere boaster, or a performer of his threats, can have no tendency to show the effects of the threats, unless there be proof

that the person threatened *knew* his character in this respect. So this qualification must at all events be added.

If, however, it be assumed, that such evidence is admissible in the ecclesiastical courts, it is very certain it is not admissible in the common law courts; and we have a question as to the effect of the Statute, which provides that all issues of *devisavit vel non* shall be tried by *a jury in the common law courts.* Are the latter to proceed according to their own rules of evidence, or are they to import the rules of the former? The difference between trials before a fixed tribunal, which decides the facts as well as the law, and jury trials, is pointed out in *Downey* v. *Murphey*, 1 Dev. and Bat. Rep. 83, and *State* v. *Williams*, 2 Jones' Rep. 257; and it follows, of course, if there be a difference in the rules, where the statute requires the issue to be tried before a jury in the common law courts, it was intended they should proceed in the trial as in other cases. Trials as to wills of personalty and devises are put on the same footing. The ecclesiastical courts never had jurisdiction in respect to the latter; which proves beyond question, that the common law courts are to proceed according to their own rules in regard to both. *Mr. Moore* says, the idea of having a different rule of evidence in regard to the same question, because the trial is transferred from one Court to another, is monstrous. The reply is, the idea of the same Court acting upon different rules of evidence, when the principle is the same, is still more monstrous!

But we apprehend this question does not arise. Swinburne is not laying down a rule of evidence, but is attempting to point out the distinction between a *just fear* and a *vain fear*, "whereof" he says, "no certain rule can be delivered." He assumes that a threat is established, and confines himself to the enquiry as to the effect it is calculated to have on the person threatened; so the passage does not support the position for which it was cited. Swinburne says, if a threat be made, the character of the person threatening has a tendency to show its effect; the object of *Mr. Moore* is entirely different; he wishes to prove the character of the propounder as tending to

show that *no threat was ever in fact made.* Suppose, with Swinburne, a threat has been made; how can the fact, that the propounder is a man of easy, facile disposition, answer the purpose for which, as the case states, the evidence was offered?

Whether, if a threat be proved, evidence that the propounder is "a mere boaster, or a performer of his threats," would be admissible, to show the nature and effect of the threat; and whether, supposing it to be admissible, the fact must be established by general proof of reputation in that respect, or by proof of particular acts, are questions not now presented. It is sufficient to say, the passage from Swinburne does not support the position, that such evidence is admissible in either mode, to prove that the propounder did not make the threat, or was more or less likely to do so, which is the question before us; and does not conflict with the conclusion to which we have arrived.

PER CURIAM. There is no error. Judgment affirmed.

JOHN G. BURWELL *et al. vs.* WYATT CANNADAY.

In an action by petition to recover damages for the overflow of land by ponding water, it is not competent to use the record of a former proceeding, wherein damages were recovered for the same thing, either as an estoppel, or to establish the wrong in any way.

The second jury, in such a case, must pass upon *the whole matter*, in as full and free a manner as the former.

PETITION for DAMAGES against the owner of a mill, for ponding water and overflowing plaintiff's land, and obstructing his mill-wheel, tried before his Honor, Judge CALDWELL, at the Spring Term, 1855, of Franklin Superior Court.

In 1830, Lewis Taylor owned a mill on Fishing Creek, which flows into Tar River; at the same time, he and one Paschal, owned a mill on Tar River, below the mouth of Fishing Creek, and a little short of two miles from the other, which, in that year, 1830, they sold to defendant, Cannaday.

Early in 1834, the defendant took down his dam and rebuilt it, making it higher than it had been.

In 1835, Taylor filed a petition in Granville County Court, against the defendant, under the Act of Assembly, claiming damages for ponding back the water upon his land and water-wheel, by means of this new erection; and in the Superior Court, to which it was taken by appeal, recovered an annual damage of twenty dollars.

Taylor conveyed the mill on Fishing Creek to the plaintiffs, (Burwell and Eaton,) who, in May, 1852, filed a petition for damages for ponding the water back into Fishing Creek, by means of his dam on Tar River, and thus overflowing their land and obstructing their mill-wheel. The cause was carried by appeal to the Superior Court of Granville, and thence removed, on affidavit, to the Superior Court of Franklin. On the trial, in that Court, there was proof, that in the year, 1851, the defendant raised his dam still higher than it was in 1834. The plaintiffs offered in evidence the record of the Superior Court of Granville, showing the recovery of damages by Lewis Taylor against the present defendant, and insisted, that if the water was raised by the dam of 1851, as high as it was by the dam of 1834, the defendant was estopped to deny that it was a wrongful act thus to raise it in 1851, and was liable, unless he could show a license therefor.

The introduction of this record was objected to by the defendant, who insisted, that it was not admissible either as an estoppel, or as proof in any way.

But his Honor was of opinion, that this record was admissible, "to show the fact, that the dam of 1834, was so high as wrongfully to pond the water on Taylor, the assignor of the plaintiffs; and the jury were allowed to infer from this fact, thus established, that the dam of 1851 was raised too high, if they should find that it was as high as the dam of 1834." To this instruction the defendant excepted.

Verdict for the plaintiffs. Judgment and appeal.

Moore, for plaintiffs.

Lewis and *Graham*, for defendant.

PEARSON, J. Had the plaintiff in 1834, in an action on the case for overflowing land, &c., on the plea of "not guilty," obtained a verdict and judgment for damages against the defendant, and afterwards, in 1851, brought a second action on the case for overflowing his land, &c., it is settled, that the verdict and judgment in the first action, is inadmissible as evidence, and cannot be pleaded as an estoppel in the second action. *Bennet* v. *Holmes*, 1 Dev. and Bat. 486; *Long* v. *Baugus*, 2 Ire. 292; *Rogers* v. *Ratcliff*, decided at this term. In those cases, the subject is fully discussed, and the argument is exhausted. Such being the rule, in regard to a verdict and judgment in a former action on the case, upon the plea of the general issue, of course the like rule must apply in regard to a verdict and judgment in a proceeding by petition under the statute, which is summary, and is designed as a substitute for the action on the case. Indeed, the statute enacts that the judgment shall have force and effect for the term of five years in certain cases, after which, the matter stands in *statu quo*, and the parties may commence *de novo*. So that the first proceeding is not conclusive, and fixes nothing. The rights of the parties, and the condition of things at the commencement of the second proceeding being open questions.

In our case, his Honor allowed the defendant to be trammelled, and bound to some extent, by the proceeding in 1834; in this manner: it is established that, in 1834, the dam was too high; the dam in 1851, is as high as it was in 1834; *ergo*, it is too high in 1851. It will be remarked, that the minor premise is not established by the record, but must be proven by the testimony of witnesses, and matters *de hors;* so, it is not conclusive as evidence, and cannot be pleaded as an estoppel; and consequently, it must be passed on by the jury in the second case. This being so, there is no authority, or reason, why the second jury should not pass upon the *whole matter*, in as full and free a manner as was done by the first jury.

PER CURIAM. *Venire de novo.*

URIAH WELLS *vs.* W. P. CLEMENTS AND W. W. CLEMENTS.

A Judge, in instructing a jury upon the trial of a cause, has a right to tell them that there is *no evidence* bearing upon a question presented in the case; but he has no right to tell them that the evidence adduced, (there being some evidence,) *is not sufficient* to warrant them in finding one way or the other.

It is improper in a Judge below, to send up depositions containing exceptionable matter, with a statement that, "only such parts of the said depositions were read as were admissible evidence," without designating what part he deemed admissible, and what otherwise.

THIS was an ACTION of ASSUMPSIT, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Northampton Superior Court.

The plaintiff declared on a special contract in assumpsit, and also on the common counts, and the question below was whether certain mill-irons, which had been procured by one William B. Jackson from the plaintiff, and which were used on the defendants' mill, were properly chargeable to the said Jackson, or to the defendants, the owners of the mill. The plaintiff alleged, 1st, that Jackson was the agent for the defendants in making the purchase; 2ndly, that the goods came to the possession of the defendants, and were used by them, thereby confirming the act of Jackson. The plaintiff, in support of his case, read various depositions. That of one *Morton*, who proved that the defendants bought of him, through the agency of Jackson, a circular saw for the same mill, and Jackson sent word, through witness, to Wells, the plaintiff, to fit the axles he was making, to the saw. Jackson bought this saw and other materials for this mill, which were charged to the defendants and paid for by them. Witness knows that the saw was used, (for complaint was made of it, and another sent in its place,) and that Jackson worked as a millwright on defendants' mill. That of one *Lilly*, proves that he was a clerk at plaintiff's foundry, and that the articles were furnished as charged. The charge was first entered against Jackson, but afterwards, on conversing with him, it was

changed so as to be against the defendants. Witness applied to W. P. Clements, who referred him to his brother, W. W. Clements, as the business or managing partner, who made no objection to the bill, but said Jackson was the man to be seen about it. Jackson was supposed to be insolvent, and had gone to a distant country.

Two other depositions of agents of the plaintiff, prove that the orders were given for the articles by Jackson for Dr. Clements' mill, and so entered in the order book; one of them, *Poe*, swears that the credit was given to the defendants, and not to Jackson.

The plaintiff, on the trial, introduced his day-book, in which it appeared that the articles were there charged to the defendants.

In the statement sent up by his Honor, is this clause, "only such parts of said depositions were read as were admissible evidence, the defendants objecting to all other portions of the same."

"The Court intimated to the plaintiff's counsel, that supposing all their evidence to be true, there was not sufficient to warrant the jury in finding that Jackson was the agent of defendants, and authorised by them to purchase the goods from the plaintiff; nor was there sufficient evidence that the goods ever came to the possession of the defendants, and were used by them."

The plaintiff, in submission to this intimation, suffered a non-suit and appealed.

Attorney General, for plaintiff.
Moore, for defendants.

BATTLE, J. It is a matter of regret that, from the manner in which this case comes before us, we cannot decide the question which was intended to be presented for our determination. That question is, whether there was any testimony given on the trial, proper to be submitted to a jury, in favor of the plaintiff's claim. The bill of exceptions states that

several depositions were read to the jury, and sets out the depositions in full, as part of the case; but adds, "that only such parts of said depositions were read as were admissible evidence, the defendants objecting to all other portions of the same." What parts were read, and what portions were objected to and rejected, we are not informed. The Court, however, "intimated to the plaintiffs' counsel, that, supposing all their evidence to be true, there was not sufficient evidence to warrant the jury in finding that Jackson was the agent of the defendants, and authorised by them to purchase the goods from the plaintiff; nor was there any sufficient evidence, that the goods ever came to the possession of the defendants, and were used by them." Whereupon the plaintiff submitted to a judgment of non-suit and appealed. Now, if there were any proper and relevant testimony to be submitted to the jury, his Honor erred in taking the case from them; for, under the Act of 1796, (1 Rev. Stat. ch. 31, sec. 136; Rev. Code, ch. 31, sec. 130,) it was their exclusive province to pass upon its *sufficiency*, without any intimation of opinion thereon from the Court. The language of his Honor implies that there was some such testimony, for he does not say that there was *no* evidence, but only, there was *no sufficient* evidence. It is true, that if there were *no* evidence, then we might uphold the decision, upon the ground, that the word "sufficient" was used inadvertently, and could do no harm; but that cannot be, because the whole of each deposition is set out in the bill of exceptions, without any statement of what part was read and what part was rejected, except only the general allegation, that such "parts only were read as were admissible evidence." Now, it is clear, upon reading the depositions, there are certain portions of them, which, if permitted to be considered by the jury, would tend to establish the issue in favor of the plaintiff. If then, they had been read to the jury, with instructions from the Court, that the jury should take into consideration such parts of them only as were competent, and must reject the residue, it would be manifestly erroneous. We think it equally objectionable and erroneous for the

Judge to intimate to the counsel that certain portions of testimony were competent, and the residue not, without specifying what he deemed admissible, and what not. Such a course is an attempt to impose upon the appellate tribunal, the duty of deciding a question, without letting it know what the question is. This is an error apparent upon the bill of exceptions, for which the judgment of non-suit must be set aside, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

WM. H. WHITEHEAD *vs.* JOSEPH T. H. GARRIS.

The metes and bounds of a deed take in a mill-house and half of the mill-dam and pond, and then are added these words, "also all my mill on the said creek to be attached to the above-mentioned tract:" it was *Held* that the soil of the dam and mill-pond, outside of these limits, does not pass by that deed, but that an easement to use it as an incident to the mill does pass.

Held further, that the owner of the soil in the above case, is not liable to the owner of the easement on the action of trespass for an injury to the dam.

ACTION of TRESPASS QUARE CLAUSUM FREGIT, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Northampton Superior Court.

The plaintiff claimed title to the *locus in quo*, under a deed from John White to Willie Lewter, conveying a tract of land on the south side of Kirby's creek, by metes and bounds, of which the following calls are only material, "thence down Williams' branch to the creek, thence up the creek to the mill-house, thence along the middle of the mill-pond," &c., "to have and to hold the said tract or parcel of land, with all improvements whatever to the same belonging, to the said Willie Lewter; also all my mill on the said Kirby's creek to be *attached* to the above-mentioned tract or parcel of land, to him the said Willie Lewter, his heirs, &c."

The mill-house in question is represented as being about the

middle of the mill-dam. The action is brought for a trespass to the north end of the dam, and to the land covered with the pond-water north of the line above described. It was admitted that the *locus in quo* was not included within the lines set out in the deed, but it was contended that it passed as an incident to the mill.

His Honor being of opinion that the places trespassed on did not pass with the mill, the plaintiff, in submission to that opinion, took a non-suit and appealed.

Miller, *Moore*, and *Barnes*, for plaintiff.
Conigland, for defendant.

BATTLE, J. The plaintiff admits that the *locus in quo* the trespass was alleged to have been committed, is not included within the metes and bounds of the land described in the deed under which he claims, but he insists that it is embraced in the terms used by the grantor of "all my mill on the said Kirby's creek to be attached to the above-mentioned tract or parcel of land."

The land is described as lying on the south side of the said creek, and to make his claim good to that part of the mill-dam which is on the north side of it, the plaintiff ought to have shown that his grantor owned the land on that side of it also; which he has not done. But as the question has been discussed here by the counsel of both parties, as if the maker of the deed in question, owned the land on both sides of the creek, and had the right to grant the whole dam, we will decide it upon that view. In passing, we will remark, that the particular description of the line running from the mill-house "along the middle of the mill-pond," &c., necessarily excludes the plaintiff from setting up a title to more than a mere *easement* in one half of the pond, which seems to be conceded by his counsel. The argument in favor of the plaintiff's title to that portion of the dam which lies on the north side of the creek, is founded on the supposition that it is an essential part of the mill—necessary to its very existence, and, therefore,

must pass with it, as an incident in the grant of the mill. This proposition is stated as one strong enough to stand unsupported by adventitious aid; but if it needed support from authority, it is contended, that such support may be found, both in adjudicated cases, and in elementary treatises of the highest character. To a certain extent we admit the proposition, and do not question the authorities cited for it. A dam is necessary to the plaintiff's mill, and to the benefit of a dam he is entitled under his deed. But here another question arises; is the ownership of the *soil* of the dam essential to the existence of the mill as such? Is not a mere easement in the dam entirely sufficient for any and every purpose which the plaintiff can have in view with regard to the use of his mill? The question whether an interest in the soil or an easement passed, is one of intention, arising on the construction of the deed, and as such, we do not hesitate to declare our opinion to be, that the grantor never intended to convey to the person under whom the plaintiff claims, any part of his soil lying on the north side of Kirby's creek. Of this we think every unprejudiced mind must be satisfied from a bare perusal of the deed. A right to keep up the dam, as necessary to the use of his mill, passed to the grantee *ex necessitate*, just as a right of way will pass to a grantee of land surrounded by the lands of the grantor. 2 Black. Com. 36. In neither case is any thing more than an easement necessary, and, therefore, the law will not transfer any thing more, independently of the expressed will of the grantor.

Let us see to what results the construction contended for by the plaintiff would lead. If he became, by the grant, the owner of the soil in the dam, then he would continue to own it though he might abandon the mill and let it go down for ever. It can hardly be supposed that the grantor intended, in such case, to have a little strip of land fifteen feet wide and forty yards long, owned by another, running into his. Suppose a rich gold mine were found underlying the dam, would it belong to the grantee of the mill? The grantor would be reluctant to agree to that, and would insist very strenuously that

if he could work it without interfering with the plaintiff's enjoyment of his mill, he ought to be allowed to do so, and in our opinion his claim would be hard to resist. These considerations have satisfied us that the plaintiff has but an easement in the dam as well as in the pond.

But supposing that he has no more, his counsel still contends that his action of trespass *quare clausum fregit* may be maintained. As an easement is an incorporeal right, it cannot be denied that trespass on the case is the action most appropriate for an injury to it. 1 Chit. pl. 144, 3 Kent's com. 418. If, under any circumstances, trespass for an injury to an incorporeal right may be brought, it may be safely said that none such appear in this case.

The judgment of non-suit must be affirmed.

PER CURIAM. Judgment affirmed.

DAVID LUNCEFORD *vs.* DUNCAN McPHERSON *et al.*

Where, in a petition for a *certiorari*, it is alleged that defendant has good reason to believe, and does believe, that the debt on which he is sued had been paid, and shows facts and circumstances that make this probable; and further shows that he did not attend at the trial of the cause in the County Court, because he was told by plaintiff's counsel that it would be dismissed at the ensuing Court, at the plaintiff's cost, but nevertheless, a judgment by default was taken against him, a *certiorari* will be granted to bring the cause to the Superior Court, where it will be heard *de novo*.

PETITION for a *Certiorari* heard before his Honor, Judge DICK, at the Fall Term, 1855, of Johnston Superior Court.

The petition sets forth, "that on 26th of November, 1853, the petitioner, as the surety of one Joseph W. Price, executed with him, a bond for $196, payable to one John P. Cooke, due four months after date, with interest from date; that this bond was subsequently endorsed by the obligee, Cooke, to K. M. C. Williamson and A. D. Northam, without recourse, who endorsed the same, after it had become due to the plaintiff, Da-

vid Lunceford; that about the time of the maturity of the said bond, Price married the daughter of Lunceford, and being about to visit some of the northern cities, he deposited with the petitioner a quantity of valuable silks and other goods, as collateral security to indemnify him against his liability on this bond, directing him to hold the same subject to the order and disposal of the said Lunceford. Petitioner alleges further, that he informed Lunceford of this deposit and its object, and he was directed by him to take care of the goods and all would be right; that when Price returned, he applied to the petitioner for the goods, and carried them to Lunceford, stating that they were to be taken by him in satisfaction of the debt; and he verily believes, and so alleges, that these goods were received by Lunceford, and either used, or sold by him in satisfaction and discharge of this bond; that after this, Price frequently told the petitioner that the bond had been settled, and that all was right between him and his father-in-law; that Lunceford was a man of ample means to provide for his children, and that he did so provide, in a considerable degree, for his son-in-law, Price, by settling him on a tract of land, and assisting him in building on it, and in other ways; and that a good understanding has always existed between Price and Lunceford.

"Notwithstanding this satisfaction of the bond, Lunceford brought suit against petitioner and the endorsers, Williamson and Northam, returnable to the November term of Johnston County Court. Upon the writs being served on the petitioner, he applied to Price to know why he had been sued, to which he replied that there was a mistake about the matter; that he would see his father-in-law and have it adjusted. The petitioner further alleges, that he applied to the attorney who brought the suit, (S. B. Smith,) stating the facts, and remonstrating against the injustice of the proceeding, when he was assured by said attorney, that the suit would be dismissed at the next Court, (which was the return term,) at the plaintiff's cost, and that such was the understanding between his client and Price. Confiding in these promises and assurances, the

petitioner says he gave himself no further concern about the matter; but, to his astonishment, at the next term of the Court, in the absence of petitioner, and without his knowledge or consent, a judgment by default was taken against him and the endorsers. He avers that he is advised, and believes, that he has a good defense to the said claim, and that upon a fair trial, he can make it appear; that if he had had any doubt as to the good faith and integrity of the plaintiff in the premises, he would have employed counsel to defend the suit, and if it had gone against him, would have appealed."

No answer is put in to this petition, and no proofs filed.

On the defendants' motion to transfer the cause to the trial docket for a trial *de novo*, the plaintiff moved to dismiss the petition, and upon hearing these several motions, his Honor, being of opinion that the allegations in the petition were not sufficient, ordered the same to be dismissed. From this order defendant appealed.

Fowle, for plaintiff.
Miller and *Winston, Sen.*, for defendant.

BATTLE, J. If a party to a suit in the County Court be deprived, by the fraud of his opponent, of a defense which can be made in that Court only, he can have no other mode of redress, than by application to a Court of Equity, whose peculiar province it is to relieve against mistake, accident, surprise, or fraud. *Watts* v. *Boyle*, 4 Ire. Rep. 331. The same mode of redress is the only one open to him, against whom an unconscientious judgment has been obtained in the Superior Court, because, if there be no error apparent on the record, there is no appellate tribunal which can give relief. But if the defense, which, but for the fraud, might have been availed of in the County Court, be of a kind which, upon an appeal to the Superior Court, is equally cognizable there, then, the latter Court will, when the appeal has been lost without any default of the party, afford relief by means of the writ of *certiorari*. And, if the judgment were taken by default, it

will be set aside, and the party allowed to plead so as to have a trial upon the merits. *Dyer* v. *Rich*, 2 Car. Law Repos. 610; *Hunter* v. *Kirk*, 4 Hawks' Rep. 277; *Dougan* v. *Arnold*, 4 Dev. Rep. 99. These cases fully warranted this Court in saying, in *Betts* v. *Franklin*, 4 Dev. and Bat. Rep. 465, and again, in *Kelsey* v. *Jervis*, 8 Ire. Rep. 451, that "it is true, a *certiorari* has been allowed, and properly, where the judgment in the County Court was by default; and upon it the judgment has been set aside, and the defendant allowed to plead." The Court then goes on to say that this "can never be done, unless the party show two things: first, an excuse for the laches in not pleading, and secondly, a good defense." The defendant in the present case, then, is entitled to the relief which he seeks, if he has shown what we have thus seen it is necessary for him to do. The allegations contained in his petition are not denied, and we must, therefore, take them to be true. His excuse for not pleading to the suit in the County Court is, that the plaintiff's attorney told him that the suit would be dismissed at the plaintiff's cost, and that such was the understanding between him and Price, the principal debtor. Surely a better excuse for the defendant's *laches* could not well be rendered. His defense is, that his principal debtor deposited with him as collateral security, certain goods which he has reason to believe, and does believe, went into the hands of the plaintiff, and were applied by him, in some way, in discharge of the debt, and he believes that if an opportunity be allowed, he can prove it. The plaintiff's counsel objects that this is not stated with sufficient certainty; but we cannot see how it could properly be stated in any other manner. The defendant does not profess to have a personal knowledge of the matter, and it would be very hard to deprive him of a defense which he could establish by the testimony of others, merely because he did not happen to know it himself. Our conclusion is, that the Judge in the Court below erred in making the order to dismiss the writ of *certiorari;* therefore the order must be reversed, and this must be

certified, to the end that the parties may proceed with the cause.

PER CURIAM. Judgment reversed.

STATE *vs.* JOHN GERHARDT.

A license to retail spirituous liquor by the small measure, granted "for one year" to two persons as partners in trade, will, during the year, protect one of the partners against the penalty for retailing, although the other may have retired from the firm.

A town may be named in the license, as the place where the business of retailing may be carried on; but the person obtaining it can not sell spirits under it at more than one place in the town.

INDICTMENT for UNLAWFUL RETAILING, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Johnston Superior Court.

The act of selling spirituous liquor by the small measure, having been proved by the State, the defendant gave in evidence the following order for a license: "Ordered that John Gerhardt and Perry Rentfraw have license to retail spirituous liquors by the small measure in the town of Smithfield for one year." The Sheriff issued a license according to the order.

When this order was obtained, the persons named were in partnership under the name of Rentfraw & Gerhardt; the tax was paid out of their joint funds; and they jointly carried on the business at one place in the town of Smithfield for about one month, when the partnership was dissolved by the retirement of Rentfraw from the concern, after which, Gerhardt, the defendant, carried on the business at the same place in the town of Smithfield. The acts complained of took place after the withdrawal of Rentfraw, but during the year from the granting of the above order.

Defendant's counsel asked his Honor to charge the jury that a license taken in conformity with the order above set out,

was valid to protect the parties therein named, and that it was good to protect the defendant, after the retirement of the other partner, during the whole year from the date of its being granted.

His Honor refused to give the desired instruction, but told the jury "that if they believed this was the state of facts they should find the defendant guilty." Exception by defendant.

Verdict for the State. Judgment and appeal.

Attorney General, for the State.
Cantwell and *Lewis*, for the defendant.

BATTLE, J. It does not appear that any objection was taken in the Court below to the license under which the defendant acted, upon the ground that it was not sufficiently definite as to the place at which the spirituous liquors were to be retailed. It is urged here, that the town of Smithfield embraces too large a space to constitute the *one place* in the County at which the license may authorise the spirits to be sold. The Act does not specify the extent of the place, and in giving it a reasonable construction, in that particular, we hold that a town may be named in the license as the place, though it is very clear that the person obtaining it could not carry on his business at more than one place in the same town.

There has been no objection, either in the Court below, or here, to the license, because of its authorising two persons to retail as partners. Such, we understand, has always been the practice, and we will not now question it. The Act, indeed, speaks of "a person," and requires of him proof of his good moral character, before he can obtain a license. This might seem to indicate that a license could be granted to one person only, and not to a number of copartners. But it will be seen that the Revenue Act uses similar language with respect to merchants and jewellers, among whom copartnerships are so common that we cannot, for a moment, suppose that the tax on several persons trading together as partners, was intended to be different from that on a single trader. Furthermore, in

the section in which a tax is imposed upon pedlers, it is expressly provided, that one license shall not authorise two or more persons to peddle goods, &c., together as partners.

It being established, then, that the license was properly granted to the defendant and another person, authorising them to retail spirituous liquors by the small measure for one year, in the town of Smithfield, as partners, we cannot perceive any good reason why the withdrawal of one of them from the concern should prevent the other from carrying on the business at the same place, under the same license. The State will not thereby be defrauded of her revenue; because the tax has already been paid. The interest of the public cannot be affected by the change; because it will be the same to the customers of the dram-shop, whether they be served by one, or by two persons. It will not authorise an improper person to retail; because the moral qualifications of the retailer have already been examined into and passed upon by the County Court. In this respect it differs essentially from the case of an assignee, or of the personal representative of a licensed person, claiming the right to sell under the license. Such claim would be rejected, for the obvious reason, that the claimant would not have the sanction of the County Court. But that reason would not apply to the case of a surviving partner, and does not apply to the case of the present defendant, who is a remaining partner. For these reasons, we are of opinion that the Judge, in the Court below, erred in charging the jury that the defendant was guilty; and for such error he is entitled to a *venire de novo.*

PER CURIAM. Judgment reversed.

E. G. BREWER AND ORAN A. WILLIAMS *vs.* JORDAN TYSOR AND ORAN A. TYSOR.

Where the terms of a contract are, that A shall cut a race of certain dimensions, within a certain time, for which he is to receive so much, he cannot

recover any thing, either upon the special contract, or upon a quantum meruit, unless he avers and proves an entire performance.

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

The plaintiffs declared on a special contract to build a dam across Rocky river, and to cut a race, for $250. There was also a count for work and labor done. The contract, as above stated, was proved by one Benj. Williams, (son of one of the plaintiffs,) who also stated, that the plaintiffs cut a race, and laid the foundation of a dam; the race was to begin at the dam, and to run to a dogwood, and to be four feet wide, and three feet deep.

The plaintiffs examined one John Gilmore, who proved that in July, 1851, he was called on by Oran Tysor, to take notice that he had now told the plaintiffs that he had lost by their not performing their contract within the time, and in the manner, agreed on; and if they did any more work, it must be at their own expense. Tysor also stated, that he had already paid as much as the work was worth; to which Brewer replied, that the receipts would show what had been paid. The plaintiffs had quit the work some two months before, and this conversation took place just as the plaintiffs were about resuming the work on the dam. The witness thought the dam was not more than half done.

It was also proved that the plaintiffs had cut a race, 400 yards long, between the points designated by witness Williams; but it was not three feet deep in some places. It was also proved that after plaintiffs had abandoned the work, the defendants did some work on the race, and then used it. It was further proved that the defendants erected a dam upon the foundation laid by the plaintiffs.

The defendants produced, and proved, a written agreement under seal, signed by plaintiffs and defendants, dated 13th December, 1850, in which the plaintiffs covenant to *make a race* three feet deep and four feet wide, between certain points, within five months, at the sum of $250, and payments to be

made at certain times, as the work progressed. Nothing was said in this bond about the dam. The defendants then proved, by one *Barker*, that after this contract was entered into, he heard Jordan Tysor and one of the plaintiffs have a conversation, in which he left it to the option of the plaintiffs, either to finish the race the whole way, according to the within contract, or cut it part of the way, and raise the water into it by a dam 5½ ft. high, across Rocky river. Brewer then asked, what was to become of the bond or agreement they had previously entered into; to which Tysor replied, let that stand; for that his word was as good as his bond. This witness also proved, that plaintiffs did not finish the race in one or two places according to the contract; that the defendants altered a part of it, and then used the whole—that which plaintiffs had made, and that which had been cut or altered by themselves. Defendants showed payments to the amount of about $140.

The witness Benjamin was again introduced, and stated, that he learned from the parties, that the written agreement was abandoned, and the agreement as above stated was substituted; he heard one of the defendants say, that "the old bond was now dead." Defendants also proved, that one of the plaintiffs, about the middle of June, 1851, had a violent attack of disease which disabled him from work.

The defendants' counsel upon this state of facts, asked his Honor to instruct the jury, that whether the written contract produced by the defendants, or the parol contract set up by plaintiffs in its lieu, were to govern; yet, according to either, there was an entire service to be done, which was not done, and therefore, that the plaintiffs could not recover. 2. That the plaintiffs could not recover on the common counts, because the work had not been finished according to the contract, or finished at all.

3. If the jury were satisfied that the written contract was set aside by the parties, and the contract, as proved by B. Williams, was the true one, that then, the plaintiffs were bound to perform the work in a reasonable time, and that an abandonment for two months would deprive them of the right

to recover, either on the special contract, or on the common count.

The Court instructed the jury, if the written contract of 13th of December, had not been surrendered by the consent of all the parties, the plaintiffs could not recover on the common count, because that contract had not been performed; that, supposing the first contract had been abandoned, and the contract as proven by B. Williams was the true one, then, the enquiry was, whether it had been performed by the plaintiffs; and as it was admitted on all hands, that it had not been, then, they would enquire, whether they had had a reasonable time, within which to perform it, before they were desired by one of the defendants to quit; that if they had had, then, they were not entitled to recover on the contract.

The Court further instructed the jury, that it was proved that plaintiffs had cut a race for the defendants, 400 yards long, and done some work to the dam; if they were satisfied that defendants had used the work done upon the race, and that done on the mill-dam, the plaintiffs would be entitled to recover the worth of it, and in this point of view, they would give the balance of that value, after deducting the payments made by the defendants. Defendants excepted.

Verdict for plaintiffs. Judgment and appeal.

G. W. Haywood, *Bryan* and *Graham*, for plaintiffs.
Haughton, for defendants.

NASH, C. J. The contract is a special one, executory in its character, and entire. It is admitted that the plaintiffs cannot recover on the special count; neither can they on the merits of this case on the *quantum meruit*. The contract being an entire one, performance on the part of the plaintiffs, was a condition precedent, necessary to be averred in the declaration, and proved as averred, unless the other contracting parties have discharged them from the performance. If the plaintiffs do not aver performance, or a readiness to perform, they can recover, neither on the special contract, nor on the

quantum meruit. *Winstead* v. *Reid*, Busbee 76, and *Cutter* v. *Powell*, 6 Term Rep. 320; *White* v. *Brown & Son*, 2 Jones' 403. The contract in this case was, that the race should be completed in five months after the date of the contract, of a certain length, depth and breadth. A portion only of the race was cut; and, after working three months, the plaintiffs abandoned the work, and it was completed by the defendants. Here, time was of the essence of the contract, and the plaintiffs failed to bring themselves within it. It is said the plaintiffs were sick most of the time, and are, therefore, to be excused, under the maxim, *actus Dei nemini facit injuriam;* but the sickness of the plaintiffs did not render it impossible for them to execute their contract, as they might and ought to have procured the work to be done.

It is again said, that the defendants received the work as it had been executed, and, therefore, they are bound under the 2nd count. The reply is, that the work which the plaintiffs had contracted to do, was necessary to the enjoyment, by the defendants, of the property to which it was appurtenant, to wit, the mill; that the defendants were obliged to use that portion of the race dug by the plaintiffs, in order to put their mill into operation; it could not be removed, nor could it be cut in any other place, to answer the purpose for which it was intended. If such was the fact, it was incumbent on the plaintiffs to have shown it. We do not think that case comes within the principle, that where there is a special contract for work to be done, and it is done, but not in accordance with the contract, and is received by the person for whom it is executed, he shall pay, not on the special contract, but on a *quantum meruit*. Here, the work was but partially done, and the plaintiffs abandoned it before completion. As to the conversation between the parties, at the time the demand of payment was made, it can, in no sense, sustain the 2nd count in the declaration. There was, on the part of the defendants, an express denial of any liability; for they asserted that they had paid the plaintiffs more than their work was worth. There was, in

fact, no acceptance by the defendants of the work done. There was error in the charge.

PER CURIAM. The judgment is reversed, and a *venire de novo* awarded.

JOHN RAY *vs.* WILLIAM LIPSCOMB.

The user of a private way for twenty years or more, not adversely, nor under a claim of right, is not a sufficient ground for a jury to presume a grant of the easement.

Where the language of a Judge's instruction showed that it was probably intended to convey a correct proposition, though it did not do so critically, but the inaccuracy was not called to his attention at the time of giving his charge, there is no ground for exception.

Where an error in a Judge's charge was favorable to the party excepting, it is not a ground for a *venire de novo*.

ACTION ON THE CASE for the obstruction of a right of way claimed by plaintiff, tried before his Honor, Judge CALDWELL, at the Fall Term, 1855, of Orange Superior Court.

The plaintiff resided on the north side of Little River, which stream divides his land from that of the defendant, and the way, as claimed by him, runs through a ford on the river, and through the land of the defendant, to a public highway, called the Hillsborough and Oxford road.

There was evidence tending to show that, for more than twenty years before the obstruction complained of, the plaintiff, and other persons of the neighborhood, had used the way in question. This obstruction was by the defendant's running his fence across the way, and taking a part of it into a field.

On the part of the defendant, it was proved, that many years before the act complained of, he, and those under whom he claimed, had at several different times, as his and their convenience required, fenced over the way as it then ran, and had at each time made changes in its route, and that this had been done without opposition or complaint from the plaintiff or the others using the way.

To rebut the presumption of right, the defendant offered in evidence a certified copy of a petition, filed in the County Court of Orange in 1851, praying that a right of way might be granted to him, over the same route as that now insisted on; upon which, an issue had been made and tried between the same parties, and determined against the plaintiff.

The plaintiff at first objected to the introduction of this record, but afterwards withdrew his opposition, and it was read by consent of the parties.

His Honor charged the jury, that, if they believed the plaintiff had used the way in question, for twenty years or more, and that such *user* was adverse, and upon a claim of right, they had a right to presume a grant to the easement, and in such a case, the plaintiff would be entitled to recover; that every man was presumed to have a right to do that which he was in the habit of doing; but if they should believe that such *user* was by the curtesy and good will of the defendant, and not adverse to his right, they ought to find for him.

The Judge further charged the jury, that the petition, offered in evidence by the defendant, was evidence against the plaintiff, but that it was very slight.

To these instructions, plaintiff excepted.

Verdict for defendant. Judgment, and appeal by the plaintiff.

Bryan, for plaintiff.
Graham and *Norwood*, for defendant.

PEARSON, J. The general principles involved in this case, are fully discussed and settled in *Ingram* v. *Hough*, 1 Jones' Rep. 43; *Mebane* v. *Patrick*, Ibid. 23. These cases, as it seems to us, put the doctrine of the presumption of a right of way from *user*, on its true basis; and, as was said in the argument, considering the state of things among us for many years past, in regard to one neighbor's passing over the unenclosed land of another, either on foot or horseback, or with

his wagon, any other conclusion would have resulted in great and general inconvenience.

The counsel for the plaintiff, conceding the general principle to be settled, excepted upon two minor objections.

1. His Honor charged, that upon a certain state of facts the jury *had a right* to presume a grant of the easement.

The presumption of a grant is a matter of fact, and cannot be made by the Court. But it is proper for the Court to advise, or (as we say) instruct the jury, that if certain facts are found by them, it is their duty to presume a grant. Had a special instruction to this effect been asked for, it would have been error to refuse it. But it does not appear that the attention of his Honor was called to it, and the language used by him was much the same in effect; for it was the duty of the jury to do whatever they have a right to do, for the purpose of finding a true verdict. There is nothing tending to show that the charge was not understood in this sense.

2. His Honor told the jury that the petition was evidence against the plaintiff, but was very slight evidence.

The competency of the petition was not disputed, and certainly the plaintiff has no right to complain because his Honor took sides with him, and expressed the opinion that it was very slight evidence; for if evidence against him, it at least amounted to that. The *defendant* had a right to complain that this expression of opinion, in regard to the weight of the evidence, was unfavorable to him.

PER CURIAM. Judgment affirmed.

JUSTICES OF TYRREL *vs.* S. S. SIMMONS.

A justice of the peace cannot make a contract with his associate justices in their official capacity.

Where the effect of an amendment would be to reverse a judgment below, which was rightly given, and to enter a judgment here for a different party plaintiff, such amendment will be refused.

THIS was an action of ASSUMPSIT, tried before his Honor Judge SAUNDERS, at the Fall Term, 1855, of Tyrrel Superior Court.

At the July Term, 1853, of Tyrrel County Court, the defendant entered into a contract with a majority of the justices of the peace of that County, then in Court, that he would do certain additional work upon a house he was then building for the County, for the sum of $150, for which he received payment in advance. The work was not done, and this suit is brought for breach of that contract. The defendant was himself one of the justices of the peace of Tyrrel County, and was also present on the bench of the County Court, when the above contract was made.

It was admitted that damages for the breach of the contract were $149.

The defendant's counsel objected to a recovery, on the ground that the defendant was one of the justices of the County, and, therefore, that the contract was void.

The action was brought in the individual names of all the justices of Tyrrel, except the defendant.

A verdict was taken for $149 damages, subject to the opinion of the Court on the question, whether the action could be maintained, with leave to set aside the verdict and enter a non-suit, in case the opinion of the Court was against the plaintiff. On considering the question reserved, the Court ordered a non-suit, from which plaintiffs appealed.

Smith, for plaintiffs.
Hines and *Winston, Jr.*, for defendant.

BATTLE, J. We concur in the opinion given by his Honor in the Court below, that the action cannot be maintained. If the contract were intended to be made by the defendant with the justices, in their official capacity, he was one of them, and could not enter into an engagement with them, by which to subject himself to an action at law. See *Justices* v. *Bonner*, 3 Dev. Rep. 290, and other similar cases referred to by defendant's counsel.

The counsel who appeared for the plaintiffs in this Court, feeling the force of this objection, has insisted before us, that the contract made by the defendant, for doing the additional work on the house which he was building for the use of the county, was in legal effect a contract with the county, the justices on the bench having acted but as the agents of the county; that a suit may be sustained in the name of the county; and he has moved us to be permitted to amend the record by substituting, as plaintiff, the county of Tyrrel, instead of the justices of the county of Tyrrel.

We have no doubt that a county is a corporation, (*Mills* v. *Williams*, 11 Ire. Rep. 558,) and, like any other corporation, may maintain a suit. There is as little doubt that the majority of the justices of a county, while sitting in the Court of Pleas and Quarter Sessions, may make a contract for and in behalf of the county, with an architect, to build a house for the use of the county, and that such a contract will, in legal effect, be between the county and the architect. In such a case, there will be no more objection to one of the justices becoming a party to the contract with the county, as a corporation, than there would be for a stockholder in a bank or rail-road company, making a contract with the bank or company. The individual members of the corporation, and the corporation itself, are distinct persons, and there is no incongruity, therefore, in their entering into contracts with each other.

Our conclusion, then, is, that the action in the present case might be sustained in the name of the county, and, if the judgment in the Court below had been in favor of the plaintiffs, we should not have hesitated to allow the amendment, in order to support it. The cases of *Grist* v. *Hodges*, 3 Dev. Rep. 198; *Weed* v. *Richardson*, 2 Dev. and Bat. Rep. 535, and *State* v. *Muse* 4 Dev. and Bat. Rep. 319, would furnish ample authority to us for so doing. But here, the judgment in the Court below was for the defendant, and the effect of the amendment desired, would be to reverse that judgment, which was rightly given, and to enter a judgment here, for a different party plaintiff. Such an amendment was refused by this

Court in *Wilcox* v. *Hawkins*, 3 Hawks' Rep. 84. It is possible that the defendant relied so strongly upon the objection to the plaintiffs as parties to the suit, that he did not avail himself of a defense which he may have had upon the merits. If he have such a defense, he ought to have an opportunity to make it. To the real plaintiff, our refusal cannot be a matter of much consequence, because we could not have allowed the amendment, except upon the terms of paying all the costs. See cases above referred to.

PER CURIAM. Judgment affirmed.

ABRAHAM LAWRENCE, EX'R., *vs.* WILLIE MITCHELL.

Where a father, on the marriage of his daughter, made an imperfect gift of slaves to his son-in-law, manifestly and avowedly to advance them in life, but made a will afterwards, which had the effect of preventing the gift from operating as an advancement; and where the will does not notice the slaves by name; but it was evident by the intention of the testator, gathered from the general scope of the will, to provide equally between his children, seven in number; and where great inequality would be produced among his children by defeating this and gifts to two other children similarly situated, the Court *Held* that a clause, "*my slaves heretofore disposed of*," refers to these imperfect advancements, and not to previous dispositions in the will, and that the property was thus confirmed to the son-in-law by the will.

THIS was an action of DETINUE, tried before his Honor, Judge CALDWELL, at the Fall Term, 1855, of Granville Superior Court.

The plaintiff declared as the executor of Winfield Morgan, for the detention of three female slaves. The mother of the slaves claimed, had been, with two of her children, put into the possession of the defendant, upon his marriage with Frances, a daughter of the testator, and while in his possession, the third child was born; shortly after which event, Betsy, the mother, died. None of these slaves had ever been demanded of the defendant by the testator; but on the con-

trary, it appears that he had always intended them as an advancement, and for the setting up in life of his daughter and son-in-law; for on one occasion, shortly after the death of Betsy, the defendant took the three negroes in question (then quite young), to the testator, desiring him to take them back, since it would be a heavy expense to him to raise them; to which the testator replied, if he (defendant) would raise them, they should belong to him.

The gift had not been made in writing, and after the death of Winfield Morgan, the slaves were demanded by his executor, the plaintiff, previously to bringing this suit. The plaintiff insisted that, since the testator, the former owner of the slaves, left a will, in which the gift to defendant was not confirmed, the claim upon the ground of advancement was defeated. and the slaves, consequently, fell into the residuum of the estate. The defendant contended, on the other hand, that by the will the advancement is recognised and confirmed, and that the property, therefore, passes by it.

The proper construction of the will, therefore, determines this question; and since the opinion of the Court is based in some measure upon its general scope and bearing, it is deemed proper to set it out in full, viz:

"I lend to my wife, Hasky Morgan, the tract of land on which I now live, containing 730 acres, during her natural life or widowhood, and at her death or marriage it be equally divided between Hardy Morgan, Irvin Morgan, Amina Allen, Julia Allen, Rachel O. Mitchell and Elizabeth Hockeday.

2. My will is, that at my decease, my executor give to my wife Hasky, eleven hundred and fifty dollars, out of any monies that may come to his hands; also, three beds, &c., (a minute list of articles here follows.)

3. My will is, that at my decease, my wife have the following negroes, viz: Gill and George, Allen, Young, Harriet, Caroline and Susan.

4. I lend to my wife, during her life or widowhood, my man John, and at her death or marriage, John be given to Rachel Mitchell.

5. I give to my daughter Elizabeth Hockeday a certain negro girl, France.

6. My will is, that at my decease, my daughter Rebecca Jackson, be given four hundred dollars, to make her equal to the advancement made to Penelope Hester.

7. *Item.* My will is, at my decease, that the advancements heretofore made to Hardy Morgan, be made up to six hundred dollars, he having received $400; and the advancements made Irvin Morgan be made up to $600, he having received $580; Amina Allen and Julia Allen, each having received $600.

8. *Item.* My will is, that at my decease, all my negroes, not heretofore disposed of, be divided into five lots, to be made equal by valuation, and that Hardy Morgan, Irvin Morgan, Amina Allen, Julia Allen, each, receive one-fifth part, and the remaining fifth be equally divided by valuation, between Rebecca Jackson and Penelope Hester.

9. *Item.* My will is, that at my decease, my executors sell, on a reasonable credit, all my property of every description, not heretofore disposed of, and divide the proceeds in the following manner: Hardy Morgan, Irvin Morgan, Amina Allen and Julia Allen, shall each have one-fifth part, and the remaining fifth part be equally divided between Rebecca Jackson and Penelope Hester."

His Honor was of opinion, that according to a true construction of the will above set forth, the slaves in question, passed to the residuary legatee. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Graham, for plaintiff.
Miller and *Eaton*, for defendant.

NASH, C. J. The defendant married Rachel, the daughter of Winfield Morgan, and upon the marriage, the father put into the possession of his son-in-law, a negro woman named Betsy, and her two children. Betsy had another child. She is dead; and the action is brought to recover the three chil-

dren. The gift is void, as there is but a partial intestacy, and we presume it is now too late to enquire into the soundness of the rule adopted by our Courts: that to make parol gifts by a parent to a child, an advancement, there must be a total intestacy. We do not intend to disturb the cases in which the principle is decided. Winfield Morgan made a last will; and it is our duty to examine it, and see whether it does not confirm the imperfect gift previously made. If from the will itself, it sufficiently appears that such was his intention, it is incumbent on us to give efficacy to such intention. In ascertaining this intention, we are at liberty to look into the condition of the family and estate of the testator, at the time the will was made, so far as to enable the Court to place itself in the situation of the testator at the time of making his will. *Bivens* v. *Phifer*, 2 Jones' Rep. 436; *Martin* v. *Drinkwater*, 2 Beavan 215. At the time the will of Winfield Morgan was written, he had seven children, and to one of them, Rachel, the wife of the defendant, he had given three negroes—two of them mere infants—and made advancements to all the rest. In the first clause of the will, he gives the land on which he lived, to his wife during her life or widowhood, and at her death or marriage, directs it to be divided among six of his children, naming them, including therein Rachel, the wife of the defendant. It is very clear from a consideration of the whole will, that it was the intention of the testator to make an equal division of his property among his children. In the 6th item, he directs that his daughter Rebecca Jackson shall receive four hundred dollars, to make her share equal to the *advancements* made to Penelope Hester. In the 7th item he directs that the advancements heretofore made to Hardy Morgan, shall be made up to six hundred dollars, he having received four hundred dollars; and the advancements made to Irvin Morgan be made up to $600, he having received $580. He then states that Amina Allen and Julia Allen, have each received in advancements, six hundred dollars. Having by these clauses made four of his children equal, he proceeds, in the seventh and eighth clauses, to direct how the

property, not heretofore given away, shall be divided, and the same principle of equality is followed. In the residuary clause, he directs his executor, on his death, to sell all the property "not heretofore disposed of, and to divide the proceeds in the following manner: Hardy Morgan, Irvin Morgan, Amina Allen, and Julia Allen, each to receive one-fifth; and the remaining fifth to be equally divided between Rebecca Jackson and Penelope Hester." In this clause neither Mrs. Hockeday nor Mrs. Mitchell are mentioned; and Penelope Hester is no where else mentioned, except in the 6th clause, where she is referred to as having received advancements, by which the legacies to the other four children mentioned, were to be governed.

The plaintiff contends that the negroes in controversy, not being conveyed by a valid gift, were, at the death of the testator, a part of his estate not disposed of by the will, and therefore sank into the residuum, to be divided as the will directs. We do not concur in this view. We cannot believe it was the intention of the testator to cut off his daughter Rachel from her proper share of his slaves, by the legacy of John to her. The will itself puts beyond question, that all the children, including Mrs. Mitchell, had received advancements in the testator's life-time. We are confirmed in our opinion, by the word "heretofore" used by the testator in the 8th clause of his will. It is as follows: "My will is, that at my decease, all my negroes not heretofore disposed of, be divided into five lots, to be made equal by valuation, and that Hardy Morgan, Irvin Morgan, Amina Allen and Julia Allen, each receive one-fifth part, and the remaining fifth be again equally divided, by valuation, between Rebecca Jackson and Penelope Hester." It is insisted that the word "heretofore" is to be confined to the dispositions made in the previous clauses of the will. Supposing that to be so, yet, if the intention of the testator appear to refer to dispositions which he had previously made in his life-time, there is no rule of law which prevents us from understanding it in that sense, and we think it was the obvious intent of the testator to do equal justice to

all his children. The will then, upon its face, satisfies us that Mrs. Mitchell and all the children had received in the testator's life-time, gifts, or what he intended to be gifts. Receive the word "heretofore" as restricted by the plaintiff, and what becomes of Mrs. Hockeday? Is she to have no more of her father's property than the negro girl France? And is Mrs. Hester to have no more than one-half of the one-fifth of the sales mentioned in the 8th clause, and the same proportion of the residuary clause? The case of *Simpson* v. *Boswell*, 5 Ire. 49, is a strong authority in favor of the construction we have placed on this will.

We are of opinion that the previous imperfect gifts of the negroes in question, were confirmed by the will of the testator, and thereby made perfect; and of course do not sink into the residuum.

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

LEWIS WATKINS *vs.* JAMES W. JAMES.

Where B agreed to receive the draft of a merchant who had bought A's tobacco, and to credit a bond which he (B) held on A, when the money was received, but, without any fault of B, the merchant refused to give the draft, and two months afterwards became insolvent, *Held*, that it was error in the Judge below to leave the enquiry to the jury, whether he (B) was bound to procure the draft and credit the bond, there being no evidence before them to raise that question.

THIS was an action of ASSUMPSIT tried before his Honor, Judge CALDWELL, at the Fall Term, 1855, of Caswell Superior Court. Plea, general issue.

The plaintiff declared for the price of a crop of tobacco sold in 1852; also on the common counts. He also declared, on a special count, for a breach of contract.

George Williamson testified, that in the summer of 1852, the

defendant stated to him that plaintiff owed him a bond for $1800, for a tract of land which he had sold to him, and that he wished to get his (plaintiff's) tobacco crop, and to have the price credited on the bond; and having understood that the plaintiff also owed him (witness) a debt, he wished him to consent to take plaintiff's wheat towards his (witness') debt, and let the tobacco go as a credit on the bond, to which he assented.

Henry A. Richmond testified that he hauled the crop in question to Danville, for plaintiff, and delivered it to P. L. Watkins & Son, for which he took several receipts from one Hudson, their agent. He stated further, that at the October term of Caswell Court, at the request of the defendant, he carried these receipts to the court-house, and delivered them to the plaintiff, who immediately carried them to the defendant, but did not see him give them to him.

William Hudson (whose deposition was read) stated that he acted as the agent of P. L. Watkins & Son, merchants at Danville, in purchasing the crop of tobacco in question from the plaintiff, in 1852; that the defendant was present at the time of this trade, and he bought from him also *his* crop of tobacco. At the instance and request of the witness, it was agreed amongst the three, that at the October term next ensuing of Caswell Court, P. L. Watkins should give the defendant a draft, payable four months after date, for the price of both (plaintiff's and defendant's) crops, and "that any amount which might be paid to defendant on Lewis Watkins' account, should be placed to the credit of his bond then held by Mr. James for the land." Watkins & Son did not give the draft as agreed, excusing themselves from so doing by saying some of the tobacco they had got from defendant was wet when it was delivered, and insisting upon a deduction from the price on that account. He further stated he was unable to effect a settlement of the difficulty as to Mr. James' tobacco, and, therefore, preferred not giving him a draft for the plaintiff's tobacco alone. To certain questions asked by the defendant, he stated that he heard no agreement on the part of the defendant to take P. L. Watkins & Son "for the debt."

He further said that defendant had not received any thing for his tobacco.

It was proved that P. L. Watkins & Son became insolvent about Christmas in that year. There was evidence tending to show that in February, 1853, the defendant was in possession of the receipts which had been taken for the tobacco by the witness Richmond. It was proved further, that, before this suit was brought, the contract concerning the land was rescinded. The plaintiff surrendered his claim on the land, and the defendant the $1800 bond. The witness who spoke of this rescission said that nothing was then said by either party about the tobacco. The defendant offered no evidence.

For the plaintiff it was urged: 1st. That as soon as the tobacco was delivered in Danville to Watkins & Son, he was entitled to a credit on his bond.

2nd. If the first proposition was not sustained, it was insisted that it was the duty of the defendant to procure the draft and collect the money, and having failed to do so when he might have done it, he made the loss his own.

3rd. It was insisted that the defendant, having become collecting agent for the plaintiff, had made himself liable to damages by his *laches*.

The defendant's counsel admitted the contract as proved by Hudson, and, as that was certain in its terms, insisted it was the duty of the Court to declare its effect. They asked his Honor to instruct the jury that, according to that contract, the defendant was not liable; or that, if liable at all, it was only for nominal damages for negligence in failing to collect the money.

"His Honor declined charging as moved by the defendant's counsel; because in the judgment of the Court, taking the whole testimony into consideration, the case assumed more than one aspect. The Court charged that, if the jury should believe that the defendant was to take the draft on Watkins & Son, collect it, and apply the proceeds to the debt in question, or if defendant was to collect the draft and failed to do so while the Watkins' were solvent, that he would be liable for

the amount of the tobacco." The Court also charged "that if the contract was that the defendant was only to receive the proceeds of the draft on Watkins & Son, and apply the same to the said debt, in such case he would not be liable." Defendant excepted to these instructions.

Verdict for the plaintiff. Judgment and appeal

Kerr and *Morehead*, for plaintiff.
No counsel for defendant.

BATTLE, J. We differ from his Honor in the opinion which he expressed, that, in a certain view presented by the testimony, the defendant was liable to the plaintiff's action for the price of his tobacco. The contract between the parties, as proved by the witness Hudson, was, that the defendant agreed to take a draft instead of money from P. L. Watkins & Son, of Danville, Va., to whom the plaintiff had delivered his tobacco, and give the plaintiff credit for it on a bond which he, the defendant, held against him as the price of a certain tract of land theretofore sold to him. Had the draft been delivered to, and received by, the defendant, then, we think, the defendant might have been liable for not collecting the money before P. L. Watkins & Son became insolvent. But he *did not promise that he would procure the draft*, which, if he had, would have been a very different thing from an agreement merely to receive it. In the latter case, it was the duty of the plaintiff to see that the draft was delivered to him; for until then his responsibility for it did not commence: nor can it be said it was the defendant's fault that the draft was not handed to him. The excuse for the omission to do so, given by the agent of P. L. Watkins & Son, was not on account of any agreement made by the defendant to make the payment of the plaintiff's tobacco dependant on that of his own. The excuse was a frivolous one, not at all creditable to those who made it; but its effect must fall on the plaintiff, who was bound to procure the draft, and not on the defendant who was only bound to receive it. Such having been the contract between

the parties, it was not varied by the defendant, in calling for the tobacco receipts, as he might very well have wished to see them, to know how much he would be entitled to receive on them either in money or in a draft.

The view which we have taken of this case seems to be sustained by the fact that, when the parties rescinded the contract for the sale of the land, and the defendant returned to the plaintiff his bond, and repaid what had been advanced upon it, nothing was said by either of them about the tobacco. Thinking, as we do, that his Honor submitted it to the jury to find a contract between the parties, which there was no evidence to establish, we must pronounce the judgment to be erroneous, and grant a *venire de novo*.

PER CURIAM. Judgment reversed.

WILLIAM M. MEBANE *vs.* BENJAMIN A. SELLARS.

Where words alleged to impute perjury, can only be made to convey that idea by reference to a swearing in a suit in Court, and it appears that the plaintiff was not sworn at all in that suit, and that the oath which he did take, and to which only, the words spoken were applicable, was extrajudicial, *Held* that an action would not lie.

THIS was an ACTION of SLANDER, tried before his Honor, Judge CALDWELL, at the Fall Term, 1855, of Guilford Superior Court.

One *Miller* testified, that in a conversation between him and the defendant about candidates for the Legislature, the witness mentioned the name of the plaintiff, whereupon the defendant said, "who would vote for him except the Corsbys? that 'Squire Shaw had told him that he (plaintiff) had sworn him out of $20." He also testified, that a few weeks before this, he heard defendant say, 'Squire Shaw had said plaintiff had sworn him out of $20, and he understood defendant as

speaking of a suit between him (Shaw) and one Robert Mebane.

Mrs. Miller, wife of the foregoing witness, testified that she heard the defendant, on the occasion spoken of by her husband, say that 'Squire Shaw told him plaintiff had sworn him out of $20.

One *Corsby* testified, that in a conversation with defendant, he repeated the words stated by the preceding witnesses. That he understood the defendant as referring to a suit between said Shaw and Robert Mebane.

Shaw, the person above spoken of, stated that there had been a suit between him and Robert Mebane in Alamance County Court; that Mebane wished to continue it for a witness, to prove a credit of $20 which he claimed, and it was agreed that said Mebane should confess a judgment for the whole amount of the debt claimed by him, and if he, Mebane, could thereafter prove that he was entitled to such credit, it was to be allowed him. The judgment was accordingly confessed for the full amount claimed by him.

In pursuance of this understanding between him and said Robert, the plaintiff, at the instance of Robert Mebane, went before one Clapp, a justice of the peace, and made oath to the credit of $20 insisted on by Robert Mebane, whereupon he credited the judgment by that amount. He further swore, that plaintiff was not summoned nor examined as a witness in the case between him and Robert Mebane; also that he had told defendant, that the plaintiff had swore him out of $20; but he did not thereby intend to impute corruption to him.

The Court advised the jury that the plaintiff could not recover; for, according to one view of the case, as presented by the evidence, the plaintiff was not sworn in the suit referred to, and in the other view, the oath was extrajudicial; and that it was not important whether the defendant knew that the oath taken by the plaintiff was extrajudicial or not.

The plaintiff in submission to this opinion of his Honor, submitted to a non-suit and appealed.

Miller and *Gilmer*, for plaintiff.
Graham and *Bryan*, for defendant.

BATTLE, J. The words which the defendant uttered in speaking of the plaintiff, are clearly not actionable in themselves. They are not so strong as to say of a man that he is foresworn, or that he has taken a false oath, generally, and without reference to some judicial proceeding, which it was said in *Brown* v. *Dula*, 3 Murph. Rep. 574, had been established by a long series of decisions, not to be actionable. But though such words be not of themselves actionable, yet they may become so, if, by proper averments and proofs, it can be shown that they had reference to some judicial proceeding in which the plaintiff had been sworn, and that the defendant intended to impute to him the crime of perjury. Here, supposing all the necessary averments to be contained in the declaration, the proof fails to show that the defendant spoke of any judicial proceeding, or that the plaintiff had been sworn in any such proceeding. The witnesses testified indeed, that they understood the defendant to refer to a suit between Shaw and one Robert Mebane; but they did not state that he mentioned the suit, and it appears that the plaintiff was not sworn in it at all. The proof, then, did not sustain the averment, and of course, the action must fail. *Sluder* v. *Wilson*, 10 Ire. Rep. 92; *Sasser* v. *Rouse*, 13 Ire. Rep. 142; *Jones* v. *Jones*, 1 Jones' Rep. 495. The cases of *Sugart* v. *Carter*, 1 Dev. and Bat. Rep. 8, and *Chambers* v. *White*, 2 Jones' Rep. 383, referred to by the plaintiff's counsel, differ from this in the essential particular, that in them, the words used were actionable in themselves, as they imputed to the plaintiff the commission of capital felonies.

PER CURIAM. The judgment of non-suit must be affirmed.

GABRIEL JONES, *propounder, vs.* WILLIAM A. TUCK *et al., caveators.*

It is not sufficient that the decedent had, by raising himself upon his elbow, the physical ability to see the subscribing witnesses to a script, in the act of attestation, if he could not see them from the position in which he was lying when they did the act.

Especially is this not the case, if, by thus raising himself, his life would have been endangered.

ISSUE, *devisavit vel non*, tried before his Honor, Judge SAUNDERS, at a Special Term (December, 1855,) of Granville Superior Court.

A script, purporting to be the last will and testament of William Loftis, was offered for probate in the County Court of Granville, by Gabriel Jones, the executor therein named, and opposed by William A. Tuck and Susan Tuck, two of the next of kin and heirs-at-law of the decedent; and they having formally entered their caveat, the issue was tried in that Court, and found for the caveators. The propounders appealed to the Superior Court of that county, and upon the trial in that Court, the question which mainly occupies the consideration of this Court was made, as to the sufficiency of the attestation by the subscribing witnesses.

Alfred Apple, one of the subscribing witnesses, testified that he drew the supposed will of William Loftis according to his directions; that he was of sound mind when it was signed; that it was witnessed by himself and the other witnesses; that the attestation was in the adjoining room, and the decedent could not see the witnesses, at the time of their signing as he then lay; that he was lying in bed in such a situation that, by raising himself on his elbow, he might have seen the witnesses and the paper, as they were subscribing their names; that the testator was quite feeble, but from the fact that he saw him turn over in bed, both before and after the act of signing, he thought he had sufficient strength to have raised himself without assistance.

Jane Chandler, another of the subscribing witnesses, and one *Jones*, both, verified the statement of the other subscribing wit-

ness, *Apple*. They said that the decedent could have seen the act of attestation itself, if he had raised himself up on his elbow, and that, though feeble, they thought he could have done so.

For the caveators, the attending physician was introduced, who testified that the decedent was dangerously sick and very feeble; that some days before, in attempting to get out of bed, he had fainted, and witness had advised him not to make any effort of the kind again; he doubted whether the patient had the strength to raise himself to the position which the other witnesses had said was necessary to have enabled him to see them sign the paper, and if he could, it would have endangered his health and life to have done it.

The Court charged the jury, that "all the forms for making wills had been complied with in accordance with the statute." "The law requires that the witnesses should subscribe the paper in the presence of the maker; that our Supreme Court had held, that such must be the position of the parties, that the testator should have it in his power to see the witnesses sign, and also to see the paper, so as to avoid imposition. The English Judges held that while it was not necessary to prove the testator did see them sign as witnesses, it was necessary to be shown that he might have seen them. Here, if the witnesses *Apple* and *Jones* were believed, the testator could not see from his bed without changing the position in which he was lying; but by raising his head on his elbow, he might have seen the paper, and the witnesses sign; and if, therefore, the jury should believe the testator had the power—the physical ability—to do this, though against the advice of his physician, and imprudent for him to make such an effort, it would be a signing in his presence."

The counsel for the caveators repeated a request they had before made, for his Honor to charge the jury "that if they should believe that it was not safe for the testator to have made the effort, and that it would have been dangerous for him to have done so, it was not a sufficient signing."

This instruction the Court declined to give, and the cavea-

tors excepted as well to the charge given by his Honor, as for his refusal to charge as requested.

Verdict for the propounders. Judgment and appeal.

Kerr and *Winston, Sen.*, for the propounder.
Moore, for the caveators.

NASH, C, J. We do not concur with his Honor, in the instructions he gave as to the attestation of the witnesses' being in the presence of the deceased. It was, "if the witnesses Apple and Jones, were to be believed, the testator could not see from his bed without changing the position in which he was lying, but that by raising his head on his elbow, he might have seen the paper, and the witnesses sign. If, therefore, the jury should believe the testator had the power—the physical ability—to do this, though against the advice of his physician, and imprudent for him to make such an effort, it would be a signing in his presence."

Before examining the principle laid down by his Honor, it is proper to state a general principle relative to the question before us, and which was not controverted at the bar. If the witnesses to a will attest it in the room where the testator is, it is *prima facie* evidence that the testator saw them and the paper, at the time of the attestation, and the burthen of proving that he did not, or could not, see it, is thrown upon the caveators. If it is attested in another room, it is *prima facie* evidence that he did not, or could not, see the act. In that case the burthen of proof is upon the propounder, that he did see, or might have seen, both the witnesses and the paper. It was also conceded on both sides, that the word *presence*, as used in the statute, was not confined to "view" as meaning "seeing," but extended to being face to face with the testator, or not at the time absent from him; otherwise, a blind man under the statute, could not make a will, which has been decided in many cases, he may do.

The case was elaborately argued, and the authorities, many in number, brought to our notice. We have carefully

examined them, or such of them as are within our reach, and have come to the conclusion, that the rule as laid down by Powell in his work on Devises, 1 vol. page 98, is the true one. His words are, "but though the signing be in a room or chamber, immediately contiguous to the room where the testator is, yet the devise will be void unless the testator is in a *position* in which he can, if he please, without changing his situation, see the witnesses subscribe." This position is recognised in *Wright* v. *Manifold*, 2 Maule and Selwyn 294, and by Mr. Jarman in his treatise on Wills, vol. 1, page 77. His language is, "and it was not enough that in another part of the same room, the testator might have perceived the witness, if in *his actual position* he could not." Mr. Best, on Presumptions, uses the same language, vol. 31, page 66, L. Lib. "So, it has been established by several cases, that where the will has been signed by the witnesses in such a position that the testator might see them, it is to be presumed that he did see them sign it. *But it is different when* the witnesses attest the will in an adjoining room, *under such circumstances*, that the testator could not, from his position, see them." *Position* and *situation*, so far as they relate to matter, are indifferently used by lexicographers as synonymous terms, i. e., "the state of being placed," "posture,"—*vide* Worcester's Dict.

The case in 2 Maule & Selwyn is, upon this point a very strong one. There, the testator was in bed in a room, from one part of which, he might, by inclining his head into the passage, have seen the witnesses attest the will, *but not in the situation* in which he was. This was decided not to be a good attestation. The case of *Graham* v. *Graham*, 10 Ire. Rep. 219, is a strong one, confirmatory of the view we are taking of the principle under consideration. There the testator was lying in bed, very sick. After the will was signed, the witnesses took it into an adjoining room, where it was attested. It was proved that the testator, as he was lying in bed, could, by turning his head, and looking around the side of the door, see the backs of the witnesses as they sat at the chest, writing, but he could not see their faces, arms or hands, or the paper

on which they wrote. It was decided that the attestation was not in his presence.

If it be true that the law requires the attestation to be in the presence of the testator, to protect him from a fraudulent substitution of another paper for his will, then, it is necessary for him to be in such a situation, that he may see the paper, as well as see the witnesses subscribe their names. The decision is completely within the cases decided both in England and in this country. The bodies of the witnesses as effectually shut out the view of the testator, as the partition-wall did. In the case before us, all the witnesses agree that the testator was, at the time, very ill, and from his then position, he could see neither the attesting witnesses nor the paper. Two of them said, that the bed in which he lay was in such a position, that the testator by raising his head on his elbow, might have seen the paper, and the witnesses subscribe their names. The attendant physician stated that, a day or two before, in attempting to get out of bed, the testator fainted, and he directed him not to make such an attempt again; and if he had strength to raise himself on his elbow, the attempt to do so might have endangered his health and his life. His Honor's instruction was, that if he had physical ability, and by raising his head upon his elbow, might, from that position, have seen the witnesses and the paper,—though imprudent, and against the opinion of his physician—the attestation was in his presence. The charge conceded that, from the position in which the testator lay in his bed, he could see neither the witnesses nor the paper, and that a change of his position was necessary to enable him to do so. This instruction is not in accordance with the cases herein referred to. But his Honor went a step further, and throws out of view entirely the opinion of the medical attendant. The law makes no such requisition upon a testator. It does not require him to risk his life to see that the witnesses signed the paper, or to see the paper. If it were required for the testator to alter his position, from a prostrate to a reclining one, where will you stop? From a reclining to an upright one may be required

when that position is necessary to enable the testator to see the attestation, or it may be required of him to get out of bed for that purpose. If mere physical ability to put himself in the position where he may see, be the test, there can be no stopping place.

In reply to this idea, it was forcibly put: suppose when the witnesses retire to an adjoining room, a ruffian, or some person interested in having the will attested, stands by the sick man's bed with a bludgeon, and prevents him from altering his position so that he could see, would an attestation under such circumstances be a sufficient one? No, certainly not; and why? because the testator was in fear of his life. Was not the testator here restrained by the same cause?

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

Doe on Dem. of B. H. STANMIRE *vs.* DAVID TAYLOR *et al.**

Where Commissioners, appointed by the Legislature for that purpose, sold a tract of land at public auction, and took the bond of the purchaser for the price, which was afterwards collected, and the money used by the State, an Act of the Legislature granting it to another person was *held* to be against Art. 1, sec. 10 of the Constitution of the United States, and, therefore, void.

ACTION of EJECTMENT, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1855, of Cherokee Superior Court.

The plaintiff offered in evidence a resolution passed by the General Assembly of the State, in 1848, which directed the Secretary of State to issue to Ailsey Medlin, a grant for six hundred and forty acres, and which is as follows: "*Resolved*, That the Secretary of State be, and he is hereby au-

*This and the succeeding case were transmitted from the Supreme Court at Morganton.

thorised and required to issue to Ailsey Medlin, for the services of her father, Benjamin Schoolfield, in the continental line of the State, in the war of the Revolution, or to her heirs and assigns, a grant or grants for a quantity of land not exceeding 640 acres, on any of the lands of this State now subject to entry by law: Said grant to be issued on application of the said Ailsey Medlin, her heirs or assigns, as she may prefer, in one or more grants."

"2. That the said warrant or warrants shall, or may be laid, so as to include any lands now belonging to the State, for which the State is not bound for title: *Provided*, That this Act does not extend to any of the swamp lands of this State."

Which resolution was assigned by the said Ailsey Medlin to the lessor of the plaintiff, who obtained a grant for the land in question from the State. The secretary of the State in issuing the same, acted under the authority of the above recited resolution.

In 1852, the Legislature passed an Act, which is, as follows:

"Be it enacted, &c., that a grant, number 918, bearing date 29th of Sept., 1849, issued to B. H. Stanmire, assignee of Ailsey Medlin, for six hundred and forty acres of land in Cherokee county, be and the same is hereby validated and declared good and effectual to pass all the right of the State in and to the said land, any law to the contrary notwithstanding."

Upon this grant from the State, thus affirmed by the Act of the General Assembly, the plaintiff relied as his evidence of title.

The defendant offered evidence, showing that the land in controversy, was a part of the lands ceded to the State by the Cherokee Indians, and was sold by the agents of the State, in the year 1838, and that one Richeson became the purchaser, at the price of $; that he transferred his bid to the defendant, who gave bond for the purchase money, and took possession of the land, which he has held ever since. The defendant also produced in evidence, a grant from the State, dated in 1853, for the premises, and proved that in May, 1841, he tendered the amount of the purchase money to the Trea-

surer of the State, who declined to receive it, as the bonds were in the hands of the State's agent. He then proved by *Mr. Siler*, the agent, that on 3rd of November, 1852, the purchase money was paid by him to the agent.

The Court, *pro forma*, upon this evidence, instructed the jury that the plaintiff was entitled to recover. Defendant excepted.

Verdict for plaintiff. Judgment and appeal by the def't.

Avery, *Baxter* and *Moore*, for plaintiff.
J. W. Woodfin, *Gaither*, and *H. C. Jones*, for defendants.

NASH, C. J. The lessor of the plaintiff claims the land in question, under a grant issued to him by the State, on the 25th September, 1849. The Legislature, at its session of 1848, passed a Resolution directing the Secretary of State to issue to Ailsey Medlin a grant for 640 acres of land, &c., to be located on any of the lands of this State now subject to entry by law. The 2nd branch of the Resolution restricted the location, so as to include any of the lands now belonging to the State, "for which the State is bound for title, &c." Ailsey Medlin assigned her right to the lessor of the plaintiff.

The defendant claims title, under a sale made on 2nd of November, 1838, by certain commissioners appointed by the State. The land in question was bid off by one Robeson, who assigned his bid to the defendant, who gave bond for the purchase money, and took possession. In 1841, the defendant tendered the purchase money to the Treasurer of the State, who declined receiving it, as the bonds were in the hands of the agent of the State. In November, 1852, he paid the money to *Mr. Siler*, the State's agent, who was duly authorised to receive it; and on 31st March, 1853, he obtained a grant from the State. The defendant had possession from the sale in 1838, up to the time of the trial.

At June Term, 1852, of this Court, a cause came up for trial between this plaintiff and one John A. Powell, upon the title now presented by the plaintiff, for another tract of land

similarly situated. *Vide* 13 Ire. Rep. 312. The Court decided that the grant to the plaintiff's lessor was void, having been issued for land lying in the Cherokee country, where the lands are protected from entry by the general law, and where no entry-taker's office was, at that time, established. At the succeeding session of the Legislature, commencing in October, 1852, an Act was passed for the special purpose of establishing the legal right of the lessor of the plaintiff. It is as follows: "Be it enacted, &c., That a grant, number 918, bearing date on 28th of December, 1849, issued to B. H. Stanmire, assignee of Ailsey Medlin, for six hundred and forty acres of land, lying in Cherokee county, be, and the same is hereby validated and declared good and effectual to pass all the right of the State in and to the said land, any law to the contrary notwithstanding." This Act took effect, by its provision, from and after its passage.

The question presented for our consideration is, what effect does the Act of 1852 have upon the grant made to Stanmire in 1849? Before proceeding to answer this question, another point presents itself, which must be disposed of: can a grant founded on an entry made where vacant land is not subject to entry, be impeached collaterally, for defects in the entry, or for irregularities in any preliminary proceeding? The question is settled by the Court in *Stanmire* v. *Powell*, *ut supra*. They say, "where the law forbids the entry of vacant land in a particular tract of country, a grant for a part of such land is absolutely void, and that may be shown in ejectment. According to this decision, then, the grant of 1849 was void, and it can be shown collaterally.

This brings up the main point in the case, which is as to the validity, and consequently the effect, of the Act of 1852. We believe it to be void, as being in violation of the Constitution of the United States. We are not unmindful of the delicacy of the question, and the just regard which ought to be observed towards a co-ordinate branch of the Government. To the General Assembly all legislative power is entrusted, and an act of theirs, passed with all the due formalities, should

never, in a doubtful case, be pronounced by any Court to be unconstitutional. But when satisfied such is the fact, the Court would be unmindful of its high station, and of its solemn obligation, if it shrank from declaring the truth. In *Fletcher* v. *Peck*, 6 Cranch's Rep. 128, Judge MARSHALL declares, "The opposition between the Constitution and the law should be such, that the Judge feels a clear and strong conviction of their incompatibility with each other." The power of Courts of justice to pronounce an Act of the Legislature unconstitutional, is now too firmly sanctioned by judicial decisions in every State of the Union, and in the Federal Courts of the United States, to be questioned. In the nervous language of Chancellor Kent, in the first volume of his Commentaries, p. 444, "To contend that the Courts of justice must obey the requisitions of an act of the Legislature, when it appears to them to have been passed in violation of the Constitution, would be to contend that the law is superior to the Constitution, and that the Judges had no right to look into it, and regard it as the paramount law of the land. It would be rendering the power of the agent superior to that of the principal." If there were no power in the State to declare an Act of the Legislature unconstitutional, it was idle to impose restraints upon it, and every man would be driven to the necessity of putting his own construction upon the Act, or the Legislature, as in England, be considered omnipotent. But in North Carolina this duty is imperative. By the 12th section of the Constitution, it is provided, that every person who shall be chosen a member of the Senate, or House of Commons, or appointed to any office, or place of trust, before taking his seat, or entering upon the execution of his office, shall take an oath to the State; and all officers shall take an oath of office." If then, as a Legislator or a Judge, he turn aside from his duty, or shrink from the performance of it, where a proper case presents itself, he is unfaithful to his trust, and does an act injurious to those whose interests and rights he is bound to protect, and which is offensive to God. Besides the oath of fealty to the State, and the oath of office, every judicial offi-

cer takes an oath of fealty to the Constitution of the United States, and is as much bound to declare an Act of the Legislature, which violates its requisitions, unconstitutional, as when it violates that of the State. By the 10th section of the 1st Article of the Constitution of the United States, it is provided, that *no State shall pass any law impairing the obligation of contracts.* The unappropriated land in this State belongs to the people of the State, in their collective capacity, and the Legislature, representing the sovereignty, have a right to transfer it to whom they please. Their right to grant it is not questioned; but they must be careful in doing so, not to trespass on the vested rights of others. Let us see then if the Act of 1852 violates the article of the Constitution of the United States, above cited. The Cherokee lands were not the subject of entry; the Legislature had adopted a different mode of disposing of them, from what was ordained for the other unappropriated lands. They had directed them to be sold by commissioners appointed for that purpose. At the sale by the commissioners, one Robeson purchased the premises in dispute, but transferred his right to the defendant who gave his bonds to the commissioners for the purchase money which he paid to the agent of the State in November, 1852, and in March, 1853, procured his grant. The grant to the lessor of the plaintiff, under the decision of *Stanmire* v. *Powell* herein before referred to, was void and of no effect, and he acquired, under it, no title. In 1838, the defendant made his purchase. What was the contract between the State and the defendant? The former, through its agent, sold the premises to the defendant, and agreed to make him a title upon his paying the purchase money within a specified time. This he failed to do, and the State might have put an end to the contract, by ordering the lands to be re-sold, and returning to the defendant his bonds; but this she did not do. She preferred to hold the defendant to his contract by sending the bonds to the agent, *Mr. Siler*, for collection, and afterwards accepting the purchase money paid by the defendant to Mr. Siler. At the time, then, when the act of 1852 was passed,

the defendant had a clear equitable right to the premises, of which the Legislature could not divest him, and which was turned into a legal one by his grant. A grant made by the Legislature is a contract within the meaning of the clause of the Constitution of the United States: no State shall pass any law violating contracts whether they be executory or executed, *Fletcher* v. *Peck*, *ubi supra*, p. 137. "A law," says Judge Marshall, "annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution, as a law discharging the vendors of property, from the obligation of executing their contracts by conveyances." Neither can the Legislature discharge itself from its obligation to perform its contracts. If the Act of 1852 was intended to give life to the void grant, under which the plaintiff claims the premises, by giving a construction to it, the act was a judicial one, which it is not in the power of the Legislature to pronounce. If it is to be considered purely a Legislative grant to the lessor of the plaintiff, then it violates the contract it had made with the defendant Taylor, and is void. If void, it cannot bind the Courts, for it would be to overthrow in fact what was established in theory, and make that operate as law, which is not law. It may, indeed, be well questioned if the Act of 1852 is not void by force of the common law. It attempts to transfer the property of one, without his consent, to another. In Dr. Bonham's case, 8 Coke, 118, Lord COKE declares that, "the common law doth control acts of Parliament, and adjudges them void when against common right and reason." This opinion was recognised by Chief Justice HOBART in *Day* v. *Savage*, Hob. Rep. 87, and by Chief Justice HOLT in *City of London* v. *Wood*, 12 Mod. Rep. 687. Chancellor KENT admires the intrepidity and powerful sense of justice evinced by Lord Coke in avowing such a sentiment. It will not do to say that the State cannot be sued by one of her own citizens. True, she cannot, but does that absolve her from the obligations of justice, and truth, and honor? And to refuse know-

ingly to execute her contracts, or to endeavor to put it out of her power to comply with them, is what has not yet fallen upon North Carolina; and *longo, longo intervallo*, may the time be before she shall refuse justice to the humblest of her citizens because she cannot be *compelled* to grant it.

It does not become us to look into the motives of the Legislature in passing the Act of 1852. Its effect and operation we are at liberty to declare. Believing that the Act violates that article of the Constitution of the United States to which we have referred, our duty is to pronounce it void.

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

Doe on Dem. of B. H. STANMIRE *vs.* ELIZABETH WELCH *et al.*

(Same point as in the preceding case.)

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

The plaintiff declared on the same title as that set out in the preceding case, Doe on dem. of *Stanmire* v. *Taylor*, and the matters relied on in defense are substantially the same also. The particulars in which they differ are noticed in the opinion of the court.

Baxter, *Avery* and *Moore*, for plaintiff.
Gaither, *J. W. Woodfin* and *H. C. Jones*, for defendants.

NASH, C. J. The decision in *Stanmire* v. *Taylor*, made at this Term, governs this. The facts are substantially the same.

John A. Powell purchased the premises in question at the commissioner's sale in 1838, at the price of $8,000, and paid $1,000 at the same time, and secured the payment of the balance by bond. At the time of the sale and making the first

payment, he took from the commissioners a certificate of the sale, on which was the endorsement of this payment. In 1841, he paid into the public treasury $400, in part payment of his bond. Subsequently, commissioners were appointed under the authority of the Legislature, to reduce these bonds, which was done by them, and the purchase money bid by Powell reduced to $4,500. Powell sold his right to the defendant, by deed, dated November, 1838. When the commissioners made their reduction of the bond, they listed it as Powell's land, and the defendant, Welch, executed new bonds for the sum of $1,500, which are still in the hands of the agent of the State. In October, 1853, the defendant, Welch, paid the agent, Mr. Siler, $281, and in March, 1854, she paid to the agent the additional sum of $716.00¾, in full of the first instalment upon her first bond. It thus appears that the State sold the land to Powell at public auction, at a very high price, before the alleged grant to Stanmire, and, since the passage of the Act of 1852, has received from the defendants nearly $1000 of the purchase money; and the bonds for the purchase money are still in the hands of her agent, for collection. The State *had no right to make the grant to Stanmire;* for as is said in *Stanmire* v. *Taylor*, she was previously, by her contract and by her honor bound, *to convey to another person.*

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

CHARLES MOORE *vs.* JAMES R. LOVE.

In an action for enticing away an apprentice, where there has not been an entire loss of the apprentice, (as by removing him to a distant country,) it is erroneous for a jury to give damages for the loss of services for a period elapsing after the commencement of the suit.

ACTION on the case for enticing away apprentices, tried before BAILEY, Judge, at the Special Term of Buncombe Superior Court, July, 1855.

The plaintiff declared for the loss of the services of three children of color, that had been bound to him by the County Court of Buncombe. These persons left the employment of their master, the plaintiff, and went into that of the defendant, who resided about twenty-five miles off, in an adjoining county. They remained with the defendant until about the time of bringing this suit in June, 1849, when they left him for a while, but shortly afterwards returned, and, with intervals, continued in his service until the trial in 1855. The negroes were not concealed, and no allegation was made of an effort to remove them further than defendant's residence. After the writ issued, it was proved that defendant disclaimed any right to them, and sent word to plaintiff that he could get them. It was proved that some of them, after this, returned for a while to Buncombe, near the residence of the plaintiff, and several times passed from defendant's neighborhood to that of plaintiff.

Defendant's counsel insisted that if his client was liable at all, he was not liable in this suit, for the detention and employment of the apprentices after the suit was commenced, and asked his Honor so to charge.

But his Honor instructed the jury, that if they found that the defendant had, by himself, or through another, enticed the plaintiff's apprentices from his service, as alleged, he was entitled to recover some damages; and that in estimating the damages, they ought to include the value of the services of the several apprentices while in the defendant's service, either before, or after, the commencement of this suit, till they arrived at majority; subject to such deduction as they thought ought to be made for the chances which the plaintiff had to reclaim the possession of them. To this charge of his Honor, defendant's counsel excepted.

Gaither, *N. W. Woodfin* and *H. C. Jones*, for plaintiff.
Baxter, for defendant.

BATTLE, J. This cause was argued before us at the last

Morganton term, by counsel on both sides, and we then gave to it all the consideration which the limited library there enabled us to do. For the purpose of further research into the authorities upon the interesting question which the case involves, we adjourned it to the present term, and the investigation which we have here been able to make, has satisfied us, that the rule of damages laid down by the presiding Judge in the Court below, cannot be sustained upon principle, and is opposed by the most approved adjudications.

That eminent lawyer, Lord Chief Baron Comyn, in his great work, the Digest of the laws of England, says, "the general rule in personal actions is, that damages are allowed only to the time of the action commenced." 3. Com. Dig. Tit. Damages D. p. 348. Thus, in *Hambleton* v. *Veere*, 2 Saund. Rep. 169, which was an action on the case where the plaintiff declared against the defendant for procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested; because it appeared that the term was not expired at the commencement of the suit; and the Court said expressly, "he ought to have recovered damages for the loss of services until the exhibiting the bill, and no more." So, in *Ward* v. *Rich*, Vent. Rep. 103, (to be found also in 7 Vin. Abr. 298, pl. 25,) Ward brought an action *de uxore abducta*, and keeping her from him until such a day, which was some time after the exhibiting the bill. After verdict for the plaintiff, judgment was arrested; because the jury may have given damages for the whole time laid in the declaration. Again, in *Walter* v. *Warren*, 10 Modern Rep. 273, an action was brought by a husband for taking his wife away and ravishing her, *per quod consortium amisit* for one year; and after a verdict and general damages, inasmuch as the year had not expired at the time of the verdict, and as the jury might have given damages to the time of the verdict, the Court would not render a judgment for the plaintiff. The rule of damages adopted in these cases, only followed what had been laid

down long before in *Robert Pitfold's* case, 10 Coke's Rep. 115, to wit: that the plaintiff in all personal actions, except perhaps the action of account, is entitled to recover damages only for the wrong done before the writ was brought, and shall not recover for any done pending the writ. In accordance with this, is the well-known doctrine, that in an action on the case for nuisance in erecting a mill-dam, and thereby overflowing the plaintiff's land, he can recover damages only up to the time of issuing his writ; but that he may sue from time to time for the continuance of the nuisance. *Caruthers* v. *Tilman*, 1 Hayw. Rep. 501; *Bradley* v. *Amis*, 2 Hayw. Rep. 399. This, being very oppressive upon mill-owners in this State, caused the passage of the Act of 1809, (Rev. Code, ch. 71, sec. 8, *et seq.*,) which made very material alterations in their favor. See *Mumford* v. *Terry*, 2 Car. Law Repos. 425. But the necessity for the alteration shows the strength of the original rule. Indeed, so rigidly was it adhered to in England, as to the time to which damages should be carried down, that, until the case of *Robinson* v. *Bland*, 2 Burr. Rep. 1077, interest on money in the action of assumpsit, was not computed beyond the commencement of the action.

There is another class of cases, some of which were cited by the plaintiff's counsel, and upon which they rely with much confidence for the support of their action. An examination of these cases will show under what circumstances, prospective damages, as they have been called, may be given, and will serve to mark out the true line of distinction between them and those to which we have already adverted. *Fetter* v. *Beale*, reported in 1 Ld. Raym. 339, 692, and also 1 Salk. 11, was an action of trespass, in which plaintiff declared for a battery, alleging that he had previously brought an action for it against the defendant, and recovered £11, and no more; and that afterwards part of his scull, by reason of said battery, came out of his head, and for this subsequent damage, the suit was brought. The defendant pleaded the former recovery in bar, to which plaintiff demurred, and his counsel argued "that if a consequence will take away an action, for

the same reason it will give an action." But judgment was given for the defendant, the whole Court being of opinion, "that the jury in the former action considered the nature of the wound, and gave damages for all the damage it had done the plaintiff." The case being moved again, Lord HOLT, C. J., said, "if this matter had been given in evidence, as that which, in all probability, might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury which is the foundation of the action is the battery, and the greatness or consequence of that, is only in aggravation of damages." So, where the defendant was employed as an attorney to investigate securities on which a loan was to be made, and it was alleged that he had neglected to use proper care, and that the securities had proved defective, but that the insufficiency was not discovered until more than six years after the defendant had been guilty of the neglect, it was insisted, that the statute of limitations which was pleaded, ran, not from the time when the insufficient security was taken, but from the time when the special damage alleged in the declaration occurred. But the statute was held a good bar, and HOLROYD, J., said, "if the action had been brought immediately after the insufficient security was taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security." *Howell* v. *Young*, 5 Barn. and Cress. 259, (11 Eng. C. L. Rep. 219.) A similar decision was made by the Supreme Court of the United States, in the analogous case of *Wilcox* v. *Plummer*, 4 Peters' Rep. 172. Similar in principle, as to the rule of damages, is the case of *Whitney* v. *Clarendon*, 18 Verm. Rep. 252, where it was held that a recovery in an action of trespass on the case, brought by the father to recover damages sustained by himself, in consequence of personal injuries to his son, was a bar to his second action by the father, to recover for damages sustained in consequence of the same injury; notwithstanding the recovery in the first action was limited to damages which accrued prior to the commencement of the suit, and the second action

was brought expressly to recover for loss of service, and other damages sustained subsequent to that time. Upon the same principle must be put the case of *Hodsoll* v. *Stallebrass*, 9 Carr. and Payne, 63, (38 Eng. C. L. Rep. 35) S. C. in 11 Adol. and Ell. 301, (39 Eng. C. L. Rep. 94.) That was an action on the case, brought by the plaintiff to recover for the loss which he had sustained by reason of an injury inflicted upon his apprentice by the bite of the defendant's dog. The declaration stated the injury to be *permanent*, and assigned the damages specially, that the apprentice was enfeebled and hurt, and would never again be capable of working at his trade, and that he was obliged to support him during the remainder of his apprenticeship. Lord DENMAN, C. J., before whom the cause was tried, thought that, under *that declaration*, the plaintiff might recover for the whole damages sustained, as for a *permanent* injury; and the Court of King's Bench refused to set aside the verdict of the jury, which assessed the damages for a *permanent* injury.

We are now prepared to see and point out the distinction between the two classes of cases upon which we have been commenting. It is clearly stated by Lord MANSFIELD in the case of *Robinson* v. *Bland*, cited above, "when a *new* action *may* be *brought* and a *satisfaction obtained* thereupon, for any duties or demands which have arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment upon the former action. As in covenant for non-payment of rent, or of an annuity payable at different times, you may bring a new action *toties quoties*, as often as the respective sums become due and payable, so, in *trespass* and in *tort*, new actions may be brought as often as new injuries and wrongs are repeated; and, therefore, damages shall be assessed only up to the time of the wrong complained of. But where a man brings an action of assumpsit for principal and interest, upon a contract obliging the defendant to pay such principal money, with interest from such a time, he complains of the non-payment of both, the interest is an accessory to the principal, and he cannot bring a new

action for any interest grown due *between* the commencement of his action, and the judgment in it." What is here so well said about the interest being the accessory to the principal money, and therefore recoverable down to the time of the trial, applies with equal force to the case of *trespass* and *tort*, where the wrong done is not repeated, or continued, though the damage resulting from it may not cease being developed until after the time when the writ was issued. In the latter case, the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage which can then be estimated as reasonably certain to occur. See 2 Williams' Saund. 171, note 1; Sedgwick on Damages 102, *et seq.*

This brings us to the consideration of the case of *McKay* v. *Bryson*, decided in this Court, and reported in 5 Ire. Rep. 216, which may seem, at first view, to militate against the distinction by which we have endeavored to reconcile the decisions which have been made upon the subject of prospective damages. It was an action on the case, brought to recover damages for enticing the plaintiff's apprentice from his service, *and conveying him out of the State.* The testimony showed that the boy was bound apprentice to learn the business of a tailor, and that he continued in the service of his master until he was carried away by the defendant; and when last heard from he was in Tennessee. The suit was brought some time before the expiration of the term of service, and the jury were instructed that they might give damages as for a total loss of service during the whole period of apprenticeship, subject to a deduction, on account of the plaintiff's chance of regaining the boy. The charge given to the jury in the Court below was approved in this Court, upon the *authority* of the case of *Hodsoll* v. *Stallebrass*, above referred to. No other case appears to have been cited, and the Court do not advert to the fact that, in *Hodsoll* v. *Stallebrass*, the injury from which the loss accrued to the plaintiff, was a *single act of wrong;* but they do advert to, and state the fact, that the loss caused by the

tort of the defendant was, in effect, a total loss of the plaintiff's apprentice. The only wrong alleged in the declaration, or proved on the trial, was that of carrying the apprentice beyond the limits of the State, which caused a *total loss* of his services to his master. In this view, the case may well be sustained, upon the principle applicable to the second class of cases to which we have referred. That the removal of the apprentice out of the State may be regarded in the same light as if a permanent injury had been inflicted upon him, we have the strong analogy of the case of trover by one tenant in common against another, for the destruction of the article held in common. If the article be sent off by the defendant to a place unknown to the plaintiff, so that, as to him, it is totally lost, it is equivalent to its destruction, *Lucas* v. *Wasson*, 3 Dev. Rep. 398. The circumstances of the present case are very different from those of *McKay* v. *Bryson*. The apprentices were carried by the defendant to his residence in an adjoining County, only twenty-five miles distant from the plaintiff. They were not concealed from him; and it appears from the proof, that he knew where they were. The continued detention of them by the defendant was a *succession of torts* for which he might bring new actions from time to time; and hence his case falls into the class with *Hambleton* v. *Veere*, and all those in which damages can be given for the loss of service up to the commencement of the suit only. This rule was violated by the charge of the Judge in the Court below, and there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

GEORGE LYTLE *vs.* NELSON BIRD.*

An action for a deceit will not lie for a fraudulent misrepresentation upon the sale of a tract of land, as to where certain lines ran, and as to particular lands being included in the deed.

*Transmitted from Morganton, by order of the Court.

Lytle *v.* Bird.

THIS was an ACTION on the case for a DECEIT in the sale of a tract of land, tried before his Honor, Judge PERSON, at the Fall Term, 1854, of McDowell Superior Court.

By a deed, dated 3rd of November, 1852, the defendant conveyed to the plaintiff, in consideration of $800, a tract of land in the County of McDowell, on Crooked creek, thus described: viz, "bounded as follows, W. D. Reed on the North and East, A. J. Bird on the East, and William Maffet on the West, and the 'Speculation line' on the South; beginning at a beach on the South bank of the creek, and runs North, &c.," calling for distinctive lines and points all round the tract to the beginning. These boundaries have since been clearly traced, and it is found that none of them reach the "Speculation line," which is an old and well known line in that country. It was proved that there are one hundred and thirty-six acres of land between the nearest line of the above described tract and the speculation tract.

It was in evidence, that while the plaintiff and defendant were trading about this land, they went together on the premises, and the defendant pointed out the one hundred and thirty-six acres, between the land included in the particular boundaries and the speculation land, as a part of the land he was selling, and asserted that these particular boundaries included it. It was further in evidence, that, when they were preparing the deed for execution, the defendant again asserted that he was selling the one hundred and thirty-six acres above mentioned. There was also evidence tending to show that at the time of executing this deed, and before that time, the defendant knew that its courses did not embrace the land up to the speculation line.

The defendant resisted a recovery, 1st, upon the ground that this action would not lie at all upon the facts disclosed, and 2ndly, upon the ground that, by the exercise of reasonable diligence, the plaintiff might have ascertained the identity of the land he was buying.

The court instructed the jury that, "if they believed the evidence, the action was well brought; and that the plain-

tiff's right to recover, depended upon the fact whether the evidence satisfies them that the defendant falsely represented, when he executed the deed, that it included land which he knew, at the time, it did not include. To these instructions, defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Gaither and *Bynum*, for plaintiff.
J. W. Woodfin and *Baxter*, for defendant.

NASH, C. J. The case presents the question, whether an action of deceit can be brought for a fraud perpetrated by a vendor, in showing to the vendee, what he knew was not his, as being his, in order to induce him to make the purchase. The plaintiff alleges, that when he made the contract with the defendant, he showed him land that did not belong to him, and asserted to him, that his land extended up to a line which is called the "speculation line;" that when the conveyance was made, he renewed the assurance. The conveyance was made by metes and bounds which did not extend to that line, and there were one hundred and thirty-six acres between the defendant's land and the "speculation line." This land had been shown by the defendant, before the conveyance was executed, as part of his tract.

This is not a new question in this State. In *Fagan* v. *Newsom*, 1 Dev. Rep. 20, the doctrine is asserted that a purchaser is not entitled to an action of deceit, if he may readily inform himself as to the truth of the facts. The defendant, to induce the plaintiff to buy the land, showed him two acres of bottom land, which he represented as a part of the land he was selling. The defendant tendered a deed which did not include the bottom, and plaintiff refused to receive it. There the plaintiff could have informed himself whether the bottom did belong to the defendant or not. A stronger case is that of *Saunders* v. *Hatterman*, 2 Ire. 32. The land was represented by the defendant as worth three dollars per acre; that it had sold for five or six hundred dollars. These representations

were false. As in this case, the contract was completed by a conveyance, and the action was for the fraud. The contract was made, and the conveyance executed, in the county of Cabarrus, and the land lay in Davie. The Court say, if the plaintiff, by using reasonable diligence, could have ascertained the truth, it was his own folly to trust to the representations of the vendor. In this case, the defendant alleged his land extended to the "Speculation" line. The plaintiff accepted a conveyance, by metes and bounds which did not extend to that line. The mode and facility of ascertaining that fact was open to him, equally with the defendant, by a survey which he ought to have insisted upon before receiving the conveyance; it was his own folly not to have done so. If this were not so, it would create endless confusion and litigation, and we should be called on continually to investigate frauds in contracts of land, where there is a conveyance, under parol evidence. *Vigilantibus non dormientibus servit lex.*

His Honor instructed the jury, if they believed the evidence, the plaintiff was entitled to their verdict. In this there is error.

PER CURIAM. The judgment is reversed, and a *venire de novo* awarded.

Den on dem. of DANIEL A. ROGERS *vs.* AVELON RATCLIFF.

In an action of trespass *quare clausum fregit*, the pleas of general issue and *liberum tenementum* were entered, and the finding was general for the defendant; such finding was *held* not to be a bar to plaintiff's right to recover in a second action brought for trespass on the same land.

EJECTMENT, tried before his Honor, Judge BAILEY, at the Special Term, July, 1855, of Buncombe Superior Court. Pleas: general issue, *liberum tenementum* and stat. lim.; and specially, a former judgment and recovery between the same parties, upon the same subject matter.

In support of the plea of *liberum tenementum*, and of the special plea, the defendant produced in evidence the transcript of a record of an action of trespass *quare clausum fregit*, tried at December Term, 1851, of Buncombe Superior Court, between the same parties. The pleas therein were general issue *liberum tenementum* and stat. lim. The cause of action in that case was trespass upon the same land that is now in controversy, and the same evidence was offered in that trial as in this.

The verdict in that case was in favor of the defendant, on all the issues, and a judgment thereon rendered for the defendant. Upon the trial below, it was insisted by the defendant's counsel that the former verdict and judgment were a bar to the plaintiff's recovery in this action, as an estoppel.

The cause was submitted to the jury upon the other evidence in the case, with instructions from the Court, to which there was no exception, and a verdict was rendered for the plaintiff. The question of law, however, as to the effect of the recovery in the former action, was reserved by the Court with the understanding, that if the Court should be of opinion with the defendant, the plaintiff would take a non-suit.

The Court, upon consideration, being of opinion with the defendant, the verdict was set aside, and a non-suit entered. Plaintiff appealed.

J. W. Woodfin and *N. W. Woodfin*, for plaintiff.
Gaither, for defendant.

Pearson, J. It is agreed that the finding upon an issue taken on a traverse of a *precise* fact material to the right in question, is conclusive, and operates by way of estoppel between the parties and privies, if pleaded in "due form and apt time." *Long* v. *Baugus*, 2 Ire. Rep. 290; *Bennet* v. *Holmes*, 1 Dev. and Bat. Rep. 486; *Outram* v. *Morewood*, 3 East, 346.

It is conceded also, for the purpose of this decision, that if the case had been put to the jury, upon the issue taken on the

plea of *liberum tenementum* alone, a verdict responsive to that single issue would have been conclusive.

But it is contended that, as it appears by the record, the case was put to the jury upon the issue joined on the plea of "not guilty," which issue is found in favor of the defendant, that finding put an end to the case. The jury were then *functi officio;* and the finding, in regard to the issues, the plea of *liberum tenementum*, and also the statute of limitation, was uncalled for,—not material to the right in question, and consequently cannot have the effect of an estoppel.

The broad question is, when a verdict is in favor of the defendant, both upon the general issue and upon an issue taken in a special plea, can the finding upon the latter issue be afterwards used as an estoppel against the plaintiff?

When an estoppel is technical, and does not involve considerations of bad faith or unfair dealing, it is, according to the authority of Lord Coke, odious, and should not be extended by inference or implication.

The research which this case has given rise to, has not enabled us to find any case in which it is held that a verdict amounts to an estoppel, except where the finding is of a *precise* fact material to the decision of the case. For instance, in *Outram* v. *Morewood*, cited above, the only matter put in issue on a former trial, was, whether a certain coal-mine was included by a certain deed. The jury found that it was not. Upon that the case turned. Afterwards, in a second action in respect to the same coal-mine, the defendant, by his plea, alleged that the coal-mine was included by the deed. The plaintiff, in his replication, relied on the finding in the former action as an estoppel, and the Court held that it operated as an estoppel.

We do not consider "a case in point" necessary, in order to justify the application of a general principle; but when no such case can be met with, a careful recurrence to principles becomes necessary.

Our reflections have brought us to the conclusion, that a finding for a defendant, upon a fact put in issue by a special

plea, is not conclusive, when there is, by the same verdict, a finding for the defendant upon the general issue.

We base this opinion upon three grounds: 1. A finding in favor of the defendant, upon the "general issue," fixes the fact that the plaintiff has no cause of action; consequently, it is unnecessary to investigate the matter alleged by the special plea, and a finding in regard to it is immaterial—a blow inflicted upon the body of a dead adversary,—and must, at the least, be treated as surplusage, under the maxim *utile per inutile non vitiatur;* and being immaterial and mere surplusage in respect to the action then on trial, the idea that it may subsequently become material, and be used as an estoppel, so as to defeat another action brought afterwards, involves an absurdity. Every one who has witnessed trials on the circuit is aware that when a plaintiff fails to establish his cause of action, the defendant rarely offers evidence to support his special plea; for the very sufficient reason, that it is uncalled for; and if he does, the plaintiff and his counsel do not deem it necessary to contest the matter; and it is, on all hands, considered not worth while to attend to the manner in which the verdict should be entered; because the plaintiff is obliged to lose the case. If what is immaterial to the case then on trial, and is in practice, for that reason, permitted to pass *sub silentio*, may afterwards be used as an estoppel, so as to exclude *the truth* by a technical rule of law, it amounts to an intolerable grievance. For example: to an action of slander, the defendant pleads the "general issue" and "justification"; on the trial, the plaintiff fails to prove that the defendant spoke the words; a verdict is entered generally, finding "all the issues in favor of the defendant;" the defendant then makes the charge, and when sued for it, pleads "justification," and relies on the former general finding as an estoppel, by which the plaintiff's guilt is established, and his mouth shut; ought not the plaintiff to be allowed to say, "the general finding embraced a matter which had become immaterial, and no one paid any attention to it; and as the matter is now material, every principle of

justice requires that it should undergo a full and deliberate investigation?"

Look at it in another point of view. Say the jury find the defendant not guilty; and upon the special plea, the verdict is entered for the plaintiff; another action is brought, to which the defendant pleads "justification," and the plaintiff relies on the finding in the former action as an estoppel; might not the defendant well be heard to say, "in that suit, as you had failed to establish a cause of action, I did not deem it worth while to offer evidence in support of my special plea; and if I had, it would have been looked upon by the Court and every body else, as not only evincing malice, but meanness; because I had you in my power, and was obliged to gain the suit any how?" To exclude the defendant from proving the truth under such circumstances, would be an ill return for his forbearance.

We are not to be understood as intimating that inattention on the part of a party, or of counsel, can prevent the application of a principle of law. Our position is, that when a matter becomes immaterial in the progress of a cause, an inattention to it is the natural result of its immateriality; it is not such a well considered and solemn act, as, according to all of the authorities, is necessary to create an estoppel. *Armfield* v. *Moore*, Busb. 157.

2nd. The finding is not merely immaterial, but inconsistent, and repugnant to the special plea.

Every special plea admits the cause of action. 1 Saunders' Rep. 14, *note*, 28, *note* 3. Indeed, from this quality it is called a plea by way of *confession and avoidance*. Formerly, this admission was made explicitly, and pleas commenced, "True it is, that, &c.," (admitting the cause of action,) and then alleging matter in avoidance. Stephen's Pleading, 200. After double pleading was allowed by the statute of Anne, this explicit admission was, of course, no longer required; for as the defendant, after pleading the general issue, was allowed to add a special plea, an explicit and absolute admission of the plaintiff's cause of action would make the two pleas palpably in-

consistent. Hence, the form of the pleas was modified, and instead of an explicit and absolute admission, it commenced by an implied and conditional one. "It is essential, however, that the confession, though not express, should be distinctly implied in, and inferable from, the matter of the pleading." Stephen on Pleading, 200. By way of example, he refers to a plea of release to an action for breach of covenant, "and the said defendant says that, after the *said breach of covenant*, the plaintiff, by his deed of release, &c." This confession, although merely "implied, and inferable from the matter of the special plea," is, nevertheless, seemingly inconsistent, when the defendant, availing himself of the benefit of the statute, had before pleaded "*non est factum.*" This was the necessary effect of the statute, and gave occasion for the witticism in ridicule of double pleading; "one sued for breach of a contract of bailment in returning a skillet broken, which he had borrowed whole, pleads: 1st. That he never had it. 2nd. That he returned it whole. 3rd. That it was cracked when he got it." This inconsistency, however, is rather seeming than real, when it is borne in mind that the confession is only conditional, and made for the purpose of having the benefit of the new matter alleged by way of avoidance, in the event that the general issue is found against him. If that issue is found for him, then he has no occasion for his special plea, and it is thereby not only made immaterial, but its essential quality of confessing the cause of action is taken from it and made repugnant to the finding. A verdict, finding the issues for him, upon both pleas, would be obnoxious to the witticism alluded to; for, if the defendant, in the case supposed, did not execute the covenant, how could he have a release for the breach of it? Or, if, in trespass for assault and battery, the defendant pleads not guilty, and "son assault," when the jury find that he did *not* commit the assault and battery, it is manifestly inconsistent also, to find that the defendant was justifiable in committing the assault and battery in self-defense. In debt on specialty, pleas, "general issue," "payment and set-off," the jury find all issues in favor of the defendant; that is, "he did

not execute the bond; he paid it, and had a set-off." Such repugnance must be attributed to inattention in entering the verdict. If the defendant afterwards bring an action for the debt due him, is he to be concluded by the former record, by which it appears he has used it as a set-off? In all such cases, where the jury find for the defendant upon the general issue, to prevent this apparent inconsistency from being put upon the record, the regular course is for the Court, upon motion, or *ex mero motu*, to direct the other issues to be withdrawn, or stricken out of the record.

3rd. Where there is a finding for the defendant upon the general issue, the instruction of the Judge in the Court below, in reference to the special plea, cannot be reviewed in this Court. By way of illustration: a woman brings an action against a man for assault and battery; the defendant pleads *not guilty*, *son assault*, &c.; the Judge instructs the jury that a man may justify an assault and battery on a woman, if she gave the first blow. (Question raised in *State* v. *Gibson*, 10 Ire. Rep. 214.) The jury find all issues in favor of the defendant. The plaintiff appeals. This Court will not pass upon the plaintiff's exception to the charge; because, as the defendant had not committed the assault and battery complained of, its decision is uncalled for. On the same ground, if, in an action of covenant, the defendant plead "non est factum," which is found in his favor, this Court will not pass upon an exception to the charge, in reference to the measure of damages. *Gant* v. *Hunsucker*, 12 Ire. 254. As the plaintiff cannot have his exceptions to the charge, in reference to the special plea, passed upon in this Court, it follows that he should not be estopped.

The general rule, therefore, is, when the jury find for the defendant on the "general issue," the finding in his favor on a special plea, cannot be used as an estoppel. It remains to be seen whether there is any ground for making an exception in reference to the plea of *liberum tenementum*.

It is a well settled general rule, that matter which amounts to the general issue, cannot be pleaded specially. In cases where the defendant is willing to put the defense upon his

title, there are several reasons for allowing him to do so by special plea; although it amounts to the "general issue." If the plaintiff admit the facts by a demurrer, the case is withdrawn from the jury, and decided at once by the Court. If he put in a replication, the case then goes to the jury upon a single issue; whereas, if the defendant is compelled to plead the "general issue," the matter goes to the jury at large. A defendant, therefore, is allowed to allege title in himself, by way of special plea; provided he will admit, as a condition precedent, that he committed the act complained of, and that the plaintiff has such a title as will enable him to recover against a wrong-doer, and of course against him, unless he is the true owner. This is what is called "giving color." Although Mr. Stephen, at page 206, remarks, "this is one of the most curious subtleties that belong to the science of pleading," the remark is applicable rather to the form than to the substance of the thing; for in substance, the rule which requires all special pleas amounting to the general issue, to give color, either expressed or implied,—that is, to admit that the plaintiff is entitled to judgment, unless the defendant is the true owner—has stood the test of ages; and, like all the other rules of pleading which have stood this test, is founded in good sense and the purest logic; has a practical object in view; and is well calculated to effect it. It would be equally appropriate to say, the rule which requires all special pleas in avoidance, to confess the cause of action, "is a curious subtlety of the science of pleading." For instance, the plea of *liberum tenementum* admits that the plaintiff was in possession, and that the defendant broke the close, and relies on the allegation, that it was the soil and freehold of defendant. Here, there is implied color, as the plaintiff may have been in possession as lessee for years; but if the defendant make title as tenant for years, so as to exclude this implied color, then he must give express color; the usual *form* being, to suppose the plaintiff's being in possession under a deed of feofment without livery of seisin. So, in an action for tres pass to personal property, if the defendant plead specially

"title in himself," he must give express color, and the usual form is, "that the defendant delivered the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them." See 2 vol. Chitty's Pleading. The form may be a "curious subtlety," but the substance is, that a defendant shall not play "open and shut." If he choose to rely on his title by special plea, he must do so in a way to make it decisive of the case, and is not allowed to assume a position so that if he succeeds he will be entitled to judgment; whereas if he fail, he may say to the plaintiff, "you are not entitled to judgment, although I have no title, for your cause of action has neither been established nor admitted." Thus it is seen, that "color" is just as essential a quality to a special plea which amounts to the general issue, as an admission of the cause of action is to an ordinary special plea by way of *confession* and avoidance; and the reasoning by which we have proven that an issue on the latter, found for the defendant, does not operate as an estoppel, when there is also a finding for him on the "general issue," is equally applicable to the finding for a defendant, upon an issue in the former.

When the "general issue" is pleaded, it is difficult to see any motive for adding a special plea which amounts to the general issue. The greater includes the less; and none of the advantages in the administration of justice, which induce the Court to allow "title in the defendant," to be relied on by way of special plea, can be gained by it; for under the general issue, the whole matter goes to the jury with instructions from the Court in respect to the question of title; and if the jury find the issue for the defendant, any further enquiry as to the matter of the special plea, becomes immaterial, and the plea itself is made defective by being deprived of "the color" which is an essential quality. The habit of adding such a special plea after the "general issue," is attributable to a free use of the privilege of double pleading, which pleaders seem disposed to avail themselves of. They know a special plea can do no harm, and do not stop to enquire what purpose it is to answer. If the pleader desire to have the advantages

above pointed out as attending a special plea, he must put the defense upon title *alone*. Even then, in regard to the plea of "*liberum tenementum*," it may be a question, whether he can have the additional advantage of using the finding as an estoppel in a second action; because the averment is general, that the close was the "soil and freehold" of the defendant *at the time* he entered, and *non constat* that his estate continued up to the time of the entry for which the second action is brought; so, the averment of title may be too vague to have the effect of an estoppel. Upon this question an opinion is not called for; but it certainly would not, like the averment in the leading case of *Outram* v. *Morewood*, be a *precise allegation* of a fact material to the decision.

Our attention was called to the case of *Basset* v. *Bennet*. We have no report of that case, and find it referred to by Lord ELLENBOROUGH in his elaborate opinion in *Outram* v. *Morewood*, where he proves that the finding of a precise fact, in reference to the title to real estate, is conclusive as to the title; although the issue was joined in a *personal* action. He says: "as to the case of *Basset* v. *Bennet*, in which a new trial was moved for, because a verdict was taken for the defendant, both on the general issue and on the plea of *liberum tenementum*; whereas, there was only evidence to support the finding on the general issue; and where the new trial *is said* to have been refused, because the Court held that the finding on *liberum tenementum* would not prejudice the plaintiff, as a judgment in the possessory action was not conclusive on real rights. If it were indeed so laid down by the Courts, the doctrine must certainly be received with some degree of qualification and allowance. The plea would be conclusive, that at the time of pleading the plea, the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff from again alleging the contrary."

The *decision* in *Basset* v. *Bennet* was correct, and supports the conclusion to which we have arrived; but we concur with Lord ELLENBOROUGH, that, if correctly reported, the Court gave

a wrong reason for it. The true reason is, that the finding for the defendant upon the general issue, made the finding upon the plea of *liberum tenementum* immaterial, and took from it an essential quality. The remark of Lord ELLENBOROUGH, that the finding was an estoppel, as to the soil and freehold being in the defendant at the time of pleading the plea, is a mere *dictum*. The aim of his Lordship was to get clear of *Basset* v. *Bennet* as an authority for the position, that a finding in a possessory action could not be conclusive of real rights; and he evidently made the remark without taking into consideration the effect of the peculiar circumstances, that there was a general finding in favor of the defendant upon both pleas. He was looking at the reason given for the decision, and not at the decision itself. There is error.

NASH, C. J., *dissentiente*. I do not concur with my brethren in their opinion. It appears to me wrong in principle, and contrary to the practice which, as far as I am apprised, has ever existed in this State. The object of pleading is to produce an issue, either of law or fact,—a precise point of affirmation on one part, and negation on the other. The common law, with a view to this principle, denied to the defendant, the right to enter more than one plea to the same matter. When, therefore, he had more than one answer or defense to the same matter, he was obliged to select one and to rely on that. The strict observance of this principle was found, in practice, to work much evil and injustice, and it was relaxed by the Stat. 4th Anne, ch. 16, sec. 4th, allowing a defendant, with leave of the Court, to plead as many several matters as he might think necessary to his defense. Stephen on Pleading, 272. The Act of Assembly of this State passed in 1777, sec. 73, establishes the same principle, with this difference, that it gives to the defendant the *right* to "plead as many several matters, as he may think necessary, &c." Here, it is a matter of *right*, and not of *favor*. Being a matter of right in the defendant, he has the further right of having his pleas, as to matters of fact, submitted to the jury, and it is their right and their *duty* to pass upon them. If the jury do

not respond to all the issues upon the record, the verdict is defective, and no judgment can be rendered upon it. *Vines* v. *Brownrigg*, 2 Dev. 537. Over these rights and this duty, the Court has no control, as to withdrawing them, or either of them, from the jury. In the first action between these parties, the defendant pleaded the *general issue*, *liberum tenementum* and the *statute of limitations*. The jury found each issue in favor of the defendant; that he was not guilty of the trespass complained of; and, that the premises, upon which the acts complained of were committed, are the freehold of the defendant. The present action is by the same plaintiff, for an alleged trespass by the same defendant, upon the same premises, at a different time and place. The defendant relies upon the judgment in the first action, as an estoppel in this. My brethren think there is no estoppel. I think there very clearly is. What is an estoppel? It is an impediment in bar of an action, arising from a man's own act, or where he is forbidden by law to speak against his own deed; for by his act or acceptance, he may be estopped to allege or speak the truth. Fitz. N. B. 142, 3 vol.; Thom. Coke, 466. It may arise by matter of record, or by matter in writing, or by matter in *pais*. With the two latter I have nothing to do at present. Lord Coke at the same page of Thomas, in stating an estoppel by record, says, "by letters patent, fines, recoveries, pleading, &c.," and further, that the estoppel must be certain to every intent, and not to be taken by inference or argument, and must be a precise affirmation of that which makes it. The plea of *liberum tenementum* in the first case, embraces every particular required to render it conclusive on the parties, when found by the jury. It leaves nothing to inference or argument; is certain to every intent; and contains a precise affirmation of the fact which makes the estoppel. If it stood alone, there is no question but what it would estop the party against whom it is found, not only as to the fact of the trespass complained of, *but as to the title of the premises* upon which it was committed. In *Outram* v. *Morewood*, 3 East, 353, Lord Ellenborough, Ch. Justice, declares as follows:

"If it be said, that by the free-hold coming in debate, must be meant a question concerning the same, in a suit in which the free-hold is immediately recoverable, as in an assize, or writ of entry, I answer that a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject matter of such title; and that a finding upon title in an action of trespass, not only operates as a bar to the future recovery of damages, for a trespass for the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." At page 356, he states: "In trespass, damages for an injury to the possession, are the only thing claimed in the declaration; the judgment can only give the plaintiff an ascertained right to his damages, and the means of obtaining them: it concludes nothing upon the ulterior right of possession, much less of property in the land; *unless a question of that kind, be raised by the plea, and a traverse thereto.*" Thus it appears that when the plea of *liberum tenementum* is solely relied on by the defendant, a finding by the jury is conclusive upon the parties to it. But the defendant, in the case we are considering, did not rely on that plea alone; he also pleaded the general issue. Can that fact alter the principle? Surely not, with any just reference to the nature of the plea of *liberum tenementum*, or to the rights of the defendant under the Act of 1777. As to the form and nature of the plea, Mr. Stephen in his treatise on pleading, at page 315, gives it to us, which, as far as is necessary to quote for my purpose, is as follows: "And for a *further* plea in this behalf, as to the breaking and entering the said close, &c., the said defendant says, that the said plaintiff ought not to have or maintain his said action thereof against him; because he says, that the said close, &c., now is, and at the several times, &c., was the close, soil and free-hold of him, the said defendant, wherefore, &c." This is the form of the plea as contained in the 2 vol. Chitty's Pl. p. 551, and Mr. Eaton's valuable work on forms of pleading in this State, page 157. This plea gives no color to the plaintiff, but is not objectionable on that account; for though it asserts that the free-

hold of the *locus in quo*, is in the defendant, yet, as the plaintiff may be possessed of it for a term of years, it leaves a sufficient color upon which to recover. *Leyfield's* case, 10 Coke, 89 b. Step. 317. This plea stands, upon its form, as entirely unconnected with the plea of the *general issue*, as if they were upon different records. Per Buller in *Kirk* v. *Nowill*, 1 Term Rep. 118, and is a general principle, that where there are several pleas, each plea must stand or fall by itself. In the case in 1 Term R., the defendant pleaded the general issue, and several special pleas, yet no objection to that fact was urged, nor did the Court advert to it; the attempt there, was to support one plea by another. The attempt was repudiated by the Court. So, in *Grills* v. *Mannell and others*, Willes' Rep. 378, the Chief Justice says, "though the defendant has denied it in his second plea, (that the opposite party was seized in fee,) that will make no alteration; it being a known rule, and never controverted, that one plea cannot be taken in to help or destroy another, *but every plea must stand or fall by itself.*" Chief Justice MARSHALL, in commenting on the two above cases, in *Whitaker* v. *Freeman*, 1 Dev. Rep. 278, says, "it is admitted that these cases apply only to the entire independence of different pleas in point of law; but they certainly show that the facts alleged in one plea, have no more influence on an issue made in a distinct plea, in the same cause, than if the same matter had been pleaded in a different cause." The plea of *liberum tenementum* is not, in form or principle, inconsistent with that of the general issue. They are as distinct as if pleaded in different suits. They each answer a different purpose. It appears to me, however, that this is not an open question.

In the case of *Gilchrist* v. *McLaughlin*, 7 Irc. 310, the question here presented, is substantially decided. That was an action of trespass *quare clausum fregit*; the pleas, *liberum tenementum* and not guilty. The Court say the first plea admits the fact that the plaintiff was in possession of the close described in the declaration; and that the defendant did the acts complained of; raising only the question whether the

close described was the freehold of the defendant. But, under the plea of not guilty, the defendant may give in evidence any facts which go to show that he never did the act complained of; as, that he never entered the plaintiff's close; or that the freehold and immediate right of possession are in him, or one under whom he claims. Under the latter plea, *if it stood alone*, the plaintiff would have had to prove nothing but the amount of his damages; and the burthen of proving that the freehold was in the defendant, lay upon him. Under the other plea of not guilty, (the defendant may plead double,) the plaintiff was driven to the necessity of sustaining by proof, the affirmative allegation in his declaration, that the defendant broke and entered his close, 2nd Greenleaf's Ev. 513. From the above case, it appears that if the defendant intends to deny the possession of the plaintiff, and the commission of the acts complained of, he must plead the general issue. It is the only plea by which he can drive the plaintiff to sustain, by evidence, the affirmative allegation of his declaration, that the defendant broke and entered his close. That case affirms the principle, that the plea of *liberum tenementum*, is not inconsistent with the general issue; that they may be pleaded to the same case; and each answers a different purpose. This doctrine is in conformity with the English practice. *Morse* v. *Appleby*, 6 Meeson & Welsby, 145, was an action of trespass *quare clausum fregit.* The pleas there were: 1. Not guilty. 2. That the plaintiff was not possessed of the close, in the declaration mentioned. 3. That the defendant was seized in fee of the close in which, &c. 4. That A. B. was seized in fee of the close in which, &c., and the defendant, as his servant, and by his command, committed the trespass complained of. The plaintiff had obtained a rule upon the defendant, to show cause why the 2nd plea, or the 3rd and 4th pleas, should not be struck out, *as being* founded on the same ground of answer or defense. The rule upon argument was discharged. The Court say, the plea of *liberum tenementum* admits the plaintiff to have the actual possession, but alleges that the right of possession is in the defendant as owner of the fee. It is *con-*

sistent with that plea that the plaintiff may be in possession under a lease from the owner of the fee. It is possible that these pleas may apply to a state of facts constituting one and the same subject matter of defense; but it is also possible they may apply to a totally different state of facts, constituting a different defense, and if that be so, do not come within the rule which has been cited. The rule upon the defendant, was for an alleged violation of the general rules and regulations as to double pleading, adopted by the Court in the 4th year of William the IV, and *they* were adopted under the Act of Anne, giving to the Court a discretionary power to admit different pleas. But there, even under the power given by the statute, the Court discharged the rule. In *Slocomb* v. *Lyal*, 2 English Law and Eq. Rep. 376, the same point is decided by the Court. It was an action of trespass *q. c. fregit*, and the defendant obtained a rule upon the plaintiff to show cause why he should not be permitted to plead, first, that the said close was not the property of the plaintiff *modo et forma;* second, *liberum tenementum*. It was opposed as being in violation of the rules adopted under William the IV. Irrespective of those rules, PARKE, Baron, observed, "we have always allowed these two pleas." And in reply to the *regula generalis*, the same Judge observes, the plea of *not possessed* enables the defendant to dispute the plaintiff's possession; but *liberum tenementum* admits the possession, and drives the plaintiff to produce his title if any. ALDERSON, Baron, declared, "it has been the universal practice to allow these pleas to be pleaded together." It cannot be objected that the above two cases were decided mainly in reference to the rules of William IV; the principle is precisely the same, and in reference to the peculiar nature and effect of the plea of *liberum tenementum*. If, then, the English Judges, under the discretion with which they are clothed by the Stat. of Anne, admit the two pleas of not guilty and *liberum tenementum* to stand together, I cannot see by what authority, or upon what principle, our Courts, who have no discretion under the Act of '77, in receiving the pleas, can substantially deny to a de-

fendant the right to plead as many pleas as he thinks proper, by denying to him the benefit of a special plea, which has, by the jury, been found in his favor. It is said estoppels are odious as concluding the truth, and are not to be favored. What I presume is meant, is that they shall not be taken by inference; but when they arise by record, and plainly appear by it, the Court has nothing to do but to enforce them. And if there be any truth in the maxim "*interest reipublicæ ut sit finis litium*," they certainly are very useful. But for this principle there would be no end to litigation. The plea of *liberum tenementum*, to an action of trespass *q. c. fregit*, is the only mode by which the title can be settled between the litigants; for the reason that it is the only plea by which the title can be put directly and precisely in litigation, and is never pleaded but with the purpose to ascertain in whom the title is. The defendant, under the general issue, is entitled to make the same defense as under the plea of *liberum tenementum*, that is, he may show title to the *locus in quo* in himself, and he may show title in another under whom he entered, or that he did not commit the acts complained of; and for reason of this variety of defense under the general issue, a verdict in favor of either of the parties does not act as an estoppel, for the title has not, by a proper plea, been put in issue on the record. The opinion of my brethren carried out, will produce this result; that a verdict upon the plea of *liberum tenementum* cannot amount to an estoppel, unless it stands on the record by itself; if accompanied by the plea of not guilty, a verdict leaves the question of title at large, as if upon the latter plea alone. This would amount to a judicial repeal of the Act of '77 upon this point; depriving the defendant, when the verdict is in his favor, of the only benefit he can derive from it, which is not contained in the plea of not guilty. He wishes to be secure in his title—not to be harrassed by repeated actions, under the same title for every entry he may make into the *locus*. He must admit the possession of the plaintiff, and that he entered upon his close. This, however, he is not willing to do. By the Act of '77, he may plead as many matters as

he thinks necessary to his defense; the opinion of my brethren virtually refuses it. This, under the Stat. of Anne, the English Judges have a right to do; for the Statute gives them a discretionary power, as to admitting a second plea; and if pleaded, they have a right to order it to be stricken from the record. *Jenkins* v. *Edwards*, 5 Term Rep. 97. But here, the admission of several pleas is not a matter of discretion in the Court, but a matter of right in the defendant, over the exercise of which, the Court has no control; and this has been the uniform practice under the Act of '77.

We have seen then, that, under that Act, it is the right of a defendant to plead as many matters as he may deem necessary to his defense; that he has a *right* to have all of them, if traversed, submitted to the jury, whose duty it is to respond to each; that when there are several pleas, each must stand or fall by itself; that they are as unconnected as if they were on separate records. In the first case between these parties, the defendant pleaded not guilty and *liberum tenementum*. The jury responded by their verdict to each seperately. To the first, that the defendant was not guilty of trespassing on the close of the plaintiff; to the second, that the close upon which the alleged trespass was committed, was the freehold of the defendant; and upon each of these findings, the Court below have pronounced judgment; upon the latter, that the *locus in quo* is the freehold of the defendant. And this judgment is now in full force and unreversed. Here, then, is a judgment of a Court of competent jurisdiction upon a question of title, distinctly brought before it by a proper plea, and my brethren are of opinion that that judgment does not estop the parties to it. I confess I do not so understand it. The present action is for an alleged trespass upon the same premises; and a jury had solemnly found that those premises were the freehold of the defendant.

In my view of the case, the opinion of my brother judges is against principle, and in direct variance with what has been considered the settled law in this State; and that the judgment ought to be affirmed. It will be seen that I have

not attempted to review the opinion of my brethren; my sole object being to set forth *my* reasons for the opinion I entertain on the subject.

PER CURIAM. Judgment reversed.

JAMES E. KEA *vs.* JAMES MELVIN.

Where upon *scire facias* against a sheriff for not returning an execution in this Court, the parties are at issue upon matters of fact, the Court, having no power to empannel a jury, must, of necessity, decide the case upon affidavits.

THIS was a SCIRE FACIAS to amerce the sheriff of Bladen county, for failing to return into the office of this Court, at June Term, 1855, a *fi. fa.* issuing from the same, in the case of James E. Kea v. James A. Robinson.

The defendant pleaded "Nul tiel record," and specially "that the writ of *fi. fa.*, in the case of Kea v. Robinson, did not come to his hands twenty days before the term of the Court to which the same was made returnable;" and, further, he pleaded specially "that the *fi. fa.* in the above case came to his hands on the 5th of June, 1855, and that he did levy the same on several negro slaves, the property of the defendant in that execution, James A. Robinson; and that he endorsed the said levy on the writ, and returned the same to the next term of the Supreme Court, (the term to which it was returnable,) and that there was not sufficient time for him to sell and make the money from the time of making the said levy until the return day of the *fi. fa.*"

Plaintiff replied generally to these pleas.

The plaintiff moved that the judgment be made absolute for $100; which was opposed by the defendant, on the ground, that two issues of fact, which had been tendered by the defendant and accepted by the plaintiff, were not disposed of, and

which it was necessary should be tried by a jury, before the Court could render a final judgment on the case. No proofs were filed by defendant, nor was the day of receiving the execution entered on it.

W. A. Wright, for plaintiff.
McDugald, for defendant.

NASH, C. J. The execution set forth in the scire facias, issued from this Court, upon a judgment obtained here. The scire facias is returnable of course to the Court from which the execution issued, and to which it was returnable. The defendant pleaded *nul tiel record*, and other pleas to the country, which, in the ordinary course of practice, are to be tried by a jury. This Court has no power to call a jury before them; we are therefore compelled, in a case where we have jurisdiction of a question which ordinarily requires the action of a jury, to decide the matters of fact ourselves. In such cases, we must resort to affidavits, properly to enlighten us on the facts. The Act under which these proceedings are instituted, authorises a judgment final, against the sheriff, unless he can, at the succeeding term, show sufficient cause to the Court.

The defendant has pleaded that there is no such record as is set forth in the scire facias, or in other words, *nul tiel record*. The Court adjudges there is such a record.

Upon his other two pleas, which involve matters of fact, he has not sustained them by any evidence. As before remarked, he was at liberty to have sustained them by affidavits; he has not done so. As the plaintiff replied to the defendant's pleas, the burden of proof lay upon the latter to bring in matter of excuse.

The rule is made absolute, and judgment rendered against the defendant for $100, the penalty for not making a due return upon the execution.

STATE *vs.* REDDICK SEWELL.

Delirium tremens, being but a temporary madness, generally of short duration, he who sets it up as a defense, must show that, *at the time* the act was done, he was in a paroxysm of that disorder. There is no presumption of its existence from antecedent fits which had been cured.

INDICTMENT for MURDER, tried before his Honor, Judge SAUNDERS, at the Fall Term, 1855, of Perquimons Superior Court.

The circumstances of this case disclosed the fact, that the prisoner had shot an old free negro woman (aged about 60) in the eyes and face with a pistol. That about an hour afterwards he was found on a pallet with her, and there were indications that he had ravished her as she lay insensible. There was a jug of liquor on the same pallet.

There was no question in this Court as to the fact of the killing, and, therefore, the voluminous and minute evidence sent up as part of the case in relation to the transactions connected with the crime, is not reported. The defense of the prisoner was *insanity*, and upon this point, the evidence was as follows:

David Beach swore he saw the prisoner on the Wednesday morning before the act, which was done on the following Friday night. He came on the morning previous, and stopped at the hotel where witness lived; he seemed very tremulous, could not use one hand, and had to be helped at the supper-table. The next morning, just before the prisoner left, while the witness was at breakfast, he came up behind him stealthily, seized his cup of coffee, and drank it. Witness did not think the prisoner was in his right mind. He had no other reason for coming to that conclusion, except his taking the coffee in the manner he described, his tremulousness, and the wildness of his eyes; but from these things, he did think so.

Several witnesses testified that on the way to the jail, he begged the persons about him not to hurt him, or that he should not be hurt. At other times he asked them to hang him.

Dr. Parker testified that he resided at the south mills in

Camden county; that he was called to attend the prisoner about two weeks before the homicide; that the prisoner had been drinking very hard, and had *delirium tremens* and inflamation of the stomach; that he talked incoherently, gave inconsistent answers to his questions, and made foolish remarks. The witness gave it as his opinion that the prisoner was then insane. The prisoner got better in three or four days, and left the house, being driven off by the landlord. When he left the prisoner, he advised him to desist from drinking, for that a very little indulgence would bring back the same results. He stated that, generally, insanity from this cause was of short duration, but not always so.

Thomas Garret testified that in January or February preceding the homicide, which was on 13th April, the prisoner came to his house in Camden county, apparently intoxicated; he had been drinking very freely, and was so tremulous that he could not clean some furniture which he undertook to clean, and which was his occupation. Witness saw him catching at something near the fire, on one occasion, and asked him what he meant; to which he replied that his jaws were locked, and he wanted to get the tongs to unfasten them.

One *Wigginston* stated that he had known the prisoner in Currituck county; that in the fall of 1854, he was at his house, and acted so violently as to make witness afraid to trust him alone. He was confined at witness's house for several days, and acted irrationally. Witness thought he was quite out of his mind. Prisoner had been drinking freely. He stated that before he began to drink, prisoner's behavior had been good.

C. B. Brothers stated that he was the jailor to whose custody the prisoner was committed on the night of the homicide; that he was perfectly rational that night; but that next day, and for several days, he was out of his mind; that he talked strangely and incoherently. After a few days he became better, and continued quite rational.

The State in reply, introduced the opinion of several witnesses, that at the time he was taken, the prisoner was quite

sane; and many conversations were proved to show the fact. On the Sunday before, it was proved that he was rational.

It was insisted by the prisoner's counsel, that the presumption of sanity did not arise in this state of the facts; but that the prisoner was entitled to the contrary presumption of insanity; and that it devolved on the State to show that the prisoner was sane when the act was done.

Upon this point, his Honor charged the jury "that to hold the prisoner responsible for his act, it should appear that at the time of its perpetration, he was sufficiently rational to distinguish right from wrong, and to know that what he was doing was in violation of the laws of God and man. "That the general presumption is that all persons are sane, until something is shown to the contrary. When derangement or partial insanity is shown, and there are lucid intervals, it is still necessary for one relying on insanity, to show that the act charged was done during this paroxysm of insanity." To this instruction, the prisoner's counsel excepted.

There was a verdict finding the prisoner guilty of murder. Judgment of the Court was pronounced, and an appeal to this Court taken by the defendant.

Attorney General, for the State.
J. P. Jordan, for the defendant.

NASH, C. J. The efficacy of a plea of insanity in shielding from punishment for crime; the necessity of drawing the dark picture of such a state of mind, and tracing out the minute and delicate shades of this sorest affliction to which humanity is subject, is not required at our hands at this time. It is not denied, that insanity, to protect from punishment, must exist at the time the act is perpetrated. This is indeed the very substance of the defense; for, however great the disease, and in whatever form, if, at the time the prisoner commits the act, his mind is then capable of distinguishing between moral right and wrong, he is an accountable being, and comes within the operation of the law.

The prisoner, a fortnight before the perpetration of the offense, had been in a state of delirium tremens, from which he was relieved by his physician, who cautioned him against indulging in the use of spirits. After that, he was proved to have been in his right mind; but a few days before that on which the transaction occurred, one witness thought he was not in his right mind. His Honor instructed the jury as follows: "The general presumption is that all persons are sane, until something is shown to the contrary. When derangement, or partial insanity, is shown, and there are lucid intervals, it is still necessary for one relying on insanity to show that the act was done when he was laboring under this paroxysm of insanity." His Honor then proceeds to apply these general principles to the case before him, stating the grounds upon which the State relied, and those upon which the prisoner rested his defense, and winds up by leaving the question of sanity or insanity of the prisoner at the time of committing the act, to the jury.

This case is not one of permanent insanity, nor is it one of lunacy. Mr. Russell, at page 7 of his Criminal Law, defines a lunatic to be one laboring under a species of *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder, only at certain periods or vicissitudes, —having intervals of reason. It more properly ranges itself under the class of partial insanity, though strictly, not so. Partial insanity imports that the person is insane on one or more particular subjects. Shelford on Lunatics, p. 6. This species of insanity is termed monomania. The derangement of the prisoner was neither a permanent one, nor lunacy, nor strictly, partial, but a temporary one arising from the too free use of ardent spirits. It was temporary, for it lasted only during the time the effects of the spirits were upon him. It had not in his case reached that period when the mind becomes entirely destroyed. His physician cured him of the attack of delirium tremens, and stated, that in most cases the alienation of mind was but temporary. It was shown that after that attack, and before the act was committed, he was restored to his under-

standing, and there was no evidence that delirium tremens existed after the time first spoken of. It was insisted by the prisoner's counsel, that the presumption of sanity, in favor of the State, did not arise; but that the presumption of insanity did, on behalf of the prisoner; and that sanity must be shown by the State; at least that the presumption was not in favor of the State. This principle, if true, does not apply to this case. Here, was no lunacy; no recurrence of the disease at certain periods; but a temporary insanity, brought on by the prisoner's own procurement, and, in general, disappearing when the immediate cause was removed. Drunkenness, in general, is no excuse for crime. When it is carried so far as to cause delirium tremens, any act perpetrated under the delirium is excused, though the disease is but temporary; and when continued so far as to dethrone reason altogether, the presumption of law is removed; because the disease is then permanent: the law looks only to the state of the mind, and not to the cause producing it.

His Honor is sustained in his general proposition by Lord HALE. P. C. vol. 1, 34. He lays down the doctrine more strongly than it is done here; and although we find it nowhere stated in the same terms, we find it nowhere contradicted in our elementary works on crimes.

In this case, the general presumption of law was not removed, and it was incumbent on the prisoner to show that at the time of perpetrating the offense, he was insane.

After his Honor had closed his remarks, particular instructions were asked, as set forth in the case. His Honor had already given the instructions required. There is no error.

PER CURIAM. Judgment affirmed.

STATE *vs* CHRISTOPHER ROBBINS.

If a Judge, in charging a jury in a case of homicide, lay down a series of

abstract propositions, some of which are not strictly applicable to the facts of the case, and there be error therein, which however, is corrected in a part of the same charge that applies those propositions to the facts, it is not a cause for a *venire de novo*.

THIS was an INDICTMENT for MURDER, tried before BAILEY, Judge, at the last Superior Court of Wilkes.

The defendant was indicted for the murder of a negro slave belonging to himself, by the name of Jim. The evidence was principally the testimony of three step-children of the defendant, the eldest of whom, Mary Jane, was about seventeen years old. She stated that the prisoner came home on the evening of the 20th of July last, from a tax-paying, between sun-set and dark, and after asking a question as to the weather, and receiving an answer, sat down at the door for a minute or two, seemed serious and held his head down. He then got up and went out, and was out for some time; the precise time not stated. She next heard the deceased at the wood-pile, crying out, "don't kill me," and the prisoner cursing him, and saying, "he intended to kill him." On going to the door, she saw the prisoner beating the deceased with the handle of an axe, holding the blade in both hands. He beat the deceased, she stated, two or three times around the wood-pile, from thence to the barn, and from thence to the house, still using the handle of the axe. This handle, she said, was split before the beating began, for about a finger's length from the end, and that the force used split it further, to within a finger's length of the blade. This handle, she said, was of hickory, and about the usual size. Afterwards, she said, she saw blood on the axe-handle. The deceased then ran into the kitchen, saying to the prisoner, that he would kill him, to which he, prisoner, replied, he intended to do so. The prisoner then putting down the axe at the door, went in, and striking the deceased with his fist on the side of the head, knocked him against the fire-board, from which he fell violently on the floor. From that time, she said, the negro became speechless. She heard him making groans several times in the house and out of it. After the deceased fell, the

prisoner jumped on him, and stamped him for more than ten minutes; that he stamped him upon the head, shoulders, back and sides; indeed, all over; that the prisoner then called for his wagon-whip, and with the butt of it beat the deceased a long time, to wit, for half an hour, upon the head, back and sides; that he would beat until he became exhausted, and then rest and commence again; that he then called for scalding water, and there being none, had water heated, and poured it on the head, back and sides of the deceased; that he then took salt, and putting it on the back of the deceased, whipped it into the flesh with the wagon-whip. She said that he heated water four or five times, and poured it on the deceased; that this stamping, whipping with the wagon-whip, and pouring of the scalding water, continued without cessation until 9 or 10 o'clock at night. He then made the witness and her sister drag the deceased out of the house into the yard, and said, "damn you, you may rest there while I rest in here," and went to bed.

The other two children, *Martha*, about thirteen years of age, and *Pinkney*, about fifteen, proved in substance the same. It was then proved that the wagon-whip was of a large size, with a butt-end of wood covered with leather.

One of the witnesses stated, that while the prisoner was beating the deceased with the axe-handle near the wood-pile, he said, "why did you not" or "you did not feed my horse," to which the deceased replied, that he had fed the horse. The only other words the deceased was heard to say, were, "Oh Lord!" and "you will kill me." These last words were said at different times, and the prisoner replied, "I intend to kill you." It was in proof, that the deceased died about 1 o'clock the next morning; and about 4 o'clock, the prisoner got up and went into the yard and enquired for his family, who had all fled but *Martha;* that he made her assist him in dragging the body into his (deceased's) house or cabin; that he told her to shut the door and nail it up from the inside, and that she must come out by raising a plank of the floor; that he made the witness wash up the blood from the kitchen floor,

and put sand on the floor; that there was much blood on the floor before it was washed off.

One *Johnson* swore that abont 10 or 11 o'clock, the wife of the deceased came to his house, and he returned with her; that the deceased was then lying in the yard, still alive, but breathing very hard and making a gurgling noise in breathing. This witness also proved that Jim was the slave of the deceased, and was about sixty years old.

The coroner of the county, and one of the jury of inquest, testified that they went to the house of the prisoner on the evening of the 21st of July last, about one hour before sunset, and found the deceased in his cabin on a sort of bed or scaffold, dead; that they then took the deceased into the yard, and examined the body; that his jaw-bone was broken, and his teeth knocked out; and that there appeared on the head, seven wounds, six on the front and one on the back part of the head; that one of those in front was of a dangerous character; the other five very severe; there was one of the wounds on each temple, and the other four between these, on the forehead; that the wound on the back of the head was a round indentation, and witnesses thought the skull was "dented" or fractured; that they did not particularly examine the other parts of the body, and only saw one place on the breast and one on the back where there was any abrasion of the skin. The coroner stated that the head of the deceased was very much mutilated, and on that account he did not particularly examine the body. A physician, *Doctor Cook*, who heard all the evidence, stated it as his opinion, that the deceased died from the violence inflicted; and that the wounds on the front part of the head, as described by the coroner, were of a character to produce death.

The defendant introduced no testimony.

1. The Court charged the jury, that a master has a right to chastise his slave, and to exercise his own discretion as to the amount of punishment, provided life is not taken, and that the Court had no right to question his authority so to do; that if the master take life, he is then held responsible.

2. If the master chastise his slave for the purpose of correction and amendment, and unfortunately kill him, without any intention of so doing, and without a weapon calculated to kill, he is not guilty of any offense.

3. If the slave be disobedient, or if he resist the authority of his master, and under passion excited by this provocation, be slain by the master, the offense would not be murder, but manslaughter only; although a deadly weapon was used. The disobedience, or resistance, would amount to a legal provocation, and would be the same as a blow from a white man.

4. If the master *intend* to kill, it is immaterial how death be produced, whether with or without a deadly weapon, and death ensue, he is guilty of murder.

5. If he *do not intend* to kill, but *deliberately* chastises for the mere purpose of torture and revenge, and death ensue, he is guilty of murder. If he do not intend to kill, but uses a deadly weapon for the mere purpose of inflicting great bodily harm, regardless whether death might follow or not, and death does follow, it is murder.

6. If the master strike with his fist, not intending to kill, but strikes to correct and amend, and a mortal blow be received by the slave's falling against the fire-board, or upon the floor, it is no offense, and is an accidental killing.

7. If, however, after such a blow be given with the fist, and a mortal blow is received by the fall, the master beat him while on the floor, with the butt-end of a wagon-whip, out of mere cruelty, torture and revenge, and not for correction, and his death be thereby hastened; or in other words, although he would have died of the mortal wound received by the fall, but would not have died so soon, according to the opinion of the doctor, and these additional blows be given merely for the purpose of torture and of malice, he would be guilty of murder.

8. The Court further charged the jury, that the axe-helve with which the prisoner struck the deceased, was a deadly weapon; and whether the wagon-whip was a deadly weapon or not, was a question for them and not for the Court.

9. The Court further charged, by way of application of the principles above declared, that if the jury should be satisfied that the first three witnesses had told the truth, and that Jim had not fed his master's horse, the master had a right to inflict punishment, and as to the amount of punishment he was the sole judge, and it was the duty of the deceased to submit; that he had no right to run; that running would be disobedience, unless his life would be put in jeopardy by submission; that if the prisoner were about to take the life of the deceased, then he had a right to run, otherwise he must unfeignedly submit to the will of his master.

10. That if the doctor were correct in his opinion, that the mortal blow was received in the house, and it was caused, as before stated, by falling; and after the mortal blow was received, the prisoner beat with the whip, stamped with his feet, and used the hot water and salt for a length of time and in the manner stated by the first three witnesses, and this beating and stamping shortened the life of the deceased for only one hour, if done out of malice and for the purpose of torture, he would be guilty of murder.

The prisoner's counsel asked the Court to charge the jury, that if a master is seen whipping his slave, the presumption is that he is rightfully whipping him.

The Court declined to charge the jury in the language thus used, but charged them, as before stated, that the master had a right to inflict punishment without provocation; and if he did not kill, his acts could not be questioned in a Court of justice.

The Court further charged, that the presumption was that the prisoner was innocent until the contrary was proved, and that if a killing were proved, or admitted, the presumption was that it was murder, unless the contrary was either shown by the prisoner or it appeared from the evidence adduced by the State.

The Solicitor for the State moved his Honor to charge, that if the first three witnesses were believed by the jury, the prisoner was guilty of murder.

The prisoner's counsel admitted that the prisoner had caus-

ed the death of the deceased, but insisted that it was only manslaughter. Defendant excepted on the ground of the Court's refusing the instruction asked, and for error in the charge, particularly in 4, 5, 7 and 10 of the foregoing propositions.

Verdict—"guilty of murder." Judgment and appeal.

Attorney General, for the State.
Boyden and *H. C. Jones*, for the defendant.

BATTLE, J. Upon the testimony, supposing it to be true, the counsel admitted on the trial, that the deceased was killed by the prisoner; but contended that it was not a case of murder, but of manslaughter only. The jury, under the charge of the presiding Judge, having found him guilty of murder, his counsel excepts to the charge as erroneous in several particulars, and insists that he is, therefore, entitled to a *venire de novo*.

In considering those exceptions, it is proper to remark, that "the language of a Judge in his charge to the jury, is to be read with reference to the evidence, and the points disputed on the trial; and of course is to be construed with the context." *State* v. *Tilley*, 3 Ire. 424. It is also to be borne in mind, that counsel have no right to require an instruction upon a hypothetical state of facts, not supported by the testimony; and if the Judge express an opinion "upon a mere abstract proposition, and it is apparent upon the whole case, that it could not have misled the jury," it is not erroneous. *State* v. *Benton*, 2 Dev. and Bat. Rep. 196; *State* v. *Collins*, 8 Ire. Rep. 407; *Hice* v. *Woodard*, 12 Ire. Rep. 293. The Judge commenced his charge in the present case, by stating a series of propositions, among which are those to which the prisoner excepts. Without noticing any others than those which the counsel deem objectionable, we are of opinion that they were merely abstract, having no connection with any state of facts proved on the trial. This very clearly appears from the application which the Judge himself made of the "principles" which he had before declared. In such applica-

tion, he stated the law as favorable to the prisoner as the latter had any right to require; and in so doing, corrected whatever error he may have previously committed. It is unnecessary to comment upon the facts in detail. The homicide being admitted, we may say, as this Court said in *State* v. *Hoover*, 4 Dev. and Bat. Rep. 365, that we are "at a loss to comprehend how it could have been submitted to the jury, that they might find an extenuation from provocation. There is no opening for such a hypothesis." The only act of the deceased, that can be held to have been a provocation, was the imputed neglect to feed his master's horse. His flight, while his master was beating him with a deadly weapon, and declaring that he intended to kill him, cannot be deemed such. *State* v. *Will*, 1 Dev. and Bat. Rep. at p. 165. The prisoner then had a right to chastise the deceased for the only offense of which there is the slightest testimony that he was guilty. Can the prisoner take shelter under that right, for what he actually did? We adopt for our answer, with a slight variation, other language of the Court, in the same case of the *State* v. *Hoover*, "that nothing could palliate such a course of conduct. Punishment, thus immoderate and unreasonable in the measure, the continuance, and the instruments, loses all character of correction *in foro domestico*, and denotes plainly, that the prisoner must have contemplated the fatal termination which was the natural consequence of such barbarous cruelties."

Our conclusion then is, that there is no view which could have been taken by the jury, of the facts set out in the prisoner's bill of exceptions, that would mitigate the admitted homicide from murder to manslaughter. The consequence is, that the judgment cannot be reversed; and there being no error assigned or seen for its arrest, a certificate to that effect must be sent to the Superior Court, to the end that the sentence of the law may be pronounced upon the prisoner.

PER CURIAM. Judgment affirmed.

STATE *vs.* BRYANT ALLEN.

In trials by a jury where there is an entire absence of evidence, it is the duty of the Judge so to instruct the jury; but if there be any competent evidence, relevant, and tending to prove the matter in issue, although it be very slight, it is the true office and province of the jury to pass upon it.

Where one witness, on a trial for murder, deposed to facts which tended to prove a legal provocation, though other witnesses contradicted him, the prisoner had a right to the opinion of the jury upon the question of provocation, and it was error in the presiding Judge to say there was no evidence of provocation.

INDICTMENT for MURDER, tried before his Honor, Judge CALDWELL, at the last Fall Term of Granville Superior Court.

The prisoner was indicted for the murder of one Zachariah Fuller; and on the trial, the following was the testimony introduced on the part of the State, and relied on for a conviction, viz:

One *Hobgood* testified that in July last, at a barbacue and tax-gathering in Granville county, he saw the prisoner and the deceased meet near his cart; they shook hands and passed the usual civilities, seemingly friendly; the deceased held in his hand a small whip, with which he tapped both the prisoner and himself (witness) in fun; that both prisoner and deceased were drinking. In a short time the deceased moved off, when the prisoner drew out his knife and remarked, "that if the deceased, or any other man should push upon him that day, he would put his knife into him;" to which he (witness) said in reply, "you had better not, for you know that you cut a man to pieces some years since, and you will get yourself into trouble." The prisoner replied, "I will be damned if I don't." This was about 12 o'clock, and witness saw nothing more of the parties for an hour or two. He then saw them down on the ground, the deceased being on the top, near the tax collector. The witness was too far off to see distinctly what occurred, but thought he saw deceased have both hands in the hair of the prisoner; saw no blows pass, but thought he saw the prisoner kick at the deceased just as he,

(deceased) was taken off, or got off. He stated that the deceased after getting up, passed immediately around a tree that was standing near; that the prisoner, as soon as he got up from the ground, followed after the deceased, and the next thing he saw, the prisoner had overtaken the deceased. He (prisoner) had a knife in his hand, and the blood was gushing out of the arm of the deceased, and heard him say "I am a dead man." Some of the bystanders remarked "you have killed him," to which he replied, "damn him, if he ain't dead I will kill him." The prisoner and the deceased were old men, apparently of the same age; the prisoner the taller, and the deceased the thicker set.

One *McGehee* stated that after dinner on the day of the barbacue, he was engaged at a table in the open air, in taking the list of taxables; that he heard a noise as if of a quarrel between the prisoner and the deceased; that soon thereafter he saw the prisoner and some one approaching his table, and thought that person had hold of the prisoner, though he did not seem to be leading him; that when the prisoner came up, he (the witness) remarked to him, he had better go home or he would get into a difficulty with the deceased, to which he replied, "he should not say any thing more, but if the deceased spoke to him he would knock him in the head." He stated that some half an hour thereafter, he saw the parties again together, near his (witness') table; that they were dancing, and continued to dance some little time, when deceased proposed to go for a drink, to which prisoner assented, but they did not go. The prisoner then caught the deceased by the head and butted him in the forehead very severely, two or three times. The deceased then caught hold of the prisoner and bore him back upon the table, and then they fell upon the ground, the deceased being uppermost. The witness said to the bystanders "part them," when the prisoner spoke and said, "I am not mad," to which witness replied, "but you may get so." Some one then took hold of the deceased and separated him from the prisoner; that as they were being separated the prisoner kicked at the deceased. The deceased,

as soon as he got up, went behind a tree, some twenty feet off, and the prisoner, having got up, followed after him with his knife drawn, swearing he would cut him. He saw the prisoner strike with the knife as soon as he came up to the deceased; saw the blood flow from the arm of deceased, who then retreated towards the store-house. He said further that the prisoner followed him a short distance with the knife in his hand, when the sheriff interposed and stopped him. He further stated, that he heard the prisoner say, after the deceased had fallen on the ground, "if they would let him get to him (deceased) and he was not dead, he would stamp him to death."

The third witness, one *Hicks*, stated that he was present aiding the sheriff to collect taxes, near the table spoken of by McGehee; that some hour or two after dinner, deceased came near to where witness and McGehee were sitting, and soon began to abuse a certain political party, and some man by the name of Hart; that the prisoner was sitting on the ground a little way off, and soon commenced whistling, when the deceased began to dance. After a little, the prisoner ceased whistling and got up, when the deceased handed his whip to some one and began himself to pat upon his knees, to which the prisoner danced, and after a while they both danced. While thus dancing, the prisoner took the deceased by the shoulders and butted him severely in the forehead; nothing was said then, but they both continued to dance. After another short interval, the prisoner again caught the deceased in the same way and butted him again; still nothing was said, and after continuing to dance for a short time longer, the prisoner as before, repeated the butting a third time. The deceased then caught the prisoner and bore him backwards until both came to the ground, the deceased being on top. The deceased had his left hand in the hair of the prisoner, and waved his right hand over him saying, "now see what I could do to you." The deceased did not strike, but as prisoner would endeavor to raise his head from the ground, deceased would press it down. About this time McGehee ordered them to be parted lest they might get mad, to which prisoner re-

plied, "I am not mad." Some one immediately took hold of the deceased, but did not remove him at once; in a short time, however, the deceased was taken off without resistance on his part. As he was being taken off, prisoner kicked him, or kicked at him. The deceased, as soon as he was up, turned off some twenty feet or more, when the prisoner getting up, drew his knife and followed on after him, swearing that he would stick it in him; as soon as he came up, prisoner struck deceased with the knife, and inflicted the blow above spoken of. The deceased then retreated towards a store which was near, and was pursued by the prisoner with his knife in his hand, for a few steps, when he was stopped by the witness, who told him he arrested him, and to put up his knife, which he accordingly did. The knife was here produced in Court and identified by the witness; it was some eight or ten inches long, (handle and blade); the blade wide and heavy. Witness further stated, that while deceased was lying upon the ground, bleeding, prisoner asked to see him, and was allowed to do so, whereupon he remarked, "he was not dead, but only drunk," and added "damn him, he ought to be dead." On several other occasions during the evening, the prisoner used harsh language towards the deceased. On their way to the jail, the sheriff, who had the prisoner in custody, asked him if he was not sorry for what had occurred, to which he answered he was not; that he wished the knife had stuck into his heart instead of his arm. The prisoner also said, according to this witness, there was an old grudge between them, out of which all this had arisen; that some fifteen years since, he had charged the deceased with having stolen a knife, and deceased had raised a bar of iron over him, and would have struck him, but that he was prevented by others; that he and deceased had once agreed to meet, with their brothers, and fight it out, but were hindered in some way. This witness also stated, that both prisoner and deceased were drinking, and after the occurrence the prisoner drank freely, and was very drunk when he started off to jail, and when speaking of the old grudge. He further stated that when the prisoner

was searched, three knives were found upon him, and that deceased was unarmed.

Witness, on his cross examination, did not remember, certainly, whether the remark of the prisoner about not being mad was before or after the deceased had taken hold of prisoner's hair, or whether it was at that very time.

Doctor White, the fourth witness, testified that the death was caused by the wound.

The prisoner introduced no testimony.

The Court, after some remarks upon the law in cases of homicide, charged the jury that there was no evidence heard by the Court, showing that the parties were angry while engaged on the ground, and requested, if there was any such, that it should be pointed out; that if the jury believed the testimony in the case, it was a case of murder, apart from the question of express malice; that there was no legal provocation proved, to mitigate the offence to manslaughter; and that even supposing the deceased had injured the prisoner when the parties were on the ground, the assault by the prisoner with a deadly weapon was out of all proportion to the offence.

The counsel for the prisoner insisted that it was a case of manslaughter, and asked the Court to charge the jury that it was a case of mutual combat; and that if the parties became heated in the contest on the ground, and thereupon the prisoner, immediately, and in the heat of blood, used the knife as deposed to, that it was manslaughter. The Court declined so to charge. The prisoner's counsel excepted to the charge, and for the refusal to charge as requested.

The jury found the defendant guilty of murder. Judgment and appeal.

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

PEARSON, J. "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." That in all

controversies of law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain "sacred and inviolable." Declaration of Rights, Secs. 9. 14. To carry into effect this fundamental principle thus solemnly announced, it is provided by the Act of 1796, Rev. Code, ch. 31. sec. 130: "No Judge, in delivering a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proved; such matter being the true office and province of the jury; but he shall state in a full and correct manner, the evidence given in the case, and declare and explain the law arising thereon."

Thus, besides a direct legislative enactment that a Judge shall not express to the jury his opinion in regard to the sufficiency of the evidence, we have a principle of our organic law, by which it is declared that the trial by jury is an institution which has been, and must be, cherished by every free people, as the best security for their lives and property, and ought to remain "sacred and inviolable." So, this is no ordinary question, involving merely the construction of a statute; but it is a matter, in regard to which the constitution imposes an obligation upon the Courts. It is our duty to see to it, that the trial by jury shall remain "sacred and inviolable;" and if, upon the circuits, there has grown up any practice encroaching upon the trial by jury "as heretofore used;" although such practice may, to some extent, have been sanctioned by decisions of this Court, it is our duty to put a stop to it; and while we will not allow a jury to encroach upon the province of the Judge, i. e., to declare and explain the law, and undertake, by an *abuse* of their power, to decide questions of law, (*State* v. *Peace*, 1 Jones' Rep. 257;) on the other hand, we are equally solicitous to see that the Court shall not commit usurpation upon "*the true office and province of the jury.*" Repetition of error can never justify the violation of a positive enactment of a statute; much less the infringement of a fundamental principle upon which our social existence is declared to rest. An error may have crept into our practice by reason of the Judges' not having attached due importance to

the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected both by the constitution and by legislative enactment. A Judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or entire absence of evidence, it is his duty so to instruct the jury; but if there be any competent evidence, relevant and tending to prove the matter in issue, it is "the true office and province of the jury" to pass upon it; although the evidence may be so slight, that any one will exclaim, "certainly no jury will find the fact upon such insufficient evidence!" still, the Judge has no right to put his opinion in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent them from being misled by the arguments of counsel, or their own want of apprehension. It is true, juries will sometimes find strange verdicts, acting under the influence of ignorance or of prejudice; but in general, juries are *honest*, and it is considered safer for the lives and property of the people to submit to the inconvenience of particular cases of this kind, than in anywise to allow the Judge to encroach upon "the true office and province of the jury." This partial evil is in a great measure obviated by allowing the Judge to grant a new trial in all cases (except where a party is acquitted upon a criminal charge) whenever he thinks the jury have found against the weight of the evidence.

There is no difficulty in regard to the rule; but it must be confessed, there is frequently very great difficulty in making the application; because the distinction between "no evidence" tending to prove a fact, and evidence confessedly "slight," is often a very nice one, and the dividing line can scarcely be traced: so that it is not to be wondered at, that Judges sometimes err, and get on the wrong side of the line. The safest course in such cases is to depend upon the good sense of the jury, and to take it for granted, subject to the corrective power of the Court above referred to, that a jury will not *conjecture* or *guess* at a fact when there is no sufficient

evidence to establish it. The dividing line may be marked thus far: when there is evidence of a fact, which, in connection with other facts, if proven, would form a chain of circumstances sufficient to establish the fact in issue, the fact so calculated to form a link in the chain, although the other links are not supplied, is nevertheless *some* evidence tending to establish the fact in issue, and its sufficiency must be passed on by the jury; but when the evidence could, under no circumstances, form a link in the chain, and, although competent, yet has no relevancy, or tendency, to prove the fact in issue, the jury should be so instructed. By way of illustration: it is proven that goods are found in the possession of the prisoner, twelve months after the larceny was committed; every one would say, this is not sufficient evidence to convict; but yet, it is some evidence. On the other hand; the question being, is the place where a larceny was committed, within a certain county; the proof is, that it was within five miles of the court-house of that county; this is no evidence of the fact in issue. *State* v. *Revels*, Busbee's Rep. 200. So, the question being, whether the purchaser of a negro woman, knew of her unsoundness; the proof is, that he was the owner of the woman's husband; this is no evidence of the fact in issue. Such was the first position in *Cobb* v. *Fogalman*, 1 Ire. 440. There may be reason to doubt whether the second position in regard to the *scienter* of the vendor was not put by the Court upon the wrong side of the line.

In the case now under consideration, the Judge withdrew the facts from the jury, and instructed them, that if the testimony was believed, it was a case of murder, and there was no evidence of a legal provocation. So, the prisoner has a right to insist that the testimony should be taken in the point of view most favorable for him; and that if, in any aspect, the evidence is consistent with his being guilty of manslaughter only, there was error in the manner in which the case was put to the jury. *Avera* v. *Sexton*, 13 Ire. 247; *Hathaway* v. *Hinton*. 1 Jones' Rep. 243.

Several views were suggested by his counsel. It will be

sufficient to notice one. Suppose the testimony of *McGehee* and *Hicks*, whose evidence tended to explain the scuffle which immediately preceded the fatal blow, is put out of the case, because the jury did not rely upon them, then we have the testimony of *Hobgood;* and considering it *apart from the question of express malice*, which his Honor excludes, we have this evidence: the prisoner and the deceased are seen by this witness, on the ground, the deceased on top; witness was too far off to see distinctly what occurred, but thought he saw deceased have both hands in the hair of the prisoner; saw no blows pass, but saw the prisoner kick at the deceased just as he was taken off; the deceased went around a tree near by, and the prisoner, as soon as he got up from the ground, followed after the deceased, and the next thing he saw of them, the prisoner had overtaken the deceased, had a knife in his hand, and the blood was gushing out of the arm of the deceased, who exclaimed, "I'm a dead man," and to the remark of a bystander "you've killed him," the prisoner replied, "d—n him, if he ain't dead, I will kill him." Upon this view of the evidence, will any one say there was "no evidence" *fit* to be passed on by the jury, that the parties had engaged in a mutual contest, or, that the deceased by pulling the hair of the prisoner, as the by-standers were taking him off, or in some other way, had not *hurt* him so as to amount to legal provocation and bring on the *furor brevis* which, apart from express malice, mitigates the homicide from murder to manslaughter? Even in England, where there is no express constitutional provision, making the trial by jury "sacred and inviolable," and no direct legislative enactment which forbids a Judge from expressing his opinion in regard to the sufficiency of the evidence, a Judge would have felt himself bound to permit the jury to pass upon this testimony, in the point of view in which it is now presented.

PER CURIAM. *Venire de novo.*

STATE *vs.* PETER JOHNSON.

In a trial for murder, where the homicide is clearly established or admitted, it is not error for the Court to refuse to instruct the jury that they must be satisfied by the State, beyond a reasonable doubt, that the offense is murder and not manslaughter; for the killing being established against the prisoner, every matter of excuse, mitigation, or justification, must be shown by him.

In a case where it is proper to instruct the jury, that they must be satisfied, beyond a reasonable doubt, of the prisoner's guilt, it is not error for the Court to omit such instruction, if, in the argument, the rule has been properly laid down by the defendant's counsel, and admitted by the counsel for the prosecution.

Where a homicide was established by proof, and was admitted on the trial, the facts that the parties had been friendly a short time before, and that a lumbering, as of chairs, was heard about the time the blow was given, accompanied with the expression, "O Lordy" by the deceased, and replied to by the prisoner, "if you don't shut your mouth, I will kill you," (the prisoner immediately afterwards, and always up to the trial, denying that he did the act,) were *Held* (Pearson, J., *dissentiente*,) not to be any evidence to mitigate from murder to manslaughter.

THIS was an INDICTMENT for the MURDER of one Dimond, tried before his Honor, Judge CALDWELL, at the last Term of Guilford Superior Court, to which it had been removed from the county of Rockingham.

Dr. McCain swore that he examined the wounds of the deceased on Tuesday. His skull was broken behind—shattered for some inches, by a blow that must have produced instant death. There were some small contusions on the face which had the appearance, from the crisped flesh, of having been done by a hot instrument. The wound on the back-part of the head seemed to have been made by a heavy, blunt instrument. The homicide occurred on the 25th of December, 1853.

Dr. Scales swore about the same.

Jesse F. Slade swore, that he was sent for to prisoner's house on Monday 26th of December, 1853; that he found the deceased on the floor, with the prisoner's coat under his head.

He examined the back of the head, and found the skull greatly shattered, the skin on the face apparently burnt, and the hair singed. The prisoner's account was, that the deceased had got up and gone out of the house, and directly came back and said that somebody had killed him; that he caught prisoner in his arms and instantly died, adding, "and here he is as dead as hell." The prisoner also said, that if he had killed him, he would have taken him off and covered him up in the leaves where the hogs could have eaten him up. The prisoner was under the influence of spirits, but not drunk. The witness examined, both in doors and out, for blood and marks of violence, but found none. The only blood seen, was where the deceased was lying on the floor. He found a heavy iron shovel in the house, and, in the opinion of the witness, the edge corresponded with the wound on the deceased. The prisoner, when charged with the killing, denied it, and bristled up for a fight.

David Wilson swore that he went to the prisoner's house on Sunday 25th December, 1853, about 12 o'clock; that no one was there but the prisoner; that the prisoner was drinking some; that after a time the deceased came, as he said, to buy some corn; that the deceased and the prisoner drank, and continued to drink until the former got very drunk, and lay down on the floor; that the prisoner was not drunk, but was perfectly rational. He stated that, late in the evening, Joseph Allen came, who staid some minutes, and left. The witness also left, some minutes thereafter. Before leaving, at the suggestion of Allen, the prisoner and witness put the deceased in bed. The witness said he left no one there but prisoner and deceased. He went to Mrs. Smithy's, about three hundred yard's from the prisoner's house. About one hour in the night he heard a noise at the prisoner's, and heard the deceased saying "O Lordy!" and the prisoner saying, "God damn you, if you don't shut your mouth I will kill you." The noise then ceased, and in a few minutes he heard prisoner calling to the witness to come there. The witness said he went, and found the prisoner with his sleeves rolled up, and

coat off, and the shovel in his hands. Prisoner said to him, "Here is Dimond dead as hell and I have killed him." Witness went out and brought in some wood, when the prisoner struck at him, and said he thought it was a dog. He gave the wood to prisoner, and while he was putting it on, witness felt the pulse of the deceased. He also raised the head and saw a stream of blood on the floor, as long as his arm. There was nothing under the head of the deceased. Witness said he was frightened, and left the house suddenly. No one was there but the prisoner and the deceased. The prisoner was then under the influence of spirits, but was rational. Next morning, in company with others, witness went to the prisoner's house, and found him still under the influence of spirits; heard the prisoner say, "there was his good coat under his head, and he would not give it for the damned man."

Joseph Allen swore that he was at the prisoner's house on Sunday evening; found David Wilson, the prisoner, and the deceased there; the latter was drunk on the floor, and the prisoner drinking, but not drunk; witness told them to take the deceased up and put him to bed, which they did; he did not recollect who did it. He staid but a short time there, and left about three-fourths of an hour by sun. Witness was sent for next morning, and went to the prisoner's house. Prisoner said to him, "Here is Dimond dead as hell, but I did not kill him." Witness asked him who did, to which he replied, "he killed his own self." He, prisoner, said to the witness, that the deceased went out of the house, was gone a short time, and returned crawling; that he caught him (prisoner) by the arms and said somebody had killed him, and fell instantly dead. Prisoner further said, that he "wished Dimond had broke his damned body before coming there." Prisoner was under the influence of spirits, but was rational. Prisoner further said that "he had sat up with the deceased until the candle went out, when he went to bed; and that if his friends did not come and take him away he would throw him to the hogs;" that "there was his best coat under his head which he would not give for Dimond." Witness further stated, that the coat which the

prisoner was wearing on Sunday was under the head of the deceased, who then had on another coat. He then looked for blood but found none, except where the deceased was lying, which had run some six inches. He saw the shovel which was large and heavy. He examined the wound, and found the face as if it had been struck with a hot instrument. The back of the skull was broken, and witness believed it had been done with the shovel. He found a horse of the prisoner hitched near the house, some six yards off, which horse was a very vicious one. Witness had never seen the prisoner and deceased together before, and did not know that they were acquainted. The character of the prisoner, when sober, was peaceable; but when drunk he was a violent and outrageous man, and would as soon strike a friend as a foe; there was no doing any thing with him; he seemed frantic; but never had seen him when he did not know right from wrong.

Mrs. Smithy swore that she lived some 200 yards from the prisoner; that on the evening of the homicide, about an hour after dark, she was sick in bed in a back room; that she heard a "lumbering" up at the prisoner's house; she did not know what it was, but heard the prisoner once saying, "if you don't shut your mouth I will kill you;" the noise ceased after a little, and in a few minutes she heard the prisoner calling David Wilson to come there, who went and returned in a few minutes. She also stated she saw the prisoner on Sunday morning and he was drinking. She said the "lumbering was something like chairs."

Joseph Smithy swore that he was at Mrs. Smithy's on the evening of the homicide; that about an hour in the night he heard a voice up at the prisoner's house, and then the voice of the deceased saying "O Lordy!" He also heard the voice of the prisoner saying "if you don't shut your mouth I will kill you." The voice ceased, and the prisoner then called David Wilson to come there. He thought Mrs. Smithy's was a quarter of a mile from the prisoner's house.

Edward R. Windsor testified that he was at the prisoner's house next morning after the homicide; heard the prisoner

say "I wish I had broke your damned body instead of your head," or "I wish your damned body had been broke instead of your head, before you came here;" he did not remember which. Prisoner said "as deceased started out of the house he fell, and then fell against the house two or three times, then came in and said somebody had struck him, seized the prisoner and said he was a dead man; and that if his friends did not take him away he would throw him to the damned hogs; he would not give his coat for the damned man."

Zachariah Groom swore that he heard prisoner say on the morning after the homicide, "I wish I had broke his damned body instead of his head;" that he first said "he wished whoever had killed him had broke his damned body instead of his head."

It further appeared that the prisoner continued drinking on Monday, and became more and more intoxicated during the day.

Upon this evidence, the counsel for the prisoner moved the Court to charge the jury, that if the prisoner were under the influence of spirits, so as to have been frantic at the time of the homicide, the jury ought to acquit. The Court declined so to charge, and told the jury that his drunkenness would not excuse; that if he knew right from wrong, he was responsible. Defendant excepted.

The prisoner's counsel insisted that it was a case of manslaughter, and that his intoxication ought to be taken into consideration upon the question of malice, and moved the Court so to charge.

The Court charged that upon a question between murder and manslaughter, the jury had a right to take into consideration the intoxication of the prisoner to repel malice.

The counsel also moved the Court to charge the jury, that if there was any doubt whether the offense was murder or manslaughter, they ought to find him guilty of manslaughter.

The Court, in the course of the charge, explained the difference between murder and manslaughter, and then said to the jury, that where a homicide was committed, every matter of

excuse, mitigation, or justification, ought to be shown by the prisoner.

The Court called the attention of the jury to the evidence, and asked them, with emphasis, what evidence was there, to reduce the offense to manslaughter. And in relation to the testimony of Mrs. Smithy, the Court said, "that while they had no right to guess the prisoner into conviction, neither had they the right to guess him into an acquittal." Defendant excepted.

The Court omitted, by oversight, to charge the jury that they ought not to convict the prisoner, unless satisfied of his guilt beyond a reasonable doubt. The prosecuting officer, in the course of his argument, told the jury that such was the law. The counsel for the prisoner so argued before the jury, and made it a point upon a motion for a new trial, that they moved the Court so to charge. The Court had not, nor has it now, any recollection that there was a motion for it so to charge. The trial was a long one, and lasted until some time in the night. Defendant excepted for this refusal or omission.

The verdict was, that the prisoner was guilty of murder. Judgment and appeal.

Attorney General, for the State.

J. H. Bryan, with whom were *Miller* and *Gilmer*, argued as follows: There was *no* evidence of any unfriendly feeling existing between the prisoner and the deceased, which was a circumstance, however slight, to be attended to, in connection with the evidence, as bearing upon the question of the character of the homicide.

There *was* evidence, however slight, (Mrs. Smithy's) tending to show a scuffle or contest; the "lumbering noise" and outcries of the parties, were noises usually accompanying a struggle or contest, and was fit for the consideration of the jury. In *Blackledge* v. *Clark*, 2 Ire. 394, it is said, "that a reasonable suspicion or presumption of a fact may be left to

the jury, though the Court might well think the jury would be justified in *not* inferring the fact," &c.

When his Honor asks the jury with emphasis, "what is there in the case to reduce the offense to manslaughter?" he must have been understood by the jury as referring to *all* the facts and circumstances in the case, and as intimating his opinion that there was nothing in the *whole* case tending to reduce the offense to manslaughser. Now, we would respectfully submit, that the previous relation of the parties indicating, as we contend, a friendly state of feeling, the absence of all malice or *motive* to quarrel, the evidence of Mrs. Smithy tending to show a mutual combat, were matters well worthy and proper for the consideration of the jury, and the prisoner had a right to have them submitted to their consideration unimpaired in their operation upon their minds, by any remark of the Judge, the sole question here being, whether they were relevant, and not, how much they would weigh upon their minds. *State* v. *Moses*, 2 Dev.; *State* v. *Lipsey*, 3 Dev. 498.

It is the duty of the Judge to bring to the notice of a jury, principles of law and fact, &c. *Bailey* v. *Pool*, 13 Ire. 404. And although there might not have been a special request by the counsel to instruct the jury upon the question of reasonable doubt, yet, this was a principle of law necessarily occurring in every capital case. It is the injunction of the law itself, wherever the life of man is concerned, and is a part of the law of the case. The Judge should, *ex officio*, have given this advice to the jury.

But we contend that according to the case as stated, this request was *substantially* made, when his Honor was requested to inform the jury if they had any doubt, as to whether the homicide was murder or manslaughter, they should find it to be manslaughter. The question was whether the case was murder or manslaughter; the counsel for the prisoner not contending for an acquittal. "Doubt" here, must mean *reasonable* doubt; the law will so construe it; this request must be regarded as applied to the whole evidence in the case, and if

the counsel had contended for an *acquittal*, the law would require the instruction to be given. How is the question varied if the counsel contend that it is a homicide of a more mitigated grade than murder? It would seem if there were any difference, it would be in favor of the prisoner.

BATTLE, J. The bill of exceptions filed by the prisoner, presents only one question upon which there can be the slightest doubt. If counsel pray an instruction, in a voice so low, or under such circumstances, that the presiding Judge does not hear it, his omission to give it cannot be regarded as a neglect or refusal; and unless the jury were misled by the bare omission, it is not error. In this case the prisoner could not be prejudiced by it, because the rule, that the jury must be satisfied beyond a reasonable doubt, of his guilt, before they can find him guilty, was expressly stated by his counsel, and admitted by the solicitor for the State. Moreover, it could apply only to the fact of the homicide; for if the jury found *that* against the prisoner, the Judge very properly said "that every matter of excuse, mitigation, or justification, ought to be shown by him." The burden of proof in such case, being shifted from the State to the prisoner, it was incumbent upon him to establish the matter of excuse or mitigation beyond a reasonable doubt.

There is but a single question, then, presented for our decision, and that is, whether there was any testimony which the Judge ought to have submitted to the jury as tending to prove a mitigation in the character of the homicide, and thus reduce it from murder to manslaughter. In assuming that to be the sole question, we had taken for granted what the Attorney General has, with a proper degree of candor, conceded, that the emphatic manner in which the Judge asked the jury, "what evidence there was to reduce the offence to manslaughter?" was equivalent to telling them that there was no such evidence. See *McRae* v. *Lilly*, 1 Ire. 118. *State* v. *Noblett*, 2 Jones' Rep. 418. If there were no evidence upon the point in dispute, then it was the duty of the Judge so to declare

but if otherwise, then, we admit that he ought to have submitted it to the jury, without intimating to them an opinion upon its sufficiency or its weight.

In examining this question, we must constantly bear in mind that it assumes the killing of the deceased by the prisoner as an established fact, and that he must show us the testimony which mitigates his offence. This his counsel contends that he has done by the testimony, which proves that on the evening when the transaction occurred, the parties were on friendly terms; that no express malice was shown; that Mrs. Smithy heard a "lumbering at prisoner's house, something like chairs;" that the distance between Mrs. Smithy's house and the prisoner's was too great to enable the witnesses to distinguish the voice of the deceased from that of the prisoner; and that all these circumstances had a tendency to prove that there was a mutual combat, or scuffle, between the parties. It is said also, as a confirmation of this view, that, from the appearance of the bruises and wounds on the deceased, and from the fact that no blood was found on the bed, or anywhere else, except on the floor where the deceased lay, he must have got out of the bed, and been standing on the floor when he received the mortal blow on the back of his head. In considering whether these circumstances ought to be allowed to have the effect contended for, we must collate them with the other circumstances which formed a part of the same transaction, and judge of the whole together. From the testimony of Wilson and Allen, it appears that, late in the afternoon of the day when the homicide was committed, the prisoner and the deceased drank spirits together, until the latter became so drunk that it was thought proper to put him on the prisoner's bed; that about an hour after dark, the "lumbering, as of chairs," spoken of by Mrs. Smithy, or the "noise," as it was called by the witnesses Wilson and Joseph Smithy, was heard up at the prisoner's house, and then these witnesses heard the voice of the deceased crying out, "O Lordy!" and that of the prisoner saying, "if you don't shut your mouth I will kill you;" that Wilson, upon hearing his name called by the pris-

oner, went up to his house and found him with his coat off, his sleeves rolled up, and the shovel in his hand, and he then said, "here is Dimond dead as hell, and I have killed him." The next day, however, he denied that he had killed the deceased, and alleged that the deceased had killed himself, or that some person out of doors had killed him; but he did not on the night of the homicide, or at any other time, pretend that the deceased had made an attack upon him, or that he had got into a fight, or even scuffle, with him. He had no wound of any kind upon him, and there was nothing in the appearance of his clothes, or of the room, to indicate that there had been a mutual combat. Whatever appearance there was of wounds or bruises, was upon the deceased alone. Whatever indications there were of violence, from the outcries of the parties, were that the deceased was a sufferer, and the prisoner was beating him. Under these circumstances, could the prisoner ask that the Court should leave it to the jury to infer a mutual combat between him and the deceased, from the single fact that a noise was heard in his house? In deciding whether there be any evidence to be submitted to a jury, the Judge must necessarily be governed by the impression which the alleged testimony makes upon his mind. The question is admitted to be oftentimes a very difficult one, but he must decide it as he does every other question which the law makes it his duty to decide, according to the honest convictions of his understanding. He cannot shrink from his duty and throw the responsibility upon the jury, by allowing them to conjecture the existence of a fact where there is no testimony tending to establish it. The same duty will, upon an appeal in such case, devolve upon the Judges of the appellate tribunal, and they must decide in like manner, upon the honest convictions of their understanding. With an earnest desire to decide correctly, we have come to the conclusion, that the prisoner has not shown us any evidence of a mutual combat between him and the deceased, and that his Honor who presided at the trial, committed no error in so instructing the jury.

This opinion must be certified to the Superior Court, to the

end that the sentence of the law may be pronounced upon the prisoner.

PEARSON, J., *dissentiente.* As is said in Allen's case, (ante, 257,) decided at this term, where there is any evidence, however slight, which is competent and relevant as tending to prove the fact in issue, its sufficiency must be passed on by the jury. There is no difficulty in respect to the rule; but it is sometimes very difficult to make the application, as the distinction between no evidence, and evidence confessedly slight, is a very nice one, and the dividing line can scarcely be traced. Like light and shade which run into each other, so as to give rise to a difference of opinion as to whether a certain point is on the bright or the dark side of the line. This has occurred in the case under consideration; my brother Judges put it on the dark side; I am convinced that it should be put on the bright side. When the case was first opened, I thought there could be no doubt about it; but finding there was a difference of opinion I have given to the matter mature reflection, and feel it to be my duty to dissent from the conclusion made by the other Judges.

It may be that the prisoner is guilty of *murder.* I do not feel it to be my duty to say, whether, according to the testimony and matter set forth in the statement of the case sent to this Court, *I* think the prisoner is, or is not, guilty of murder; but I do feel it my duty to say, *I think his guilt has not been established according to the law of the land;* for I think there was some evidence tending to show that the homicide was committed under legal provocation, and if so, his guilt ought to have been established by the verdict of the jury, and not by the opinion of the Judge. I think there was not only some evidence tending to show legal provocation, but that, taking the whole matter together, it presented a case peculiarly fit to be left to the good sense of the jury. 1. There was no previous grudge; the parties being but slightly acquainted. The deceased called to see the prisoner upon ordinary business, and there is no suggestion of a *motive* for the commission of murder. So, at most, it is a case of *constructive malice afore-*

thought, which is implied, under a harsh rule adopted by the Courts, *ex necessitate*, in the administration of the criminal law. 2. The prisoner did not strike the fatal blow while the deceased was lying on the bed; no blood is seen except at the place where he was lying on the floor; so, the deceased had got up from the bed. 3. There was a "lumbering noise as of chairs;"—this tended to indicate that there was a mutual combat, or scuffle of some sort. 4. A voice is heard exclaiming "O Lordy!" and another voice, "Damn you, shut your mouth or I'll kill you!" The witnesses say the first voice was that of the deceased; the latter, the prisoner's; but these witnesses were at the house of Mr. Smithy, which, according to one witness, was distant three hundred yards; according to another, two hundred yards; and according to a third, a quarter of a mile. Was it not fit for the jury to inquire whether voices could be distinguished at that distance? and whether the opinion of the witnesses in regard to the voices heard, should not be ascribed to the inferences which they formed from facts afterwards ascertained? This consideration was material; because a mistake as to the voice, changes the whole aspect of the case. 5. The first blow was a slight one with the hot shovel, on the face; so, the parties were then fronting each other, and we may assume, that as the deceased turned to retreat, the fatal blow was given. 6. The prisoner makes no attempt to *flee from justice*, but makes an outcry for the witnesses, who find him with his coat off and his sleeves rolled up, and the shovel in his hand; the deceased lying on the floor with his head on the prisoner's coat. If to these facts had been added a bruise, or even a scratch on the person of the prisoner, the chain of circumstances would have been complete to establish a legal provocation. So, there was *only one link* in the chain missing. How can it be said that all the other links do not constitute some evidence fit to be taken into consideration by the jury? We may imagine the poor wretch, after he came to himself, upon seeing the awful deed which he had committed, hesitating to criminate himself to the extent of manslaughter, and let it appear as a case of mu-

tual combat, or to attempt to excuse himself altogether, by resorting to artifice and falsehood, and asserting that the deceased had gone out of the house and there received the fatal blow. Foolishly, and most unfortunately for him, he adopted the latter course; hence, the vicious horse is hitched near the house, and is standing there an hour after dark, and the deceased is laid on the floor, with the prisoner's "good coat" tenderly put under his head. God knows how the homicide occurred; but the whole transaction has a mystery around it, which, in my opinion, it was the "proper office and province" of the jury to unravel, with the humane admonition of Lord Hale: "Even innocent men will, when they find themselves in difficulty, sometimes resort to artifice and falsehood." This is illustrated by the case of the uncle, who, being charged with having murdered his niece, and finding appearances much against him, procured a girl who resembled his niece, to personate her, and presented her to the Court and jury as his niece. The artifice was detected, and the poor man was thereupon convicted and hung. Some time afterwards, the niece made her appearance, and the mystery was explained by the fact that she had run away to be married.

Besides feeling it to be my duty to dissent from the conclusion of my brother Judges, I also feel it to be my duty to protest against the manner in which, of late years, cases are made for this Court. Why insert circumstances of aggravation? It is the duty of this Court to confine its attention to the questions of law presented by the record. Any matters of fact not necessary to present those questions, but which are calculated to paint the offense in stronger colors of horror, so far from aiding our deliberations, tend to embarrass us, by imposing the additional duty of endeavoring to free ourselves from the prejudices which such irrelevant matter of fact necessarily creates. For instance, in this case, why set out the oaths and awful imprecations used by the prisoner after the commission of the offense? Why set out, that, according to the evidence, when sober, he was a peaceable man, but when drunk, frantic and a demon? There was no allegation of ex-

press malice. These matters were, in the opinion of the Judge, irrelevant, and not fit to be passed on by the jury; then, why set them out for the information of Judges who are to decide the questions of law? Again, in Allen's case, referred to above; according to the opinion of the Judge, he was guilty of murder, upon the testimony, *apart from the idea of express malice;* then why was the case encumbered with the proof in regard to express malice? These two cases I refer to, merely because they are now in my mind; but it may be proper to say, *my protest* has no particular reference to the Judge before whom these cases were tried; for I concur, with the profession, in regard to the very high estimate which is put upon his integrity and learning as a Judge.

PER CURIAM. Judgment affirmed.

ANNE WEBB *vs.* JOHN D. WEEKS *et al.*

Where a testator gives slaves to his five children, and adds, "in case any of my aforesaid children shall die without a lawful heir begotten of his or her body, then his or her share to be equally divided among the survivors;" three of the five having died, and their estates being disposed of, the fourth also died, and the fifth, who was survivor of them all, brought suit for the share of the fourth legatee, it was *Held* that such last survivor is not entitled to recover.

ACTION of DETINUE, tried before his Honor, Judge CALDWELL, at the Fall Term, 1855, of Halifax Superior Court.

The plaintiff declared for seven slaves; and the following facts were submitted as a *case agreed*, for the judgment of his Honor:

"George Zollicoffer died in the year 1802, leaving a last will and testament, by which he bequeathed among other bequests, as follows:

Fourthly. 'My will and desire is, that all the rest of my estate, after my just debts are paid, consisting of negroes and

stock, house-hold and kitchen furniture, plantation utensils, together with what money is due me in Switzerland, shall be equally divided between my beloved wife, Anne Zollicoffer, and my five children, John Jacob Zollicoffer, George Zollicoffer, James Zollicoffer, Julius H. Zollicoffer, and Anne Zollicoffer, and at the death of my said wife, all the land and negroes that may fall to her, shall return to James Zollicoffer. And in case of either of my aforenamed children dying without a lawful heir begotten of his or her body, that then, his or her part shall be equally divided among the survivors.' The widow died in the year ——.

"After her death, John Jacob, George and James died in the order of time in which they are named; two of them without leaving any issue. In June, 1854, Julius H. Zollicoffer died, leaving a last will, and without any issue, other than such as were born out of wedlock, and legitimated by his petition.

"The plaintiff, as the only survivor of the legatees, brings suit for the slaves which were allotted to Julius H. Zollicoffer, and it is agreed that if, upon the foregoing facts, the plaintiff is entitled to recover, then judgment is to be rendered accordingly for the said slaves, and for the sum of $338,31 as damages; but if otherwise, the plaintiff is to be non-suited."

On consideration of the above case, his Honor was of opinion with the plaintiff, and judgment was entered according to the terms agreed on. Defendant appealed.

Attorney General, for plaintiff.
Moore, for defendant.

NASH, C. J. George Zollicoffer, by the fourth clause of his will, devises as follows: "Item, my will and desire is, that all the rest of my estate both real and personal, &c., shall be equally divided between my beloved wife, Anne Zollicoffer, and my five children, John Jacob Zollicoffer, George Zollicoffer, Julius H. Zollicoffer, and Ann T. Zollicoffer; and at the death of my wife, all the land and negroes that may fall to her, shall return to my son James Zollicoffer; and in case any

of my aforesaid children shall die without a lawful heir begotten of his or her body, then his or her share shall be equally divided among the survivors." After the death of the testator, the property devised in this clause, was divided among the legatees, and each took possession of his allotted part. The widow is dead, and by the terms of the will, her share became the property of James Zollicoffer. All the sons are dead; John, George, and James, first three in the order of time in which they are named; only one of them leaving any issue; but which of them that was, is not stated, nor was it necessary in this enquiry. At the time the legatees took possession of their respective shares, each held it under a defeasible title. We are not called on to decide how the property so held by the legatees is to be distributed; our enquiry is, can the present action be maintained? It is brought against the administrator of Julius H. Zollicoffer, to recover the negroes which were alloted to him in the division, he having died, as alleged, without leaving any legitimate issue born of his body. It is not necessary for the purposes of this case, to ascertain at what period the defeasible legacies became indefeasible, because the plaintiff cannot maintain her position. She sues upon the ground, that Julius Zollicoffer, at the time of his death, held by a defeasible title, and the condition having failed, and she being the survivor of the children, is entitled to the share allotted to him. This cannot be. If the will had said survivors or survivor, her claim would have been more tenable. She, by herself, does not answer the requirements of the will. At the time that James died, two of the legatees were alive, to wit, Julius and the plaintiff; and if that were the period contemplated by the testator, then the legacies of Julius and Ann, became in each, indefeasible, and upon the death of Julius, intestate, his share passed to his next of kin, of whom the plaintiff is one, and she cannot litigate her rights, as such, in a Court of law.

The plaintiff places her right to recover the negroes under the will, as the survivor of all the children. I cannot better answer this position than by inserting that of the Court in

Hilliard v. *Kearney*, Busb. Eq. 227: "This construction is totally inconsistent with the admitted facts, that, in regard to the original shares, each legatee is the primary object of the testator's bounty, and that it was his primary intention to give the property itself, and not simply to lend, or give the use of it. The amount of it is to give to the proviso the effect of so clogging all the legacies, as to deprive all the children but one, of the ownership and right to dispose of the property during their lives, and that one is to be so deprived until the death of all the others." The plaintiff cannot maintain her action.

PER CURIAM. Judgment reversed, and judgment of non-suit.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NORTH CAROLINA.

AT RALEIGH.

JUNE TERM, 1856.

WILSON R. SUTTON *vs.* STEPHEN WESTCOTT, Sen'r.

The recording of a will without any evidence that the same had been proved before the proper tribunal, amounts to nothing, so that a copy taken from the will-book of such a writing, does not constitute color of title.

ACTION of TRESPASS, *quare clausum fregit*, tried before his Honor, Judge MANLY, at the Spring Term, 1856, of Currituck Superior Court.

The defendant claimed title to the *locus in quo*, and offered a paper writing purporting to be a copy from the will-book, of the last will of Stephen Westcott. There was no proof that this instrument had ever been proved, and no verification offered of it on the trial, as an original paper, or as a copy of a paper whose absence was accounted for. Upon the copy offered in evidence was entered, "Recorded and examined, 9th day of September, Anno Dom., 1807," "Attest. T. BAXTER, Clerk pro tem;" to which was further added this certificate: "I, Joshua W. Baxter, Clerk of the Court of Pleas and Quarter Sessions, of the County and State aforesaid, do hereby certify, that the foregoing is a full, true, and perfect copy of a certain will, made by Stephen Westcott, on the 10th day of August, 1807, and recorded in the will-book from 1719 to

1810, in my office." Attested by the Clerk, with the seal of the Court, and dated May 21, 1856.

His Honor, on argument, refused to admit the proof offered; for which the defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

No counsel appeared for the plaintiff in this Court.
Jordan, for defendant.

NASH, C. J. The sole question upon which the case is before us, is upon the correctness of his Honor in ruling out the paper purporting to be the last will of Stephen Westcott, under which the defendant claimed title to the *locus in quo*.

The paper offered in evidence purports to be a copy of the last will of Stephen Westcott. There was no evidence that the original paper had ever been proved before any Court. The copy is taken from the will-book of the proper County, but by what authority it was put there, does not appear. The registration of the original was of no more effect than would be the registration of a deed, which had not been duly proved.

It was contended that the paper writing was, at any rate, good as color of title. It could have no such effect. If the original, executed according to the statute, had been produced, and been duly proved on the trial, or if never proved and registered, its absence had been properly accounted for, and the paper offered been properly proved to be a true copy, it (the copy) might have been received as color of title. A copy of a deed can never be considered as color of title until it is shown that a deed did exist of which it is a true copy; so, neither can a copy of an alleged will. See *Commissioners of Beaufort* v. *Duncan*, 1 Jones' Rep. 239; *Callender* v. *Sherman*, 5 Ire. Rep. 711; *Drake* v. *Merrill*, 2 Jones' Rep. 374. There is no error.

PER CURIAM. Judgment affirmed.

WINSLOW & CANNON *vs.* EXUM STOKES.

Where in an action for breaches of a covenant, the plaintiff was entitled to prospective damages, that is, damages accruing subsequently to the bringing of the suit, and under the erroneous instruction of the Court, only damages to the time of the trial were given, this affords no ground for bringing another action for the same breaches.

THIS was an ACTION of COVENANT, tried before his Honor, Judge MANLY, at the Spring Term, 1856, of Perquimons Superior Court.

The action was brought on a written covenant in relation to the superintendency and management of a saw-mill. The pleas were covenants performed, former suit, and recovery for the same cause of action.

It appeared upon the trial below, that a former suit had been brought upon the instrument in question, and the same breaches assigned as in the present case; also, that the plaintiff had recovered damages for these breaches, and received satisfaction for the same before this suit was brought.

Upon an intimation from his Honor that this appeared to be a full answer to the suit, the plaintiffs offered to show that the jury on the former trial were instructed by the Court to give damages up to the time of the trial, and for no longer time; but his Honor being of opinion that this would not alter the case, refused the testimony, and the plaintiffs excepted.

Verdict and judgment for defendant, and appeal by the plaintiffs.

No counsel for plaintiffs.
Jordan, for defendant.

BATTLE, J. The recovery in the former suit upon the same covenant in which the same breaches were assigned was, we think, a bar to the present action, and his Honor properly ruled out the testimony which was offered to show that full damages were not then given. The covenant was, in the particulars mentioned, one and indivisible, and upon a breach of

it, the plaintiffs were entitled to the whole amount of damages, present and prospective, caused by such breach. If the damages were restricted in consequence of instructions from the Court, it was an error which the plaintiffs, by taking the proper steps, might have had corrected in that action. Their omission to do so cannot give them the right to harrass the defendant with the expense and trouble of another suit. For the distinction between the cases where prospective damages, that is, such as have accrued since the commencement of the suit, may, and where they cannot, be given, see the case of *Moore* v. *Love*, decided at the last term, and reported ante 215, in which the subject is fully discussed.

PER CURIAM. Judgment affirmed.

WHITLEY, McCONKEY & CO. *vs.* SAMUEL T. GAYLORD.

In a summary proceeding, by motion for judgment on a bond to keep the prison bounds, if the defendant plead matters of fact *in pais*, he is entitled to have them tried by a jury.

APPEAL from the Superior Court of Washington, tried before his Honor, Judge MANLY, at the Spring Term, 1856.

This was a motion for judgment on a notice under the statute, alleging breaches of the condition of a bond for the prison bounds.

At the return of the notice the defendant had pleaded conditions performed, and not broken.

The case being called for trial, the plaintiffs moved for execution, offering to show the Court the alleged breaches of the bond; but the defendant contended that the issues, involving matters of fact, should go to the jury.

The Court being of opinion with the defendant, so ruled. From which judgment, plaintiffs, by leave of his Honor, appealed to this Court.

E. W. Jones, for plaintiffs.
No counsel appeared for defendant in this Court.

PEARSON, J. At common law it was the creditor's right to have his debtor confined in close prison "to satisfy his debt." This right has been much modified and abridged by numerous statutes. That now under consideration, gives to prisoners liberty to walk within the prison bounds, provided bond be given "to keep continually within the rules."

It was no doubt intended, by way of compensation to creditors for the abridgment of their right, not only to require the most ample security, but to make it available with the least delay that was possible. To these ends it is provided that the bond shall have the force of a judgment; that the proceedings for a breach of the condition shall be in a summary manner, so as to avoid the delay incident to an ordinary action; and that the execution of the bond shall not be denied except upon oath.

But we can see nothing in the statute indicating that it was the intention to make so radical a change in the law as to take from the parties the right to have "the issues of fact" tried by a jury, and require such issues to be tried by the Court.

It would, in the first place, require the use of express words to bring us to the conclusion that such was the intention of the Legislature; and, in the second place, it would become necessary to inquire how far such a change is consistent with the fundamental law of our government.

The counsel for the plaintiff relied on the fact that the statute gives to the bond the force of a judgment, and cited *Brown* v. *Frazier*, 1 Murph. 421. We can see nothing in this to support the position that it was the intention that issues of fact should be tried by the Court. The words are satisfied by supposing the intention to be to make the security more ample by giving it the force of a judgment, whereby a lien upon the land, if an elegit is sued out, is created from the rendition of the judgment; and in the distribution of assets, if either of the obligors die, the bond will have the dig-

nity of a judgment, and take priority over specialty debts; but this does not alter the mode of trial, if issue be taken on any matter of fact *in pais*.

In debt on a former judgment or a *sci. fa.* to revive, it is true, if issue be taken on "*nul tiel record*," that issue of fact is tried by the Court; but if issue be taken on the plea of "payment" or "release," or any other matter *in pais*, the trial is by jury. So, upon a *sci. fa.* on a judgment upon a penal bond for the performance of covenants or agreements, suggesting a further breach under 8 and 9 Will. 3, Rev. Code, ch. 31, sec. 58, if issue be taken on "conditions performed no breach," the trial is by jury. Here, we have an instance of a bond having passed into a judgment, analogous to that under consideration, except that in the one, a further breach is suggested upon *sci. fa.*, in the other, a breach is suggested upon motion after notice thereof.

The case cited decides that an action cannot be maintained on the bond, as "a common law deed," but "it must be treated as a judgment, and the party must take the remedy thereon which the act prescribes." Whether the remedy given by this statute is not *cumulative*, so that the creditor, for *whose benefit it is given*, might waive it, and elect to pursue his common law action, is not now the question; for, admitting that he *must* take the remedy which the act prescribes, by suggesting a breach on motion, treating the bond as a judgment, we have seen, that in actions of debt or other proceedings on judgments, if issue be taken on a matter of fact *in pais*, the trial is by jury, and there is no intimation to the contrary in the case cited.

In further support of his position, the counsel relied on the fact that the proceeding was to be summary, on motion, without any formal process, declaration or pleas, or other matter tending to delay, and our attention was called to *Northam* v. *Terry*, 8 Ire. Rep. 175. We see nothing in this to support his position. The words are satisfied by supposing the intention to be, to avoid the delay incident to the proceedings in an ordinary action, by dispensing with formal process and

pleadings, and having a summary trial upon the matters about which the parties differ; for instance, it was not intended that the trial of the issues should be postponed until "the next succeeding term, after they shall be made up," as in ordinary cases, (Rev. Code, ch. 31, sec. 57,) but the trial was to be at the first term. A provision similar to this is made in express terms in regard to the trial of issues of fraud in the case of insolvent debtors. So, matters growing out of a motion on a forthcoming bond, or a motion against "a sheriff or other officer for failing to pay over money which he has collected," and other similar cases, where the remedy is summary, are all tried at the first term; but if the parties differ about a matter of fact *in pais*, of course the trial is by jury. There is no more delay in trying a matter of fact by a jury than if the matter is tried by the Court, provided the trial is at the first term. The instances that judgment is rendered by the Court, on motion, without the intervention of a jury upon appeal bonds, recognizances and the like, do not bear upon the question; because, in such cases, the breach is known to the Court as a matter of record, and there can be no matter of fact *in pais*, to be tried. The case cited, decides that a bond taken before the debtor is in close prison, is void, under the act of 1777; and that the objection may be taken without the formal plea of *non est factum* put in on oath, as the *execution* of the bond is not denied. The decision does not touch the point in our case; and the only thing calculated in the least degree to support the position of the plaintiff's counsel is a *dictum* thrown out by RUFFIN, C. J., in the conclusion of his opinion. "The usual course is to hear affidavits on each side, on which the Court acts. No doubt, however, that in a proper case, as where it is doubtful how the facts are, upon the proofs, the Court may direct an action to be brought, or direct an issue to be tried by a jury."

After laying down the proposition that the Court is to act upon the *affidavits of the parties*, a difficulty seems to have presented itself: suppose the parties differ as to the fact of a breach of the bond or matter arising upon other defenses; for

instance, "that the creditor had assented to the debtor's going out of the rules, or that the latter had paid the debt or been in any other manner discharged." To meet this difficulty, it is suggested that the Court may direct an action to be brought, or an issue to be tried by a jury. This is familiar practice in Courts of Equity, but an intimation that a *Court of Law* may direct an action to be brought when it is doubtful how the facts are upon the proofs, is no where else to be met with in the books, and the question is waived by the concluding remarks, "but the facts are not even disputed here, and the *sole* question was as to the validity of the bond, upon those facts, under the statute."

This dictum cannot be allowed to influence our opinion, for it is not supported by any authority or reason; indeed, the reason is against it; for, if the Court may stop the proceeding and direct an action to be brought, (which conflicts with *Brown* v. *Frazier* supra,) that would necessarily cause delay, and defeat the intention to give a summary remedy; or, if the Court may direct an issue to be tried by a jury, that proves that there was no necessity, and consequently no intention to change the law in this particular, and depart from the ancient mode of trial by jury. There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH LONG, ADM'R., OF REUBEN LONG *vs.* MILLY A. WRIGHT, ADM'X. OF STEPHEN WRIGHT.

A fraudulent conveyance of personal property passes the legal title as to *subsequent purchasers*, though void as to creditors under the Statute 13 Eliz. (*Garrison* v. *Brice*, ante 85, cited and approved.)

THIS was an action of TROVER to recover the value of slaves Esther and Henry, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Columbus Superior Court.

The intestates of both plaintiff and defendant derived title to the slaves in question from one Washington Long. On the 23rd of June, 1849, he conveyed by deed of that date, to the former four slaves, to wit, Esther, Maria, Henry and Sam, for the consideration expressed of $800. On the 16th of May, 1851, he conveyed to the latter two of these slaves, that is, Esther and Henry, for the consideration of $700. All four of the slaves remained in possession of Washington Long from the date of the deed to plaintiff's intestate, to the time of the sale to defendant's intestate, when according to the terms of the sale, the slaves Esther and Henry went into the possession of defendant's intestate. There was evidence tending to show that the deed was made to secure and indemnify plaintiff's intestate, against a liability of between three and five hundred dollars, which had been since discharged by Long himself; but there was plenary evidence that this deed was made to hinder delay and defraud the creditors of Washington Long in the collection of their debts.

There was evidence also, that the sale to defendant's intestate was *bona fide*, but that he had notice of the deed to plaintiff's intestate, its purposes and designs.

A question arose below as to the competency of Washington Long as a witness, but not being considered by this Court, it is not deemed material to notice it more distinctly.

The plaintiff's counsel insisted on the trial below, that if defendant's intestate had notice that said deed was intended as a security, or had notice that it was intended to hinder, delay, and defraud creditors, the defendant could not protect himself under the deed of 1851.

But the Court charged the jury, that if the intestate of defendant purchased the slaves in question in good faith, and paid therefor a fair price, though he had full notice that said deed was executed as a mere security to save harmless plaintiff's intestate, or to hinder, delay and defraud the creditors of the said Washington, or both, that defendant was entitled to their verdict. Plaintiff excepted to this charge.

Verdict and judgment for defendant, and appeal by plaintiff.

Strange, for plaintiff.
Shepherd, for defendant.

PEARSON, J. The position that a conveyance of slaves made with an intent to hinder, delay and defraud *creditors*, is void against a subsequent purchaser, who bought "in good faith, and paid therefor a fair price," is not supported by any statutory provision, or by any principle of the common law.

The Act which protects subsequent purchasers against fraudulent conveyances, by its terms, is confined to "lands and hereditaments." Rev. Code, ch. 50, sec. 2, (27 Eliz.) It of course, does not apply to slaves. *Garrison* v. *Brice*, ante 85. After some hesitation, it was held to apply to copy-hold estates, *Doe* v. *Rutledge*, 2 Cowper's Rep. 710; but there is no intimation to be met with in the books that it applies to personal property.

The common law protected against fraud, only such rights *as existed at the time of the conveyance.* One who acquired a right after the conveyance, was without remedy except in a Court of Equity. Upon this principle it was held, that a husband had no remedy at Law against a conveyance made by the wife shortly before the marriage, with an intent to defraud him of his marital rights. *Logan* v. *Simmons*, 1 Dev. and Bat. 13. But relief was given in Equity. *Logan* v. *Simmons*, 3 Ire. Eq. 494. Indeed, the principle has been settled ever since *Twyne's case* 3 Coke's Rep. 83. 1 Smith's Leading cases, 8. "It was agreed that by the common Law an estate made by fraud, should be avoided only by him who had a former right, title, interest, debt or demand, as by 33, H. 6, a sale in open market by covin shall not bar a right which is more ancient: nor a covinous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72; but he who hath right, title, interest, debt or demand more puisne, shall not avoid a gift or estate precedent by fraud, by the common law." At page 14, *Mr. Smith* remarks, "the statute 27 Eliz. was perhaps a more beneficial enactment than that of 13 Eliz., for it has been laid down that at common law no fraud was

remedied which should defeat an after purchase, but only that which was committed to defraud a former interest. Cro. Eliz. 445 and 7 and 8 pp. supra : yet there is a *dictum* of Lord Mansfield to the contrary in *Cadogan* v. *Kennett*, Cowp. 434."

The 13 Eliz. is declaratory of the common law so far as regards existing creditors. The remedy given to subsequent creditors rests upon the enactment of the Statute. In this sense it is sometimes said that 13 Eliz. was in affirmance of the common law. But the remedy given to subsequent purchasers by the Stat. 27 Eliz. rests wholly upon the enactment of the Statute. Co. Lit. 290 b. 3 Ba. Ab. Tit. "Fraud" p. 307.

In *Cadogan* v. *Kennett*, the question was whether a settlement made by a husband in consideration of the marriage and of £10.000, his wife's portion (which was supposed to be more than the amount of his debts) of all his real estate and likewise his *house-hold goods*, his real estate alone not being thought an adequate settlement, in trust to himself for life, remainder to his wife for life, remainder to the children of the marriage, was void against a *creditor at the time* of the settlement, under 13 Eliz. It was decided that the settlement was good against creditors ; but Lord MANSFIELD in his sweeping manner, commences his opinion with this broad proposition, i. e., "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 and 27 Eliz." This proposition has never received the sanction of any adjudication, and is treated by *Mr. Smith* and other writers as a *dictum*. It certainly is a striking illustration of his Lordship's proneness to break through the distinction between Law and Equity.

Our attention was called, in the argument, to *Plummer* v. *Worley*, 13 Ire. 423, where RUFFIN, C. J., uses this language : "It is true, that the Statute of 27 Eliz. is in its terms confined to lands, but it has been often said that it was but in affirmance of the common law." It is apparent, reference is here made to the dictum of LORD MANSFIELD, and the inference is

indistinctly suggested that the principle of 27 Eliz. might be extended to "things personal;" but the idea is not followed out, and the decision is put on the ground, that the pretended sale to plaintiff's intestate under the circumstances, did not in fact pass the title. The subject matter being a horse, in the transfer of which no ceremony or form is requisite, and it being considered that it amounted to a mere pretended transfer to baffle creditors, leaving the actual ownership in the debtor who had "authority as the secret *cestui que trust*, or as the agent of the pretended purchaser to dispose of the property by sale;" of course the title having never been out of the debtor, passed by sale to defendant.

But in our case the subject matter is a slave, and a deed is made use of to pass the title. In the absence of statutory provision, making it void against a subsequent purchaser, the legal effect of the deed was to take the title out of the debtor and vest it in the plaintiff's intestate, notwithstanding a fraudulent intent in regard to creditors, and the trust intended for the debtor. The legal title being out of him, it follows that he could pass nothing by the deed subsequently executed to defendant's intestate. Whether it passed the supposed trust so as to entitle the defendant to relief in Equity, is not for us now to say, as it cannot affect the rights of the parties at law.

So the case is distinguishable from *Plummer* v. *Worley*, and is governed by that of *Garrison* v. *Brice*.

We concur with the remark of Lord KENYON, "it is safest to preserve the ancient landmarks of the law." If the dividing line between Law and Equity be destroyed, the science of Law will be in utter confusion, and no one will be able to see his way.

It is not necessary to notice the other branch of the charge, as an error in this is decisive. There is error.

PER CURIAM. *Venire de novo.*

Den on dem. of BENJAMIN SHANNONHOUSE *vs.* DOCTRINE BAGLEY.

The Act of 1823, respecting security for costs and damages to be filed by a tenant holding over, before he can be admitted to plead, applies in favor of one who purchases the land during the lease.

The affidavit required to be made by the lessor of the plaintiff in the action of ejectment in order to compel an over-holding tenant to give security for costs and damages, need not set out the length of the term, or whether the lease was for years, or from year to year.

An affidavit in such case, which sets forth "that the lease had expired before bringing the suit—that the defendant *refuses* to surrender possession, and holds over against the will and consent of the affiant, and now pretends to claim title thereto," is sufficient, without alleging a more formal demand and refusal before bringing the suit.

AT the return Term of an ACTION of EJECTMENT, motions were made on behalf of the respective parties, which were considered by MANLY, J., at the Spring Term, 1856, of Perquimons Superior Court

The defendant's counsel asked leave to plead upon filing an ordinary bail-bond.

On the other hand, the plaintiff's counsel contended that he was entitled to judgment against the casual ejector, unless the defendant gave bond and security for the costs and damages accruing subsequently to the expiration of the term. His motion was predicated on the following affidavit:

(COPY OF THE AFFIDAVIT.)

"Benjamin Shannonhouse, maketh oath that the defendant, Doctrine Bagley, entered into the premises, now occupied by him, as tenant of one Charles Skinner, and that after his being thus in possession, this affiant purchased of said Skinner the tract of land on which defendant is and was situate, and which he cultivated as tenant as aforesaid; and said Bagley, since then, has occupied the premises as his tenant; that his term has long since expired, and that the defendant holds over against the will and consent of this affiant, and now pretends to claim title thereto, and refuses to surrender it."

The defendant contended that there was no such tenancy here, as authorised such a requisition from him; and further, that the affidavit itself was insufficient for that purpose; but his Honor being of opinion with the plaintiff, decided that unless the defendant gave bond according to the act of 1823, he should not be permitted to defend, and that judgment should, in that case, be entered against the casual ejector; from which order the defendant appealed.

The following is the act of 1823. Rev. Code, ch. 31, section 48:

(COPY OF THE STATUTE.)

"If the lessors of the plaintiff, or any one of them, in an action of ejectment, his agent or attorney shall, at the return term of the declaration in ejectment, file his affidavit that the tenant in possession of the premises sued for, and to whom the notice of the said suit is directed in the process issued, entered into said premises as his tenant, or as tenant of the person for whom such agent or attorney deposes, and that the said tenant's term therein was expired at the commencement of the suit, and that he refuses to surrender the possession of the premises to said lessors or any of them, then the person in possession, or any other person applying to become defendant, shall not be entitled to plead to the suit, and the lessors of the plaintiff shall be entitled to judgment final against the casual ejector at the said term, unless the person in possession or other person applying to be made defendant, shall make affidavit before the Court in writing, that his term therein had not expired, and also enter into bond with ample security, in such sum as the Court shall direct, conditioned that the defendant shall pay the lessor or lessors such costs and damages as shall be recovered in the suit; and the jury in such cases, when the issue may be joined, shall find in their verdict whether the defendant entered into possession of the premises as the tenant of the lessors, or of which of them, and whether he refused to surrender the premises after his term therein had expired. And if the finding be in favor of the lessors of the plaintiff, the jury shall assess the damages to

which they shall be entitled, including the value of the occupation of the premises sued for, from the expiration of the tenant's time to the rendition of the verdict, and damages for waste and trespass during the time of said holding over; and the Court shall render judgment against the defendant and his sureties upon their said bond, to be discharged by the payment of the damages assessed and all costs; and judgment upon the verdict shall bar the action for mesne profits, or for the trespass by any of the lessors in the said action."

Jordan, for plaintiff.

No counsel appeared for the defendant in this Court.

PEARSON, J. When a tenant, after his term expires, refuses to give up the possession, the lessor is subjected to great inconvenience, and in many cases, to actual loss. He is unable to sell the land or to lease to another, because, he cannot give possession; and if he brings an action, besides the delay, he usually has his own costs to pay and loses the profits. A tenant who holds over is apt to be worth nothing, or to be that sort of a man who will put his property out of the reach of creditors, before a judgment can be obtained. For these reasons owners of land were reluctant to make leases, and poor men found it difficult to procure homes. This state of things was not only injurious to these two classes, but affected the whole community. It is against public policy that land should lie idle and be unproductive. To remedy this evil and to encourage the making of leases, was the object of the statute now under consideration.

The first point is, that our case does not come within the operation of the statute; for, that the defendant did not enter as the tenant of the lessor of the plaintiff, but as the tenant of one from whom he bought the land, pending the lease; and it is contended that although the defendant continued in possession after the sale, as the tenant of the purchaser, yet the statute applies only to cases where the *original* entry was as the tenant of the lessor of the plaintiff.

It is certain that our case falls within the mischief for which the statute intended to provide a remedy. Owners of land would be reluctant to make leases, if thereby it was put out of their power to sell, should a good offer be made, unless the purchaser was willing to depend upon the mere promise of the lessee to give up possession at the expiration of the term.

We think it clear that the statute embraces all cases where the relation of lessor and lessee exists between the parties, so that the latter holds possession under the former, without reference to the manner of the original entry. A construction hinging upon the word *enter* would disregard the admonition *quod hæret in litera hæret in cortice.*

But the word *enter*, in legal parlance is not confined to the original act of going upon the land. There may be an entry in contemplation of law as distinguished from an actual entry; for instance, a lease is renewed and the lessee continues in possession; he is considered as having entered under the new lease, so as to change it from a mere *interesse termini* into a *term*, without the idle form of going off of the land and coming back again. So in *trespass quare clausum fregit*, laying the trespass with a continuando, or from day to day, to support the action, which is for an injury to the possession, the plaintiff after he regains possession, by the *jus postliminii* is considered to have been in possession all the time, and the defendant is considered to have entered every day so as commit a series of distinct trespasses; otherwise the action could only be maintained for the *original entry.* By parity of reasoning, in contemplation of law, for the sake of the remedy, the defendant may be considered as having entered as the tenant of the lessor of the plaintiff as soon as he acquired the title, and the relation of lessor and lessee was established between them.

The next point is, that the affidavit does not set out the terms of the lease so as to show whether it was a lease for a certain number of years, or from year to year, but contains merely a general statement "that the defendant's term had long since—before the commencement of this suit, expired."

Phelps v. *Long*, 9 Ire. 226, is relied on. We can see no reason for requiring the terms of the lease to be set out in the affidavit; the substance is, that there was a lease, and that it has expired; if so, it can make no manner of difference whether it was for five or ten years, or from year to year. It is sufficient to say, that the statute does not require the terms of the lease to be set out. The case cited does not support the objection. The affidavit there did not aver in words that the lease of the defendant had expired, but left it merely as an inference, from the fact that notice to quit had been given in 1843. The Court decide that no such inference can be made, because, taking it to be a tenancy from year to year, it was necessary to state at what time of the year the lease commenced, in order to enable the Court to see whether the notice had been given within reasonable time so as to determine the tenancy, and in that way make the inference that the lease had expired. The plaintiff in his affidavit, having omitted to aver the fact expressly, the question simply was, whether the matters stated were sufficient to enable the Court to supply this omission by making an inference.

The remaining point is, that the affidavit does not allege a demand and refusal to surrender possession, before the action was commenced, but alleges merely that the defendant *refuses* to surrender possession, in the present tense, i. e., at the time of filing the affidavit.

A man would hardly be at the trouble and expense of bringing an action of ejectment, unless his tenant, after the expiration of the term, refused to give up the possession; hence the *allegata* and *probata* in regard to this matter need not be very strong, because the fact of his bringing the action speaks for itself. In this case, however, besides the allegation that the defendant "refuses to surrender possession," there is the allegation that "the defendant holds over against the will and consent of the affiant, and now pretends to claim title thereto." So, besides the fact that the lessor was under the necessity of bringing the action, we have the further fact, that the defendant disavows his tenancy and sets up title in himself.

Admitting, therefore, as contended for by the defendant's counsel, that the proper construction of the statute requires an averment, that the defendant had refused to surrender the possession before the action was commenced, we think this averment is substantially made. But a conclusive reply is, the affidavit pursues the very words of the statute, and actually goes further; and if the construction is correct in regard to the statute, it follows that it must be so in reference to the affidavit.

It was assumed in the argument, that this is a rigid statute and ought to be construed strictly. It will be seen, that we do not concur in this view of it. It imposes no penalty, and does not deprive the defendant of any vested rights, but simply says to him, if the plaintiff will make oath that you had possession as his tenant, that the lease is expired, and that you refuse to give up the possession, you will not be permitted to take advantage of the delay which is incident to the proceedings of the Courts, in order to keep him out of possession, unless you will give security to pay the cost, and the profits of the land, in the event that he recovers against you; and to make this the more reasonable, the statute requires that the facts on which the application was founded, that is, a lease, its expiration, and the defendant's refusal to surrender, must be found by the jury, so as to convict the defendant of wrongfully holding over in violation of his fealty as a tenant. It may as well be said that the statute in regard to the action of replevin is rigid, and ought to be construed strictly.

PER CURIAM. There is no error. Judgment affirmed.

HENRY M. SHAW *vs.* THOMAS J. ETHERIDGE.

Where the owner of a tract of land upon which there is a ditch, sells the upper part, including a portion of the ditch, he has no right to stop up, or obstruct, even partially, the ditch below, so as to throw the water back upon the other part.

And this is so whether the ditch was originally made to drain this upper part of the tract or not; for if it actually answered that purpose, the purchaser was entitled to the unmolested use of it.

It was error in the Court to instruct the jury in the above mentioned case, that they might give damages accruing after the issuing of the writ down to the time of the trial. (Case of *Moore* v. *Love*, 3 Jones' Rep. 215, cited and approved.)

THIS was an action of TRESPASS on the case, tried before his Honor, JUDGE MANLY, at the Spring Term, 1856, of Currituck Superior Court.

The action was brought for obstructing a ditch which traversed the land of the plaintiff and passed through a part of the land of the defendant. Both these parcels of land had belonged to the defendant until the 9th of November, 1853, when he conveyed to plaintiff the part now in question, which was the upper part of the same. Previously to this conveyance, to wit, in September of that year, the defendant had cut the ditch in question.

It was in evidence, that the ditch was obstructed; but whether this was done before or after the sale to plaintiff, was left in doubt by the testimony, there being conflicting evidence as to that fact.

It was insisted in behalf of the plaintiff, that he was entitled to damages if the obstructions had been put into the ditch by the defendant after the sale, or if a part of it had been made before, and added to after that time, by him.

In behalf of the defendant it was contended, that he had a right to obstruct the ditch after the sale. He also contended, that it was not proved that he had placed the obstruction complained of, in the ditch, after the sale.

The Court was of opinion with the plaintiff upon the matter of law suggested in the defense, and charged the jury that if the defendant placed the obstruction complained of, in the ditch, after he sold it to the plaintiff, or if additional obstructions were placed in it so as to impede the flow of water from the plaintiff's land, he was entitled to damages, and directed the jury to give such as they thought commensurate with the

injury produced by the acts of the defendant to the crop and land of the plaintiff.

The Court further charged the jury that in estimating the damages they might take into account the injury done since the writ, down to the trial, provided such injury flowed from acts of the defendant done before the bringing of the action, and which continued in their effects up to the present time.

It was controverted between the parties, whether the ditch was cut by the defendant for the purpose of draining the land which he afterwards sold to the plaintiff, but the Court expressed the opinion that it made no difference what was the view with which the ditch was originally cut, if it served as a drain to plaintiff's land. To these instructions defendant excepted.

Verdict for plaintiff. Judgment and appeal by defendant.

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

BATTLE, J. We do not discover any error in the charge of his Honor except in relation to the question of damages. Upon the facts as they are stated in the bill of exceptions, his Honor was justified in instructing the jury that they might find for the plaintiff. The case of *Hazard* v. *Robinson*, 3 Mason's Rep. 236, relied upon by the plaintiff's counsel, is directly in point for him, and the force of it is not at all weakened by the authorities referred to on the part of the defendant.

But the charge of the Court "that in estimating the damages, the jury might take into account the injury done since the writ, down to the trial, provided such injury flowed from the acts of defendant done before the bringing of the action, and which continued in their effects to the present time," we hold to be erroneous. It is in direct conflict with the case of *Moore* v. *Love*, decided at the last term, and reported, ante 215, but not published until since the trial of this cause. For

the reasons which are fully stated in that case, and which, therefore, need not be repeated here, we must reverse the judgment and grant a *venire de novo.*

PER CURIAM. Judgment reversed.

Den on dem. of WM. F. BAXTER *vs.* ISAAC BAXTER.

Where the demise in a declaration had expired before the trial in the Court below, this Court will allow an amendment without costs, though the defect was not noticed below, and the motion is first made in this Court.

THIS was an action of EJECTMENT, tried before his Honor, Judge MANLY, at the last Spring Term of Currituck Superior Court.

On the trial, the plaintiff proved that the lands belonged to one Jesse W. Doxey, who, by his deed of bargain and sale, for the consideration of one thousand dollars, conveyed the same in fee to the lessor of the plaintiff and the defendant, as tenants in common, and this suit was brought to recover possession of a moiety.

The only question in the Court below was in regard to the admissibility of the following evidence:

The plaintiff proved, that the lessor, William F., and the defendant Isaac, were co-sureties to Doxey on a certain administration bond, and that this deed was made to indemnify them against loss by reason of such suretyship; that subsequently to its execution, defendant had to pay $2000, one half of which was reimbursed him by the plaintiff, and the loss thus equally divided between them. This was before the bringing of the action. The evidence was objected to by the defendant, on the ground that it impeached the consideration set out in the deed, and that no other, or different consideration, could be shown.

His Honor, however, admitted the evidence, and charged

the jury that "there was no obstacle to the plaintiff's recovery on account of a want of consideration." To the admission of this testimony the defendant excepted. The jury found a verdict for the plaintiff, and the defendant appealed.

In this Court, it appearing from the record that the demise of five years laid in the plaintiff's declaration had expired before the trial in the Court below, the defendant moved in arrest of the judgment.

On the other hand, the plaintiff asked leave of the Court to amend the declaration by extending the term so as to embrace the present term.

This was opposed by defendant, on the ground that the plaintiff had been guilty of laches in not moving to amend in the Court below; but that at any rate he ought not to be allowed to amend except upon the payment of cost.

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

NASH, C. J. We cannot perceive the relevancy of the evidence offered by the plaintiff as to the payment of the $2000. It had nothing to do with the case. His Honor was correct in telling the jury that notwithstanding the evidence, there was no obstacle to the plaintiff's recovery on account of a want of consideration for the deed. The deed under which both parties claimed, expressed a consideration of one thousand dollars. Under the instruction of the Court upon other points, the jury rendered a verdict for the plaintiff.

The defendant's counsel here, moved in arrest of judgment, that the term set out in the plaintiff's declaration had expired before the rendering of the judgment. The plaintiff met this motion by a motion to amend in this Court; the matter not having been brought to the notice of the Court below.

The power of the Court to amend this defect is sustained by many cases. The proceedings in an action of ejectment are, throughout, fictitious, and the Court will mould them to the attainment of justice. The first case in which the question

was decided in this State, was that of *Young* v. *Erwin* in 1796: 1 Hay. Rep. 323. The Court there decide, after very able argument at the bar, that where the demise in a declaration of ejectment is about to expire before a trial can be had, the plaintiff will be permitted to amend by extending the term. In declaring their opinion, the Court, after adverting to some distinctions as to the time when such amendments will be allowed, say, since these distinctions were supposed to exist, it is established that the term will be extended at any time to meet the justice of the case; and such has been the practice from that time to this. Indeed, the only question in such cases is as to the terms upon which the amendment will be allowed. It is a general rule that where an amendment, necessary to the party asking it, is allowed, he must pay costs; sometimes the whole, up to making the amendment; in other cases, simply the costs of the term at which it is made. Where the allowing of costs is in the discretion of the Court, they will be allowed or not, as justice demands. If the party asking the amendment has been in fault in rendering it necessary, or is, by it seeking a benefit or interest, he must pay costs; but where he is in no fault, he ought to pay none. An ejectment is the creature of the Court; the demise in the declaration is a fiction, and its term immaterial: the leading object of the action being to try the title of the plaintiff. At the time the declaration was filed, the term stated was reasonable. The plaintiff had a right to expect to have his case tried within that time. The action was commenced in 1848, and was tried at Spring Term, 1853, when the plaintiff obtained a judgment, and the defendant appealed to this Court, where a *venire de novo* was awarded at December Term, 1853. So that the defendant was himself instrumental in occasioning the delay. If the motion to amend the demise had been made below, it would have been granted, and without costs. We cannot suffer the plaintiff to be deprived of the benefit of his judgment, or make him pay for an amendment rendered necessary by the law's delay.

The plaintiff has leave to amend the declaration by extend-

ing the term of the demise, and the judgment below is affirmed.

PER CURIAM. Judgment affirmed.

ANDREW J. BARWICK *vs.* JAMES WOOD.

Where both plaintiff and defendant claim under the same person, neither can be heard to deny that person's title, and neither can take any thing by showing an outstanding paramount title, unless he has procured that title, or can in some way connect himself with the true owner.

One who has a remainder in slaves in right of his wife after a life-estate in another, cannot pass the title during the life-estate; but if, during such life-estate the husband and wife make a deed of the slaves, and afterwards the life-estate fall in, the wife still being alive, the title will enure to the benefit of the grantee, by relation back, and will thus be perfected in him by estoppel.

A witness who swears that he is *well acquainted* with the hand-writing of a person, no question being asked him by the opposing party as to how he became acquainted with such hand-writing, is qualified *prima facie* to testify as to such hand-writing.

Whether this Court can, in a collateral proceeding, review the decision of a County Court in regard to the sufficiency of the evidence to establish the execution of an instrument as a will of personalty, if the error appear upon the face of the certificate of probate—*quare?*

THIS was an action of TROVER for the conversion of two slaves, Betsy and Allen, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1856, of Lenoir Superior Court.

This cause was before the Court at June Term, 1850, and reported in 11th Ire. Rep. 80, as *Barwick* v. *Barwick et al.* The plaintiff claims title to the slaves in question, by a deed or bill of sale from Joshua Barwick and Winefred his wife, executed in 1837, conveying their interest in a lot of negroes which are named, and which interest is recited as being derived to them under the will of Benjamin Sutton. Under this will, Sutton's whole negro property, with the land. &c., is giv-

en to his widow during her life, then to be equally divided between his four daughters, of whom Winefred, intermarried with Joshua Barwick, is one. The provision of the will as to this part, is as follows: "which they are to hold possession and enjoy during their natural lives; then my will and desire is, that at the death of my daughters, Nancy Sutton, Winefred Barwick, Mary Rouse, and Elizabeth Ellis, that the property heretofore mentioned that I lent to my beloved wife Sarah Sutton, is hereby intended to be also lent unto my four daughters here above mentioned, and at their death given to the lawful begotten heirs of their body."

Mrs. Sutton held these slaves, including the two in controversy from the death of her husband, which occurred about the year 1832, until her own death, which took place in 1846.

At the July term of the County Court of Lenoir, commissioners were appointed to divide the negroes according to the will, who did so, and their division was confirmed at the Term of the Court following; according to which proceeding, the slaves, Allen and Betsy, were allotted to Joshua Barwick and wife. On the 4th of November ensuing, they conveyed these two slaves to the defendant James Wood. Before the death of Mrs. Sutton, in the Spring of 1846, the plaintiff had got possession of the slaves as her bailee, and after her death retained them as his own property. In the latter part of October, 1846, the slaves were taken out of the possession of the plaintiff by the defendant Wood, in the night time, and carried South by the rail-road cars, and since then have not been heard from.

The defendant objected to the reception of the will of Benjamin Sutton as not having been duly proved. The certificate of probate relied on, is as follows:

State of North Carolina, } Court of Pleas and Quarter Ses-
Lenoir County. } sions, April Term, 1848.

"The foregoing last will and testament of Benjamin Sutton, sen'r., deceased, is offered for probate, and Luis C. Desmond and Wm. H. Croom being duly sworn, make oath and say, that they are well acquainted with the hand-writing of Abra-

ham Croom and Joshua H. Byrd, the subscribing witnesses to the said last will and testament of Benjamin Sutton, deceased, and that their respective signatures as subscribing witnesses to the said last will and testament of Benjamin Sutton, dec'd., are in the proper hand-writing of them the said Abraham Croom and Joshua H. Byrd, and they verily believe that the said Abraham Croom and Joshua H. Byrd affixed their said signatures as subscribing witnesses, respectively to the said will, and that the said Abraham Croom is dead, and that the other two subscribing witnesses, Joshua H. Byrd and Robert Mitchell, have long since removed from the State of North Carolina, and when last heard from, were citizens and residents of distant States; whereupon it is ordered by the Court that the said last will and testament of Benjamin Sutton, deceased, be recorded." W. C. LOFTIN, Clerk.

His Honor overruled the objection, and admitted the will, to which defendant excepted.

There was evidence offered on behalf of defendant, tending to show that at the date of the bill of sale, the plaintiff Joshua Barwick was in debt, and that the bill of sale was fraudulent as to his creditors. There was evidence also, tending to show that the defendant knew of the former conveyance at the time he purchased the slaves.

His Honor charged the jury, that "if the bill of sale to the plaintiff was made, not bona fide and for a full consideration, it was fraududent as to creditors, and also as to subsequent purchasers without notice. But that if the jury should be convinced that the bill of sale to the plaintiff was originally fraudulent as to the creditors of Joshua Barwick, yet if the defendant purchased with notice, the plaintiff would be entitled to recover; for the defendant not being a creditor of Joshua Barwick, if he purchased with notice of the plaintiff's claim, he purchased as a speculator, and must abide the consequences." To this charge defendant also excepted.

It was insisted by the defendant's counsel, that, as it does not appear from the record that the executors named in the will ever qualified, there could not be any assent to the lega-

cy, and therefore that the plaintiff conld not recover; and for the Judge's not so instructing the jury, the defendant further excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Bryan, for plaintiff.
Moore and *Dortch*, for defendant.

PEARSON, J. 1. The defendant has certainly no right to complain of the charge; the error was in his favor. It is settled that 27 Eliz. (Rev. Code, ch. 50, sec. 2,) which protects subsequent purchasers, does not embrace personal property, and the common law only protected against fraud, rights which existed at the time of the fraudulent conveyance. *Long* v. *Wright*, decided at this term, ante 290, and the cases there cited.

2. The defendant insisted that the plaintiff had failed to make out his title; for, that it did not appear from the probate of the will of Benjamin Sutton, that the executors, therein named had qualified. The reply is, in the first place, that both parties claim under deeds executed by Joshua Barwick, and it is a well established principle, that when the plaintiff and defendant both claim under the same person, neither can be heard to deny his title, and the controversy is narrowed down to the question, which of the two has derived the better title from him; and the defendant can take nothing by showing an outstanding paramount title, in a third person, unless he has procured that title, or can in some way connect himself with the true owner. In the second place, the possession of these slaves has been held under, and in pursuance of, the will, from 1832 to 1846, when the defendant took them out of plaintiff's possession, and this action was commenced. In fact the possession has been held under the will up to the present time, for the defendant claims under Joshua Barwick, who derived title under it. An executor may assent to a legacy before probate, and every presumption will

be made in support of a possession which has been held without interruption for so many years.

3. In 1837, the date of the conveyance to plaintiff, Joshua Barwick had but a remainder in right of his wife, after a life-estate in the widow, who was then living, and Barwick could not pass the title during her life. See this same case, 11 Ire. Rep. 80.

That is true, but in 1846 the widow died, and Barwick then took the slaves into possession, his wife being still living; this gave him the title which enured to the plaintiff's benefit by relation back, and, as is said in the books, "fed the estoppel." *Fortescue* v. *Satterthwaite*, 1 Ire. Rep. 566; *McNeely* v. *Hart*, 10 Ire. 63; *Christmas* v. *Oliver*, 2 Smith's leading cases, 417, 458.

4. The will was not admissible as evidence, because the probate shows on its face that it was taken upon insufficient evidence, in this, that the witnesses say merely "they were well acquainted with the hand-writing of the subscribing witnesses," but do not say they had ever seen them write, or state how they acquired a knowledge of the hand-writing; for this *Carrier* v. *Hampton*, 11 Ire. Rep. 307, is relied on.

We think when a witness states he is *well acquainted* with the hand-writing, he is qualified to testify to it *prima facie*; and that the mode by which he acquired his knowledge is a matter for cross examination. As, when the witness says he is well acquainted with the general character of a person, he may say what it is, unless upon enquiry as to how long he had known the person, how far he lived from him, &c., it be shown that he had not the opportunity of becoming so well acquainted with it as to qualify himself to speak to it. So this case is distinguishable from *Carrier* v. *Hampton*; for there the witness did not say he was *well* acquainted with the hand-writing, or even that he was acquainted with it; but swore merely that the signature was in the hand-writing of the grantor.

5. It was assumed in the argument that this Court can review the decision of the County Court in regard to the suffi-

ciency of the evidence to establish the execution of an instrument, as a will of personalty, if the error appears on the face of the certificate of probate. We are not now called upon to decide the question, and therefore leave it open; because, supposing we have the power to review the decision of the County Court in this collateral way, we are of opinion there is no error, and refer to the point now, by way of *protestando*, which is the "exclusion of a conclusion." In *Marshall* v. *Fisher*, 1 Jones' 111, the Court being of opinion there was no error in regard to the probate of the devise, this point was not adverted to.

The probate of a deed for the purpose of registration, is an *ex parte* proceeding, and when it is offered in evidence the Court may treat the probate as inoperative, if an error appears on the face of the certificate of probate, *Carrier* v. *Hampton*, supra; *Horton* v. *Bagley*, 1 Hawks' Rep. 48; *Beckwith* v. *Lamb*, 13 Ire. Rep. 400. Indeed, that is the only way in which the validity of the probate of the deeds of *femes covert* can be examined. But there may be a distinction between this class of cases and the probate of wills of personalty. In England the Ecclesiastical Court has exclusive jurisdiction; the question of the execution of a will is tried by the certificate of the ordinary, and the Courts of Common Law do not review his decision, holding that it cannot be impeached collaterally, and must be set aside by a direct proceeding in the Court of probate. In this State the County Court is substituted in place of the Ecclesiastical Court, with the right of appeal, which is quite different from an *ex parte* probate; and it would seem that when a Court has exclusive jurisdiction, and a case is properly constituted before it, its action must be conclusive until it be reversed. It is otherwise when there is a want of jurisdiction, or when it appears on the face of the proceedings, that the case was not properly constituted before it, as if process was not served on the party whose rights are to be affected by the judgment or decree. *Irby* v. *Wilson*, 1 Dev. and Bat. Eq. 568; *Drake* v. *Merrill*, 2 Jones' Rep. 368. So, a grant, issued by a proper authority of land subject to grant,

cannot be impeached collaterally in an action of ejectment on the ground of irregularity or fraud in obtaining it; but if it be of land not subject to entry, it is treated as *void*, and the objection may be taken in an action at law. *Stanmire* v. *Powell*, 13 Ire. Rep. 312; *Stanmire* v. *Welch*, ante 214.

PER CURIAM. Judgment affirmed.

Den on Dem. of JOHN W. REGISTER *et al. vs.* SAMUEL ROWELL.

Where a party is in possession of land, and registered deeds are produced, purporting to convey to him the land in question, nothing else appearing, it will be taken *prima facie* that he entered, and holds under such deeds.

Where plaintiff and defendant both claim under the same title, it is not competent for either party to deny such title.

A life-estate, conveyed by the premises and habendum of a deed, cannot be enlarged into a fee by words of inheritance contained in the warranty or covenant for quiet enjoyment.

A warranty in a deed is co-extensive with the estate to which it is annexed, and when the estate ceases the warranty ceases.

ACTION of EJECTMENT, tried before his Honor, Judge ELLIS, at the Fall Term, 1855, of Brunswick Superior Court.

The lessors of the plaintiff are the heirs-at-law of one Kilby Register, who died about the year ——, before the bringing of the suit. No grant from the State was shown by the lessors of the plaintiff, but to make good their title they showed that the defendant also claimed title through their ancestor, the said Kilby Register. To show this, they introduced deeds from Kilby Register to Niram Skipper, from Niram Skipper to Daniel Skipper, and from him to the defendant. The deed from Register to Niram Skipper does not contain in the premises or habendum, any limitation to his heirs nor any other words of inheritance, though the warranty is to him and his heirs; and it being proved that Niram Skipper was dead before the

bringing of this suit, it was insisted that the plaintiffs were entitled to the land as their reversion.

It was insisted below for the defendant, that there was no evidence that he, or those under whom he claimed, ever entered under the deed from Register to Niram Skipper, or in any way set it up or claimed under it; also that the lessors, as the heirs of Kelby Register, were rebutted from claiming the premises against the warranty of their ancestor, and that they were bound thereby.

The Court charged the jury, that the deed from Register to Skipper conveyed but a life-estate, and that the clause of warranty did not help the defect in the premises and make it other than a life-estate in Niram Skipper. His Honor also charged that the chain of conveyances from Register to defendant, made it unnecessary for plaintiff to go farther back to establish title, for that both plaintiff and defendant claiming under Register are both concluded from denying his title; also, that the heirs of Register were not rebutted from claiming against the warranty. Defendant excepted to all the positions of the charge.

Verdict for plaintiff. Judgment and appeal.

London, for plaintiff.
Strange, for defendant.

BATTLE, J. The lessors of the plaintiff seek to recover the land in dispute from the defendant upon the ground, that he is in possession, claiming under a deed from their ancestor Kilby Register, and that the deed conveyed only a life-estate which has expired by the death of the grantor. The defendant objects, *first*, that the lessors of the plaintiff had not shown that he claimed under the deed of their ancestor; *secondly*, that if such fact were shown, the deed, upon a proper construction of it, conveyed an estate in fee simple instead of for life only; and that at all events the lessors were rebutted by a clause of warranty, contained in the deed, from claiming the land therein conveyed.

The first objection is clearly untenable. The lessors hav-

ing first proved that the defendant was in the possession of the premises sued for, produced registered deeds, showing an apparent chain of title from their ancestor to him. Surely, that was at least *prima facie* evidence that he was in possession, claiming under such title. If, in truth, he entered under a different title, and had no connection with that derived from the ancestor of the lessors, he was at liberty to show it; but in the absence of such proof, the presumption was, that he was in under the deeds which had been proved and registered, and as we must suppose, proved and registered by those who apparently took an estate under them. The case then is one where, in ejectment, both parties claim under the same title; in which it is not competent for either to deny such title. It is not, as we have said several times recently, a case strictly of estoppel, but one founded in justice and convenience, and the question will be, which of the parties has the preferable title derived from the common source? See *Johnson* v. *Watts*, 1 Jones' Rep. 231; *Thomas* v. *Kelly*, Ibid 375; *Feimster* v. *McRorie*, Ibid 547. The defendant may indeed, if he can, defend himself by showing that he has obtained the better title from some person who had it, but he is not allowed to defeat the claim of the lessors by showing such better title outstanding in a third person. *Love* v. *Gates*, 4 Dev. and Bat. Rep. 363; *Copeland* v. *Sauls*, 1 Jones' Rep. 70. The defendant in the present case, having made no attempt to show a better title in himself derived from a third person, the question arises, which party has obtained the preferable title from Kilby Register, the person under whom both claim?

And this brings us to the second ground of the defense, to wit: that the deed of Kilby Register to Niram Skipper, under which he derives his title, conveyed a fee simple and not a mere life-estate, as contended for by the lessors.

In no part of the deed in question is there any limitation to the heirs of Niram Skipper, though the title of the land is warranted to him and his heirs. That a life-estate contained in the *premises* and *habendum* of a deed cannot be enlarged into a fee, either by a warranty or covenant for quiet enjoy-

ment in fee, is abundantly shown by adjudicated cases. *Roberts* v. *Forsythe*, 3 Dev. Rep. 26; *Snell* v. *Young*, 3 Ire. Rep. 379. This rule, standing upon principle as well as authority, is not at all impugned by the cases cited for the defendant, of *Armfield* v. *Walker*, 5 Ire. 580, and *Cobb* v. *Hines*, Busb. Rep. 343.

The only remaining objection is that the lessors of the plaintiff, as the heirs-at-law of Kilby Register, are rebutted from claiming the land, by the warranty of their ancestor. This objection is met by the decisive answer, that the warranty ceases when the estate to which it is annexed determines. *Seymore's* case, 10 Coke's Rep. 96, 97; *Lewis* v. *Cook*, 13 Ire. 193. Upon the death of Niram Skipper his estate in the land was determined, and the heirs of the grantor were no longer rebutted from setting up their claim. There is no error in the judgment of the Superior Court.

PER CURIAM. Judgment affirmed.

ANGUS CURRIE *vs.* JOHN M. WORTHY.

A creditor who opposes the discharge of his debtor in execution, after a voluntary escape known to the creditor at the time of his opposition, does not waive his cause of action for the escape.

Under the Act of Rev. St. ch. 109, sec, 20, the plaintiff is entitled to interest on a recovery in debt for an escape, against the sheriff in the same way he would be entitled against the debtor.

THIS was an ACTION of DEBT against the defendant, who was lately the sheriff of Moore County, for an escape, tried at the Spring term, 1856, of the Superior Court of that County, before his Honor, Judge CALDWELL.

The plaintiff had obtained a judgment, at the July Session, 1849, of the County Court, against one John M. Currie, upon which he took out a *capias ad satisfaciendum* and had him arrested, and the latter gave bond for his appearance, un-

under the act for the relief of insolvents. At the return term of the ca. sa. an issue of fraud was made up and tried, which issue was determined against the defendant, and the Court adjudged that he should be imprisoned until he should make a fair disclosure of his property and effects. Under this judgment he was committed to the custody of the sheriff of Moore County, and confined in jail. While in jail, about Oct. 1850, the door of the debtor's room, in which he was imprisoned, was left open, and the prisoner was, on several occasiǒns, seen to pass through that door into the jailor's apartment, the outer door of which opened into the street, and was not at that time locked. Afterwards, at January Session of the County Court, the prisoner filed another schedule, and offered to take the oath of insolvency, which was opposed by the plaintiff. The cause being continued at the instance of the plaintiff who was not ready for trial, the defendant then proposed giving a bond for his appearance at the next term of the Court, which was also opposed by the plaintiff. This motion was refused by the Court, and the debtor again committed to the defendant's custody. The debtor was continued in jail until February Term, 1851, of the Superior Court, when he was taken out of jail by a writ of *habeas corpus* and discharged. His discharge, under this writ, was also opposed by the plaintiff.

It was insisted for the defendant, that the conduct of the plaintiff in opposing the discharge of the debtor after he knew of the escape, was a waiver of the cause of action against the sheriff, and asked his Honor so to charge the jury. The Court refused so to instruct; for which the defendant excepted. Verdict for plaintiff.

The judgment of the Court below is for the sum of $195.51, with interest from the 1st of January, 1849, until the 4th Monday in July, 1849. It was insisted for the defendant in this Court, that that part of the judgment which allowed interest was erroneous, and ought to be set aside.

Moore and *Mendenhall*, for plaintiff.
Winston Sen., and *Kelly*, for defendant.

PEARSON, J. Where there is a voluntary escape, the sheriff is guilty of a wilful tort and breach of duty, whereby he becomes liable under the statute for the amount "mentioned in the execution, and damages for detaining the same." If the creditor afterwards receives his money from the debtor, this extinguishes his cause of action, and of course he cannot look to the sheriff and have the debt paid a second time. But it is insisted, that if the creditor endeavors to make the money out of the debtor, by "affirming" him in execution and forcing him to discharge his body under the insolvent laws, although the creditor does not receive one cent of his debt, the mere act of affirming the debtor in execution is a waiver of the creditor's cause of action against the sheriff.

If this be so, it greatly curtails the rights of the creditor under a statute which was made for his benefit, and enables the sheriff to take him at a disadvantage, and evade that responsibility which the statute imposes as a punishment for a wilful wrong; for the sheriff, without concluding himself as to the fact of an escape, is allowed to say to the creditor, "if you affirm the debtor in execution, you do so at the risk of forfeiting your remedy against me. If you do not affirm him in execution, it is my duty to discharge him, and you take the risk of being able to prove the escape!"

When the creditor, after failing to make his debt out of the debtor, sues the sheriff, and the defense is put on the ground that he affirmed him in execution, it is trifling with him to say he had notice of the escape; for he may know many things that he is not able to prove; and this matter was peculiarly within the knowledge of the sheriff, and he no doubt can prove it if it becomes his interest to do so, Besides, why should the creditor be required to decide what in law amounts to an escape, which may be a very difficult question. This case furnishes a very apt illustration; the defense was, at first, put on the ground that the facts which the creditor was then able to prove, did not in law amount to an escape, and it was so held by this Court. *Currie* v. *Worthy*, 2 Jones' Rep. 104. On the second trial, the plaintiff having succeeded in

procuring testimony enough to prove an escape, the defense is then put on the ground, that by affirming the debtor in execution, the remedy against the sheriff was forfeited! This is not right.

It remains to be seen whether there is any principle of law which leads to this result; or whether the doctrine is fixed by adjudicated cases.

It is a well-settled principle, that if a creditor consents to release from prison a debtor, who is in under execution, the *debt* is thereby discharged; and it was formerly the law, as understood about the reign of Queen Elizabeth, that a voluntary escape of a prisoner, in execution, completely discharged him from the debt; so that neither the plaintiff nor the sheriff could retake him. This was upon the idea that a creditor, by suing out a *capias ad satisfaciendum*, took the body of the debtor to *satisfy* his *debt*, and it was thereby satisfied, notwithstanding the escape; the sheriff could not retake him, because he had consented to the escape; and the creditor could not, because his debt was satisfied: the sheriff, on consenting to the escape, being supposed to act as the agent of the creditor, to whom he was responsible for the debt. This view of the law, in regard to the rights of the creditor, has been since greatly changed by the Courts. In the time of Charles the II, and of William and Mary, it was held that after a voluntary escape, the creditor was entitled to a *new process* against the debtor, and was not confined exclusively to his remedy against the sheriff, who might, perhaps, be unable to indemnify him. 2 Mod. Rep. 136; 1 Lev. 211; 1 Salk. 271. So, in 1 Rolle's Abrgt. 901, 902, it was resolved "if A be in execution at the suit of B, and escape with the consent of the sheriff, and afterwards he return, or the sheriff retake him, he shall be again in execution to B; for although B may bring an action against the sheriff for this voluntary escape, yet this is at his election, and it may be that the sheriff is incompetent to make recompense." It obviously could make no difference whether the debtor was retaken by new process, or returned voluntarily, as his return made it unneces-

sary to take out new process. So, it was held, that if after a voluntary escape, the debtor returns, and is delivered over by the sheriff to his successor in office, and there is a second voluntary escape, the creditor may sue either the old or the new sheriff. 2 Lev. 109, 132; 6 Mod. Rep. 182. Many other instances might be referred to, to show that the Courts gradually discarded the old notion that the body of the debtor was taken to satisfy the debt. Our insolvent laws put the matter upon entirely a different footing; and the writ of *capias ad satisfaciendum* is treated merely as one mode of compelling the debtor to satisfy the debt, and a means of subjecting property which is fraudulently concealed, or which, from its nature, cannot be reached by a *fieri facias*. These statutory provisions establish a new principle, and there is no kind of inconsistency in allowing a creditor to try to get his debt by holding his debtor in execution, and, failing in that, then to have recourse to the remedy which the statute has provided for him against the sheriff, if he can prove a voluntary escape. Upon what ground can the sheriff object to the creditor's endeavor to make as much as he can out of the debtor? All that is obtained in this way operates *pro tanto* as a discharge of the sheriff. So it is really for his benefit that the creditor shall proceed against the debtor.

There is no case in this State which establishes a different doctrine; and the counsel for the defendant, in a very elaborate argument, was unable to cite a single case, either in England or the United States, in which it is decided that a creditor, by affirming his debtor in execution, loses his remedy against the sheriff. It is true there are some general remarks in the cases which look that way, but these dicta do not fix the law; and I will take occasion to say, that the habit in which Judges, particularly on this side of the Atlantic, indulge, of writing *dissertations* instead of confining themselves to the point presented by the case, which is done either to display their learning or to save others from the trouble of thinking, so far from tending to fix the law, tends to unset-

tle it, and create confusion. We concur with the opinion of his Honor, in the Court below.

The defendant's counsel insisted that interest ought not to have been allowed, and relied on *Lash* v. *Ziglar*, 5 Ire. Rep. 702. It is there so decided. The Court say, "we are of opinion, from several decided cases in New York, on statutes *similar to our own*, that the plaintiff cannot have interest by way of damages, after the date of the judgment against Martin, although he might have had interest against Martin himself, up to the payment of the judgment. *Thomas* v. *Weed*, 14 John. 255; 2 John. 453; 1 Wendell 401."

We have examined the case of *Littlefield* v. *Brown*, 1 Wendell 401. The Court say, on the question of interest, "the statute (1 R. L. 425, sec. 19,) makes the sheriff answerable *for the debt and damages* for which the prisoner was committed. This was so decided in *Rawson* v. *Dole*, 2 John. 454, and in *Thomas* v. *Weed*, 14 John. 255, where it is stated that the plaintiff had his election to bring debt upon the statute, and recover what the statute gives, &c." By reference to our statute it will be seen that it gives "all such sums of money as are mentioned in the *execution*, and *damages* for *detaining* the same." Rev. Stat. ch. 109, sec. 20. So, the wording of our statute is not *similar* to the New York statute, but is essentially different. This was evidently an inadvertence on the part of the Court, caused by not referring to our statute. The plaintiff is entitled to interest against the sheriff, up to the time of the payment of the judgment, in the same way as he would be entitled against the debtor.

PER CURIAM. Judgment affirmed.

JAMES W. BELL *vs.* WALKER & HERRINGTON.

In an action for the breach of a covenant to teach an apprentice a trade, it is not competent for the defendant to show that he kept the apprentice at

work with other apprentices of the same experience, and made no distinction between them; such evidence having no tendency, by itself, to show that the defendant had performed his covenant.

THIS was an action of COVENANT, tried before his Honor, Judge MANLY, at the Spring Term, 1856, of Washington Superior Court.

The covenant declared on was an agreement, under seal, to take three negro slaves, Peter, Rhoden and Abbot, and to teach them the *ship-carpenter's* and *caulker's trade.* The breach alleged was, that the defendants had not taught or caused to be taught the said slaves the trades, as stipulated in the contract.

In the course of the trial, evidence was offered to show that the slaves were employed in the ship-yard of defendants as other apprentices of the same experience, and that no distinction was made between them and the others. This evidence was objected to by plaintiff, but received by the Court. For which plaintiff excepted.

There were other points made in the bill of exceptions, but as the above only is considered by the Court, they are omitted.

Verdict for plaintiff for nominal damages. Judgment and appeal by the plaintiff.

No counsel appeared for the plaintiff in this Court.

E. W. Jones, for defendants.

BATTLE, J. The only question made on the motion for a new trial in the Court below was, that improper testimony had been admitted, and to that we shall confine our attention. The ground of the objection is, that the testimony that the plaintiff's slaves were employed in the ship-yard of the defendants in the same manner as their other apprentices, did not show, nor tend to show, that they were properly employed in learning the trade of ship-carpenters and caulkers, and was therefore irrelevant, and ought to have been rejected. It is often difficult to draw the line which separates testimony which is irrelevant, because it is incapable of affording a rea-

sonable presumption or inference of the fact in dispute, from that which does tend, in some degree, however slight, to prove such fact. The first is not admissible, and the second is; and hence there is a necessity that the line should be drawn. The duty of doing it is imposed upon the Court; and so imposed for the purpose of preventing the minds of the jurors from being drawn away from the point in issue, and from being prejudiced and misled by immaterial matters. In performing this duty, it seems to us that the testimony in question is obnoxious to the objection urged against it. There was no proof, nor any offer of proof, that the defendants' other apprentices were properly instructed in the trade which the defendants were bound by their covenant, to teach the plaintiff's slaves. We are to assume, though it is not expressly stated, that the plaintiff had introduced testimony sufficient to make out a prima facie case of a breach of the defendants' covenant. It was then incumbent upon the defendants to rebut that testimony. Could it be rebutted, either wholly, or partially, by proof that plaintiff's slaves were as well taught as the other apprentices of the defendants, when it did not appear whether the latter were well or ill taught? It seems to us that for the want of such proof, admitting it to be competent, the testimony became irrelevant and ought to have been rejected, because it was calculated to mislead the jury by withdrawing their attention from the true enquiry before them. In the case, *Carter* v. *Pryke*, Peake's cases 95, cited in 1 Greenl'f. on Ev., sec. 52, where the question between landlord and tenant was, whether the rent was payable quarterly or half yearly, evidence of the mode in which other tenants of the same landlord paid their rent, was held to be inadmissible. But we presume the evidence would have been received had it been shown that the party held upon the same terms with the other tenants.

As the plaintiff may have been injured by the reception of the improper testimony, he is entitled to have the verdict and judgment set aside, and a *venire de novo* awarded to him.

Per Curiam. Judgment reversed.

HARRIET OWENS *vs.* JASPER CHAPLAIN.

It is error in a County County to order the cancelling of an indenture of apprenticeship which has been rightfully and properly granted, except for some of the causes enumerated in the Act of Assembly. Rev. Code, ch. 5, sec. 3.

Although it is usual to have the apprentice present in Court when he is bound out, yet there is no provision in the Act which requires it.

THIS was a motion, upon notice to the defendant to show cause why a certain colored apprentice, by the name of Polly Gordon, should not be taken from him and bound to the plaintiff, heard before his Honor, Judge MANLY, at the Spring Term, 1856, of Currituck Superior Court.

On the return of the notice the County Court of Currituck granted the motion and awarded that the defendant should pay costs. From that order, the defendant appealed to the Superior Court, which affirmed the order of the County Court, and the defendant appealed to this Court.

In 1851, the child in question had been bound at about the age of five years, by the County Court of Currituck, to one Frederick Owens, a colored man, who kept her till some time in the year 1854. In October of that year, this man Owens went on a voyage to the West India Islands, and has not been since heard from. The apprentice continued with his widow, the plaintiff, until some time during that year, when she was taken out of her custody by the defendant. The usual order for binding was obtained by the defendant, who entered into bond in the usual covenants to provide for the apprentice. No notice had been given to Harriet Owens of defendant's intention to apply for this girl, nor was the apprentice present when she was bound to defendant. It appeared that the defendant is a man of good character and a suitable and proper person to be entrusted with an apprentice.

Judgment for plaintiff, that the indenture should be cancelled and the apprentice bound to plaintiff, from which judgment defendant appealed.

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

NASH, C. J. Every indenture of apprenticeship is a contract made between the regular and proper authority, the County Court, and the master, for the benefit of the apprentice. Both the master and the apprentice have an interest in it; the former in the services of the infant for the time specified in the deed, and the latter in the instruction and maintenance by the former for the time of his servitude. This contract, as between the parties to it, is as binding as any other, made between individuals competent to contract, and neither has the power, at his mere will, to annul it. Notwithstanding, however, this binding efficacy of the indentures, the County Court still possesses a supervising power as to the apprentice. If it shall be made known to them that the apprentice is ill-used, or not taught the trade, profession or employment to which he is bound, or in the case of a white orphan, is not taught reading, writing and arithmetic, the Court may cancel the indenture, and bind the infant to some other person. Rev. Code, ch. 5, sec. 3. This binding an apprentice is a personal trust, and the master cannot therefore transfer the indenture; and when he die swithin the time limited, the trust expires and the orphan returns under the immediate jurisdiction of the County Court, to be again bound out. *Futrell* v. *Vann*, 8 Ire. Rep. 402. The case states that at August Term, 1851, of Currituck Court, Polly Gordon, a free child of color, was bound apprentice to Frederick Owens, and that the latter left the State in October, 1854, and has never since been heard from. At May Term, 1855, upon the application of the defendant, the child was bound to him, and regular indentures executed.

The first inquiry is, had the Court at May Term any power to bind the orphan to the defendant? We think they had. Frederick Owens had been gone from the State seven months, upon a voyage to the West Indies, which is usually performed in as many weeks. There was then a dereliction of duty

on his part to his apprentice, either voluntary or involuntary; if involuntary, as by reason of his death, no doubt could exist as to the right of the Court to bind the child to some other person, for his interest had ceased; if voluntary, then he had, himself, abandoned his duty and thrown the child upon the public. By the equity of the act cited, it would be such a neglect in giving her instruction in her profession or employment, as would authorise the action of the Court in 1855.

As the Court had the power to re-bind the orphan, we are bound to presume that they had sufficient ground to act on. The contract of indenture made in 1855, whereby the Court bound the orphan to the defendant, was a valid one, and it was not in the power of the Court to deprive him of his interest in it, except for the causes enumerated in the act, or such as come within its equity. The case states that the defendant was a man of good moral character, and such a one as it was proper to bind apprentices to; and further, that he had faithfully discharged his duties as master of the orphan.

It is stated in the record, that the child, Polly Gordon, was not present when she was apprenticed to the defendant, nor was any notice served upon Harriet Owens of the intention of the defendant to apply to the Court to have her bound to him. There is nothing in the act requiring the presence of the orphan when the binding takes place, though it is usual. Here it was not required, for the Court had, upon its records, the age of the child in the indentures previously entered into by Owens, and the only object which could be answered by having the child before them would be to enable the Court to form for themselves a judgment of its probable age.

As to the notice to Harriet Owens, none was necessary; she had no interest in the question. If her husband is still alive, the indenture being with him, she has no interest in the question; if dead, it is at an end.

There is error in the opinion of the Court below, which is reversed, and the notice to cancel the indenture of apprenticeship to the defendant is dismissed.

Per Curiam. Judgment reversed.

Doe on the dem. of JOHN WARD *et al. vs.* EBEN HEARNE.

A devise of land lying in this State, by a citizen of another State, can have no *validity or operation* unless it is 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.

THIS was an ACTION of EJECTMENT, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Stanly Superior Court.

On the trial of the cause the plaintiff offered in evidence a copy of the last will of William Thornton, who resided, before and at the time of his death, in the District of Columbia; in and by which he devised to his wife, A. M. Thornton, certain real estate in the County of Montgomery, now Stanly, a part of which is the subject of this suit. The introduction of the will was opposed by the defendant, on the ground that it did not appear from the certificate of probate, in Stanly County Court, that it had been proved before the said Court, as required by the act of 1844.

This certificate is as follows:

"State of North Carolina, } Court of Pleas and Quarter Ses-
Stanly County. } sions, May Term, 1853.

It appearing to the satisfaction of the Court that the last will and testament of William Thornton, herewith attached, has been duly proved in the proper Court, in Washington County, District of Columbia, according to the laws: and it further appearing to the satisfaction of the Court, that the said will and testament was executed according to the laws of the State of North Carolina, and is of sufficient validity to pass lands in the State of North Carolina: It is therefore ordered by the Court that the said last will and testament be allowed, filed and recorded in this Court.

Witness, Richard Harris, Clerk of said Court, at office, the 2nd Monday in May, 1853, and the 77th year of American Independence.

R. HARRIS, Clerk."

The Court being of opinion "that it was to be inferred from said certificate that said will had been proved as by said statute required, received said copy in evidence. To which the defendant excepted."

Verdict for the plaintiff. Judgment and appeal to this Court by defendant.

Moore, *Bryan* and *Mendenhall*, for the plaintiff.
Ashe, for the defendant.

PEARSON, J. In *Drake* v. *Merrill*, 2 Jones' Rep. 368, it is said: "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 that the execution of a deed or other conveyance of land is proved."

It is also said, in *Ward* v. *Hearne*, Busb. Rep. 184: "The acts of 1784, 1835, and 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 distinction is pointed out:—the statutes are discussed and explained in regard to devises, and it is decided that a devise of land, situate in this State, can have no validity or operation unless its execution is proved, by the oath of witnesses, before the proper Court in this State.

In our case, the order of the County Court of Stanly "that the will be allowed, filed and recorded," was made upon the certificate of *probate*, taken before a Court in Washington County, District of Columbia. So, the execution of the instrument as a *devise*, as distinguished from a will of personal property, has not been proven by *the oath of witnesses* before the proper Court in this State. There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

WILLIAM C. LOFTIN *vs.* JOHN M. ALDRIDGE.

An agent of the plaintiff having with him several notes of the defendant, demanded payment, but did not exhibit the notes or any account, to which defendant replied that "he had claims against the plaintiff, and would see L. (plaintiff) and settle." Another agent for plaintiff presented the notes and an account together, and stated the amount of the whole, but did not state the amount of the account separately; to whom defendant replied, "he would call and settle or attend to it." Neither of these coloquies, nor both together amount to the recognition of any certain debt, so as to take the account out of the operation of the statute of limitations.

THIS was an ACTION of ASSUMPSIT, tried before his Honor, Judge SAUNDERS, at the Spring Term last, of Lenoir Superior Court. Plea, statute of limitations.

The only question was, whether there had been a sufficient new promise to take the case out of the statute. The evidence upon this point was, that after the account sued on had been barred by the lapse of time, one *Hill*, as agent of the plaintiff, applied to defendant for payment, who replied that "he had claims against the plaintiff, and that he would see Loftin and settle." This witness further stated that he did not present any account, but had certain notes with him which defendant owed the plaintiff. Another witness, one *Rountree*, stated that he presented the account in question to the defendant with certain notes due by defendant to plaintiff; that he did not tell him the amount of the account, but he did tell him the total amount of both; that the defendant did not examine the account, but said "he would call down the next Saturday at plaintiff's store and settle or attend to it."

The Court instructed the jury, that upon this evidence the plaintiff was entitled to recover.

Verdict for the plaintiff. Judgment and appeal.

No counsel in this Court for plaintiff.
G. Green, for defendant.

BATTLE, J. The case of *Shaw* v. *Allen*, Busb. Rep. 58, is

very much like the present, and is decisive of it. The testimony of neither of the witnesses shows the acknowledgment of any certain debt from which a promise to pay it can be implied, nor does it furnish any data from which the acknowledgment and consequent promise to pay any certain debt can be deduced. Each of the witnesses states that he had notes as well as the account in question, in favor of the plaintiff against the defendant, and that the latter did not examine the account, nor was he told what was its amount. His reply to the demand for the payment of the notes and account together was, to the first witness, that he had claims against the plaintiff, and he would see him and settle; and to the second witness, that he would call at the plaintiff's store and settle or attend to it. Settle what? The notes or account? It may be assumed that he meant either or both. If it be taken that he meant either the notes *or* account, then of course, it is left altogether uncertain which he meant, and there cannot be implied a promise on his part to pay the account as a certain debt. If it be taken that he meant both notes and account, then it does not appear that he knew what the account was, for he neither examined it, nor was informed of its contents, nor even of its amount. His attention was not called to the account as a claim separate and distinct from the notes, and the law will not entrap him into an acknowledgment of it, and thence imply a promise to pay it, from his reply that he would call and settle, or attend to it. The defendant had said to the plaintiff's first agent that he had claims against the plaintiff, and his response to the second shows that he was not willing to pay even the notes without further enquiry, and a credit for his counter claim. It would be going much too far to say that he admitted the correctness of a stale account which does not appear to have been exhibited to him, and of the amount of which he was not informed. We are unwilling to relax in the slightest degree the salutary principle established by all the later decisions of this Court, that "to repel the statute of limitations, there must be a promise to pay the debt sued on, either expressed or implied, and the terms used" (must be

certain of themselves or) "must have sufficient certainty to give a distinct cause of action, by the aid of the maxim, *id certum est quod certum reddi potest.*"

PER CURIAM. The judgment is reversed and a *venire de novo* awarded.

EDWARD BURRAGE *vs.* JAMES M. CRUMP.

A contract to pay a certain sum, or return a lease within ninety days, will be construed as a penal obligation, and not an agreement to pay the sum as stipulated damages.

THIS was an action of DEBT, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Montgomery Superior Court.

The plaintiff declared on the following written contract: "Received of E. Burrage one lease on the Eli Russell Mine, for which I agree to pay him three thousand dollars or return the lease in ninety days. Feb. 9th, 1854."

The plaintiff proved its execution and stopped his case.

The defendant offered to prove that the lease on the Russell Mine was valueless, or of small value, insisting that the sum mentioned in the contract was a penalty. This evidence was rejected by the Court, for which defendant excepted.

There was a verdict and judgment for $3000 and interest. Appeal by defendant.

No counsel appeared for the plaintiff in this Court.
Ashe and *G. C. Mendenhall*, for defendant.

NASH, J. C. There is error in the Judge's charge and there must be a *venire de novo*. The action is brought on the contract set out in the bill of exceptions. It is loosely expressed, but we gather from it that three thousand dollars was the con-

sideration to be paid for the lease of the Russel mine, with liberty to the defendant to repudiate the contract, if, at the end of ninety days, he should choose to do so, to be evidenced by a return of the lease. The breach assigned is, that the defendant did not return the lease at the end of the agreed time. On the trial below, the defendant insisted that the sum of $3000 was a penalty, and offered to prove that the mine was of little or no value. This evidence was rejected. The correctness of the opinion of the Court rested upon the question, whether the sum mentioned was a penalty, or liquidated damages. If the latter, the testimony was properly rejected; if the former, there was error. Upon this question, the case of *Thoroughgood* v. *Walker*, 2 Jones' Rep. 15, is decisive. The doctrine is elaborately examined by the Court, in their opinion. They say, "in the case of an agreement to do, or to refrain from doing, any particular act, secured by a penalty, 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."

They further go on to say, that even in contracts where the parties in their agreement term the damages "liquidated damages," the sum mentioned, to do justice between the parties, may be considered a penalty. Their language is, "that where the contract is such that the strict construction of the phraseology would work an absurdity or oppression, the use of the term 'stipulated damages' will not prevent the Courts from enquiring into the actual injury sustained, and doing justice between the parties." Several cases are cited to sustain this position. Whether, therefore, the words liquidated damages are used in the contract or not, if its strict construction is absurd or lead to oppression, the Courts will consider the sum mentioned a penalty, and not liquidated damages. This doctrine is sustained by Sedgewick, on damages, 399. His language is, the Courts, especially in this country, have generally shown a marked desire to lean towards the construction which excludes the idea of liquidated damages, and permit the party to recover only the damages which he has actually

sustained. The language of the contract is not controlling. If the word penalty is used, it will never be construed as a sum absolutely fixed; but the reverse is by no means the case, and the phrase "liquidated damages," has been often made to read "penalty." To consider the sum mentioned in the contract as liquidated damages, would be absurd and oppressive on the defendant. We hold, therefore, that it is a penalty; the injury to be compensated to the plaintiff by the jury, in damages equivalent to the injury actually sustained. His Honor, therefore, erred in refusing the evidence tendered by the defendant.

In this enquiry, it is not material to ascertain whether the evidence offered would have proved that for which it was offered. Being rejected, it is to be considered now, as if the mine was of little or no value. To give the construction to the contract that is contended for on behalf of the plaintiff, would lead to the absurdity of making the defendant pay $3000 for not returning the paper on which the lease is written; and it would be oppressive in the extreme.

His Honor also erred in giving the plaintiff interest on the sum mentioned in the contract. See *Devereux* v. *Burgwyn*, 11 Ire. 490, where the principle governing interest is discussed.

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

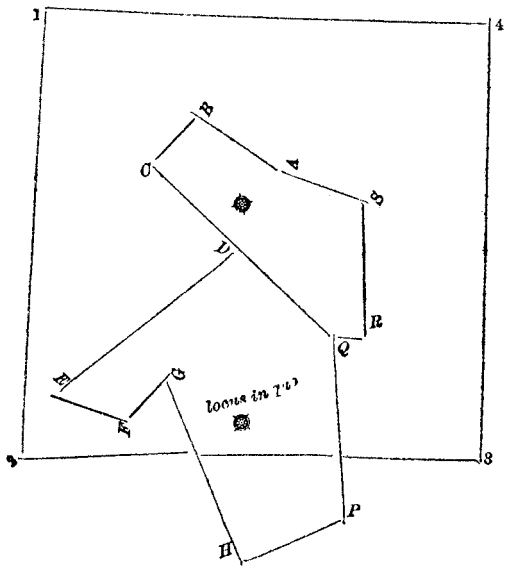
DUNCAN McCORMICK *vs.* CHRISTOPHER MUNROE.

If two grants lap, and one of the claimants be seated on the lapped part, and the other not, the possession of the whole interference is in him who is thus seated.

One who has possession of the *locus in quo*, by reason of the lappage of his grant with an older adversary grant, may maintain *trespass* against one who enters under a grant younger than his.

ACTION of TRESPASS, Q. C. F., tried before CALDWELL, J., at the Special Term (Feb. 1856,) of Cumberland Superior Court.

The plaintiff offered in evidence a grant from the State to himself, for 500 acres of land, issued on the 15th of December, 1845, described in the annexed plat by the letters A, B, C, D, E, F, G, H, P, Q, R, S, and proved that the defendant had committed a trespass within these boundaries in the winter of 1853-4, by cutting and hauling therefrom a quantity of pine timber. It was proved that plaintiff took possession of the north part of this tract in 1850, and had continued the same to the commencement of this suit, but such possession had not actually extended south of the line D, Q.



The defendant offered in evidence a grant to John G. Blount, issued in December, 1792, represented in the above diagram by the figures 1, 2, 3, 4, and proved that it covered the *locus in quo*, but showed no connection by title or otherwise between himself and the grantee.

The defendant next offered in evidence a State grant to himself, dated in the year 1848, for a part of the land embraced in the plaintiff's 500 acre grant, which part is indicated by the letters D, E, F, G, H, P, Q, and insisted that plaintiff had no such possession as would entitle him to sustain the action of trespass.

The plaintiff contended that the defendant was a mere wrong-doer, and that therefore he was, as to him, in possession and could maintain the action.

He also insisted that he was in possession, as to Blount, and that put him in possession of every part of his land which was lapped on by Blount's grant, which included the *locus in quo*.

His Honor charged the jury that, according to the above state of facts, the plaintiff was entitled to recover. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Strange, *Shepherd*, *Kelly*, and *C. G. Wright*, for plaintiff.
W. A. Wright, for defendant.

BATTLE, J. If the defendant were a mere wrong-doer, the entry of the plaintiff into the land covered by his grant, would have put him into possession of the whole of it, as against the defendant, notwithstanding the outstanding title of Blount's heirs; *Osborne* v. *Ballew*, 12 Ire. Rep. 373; *Myrick* v. *Bishop*, 1 Hawks' Rep. 485. Whether the entry of the defendant claiming title under a junior grant will make any difference, it is unnecessary to decide, since there is another well established rule which shows that the plaintiff was in possession, as against Blount's heirs. The rule is this: if two grants lap, and one of the claimants be seated on the lapped part, and the other not, the possession of the whole interference is in the former exclusively; possession of a part of the land included in both deeds being possession of all of it. See *Williams* v. *Miller*, 7 Ire. Rep. 186, and the cases there referred to. In the present case the grant to Blount covered the whole of the land included within the plaintiff's grant, and there was, therefore,

a lappage co-extensive with the whole of the land granted to the plaintiff. Blount's heirs were not in the actual possession of any part of the land included within their ancestor's grant, while the plaintiff was actually settled on a part of his. His possession of a part was, therefore, as against Blount's heirs, a possession of the whole; and, we think, it follows as a corollary, that he had possession of the whole of the land within the boundaries of his grant, as against every person entering into any part of it under a junior grant, as well as against a mere wrong-doer. The judgment of the Court below, being in accordance with this principle, is correct and must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN M. JESSUP *vs.* ALEXANDER JOHNSTON.

The fact that a father, finding himself overwhelmed with debts, conveys to his son negroes and other property worth $6000, in consideration that the son will undertake to pay debts amounting to only $4000, is of itself a presumption of fraud; and when there was no rebutting circumstance it was the duty of the Judge so to tell the jury.

ACTION of TROVER, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Cumberland Superior Court.

The action was brought to recover the value of a slave by the name of Pompey, which the plaintiff claimed title to under a deed executed by his father, Jonathan Jessup, on the 2nd day of January, 1851. This deed recites that "whereas Jonathan Jessup, the party of the first part, is indebted by several promissory notes, negotiable and payable at the bank in Fayetteville, amounting in all to the sum of $4060, which notes are endorsed by Amos Jessup, &c., (naming others,) and are now held by the Banks, in which they were respectively discounted, and whereas, the said Jonathan Jessup, being now in feeble health, is desirous to retire from business, and where-

as, John M. Jessup, the party of the second part, hath assumed the payment of the said notes, and agreed to substitute his own notes in discharge of those made at Bank by the said Jonathan," and for no other consideration expressed on the face, conveys the slave in question and seven other slaves, and some real property to the plaintiff. The value of this property was, at the time of this transfer, $6000. The plaintiff was between twenty-one and twenty-two years of age; was a clerk in the store of his father, and was not the owner of any property. The subscribing witness testified that the father and son came to him and acknowledged the execution of the deed, and that nothing more was said.

One *Taylor*, who was one of the endorsers for the elder Jessup, testified, that a short time previous to the execution of the deed, the health of the elder Jessup became bad, and that he, with other of his endorsers, called on him and insisted that he should execute a deed or mortgage, conveying his negroes and real estate to secure them; that he agreed to do so, and this deed was made for that purpose. The elder Jessup, at the time of making this deed, was much involved in debt to the Banks, as well as to individuals. All the negroes conveyed remained in possession of the father, until after Pompey was sold by the defendant, and until about fifteen months before the trial.

The value of the property was something over $6000, and the debts to the Banks about $4000 when this deed was made.

The notes falling due in April, May, June and July, were renewed in the name of the elder Jessup, with the same endorsers; after that, they were renewed in the name of the plaintiff, with the same endorsers. When this substitution took place the notes were reduced to $2,700. The plaintiff had acted as his father's agent in renewing his notes before the deed was made, and he attended to the renewal of those in the months mentioned above; but who provided the funds for such renewal, whether the father or the son, did not appear. It appeared in evidence that three of the slaves conveyed in the deed had sold for $2,100, and the proceeds

applied to the bank debts. The residue of the slaves and the real estate were still unsold, though all the bank debts had been paid off, or nearly so.

It was proved that the elder Jessup was engaged in merchandise at the execution of the deed, and some time in 1851 he had the whole stock sold at auction, which brought $1,350; notes were taken on these sales, and a part of them handed to the plaintiff, and a part to the father; but in what proportion did not appear. The money which was collected was handed to the plaintiff, who gave a receipt, as clerk for his father.

The defendant relied for his defence on judgments and executions against Jonathan Jessup, under which, he, as the sheriff of Cumberland, made the sale in question.

The Court charged the jury "that the disparity between the value of the property conveyed and the debts to be paid, was a badge of fraud, and that the amount left after the debts had been paid, or nearly so, taken in connection with this part of the case, was a circumstance the jury ought to look at as indicative of fraud; that the remaining in the possession and enjoyment of the property by the elder Jessup, was a strong badge of fraud. The Court further charged that if the plaintiff was under age and without property, when the deed in question was executed, that this was a badge of fraud. And the Court further charged, that if it was intended and agreed at its execution to be a mere security to save harmless the endorsers, that would make it fraudulent in law." Plaintiff excepted.

The jury retired under this charge and remained out over twenty-four hours. The Court, thereupon, sent for them, and stated that "upon reflection, he charged them that, looking at the testimony in this case, if they believed that the plaintiff, being the son, was a mere clerk in his father's store at the execution of the deed in question, but little over twenty-one years of age, without property or means of any kind, in this point of view, it was fraudulent in law." Plaintiff excepted to this charge.

The jury rendered a verdict for the defendant. Judgment and appeal.

Shepherd and *Strange*, for plaintiff.
Wm. McL. McKay, for defendant.

PEARSON, J. "What constitutes fraud is a question of law. In some cases, the fraud is itself evident, when it is the province of the Court so to adjudge, and the jury has nothing to do with it. In other cases it depends upon a variety of circumstances, arising from the motive and intent. Then, it must be left, as an open question of fact, to the jury, with instructions as to what in law constitutes fraud. And in other cases there is a presumption of fraud which may be rebutted. Then, if there is any evidence tending to rebut it, that must be submitted to the jury. But if there is no such evidence, it is the duty of the Court so to adjudge, and to act upon the presumption." *Hardy* v. *Simpson*, 13 Ire. 132.

In our case the substance of the charge was, that the evidence raised a presumption of fraud; that there was no evidence to rebut the presumption; and it was the duty of the jury to find for the defendant, if they believed the evidence.

The fact that a father, finding himself overwhelmed with debts, conveys to his son negroes and other property worth $6000, in consideration that the son will undertake to pay debts amounting to $4000 only, of itself raised a presumption of fraud; for it is neither more nor less than a fraudulent gift, by an insolvent father to his son, of $2000, at the expense of his creditors; to say nothing of the other facts, that the son was only twenty-one or two years of age; had no property of his own; the debts were reduced to $2,700 before the name of the son was substituted for that of the father on the notes in Bank, and that the negro in controversy, and other property which had been conveyed by the father to the son, was still in hand, after the Bank debt was discharged. As there was no evidence to rebut this presumption, it was the duty of the Judge to instruct the jury that, if they believed the evidence,

the conveyance was fraudulent and void as against creditors. So, in *McCorkle* v. *Hammond*, 2 Jones' Rep. 444, the fact that a father, being about to fail, conveyed a stock of goods to a son, who was under age, in consideration of his son's notes for a sum which was a fair price for the goods, was held to amount to fraud; the fact that the father had included the son's notes in an assignment, which he soon thereafter executed in favor of certain of his creditors, being no evidence to rebut this presumption, inasmuch as the son could not be compelled, either in Law or Equity, to pay the notes.

These cases all range themselves under the same head, that is, where there is a presumption of fraud and no evidence to rebut it. *Lee* v. *Flannigan*, 7 Ire. Rep. 741; *Young* v. *Booe*, 11 Ire. Rep. 347, are instances of another class, where the presumption of fraud is rebutted by evidence explaining the circumstances, and showing that there was no fraud.

The second charge of his Honor superseded what he had said in his former charge by taking higher ground against the defendant; and as we sustain him in that, of course it is not necessary to notice his former charge; and the fact that it was liable to exception, as being too vague, and as assuming that the son was under the age of twenty-one, which was contrary to the evidence, can make no sort of difference.

PER CURIAM. Judgment affirmed.

JARED PEAVEY *vs.* WILLIAM A. ROBBINS *et al.*

Inspectors of elections are, under the Act of Assembly, the exclusive judges of the qualification of voters, and, no corruption being charged or found against them, are not responsible for mere error in judgment.

THIS was an ACTION ON THE CASE, tried before his Honor, Judge CALDWELL, at the Spring Term of Brunswick Superior Court, 1856.

Plaintiff declared for a wrong and injury done him, by the defendants as inspectors of an election, in refusing to receive his vote. To show that he was entitled to vote, he called a witness, who testified that he knew the mother and grandmother of the plaintiff, and that they were white women, also that he knew his father and grand-father; that his father was a dark colored man with straight hair, and that his grandfather was a dark red-faced mulatto, with dark straight hair. Plaintiff also read in evidence a deposition, in which the witness testified, that he knew the mother and the grand-mother of the plaintiff, and that they were white women; that he knew the grand-father and the father of the plaintiff; that his grand-father was a colored man, and his father had the same appearance.

His Honor charged the jury, that if the plaintiff's grandfather was half and half, that is, half white and half black, the plaintiff would be within the fourth degree, and could not recover. Further, that however this might be, he could not recover at all; for by the Act of Assembly, the inspectors were constituted the exclusive judges of the voter's qualification, and were not responsible for mere error in judgment. If corruption had been charged and proved, the case would be different. Plaintiff excepted to this charge. The jury returned a verdict for the defendants. Judgment for them, and appeal by the plaintiff.

No counsel appeared for the plaintiff in this Court.
London, for the defendants.

NASH, C. J. It is a general rule that no action can be supported against a Judge or Justice of the Peace, acting judicially and within the sphere of his jurisdiction, however erroneous his decision. See *Floy* and *Barkee*, 12 Coke 23; and *Groenvelt* v. *Burnwell*, 1 Lord Ray. 454. This doctrine has ever since been steadily pursued, as being essential to the independence of those entrusted with judicial authority, by removing from their minds the peril of arraignment for every

judgment they may pronounce. See *Cunningham* v. *Dilliard*, 4 Dev. and Bat. 351, and *Gov.* v. *McAfee*, 2 Dev. 15. The defendants were inspectors of an election for members of the General Assembly, and refused to receive the vote of the plaintiff, and for this the action is brought. A question of the the admissibility of evidence as to his qualification as a voter arose in the course of the trial below, of which we take no notice, for the reason, that if his Honor was correct on the legal question decided by him, the other could not arise. By the Act of 1854, Rev. Code, ch. 52, sec. 10, after providing for the appointment of inspectors of elections, the law proceeds: "and the inspectors shall have the *sole and exclusive right* to judge of the qualification of voters, &c." By this Act the inspector has not only the ministerial right to hold the polls and receive the votes, but the judicial power to adjudge upon the right of every man to vote at that precinct. It would be monstrous injustice, to hold him answerable for every error of judgment he might commit in discharging his duties. Every person appointed by the County Court is compelled to act, under the penalty of being guilty of a misdemeanor. See sec. 6 of the 52d ch. He must act on the spur of the occasion; he cannot stop to examine testimony, to see whether the applicant is entitled to vote; it would retard the election, impede its progress, and in many instances, prevent any election at all. The inspector must rely upon that mode of proof, to which the Act has referred him—the oath of the voter—and of the effect of that he must necessarily, in the language of the Act, be the sole and exclusive judge. This very case furnishes an exemplification of the wisdom of the law, in making the inspectors the sole judges. An objection was raised to the right of the plaintiff to vote. He claimed to be a white man within the provisions of the law; it was alleged that he was of mixed blood, within the fourth degree, which excluded him from the right to vote. To establish the fact, one way or the other, the parties have been obliged to trace his pedigree, by witnesses, to his grand-father and grand-mother. How was it possible for the inspector to investigate

the matter? To hold them answerable for error in judgment, under such circumstances, would be preposterous. If, however, the defendants were not, strictly speaking, judges of the fact which they decided, still they were acting judicially under a public law, and performing a public duty; and if they acted *bona fide* and to the best of their information, they are not answerable. There is no allegation or pretence of a want of good faith on the part of the defendants.

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

JAMES T. SCHONWALD *vs.* GIDEON CAPPS.

The provision allowed insolvent debtors, under the act of 1848, may lawfully be laid off to them after an issue of fraud is made up, and while it is still pending in Court.

ISSUE of FRAUD, tried before his Honor, Judge MANLY, at the Fall Term, 1854, of New-Hanover Superior Court.

The issue in this case was made up under the act for the relief of insolvent debtors. Afterwards, and while this issue was standing on the docket for trial, the defendant procured the provision allowed to insolvents, under the act of 1848, to be laid off to him. Ire. Dig. Man. ch. 32.

The plaintiff contended on the trial that this assignment having been made after the making of the issue, was inoperative, and that the defendant not having made a full surrender as to the amount thus laid off, was not entitled to his discharge by taking the oath. Of this opinion was his Honor, who so instructed the jury, and a verdict was found for the plaintiff.

Judgment for the plaintiff, and appeal by the defendant.

London for plaintiff.

Wm. A. Wright, for defendant.

BATTLE, J. We are unable to discover any word, phrase or sentence, in the act of 1848 ch. 38, which prohibits a poor debtor from having the articles which the law exempts from execution, set apart for the use of himself and family, after a creditor has made up an issue of fraud with him. The writ of *capias ad satisfaciendum* creates no lien on the defendant's property, *proprio vigore*, and certainly no additional effect is given to it by the suggestion, on the part of the creditor, of a fraudulent concealment. The property still belongs to the debtor, as, indeed, is affirmed in the suggestion of the creditor. Being his, the act says, without qualification or restriction, that he may, by taking proper steps, have it set apart for the benefit of himself and family, and then expressly exempts it from execution. Under the act of 1844, ch. 32, (Iredell's digested manual, p. 118,) which contained similar provisions, it was held, in the case of the *State* v. *Floyd*, 11 Ire. Rep. 496, that the debtor might apply and procure an assignment of the exempted articles to be made for him, at any time, *even after a levy*, before the property was changed or converted by a sale. We merely remark in passing, that since the Revised Code went into operation, the assignment must be applied for and procured before a seizure of the property. Rev. Code, ch. 45, sec. 8. The proceedings in the present case were taken under the provisions of the act of 1848, which, in this respect, are similar to those prescribed by the act of 1844, and are not affected by the Revised Code. That these provisions in favor of poor debtors and their families ought to receive a liberal construction, will manifestly appear from the opinion delivered for the Court by RUFFIN, C. J., in the case of *Dean* v. *King*, 13 Ire. Rep. 25. Seeing nothing in the terms of the act, nor in its policy, which ought to restrict the defendant, as was done in the Superior Court, we feel ourselves constrained to reverse the Judgment, and grant a *venire de novo*.

PER CURIAM. Judgment reversed.

S. C. STALLINGS *vs.* GEORGE G. GULLY, *et. al.*

A judgment taken without the defendant being brought in by process or appearing to the case, is void, and cannot be offered in evidence in a suit brought on it afterwards.

THIS was an action of ASSUMPSIT, commenced by warrant on a former judgment, before a Justice of the Peace, and brought by successive appeals to this Court.

On the trial below, before Judge PERSON, a former judgment rendered by a Justice of the Peace, against the defendants, was offered in evidence. From the proceeding in which this judgment was obtained, it did not appear that the defendants, or either of them, had ever been cited to the trial, or served with notice of the day of trial, or that they, or any one for them, made an appearance at that trial. For this cause, and others appearing on the face of the proceeding, the defendants objected to the judgment's being received in evidence; but it was agreed that it should be received, and a verdict rendered subject to the opinion of the Court, on a question reserved as to the admissibility of the evidence; with a further agreement, that if the Court should be against the plaintiff, on the point of law, a nonsuit should be entered, otherwise the verdict should stand. His Honor, on consideration of the question of law, being of opinion with the plaintiff, so adjudged, and defendants appealed.

Lewis, for plaintiff.
Cantwell and *G. W. Haywood*, for defendants.

NASH, C. J. In all proceedings of a judicial nature, it is necessary that the person whose rights are to be affected, should in some way be a party to the proceedings. The cases affecting the revenue laws, in authorising summary judgment against delinquent collecting officers, are exceptions. It is not sufficient for the Court to have jurisdiction of the subject matter in contest; they must also have jurisdiction of the per-

son. It is a clear dictate of justice, that no man shall be deprived of his rights of person or property without the privilege of being heard.

The action before us commenced by warrant, and is founded on a prior magistrate's judgment. To sustain his action the plaintiff gave in evidence, the judgment as set out in the case. There was no evidence, by endorsement or otherwise, that the warrant had ever been served on the defendant, or that he had appeared to the case. Objection was made to the competency of the judgment as evidence; but his Honor ruled it was competent, and gave judgment upon the case agreed, for the plaintiff. In this there is error. In the case of *Armstrong* v. *Harshaw*, 1 Dev. Rep. 187, the Court say, the constitution and the laws of the country guaranty the principle that no freeman should be divested of a right by the judgment of a Court, unless he shall have been made a party to the proceedings in which it shall have been obtained." Here, the defendant, as far as the case discloses, in the original proceedings, was no party to them, either by service of the process or by appearance.

But it is said that judgment was rendered by a Court having jurisdiction of the subject matter, and, until reversed, is still in full force, and cannot be impeached in this collateral way. The principle is correct. The judgment of a Justice of the Peace, acting within the range of his proper authority, though not a record, properly speaking, is a record to some purposes; it establishes, for instance, the state of the controversy between the parties, so that in an action on a contract, if against the defendant, to the effect that he owes the plaintiff the money ascertained by it at the time of the rendition, and while unreversed, both parties are bound. But unfortunately for the plaintiff's argument, that which he relies on as a judgment is not a judgment. Though pronounced by a magistrate as such, it is absolutely void and of no effect. However erroneous or irregular a judgment may be, yet, as long as it stands unreversed, it is the act of the Court and carries with it absolute verity. But if what is offered in evidence,

has only the semblance of a judgment, as if rendered by a Court having no jurisdiction, or against a person who has had no notice to defend his rights, it is not a judgment. *Jennings* v. *Stafford*, 1 Ire. 404. Whenever, therefore, a judgment at Law or a decree in Equity, is offered in evidence, it is requisite to set forth so much of the pleadings and orders as to show that the one was pronounced and the other given in a cause properly constituted between the parties. *Williamson* v. *Redford*, 10 Ire. Rep. 198, reaffirmed in *Lyerly* v. *Wheeler*, 11 Ire. Rep. 288. The original judgment, therefore, upon which the action is brought, being absolutely void, was, in Law, no judgment, and in admitting it in evidence there was error.

PER CURIAM. Judgment reversed, and judgment of non-suit.

W. D. PEARSALL *et al.* EX'RS. *vs.* GEORGE E. HOUSTON AND JESSE BUTTS.

A presumption of payment arising from length of time in favor of one of several obligors, is a payment as to all.

A declaration of the principal obligor that he had paid the debt to one of his sureties, does not rebut the presumption that it was paid by the surety.

APPEAL from the last Superior Court of Duplin, tried before his Honor, Judge SAUNDERS.

THIS was an action of DEBT commenced by a warrant before a justice of the peace, and brought to this Court by successive appeals. The plaintiffs declared on a promissory note executed by the defendant Houston, Jesse Butts and William R. Rhodes to the plaintiff's intestate, which became due in January, 1840. In November, 1843, a warrant was returned before a justice of the peace for the debt in question, when Houston admitted the note to be just, and judgment was

waived upon the defendant's promise to arrange it. After the lapse of ten years, the defendant was again warranted, when he said he would not pay the debt twice. The plaintiff asked him if he said he had paid the debt to them; to which he replied, no, but he had paid it to Jesse Butts, one of the sureties. It appeared that Butts had the means of paying the debt up to 1845 or 1846. The other surety was good up to the year 1842, when he died.

The defendants relied upon the presumption of payment arising from the length of time.

The Court charged the jury, that to repel the presumption of payment which the law raised from the length of time, it was necessary to show an acknowledgment, partial payment, or that the defendant had not the means of payment; an assertion that he had paid the debt at some time not specified, not to the plaintiffs, but to one of his sureties, was not sufficient; that if the jury believed Butts had the ability to pay, the presumption was not repelled, and the defendants were entitled to their verdict. Plaintiffs excepted.

Verdict for the defendants. Judgment and appeal by plaintiffs.

W. A. Wright, for plaintiffs.

No counsel appeared for defendants in this Court.

BATTLE, J. It is settled that the payment of a bond cannot be presumed as to one of several obligors, while it is rebutted as to the others; payment as to one, whether actual or presumed, being payment as to all. *McKeethan* v. *Atkinson*, I Jones' Rep. 421; *Lowe* v. *Sowell*, ante, 67. It cannot be doubted that in the present case the presumption of payment arose in favor of Jesse Butts, one of the sureties, who was fully able to pay the bond for five or six years after it fell due. See *McKinder* v. *Littlejohn*, 1 Ire. Rep. 66, and *Wood* v. *Deen*, Ibid 230. The declaration of the defendant, so far from being an acknowledgement that Butts had not paid the debt, rather favored the presumption that he had.

It is a little singular too, that the plaintiff, who waived a judgment in his favor in 1842, upon a promise by the defendant to arrange it, should have taken no other steps to collect the debt for ten years. That, too, favors the presumption that Butts had done his duty in paying over to the plaintiff the money which he received from the defendant, to be applied in discharge of the debt. The presumption in favor of one of the obligors is a payment as to all. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* JIM, A SLAVE.

The master of a slave on trial for a capital felony, is a competent witness in his behalf.

It is only where evidence is ruled out on account of *the matter*, and not where a witness is objected to and rejected on the ground of *incompetency*, that it is necessary to set out in the statement of the case, what the party expected or offered to prove.

INDICTMENT for assault on a white female, with intent to commit a rape, tried before his Honor, Judge PERSON, at the last Spring Term of Johnston Superior Court.

In the course of the trial below, the prisoner's counsel offered the wife of the master of the slave, as a witness in his behalf. The State objected to her on the ground of incompetency by reason of interest; and the Court having sustained the objection and excluded the witness, the defendant's counsel excepted. Verdict for the State. Judgment and appeal by the defendant.

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

PEARSON, J. On the trial of a slave for felony, is the mas-

a competent witness in behalf of the prisoner? The question has never been decided in this State. Of course there is no case in point in the English books. Many of the slaveholding States have statutes giving a compensation to the master, so that the question could not arise in these States, and we are not aware of a decision in any of the States; so we are left to solve the question by a recurrence to principle.

The rule, that no one is competent as a witness in behalf of a party in whose success he has a pecuniary interest, is based on the idea, we are all so frail—so much under the influence of our own interest, that we are not to be trusted when it is at stake; for, the love of truth, the pride of character, the obligation of an oath, the searching power of cross-examination, and the scrutiny of a jury, are not sufficient guarantees against the blighting effect of its influence.

We are told, the Common Law is "the perfection of reason;" it is the wisdom, not of one man, but of many men put together. That this small estimate of the integrity of mankind should be adopted by the "wisdom of ages" as a foundation for a rule of evidence, is most humiliating; and it is a relief to know, that this conclusion is not an unbiased judgment upon the naked question, but has, in a great measure, been controlled and brought about by collateral circumstances. Any one who reads the "State Trials," and the old writers upon evidence, Gilbert and McNally, will find that the rules of evidence were longer in being settled than any other part of the common law, and will not be surprised that Lord Mansfield, in *Low* v. *Joliffe*, 1 Wm. Black. 366, declared on a trial at bar, that "the Court did not sit there to take its rules of evidence from Siderfin and Keble." The civil law carried the rules of exclusion much further than pecuniary interest, excluded father and son, patron and client, guardian and ward, &c., mutually, from giving evidence for each other. Many of the old rules of evidence "were drawn from this quiver," and the common law Judges unconsciously allowed the subject to be influenced by the doctrines of the civil law, and failed to discriminate between rules of evidence fit and

proper for a fixed tribunal, where all questions of law and fact were decided by a single Judge, and the evidence is in writing, where the oath of one man looks as good as another, and a trial by jury, where the witness gives his testimony face to face, so that the jury may "mark his manner," and pass upon his credibility. See *State* v. *Williams*, 2 Jones' Rep. 257; *Bottoms* v. *Kent*, ante 154; Best on the principles of evidence.

There was still another circumstance which embarrassed the subject. In early times the jury were witnesses, and gave the verdict upon their own knowledge of the facts. Of course it was then proper to exclude not only those who had pecuniary interest, but all the "kith and kin" of both parties. In the course of time this feature of jury trials was changed, and the verdict was to be rendered according to the evidence given to the jury by witnesses. This was the time for making a corresponding change in the rules of evidence; but it is hard to get rid of old notions, particularly in the action of Courts. After much struggling, the rule which excluded as witnesses parent and child, and others whose connection raised a presumption of bias from affection and other causes, was modified so as to allow it to go their credit and not to their competency; but the exclusion from pecuniary interest was adhered to, and after many conflicts and changes, was settled in Lord Kenyon's time within these narrow limits—the interest must be a *direct, certain, legal, pecuniary interest in the event of the case.* *Best* v. *Baker*, 3 T. R. 27; *Smith* v. *Prager*, 7 T. R. 60. Even under these restrictions it was felt that the rule was still liable to many objections; although it excludes falsehood, in as many cases it excludes the truth. To define by a general rule the influence which interest in the event of a case, will exercise on the mind of a given individual, is beyond all human power; on some, the slightest interest will act so as to produce perjury; on others, the greatest will be powerless. There was also necessarily a degree of inconsistency and incongruity in applying it; an heir apparent is a competent witness for his father, although the whole es-

tate be at stake, but he is incompetent if he has a pecuniary interest to the amount of one cent. It was impossible to fix any limit in regard to the amount; so of necessity, according to the rule, any interest, *however small*, will exclude. As a salvo to this, it is held that the witness may make himself competent by executing a release, which the party is obliged to accept, and as a further salvo, it is said time, and again, (as if the rule needed some apology,) where there is any doubt as to its application, the Court will *lean* to the admisibility of the evidence, and allow it to affect the credit and not the competency of the witness. By a recent statute in England, the rule of exclusion on the ground of interest is abolished, and in all cases the matter goes *to the credit.*

These remarks are made, not with a view of intimating that the rule is not too well established here to be abolished without the aid of the Legislature, but simply for the purpose of defining its limits and of tracing it back to its origin, so as to support the position, that it ought not to be extended to new cases, but be confined to cases where it has been already applied, and where the principle on which it is founded exactly fits the case.

Is there nothing in the difference between a trial where property is involved, and a trial where human life is at stake, to make a distinction in the application of this rule, so far as it relates to a witness called in behalf of the prisoner? The idea, when a prisoner calls a witness to prove his innocence, who, it may be, is the only person on earth to whom a fact is known that will save his life, that he must be repulsed by the cold announcement, "he is your master—he has an interest in saving your life, and at all events he is liable for the costs of this prosecution, and, therefore, has a pecuniary interest which makes him incompetent, so he cannot be heard in your behalf," shocks all the best feelings of our nature, and extorts the exclamation, "This ought not to be a rule of evidence!"

Frail as human nature may be, dollars and cents should not be weighed in the balance with life. It cannot be presumed that the "almighty dollar" is so controlling in its in-

fluence, as to overcome all other considerations. Our investigation satisfies us that the rule of exclusion, because of pecuniary interest, has not been applied to a case like the present, and we are clearly of the opinion, that the principle of the rule is not applicable. HENDERSON, C. J., than whom, I will take occasion to say, there has not been a more profound thinker, or one of whom it can with more justice be said, "*felix qui potuit rerum cognoscere causas*," since the days of Haywood, (*State* v. *Kimbrough*, 2 Dev. 438,) expresses the opinion, that in a capital case the rule which excludes a witness on the ground of pecuniary interest, does not apply, and that one who would become entitled to an estate at the death of the prisoner, was a competent witness against him. He says, "it is admitted that where property only is at stake, where that only is the subject of controversy, it is the presumption of law that interest in the event, will, with most men, overcome the love of truth. The law, therefore, acting upon that presumption, excludes *all* who are so interested, from being witnesses; as general rules are formed for majorities; but we are unwilling to acknowledge that where life is at stake, where the injury inflicted by the perjury is a murder, the most cold-blooded and deliberate which can be imagined, that the law makes any such presumption. Although there are beings in whom interest (I mean pecuniary interest) would thus operate, they are rare exceptions to the nature of man, and general rules are not predicated on exceptions."

The testimony of the master cannot be excluded without manifest inconsistency. The slave is put on trial as a *human being*; entitled to have his guilt or innocence passed on by a jury. Is it not inconsistent, in the progress of the trial, to treat him as property, like a chattel,—a horse, in the value of which the owner has a pecuniary interest which makes him incompetent as a witness? And as respects the master, is it not enough, that in the exercise of the right of eminent domain, his property should be forfeited to the public without compensation, and he should be made liable for the costs? Must insult be superadded by saying to him, "you have a

pecuniary interest, and, therefore, cannot be trusted; so, we must also take from you the poor privilege of being heard in behalf of your slave, and of having your credit passed upon by the jury?"

So much upon the principle of the rule; let us now look to analogy. A father has an interest in the services of his child until he arrives at the age of twenty-one; it is a pecuniary interest which the law protects by giving an action "*per quod servitium amisit*," (indeed it is the gravamen of the action for seduction,) but the father is a competent witness in behalf of his child; so a master has a pecuniary interest in the service of his apprentice, indeed he has a property in him, qualified, it is true, for he cannot assign it, but he can maintain an action for harboring him or otherwise depriving him of his services; yet, a master is a competent witness in behalf of an apprentice who is on trial for an offence which may subject him to imprisonment, transportation or death, in either of which events the master will suffer pecuniary loss. Where, then, is the principle or the analogy which makes the master of a slave incompetent? What is to be the limit of the rule? Is one who has a negro hired for a year, incompetent to give testimony in his behalf, because, by a conviction, he will lose his services?

Our attention was called in the argument, to *State* v. *Charity*, 2 Dev. 543. The *decision* is, that a master cannot be offered by the prosecution to prove the confessions of a slave. RUFFIN, J., puts his opinion on the ground of a personal privilege of the master not to be compelled to give evidence against his interest. HALL, J., puts his opinion on the ground that that the master is a party, or a *quasi* party, to the record, and so cannot be compelled to give evidence. HENDERSON, C. J., puts his opinion on the ground, that confessions of a slave to his master ought to be excluded, on a presumption that they are not voluntary, owing to the relation of master and slave. It is true, RUFFIN J., expresses an opinion, that a master is not a competent witness for a slave on account of his pecuniary interest; but HENDERSON expresses an opinion that he is

competent, and the rule of exclusion for interest does not apply; so, there is *dictum against dictum*, which, as in cases of estoppel "leaveth the matter at large." The decision in regard to the point presented by the case, is much weakened by the fact, that the Judges do not agree as to the ground on which it is put. RUFFIN, after arguing the question, says: "I think, therefore, a master cannot be a witness for his slave. It follows he ought not to be forced on the other side." Why it "follows" is not stated. If we assume that a master is incompetent to give evidence on the side of his interest, for his slave, it "follows" that he would be incompetent to give evidence on the side of his interest against his slave, (if such a case could be supposed.) But it does not "follow" that he would be incompetent to give evidence *against his interest*, either for or against the slave, or, that he ought not to be compelled to give evidence, although against his interest; for it is settled that one may be compelled to give evidence against his interest, unless he will incur a forfeiture or penalty. On the whole, "Charity's case" leads to no satisfactory result.

In our case, the *wife* of the owner was offered as a witness; we have treated it as presenting the same question as if the master had been offered. If there be any distinction, it is not necessary to inquire into it.

It has been suggested, that it should appear in the statement of the case, what the witness was called to prove, so as to show that her evidence was material. We should regret exceedingly to be obliged, because of an omission of this kind, to deprive the prisoner of another chance for his life, as we know how cases are made up for this Court from the notes of the Judges; but we think the suggestion is not well founded. Where a witness is objected to, and rejected on the ground of incompetency, we assume that the witness would have been rejected, no matter how material the evidence might have been. It is only where evidence is ruled out on account of the *matter*, that it is necessary to set out in the statement of the

case, what the party expected or offered to prove, so as to enable the Court to judge of its materiality.

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

STEPHEN W. COTTEN, EX'R., *vs.* JOHN T. DAVIS.

The addition of "executor" to the name of a party to a suit is merely surplusage, and does not prevent a plaintiff from recovering in his own right.

ACTION of TROVER, tried before his Honor, Judge DICK, at the Spring Term, 1856, of Chatham Superior Court.

The action was brought by the plaintiff as the executor of Mrs. Anne Cotten, for the conversion of a negro woman, Peggy, and her children.

The mother of the slave, Peggy, was bequeathed to Mrs. Cotten by her husband, Roderick Cotten, who died in 1827. Mrs. C. was one of the executors of this will.

Mrs. Anne Cotten died in 1847, leaving a will, in which she bequeathed Peggy and her children to the plaintiff, and he is therein constituted the sole executor. The plaintiff, in 1851, demanded the slaves of the defendant, and brought this suit in 1853.

In 1815, Roderick Cotten gave the mother of Peggy to Richard C. Cotten, who retained possession of her and her children until 1853, when the defendant intermarried with Elizabeth, the daughter of R. C. Cotten, and Peggy and her children were *given off* to them.

There was evidence tending to show that the defendant had assented to the legacy in the slaves bequeathed by his mother's will, and his Honor was called on by the defendant's counsel to charge the jury, that if they should believe he had thus assented, his form of action had been misconceived, and he could not recover; that he should have sued in his indi-

vidual character and not as executor, and his Honor did so charge. Plaintiff excepted.

Under this, and other instruction not material to be noticed, the jury found a verdict for defendant, and the plaintiff appealed.

Winston and *Nash*, for the plaintiff.
Bryan, *Phillips* and *Haughton*, for defendant.

NASH, C. J. It is well settled, that where an executor sues upon the possession of his testator, he must sue as executor, because he must make profert in his declaration of his letters testamentary; and where he sues upon his own possession, he must declare in his own name, because his possession has fixed him with assets. It is equally well settled, that when the executor sues "as executor," when in fact the action is brought on his own possession, the words "as executor" are considered as mere surplusage. *Hornsey* v. *Dimocke*, 1st Ventris 119; Comyns' Digest Pleader, (2 D. 1.) It is not a question of amendment; there is no necessity for striking out the words; the Court consider them as not being in the declaration. If then the plaintiff did assent to the legacy to himself, the action is well brought. Upon this point, (that of the form of action,) his Honor left it as a question of fact to the jury, to say whether there had been an assent on the part of the plaintiff to the legacies to him, and instructed them if they found an assent, then their verdict should be for the defendant. The prayer of the defendant was for an instruction, that the evidence proved an assent, and if so, prayed the Court to charge the jury that the form of the action was misconceived. We have shown that if there was an assent, the action was not misconceived; in this part of the charge there is no error. Upon the other points ruled by his Honor, it is unnecessary to remark; they were in favor of the plaintiff, the appellant, and of course, he has no cause of complaint; the ruling, however, we may say, was entirely correct.

For the error with respect to the form of the action, the judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

ANNIS BAILEY *et al. vs.* HENRY P. BRYAN.

Where an appeal is refused by a magistrate on frivolous ground, the remedy is by recordari.

Proceedings under the statute concerning fences, R. C. ch. 48, s. 3, against the occupants of premises insufficiently fenced, must strictly pursue the statute, and they will be strictly construed.

The report of the freeholders in such a proceeding, should embrace only damages for the particular injury complained of in the warrant, and the judgment of the magistrate should be for such damages only.

THIS was a petition for a writ of RECORDARI, supersedeas and restitution, heard by PERSON, Judge, at Spring Term, 1856, of the Superior Court of Law for Pitt County.

Petitioner was summoned, and on the 19th November, 1855, appeared before a magistrate in said county, to answer the defendant, for that "a certain cattle, the property of the complainant, was unreasonably abused and greatly injured; and killed one oxen, and that the same was done by the said Annis Bailey and others, or by their connivance and procurement, upon the premises of Annis Bailey; field not enclosed with any sufficient and lawful fence." Upon this warrant being issued, and on the same day, the freeholders proceeded to view and assess, etc., and put the damages at fifty-six dollars, for that the present plaintiff "did unreasonably abuse and greatly injure a certain steer, cow and calf, and killed also a valuable steer, the property," &c.

Judgment was not pronounced upon this report until the 30th November following, and then, it was "adjudged that the defendant did make default as set forth in the plaintiffs complaint;" whereupon "judgment is therefore rendered

against the said defendant, in favor of the plaintiff, for the sum of fifty-six dollars, and costs of suit."

On the 10th December, an execution was levied upon the personal property of the present plaintiff, and the proceeds of the sale of the same, applied in satisfaction of the above judgment.

The petition for the recordari, &c., is of date the 4th Feb., 1856. The petitioner charges under oath, that at the time of the rendition of the judgment, application was made in the usual manner for an appeal; but the magistrate refused the appeal, on the ground, as he alleged, "that he did not have his forms with him."

Upon the return of the writ and record to the Court below, the plaintiff's counsel suggested various errors, and upon the consideration of them, his Honor, being of the opinion, that the judgment of the magistrate was erroneous, reversed and set the same aside, and awarded restitution of the monies collected by execution, of the plaintiff, under it, and thereupon the defendant above named appealed to the Supreme Court.

Rodman, for the plaintiff.
The Attorney General, for the defendant.

BATTLE, J. The writ of recordari is used here as it well may be, as a writ of false judgment. *Parker* v. *Gilreath*, 6 Ire. Rep. 221; *Kearney* v. *Jeffries*, 8 Ire. Rep. 96.

Among the errors assigned by the plaintiff, there is one so obviously fatal to the judgment given by the justice, as to render unnecessary the notice of any other. The Act under which the proceedings were had, confers a special jurisdiction upon a justice of the peace and two freeholders, who are to view the fences of the person against whom the complaint is made, and in a proper case, to estimate the damage done to the stock of the party injured. See Rev. Stat. ch. 48, ss. 2, 3; Rev. Code ch. 48, ss. 2, 3. This authority being under a proceeding so contrary to the proceedings of the common law, must be strictly pursued, and the report of the justice and

freeholders must be certified under their hands as the foundation of the judgment to be rendered thereon by the justice. This report ought to embrace only the damages for the particular injury complained of, and the judgment should be for such damages alone.

Here, the complaint set forth in the warrant of the justice, was for abusing and killing "a certain cattle" and "one oxen," whereupon the justice and freeholders ascertained and reported that the plaintiff had been damaged by the defendant, who "did unreasonably abuse and greatly injure a certain steer, cow and calf, and killed also a valuable steer," the property of the plaintiff.

The whole amount of the damages is stated to be fifty-six dollars, and the report bears date the 19th November, 1855. Afterwards, on the 30th day of the same month, the justice rendered a judgment for that amount, in which no reference is made to the report, but it is expressed to be for that "the defendant did make default, as set forth in the plaintiff's complaint."

It is manifest in this view of the proceedings, that the justice and freeholders transcended their power in undertaking to assess damages for injuries of which there was no complaint made, and therefore, the judgment given by the justice for the amount of such assessment, while it professes to be for "the default as set forth in the plaintiff's complaint," must be erroneous. For this error in the proceedings, without noticing any other, the judgment of the Superior Court reversing the judgment given by the justice is affirmed.

PER CURIAM. Judgment affirmed.

Doe on dem. of WM. H. STEPHENS AND WIFE *et al. vs.* GEORGE R. FRENCH.

A copy of a will, dated in 1741, found in the office of the Secretary of State,

having three witnesses, and otherwise in proper form to pass land, is admissible in evidence, under the Act of 1852, though there is no other evidence of its probate.

THIS was an action of EJECTMENT, tried before his Honor, Judge PERSON, at the Special Term, July, 1856, of Brunswick Superior Court.

The action was brought in the Superior Court of New Hanover, for a lot in the town of Wilmington, and removed, on affidavit, to this county. The lessors of the plaintiff claimed title to the land described in the declaration, through one Joshua Grainger, and offered in evidence a copy of a paper, that purports to be his last will and testament. This copy is certified by the Secretary of State as "a true and perfect copy of a will, drawn off from the original on file in this office." This instrument bears date 29th June, 1741, and is signed with the name and seal of J. Grainger, and purports to be attested by three witnesses.

On the trial below, the defendant objected to the introduction of this paper, and his objection was sustained by the Court, whereupon the plaintiff submitted to a non-suit and appealed.

The following is the 12 sec. of 44 chapter Rev. Code, passed in 1852: "Copies of wills filed or recorded in the office of the Secretary of State, attested by the Secretary, may be given in evidence in any Court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised, in the same manner as if such wills had been duly proved and recorded in the County Court."

London and *Strange*, for plaintiff.
W. A. Wright, for defendant.

PEARSON, J. Before the Act of 1852, (Rev. Code ch. 44, sec. 12,) the execution of a devise, as distinguished from a will of personalty, was required to be proven by "the oath of witnesses" in the Court of Pleas and Quarter Sessions of the

county where the land is situate. *Drake* v. *Merrill*, 2 Jones' R. 368; *Ward* v. *Hearne*, ante, 326 (at this term.) That Act changed the law and makes an exception to the general rule in certain cases. Under an old statute, 1715, the jurisdiction of the Ecclesiastical Court in England, in regard to the probate of wills of personalty, granting letters of administration and letters testamentary, &c., is given to the Governor and Council, &c., and the *original wills* are directed to be filed in the office of the Secretary, which was the same as the present Secretary of State. This law, and the practice under it, of filing original wills in the office of the Secretary, continued until the year 1777, when the jurisdiction was transferred to the Court of Pleas and Quarter Sessions of the several counties, and it is provided, "all original wills shall remain in the clerk's office among the records of the Court," &c. Rev. Code ch. 119, sec 19. None of the old wills found in the archives of the office of the Secretary of State, and filed therein between the years 1715 and 1777, were proven in the manner required, so as to make them valid as "devises of real estate," or at least there remained no direct and sufficient evidence of the fact of their having been so proven; for, as we have seen, the Act of 1715, only provided a mode of proving them as wills of personalty, and it was the object of the Act of 1852, to make the fact of a will being found filed in the archives of the office of the Secretary of State, or recorded there, sufficient evidence of its execution as a "devise of real estate," and also to make a copy, certified by the Secretary, competent evidence of the devise. It is clear that the Legislature had power to make such a provision; and, from the general words used, we are led to the conclusion, that the proper construction embraces all papers purporting to be wills of real estate, and appearing upon their faces to have been executed with the solemnities required by law, and which were filed in the Secretary's office during the time it was the proper place of deposit, that is, from 1715 to 1777. The words of the Act are broad enough to take in a will filed in the office of the Secretary of State since 1777; but a proper con-

struction requires a restriction to wills filed before that time: because, after that, a different place of deposit was fixed by law, and there was no authority for filing them with the Secretary, and a broad construction would reach beyond the mischief intended to be remedied. So, the words are broad enough to take in a will, although it appears on its face not to have been executed with the solemnity required by law, as if there be only one attesting witness; but a proper construction, we think requires a restriction to such wills as apparently were properly executed to pass real estate.

It is insisted that there should be a further restriction so as to confine the act to wills that were proven before the Governor and council, under the act of 1715. We can see no sufficient reason for adopting this construction. 1st. There is no such restriction in the words of the act, and if such had been the intention, it is reasonable to expect that express words would have been used. 2nd. The act of 1715 authorised the probate of the instrument, only as a will in respect to personalty. The probate, therefore, had no tendency to establish the fact that it was executed in a manner sufficient to pass real estate; so in regard to the validity of the instrument as a devise, it was wholly immaterial whether it had been proven as a will of personalty or not; and the purpose is obviously more effectually answered by the restriction made above to wills, which on their faces appear to have been properly executed to pass real estate. 3rd. The mischief intended to be remedied extends to all old wills found in the Secretary's office, without regard to the fact whether they had been proven as wills of personalty or not.

In this case the will purports to have been executed on the 29th of June, 1741, in the presence of three attesting witnesses, and was filed in the office of the Secretary of State. We are of opinion that the act of 1852 makes this sufficient evidence of its execution, and allows a certified copy to be read.

PER CURIAM. There is error. *Venire de novo.*

IREDELL WILLIAMS *vs.* ALFRED THOMPSON.

A agrees with B, that if B will furnish him with evidence in a suit to establish a particular fact, he will pay him $100. B furnishes a deposition proving the desired fact, but the commission under which it was taken was not returned, so that the deposition was useless: *held* that B could not recover on this contract.

THIS was an ACTION of ASSUMPSIT, tried before PERSON, Judge, at the Spring Term, 1856, of the Superior Court of Nash County.

The plaintiff declared upon a special contract contained in the following letter from the defendant to him:

"TOSNOT DEPOT, N. C., July 14th, 1848.

Dear Sir:—I wish you to procure me the testimony of Allen T. Williams' marriage, in the State of Tennessee, previous to the year 1827. The charge, for procuring this testimony, of $100, I think is high, and so my lawyers think, but they advise me to give it, and I hereby promise to do so whenever such testimony is forwarded. The children have nothing in hand, and I shall not be in funds until we bring Flowers' administrator to an account. This evidence will do it. I believe I could get along without it, but this will remove all doubt. Write me the time and place where you will take the deposition, in order that I may give notice to the adverse party. As soon as I get your letter I will give the notice, and send you a copy and a commission with the form of the questions to be asked."

The Clerk of the Court proved that he sent a commission to the plaintiff, and afterwards a deposition came to his office, but the commission was not returned with it. This deposition was read, and it contained the evidence which the plaintiff was requested to procure. The Clerk further stated, that soon after it came, the defendant called at his office, and said it was the very evidence he wanted; he had promised to pay Williams $100; he thought it was high, but he would be as good as his word if the suit was decided in his favor. It was also

proved that when the plaintiff was informed that the deposition was defective for want of the commission, and was requested to supply it, he refused to do so unless $50 more was paid him. The suit was afterwards compromised.

Upon these facts, the defendant contended that the plaintiff could not recover, because the commission was not returned with the deposition, and the plaintiff, therefore, had not performed his contract. The question was reserved by the Court with the consent of both parties, and it was agreed that the jury should find their verdict for the plaintiff, subject to the opinion of the Court upon the question reserved. If upon that, the Court should be with the plaintiff, judgment was to be given for him; but if with the defendant, the verdict was to be set aside and judgment of nonsuit given. The Court, being of opinion with the defendant, set aside the verdict, and nonsuited the plaintiff, and from this judgment he took an appeal to the Supreme Court.

Lewis and *Winston, Sr.*, for the plaintiff.
Moore, for the defendant.

NASH, C. J. The contract upon which the action is brought is contained in a letter written by the defendant to the plaintiff, and which is made a part of the case. In it the defendant promises to pay the plaintiff one hundred dollars, upon condition he will furnish him with evidence, that Allen J. Williams was married in Tennessee before the year 1827. In the letter the plaintiff is directed to let the defendant know the time when the deposition was taken in Tennessee, that he might give the necessary notice, and he would send him a commission. The deposition was taken and returned to the proper Court, but no commission accompanied it. The necessary evidence was contained in it. The suit in which it was to be used was subsequently compromised. From the case we gather, that upon the discovery that the deposition, in its then state, could not be used, the plaintiff was requested by the defendant to go on, and complete the

evidence; this he refused to do unless the defendant would give him fifty dollars more, which was refused. The furnishing the required evidence by the plaintiff, was a condition precedent, without the performance of which no right of action accrued to him. The declaration must necessarily aver it, and the evidence must prove it. The evidence was not furnished by the plaintiff. The deposition without the commission was not admissible as evidence, and was entirely useless to the defendant; for, it was the warrant to the magistrate to act in the matter, and the plaintiff, when apprised of the defect, and requested to complete his contract, refused to do so, except upon an additional compensation; this was an abandonment of his original agreement. The action is not brought on the second promise as alleged by the plaintiff—if any such promise was made. There is no error, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

STATE *to the use of* REBECCA CATE *vs.* WM. H. THOMPSON.

The recognizance for appearance entered into by a defendant in a bastardy proceeding, is in the nature of a bail-bond, and the defendant has a right to surrender himself in discharge of his bail, after being called out, before final judgment against him on the *sci. fa.*

SCI. FA.; Orange Superior Court, Spring Term, 1856; Judge DICK, presiding.

On the 20th of November, 1854, Rebecca Cate swore the child, of which she was pregnant, to Joseph L. Turner, who made up an issue as to the child's paternity, and entered into bond, with sureties for his appearance at May term following. The cause was continued at that term, and Turner gave bond again for his appearance at August term following, with the defendants, Thompson and Wright, for his sureties. He ap-

peared at August term, when the issue was tried, and the verdict of the jury was against him. He was not prayed into custody; but on the last day of that term was called and failed to appear, when judgment *nisi* was entered against him and his sureties. The *sci. fa.* was brought to enforce this judgment. Subsequently, to wit, at November term, 1855, the defendant Turner surrendered himself, in open Court, in discharge of his bail, and the same was entered of record by the Court, and the defendant not then being prayed into custody by the plaintiff's counsel, departed from the Court. These facts were agreed by counsel, and the case signed by them. The question was, whether this surrender discharged the sureties as bail in a civil suit, or were they liable as on a forfeited recognizance in a State case.

Upon consideration of the case agreed, the Court gave judgment in favor of the State, from which the defendant Thompson appealed.

Attorney General, for the plaintiff.
Bailey and *Fowle*, for the defendant.

NASH, C. J. The case agreed states, that Joseph L. Turner, was charged on oath by Rebecca Cate, with being the father of a bastard child, with which she was then pregnant; and upon a warrant, duly issued, he entered into the usual recognizance to appear at the February term, 1855, of Orange County Court. He appeared, and at his instance, an issue was made up to try the question of paternity. The issue was not tried at that term, but was continued to May term of the Court following, and Turner entered into a recognizance, with James H. Cristie and George Wright, as his sureties, for his appearance at May term following. At May term, Turner appeared, and the trial of the issue being again continued, he was recognized in the sum of $200, with George Wright and William H. Thompson, the defendant, as his sureties, to appear on Thursday of August term succeeding. Turner appeared on the Thursday of August term, when the issue was

submitted to a jury, and found against him. He was not prayed into custody; but on Saturday of the term, he was called, and failing to appear, judgment *nisi* for the amount of his recognizance, was rendered against him and his sureties. The *sci. fa.* in this case, was issued to enforce the judgment. It was returnable to November term, next ensuing, of said Court. Turner made his appearance and surrendered himself, in open Court, in discharge of his bail.

The only question submitted to this Court, is as to the effect of the surrender of Turner.

The mistake here seems to have been, in considering proceedings under the bastardy Act as criminal proceedings, whereas, they are civil in their nature. The true test of the difference between a criminal suit at the instance of the State, and a civil suit carried on in the name of the State, is, whether the act complained of, will support an indictment. If it will, the proceeding must be by indictment; if it will not, but an action is required, it is a civil suit. *State* v. *Pate*, Busb. 244.

Being a civil suit, and his sureties being, in effect, his bail, Turner had a right, at any time before the judgment, to surrender himself in discharge of his sureties. In the Superior Court, judgment was rendered against Joseph L. Turner, Geo. Wright and William H. Thompson. The latter alone appealed to this Court.

PER CURIAM. Judgment appealed from *reversed*, and judgment entered for the defendant, according to the case agreed.

Doe. on dem. of JEREMIAH GAYLORD *vs.* EBENEZER W. GAYLORD.

In ascertaining the correctness of a boundary line, an allowance should be made for the variation of the needle, when a variation is established.

Where the identity of a boundary line was submitted in writing to arbitra-

tors, and they, in writing also, decided on a line, and actually marked it, both parties are concluded to deny the correctness of such a line, although, in fact, it was different from the true line.

ACTION of EJECTMENT, tried before SAUNDERS, J., at the last Superior Court of Beaufort.

The sole matter in dispute between the parties, is as to the dividing line made between them in partitioning the lands which had descended to them and others as the heirs of John Gaylord. The plaintiff and defendant drew contiguous lots, and the point of beginning of their dividing line was not disputed between them. The course called for in the report of the commissioners who made the division, as that of this line is, South, 24 degrees West. In 1853, the plaintiff and defendant, by a deed in writing, submitted the identity of the line in question to two arbritrators, with liberty to choose an umpire, if they should not agree. They did disagree in the matter, and the umpire decided that the line should be run as the compass then pointed, regardless of the variation which had taken place in that instrument since the original division. Under this award a new line was run and marked according to it, and it was admitted that according to that line the defendant had trespassed upon the plaintiff; but that by the line of 1825, allowing for the variation of the compass, the defendant would not be a trespasser.

His Honor, charged the jury that they were to ascertain the line as it existed at the time of the partition in 1825, and if they were satisfied that the true line, as it was then run, differed from that run by the arbitrators, in consequence of the variation of the needle, it was their duty to allow for such variation. In pursuance of the above instruction, the jury found a verdict for the defendant. Judgment and appeal by the plaintiff.

The following note is appended, by his Honor, to the case sent up by him: "I am satisfied from the testimony, the verdict of the jury was correct, and in conformity with the charge; but from authorities I since examined, I am convinced the

charge was wrong, and the defendant was concluded by the submission and award, both being in writing, and I should set the verdict aside, but that I consider it important to have the question settled."

No counsel appeared for the plaintiff in this Court.
Donnell, for the defendant.

BATTLE, J. Independently of the effect of the award upon the rights of the parties, we have no doubt that the charge of his Honor in the Court below was correct. The division line between them when the partition was made in 1825, was the course indicated by the compass at that time, and it could not change with the variation of the needle. We agree also in the opinion expressed by his Honor after the trial, that he was wrong in not giving any effect to the award in the establishment of the disputed line. The submission and the award were both in writing and under seal, and the line thereby settled was a straight line from the admitted corner to its termination, according to the course indicated by the compass at the time when the award was made. This was a full, certain and final decision of the matter in dispute, as was settled by this Court in the cases of *Miller* v. *Melchor*, 13 Ire. Rep. 439, and *Moore* v. *Gherkin*, Busb. Rep. 73. But it is contended by the defendant's counsel, that admitting the award to be binding between the parties, so as to give the plaintiff's lessor a right to relief in another forum, it neither divests the title of the defendant, nor precludes him from a defence in the action of ejectment; and for this his counsel cited the case of *Crisman* v. *Crisman*, 5 Ire. Rep. 502, and some other authorities. Of the case of Crisman v. Crisman it may be remarked, that the submission was not by deed nor even in writing. Had it been, the Court intimate very strongly, that though the award could not have operated as a conveyance of the land, yet, it would have concluded the party against whom it was made, by way of estoppel, from disputing the other party's title, as was laid down in *Morris* v.

Rosser, 3 East's Rep. 15. We are inclined to hold this to be the true doctrine; but it is unnecessary to resort to it in this case, because the matter of dispute submitted to the arbitrators was a question of fact, to wit, the location of the dividing line between the parties, and not a question as to the title of any certain parcel of land; and the decision of the umpire upon that question, concluded them, as it would have done upon any other matter of fact; and to this effect are the cases of *Miller* v. *Melchor*, and *Moore* v. *Gherkin*, above referred to. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

ALLEN LAMB *vs.* MARMADUKE SWAIN.

The claimant of a tract of land under a color of title, who puts a servant in a house situated upon it, with the privilege of getting fire-wood, is in possession of the whole tract as against a wrong-doer, and can maintain an action against one who enters and cuts timber on the wood-land.

ACTION of TRESPASS Q. C. F., tried before his Honor, Judge DICK, at the Spring Term, 1856, of Randolph Superior Court.

The plaintiff gave in evidence the will of Gabriel Lamb, proved August, 1849, in which the land in question was devised to one Nathan Lamb, and a deed from him to plaintiff for the same, dated 11th March, 1850, and showed no other title. He showed that in the year 1851, he made and harvested a crop of oats upon this land.

The plaintiff did not live on the land in controversy, but there were two houses on it, one of which was occupied by one Jane Walker, who had been put in possession of it by Nathan Lamb in 1850. The other house was occupied by some women by the name of Lineberry. These houses were held under the plaintiff, and the occupants had the privilege of cutting and using fire-wood. Only the latter paid rent.

The trespass consisted in cutting and hauling wood and rails from the wood-land of the tract in question.

The defendant insisted that, as the plaintiff had not shown title, he had no constructive possession, and having no actual possession, he could not sustain this action.

He also insisted, that Jane Walker's and the Lineberrys' possession was presumed to extend to the boundaries of the land on which they were situated, and that, as they were in the actual possession, this action in favor of the plaintiff would not lie, and asked his Honor so to charge.

The Court declined instructing the jury as requested, but said, "if the plaintiff had sown oats on the land, and had taken them off at the usual time of cutting them in 1851, and the jury believed the possession of Jane Walker and the Lineberrys' extended only to the use of the houses in which they lived, with the privilege of cutting fire-wood, the plaintiff could recover against the defendant, who showed no title." Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

No counsel for plaintiff.
Morehead, for defendant.

NASH, C. J. The question is, as to the possession of the plaintiff. Without possession, by plaintiff, actual or presumptive, the action cannot be maintained. We agree with his Honor, that the plaintiff had such a possession as will sustain his verdict against the defendant, who was a trespasser without any title. The plaintiff, claimed title under a deed of conveyance from Nathan Lamb, who claimed under the will of Gabriel Lamb. Plaintiff took possession under his deed, and put the land under cultivation, and lived on another tract of his, about two miles distant. No other person was in the adverse possession, at the time the trespass was committed. On the land in question, were two houses, which were occupied by two individuals; one of whom, Jane Walker, was his servant

to keep possession for him, and who had liberty to take firewood, from the wooded portion of the land.

His Honor was requested to charge the jury, that the possession of the whole tract was in the actual occupants of the houses, and that the action should have been brought in their names. This, his Honor declined. From the statement of the case, those individuals were merely tenants of the houses they respectively occupied, and their actual possession extended only to the houses and the ground immediately around them. Yet, though this be so as to the tenants themselves, as to the plaintiff, the possession of the tenants was his possession, and extended to the lines of his deed, so as to enable him to maintain an action of trespass against any one who has not a better title to the land. *Graham* v. *Houston*, 4 Dev. 232; *Osborne* v. *Ballew*, 12 Ire. 373. The plaintiff had such a possession of the *locus in quo*, as will maintain the action.

PER CURIAM. There is no error, and the judgment is affirmed.

WILLIAM READER *vs.* A. S. MOODY.

Where one made a number of shingles on vacant land, and left them there, he is entitled to maintain trespass against a person who privately and without his knowledge, carried them off; and this although the defendant proceeded under a license from one who obtained a grant for the land on which the shingles were made, subsequently to their being made, but before their removal.

THIS WAS AN ACTION OF TRESPASS, *vi et armis*, for taking and carrying away a number of shingles, tried before his Honor, Judge CALDWELL, at the last term of Moore Superior Court.

The shingles in question were made and left upon a tract of vacant land which adjoined the land belonging to the plaintiff. Subsequently to the making of the shingles, the son

of the defendant obtained a grant for the land on which they were made, and his father, the defendant, in company with his son, without the knowledge or consent of the plaintiff, hauled them away.

The Court charged the jury that the plaintiff was entitled to recover. The defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Strange, for plaintiff.
Kelly, *Mendenhall* and *Bryan*, for defendant.

NASH, C. J. The question in this case turns entirely upon the point, in whose possession were the shingles at the time the defendant took them away. The doctrine of specification is a branch of that of artificial accession, and consists in the making of a new species of article out of materials of a different nature belonging to another person. 1 Bouvier's Institutes, 198, 199. It is difficult, says the same writer, to reduce to general and precise rules the right of accession. A great contrariety of opinion exists in the English Courts as well as in those of this country, as to the rights of the owner of the materials manufactured, and the manufacturer. The principle seems to be, that if the manufacturer takes the material fraudulently as to the owner, by converting it into another species, he acquires no title to the article in its new form, and the original owner may recover the manufactured article; but if he took it by mistake, believing it to be his, the article belongs to him, and he is answerable only for the materials used. 2 Kent's Com. 362–3; *Sillsbury* v. *McCoon*, 6 Hill's Rep. 425; 2 Blk. Com. 404; *Betts* v. *Lee*, 5 John. 348. It is unnecessary to decide that question as between the owner of the material and the manufacturer of the article. Our case steers clear of it. The action is in trespass *de bonis asportatis*. To sustain the action of trespass it is not necessary the goods taken should be in the *actual* possession of the plaintiff at the time of taking; a virtual possession will be

sufficient against one who is a mere wrong-doer. 3 Bl. Com. 150. Whatever, therefore, may be the principle between the owner of the original article and the manufacturer, the latter, by the labor he has expended upon the article, acquires a title against all the world, except the owner of the material. In this case, the plaintiff cut the timber out of which the shingles were manufactured, on the public land, and piled and left them there. The land was subsequently granted to the son of the defendant, and the latter carried them off with the assistance of the son. The defendant had no title to the shingles, nor had the son. The grant of the land did not convey every thing that was accidentally upon its surface, and unattached to the soil; if that were so, then all the cattle, horses and hogs which belonged to others, which might have strayed upon the land, and been there at the time of the grant, would pass with it, no matter to whom belonging previously thereto. The shingles were manufactured by the plaintiff, and they were, therefore, his property, against all the world, but the owner of the original material, out of which they were manufactured. In *Armory* v. *Delamirie*, 1 Str. 505, the action of trover was sustained by the chimney-sweep, who had found the jewel, though the true owner was unknown, the defendant having no right to detain it. In the case before us, the shingles were left where they were manufactured; and as they were made by the plaintiff for his own use, they were left with the *animus revertendi*—they were not abandoned by him, nor were they derelict. If I kill a deer on my neighbor's land and hang it up, it evidences my purpose to retain my possession, and if it is taken and carried off by a person having no title, I can maintain an action either of trover, or trespass *de bonis asportatis*.

PER CURIAM. Judgment affirmed.

STATE *vs.* DANIEL HEADRICK.

It is not indictable for one to remove a fence from his own land which had been unlawfully put there by another, although it did partially enclose a cultivated field belonging to that other.

In order to subject one to the penalties of the Act of 1846, for removing a fence, he must be guilty of a trespass.

THIS was an INDICTMENT for removing a fence, under the Act of Assembly of 1846, Rev. Code ch. 34, sec. 103, tried before his Honor, Judge DICK, at the last Superior Court of Davidson County.

The defendant being the lessee of a field for a term of years, built a fence near the dividing line, between his land and the land of the prosecutor, which was then under cultivation, but entirely on his own premises. The prosecutor unlawfully and without license, extended his fences over upon the land of the defendant, and joined them with the fence of the latter. It was for removing that part of the prosecutor's fence, which was on the land possessed by the defendant, that this indictment was brought. This was a case agreed and put in the form of a special verdict, in which the foregoing facts were submitted for the Judgment of the Court. His Honor being of opinion for the defendant, accordingly gave judgment for him, from which the solicitor for the State appealed to this Court.

Attorney General, for the State.

No counsel for the defendant in this Court.

BATTLE, J. The present indictment is framed upon the 103d section of the 34th chapter of the Revised Code, which enacts that, "If any person shall unlawfully and wilfully burn, destroy, pull down, injure or remove any fence, wall or other enclosure, or any part thereof surrounding or about any yard, garden cultivated field, or pasture," he shall be deemed to be guilty of a misdemeanor. The special verdict states,

that the part of the fence, for the taking away of which the defendant was indicted, was "unlawfully and without license" put upon his land by the prosecutor. How it would be unlawful for the defendant to remove this obstruction from his own land, we are unable to conceive. If the prosecutor sustained any damage, it was in consequence of his own wrongful act, and he cannot make the defendant criminally responsible for it. "To subject a person to the penalties of the Act in question, he must be guilty of trespass," of which the defendant in the present case, certainly was not. *State* v. *Williams*, Busb. Rep. 197. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

BANK OF CAPE FEAR *vs.* W. A. WRIGHT, ADM'R.

An agent who draws a bill, as *agent*, and for the benefit of his principal, is not liable on such bill.

ACTION of ASSUMPSIT, tried before his Honor, Judge CALDWELL, at the last Spring Term of New-Hanover Superior Court. [Case agreed.]

"The action was brought against the defendant, as the administrator of Wm. C. Lord, on a bill of exchange for $2000, drawn by the defendant's intestate on the Contributionship Insurance Company of New York, dated in July, 1846, payable to the plaintiffs sixty days after date. The drawees were an insurance company in the State of New York, and the defendant's intestate was their agent in the town of Wilmington. The bill was signed by the defendant's intestate, as agent, and was made to raise money to pay the amount of a loss occasioned by fire, to a party insured by the drawees, and discounted by the plaintiffs with a full knowledge of the facts of the case. The bill was accepted by the drawees, and

$1367 paid by them, leaving a balance of $810 still due plaintiffs."

The foregoing facts were submitted to his Honor, with an understanding, that if he should be of opinion that the plaintiffs were entitled to recover, a judgment should be rendered for the above sum; but if he should be of a contrary opinion, a judgment of nonsuit should be rendered against them.

Upon consideration of the case agreed, his Honor, being of opinion with the defendant, ordered a nonsuit, from which judgment plaintiff appealed.

No counsel appeared for the plaintiffs in this Court.
W. A. Wright, for defendant.

PEARSON, J. Suppose Mr. Lord, as agent of "the Contributionship Insurance Company," had drawn a bill in favor of the plaintiff upon a third person, he would have signed the name of "the Contributionship Insurance Company, by W. C. Lord, agent;" his name being put on the paper merely to show that he had signed the name of the company, and assumed authority to do so. Suppose the drawee had accepted the bill and paid it in part, it is clear that the company would have been liable as maker, due notice being given, but no one would imagine that W. C. Lord was in any way liable. The principle applicable to our case is precisely the same, and the facts are the same, with this difference, "the Contributionship Insurance Company," instead of drawing upon a third person, is the drawer of a bill upon itself.

This is an anomaly unknown to the "law merchant." A check payable to self, or to one's own order, is in common use, and perhaps this suggested the idea of a *bill* upon self; but however that may be, it is clear that the agent who drew the bill, the agency being admitted, is in no way liable. There is no error.

PER CURIAM. Judgment affirmed.

MICHAEL BROWN AND SON *vs.* JOHN FINK.

In an action upon a store account of different items, the payment of money into Court upon a particular item, admits the character in which the plaintiff sues and the defendant's indebtedness to the extent of the amount paid in only; but, it admits nothing as to other items in the same account, upon which the money was not paid in; as to them, the defendant, notwithstanding the payment, is free to deny the character in which the plaintiffs sue, and the justice of the claim.

THIS was an action of ASSUMPSIT for goods sold and delivered, tried before ELLIS, Judge, at the last Spring Term, 1856, of the Superior Court of Law for the County of Rowan.

The plaintiffs' declaration contained but one count, and alleged that they, as *merchants and co-partners*, sold and delivered the defendant goods, &c., to the amount of $43,32, and goods, &c., to the amount of $105,00, and of these two items, they filed a bill of particulars, or store account, from which it appeared, that the first item was made up of dry goods, coffee, sugar, salt, bacon, &c., at various intervals, from December, 1851, to March, 1852, and the other, was for three lots of manure, furnished in the years, '52, '53, and '54.

Upon the return of the writ, the defendant, on motion, being allowed so to do, by a rule of the Court, had paid into Court, the sum of $48,70; that being the amount of the first item with interest; and this money had been taken out by the plaintiffs. To the other item, for the manure, they entered the "general issue," &c.

Upon the trial, it appeared that the manure in dispute, had been collected in stables erected by the plaintiff, Calvin Brown, in the county of Cabarrus, and by him, the said Calvin, sold to the defendant, and that the store from which the other articles were furnished, and in the management and profits of which the plaintiffs were co-partners, was at Salisbury, in the county of Rowan.

The defendant insisted that, so far as the manure was concerned, there was no evidence to show a partnership between

the plaintiffs, and, therefore, the action could not be sustained. The plaintiffs contended that, by paying the money aforesaid into Court, the defendant had admitted the partnership, and that the jury had nothing to do, but to assess the damages; and further, that as the declaration had but one count, the payment of the money into Court, would be held to apply to the whole count, and amounted to an admission that something was due the plaintiffs for the manure.

His Honor charged the jury, that there was no evidence of a partnership as to that part of the claim in controversy. Plaintiff excepted. Verdict for defendant. Judgment. Appeal to the Supreme Court.

Boyden, for plaintiffs.
H. C. Jones, for defendant.

NASH, C. J. The plaintiffs sue as merchants in trade. The declaration contained one count. The account on which the action is brought, is a store account. The defendant, on motion and by leave, paid into Court the sum of $48,70, the amount by him admitted to be due on the store account, together with the costs of suit, up to that time. This money was taken out by the plaintiffs. In the account filed by the plaintiffs, is an item for a quantity of manure. As to that item, the case is: The plaintiffs carried on their trade, as merchants in the town of Salisbury. In 1851, Calvin S. Brown, the son, engaged with the rail-road company as a contractor, and erected stables on the land of Mr. Miller, in Carbarrus county, convenient to the place where he was working; there the manure was collected, and was sold by Calvin S. Brown to the defendant. On the trial of the case, at a subsequent term, it was insisted by the defendant's counsel, that there was no evidence to show a partnership between the plaintiffs as to the manure. The plaintiffs, on the contrary insisted that, by paying the money into Court, the defendant admitted the character in which the plaintiffs sued, and that the jury had nothing to do, but assess the damages. He fur-

ther insisted here, that, as the declaration had but one count, the payment of money into Court, extended to the whole count, and was an admission, that something was due to the plaintiffs for the manure. His Honor was of opinion that these facts furnished no evidence of a partnership, as to the claim in controversy. In this we concur.

Mr. Phillips, in his treatise on Evidence, 1 vol. p. 142, says, as to payment of money into Court: "Such payment, *in general*, is an acknowledgment of the right of action to the amount of that particular sum." "It is an admission by the defendant, that the plaintiff has a legal demand to a certain extent, *but it is not an acknowledgment beyond that amount*, and will not preclude the defendant from taking any objection to the action, with respect to any other part of the demand to which the payment of the money does not apply, although if no money had been brought into Court, the objection might have been a bar to the whole demand." In *Rucker* v. *Palsgrave*, 1 Taunt. 419, it is held, that in an action of a general indebitatus assumpsit, payment of money into Court is no admission of a contract beyond the amount paid in. Thus, where the action was for goods sold to defendant's wife, the amount of the plaintiff's particular was £28. 5s. 6d., for various articles. The sum paid in was £10. Upon the trial, it appeared, that the wife had obtained the goods, under such circumstances that the husband was discharged from all obligation to pay any thing; but the Judge at the trial, considered the payment of the money into Court, as an admission of a general liability, and directed a general verdict for the whole. This, on a motion for a new trial, was held to be error; that the verdict ought to be restricted to the £10. In *Hitchcock* v. *Tyson*, 1 Esp. 481, note, it was held by Buller, that after a payment of money into Court, on a single count for work and labor done, the defendant might show he was an infant at the time the work was done—a defense to the whole action; and they cut the demand down to the amount paid in. If then the payment of money into Court, when the defendant has a good defense to the whole demand, does not prevent him from show-

ing a defense which might have gone to the whole action, surely he may be permitted to show, that he is not bound to pay for a part of the items upon which the money was not paid. In the case last cited, the declaration contained, as here, but one count. Our attention was called to the case of *Cox* v. *Parry*, 1 T. R. 464. That was an action *on a bond*, and several breaches were assigned. The payment of money into Court upon one breach, necessarily admitted the bond, and as necessarily admitted it to each breach. The bond was the foundation upon which each breach rested. But the case here, is very different. The payment of the money into Court, upon a particular part of the account filed, admitted not only the character in which the plaintiffs sued, but also that the defendant was justly indebted to the plaintiffs on that account, to the extent of the money paid in, but it necessarily admitted nothing as to the items upon which the money was not paid in. In fact, when money is paid into Court upon an account, and the plaintiff takes it out, that portion of the claim is considered as stricken out of the declaration, and the parties go to trial on the balance of the claim, as if the part stricken out had never been included in it. The defendant, therefore, was at liberty to deny in this case, so far as the manure was concerned, not only the character in which the plaintiffs claimed it, but also to show any thing which proved that the claim was not just. The rule must be so; if it were not, gross fraud or gross oppression might easily be practised on defendants. The rule suffering defendants to pay money into Court, was adopted to put a speedy end to litigation, and thereby save costs; a defendant knows he is indebted to the plaintiffs upon a portion of the account, but he is conscious he does not owe them the balance on a particular item. Now, he does not wish to litigate that portion which he knows to be just, but according to the plaintiffs' doctrine he must do that, and thereby incur an addition of costs; for the plaintiff must ultimately recover something. This would be oppressive and unjust. But again, in this case, suppose the defendant had a good set off against Calvin Brown, and the claim for the

manure, was due actually to him, how could the defendant avail himself in that action against Calvin's claim? How could he avail himself of this set off? Only by showing, that the claim was not a partnership demand, and thereby compelling Calvin Brown to sue him in his own name. Of this right and privilege, that is, of paying into Court what he knew he owed the firm of Brown and Son, he could not be deprived, by their putting into an account, which was due them as partners, an item due to one of them individually; nor, could he thereby be deprived of the right of showing, that he did not owe the money due for the manure to the firm, but to Calvin the son.

PER CURIAM. Judgment affirmed.

AUGUSTUS GWYNN *vs.* ANDREW SETZER.

In an action of deceit in the sale of a slave, the plaintiff must prove the sale; and if the contract of sale be evidenced by writing, that must be produced and proved by the subscribing witness, or its absence accounted for.

ACTION on the case for a deceit in the sale of a slave, tried before his Honor, Judge DICK, at the last Spring Term of Caswell Superior Court.

The plaintiff declared for a deceit in the sale of a slave named Jack. He proved by a witness, one *Stonestreet*, that he was present at the sale and delivery of the slave, Jack, to the plaintiff; that the consideration of the sale was the sum of $1075, which was paid down. The witness further proved that the defendant informed the plaintiff, before the contract was closed, that he would only warrant the title of the slave, and it was agreed that Wm. B. March should write the bill of sale; March did write the bill of sale as requested by the parties; it was executed by the defendant, witnessed by March, and delivered to the plaintiff.

The defendant's counsel made the point, that as the contract between the parties had been reduced to writing, the writing itself should be produced, and insisted that all other evidence of the contract of sale should be ruled out. The plaintiff's counsel contended that his action was brought for a deceit and not for any breach of warranty in the paper writing, and, therefore, that it was not necessary to produce the writing; that it was sufficient for the purposes of this action for him to prove the payment of the purchase money by him, and the delivery of the slave by the defendant.

The Court was of opinion that the bill of sale, or contract in writing, which had been proved to exist, must be produced and proved, before the plaintiff could proceed in his action.

The plaintiff then produced the following instrument, viz:

"Received of Augustus Gwynn ten hundred and seventy-five dollars, in full payment of a negro boy named Jack, aged twenty-two; which boy I warrant the right and title to, and warrant nothing further. Given under my hand and seal, this 5th day of November, 1853."

ANDREW SETZER, [SEAL.]

Witness, *Wm. B. March.*

The witness, March, not being present, the plaintiff proposed to prove the instrument by other testimony, insisting that it was not a bill of sale, but simply a receipt for the purchase money. But the opinion of the Court was against the plaintiff. In submission to this opinion he took a nonsuit and appealed.

Moore and *Bailey*, for the plaintiff.
Morehead, for the defendant.

BATTLE, J. To entitle himself to recover in his action for a deceit, the plaintiff was bound to prove that the defendant had sold him the slave in question.

The sale might have been made in either of two ways, by a bill of sale, or, by a parol sale, accompanied with the actual delivery of the slave. Rev. Stat. ch. 37, sec. 19; *Choat* v.

Wright, 2 Dev. 289; *Caldwell* v. *Smith*, 4 Dev. and Bat. 64. It was, in fact, made by a bill of sale, for the instrument produced was undoubtedly such. *Fortesque* v. *Satterthwaite*, 1 Ire. Rep. 566; *Respass* v. *Lanier*, 8 Ire. Eq. Rep. 281; 1 Sheph. Touch.; 30 Law Lib. 388. The question then, is, whether the contract of sale, having been made in writing, the plaintiff could prove by parol, a sale and delivery, with a view to his action for a deceit in such sale. His counsel contends that he can, assigning as a reason, that his action is not founded upon any warranty, or other thing contained in the paper writing, but upon something *dehors*, to wit, the deceit.

The argument is ingenious, but we do not assent to its correctness. Its tendency is to evade the strong rule of evidence, that inferior testimony is not admissible, where the case admits of a higher grade. The very offer of the inferior, creates a suspicion that the party fears the effect of the higher, and is, therefore, reluctant to produce it. It is not denied, that a written transfer of a slave is higher evidence of the sale than parol proof of a sale and actual delivery. Why not require him to produce it, when it appears that he actually had it in his possession? From the case of *Choat* v. *Wright* above cited, it is manifest that the Court was very reluctant to decide that the statute of frauds (Rev. Stat. ch. 50, sec. 8; R. C. ch. 50, sec. 11,) did not require all sales of slaves to be in writing. It was the case of the sale of a slave in which there was no bill of sale, or memorandum of the sale in writing, and it was objected in argument, that it could not be supported on that account. The Court say, "we should lend a ready ear to any plausible argument tending to prove that this case is within the statute of frauds; for, we feel that all the mischiefs are as apt to arise out of executed, as executory contracts; but the words of the statute are too strong and plain to be got over." After showing that the language of the statute did not admit of the construction contended for, the Court thus concludes, "we are aware of the great inconveniences that will arise from this construction, and that has made us very reluctant to adopt it; for, the same fraud and

perjury will be practiced in the dispute, whether the contract was one 'to sell,' or, 'of sale,' as in ascertaining the particular terms of a contract to sell, and thus, all the benefits intended by the Legislature, be defeated."

In the present case, we are not bound by the words of any statute, but are called upon to uphold a great conservative principle of evidence. The plaintiff cannot get along with his action, without proving a sale. That sale was effected by means of a contract, the terms of which were, at the time, reduced to writing, and signed and sealed by the defendant. That writing must then be produced and proved by the plaintiff, as the law requires. If the plaintiff fail to produce it, he must show its loss, before he can be allowed to introduce any inferior testimony. The plaintiff having failed to do this on the trial, his Honor was right in giving the judgment of nonsuit, and that judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Doe on the dem. of JAMES EATON *et. al. vs.* JAMES GEORGE.

No person is entitled to notice to quit, as a prerequisite to the bringing of an action of ejectment, unless he be a tenant of some kind to the lessor of the plaintiff.

ACTION of EJECTMENT, tried before his Honor, Judge DICK, at the Spring Term, 1856, of Stokes Superior Court.

The lessors of the plaintiff showed title to the land in question, under one *Hardy Carroll*, who was the trustee of the lessor, Jas. Eaton; they showed that the defendant claimed a right to the possession under one *John L. Bitting*, who professes to have bought also from Hardy Carroll, the trustee. The defendant alleged that he had entered, by virtue of a parol agreement with Bitting, but showed no deed or conveyance from Carroll, nor did he show that he, Bitting, had ever paid the purchase

money; all he produced on the point was a certificate from Carroll, the trustee, dated 3rd of October, 1843, stating that he had sold the land in question to John H. Bitting, agent of John L. Bitting, and an order, in favor of Bitting, from Eaton, the grantor, to the trustee, for the surplus of the money, after the satisfaction of his debts, which was accepted on the same day, (3rd of October, 1843.) The case states that the defendant was in possession before this sale.

The defendant contended that he was entitled to notice to quit. This question was reserved by his Honor, with leave to set aside the verdict, if he should be of opinion with defendant, and after further instructions, which were not excepted to, the jury found a verdict for the plaintiff.

On the question of law reserved, his Honor, being of opinion with the defendant, set aside the verdict and ordered a nonsuit; from which judgment plaintiff appealed.

Morehead, for plaintiff.
Miller, for defendant.

BATTLE, J. The only question presented in the bill of exceptions is, whether the plaintiff was entitled to recover, without showing that he had given the defendant notice to quit, or had demanded the possession of him before commencing his suit. A notice to quit, or demand of possession, can never be necessary, unless the party claiming it entered into possession, as a tenant of some kind to the lessor of the plaintiff. Here, the defendant entered under the authority of John L. Bitting, who claimed as *a purchaser*, and not as a tenant of any kind. The entry, unfortunately for the defendant, was made before his landlord had obtained a conveyance of the title, and, so far as we can see, before he had paid the purchase money. It does not appear that he entered with the consent of the vendor, so as to make him a *quasi* tenant at will, according to the cases of *Jones* v. *Taylor*, 1 Dev. 434; *Walton* v. *File*, 1 Dev. and Bat. 567. He was, therefore, in law, a trespasser, and might be so treated, by the person in whom

was the legal title, bringing an action of ejectment against him. Not being a tenant for years, or from year to year, or at will, or even by sufferance, there can be no pretence, that a notice to quit or demand of possession should be shown, before the suit was brought.

The judgment of nonsuit must be reversed and judgment must be entered on the verdict, in favor of the plaintiff.

PER CURIAM. Judgment reversed, and judgment entered for the plaintiff.

MILES COSTIN *vs.* ROBERT G. RANKIN.

To subject the endorser of a bill of exchange, where the parties reside in the same town or city, the general rule is that notice of non-payment must be given to the endorser personally, or a written notice be left at his residence or place of business. A notice put in the post-office in such a case is not sufficient.

ACTION of ASSUMPSIT, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of New-Hanover Superior Court.

The plaintiff declared against the defendant as endorser of a bill of exchange, drawn by one *McMillan* on one *Rothwell*; and the only question in the case was, whether the notice was sufficient to subject the endorser. The facts were, that at the maturity of the bill in question, it was protested for non-payment by the acceptor. The notary public proved that about half past four o'clock, P. M., of the day when the bill fell due, he deposited in the general letter-box of the post-office, in the town of Wilmington, a notice to the defendant of its non-payment, and that such was his general habit in regard to such notices. The bill had been placed in the bank for collection.

The notary public also testified that the defendant was collector of the customs at the port of Wilmington, and resided

in that town; but whether he was in town on that day he did not know.

The deputy post-master proved that the post-office was kept on the first floor of the house where the business of the custom-house was done, and that the latter was on the next floor above; that the defendant had a special box in the post-office, in which all his letters and papers, public and private, were deposited; that letters put into the general letter-box of the post-office were taken out and put into the private boxes of such as had them, two or three hours after they had been put into the office; that letters put into the general letter-box after five o'clock, were not given out till next day. He also proved that defendant called for letters and papers two or three times a day, and had not complained of any irregularity in getting them. There was no evidence that defendant had any access to the post-office other than the citizens generally. Upon these facts the Court instructed the jury that the notice was sufficient to establish the defendant's liability. Defendant excepted.

Verdict for plaintiff. Judgment and appeal by the defendant.

Bryan, for plaintiff.
W. A. Wright, for defendant.

Nash, C. J. The action is upon a bill of exchange, and the question referred to us, is, as to the sufficiency of the notice of its non-payment at maturity. In every case of the dishonor of a bill or promissory note, it is the duty of the holder to give due notice thereof to all the prior parties who are liable to make payment to him, and to whom he intends to look. If he fails to give this notice, the parties unnotified are discharged. How and when notice is to be given, has given rise to much controversy. Our present enquiry is confined to the mode.

All the parties reside in the town of Wilmington. The defendant is collector of the port, and keeps his office in the up-

per part of the same building in which the post-office is kept. The defendant has a private box in the post-office, as collector, in which all papers addressed to him were put, public as well as private, and he was accustomed to call two or three times a day, at the post-office, for papers and letters; there is also a general box. On the same day, at half after four o'clock in the afternoon, on which the bill had arrived at maturity, it was, by the public notary, protested for non-payment, and notice thereof deposited in the general letter-box; and it was the practice of the post master, at stated times, to transfer letters and papers from the general letter-box to the private boxes of individuals. There was no evidence that the notice had come to the knowledge of the defendant. The general rule as to giving notice is, that where the parties reside in the same town or city, notice should be given to the party entitled to receive it, either by personal service, or by leaving it at his domicil, or place of business. *Chitty on Bills*, 502, 516, ch. 10; *Bailey on Bills*, 276, ch. 7, sec. 2.

When the defendant does not reside in the same city where the protest takes place, but has there a place of business, notice may be given at either place, at the option of the holder. This general rule yields to the agreement between the parties, that notice shall be given at any particular place; when given there it will be sufficient. The general rule, as to notice, is recognised in New York. *Ransom* v. *Mack*, 2 Hill's Rep. 587, 591. The language of the Court there, is, "The rule formerly was, that notice of the dishonor of a bill or note, must be served personally on the drawer or endorser, or be left at his dwelling house, or place of business, and that rule still exists in this country, where the party to be charged resides in the same place where the presentment or demand is made."

This rule has, however, been relaxed to meet the exigencies of the commercial world, and it is now well settled, that, where the parties do not reside in the same town, notice may be transmitted by mail. But the post office is not the place of deposit for notices, except in cases where notices may be

transmitted by mail. *Ireland* v. *Kipp*, 10 John. Rep. 490. That case also recognizes, as cases within the exception, or where notice may be transmitted by mail, large cities, where there are more than one post-office, and where the party entitled to receive notice lives at a long distance from the general post-office of the place, and where there are what are called penny-posts. *Story* on Promissory Notes. Sec 312.

The case before us steers clear of all difficulty, on the subject of the exceptions to the general rule; the parties live in the same town; it is not alleged that the town is so large as to require a resort to different post-offices, or the residence of the defendant, from the bank where the bill was payable, so distant, as to render a resort to the post-office expedient, or necessary; or, that there is in Wilmington the establishment of a penny post; nor is there any evidence, that there is any agreement between the defendant and the plaintiff, or with the notary, that notice deposited in the post office should be sufficient. So far to the contrary, the defendant's place of business was in the same building in which the post-office is kept; it only required the notary, or the party plaintiff, to ascend a flight of steps, to reach the defendant's place of business; nor is there any evidence that the notice ever came to the hands of the defendant. The object of the notice being to apprise the defendant of the dishonor of the bill, and that he was looked to for the money, it is admitted, that any notice given to him, any where, in due time, would be sufficient. As there is nothing in the case to take it out of the general rule, the notice was not sufficient.

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

DANIEL D. PHILLIPS, *surviving partner*, *vs.* WALKER CAMERON.

The Act of 1852, ch. 51, sec. 2, providing "that the time during which the parties to a suit shall not have been resident in this State, shall not be giv-

en in evidence in support of the plea of the statute of limitations," does not apply to, and revive, claims barred before its passage.

ASSUMPSIT, tried before MANLY, Judge, Special Term, April, 1856, of Orange Superior Court.

The action was commenced by the plaintiff as surviving partner of Hooker & Phillips, by warrant, and brought to this Court by successive appeals. The statute of limitations was the defence relied on; to which the plaintiff specially replied the Act of 1852. A verdict was rendered against the defendant by consent of parties, subject to the opinion of the Court on the following case agreed, to wit: the account was contracted by the defendant in August, 1844, and he left this State, in the winter following, for the purpose of residing in Virginia, in which State he did reside from that time up to the bringing of this warrant in February, 1855. During that time he occasionally visited his mother's family in Hillsboro', Orange county, but with no intention of resuming his residence in that county. The whole time occupied by these visits did not exceed six months.

His Honor, upon consideration of the foregoing facts, being of opinion with the defendant, ordered a non-suit, from which the plaintiff appealed to the Supreme Court.

Bailey, for plaintiff.
Winston, Sr., and *Fowle*, for defendant.

BATTLE, J. The decision of his Honor in the Court below, is, we think, fully sustained by the case of *Taylor* v. *Harrison*, 2 Dev. 374.

That was an action of debt, commenced by a warrant, in March, 1828, upon a justice's judgment, which had been obtained in May, 1821, and upon which the last *fi. fa.* had been issued in September following. By the Act of 1820, (R. C. 1820, ch. 1053,) it was provided, that no process to revive or enforce a justice's judgment, should be brought, "but within three years from the date of such judgment, or from the date

of the last execution, lawfully issuing on the same," and that all process issued to revive or enforce it after that time, should be declared void, and might be abated on the plea of the defendant. At the session of 1825, another Act was passed, which declared, "that all actions of debt, grounded upon the judgment of a justice of the peace, which shall be sued or brought after the ratification of this Act, shall be commenced or brought within seven years next after the rendition of such judgment, or the test of the last execution, lawfully issuing on the same, and not after." *Tayl. R. ch.* 1296. The question was, whether the last Act, extended to, and revived, a judgment, which, before its passage, was barred by the Act of 1820. The Court held, that it did not. They say, "it is evident, that the Act of 1825, altered the law of 1820, and made seven years, instead of three, a bar to justices' judgments, in case they lay dormant during that time. But, is it credible, that the Legislature, by passing the Act of 1825, intended to disturb rights, which had been put to rest by the Act of 1820? The fair construction of the Act is, that it was intended it should operate in cases arising after its passage, or perhaps, upon cases where a three years bar had not run; but not upon cases, which the Act of 1820 had already barred. Suppose a warrant had been brought upon the first judgment given by the justice of the peace, more than three years after its date, and before the passage of the Act of 1825, and it had been abated on the plea of the defendant, under the Act of 1820, would not this be a bar to a warrant brought after the Act of 1825? If the Act of 1820 was a bar in such case, was it indispensable that it should be called into action, before the bar was completed?"

This argument is in our opinion unanswerable, and it applies with as much force to the Act of 1852, ch. 51, sec. 2, as it did to the Act of 1825.

We admit, that the Act of 1852, applying as it does to the remedy and not to rights of the parties, might have been made retrospective in its operation; but as it was in some degree intended to disturb a statute of repose, which is always

favored, we will not be justified in allowing to it such an operation, unless its language clearly requires it. The words of the Act are, "that on the trial of any suits before any of the Courts of this State, the time during which the parties to a suit shall not have been a resident, shall not be given in evidence, in support of the plea of the statute of limitations."

These words may be fully satisfied, by applying them to all cases where the bar of the statute of limitations (R. S. ch. 64, sec. 3.) had not already accrued. If the Legislature intended to apply them to a case like the present, the Act ought to have been entitled, "An act to encourage litigation, by reviving stale claims." But we do not believe, that it had any such intention, and the policy of the Act, even upon the most favorable construction, has been deemed so doubtful, that it has been omitted in the Revised Code.

PER CURIAM. Judgment is affirmed.

STATE *vs.* EDMUND S. DEAN.

When a person, not regularly a constable, has been deputed under the Act of Assembly to execute a State's warrant, the deputation ceases upon his executing the warrant, by bringing the defendant before a justice of the peace, and returning the process before him.

An authority to convey a prisoner to jail, cannot be given by a justice of the peace by parol.

THIS was an INDICTMENT, tried before his Honor, Judge DICK, at the last Term of Guilford Superior Court.

The charge in the indictment was, that the defendant having been deputed to serve a State's warrant in a case of assault and battery, was further ordered by parol to take the prisoner to jail, which he failed to do, but voluntarily permitted him to escape. The jury below returned into Court the following special verdict: "That one Nathan Hiatt, an acting justice of the peace, in and for the County of Guilford,

on the 20th day of July, 1854, issued a State's warrant for an assault and battery against one James Wood, directed to any constable or other lawful officer, of said County, to execute and return; that on the 21st day of July, of the same year, Newell R. Sapp, another acting justice of the peace, in and for the said County, entered the following endorsement on the said warrant, viz: 'For the want of a lawful officer, I depute E. S. Dean to execute the within warrant. Given under my hand and seal, this 21st day of July, 1854. Signed, N. R. Sapp, [seal].' That the said E. S. Dean, by virtue of the said warrant and deputation, arrested the said Wood, and returned the said warrant with the defendant, Wood, before Arrington Dilworth, another acting justice of the peace, of the said County, on the same day; that on the way to the house of the magistrate, the defendant asked the said Wood what he would give him to keep him out of jail, in case the justice bound him over for his appearance at Court, when the said Wood told him he would give him four dollars, two dollars in cash, and his note for two dollars more; that evidence was taken before the said justice, of the guilt of the defendant; whereupon he was ordered to enter into recognizance in the sum of $25, for his appearance at the next Court of Pleas and Quarter Sessions, of Guilford County; that the defendant failing to enter into the above named recognizance, the said justice wrote the following mittimus on the said warrant, viz: 'To the jailor of Guilford County: You are hereby commanded to put into the common jail of Guilford County, James Wood, who fails to enter into recognizance as required above. Given under my hand and seal, this 21st day of July, 1854. Signed, A. Dilworth, J. P., [seal];" which said warrant, with the mittimus thereon, was delivered by the said justice to the defendant, Dean, with directions from the justice to take the said Wood and commit him to the common jail of said County, but that the said directions were not in writing, but by parol; that the defendant took the said Wood into his charge, together with the said warrant, and carried him in the direction towards Friendship, the residence of the said

Dean, but before arriving at that place, voluntarily released him, and permitted him to go at large out of his custody, upon his paying him two dollars in cash, and giving his note for two dollars; but whether the defendant is in law guilty, on the above state of facts, the jurors are ignorant, and submit the question to the Court," &c.

The Court being of opinion, upon the special verdict, that the defendant is guilty, gave judgment accordingly; and the defendant appealed to this Court.

Attorney General and *Bailey*, for the State.
Morehead, for the defendant.

BATTLE, J. The guilt of the defendant depends upon the question, whether he had a legal authority to detain the prisoner James Wood, at the time when he was permitted to make his escape. The defendant was not a regular officer, but he had been properly deputed by virtue of the tenth section of the twenty-fourth chapter of the Revised Statutes, to execute the State's warrant, by which Wood had been brought before a justice of the peace, to answer the criminal charge therein specified. Had the prisoner then been permitted to escape, there can be no doubt that the defendant would have been indictable therefor. But we are of opinion, that when the warrant had been returned, and the justice had acted upon the case, the deputation expired, and the defendant had no longer any authority to act under it. The *mittimus* was another, and a very different "precept or mandate," which ought to have been delivered to a constable, had one been present; or "in the absence and for want of a constable," the justice who made it out, ought to have deputed the defendant, or some other person, "not being a party," to execute it by carrying the prisoner to jail. But it is said, that the defendant was so deputed by the parol directions of the justice. This raises the question, whether the law required such deputation to be in writing. The defendant's counsel strenuously contends that it did, and not only so, but that it ought to have

been under the seal of the justice. In support of this position he relies upon the case of the *State* v. *Worley*, 11 Ire. 242, in which it was decided that a seal is essential to a warrant issued by a magistrate to arrest a person for a criminal offence, and that if there be no seal, the warrant is void, and the defendant is justified in resisting its execution. The argument seems to us to be unanswerable. If a regular officer, having a warrant, perfect in all respects except in the matter of a seal, cannot legally seize and detain the person of a citizen, we cannot see how an authority to do so can be conferred, by parol merely, upon one who is not a known officer. Suppose that while on the way to jail the defendant had refused to go any further, how could he have shown that he had the right to call upon other persons to assist him? When arrived at the jail, how could he have satisfied the jailor that the prisoner was rightfully in his custody, and that the jailor would be justified in receiving and detaining him? It will not do to say that the *mittimus* was written upon the warrant, which the defendant had been lawfully deputed to execute. In truth, it ought not to have been written there, for it was the duty of the justice to keep the warrant and judgment thereon, until he could return the papers to Court. But supposing it to have been properly on the warrant, the papers themselves would have shown, that whatever authority had been conferred upon the defendant, had expired with the execution and return of the warrant. The force of this argument is not weakened by the decision in the case of the *State* v. *Maberry*, 3 Strob., S. C. R. 144. The defendant in that case had been a regular officer, but had failed to renew his bond at the proper time, and it was held that he, continuing to act as an officer, could not take advantage of his own neglect. Our opinion is, that the judgment upon the special verdict was erroneous and must be reversed, and a judgment entered for the defendant.

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

EVAN BEVAN *vs.* CHRISTENBURGH J. BYRD.

Where a quantity of unshucked corn was levied on by a constable, it was no violation of his duty to divide it into small piles and sell it by the pile.

Whether articles levied on have been *properly sold*, is a question of law, and it is error to leave that question to a jury.

ACTION on the CASE, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of New-Hanover Superior Court.

The declaration contains two counts against the defendant, as a constable, for misconduct in making sale of the plaintiff's property under an execution. The first count charges that he sold the plaintiff's property *en masse*; and the second, that he sold the plaintiff's property while the same was absent, thereby causing it to be sold at an undervalue, to the great damage of the plaintiff, &c.

The evidence on the part of the case considered by this Court was, that the defendant sold some corn in the shuck, supposed to be one hundred and fifty bushels, in five or six piles or parcels. Upon this part of the evidence, the defendant's counsel asked his Honor to charge the jury that the corn was properly sold; he refused to give the charge desired, but told them it was the duty of the officer so to have conducted the sale as to make the most money out of the property; to have sold it as a prudent man would his own property; that as to the corn, he left it to the jury under the rule laid down.

The defendant excepted to this part of the charge. Verdict for the plaintiff. Judgment and appeal.

Strange, for the plaintiff.
London, for the defendant.

NASH, C. J. There are two counts in the declaration; the first, for a misdemeanor in the sale of the property *en masse*; the second for a conversion.

The defendant, a constable, levied upon some corn, fodder,

peas, cows, cord-wood, a yawl boat, etc., to satisfy an execution in his hands against the plaintiff. On the day of sale, the corn was in the shuck, and divided into five lots; how much corn was in each pile the case does not state, but the whole is stated to have been one hundred and fifty bushels. It was sold by the pile. The peas were in the pod, and the whole sold together; and so with the fodder. Neither the yawl boat nor cattle were present at the sale.

When an officer levies an execution upon property, it is his duty so to conduct the sale as will be most beneficial to all parties. The law points out no particular mode in which an officer shall conduct his sales; but he is bound by general principles to sell the property in that way which will probably bring the most money. He is the agent of both parties, appointed by the law to conduct the sale, and must act in good faith to both, and both are interested that the articles shall bring the greatest amount of money; particularly is it important to the defendant.

When various articles are levied upon, they cannot be sold *en masse*; the officer must conform as nearly as possible to such rules as a prudent man would pursue in selling his own property. *Jones* v. *Lewis*, 8 Ire. 70; *McLeod* v. *Pearce, et al*, 2 Hawks 110. Upon this count his Honor's charge was incorrect. He was requested by the defendant to charge the jury that in point of law the corn was properly sold; this was refused, and his Honor left it to the jury under the general instructions given in the first part of the charge. Whether the corn was properly sold was a question of law, to be decided by the Court; the facts were solely in the province of the jury. It is similar to the question of probable cause in an action for malicious prosecution; the facts being ascertained by the jury, the Court is to pronounce the law upon them. So in the case of reasonable diligence and reasonable notice.

In our case, the jury ought to have been instructed that the corn was properly sold by the defendant; that it was legally sold. An officer may sell a field of standing corn, but he is not obliged to gather it. So he may sell a pile of unshucked

corn. The practiced eye of the experienced farmer can pretty well inform him of the quantity of corn, both in the field and in the pile. A man may sell an ox or hog in a pen, but he is under no obligation, unless he contract to do so, to butcher the animals. The purchaser's eye is his chapman.

As there must be a *venire de novo*, it is unnecessary to take notice of the charge on the second count.

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

STATE *vs.* WILLIAM D. HAYWOOD, *et al*, COMMISSIONERS, &c.

Wherever a duty is imposed by law, the performance of which concerns the public, the omission to perform that duty is an indictable offence.

Where, by one clause of an act of assembly, the commissioners of a town are *empowered* and *required* to let out the repairing of the streets of such town to the lowest undertaker, and by another clause of the same, they are *authorized* to lay a tax for repairing the streets, and the inhabitants of the town are, by the same act, exempted from working on the streets, it is not discretional with such commissioners whether they will let out the streets and lay the tax, but they are indictable for failing so to do.

An indictment against commissioners of a town for failing to do their duty as such, during a certain space of time therein set out, must aver the tenure and duration of their office. Therefore, an indictment which charges that they were commissioners on one particular day of the time alleged, during which they were delinquent, is defective; no judgment can be pronounced thereon.

Where commissioners are authorised to raise money, by taxation, for repairing streets, and to expend it in a particular way to effect such repairs, that is, by letting out the work to the lowest undertaker, it is not sufficient to charge generally that they refused, and neglected to apply and expend the money in repairing.

THIS was an INDICTMENT against the defendants, as commissioners of the City of Raleigh, tried before his Honor, Judge PERSON, at the last Spring Term of Wake Superior Court.

The bill charges, that on the 1st day of January, 1855, there

were certain streets in the City of Raleigh (describing them by name) used, &c., and that on that day, the same were ruinous and out of repair; also, that by an act entitled "an Act for the government of the City of Raleigh," &c., the commissioners are empowered and required to let to the lowest undertaker, on giving ten days' notice of the same by advertisement, the necessary repairing of the streets; and that "it then and there became, and was their duty, to let out the said streets, as is in the said act directed and prescribed;" and that the said commissioners, from the 3rd Monday in January, 1854, to the 3rd Monday in January, 1855, did then and there unlawfully and wilfully neglect and refuse so to let to the lowest undertaker, the necessary repairing of the said streets, by which, the said streets became ruinous and out of repair, against the form of the statute, &c.

The second count of the indictment charges, that on the 1st day of January, 1855, there were, &c., setting forth the streets as above described; that on that day they were out of repair, &c.; that on *that day* the defendants were commissioners, and that by an act of the Assembly, entitled as above stated, it was enacted, that "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 authorised to lay, levy and collect annually, a tax not exceeding ten shillings on every hundred pounds' value of taxable property in the said City, and a tax not exceeding ten shillings on all free male polls residing within the limits, and a tax not exceeding ten shillings on every male slave (of a certain age) working within the limits of the said City; and that, hereafter, no inhabitant of the said City shall be compelled to work on the streets thereof." That the said commissioners, as by law bound to do, did lay the taxes and collect the same for the purposes mentioned; and, that it then and there became, and was their duty, to lay out and expend the money thus collected, in repairing the said streets; and, that from the 3rd of January, 1854, to the 3rd of January, 1855, they wilfully neglected and refused so to do; by reason of

which neglect, the said streets became ruinous, &c.; concluding also against the statute.

On the trial of the case below, it was not denied by the defendants that the streets described were out of repair, nor, that being commissioners for the year 1854, and having collected the taxes for that year, they applied no part thereof to the reparation of the streets mentioned in the indictment. It was proved that these streets had not been let out to any undertaker in the year 1854. It was also proved that these were public streets of the City of Raleigh. The defendants objected that, under the charter of the City of Raleigh, they were not *bound*, and it *was not* their duty to apply and expend the monies so collected, as aforesaid, in repairing the streets as charged; neither were they *required* to let out the repairing of the said streets to the lowest undertaker, as is charged; on the contrary they insisted that these powers were discretionary, and, therefore, that they were not indictable for the omission.

His Honor was of a contrary opinion, and so charged the jury. Defendants excepted. Verdict for the State. Judgment and appeal. In the Supreme Court, the defendants' counsel moved *ore tenus* in arrest of judgment, for the causes mentioned in the opinion of the Court.

Attorney General, for the State.
Moore and *Cantwell*, for the defendants.

PEARSON, J. Whenever a duty is imposed by law, *the performance of which concerns the public*, the omission to perform it is an indictable offence. By the general law, the County Courts of the several Counties in the State, are required to see that the public highways are kept in repair, and to this end it is made their duty to appoint overseers and allot hands to the several roads, so that no public highway, whether it passes through a swamp or crosses over a mountain, can be out of repair, unless some one is liable to indictment for neglect of duty. The charter of the city of Raleigh

relieves the County Court of Wake from the duty of seeing that the streets of the city are kept in repair, by imposing that duty upon the Commissioners. So that the suggestion that the Commissioners may, or may not, at their discretion, see that the streets of the city, which are public highways, are kept in proper repair, cannot for a moment be entertained.

There is no question therefore, that the Commissioners are liable to indictment, but the question is does the indictment now under consideration make the necessary averments, so as to show on its face that the defendants are guilty of an omission of duty according to the terms and provisions of their charter?

The averments in the *first* count, are: on the 1st day of January, 1855, there were certain streets, known as Harrington street, &c., which streets were, on that day, and from thence hitherto, out of repair. On the said 1st day of January, 1855, the defendants were commissioners of the City of Raleigh. By an act of the Legislature, the commissioners are required to let to the lowest undertaker, on giving ten days' notice of the same by advertisement, the necessary repairing of the streets, whereby it became the duty of the defendants so to let out the repairing of the steets; yet the defendants, from the 3rd Monday of January, 1854, to the 3rd Monday of January, 1855, did neglect and refuse to let out the repairing of the streets. This count is fatally defective in this: there is no averment of the tenure of office, or of the time for, and during which, the defendants were appointed and bound to act as commissioners. There is an averment that they were commissioners *on the first day of January*, 1855; whether that was the first or the last day of their term of service, or whether the term was a week, or a month, or a year, is not averred; still the duty, for the neglect of which they are indicted, requires at least *ten days* for its performance. *State* v. *Commissioners of Halifax*, 4 Dev. R. 345.

The averments in the *second* count, are: on the first day of January, 1855, there were certain steets, known as Harring-

ton street, &c., which streets were, on that day and from thence hitherto, out of repair. On the said 1st day of January, 1855, the defendants were commissioners of the City of Raleigh. By an act of the Legislature the commissioners are required, in order to raise a sufficient fund for repairing the streets, to levy a tax. In pursuance of this authority, the defendants did levy a tax on the city property, "yet the defendants, during a long space of time, to wit, from the 3rd Monday in January, 1854, to the third Monday in January, 1855, did unlawfully and wilfully neglect and refuse to apply and expend the money raised by the taxes in repairing the streets."

Here, we meet with the same difficulty. There is an averment that the defendants were commissioners on the *first* day of January, 1855; but it does not appear whether that was the first or the last day of their term of service.

A more grave objection to this count presents itself. The commissioners are not required by their charter, to apply and expend the money raised by taxes, towards repairing the streets in a *general* way, but they are required to do it in a *particular* way, that is, by letting out to the *lowest bidder*, *after ten days notice*, the repairing the streets, in the way and manner set out in the specifications, as set forth in the first count. *State* v. *Justices of Lenoir*, 4 Hawks 194. So this sweeping charge that the defendants did unlawfully and wilfully neglect and refuse to apply and expend the money raised by the taxes, in repairing the streets, is altogether too vague, uncertain and general for a judicial proceeding.

We concur with his Honor, that the defendants are subject to indictment; it is not at their discretion to do or not to do a thing which concerns the public; but we are satisfied that the indictment is defective in not making the necessary averments. Therefore we allow the motion in arrest of judgment.

PER CURIAM. Judgment arrested.

The State on the relation of JOHN W. GARLICK *et al. vs.* RICHARD M. JONES *et al.*

A justice of the peace has no authority under the Act of 1741, Rev. Stat. ch. 24, sec. 10, to appoint a special constable to execute a *fieri facias.*

THIS was an action of DEBT, tried before DICK, Judge, at the last Spring Term of Orange Superior Court.

The relators of the plaintiff declared on the sheriff's bond against him and his sureties, and alleged as a breach, the failure to collect a debt under a *fi. fa.* in his hands.

The facts submitted in a case agreed are, that one Breese, a deputy of the sheriff Jones, had in his hands an execution in favor of the relators of the plaintiff for $47,73, against one S. D. Schoolfield, which he might have levied on a quantity of ice, some shingles, plank and scantling, and failed so to do. It is agreed that the said Breese desisted from executing the property above stated, from a belief that it was already appropriated by the prior levy of an execution. As to this execution the facts are, that the warrant on which it was obtained was not served by a regular officer, but by one Samuel Hanner; and after service of the paper on Schoolfield, a judgment was rendered in favor of the plaintiff, one Freeland, for $——; an execution was issued on this judgment, and the same was put into the hands of Hanner; besides being directed on the face of it to Samuel Hanner, the execution was endorsed thus: "for the want of an officer, I hereby deputise Samuel Hanner to execute this execution," and signed. This execution was levied on the property in question, before the execution of the relators came into the hands of Breese, and it was duly taken into possession by Hanner, and kept by him until he made sale of the same. Upon this statement of facts, it was agreed by counsel, that if his Honor should be of opinion, that the execution in the hands of Hanner was duly levied, and that under it, the said Hanner had a right to hold the property, that a nonsuit should be entered; but if his

Honor should be of a contrary opinion, judgment was to be entered for the plaintiff.

Upon consideration of the case agreed, his Honor, being of opinion with the defendants, ordered a nonsuit. From which judgment the plaintiff appealed.

Bailey and *Fowle*, for plaintiff.
Norwood, for defendants.

PEARSON, J. It is a matter of public policy, that writs and, all other process in the administration of law, should be executed by regularly appointed and known officers; so that there may be some guarantee of fitness for the place, and some degree of responsibility secured, and that by practice a familiarity with the duties of the office may be acquired; but more than all, that the authority of the office should be well known, and readily submitted to, by all with whom it may have to deal.

The necessity arising out of sudden emergencies, induced the colonial Legislature, as early as 1741, to make an exception to the general rule, and the provision of the statute then enacted, has been brought down to us by the several revisals. "For the better executing any *precept* or *mandate* in *extraordinary cases*, it shall and may be lawful for any justice of the peace to direct any such precept or mandate, in the absence of, or for the want of, a constable, to any person," &c.

This being an exception, of course the general rule must prevail; and nothing comes within the exception, unless it fall within the cases intended to be provided for, and the mischief to be remedied.

There is a marked distinction between process in civil and in criminal proceedings; in the one, there is danger that the party suspected may become a "fugitive from justice;" hence a necessity for his immediate apprehension; the officer or person deputed to execute the precept or mandate, is required to arrest the party and have him *forthwith* before some committing magistrate, to be dealt with according to law; in

the other, there is no such imminent cause for haste, and the writ or other process simply commands the officer to arrest the party and him safely keep, so as to have him at the next term of the Court; or to execute the process within thirty or ninety days (Sundays excepted). At common law the officer might, at his discretion, take bail or refuse to take it; and *bail below* was a bond payable to the officer. Here, we see at once, that in regard to the execution of writs and civil process, different considerations are involved, and objections to the action of any but regularly appointed and known officers present themselves other than such as apply to the execution of precepts or mandates for the arrest of persons charged with the commission of felonies and offences against the public. In regard to debtors who abscond, or otherwise conceal themselves, so that the ordinary process of the law cannot be served on them, the statute in reference to original attachments gives a remedy; and the idea that a common writ of *fieri facias*, which is to be executed within ninety days, is a *precept* or *mandate* in *extraordinary cases* within the meaning of the statute, cannot be entertained; there is no reason to presume that "the absence of, or want of a constable" to levy upon and hold possession of property until such time as it can be sold according to law, presented an exigency for which it was the intention of this statute to provide, any more than the absence or want of a sheriff in regard to writs and other process issuing from the Courts.

Sheriffs and constables may make deputies whenever the press of business requires it, and they are liable under the maxim *respondeat superior* for all defaults of their agents in civil proceedings. Why should creditors and debtors be unnecessarily exposed to irresponsible persons appointed by a single justice of the peace? No reason can be assigned for it, and in fact, such was not the intention of the statute.

We have, therefore, come to a conclusion differing from that of his Honor: We think that the defendant had a right, and was bound, to levy upon the ice and shingles, &c., in the possession of the debtor Schoolfield, notwithstanding the pre-

tence of claim set up by Hanner, under his unauthorised deputation.

Judgment of non-suit set aside, and judgment for the plaintiff according to the case agreed.

PER CURIAM. Judgment reversed.

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

Writings in general cannot be submitted to the inspection of a jury, to enable them to form an opinion as to the genuineness of another paper. When the contents of such papers are admissible, they must be read to the jury, but not exhibited to their sight.

One who has signed a prosecution bond may become a competent witness, by the substitution of a new bond, under an order of the Court, that such new bond shall be substituted, and the former one cancelled; and this, though such former bond is not then present in Court, to be cancelled.

In order that the Court may judge of the competency of testimony objected to, the bill of exceptions should set it forth. (*Outlaw* v. *Hurdle*, 1 Jones' Rep., cited and approved.)

ACTION of DEBT, tried before PERSON, Judge, at the last Spring Term of Edgecombe Superior Court.

The plaintiff declared on a bond for the payment of money, purporting to have been signed by Joseph John Norcott, the intestate of the defendant, for the sum of $1080, dated 4th day of October, 1846.

The defendant pleaded the "general issue."

The signature of Norcott was proved, and was not denied by the defendant; but it was alleged that the seal and body of the bond were written by the plaintiff, and had been written after the signing, and in the place of some former writing on the paper, which had been extracted with chemicals. It was in evidence that the body and seal of the note were in the hand-writing of the plaintiff. One *Hanrahan* proved the hand-writing of Norcott, and that the latter part of his name

ran into the scroll of the seal; that he had seen thirty bonds signed by Norcott, and his general habit in signing his name to sealed instruments, was to avoid running his name into the seal or scroll, and that he had no recollection of ever seeing one in which he had done so.

Upon examination of plaintiff's counsel, this witness stated, that twenty of the bonds of which he spoke, were shown to him yesterday, for the first time, by the defendant at his own room, and that they were all signed in the genuine hand-writing of Norcott. The defendant's counsel then proposed to ask the witness if the bonds which he then held in his hand were those which were shown to him yesterday by the defendant. On objection from plaintiff's counsel, this evidence was excluded, for which defendant excepted.

The defendant's counsel then proposed to show the bonds to the witness, and to prove by him that the bonds were genuine, and that Norcott had signed every one of them without touching the seal or scroll. To this plaintiff's counsel objected, and the testimony was excluded. For this defendant excepted.

Mr. Satterthwaite was offered as a witness for the plaintiff, and was objected to on the part of the defendant, because it appeared from the record transmitted from Pitt County, from which the cause had been removed, that he was surety for the prosecution of the suit. Thereupon the Court permitted a new prosecution bond to be executed by another surety, and ordered that Mr. Satterthwaite be released from his surety-ship on the bond heretofore given, and that the same be cancelled. The defendant still objected, because the original bond was not present, and was not cancelled; but the Court allowed the witness to be examined. The defendant again excepted.

Dr. Blow, a witness for the defendant, testified that he was well acquainted with the hand-writing of Norcott; that he was very neat and orderly in his writing and signature; that his general habit in signing his name to a seal was to give himself sufficient space, so that his signature did not reach or

run into the seal, and this was his habit when he signed his name and added "surety" or "administrator." The witness further stated that he saw the bond in suit, in the Spring of 1850, and examined it carefully; that he has been in the habit of observing the hand-writing of persons generally, but upon enquiry by plaintiff's counsel, he said he had not been engaged in any business which directed his attention particularly that way, and he could not say that he was an *expert* in deciding upon the genuineness of hand-writing, or possessed any particular knowledge upon the subject. The counsel for the defendant then proposed to ask him what his opinion was, formed at the time that he made the examination in 1850, and now entertained by him, as to whether the seal was made before or after the signature was written. This evidence was objected to by the plaintiff's counsel, and ruled out by the Court. Defendant excepted.

George W. Mordecai, plaintiff's witness, testified that he had been President of the Bank of the State for five or six years, and is in the habit of examining carefully, in the course of his business, and as a part of it, notes and papers, to detect counterfeits and forgeries, and thinks that he has acquired a knowledge of hand-writing superior to other men generally, and that he is a judge of such things; and, upon cross examination, he said he could not say that he had any particular knowledge or expertness in detecting whether the *seal* or *signature* of a bond was first written. The defendant objected to the opinion of Mr. Mordecai, upon the question whether the seal or signature was first written, but the Court allowed him to give an opinion; for which the defendant excepted.

There was a verdict for the plaintiff. Judgment and appeal by defendant.

Moore, for plaintiff.
Rodman, for defendant.

NASH, C. J. The notes offered in evidence were properly

rejected. If they could be used in the manner proposed, it would necessarily lead to a violation of the rule, that a jury cannot decide by a comparison of hand-writing. They would, if entrusted with the papers, compare the hand-writing of the document upon which the action is brought, with those given in evidence; and not being themselves experts, supposition would take the place of facts, upon which alone a verdict ought to be founded. More especially ought the papers offered in evidence here, to have been rejected; they were shown to the witness on the morning of the trial, and might have been selected from many others to answer the particular purpose for which they were tendered. If such a thing were countenanced in practice, it would lead eventually to imposition on the Court, and fraud upon the opposite party. I hope it is unnecessary to say we impute no improper conduct or motive to the defendant in the present instance. Writings, in general, are not properly submitted to the inspection of a jury; if used on the trial of a case, they may be read to them. *Outlaw* v. *Hurdle*, 1 Jones' Rep. 150. In the rejection of the papers as evidence to go to the jury for their inspection, there is no error.

The *second* exception is not sustained; the papers themselves being rejected, the question propounded to the witness was entirely immaterial; if they had been admitted it might have been material to identify them as the papers shown to the witness on the day before the trial.

The *third* exception is not tenable. Mr. Satterthwaite, when first tendered as a witness, was incompetent. Being the plaintiff's security on the prosecution bond, he was disqualified by his interest. By permission of the Court, the plaintiff was allowed to file another prosecution bond with a different surety. The Court ordered the first bond to be cancelled. It is objected, that the first bond was still in force, and the Court could not deprive the defendant of his interest in it, and because the prosecution bond was on file in another Court, and not present to be cancelled. By the order of the Court directing the first bond to be cancelled, it was as effect-

ually stript of all efficacy against the witness, Mr. Satterthwaite, as if it had been present and actually destroyed; and any attempt to enforce its collection by a suit at Law would have been a contempt of Court. See cases of *McCulloch* v. *Tyson*, 2 Hawks. 336; 2 E. C. L. R. 468. The first was an appeal bond, for which, on motion, the witness being interested, the appellant was permitted to substitute a new bond. If this can be done, upon an appeal, we see no reason why it should not be done in the case of a prosecution bond. In requiring a bond in either case, the security of the opposite party is the main object; and if, when the cause is to be tried, he is secured by a competent bond, the object is answered. Mr. Satterthwaite, after the order was made by the Court, was a competent witness.

The question put to Dr. Blow by the defendant's counsel was properly ruled out by the Court; the witness had stated that he was not an expert in deciding upon the genuineness of hand-writing, he was, therefore, not competent to answer the question put to him.

The answer of Mr. Mordecai to the question put to him, is not set forth, so that the Court may judge of its bearing upon the question; the exception must set out the evidence objected to. *State* v. *Clark*, 12 Ire. 151; *Sutliff* v. *Lunsford*, 8 Ire. Rep. 318. There is no error.

PER CURIAM. Judgment affirmed.

ROBERT SIMPSON *vs.* ZEBULON L. MORRIS.

Where the bargainor and bargainee to a bill of sale of slaves both lived in Union County, but the bargainee having a plantation in Mecklenburg, within the year sends the slaves to this plantation, whither he himself afterwards removes, and thenceforward resides; *Held* that this bill of sale was properly registered in Mecklenburg county.

ACTION of DETINUE, tried before his Honor, Judge ELLIS, at the last Superior Court of Mecklenburg.

The plaintiff claimed under a bill of sale, executed to him by David Simpson, embracing several slaves, including the one in question. This bill of sale was made in 1851, in Union county, and during the same year the slaves were removed to a plantation in Mecklenburg, belonging to the plaintiff, and there kept under the control and management of his agent, until he removed to the same place, and his father, the said David, to a place near there. There was a conflict in the testimony, as to who used and controlled the slaves afterwards, whether the plaintiff or his father; but there was no question as to the fact, that they remained in Mecklenburg from a short time after the bill of sale was made. The plaintiff's bill of sale was proved and registered in Mecklenburg county, and the defendant objected to its reception as evidence, insisting that it should have been registered in Union county, where it was executed, and where the parties lived at the time; but this objection was over-ruled by his Honor, and the bill of sale was admitted to be read. For this defendant excepted.

The defendant claimed by virtue of a sheriff's sale, under an execution against David Simpson, posterior in test to the date of the bill of sale; but he contended that this deed from the father, David, to his son, the plaintiff, was fraudulent and void as to creditors, and there was much conflicting evidence in that question. His Honor refused to give his opinion as to whether the conveyance was fraudulent, for which he also excepted.

Verdict for the plaintiff. Judgment and appeal by defendant.

Boyden and *Osborne*, for plaintiff.
Wilson, for defendant.

NASH, C. J. Two objections are made by the defendant to the plaintiff's action. First, that the bill of sale under

which he claims the slave in dispute, was not registered in the proper county. Second, that the purchase of the plaintiff from his father, was made to defeat his creditors, and was therefore fraudulent and void in law.

The first objection depends upon the proper construction of Rev. Stat. ch. 37. The twentieth section provides as follows: "where the transfer or conveyance of any slave shall be in writing, such writing, after being legally proved, shall be registered in the county where the purchaser shall reside, he being in the actual possession of the slave." In this case, the parties and slaves, at the time of the sale to the plaintiff, were in Union county. The case does not disclose the date of the bill of sale, but the plaintiff having a plantation in Mecklenburg county, the slaves were removed there soon after the sale, in the month of September, in the same year in which they were bought by the plaintiff; and soon thereafter, the plaintiff and his father both removed to Mecklenburg county, in which county the deed was proved and registered. The presiding Judge held the registration sufficient, and we concur with him. One object of the registration acts, is to furnish those who deal with the owners of slaves a ready way of ascertaining their title to them. Another is to ascertain where slaves are to be given in under the revenue laws. The purchaser, the plaintiff, residing in Mecklenburg county, and the slaves being there, a creditor, or one about to deal with him as to the slaves, would naturally search the register's office of that county, to ascertain his title. The construction put upon the Act by his Honor, is strengthened by the phraseology of the Act—"the purchaser being in possession of the slave." As the date of the bill of sale to the plaintiff is not given in the case, we are at liberty to presume that the slaves were removed to Mecklenburg soon after the sale to him.

On the second point, we see no valid objection to the Judge's charge. The Court was requested to charge the jury, that the evidence disclosed such a possession of the slaves after the sale, as to make the conveyance to the plaintiff fraudulent. This was declined by the presiding Judge; but he, being

of opinion that the fact of the possession by David Simpson was a controverted one, left it to the jury to determine how the fact was. The latter part of the charge being in favor of the defendant, he cannot complain of it. His Honor could not give the instructions prayed for; it would have been deciding a matter of fact controverted between themselves. The prayer was, that the jury should be charged, that the possession, under the evidence, was in David Simpson, the bargainor. This was denied by the plaintiff, and there was evidence on each side upon that fact. It was clearly the right of the jury to ascertain how the fact was, and to them it was left by the Court. These are the only questions referred by the defendant in his bill of exceptions to this Court.

PER CURIAM. Judgment affirmed.

ALEXANDER LASHLEY *vs.* JAMES LASHLEY.

A testator bequeaths to his daughter two slaves, and provides that she shall remain with her mother while she remains single; and then, is added the clause, "if she should die single, then, the property willed to her" to go over to others. The daughter married, but her husband died before she did, and she did not marry again: *Held*, that the limitation over did not take effect.

ACTION of DETINUE for two slaves, Dinah and Henry, tried before DICK, J., at the last Superior Court of Orange.

This case depends upon the construction of the will of Thomas Lashley, who died in 1824. After giving to his daughter, Fanny, the two negroes in question, he adds, "It is also my desire that my daughter, Fanny, live with her mother as long as she thinks proper; enjoying the same privileges she hitherto enjoyed, while she remains unmarried; if she should die single, then, the property willed to her, to be equally divided among the rest of my legatees."

Fanny Lashley, after the death of her father, married Thom-

as Thompson, who died in 1841, and she died in 1853, without having any child, and without having again married.

The plaintiff claims, as one of the legatees of Thomas Lashley.

The defendant claimed title under the will of Fanny Thompson, which was duly executed to pass such property and proved. His Honor charged the jury that Fanny Thompson had died single, according to the meaning of her father's will, and the plaintiff was entitled to recover.

Defendant excepted. Verdict and judgment for plaintiff, and appeal.

Graham, for plaintiff.
Norwood for defendant.

PEARSON J. The case turns upon the meaning of the word "single," as used by the testator, in the bequest to his daughter, Fanny When applied to a woman, "single," in its strict literal sense, means without a husband; but in its ordinary sense and as used in common parlance, it denotes a class; those who have never married, as distinguished from married women and widows. We are satisfied this is the sense in which it was used by the testator. His daughter, Fanny, in respect to the legacy given to her, was the primary object of his bounty; therefore, the restraint upon it ought not to be extended by implication. The testator uses the word "single," in opposition to the word unmarried, and obviously had in his mind, two future events. Fanny will either marry and settle in life, like the rest of my children, or she will remain unmarried, and continue to be with her mother; in this latter event, I can restrict the legacy, without interfering with her prospects in life; so, in that case, I direct the property willed to her, to be equally divided among the rest of my legatees.

There is another view, which we think conclusive. The limitation over, is not, if she should die single, and *without having children*, but, simply if she should die single; so, tak-

ing the word "single," as embracing the condition of her being a widow, the limitation over would take effect, although she left half a dozen children. A construction which leads to such a result cannot be for a moment entertained.

It was suggested upon the argument, that the term "single woman," had received a judicial construction, under the bastardy law, and was extended so as to include widows. So it has been extended to married women, under certain circumstances; but this broad construction of the word, as used in the bastardy law, is put on it to meet the mischief, and carry out the intention of the Legislature. But, as we have seen, there is nothing in the will under consideration, to extend the word beyond its ordinary meaning, and to indicate an intention to make a limitation over, if the daughter should be a widow, at the time of her death.

As the facts in this case are admitted, we will suggest to counsel, that, in all such cases, where a mere question of law is involved, the better course is to put the case in a shape so as to make the judgment of this Court final. In the way the statement of this case is made up, we can only direct a *venire de novo.*

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

GEORGE AND JOHN HYMAN *vs.* CLAYTON MOORE, ADM'R.

To constitute a deed, the party executing it must accompany the acts of signing, sealing and delivering, with the intention of making a deed.

Where, therefore, a person, being drunk, on the receipt of a sum of money which was due him, gave a bond for money instead of a receipt, the instrument is void.

THIS was an action of DEBT, commenced by a warrant and brought to this Court by successive appeals: it was tried before PERSON, J., at the last Superior Court of Martin county.

It was proved that the defendant's intestate had sold the

plaintiffs a quantity of fish, and that a suit was brought by him against them for the price; that afterwards, in a conversation about the suit and the state of the account, the intestate, at the request of the plaintiff George, made a statement which is in part, as follows: "you paid me $100 at one time, and I gave you a note instead of a receipt." To this, George made no reply.

Needham Hyman proved, that "George Hyman told him that Edmund S. Moore was groggy, and he, George Hyman had paid him $100 on account of the fish sold, and that Moore gave a note for the same instead of a receipt."

Miles Davis proved two other conversations with George Hyman, at different times, in which the same thing, in substance, was said, except as to the intestate's being groggy. The point raised below was as to payment, and the bill of exceptions sent up chiefly concerns that question; but from the view taken of the case in this Court, a further notice of it is deemed unnecessary.

Verdict for defendant. Judgment and appeal.

Rodman, for plaintiffs.
Moore and *Winston, Jr.*, for defendant.

PEARSON, J. This was debt on a bond for $100; pleas, "general issue, payment, fraud, &c.;" the jury find "all issues," in favor of the defendant.

In the Court below, the case was made to turn upon the question of payment, and the jury acting, we presume, under a general impression of the injustice of the plaintiffs' demand, and being left at large by the instructions of the presiding Judge, find all the issues in favor of the defendant.

We will not advert to the points made upon the plea of payment, because on the face of the proceeding, a ground is presented, upon which the defendant can take his position, and deny, *in limine*, the plaintiff's' cause of action, to wit, the writing declared on is not *his deed.*

According to the evidence, in a conversation between the

parties, the intestate of the defendant said, "you paid me $100 at one time, for which I gave you *a note, instead of a receipt.*" This was assented to, by silence. Needham Hyman swore, that George Hyman told him, that Edmund S. Moore was groggy, and he (George) *paid* him $100 on account of the fish, and Moore gave him *a note for the same, instead of a receipt.* Miles Davis proves two other conversations of the plaintiff, to the same effect.

Now, the question of law is, the facts being admitted, was the writing declared on, *the deed* of the defendant's intestate?

To constitute a deed, there must be *an intention to do the thing*, as well as an act; so that an act, without an intention, is just as inoperative as an intention without an act; *both* are required to make *a deed.* The distinction between fraud in *the factum*, and the fraud *in procuring or inducing the execution of an instrument*, is plain, yet some how or the other, it is not readily reduced to practical application. Fraud in the factum, is, where a party executes an instrument without having capacity; as a feme covert, or one non compos, or without knowledge of the contents; as, where a different instrument is slipped into the place of one he intended to execute, or where it is read falsely, or from some other cause he executes it in ignorance of its contents, so that he did not intend to do, what the instrument purports. *Fraud in procuring or inducing the execution of an instrument*, is, where a party having capacity, and with a knowledge of the contents, and with an intention to make it *his deed*, is induced by undue influence, false representations, or fraud in the consideration, to execute the instrument, with a knowledge of its contents, and *with an intention to make it his deed.*

In our case, the want of intention is fully proven, and to hold, that the plaintiff is entitled to recover upon an instrument executed under such circumstances, and that the defendtan must resort to a Court of Equity for protection, would be to put disgrace upon the Common Law Courts.

The distinction between fraud in the factum, and fraud in procuring the execution of a deed, is well pointed out, and

the line of demarkation distinctly drawn, in the following cases: *Reed* v. *Moore*, 3 Ire. Rep. 314; *Logan* v. *Simmons*, 1 Dev. and Bat. 14; *Gant* v. *Hunsucker*, 12 Ire. 258. The bond declared upon, was not the deed of the defendant's intestate, and the jury were well justified, in finding in his favor, on the "general issue."

PER CURIAM. Judgment affirmed.

CHARLES HENSON *vs.* ROBERT KING.

Whether an affirmation of the qualities of a chattel sold, is a warranty of soundness, is a matter depending on intention and should be left to the jury.

ACTION on the CASE for FALSE WARRANTY and for a DECEIT.

The plaintiff having proved the unsoundness of the animal in question, (a mare,) proved by one *Seahorn*, that, being a neighbor to both parties, he consented to be present at an interview between them on the subject of the trade. The plaintiff took the mare with him to defendant's house, and offered her back to the defendant, proposing to pay him twenty-five bushels of corn if he would rescind the bargain; on this being refused, he proposed to raise the quantity to fifty bushels, which, after some further conversation, was also refused. When the offer was first made by plaintiff, he said to him, that he had brought the mare back which he had purchased of him; that she was not what the defendant represented her to be; she was not sound; that the defendant had sold her as a sound mare, and that he had paid $100 for her; to which statement the defendant said nothing. There was much other testimony, but the above only is material to the view taken of the case by this Court. The Court below charged the jury that

there was no evidence of a warranty of soundness; to which instruction the plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Wilson, for plaintiff.
Boyden, for defendant.

NASH, C. J. It is well settled, that a bare affirmation of the quality of an article sold, merely expressive of the judgment or opinion of the vendor, will not amount to a warranty; to make it so, it must appear that it was a part of the contract that there should be a warranty. *Foggart* v. *Blackweller*, 4 Ire. 238, and the authorities there cited; *Baum* v. *Stevens*, 2 Ire. 411. It is not denied but that the animal was unsound; it is, however, denied that there was any warranty. His Honor instructed the jury, that there was no evidence of a warranty. In this there is error.

The witness states, that, at the request of the plaintiff, he went with him to the house of the defendant, and the plaintiff proposed to the defendant to take the mare back. The plaintiff observed to the defendant that the mare was not what he had represented her to him; she was not sound; that *defendant had sold her to him as a sound mare*. The defendant said nothing. The sole enquiry is, is this any evidence of a warranty? His Honor must have been of opinion that there was no contract of warranty between the parties. Whether the circumstances amounted to a warranty or not, was a question of fact for the jury; because, its being, or not so being, was in the *intention* of the parties. *Baum's case*. In that case, the defendant had sold a number of negroes, and when one named Jim was put up, he said: "Here is a young, likely, healthy negro; what is bid for him?" The presiding Judge notified the plaintiff's attorney, that he should instruct the jury that the words did not amount to a warranty. This Court ordered a *venire de novo*, upon the ground that the question ought to have been left to the jury as a matter of intention between the parties. In *Blackweller's* case, wheth-

er the negro was sold as sound, was a matter of controversy among the witnesses. His Honor, the presiding Judge, stated to the jury, that where a vendor used the word warrant or promise, or any other word or phrase, signifying that he undertook that the article sold was sound, it was in law a warranty; but when he used only words of affirmation, there, whether it was a warranty or not, was a question of fact for the jury; they were to say whether the parties intended a warranty. The Court here adopted their instructions. In this case, the word warranty was not used; but, the defendant, by his silence, admitted he had sold the horse as a sound one. His Honor erred in telling the jury there was no evidence of a warranty. We think there was evidence of a warranty, which ought to have been left to the jury.

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

STATE *vs.* ALVIN PRESLAR.

An allegation in a bill of indictment, that a husband "feloniously did make an assault" upon his wife, and "from and out of the said dwelling-house into the open air, his said wife, violently, feloniously, and of his malice aforethought did remove, force, and there leave, whereby she came to her death," is not sustained by proof, that after she had been beaten, and after her husband had gone to bed, she voluntarily left his house and unnecessarily remained out in the open air.

INDICTMENT for MURDER, tried before his Honor, Judge ELLIS, at the last Superior Court of Union.

There were three counts in the bill of indictment.

The *first*, charging the defendant with feloniously killing his wife, by striking her with a stick, and by choaking, kicking and stamping her.

The *second* charges, that the defendant did feloniously strike his wife with a stick, and did knock, stamp and choak her, so that she became very weak, from such injuries, as well

as from previous sickness; and being thus weak of body, he drove her from his house at night, and left her exposed to the open air, from which two causes combined, to wit, the beating and exposure, the deceased came to her death.

The *third* count charges, that the defendant feloniously killed his wife, by exposing her to the open air, as set forth above.

The jury returned a verdict for the defendant on the first and third counts; and against him on the second.

The evidence on the case, applicable to the second count was:

Noah Preslar, a son of the prisoner and deceased, testified that he is about eighteen years old; a quarrel arose between his father, who was in liquor, and his mother, which continued for an hour or more, about a tract of land, in the course of which he kicked her about the knees, having his shoes on; afterwards he kicked her again about the same place; she then went out of doors, and he gave her a pretty severe kick in the side as she passed out; he followed her out, and taking her by the hand, told her to go into the house; she said, she did not want to go in; he told his little daughter, Rachel, to bring him the axe and stick, saying, he would kill her; these were brought, and then he gave a knife, which he had in his hand, open, to the daughter. The deceased then went into the house and sat down, whereupon, he (witness) went outside, and looked at the parties through a crevice in the wall, which was of logs; he saw the prisoner return into the house where his wife was, and, with a sound piece of sap pine wood, about two and a half feet long, and an inch square, strike the deceased a pretty hard blow on the head, she having on her bonnet at the time. The deceased then rose up and went into the yard; the prisoner followed, and caught hold of her about the waist; the witness then went up to his father, and told him he should let her alone, when he desisted. After this, the deceased went a short distance and sat down; the defendant sat down also, and after about five minutes, went into the house and laid down upon the bed, with his clothes on. In

about half an hour afterwards, the deceased proposed to the witness, to go with her to the house of her father, Mr. Broom, which was distant two miles and a half; he agreed to do so, and they started about seven o'clock at night, she taking along her infant child about nine months old, a bed-quilt and some clothing: after going about half a mile, she complained of being weary, and stopped to rest. After about five minutes, she proposed going on, which she did for about one fourth of a mile, when she again stopped to rest. She then proceeded some half a mile or three quarters further, when they came within two hundred yards of the house of her father: she said she did not want to go to her father's till morning: she spread down the bed-quilt in the woods, and witness covered her and the child, and lying down himself, fell asleep, and slept till about two hours before day. The deceased then insisted that he (witness) should return home, which he did. The deceased was in a weak condition at the time, having just recovered from chills and an attack of the mumps: this was on the 21st. He next saw deceased at his grand-father's, Mr. Broom's, dead. On cross-examination, he stated, that they crossed several hills and a branch on the way: he said they carried the child and clothing alternately: he said when he left his mother in the morning she was not complaining: he further said, it rained some on the morning of that day.

Rachel Preslar, a daughter of the prisoner and the deceased, testified as to the blow with the stick, and said he kicked her four or five times about the knees, and once saw him have hold of her by the throat: the quarrel lasted about two hours. She went to bed, and did not know when the deceased left; said deceased carried nine yards of spun cotton with her, for she saw it at her grand-father's next day.

Martha Broom testified, that she is the step-mother of the deceased, and that she was at home on the morning of the 22nd of November spoken of. About day-break, she heard some one calling on Mr. Broom from without, and upon enquiry, found it to be the deceased: she got up and went out to her: found her about one hundred yards from the house,

lying across the road with her child upon her arm: the witness tried to help her up, but she was unable to stand. Witness then went and procured some bed-clothes for her to lie upon, and then called for Mr. Reynolds, a neighbor, who lived a quarter of a mile distant; he came and assisted in carrying the deceased into the house; she was in a fainting, exhausted condition, and they were compelled to stop twice on the way, to enable her to recover strength: the witness examined her but partially; found bruises on her legs, thighs and arms; the latter were rendered useless; deceased declined from that time; said she must die, and did die about five o'clock the next morning, (23d). She complained of weakness and misery all over; said that her husband had kicked her nearly all over; that he hit her on the head with a stick, and had choaked her: except a little coffee, she could swallow nothing, in consequence of a soreness of the throat, of which she complained; that she could not pass her urine, though she tried, and did not pass it till about fifteen minutes before she died; she fainted several times during the day, and seemed to be in great misery; she complained of cold; her hands and feet were numb from the time she came, until her death; didn't think she had a chill.

Hiram Reynolds says, he was called by Mrs. Broom, as spoken of by her, and speaks to very nearly the same matters as she: deceased could not stand; fainted down, and had to carry her to the house; they stopped to let her rest and recover herself; she was placed on some bed-clothing before the fire; said that the deceased said, before she awoke in the morning her child had escaped from her a little distance, and, that in attempting to recover it she had fallen, or was compelled to sit down through exhaustion. This witness admitted that he had said, "probably the deceased may have had a chill."

Lecy Broom, said she was a sister of the deceased; that she reached her father's about nine or ten o'clock on the night of the 22nd; said deceased said she was dying, and that the prisoner had beaten her all over; that she had lost all her

feeling; was numb; that her stomach and bowels gave her pain; examined her person after her death, and found bruises on her legs and thighs, and on the lower part of her stomach, which was much swollen, also on her hips, side, arms and neck.

Eliza Hays, another sister of the deceased, and *Elizabeth Creaton*, a mid-wife, gave a particular account of the bruises, &c., and the latter said that the deceased said "he had kicked her about to death;" she did not examine whether deceased had a chill or fever.

Dr. McLaughlin testified that he is a physician and surgeon by profession, and was called to make a *post mortem* examination of the deceased for the jury of inquest; there were some slight wounds on the neck; her arms were bruised; there was also a bruise on the abdomen, which, on being cut, was found to extend inwardly some little distance, half an inch or so; the bruises were running together, and presented the appearance of mortification; she had bruises on her thighs, legs and arms; he did not examine the private part of her person; made no other examination by incision; her tongue was in a healthy condition; he gave it as his opinion, from the examination which he had made, and from the testimony he had heard, that the wounds, of themselves, were not mortal; that if she had remained at home, and been taken care of, she would have recovered; nor did he think the exposure, of itself, produced her death; his opinion was that the two causes combined had caused her death; that exposure alone would not have proved fatal so soon afterwards; there was no sign of fever; temporary stricture not unfrequently results from a wound in the region of the bladder; the internal evidences of the body, as far as he saw, were healthy.

The prisoner offered no evidence.

Among other things (not now relevant,) his Honor charged the jury, "that if the deceased left home under a well grounded apprehension of losing her own life, or suffering great bodily injury at the hands of the prisoner, in case she remained, with the object of seeking protection from her father, and

on the way, was exposed to the inclemency of the weather, from which cause, combined with the effects of the wounds, she died, when the exposure, of itself, would not have caused her death, the prisoner would have been responsible for the consequences, and guilty of murder." Defendant excepted.

"So, also, should they be of opinion that the wounds were not, in their character, mortal, and might, by suitable applications and proper care, have been cured, and not, of themselves have caused death, but, that they were so aggravated and made worse by the exposure to the weather, as to produce that result, it would be murder, provided, however, the deceased exposed herself through a well grounded fear of serious personal injury from the prisoner, if she remained at home, and not merely wilfully and without such sufficient cause." Defendant excepted.

"If, in the best exercise of her judgment, under the circumstances, she deemed the course pursued the most suitable to protect herself and infant, although the jury might not think it the most proper, still the prisoner would be responsible for the consequences, under the restrictions, and with the qualifications heretofore expressed." To this part of the instruction the defendant also excepted.

Verdict of guilty, on the second count, and not guilty, on the first and third counts. Judgment and appeal.

Attorney General, for the State.
Wilson and *H. C. Jones*, for defendant.

PEARSON, J. The jury having found the prisoner not guilty, on the first and third counts, we are to assume that the injuries inflicted upon the person of the deceased, were not sufficient, of themselves, to have caused her death, without the additional circumstances of her being exposed to the inclemency of the weather, by remaining out all night on the damp ground, in the open air.

The second count, besides the injuries inflicted upon the person of the deceased, charges, that the prisoner drove her

out of his dwelling house, and *left her* in the open air, and, that the injuries inflicted upon her person, together with the exposure, by being so left in the open air, caused her death. Upon this count, the prisoner was convicted.

The testimony in reference to the exposure is, after the prisoner had desisted from beating the deceased, she went off a little distance in the yard and sat down; the prisoner sat down also; after about five minutes, he went into the house, and laid down on the bed with his clothes on. In about half an hour afterwards, the deceased proposed to the witness (who was her son) to go with her to the house of her father, which was distant about two miles and a half. He assented, when she took a bed-quilt and some clothing, and her infant child, about nine months old, and they left together, about 8 o'clock at night. Another witness, a daughter of the deceased, says, she also took nine yards of spun cotton. On the way, she complained several times of being weary, and stopped to rest a few minutes; complained of her legs; she was a fat woman. When *they got within some two hundred yards of her father's house*, the deceased said, *she did not want to go to her father's till morning*, and spread down the bed-quilt in the woods; witness covered her and the child with the clothing, and remained there until about two hours before day, witness having fallen asleep, when she insisted on his returning home; he did so, and left her and the child alone, where they remained until daylight, when she was taken to the house.

Now, admit that, from this evidence, the jury were at liberty to infer, that the prisoner drove the deceased out of his house, there is no evidence to support the further allegation, that he left her exposed in the open air; in that scene of the tragedy, he had no part; she had arrived within two hundred yards of her father's house; there was nothing to prevent her from going on, but she chose, of her own accord, to remain out all night, exposed on the damp ground.

We can see nothing in the evidence to support the suggestion made by his Honor, in explanation of this conduct on her part; after charging, that if she voluntarily exposed her-

self, when she could have gone into her father's house, the prisoner was not responsible, he adds, "but, if, in the best exercise of her judgment, under the circumstances, she deemed the course pursued the most suitable to *protect herself and her infant*, although the jury might not think it the most proper, the prisoner would be responsible." Where is the evidence that she remained out all night, for fear that her husband would pursue her? Taking the bed-clothes and the spun cotton, when she left home, indicated a certain degree of deliberation, and it would have been a strange idea, to be out all night by the side of the road, instead of seeking shelter, at once, under her father's roof, had she apprehended further violence.

If, to avoid the rage of a brutal husband, a wife is compelled to expose herself, by wading through a swamp, or jumping into a river, the husband is responsible for the consequences; but, if she exposes herself thus, without necessity, and of her own accord, we know of no principle of law, by which he is held responsible, to the extent of forfeiting his life.

PER CURIAM. There is error; let there be a *venire de novo*.

CHARLES A. HOOPER, ADM'R., *vs.* SAMUEL MOORE.

Before a witness can be called to impeach another witness, by proving inconsistent statements, the impeached witness must be asked as to such statements, in order that he may have an opportunity to explain.

This rule applies to depositions, unless the inconsistent statements were made after the deposition was taken.

It is error to permit an impeaching witness to say whether, if he were a juror, he would believe the impeached witness on oath.

DETINUE for SLAVES, tried before DICK, J., at the last Caswell Superior Court.

The plaintiff read in evidence, the deposition of one *Mar-*

tha Bailey, as to the title of the slaves in question. The defendant offered to discredit this evidence, by showing that the deponent had made previous declarations inconsistent with the facts stated in her deposition. This evidence was objected to, on the ground that the deponent was not apprised, at the taking of her deposition, that such inconsistency was to be attributed to her, and so, had no opportunity to explain. The testimony was admitted, and the plaintiff excepted.

Another witness was offered, as to the general character of Martha Bailey; and having testified as to that, he was asked by the defendant's counsel, whether, if he was a juror, from what he knew of her general character, he would believe her on oath. The question was objected to, but allowed by the Court. Plaintiff again excepted.

Verdict for defendant. Judgment and appeal.

Norwood, for plaintiff.
Morehead, for defendant.

BATTLE, J. It must now be considered as settled, that before you can impeach the credibility of a witness, by showing that he has previously made inconsistent statements, you must first put to him what are called the usual preliminary questions, in order that he may have an opportunity to explain himself. The *Queen's case*, 2 Brod. and Bing. 314, (6 Eng. C. L. Rep. 130); *Edwards* v. *Sullivan*, 8 Ire. Rep. 302. The same rule applies to depositions, unless the inconsistent statements were made after the time when the depositions were taken; *Roberts* v. *Collins*, 6 Ire. Rep. 223. In this case, they were made before, and the Judge, therefore, erred in permitting the impeaching testimony to be given.

We cannot see that the witness Stamps was more interested on the one side than the other, and, therefore, cannot pronounce that he was incompetent. It is a matter of mathematical certainty, that if two slaves be worth $2000, and ten, including these two, be worth $5000 only, the two will

be of more value than a third of the whole; such, so far as we can discover, may be the case before us; at all events, the defendant has not furnished us with the means of ascertaining that it is otherwise.

The third and last objection raises a question of practice, in relation to the examination of witnesses called to impeach the characters of other witnesses, which we are not sorry to have an opportunity of attempting to settle.

The question is, whether an impeaching witness, after he has stated that the character of another witness is bad, can be asked whether, from his knowledge of that character, he would, if he were a juror, believe the witness upon his oath. We are decidedly of opinion that such an enquiry, if permitted, gives occasion, either to improper replies, or makes the witness usurp the province of the jury, and is, therefore, wrong in principal, as well as embarrassing in practice. We are aware that the rule to which we object has the sanction of the English Courts, and has been referred to without disapprobation by this Court. See the *State* v. *Boswell*, 2 Dev. Rep. 209, and the authorities there cited. By reference to the case just referred to, it will be seen that what the Court said upon this subject was not necessary to the decision, and that it was a mere statement of what was the English practice, without much reflection whether the rule was well or ill founded in principle. Those who have seen its application, must have observed that the replies of the impeaching witnesses were oftener prompted by their own opinion of the witness, than by their knowledge of his general character, that is, the estimation in which he was held by others. The replies, too, are very apt to be evasive and hypocritical. "The witness would believe him if he were disinterested, or had no feeling in the matter, but otherwise, he would not believe him." These and such like replies are improper, because they do not fairly meet the inquiry, whether the character of the impeached witness is so bad that he ought not to be believed, though testifying under the sanction of an oath. But the great objection to the rule is, that the impeaching witness is

called upon to do that which belongs exclusively to the jury. It is, or ought to be, their province to pronounce whether a witness is to be believed, and, consequently, whether a fact to which he testifies, supposing him not to be mistaken, is proved. The character, whether good or bad, of a witness, is a fact, and, of course, as to that, another witness may testify. Whether that character, if bad, is so bad that he ought not to be believed, is an opinion or conclusion which the law, as a general rule, forbids a witness to give, except in certain cases where he testifies as an expert. Our Legislature has been careful in guarding and preserving the exclusive province of the jury to decide upon questions of fact, by prohibiting the judge from giving an "opinion whether a fact is fully or sufficiently proved;" Rev. Stat., ch. 31, sec 136; Rev. Code, ch. 31, sec. 130. We ought to be equally careful in settling rules of practice, to protect the jury from an improper invasion of their province by the witnesses. The evil arising from such an invasion, is thus ably and forcibly set forth by SHEPLEY, J., in the case of *Phillips* v. *Kingfield*, 1 Appleton's Rep. 375. "To permit the opinion of a witness that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions and feelings of that witness to form, in part at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and establish rules of law respecting the kind of testimony to be admitted for the consideration of the jury, and their duties in deciding upon it. It would, moreover, permit the introduction and indulgence, in Courts of justice, of personal and party hostilities, and of every unworthy motive by which man can be actuated to form the basis of an opinion to be expressed to a jury to influence their decision." See, also, Greenleaf on Ev., sec 461. Our conclusion is, that the Judge erred in permitting the question to be put, after it was objected to by the plaintiff.

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

DANIEL W. RUSSELL, ADM'R., *vs.* DAVID W. SAUNDERS, EX'R.

The giving of a prosecution bond is not a condition precedent to the bringing of a suit, and it is not error for a Court to permit one to be filed, after the writ is returned.

MOTION to dismiss a suit for the want of a prosecution bond, heard before SAUNDERS, Judge, at the last Superior Court of Onslow.

The writ was returned to the County Court of Onslow, without any prosecution bond, and the defendant moved to dismiss for that cause; the Court refused to dismiss, but allowed the plaintiff to file a bond at that Court.

The defendant appealed to the Superior Court, when, in that Court, it was moved to dismiss the appeal. This was ordered by his Honor, and the defendant appealed to the Supreme Court.

Strange, for plaintiff.
Moore, for defendant.

PEARSON, J. We consider the point made in this case, settled by *McDowell* v. *Bradley*, 8 Ire. Rep. 92; the Court say, "But, we think, the new bond was an answer to the defendant's motion, for it fully meets the purposes of the act, and the ends of justice, by effectually securing the appellee, and substantially, by the means prescribed in the statute. Although the proper bond was not taken at the proper time, yet the Court has the *power* to supply the omission, as was done with respect to certiorari bonds, in the case of *Fox* v. *Steele*, 1 Car. Law Rep. 379.

So, we think, in this case, the new bond was an answer to the defendant's motion. *McDowell* v. *Bradley*, has been cited and approved in several subsequent cases. *Robinson* v. *Bryan*, 12 Ire. 183. There is no reason why prosecution bonds, appeal bonds, and certiorari bonds, should not be put on the

same footing. Such has been the uniform practice and understanding of the profession.

It was insisted by the defendant's counsel, in the second place, that the appeal from the interlocutory order, brought the whole case up to the Superior Court, and took it out of the County Court; so that after affirming the judgment of the County Court, in respect to the bond, the Superior Court ought to have retained the case, and proceeded with the trial.

We do not concur in this position. If the County Court had dismissed the suit, so as to put the case out of that Court, upon an appeal or reversal of the order of the County Court, the further proceedings in the case would have been properly in the Superior Court. *Shaffner* v. *Fogleman*, Busb. 280. But, as the County Court refused to dismiss the suit, and permitted the plaintiff to file a prosecution bond, the case was still in that Court, notwithstanding the plaintiff appealed from this interlocutory order; and upon an affirmance of the order, the further proceedings in the case, were properly to be had in the County Court. *Mastin* v. *Porter*, 10 Ire. 1, is in point; there a *procedendo* issued.

The entry, that the Superior Court "*dismissed the appeal*," and affirmed the judgment of the County Court, is evidently a misprision of the Clerk. The proper judgment was to affirm the judgment of the County Court, in respect to the order appealed from, and direct a *procedendo*.

PER CURIAM. Judgment affirmed.

WILLIAM BROCKWAY *vs.* THOMAS M. CRAWFORD.

When a felony has been committed, an officer, or a private individual, may justify the arrest of a suspected person, without a warrant, for the purpose of bringing him before an examining magistrate, if done without malice, and upon proof of probable cause.

ACTION of TRESPASS *vi et armis*, for false imprisonment, tried before ELLIS, J., at the last Spring Term of Rowan Superior Court.

The plaintiff, called one *Klutts*, the sheriff of Rowan County, who stated, that on the 3rd of March, 1855, the defendant placed in his hands a warrant, sued out by him, which is as follows:

"To any lawful officer, to execute and return forthwith: Whereas, information hath been made to me, John I. Shaver, one of the justices of said County, on the oath of Thomas M. Crawford, that he has great reason, and does believe, from what he has heard, that one Wm. Brockway, or some such man, has been guilty of horse-stealing from one Mr. McLeod, of Charlotte. This theft was done in the last three days, against the statutes," &c., with the usual mandate to arrest, signed by the magistrate, with the addition of J. P., but, having no seal, nor scroll representing a seal, and requested him to arrest the plaintiff under it. The witness and defendant had some conversation on the subject, when the latter said he had been advised by Mr. Kerr (a lawyer) as to his liability for suing out the warrant, and that, under the circumstances, it was a dangerous proceeding; but that he had been informed by Mr. McLeod, a brother of the owner of the horse, that the plaintiff had been at the Huie mine, in Mecklenburg, about the time the horse was stolen, and that he bore a close resemblance in dress and personal appearance to a man calling himself Clary, who was suspected of stealing the horse; that Mr. Calvin S. Brown had been to Charlotte since, and procured a description of the man Clary, which closely resembled the plaintiff, and he believed he was the man. He stated that other persons (not lawyers) had advised that the circumstances would justify the arrest; among them, D. A. Davis, a justice of the peace of the County. He also said a reward of one hundred dollars had been offered for the apprehension of the thief. He said that Mr. McLeod, the owner of the horse, requested him to arrest the plaintiff. After which, the witness told the plaintiff if he went to serve the

warrant, he, defendant, must go with him; to which he agreed. Upon which, he, the defendant, and several other persons (summoned for that purpose) proceeded to the "Rymer Mine," five or six miles below Salisbury, where the plaintiff was arrested. This was in the night time. He was brought immediately before a justice of the peace, at Salisbury, and discharged for the want of evidence of his guilt.

The Court adjudged, on inspection of the instrument, that there was no seal to the warrant.

The defendant called on one *McLeod*, who said that, in February, about the 22nd, his brother had a horse stolen from him in Charlotte; that suspicion fell upon a man calling himself Clary; that he went to the Huie Mine, eighteen miles from Charlotte, in search of Clary, when he learned that the plaintiff had been there, and bore a resemblance, in dress and appearance, to Clary. The witness then described the dress, &c., of Clary, and it was admitted that there was a strong resemblance to the plaintiff, as he was dressed at and before the arrest; that he immediately proceeded to Salisbury; had an interview with defendant, and informed him of the fact of the horse having been stolen; that suspicion attached to a man calling himself Clary, and pointed to the marks of resemblance between Clary and the plaintiff. He also stated to defendant that the plaintiff had been at the Huie Mine about the time the theft was committed, and requested the defendant to go with him to the Rymer Mine, on that night, to have the plaintiff arrested, and the defendant declined doing so.

It also appeared in evidence, that after the interview with Mr. Kerr, and after the conversation with Mr. McLeod, *Mr. C. S. Brown*, a citizen of Salisbury, who had been to Charlotte, upon his return, informed the defendant that he had conversed with several respectable citizens of Charlotte upon the subject, and they described to him the appearance and dress of the man Clary, which description, Mr. Brown gave in his evidence, and which, it was conceded, bore a close resemblance to the plaintiff. Mr. Brown further told defendant

that Clary was suspected of the felony by persons whom he saw in Charlotte, and that he, witness, had no doubt in his own mind, that plaintiff was the same person, and guilty of the larceny, and advised him to proceed to the arrest. It was after this that defendant had an interview with Mr. Davis, who advised him to make the arrest; that the evidence justified him in applying for the warrant.

Mr. *Shaver*, the justice of the peace who issued the warrant, testified that the defendant made a full disclosure to him of the facts above stated, as having come to his knowledge before taking out the warrant, and expressed his confident belief that Clary and Brockway were the same person. Mr. Shaver also testified as to the resemblance in dress, person, &c.

The defendant's counsel asked the Court to instruct the jury, that although the warrant was without a seal, and therefore invalid, still, if the sheriff had reason to believe that the felony had been committed by the plaintiff, he was authorised to make the arrest without a warrant, and to summon the defendant to assist him in so doing, and that so, the defendant was justified in what was done.

The Court was further asked to charge, that if the felony had actually been committed, and that the defendant had reasonable ground for believing that plaintiff was the felon, as a private individual, he was justified in making the arrest, and, therefore, not liable in this action, though the warrant was void for the want of a seal.

The Court declined giving these instructions, and charged the jury that the plaintiff was entitled to recover, if the evidence were true; that the warrant conferred no authority to make the arrest, and, that although the plaintiff bore a resemblance to a man representing himself as Clary, who was suspected of the theft, yet no reasonable grounds for that suspicion appeared in evidence, and there were no facts proved which would justify the arrest of said Clary without a warrant, and, of course, none to justify the arrest of the plaintiff.

Defendant excepted to this charge. Verdict for $200 and judgment for plaintiff. Defendant appealed.

Boyden, for plaintiff.
Wilson, for defendant.

PEARSON, J. It concerns the public that all who commit felonies should be punished; hence, compounding a felony is a misdemeanor, and the law encourages every one, as well private citizens as officers, to keep a sharp look-out for the apprehension of felons, by holding them exempt from responsibility for an arrest, or prosecution, although the party charged turns out not to be guilty, unless the arrest is made, or the prosecution is instituted, without probable cause and from malice.

In our case actual malice was not alleged, and the main question was the existence of probable cause.

Had a seal been affixed to the warrant of the justice of the peace, so as to compel the plaintiff to sue in case, for a malicious prosecution, from the evidence it is clear there could have been no question that the plaintiff had probable cause; so the amount of the case is, that by the accidental omission, on the part of the magistrate, to affix a seal after signing his name, the defendant must not only pay the cost, but is mulcted in damages to the amount of $200, without reference to the question of malice or probable cause. This result cannot be right.

Admit that the want of a seal put the warrant out of the way, and enabled the plaintiff to sue in trespass for the false imprisonment, so as to be entitled, without more showing, to nominal damages, yet, surely, he could only entitle himself to actual damages, on the ground that the defendant had acted maliciously and without probable cause; so, the want of a seal ought only to have affected the form of action, whereby to subject the defendant to nominal damages and costs, leaving the merits of the case to turn on the question of probable cause.

In regard to this, we take a different view from that entertained by his Honor; we think there was some evidence tending to show probable cause. On the 22nd of February,

1855, a horse, the property of one McLeod, is stolen in the town of Charlotte; thus we have a felony *committed;* suspicion rests upon a man named Clary, who is seen and heard of no more. A brother of McLeod goes to the Huie Mine, eighteen miles from Charlotte, in search of Clary, and is there informed that a man calling himself Brockway had been at the mine about the time the horse was stolen; "the description of the clothes and the personal appearance, resembled Clary very closely." Mr. McLeod was so well satisfied that he was the same man, that he pursues on to Salisbury. A reward of one hundred dollars is, in the meantime, offered for the apprehension of the felon. In Salisbury, McLeod meets with the defendant; gives him a full account of the felony; of Clary's being suspected, and having absconded; of the advertisement; of the fact that a man calling himself Brockway (who, in dress and personal appearance, closely resembled the man Clary,) had been at the Huie mine about the time the horse was stolen, and was then, as he learned, at the Rymer mine, about six miles from Salisbury, and asks the defendant to go that night with him, and have the said Brockway arrested, and brought before a justice of the peace for examination. The defendant hesitates; but Calvin S. Brown arrives from Charlotte; he had procured a description of Clary, and confidently expresses the belief that *the plaintiff is the man.* Esquire D. A. Davis and Esquire John I. Shaver, upon these pregnant proofs, as they were supposed to be, on all hands, expressed their opinion that Brockway was the man Clary, passing under an alias; whereupon he is arrested that night; but without any kind of oppression or delay, he is forthwith brought before a magistrate, and there being no proof that he is the man, is accordingly discharged.

What has the plaintiff (if he be a good citizen,) to complain of? A felony is committed, and the felon escapes; he is advertised, and a reward of one hundred dollars is offered for his apprehension. The plaintiff bears a close resemblance, both in dress and personal appearance, to the suspected person; his associations and *fixedness in his position as a mem-*

ber of the community, do not place him above the marks of honest suspicion which attach to him because of the close resemblance to the man who figures under the reward of one hundred dollars, as a fugitive from justice. Has he cause to complain? Ought he not rather to congratulate himself that he lives in a land where justice is administered with a steady hand. And if occasionally "the wrong passenger is waked up," every good citizen should bear in mind that it was meant for the best, and will work around for the good of the whole.

Samuel v. *Paine*, Doug. 359; *Beckwith* v. *Philby*, 6 B. and C. 635; *Davis* v. *Russell*, 5 Bing. 354, are cases of the highest authority, showing that, upon proof much short of that offered by the defendant in our case, the Courts in England hold, that an officer or a private individual may justify the arrest of a suspected person for the purpose of bringing him before a committing magistrate, provided there be proof that a felony has been committed. Much might be said as to the effect of our bill of rights upon the ex-officio powers of a sheriff or constable, who acts without warrant, and when there is no immediate apprehension that an escape will be attempted before one can be obtained from a justice of the peace. But a discussion of this matter is not now called for.

BATTLE, J. *dissentiente.*—I cannot concur in the opinion of the majority of the Court, that there was a cause of suspicion sufficient to justify the defendant in having the plaintiff arrested upon a charge of felony. The warrant under which the arrest was made has been put out of the way, because it is admitted to be void for want of a seal. The authority for making the arrest without a warrant, is alone relied upon for the defense. The cases of *Samuel* v. *Payne*, Doug. Rep. 359; *Beckwith* v. *Philby*, 6 Barn. and Cres. 635, and *Davis* v. *Russell*, 5 Bing. Rep. 354, are certainly very strong, and go very far in the justification of officers, who apprehend suspected persons without warrants. They carry the law, as it seems to me, farther than is compatible with that personal liberty, of which English jurists

are so fond of boasting. When an innocent man can be arrested on the highway by a constable, who has no other ground of suspicion against him, than that he, having sold his horse, is carrying his saddle home, it gives rise to the saddening reflection of how much we all are at the mercy of one who is dressed in a little brief authority. But this case, in my estimation, goes even beyond that. Here, the party, who is arrested, is but the shade of a shadow. A horse was stolen at the town of Charlotte, in the county of Mecklenburg. A dim suspicion is somehow gotten up that a man named Clary stole him. No person says that he ever knew Clary to have the horse in possession, or that he ever saw him in or near the place where the theft was committed. Not a single witness is called to prove that he ever saw *Clary* going *towards* Charlotte, or going *from* Charlotte, or that he ever saw him *in* Charlotte or about Charlotte. A rumor that a man of that name was suspected, is the single, isolated fact relied upon to connect him with the transaction. No one can tell us who he was, or what he was, where he came from, or where he was going to, or what he had done, or what he had said, except that he called himself Clary. He seems to have been a dim, shadowy being, who did, indeed, have on clothes, and clothes of a particular description, but when he wore them, or where he wore them, nobody can tell. The nearest to Charlotte that the testimony brings him, or any person like him, is the Huie mine, in the county of Union, eighteen miles distant. Uufortunately for the plaintiff, he was, about the time when the theft was committed, at the Huie mine, and was thought to have a strong resemblance to Clary in his clothing and in his personal appearance. Still more unfortunately for him, he left the Huie, and went over to the Rymer mine, near Salisbury. There, the defendant, stimulated either by the hope of the reward which had been offered, or by a desire to bring offenders to justice, had him arrested, when it was at once discovered, (what might just as easily have been ascertained before) that he had no connection whatever with the theft. I agree, therefore, with the Judge who tried the cause, that

there did not appear, from the testimony, any reasonable ground of suspicion to justify the arrest of Clary, much less the plaintiff. I believe the defendant permitted himself to be made an instrument by others, to do that, which they were afraid to do themselves, and, I think, he ought to bear the consequences.

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

JOSEPH GUNTER *vs.* ABNER GUNTER.

An executor, before the enactment of the Revised Code, could not be a witness in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856, when that Code went into operation.

Issue of *devisavit vel non*, tried before DICK, Judge, at the last Superior Court of Chatham.

The propounders offered the script as the last will and testament of one Elizabeth Straughan.

The will purported to bear date in June, 1854, and the decedent died in the month next following.

There were two witnesses to the will, one of whom, William G. Harris, was named the sole executor therein.

At November session of the County Court of Chatham, the said William G. Harris, in open Court, and before he had assumed any of the rights or authority of an executor, refused to take upon himself the said office, and released all his interest under the said will. The issue was made up in the County Court, and brought to the Superior Court by appeal.

On the trial, in the Superior Court, W. G. Harris was tendered as a witness by the propounders, and objected to by the caveators. The objection was sustained by the Court, who charged the jury, that as there was but one competent subscribing witness, they should find for the caveators. Exception by propounders. Verdict for the caveators. Judgment and appeal.

Haughton, *Moore* and *Manly*, for propounders.
Winston, *Sr.*, and *Howze*, for caveators.

BATTLE, J. The question raised in this case, is settled by three decisions recently made in this Court; and the strong argument of the counsel for the plaintiff, has failed to convince us, that we ought to overrule them. See *Tucker* v. *Tucker*, 5 Ire. 161; *Morton* v. *Ingram*, 11 Ire. 368; *Huie* v. *McConnell*, 2 Jones, 455. The latest of these decisions, was made at Morganton, in Aug., 1855, and they are all founded upon the case of *Allison* v. *Allison*, decided in 1825, and reported in 4 Hawks. 141.

An executor is now made competent to prove the execution of the will in which he is appointed, or to prove the validity or invalidity thereof. R. C. ch. 119, sec. 9. But this will was executed, the testatrix died, the will was offered for probate, and an issue of *devisavit vel non* thereon was made up, all before the Revised Code went into operation. It is true, that the second section of the Act concerning the Revised Code, R. C. ch. 121, repeals all laws which are in conflict with its provisions; but the third section, exempts from the operation of such repeal, "any act done, or any right accruing, or accrued or established, or any suit, or proceeding had, or commenced in any case, before the time when such repeal shall take effect; but the proceedings in every such case, shall be conformed, where necessary, to the provisions of the Revised Code."

By "proceedings," in the plural, is here evidently meant, the formal mode of conducting the "suit or proceeding," which is in no otherwise to be affected by the repeal. Surely, it was never intended to make a will good, which was before invalid, and thus change the whole devolution of the property mentioned in such will.

PER CURIAM. The judgment of the Superior Court must be affirmed.

STATE *vs.* PATRICK, A SLAVE.

It is too late, after a juror has been taken and accepted by the prisoner, and has served on the trial, to except to him for incompetency.

The 32nd sec., ch. 35 Rev. Code, limits the number of peremptory challenges in capital cases to twenty-three.

The declaration of the deceased, that he was afraid that another person than the prisoner would kill him, is not competent evidence.

Where one, who had, from facts and circumstances, satisfied himself of the guilt of the prisoner, who was a slave and had been previously in the service of the witness, and told him he might as well tell all about it, *for he was satisfied*, and again, being a little angry, said to the prisoner, "if you belonged to me I would make you tell," and repeated the first declaration several times, to which the prisoner each time made a denial of the charge, but afterwards, of his own accord, the prisoner took the witness aside and then made a full disclosure, such confession is admissible.

It is not error for a Judge to refuse to charge the jury that confessions are to be made with caution and distrust, especially if he proceed to make proper comments on the nature of such testimony.

THIS was an INDICTMENT for MURDER, tried before his Honor, Judge PERSON, at the Spring Term, 1856, of Pitt Superior Court.

The defendant was charged with the murder of Allen Green; and one John W. Fornes was in the same bill charged as an accessory before the fact. The slave was tried alone.

1. On the trial, one of the *venire* who was not a slave-owner, was drawn, and being tendered to the defendant was accepted by him, no objection or question being at the time raised as to his competency to sit on the jury. After the trial and conviction, the counsel moved for a *venire de novo*, on the ground that he had not been tried according to law in this particular.

2. After the prisoner had challenged twenty-three of the panel peremptorily, one was offered whom he again challenged peremptorily, but his Honor ruled that no more peremptory challenges could be allowed, and there being no challenge for cause, the person tendered was sworn as a juror. For this defendant excepted.

3. The defendant offered evidence to prove that the deceased had declared, some time before his death, that he was afraid of John W. Fornes, and expected he would kill him yet. This evidence was objected to by the Attorney General and ruled out by the Court. Defendant excepted.

The counsel for the prosecution offered the confession of the prisoner, which had been made under the following circumstances: It was proved by one *Ventres* that about 8 o'clock at night, on the 20th of December last, he saw the body of the deceased lying on the path, about one-fourth of a mile from his own house, having gun-shot wounds in several places. He also saw his cart there a little nearer the house. About sun-set the same day, as he was going home from feeding his hogs, he met the prisoner upon the path which leads from the house of the witness to that of the deceased, and about two hundred yards from the latter. He saw him again about mid-night upon the witness' plantation, where he (Patrick) had a wife, and asked prisoner if he had heard a gun, and where he was at the time. He answered that he did, and that he was at the Puncheen branch, which was about half a mile from where Green's body was found.

Next morning this witness went to where the body was found, and discovered a plain track near by, a little way from the path; there was the print of the half-sole, with tacks all around it. About ten o'clock that night, the defendant was arrested under a warrant, and tied; he was then carried into the dwelling house of the witness, and there kept all night, sitting or lying on the floor. Those who guarded him sat up all night, there being no places for them to lie down. The prisoner asked why he was arrested; to which the officer replied, he had a complaint against him. Early next morning the officer put the prisoner in charge of this witness, and went to notify the owner, Mr. Clark. Witness, soon after, took Patrick to the place where Green's body was lying, for the purpose of comparing the track which he had found there with his (Patrick's) boot. He made him take off his boot, and putting it into the track, "*it seemed to fit precisely.*" He

then said to Patrick, "you might as well tell all about it, for I am satisfied;" he denied it, and the witness being a little angry, said to him, "if you belonged to me I would make you tell." The prisoner still denied it. They went back to the witness' house about breakfast time. After breakfast he went to where Patrick was, in his wife's house. He then said to witness, "did you ever catch me in a lie?" to which he answered, "no, not about your work." Patrick said: "Are you afraid to go one side with me?" Witness said, "no." They then went out together, Patrick still having his hands tied, as he had been ever since the arrest. The witness, on coming to a fence, stopped, when the prisoner asked him "if he was afraid to go over the fence a short distance," to which he said, "no." They crossed the fence and sat down on a log. To further interrogations from the defendant's counsel, this witness said, that he owned Patrick's wife, and that he had hired him for two or three years preceding that year; that he was the father-in-law of the deceased. He said he could not say that he had not repeated as many as half a dozen times, "You might as well tell all about it, for I am satisfied." He said he did not mean that Patrick should understand from this language that it would be better for him to tell, but that it would not alter his opinion about the matter. The witness did not remember whether he told Patrick, on the night when he was arrested, what was the charge against him; but if he did, Patrick denied it. He thinks that the conversation there was about the murder of Green. He said, also, that Patrick did not sleep or lie down that night. Another witness, one *Thomas Fornes*, said that Ventres, the preceding witness, accused the prisoner of having threatened the life of a slave belonging to him, to which he replied, he reckoned that must have been when he was drunk, and had a quarrel with Alex. He also said Patrick was told that night, of the charge against him, but he denied it.

Another witness, one *C. W. Moore*, the coroner, said that, on the examination of the body, Patrick confessed that he had done the act, and gave the minute particulars of the hom-

icide. He said no influence had been used to get him to confess, nor was any caution given him. He said the prisoner was treated kindly. This was after his confession to Ventres.

His Honor, upon this proof, permitted the witness, Ventres, to state the prisoner's confessions. For this, defendant's counsel excepted.

The prisoner's counsel requested the Court to instruct the jury that the confessions of the prisoner ought to be received with caution and distrust. The Court refused to give the instructions asked, but told the jury that confessions, like all the other evidence, in cases of this kind, were to be received with caution, and to be carefully considered by the jury, in connection with the facts and circumstances under which they were made, and allowed to have such weight as they should think they ought to have, considered in this way. The defendant's counsel excepted to this refusal to charge as asked.

Upon these and other instructions, not excepted to, the jury found the prisoner guilty of murder. Judgment was pronounced, and he appealed to this Court.

Attorney General, for the State.

Rodman and *Singletary*, for the defendant.

NASH, C. J. The prisoner was convicted of the murder of one Allen Green. By his counsel, the prisoner moved for a new trial, upon several grounds, which we will consider in their order.

First, that one of the jurors of the panel was not a slave-owner. This objection, if taken at the proper time, would have been allowed. Rev. Code, ch. 107, sec. 34. The same section provides, that the Superior Courts shall have exclusive original jurisdiction of all felonies and other offences, committed by slaves, &c., " and the trials shall be conducted in like manner as the trials of free men, for the same offences." The slave stands at the bar, clothed with the same privileges that the white man enjoys, and the trial is conducted by the

same rules. Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. In all legal proceedings there is an apt time for every step in the proceeding, and every objection or privilege must be made or claimed at the proper time, or the party making it will be considered as having waived it. *Briggs* v. *Byrd*, 12 Ire. Rep. 382. The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced. *Joy* on Jurors, 219. The right to be tried by the owner of slaves is a privilege accorded to the slave; but it is a privilege he may waive; and having failed to make his objection at the proper time, he comes too late after verdict. To enable the prisoner to make his challenges intelligently, the Clerk is required to read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be empannelled to try the issue. Rev. Code, ch. 35, sec. 32.

The *second* exception cannot avail the prisoner. The same section of ch. 35, limits the right of peremptory challenge to twenty-three, when the prisoner is on trial for his life, whether bond or free.

The *third* exception is to the rejection of the declarations of the deceased man Green, as to his fears of Fornes. We cannot perceive upon what principle of law those declarations could have been received. The Court committed no error in rejecting them. *State* v. *Duncan*, 6 Ire. Rep. 236.

The *fifth* exception is to the refusal of the Court to give the instructions to the jury as prayed for. The presiding Judge refused to give the instructions "as asked." He then gave the instructions which the law required him to give, substantially that which was asked. In this there was no error.

The *fourth* exception is the important one. The admissions of a party against his interest, are considered as strong evidence, and are competent in general. In criminal cases, how-

ever, they must come from the accused voluntarily, and free from all fear or hope impressed upon him by others.

In this case, the witness Ventres states, that the morning after the homicide he went to the place where the body was found, and discovered a plain track near by, a little way from the path. There was the print of a half-sole, with the distinct impression of the tacks all around. The morning after the prisoner was arrested, the witness, in whose custody he was, took him to the place where the body was found, and, upon applying one of his boots to the track, it seemed to fit precisely; when he observed to the prisoner, "you might as well tell all about it, *for I am satisfied.*" Patrick denied it, and witness, being a little angry, said to him, "if you belonged to me I would make you tell." The prisoner still denied it, and they went back to the house of the witness to get their breakfast. After breakfast the witness went to the house of Patrick's wife, where he was when prisoner asked him if he ever knew him to tell a lie. He answered, "no, not about your work." Patrick then said, "are you afraid to go with me." He said, "no." They walked out together, Patrick's hands being tied, and when they came to a fence, a short distance off, witness stopped; at the suggestion of the prisoner, they crossed the fence and sat down upon a log, when he made the confessions given in evidence.

Baron Eyre, in *Rex* v. *Hearne*, 4 Car. and Payne, 215, (19 E. C. L. Rep. 350,) observes, a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers; but a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape that no credit ought to be given to it. The material enquiry, therefore, always, in such cases, is, has the confession been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind? This enquiry is, in its nature, preliminary, and is addressed to the Judge, who admits the confession to the jury, or not, as he may find it to have been drawn from

the prisoner by these motives. His Honor admitted the evidence in this case, and in so doing committed no error; no influence of hope or fear could have been impressed on the prisoner's mind by the remarks of the witness, and no hope, that, by confession, he would better his position, but simply that by measuring the track with the boot of the prisoner, the witness was satisfied of his guilt, and that his confession would not add to his belief; confess or not, as you please, I am satisfied. This certainly held out to the prisoner no hope that, by confession, his situation would, in any respect, be bettered. So, neither were his fears excited that his sufferings would be increased by not confessing. The expression used by the witness, "if you belonged to me I would make you tell," carried with it the assurance that the witness would inflict no suffering upon him. Many cases are contained in our reports upon this rule of the criminal law; many of them irreconcilable with the principle announced by BARON EYRE, in the case cited, pressing the principle of exclusion too far, and applied when there could be no reason to believe that the inducement had any influence on the mind of the prisoner, and, thereby, occasioned the escape of many criminals. *Philips* on Ev. 424; *Joy* on Jurors, 21.

It seems now to be settled law upon this point, if the prisoner has made his own calculations of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say it is not a voluntary confession. In order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the Court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit. *Greenleaf* on evidence, 279, N. 5. In the *State* v. *Cowan*, 7 Ire. Rep. 239, the words used by the magistrate were, "unless you can account for the manner in which you became possessed of the watch, I shall be obliged to commit you to be tried for stealing it." The Court held that these words did not amount to such a threat or influence as would prevent the introduction of the subsequent confession. Here

the prisoner seems to have made his own calculations. He appealed to the witness as to his character for truth, invites him to take a walk with him, and then deliberately makes the confession.

There is no error in receiving them.

PER CURIAM. Judgment affirmed.

STATE *vs.* BANK OF FAYETTEVILLE.

The 6th sec. ch. 36, of the Revised Code, making it a misdemeanor to "pass and receive" bank notes under the denomination of three dollars, does not apply to the bank.

The punishment intended against a bank, is a penalty of fifty dollars for *making* and *issuing* notes of less denomination than three dollars, under 3rd section of the Act.

This was an INDICTMENT, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Cumberland Superior Court.

The first count on the bill, charged that the Bank "unlawfully did *issue* a certain note for the payment of money for a less sum than three dollars, to wit, of one dollar."

The second count is to the same effect, with a change in the phraseology.

The third count charges that the bank "did pass as the representative of, and as the substitute for, money, a bank bill of a sum less than three dollars, to wit, of the sum of one dollar." These several counts concluded against the form of the statute, &c.

It was agreed that the Bank of Fayetteville, on 10th day of February, 1856, in the county of Cumberland, did issue a note for a sum less than three dollars in manner and form as charged in the bill of indictment; upon which case agreed the solicitor for the State moved for judgment, but it was insisted that no judgment could be pronounced, upon the ground,

that the facts did not amount to an indictable offense. But his Honor being of opinion with the State, rendered judgment accordingly, from which the defendant appealed.

Attorney General, for State.
Badger and *Shepherd*, for defendant.

PEARSON, J. The 6th section, ch. 36, of Rev. Code, title "currency" making it a misdemeanor to "pass or receive" bank notes under the denomination of three dollars, does not apply to the bank; the punishment intended for it is imposed by the 3rd section, to wit: a penalty of fifty dollars for making and issuing such notes. There is nothing by which an indictment for a misdemeanor is superadded. Indeed the bank is bound by its *contracts*, to receive and redeem its notes, and the Legislature had no power to forbid it.

Whether the Legislature had power, besides imposing a penalty, to denounce the "pain" of being deemed to have violated its charter for making and issuing such notes, may be questioned. Conditions by which an estate is defeated, must be made at the time of its creation. This principle would seem to be applicable to the grant of a franchise; but we express no opinion in regard to it.

PER CURIAM. Judgment reversed, and judgment for defendant.

STATE *vs.* WILLIAM G. MATTHEWS.

Under the ch. 36, Rev. Code, an individual is indictable for passing or receiving, since the first of January, 1856, a Bank Bill, issued by the Bank of Fayetteville, of a denomination less than three dollars.

THIS was an INDICTMENT, tried before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Cumberland Superior Court.

The indictment charges that William G. Matthews, teller of the Bank of Fayetteville, did, on the 10th day of February, 1856, unlawfully pass to one William Warden, as the representative of, and as the substitute for, money, a bank bill of a less sum than three dollars, to wit, the sum of one dollar, (setting it out,) which said bill was issued by the said bank without being allowed by its charter to do so; against the form of the statute, &c.

There were counts varying the charge, also one count charging that the defendant did *receive*, &c.

The facts of passing a one dollar bank bill of the bank of Fayetteville, of the description charged, since the first day of January, 1856, was admitted, and were submitted to his Honor as a special case agreed. The only question raised and considered was, whether these facts were sufficient in point of law to authorise the judgment of the Court.

The following clauses of Chapter 36, of the Rev. Code, are material to a proper understanding of the case:

"SEC. 3. No bank, unless plainly and expressly allowed by its charter, shall make or issue any note, bill, check, draft, order, acknowledgment of indebtedness, or certificate of deposit, for a less sum than three dollars, on pain of being deemed to have violated its charter; and, moreover, of forfeiting and paying for each offence the sum of fifty dollars.

"SEC. 4. No corporation whatever, which is allowed to receive money on deposit, shall make, issue, or deliver any certificate, or acknowledgement of deposit for a less sum than three dollars; nor shall make, issue, or deliver any such certificate or acknowledgement of indebtedness for any sum whatever, with the intent that the same shall be circulated as money, on pain of being deemed in either case, to have violated its charter; and, moreover, of forfeiting and paying for each offence the sum of fifty dollars.

"SEC. 5. No person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note, or obligation, or any other kind of security, whatever may be its form or name,

with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, on pain of forfeiting and paying for each offence the sum of fifty dollars; and if the party offending be a corporation, of also being deemed to have violated its charter. And every person offending against this section, or aiding or assisting therein, shall likewise be deemed guilty of a misdemeanor.

"SEC. 6. No person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any such bill, check, certificate, promissory note, or other security of the kind mentioned in this chapter, whether the same were issued within or without the State. And any person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section, shall for every such offence forfeit and pay five dollars, and shall, moreover, be deemed guilty of a misdemeanor.

"SEC. 7. The public treasurer is hereby directed not to receive in payment of public taxes, the notes of any bank in the State that issues bills of a denomination less than three dollars."

His Honor gave judgment for the State, from which defendant appealed.

Attorney General and *Moore*, for the State.
Badger and *Shepherd*, for defendant.

PEARSON, J. The question presented by the case will be considered under three heads. Does the charter authorise the bank to issue one dollar notes for circulation "as the representative of, or as a substitute for, money"? Had the Legislature power to prohibit the circulation of such notes? Was it the intention of the Legislature, by the 36th chapter Rev. Code, title "Currency," to exercise this power in regard to the notes of the Bank of Fayetteville?

1. There is no clause in the charter which, in so many words, authorises the bank to issue notes for circulation as money; the charter confers banking powers in general terms.

In one clause "bills or notes," issued by order of the corporation, promising to pay money to any person or to bearer, are mentioned. In another clause the bank is required to furnish the public treasurer, once in six months, with a statement of the cash on hand, "notes in circulation," &c. All the bank charters in this State are worded in much the same way. The charter of the bank of the United States, obviously, was the original from which all the charters are directly or indirectly taken, and in none is the power to issue notes for circulation given in terms any more direct. So there can be no doubt that the charter does confer the power to issue notes for circulation as money. As the act of 1816 (Rev. Stat., ch. 34, sec. 90,) prohibits any person or corporation from issuing "notes, commonly called bank notes, of any value, with intention that the same shall circulate as money, without the authority of the Legislature first had," it is somewhat strange that the draughtsmen of these several charters were content to leave the authority dependent upon general terms. The omission to give the power, *in totidem verbis*, can only be accounted for by the circumstance alluded to: having a form they did not like to depart from it.

The power to issue notes for circulation is not restricted by the charter under consideration; it embraces notes of all denominations—under, as well as over, one dollar. But it is clear the charter must be construed with reference to the existing laws. The act of 1816 (Rev. St., ch. 34, sec. 86.) prohibits any person or corporation from issuing promissory notes, called due bills, (under one dollar,) for circulation as money, and it is agreed the power is restricted by this act so as to exclude the right to issue due bills.

It is insisted that the act of 1830 (Rev. St., ch. 11, sec. 1,) has a similar effect, and restricts the power so as to exclude the right to issue bank notes under five dollars. On the other hand, it is insisted that the act of 1830 applies only to the notes of the banks of other States. So the question is, did that act apply to the notes of the bank of this State? We think it did not. It enacts: "It shall not be lawful for any

person to pass, circulate, or receive in payment, within this State, any bank notes under the denomination of five dollars, issued by any State or sovereignty, or by any body politic or corporate not authorised to issue the same by any of the laws or statutes of this State." These words are satisfied by giving them the effect of prohibiting the circulation of the small notes of the banks of other States. The two principle banks in this State were authorized by law to issue notes under five dollars. So the circulation of their notes is expressly taken out of the prohibition, and there is but little ground to support the suggestion that this was a prospective general enactment aimed at banks that might at some future time be chartered in this State, and might, as it was feared, issue such bills, although not authorised so to do. Again, if it was intended to apply to the notes of our banks, it is reasonable to suppose that it would have contained a prohibition against the *issuing* of such bills. The act of of 1816 has two sections, one against the issuing, and the other against passing or receiving due bills. The act of 1854 (R. Code) by one section prohibits the issuing, and by another, the circulation of notes under three dollars; and the omission in the act of 1830 of an enactment against the issuing of notes under five dollars, tends to show that it was aimed exclusively at the banks of other States, over whose power to issue, our Legislature could assume no control. But all ground to support the suggestion of a prospective general enactment, above referred to, is taken away by the fact that the title of the act of 1830 is "An act to prohibit the circulation in this State, after the time therein mentioned, of bank notes under five dollars, issued by the banks of other States." The title of a statute may be invoked in aid of its construction. *Rex* v. *Cartwright*, 4 T. R. 490; Dwarriss on Statutes, 18. It is true, in the Revised Statutes, the title is changed and general words are used—"An act to prohibit the circulation of bank notes under the denomination of five dollars." But the change in the title of an act, in making a revisal, is not permitted to alter the construction which was before proper, when the same words were used in the enact-

ment, unless the title had been allowed the effect of altering what would otherwise have been the construction. *Terry* v. *Foster*, 1 Mass. R. 150. Here, as we have seen, the construction, confining it to the notes of the banks of other States, does not depend simply upon the title. But suppose that it be yielded that this change in the title was made to allow the general words used to have application to banks in this State, if any should ever issue notes in violation of their charter, so that the act of 1816 fixes a penalty for issuing notes without authority, and this act prohibits their circulation, still that would leave the question open in regard to the authority to issue under any particular charter; which is the question now under consideration.

It was further insisted, although the act of 1830 may not of itself be sufficient to restrict this charter, yet it has that effect, when taken in connection with the fact that the several acts incorporating the other banks, all contain a provision making it unlawful to issue small notes; thus showing the settled policy to be, to prevent the issue and circulation of such notes, so as to drive them out and make room for a metallic basis. We are asked, can it be possible that the Legislature intended to abandon this favored policy, and to confer, at the expense of the public, a special privilege upon the bank of Fayetteville, in which our other banks were not at liberty to participate? Is such a construction of this charter reasonable? We have given to this suggestion much consideration. A difficulty presents itself at the outset. The act of 1830, and the charter of the bank of NewBern, exclude all notes under five dollars: the charter of the bank of the State and the bank of Cape Fear exclude only notes under three dollars. This creates uncertainty in regard to this "settled policy," and in attempting, by inference from these Statutes, to impose a restriction upon the bank of Fayetteville, it would be found impossible to decide whether the limit should be fixed at five or three. But we have come to the conclusion that the only legitimate effect to which this argument is entitled, is to prove that, in all probability, the omission of a proviso as to issuing

small notes, similar to that inserted in the charters of the other banks, was an oversight; in other words, the Legislature, from mere inadvertence, forgot to insert it. If we were at liberty to make this supposition, the evil is beyond our control; for most certainly this Court has no power to supply the omissions or to correct the mistakes of the Legislature. Indeed, the omission of this proviso in its bearing upon the argument leans the other way, and tends to show that the authority is conferred; for, if its insertion was necessary to restrain the other banks, it follows that, without it, the power is given. In our case the same general terms are used, without this restriction. For these reasons, we are of opinion that the charter does confer upon the bank authority to issue one dollar notes.

2. It was assumed in the argument, that the Legislature had not the power to prohibit the circulation of small notes unless it had the power to revoke directly the authority to issue them, upon the ground that to prevent their circulation would necessarily prevent their issue, and that cannot be done indirectly which cannot be done directly; so, the two powers were treated as being precisely one and the same thing. We are not prepared to admit the position in the broad sense in which it was used. One may go around a hill and get on top of it, although he is not able to climb directly up. Many who deny that Congress has the power to protect manufactures by an act passed directly for that purpose, are forced to admit the power to give incidental protection by a tariff for revenue. So there may be a distinction; but we are not disposed to press it, except to the extent of claiming this reasonable concession: the object of the Legislature was to prevent the circulation of small notes, and the revocation of the authority to issue was necessary to effect that purpose.

So, a fair statement of the question is, had the Legislature, for the purpose of preventing the circulation of small notes, power to revoke the authority of the bank to issue them?

Political and other considerations are apt to connect themselves with the subject of corporations, and thereby give to

it more importance than it deserves as a dry question of law; and the unusual amount of labor and learning bestowed on it, has tended to mystify rather than elucidate the the subject. In *Meares* v. *the Com. of Wilmington*, 9 Ire. 78, it is said, "the idea that corporations are less accessible and less responsible to actions than individuals, (which, by the bye, was one reason why corporations have always been looked upon by the public with so much jealousy and so little favor,) has yielded to common sense, and it is now settled that corporations are as liable as individuals to be sued in contract or in tort, or to be indicted." In *Bank of the State* v. *Bank of Cape Fear*, 13 Ire. 80, it is said, "The Court supposes it to be clear that a corporation, is, like an individual, bound by, and may take benefit of, the general laws, where it is within the reason of them, unless there be particular modifications in the charter." The notion that a corporation is above the law has no ground to support it; the creature cannot be above the maker. Indeed, it is conceded that corporations and individuals stand on the same footing; both are equally subject to the laws, unless exempted from their operation by the force of a contract, and both equally have a right to protection. *Stanmire* v. *Welch*, ante, 214, is an instance where an individual was protected from the operation of a statute on the ground of his contract. The land of a corporation may be taken for public use under the right of eminent domain, in the same manner as the land of an individual may be taken. *West Riv. Bridge Co.* v. *Dix*, 6 Howard, 507. These positions have been stated to clear the way and present the naked question—is authority to issue small notes conferred by the charter, as a part of the essence of the contract, with the intention to put it beyond the control of all future legislation? —or, is it conferred as a mere incident, with the intention that it should be subject to such limitation as the Legislature might at any time thereafter deem expedient to make for the purpose of regulating the currency of the State? This is a mere question of construction and a plain statement seems sufficient to dispose of it. With the exception of the powers

surrendered to the United States, each State is absolutety sovereign. With the exception of the restraints imposed by the Constitution of the State and the Bill of Rights, all legislative power is vested in the General Assembly. It is consequently unreasonable to suppose that the General Assembly, admitting it has the power, would alien or surrender and make subject to any individual or corporation, a portion of its sovereignty, and thereby disqualify itself from doing that for which these ample powers are conferred on it. As is said in *McRee* v. *Wil. R. R Co.*, 2 Jones' R. 189, "we should hesitate long before bringing our minds to the conclusion it was the intention of the Legislature to take from itself the power of doing that for which all governments are organised—promoting the general welfare, by adopting such measures as a new state of things might make necessary for the benefit of the public; in other words, it is unreasonable to suppose an intention to surrender the means by which it may thereafter be able to effect the purpose for which it was erected and formed into a government." It follows, that to establish a contract on the part of the Legislature to relinquish any of its powers, plain and unequivocal words must be used. For instance, if its charter authorises a bank to lend money, and is silent as to the rate of interest, the general law will fix it; and should the Legislature afterwards make the rate lower, the corporation as well as individuals will be bound. So, if a rail-road company is authorised to carry passengers and freight, the Legislature may afterwards regulate the speed at which the cars shall run, or may make it unlawful to carry gun-powder on the same train with passenger cars; the sovereign being presumed to reserve to itself the regulation of all such matters, in the absence of an express contract to the contrary. In looking over the statute by which this bank is incorporated, we find authority to issue notes given in general terms; and although it may be inferred that it was then the policy, or rather that there was no purpose not to allow the issuing of small notes at that time, yet there is nothing which can be fairly construed as a contract on the part of the State not to change

the policy, and afterwards prohibit their issue and circulation. There is no pledge to this effect. Nothing is said about the size of the notes to be issued. There are, in this respect, no words but those of ordinary legislation, subject to be modified at any time that it might be deemed expedient. There are no words of contract used, and, in fact, no words which, by the utmost ingenuity and straining, can be made to imply a contract on the part of the Legislature that it will not at any future time regulate the currency, so as to prohibit the issuing and circulation of small notes. The persons who subscribed for stock in this bank had no right to suppose that the Legislature had tied its hands in this particular. On the contrary, in view of the act of 1830, and the restraining clauses in the charters of the other banks, they had every reason to believe that this restraint would be made by a general law on the subject. So, in my opinion, there is not only no objection on constitutional grounds, but no hardship in the case.

The only objection that can be urged to this conclusion, at all plausible, is, if the Legislature can prevent the issue and circulation of one dollar bills, the same may be done in regard to fives, tens, twenties, &c., so that by the abuse of the power, the bank may be restrained from issuing any notes whatever. That is true; but the same objection may be made to the exercise of any power; and it is a full reply to say, the Court can only declare a statute void where there is a want of power in the Legislature. In reference to questions of expediency or abuse of power, there is no jurisdiction.

3. What has been already said makes it unnecessary to add much upon the third head. Any one will say at once, if the Legislature had the power to revoke the authority conferred by this charter, the intention to exercise it is manifest from all of the circumstances; because, if this bank could issue small notes, it made the restraints put on other banks of no use, and defeated the whole purpose. The charter was granted at the session of 1848. At the next session an act was passed to amend the charter. It provides, "it shall and may be lawful for the corporation, &c., to issue notes of the de-

nomination of three dollars, but no note shall be issued by said bank for a less sum than three dollars." This was an attempt to remedy the "oversight;" and the amount of it is, there being a doubt whether the bank can issue any note under five dollars by force of the act of 1830, it is proposed, as a compromise, to allow the bank to issue notes of the denomination of three dollars and upwards, provided it will agree to issue no notes under that denomination. This proposition was rejected by the bank. At the session of 1854, the act under consideration was passed as a part of the Revised Code, to go into effect 1st of January, 1856. The general purpose of this act is to regulate the currency by prohibiting the circulation of small notes; and to this end it was necessary to prohibit the issuing of such notes; so, the particular purpose was to revoke the authority to issue them, should it have been conferred upon the bank, unless it was conferred plainly and expressly by the charter; if not so conferred, a penalty was imposed upon the bank for issuing such notes; any person passing or receiving them was subjected to indictment, and the public treasurer was directed not to receive them in payment of taxes; thus evincing a determination to effect the purpose, if it could be done.

The question then, is, do the words used express this intention with sufficient clearness? in other words, is the bank plainly and expressly allowed by its charter to issue such notes? We are not at liberty to consider the word "expressly" as used in the sense of *in totidem verbis;* for in another section of the same act, it is enacted, "no person or corporation, unless the same shall be expressly allowed by law, shall issue any bill, note, &c.; and taken in that sense, this would apply to all of the banks; but the charters of these banks all contain a clause expressly prohibiting the issue of notes under a certain denomination; this express prohibition is taken to give the right to issue notes above that denomination, by reversing the maxim *expressio unius exclusio alterius.* A good rule works both ways; and in this latter sense the other banks are expressly allowed to issue notes, whereas this bank

is not expressly allowed to do so, in either sense of the word; but the addition of the word "plainly" removes all doubt. After making so long an argument under the first head to prove that this bank had authority to issue such notes, it certainly cannot be necessary to make another long argument to prove that the authority is not plainly and expressly given.

NASH, C. J. *dissentiente.*—I agree with my brethren in the first two propositions conveyed in their opinion. First, that by the act incorporating the bank of Fayetteville, power was granted to issue notes or bills of any denomination, from one dollar to any amount; and secondly, that the act of 1830 has no bearing upon the question submitted to the Court in this case. The first proposition is true, because the end and object of the grant was to establish a bank of issue as well as of deposit; and the second, is true, because by the caption of the act of 1830, as originally passed, the object and intent of the Legislature is plainly set forth to be, to prevent the circulation, in this State, of bills issued by banks out of the State, of a less denomination than five dollars. And the fact, that in the Revised Statutes, the act is brought forward without the caption, can make no difference, as the caption is no part of the act, but simply a key to unlock the intention of the enactors of it. I do not concur in the opinion, upon the effect and operation of the act of 1854, upon the right of the bank of Fayetteville to issue notes or bills of the denomination of one dollar. It is not my purpose to go into an elaborate investigation of the subject, but to content myself with the statement of a few principles, and a reference to a few cases, to sustain my views.

It is a sound rule, that where an act is passed by the Legislature, susceptible of two constructions, one in conformity with their constitutional powers, and another in conflict with them, the former is to be taken as the true construction, rather than the latter. A due regard to a co-ordinate branch of the government requires such a rule. Was it the intention of the Legislature, to be gathered from the act itself, in passing the act of

1854, to deprive the bank of Fayetteville of the power to issue one dollar bills? My impression is that it was not. In the first place, it is not to be presumed that the Legislature was disposed to do that indirectly, which they felt they had no power to do directly. This would be doing great injustice to that body. Again, the bank of Fayetteville was the only bank in the State whose charter authorised the issue of notes of that denomination. If it was, then, the intention of the Legislature to withdraw that power, an act, plain and simple in its phraseology, expressly repealing so much of the act incorporating the bank as conveyed that power, would have been sufficient, and would have left no doubt as to the intent of the Legislature. This they have not done, but passed a general act. My opinion is, that the Legislature did not intend to interfere with rights already vested, but those which might thereafter be called into existence by the future incorporation of banks. This construction leaves the act of 1854 free to act, untrammelled by the constitutional objection raised to it. If, however, I am mistaken in this view of the act of 1854, and it was the intention of the Legislature to repeal so much of the charter of the bank of Fayetteville as confers upon the corporation the right to issue one dollar bills, I am constrained to say, I deem the act, so far, unconstitutional, as being a plain violation of the 10th section of the first article of the constitution of the United States, which, among other restrictions upon the power of the States, forbids the passing of any law impairing the obligation of contracts. This clause of the constitution was intended to restore public confidence, shaken by the course pursued in several States at the close of the war of the Revolution, and to establish the great principle, that contracts should be inviolable. Under its ægis, it was intended that all our institutions, commercial, literary, charitable and religious, should find safety from the fluctuations of public opinion and political strife. It embraces all contracts, whether made by the State with one of its citizens, or one made between private individuals; whether executed or executory. It is not questioned but that a grant made by the

State is a contract under the constitution, and protected by it. In the celebrated case of *Fletcher* v. *Peck*, 6 Cranch 87, the Court declare, that where a law is in the nature of a contract, and absolute rights had vested under it, the repeal of the law cannot divest those rights, nor destroy or impair them. The same principle is declared in the case, the *State of New Jersey* v. *Wilson*, 7 Cranch 164. In *Tenent* v. *Taylor*, 9 Cranch 43, it was declared, that a legislative grant, competently made, vested an indefeasible and irrevokable title, and repudiates the doctrine, that such a grant was revokable in its nature, and held only *durante bene placito*.

In the case of *Dartmouth College*, 4 Wheaton 518, the whole doctrine arising under this restriction in the Constitution of the United States, was most elaborately argued, and received the most clear and practical exposition by the Court. Chancellor Kent, in the 1st vol. of his commentaries, p. 418, observes: "The decision in that case did more than any single act proceeding from the authority of the United States, to throw an impregnable barrier around *all* rights and franchises derived from the grant of the Government." Impregnable no longer, if held *de bene placito* of the legislature. The question again came before the same tribunal in the case of *Green* v. *Biddle*, 8 Wheaton 1, in which the Court declare, that the objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change. Any deviation from its terms, however minute, or apparently immaterial in its effect upon the contract, or upon any part or parcel thereof, impairs its obligation. Thus in *Woodruff* v. *Trapnell*, 10 How. U. S. Rep. 190, it was held that an act of the Legislature of Arkansas, repealing a clause of a previous act chartering a bank, in which the State was the sole stockholder, and in which it was stipulated, "that the bills and notes of said institution, shall be received in "payment of debts due the State," violated the charter, as impairing the contract between the State and the holders of the bills. The same principle was recognized in *Pauf* v. *Drew*, 10 How. 218, and in *Trigg* v. *Drew*, do. 224. In the

Planters Bank v. *Sharp*, 6 How. 301, the Court decide, that where a bank is chartered with power to *acquire and dispose* of goods, chattels and effects, of what kind soever nature and quality, and to discount bills and notes, that a subsequent act passed by the Legislature prohibiting any bank from transferring by endorsement or otherwise, any note or bill receivable, or other evidence of debt, was void, as impairing the obligation of the contract contained in the charter previously granted. Any law, then, which enlarges, abridges, or in any manner changes, the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it; nor can the manner or degree in which the change is effected, at all influence the result. Nor does it make any difference whether the contract is express or implied; each is equally under the protection of the constitution. Story's Com. on the Con., ss. 700, 703.

By the charter of the Bank of Fayetteville, it was authorised to issue notes of the denomination of one dollar and upwards; by the act of 1854, if the construction given to it by my brethren be correct, that privilege is taken from it. It, therefore, without the consent of the bank, changes an important feature contained in the charter, and revokes a power granted and guaranteed to the corporation. A more palpable violation of a contract, to my mind, cannot well be perceived. My brethren, however, hold, that though this be so, yet the act of 1854 is not unconstitutional. And this is founded upon the position that the power to regulate the currency of the State is a sovereign power, which no Legislature has a right to part with. To this proposition I do not assent; grant it, and every banking corporation in the state, holds its charter at the will of the Legislature. If, under the plea of regulating the currency of the State, the Legislature can withdraw from the corporation the power granted to issue bills of a particular denomination, the same plea will justify them in forbidding the issuing of any bills. Having granted to the bank of Fayetteville the right to issue bills of the denomination of one dollar, the same principle will justify them in forbiding

them to issue bills of a less denomination than of ten, twenty, fifty, one hundred, or any other large denomination. So that, in fact, it would be in the power of the Legislature to convert every bank in the State simply into banks of deposit. The banks of the State, and of Cape Fear, have the right expressly given them to issue bills of any denomination not under three dollars; what is to prevent the Legislature from withdrawing this right, and forbidding those banks from issuing any bills under fifty or a hundred dollars, or any bills at all but certificates of deposit. The only difference between the case of these latter banks and that of the bank of Fayetteville, is that the restriction upon them is expressed. This surely can make no difference in the exercise of the power now claimed for the Legislature, which necessarily explodes the idea, that banking charters are contracts. They are simply Legislative acts, subject to the control of the Legislature, and liable to be recalled whenever that body deems it expedient so to do. But numerous decisions of our courts of justice, and opinions of our ablest jurists, sustain the idea that they are contracts within the constitutional power of the Legislature to make; if so, they are under the protection of the article of the Federal Constitution before cited. To coin money is an act of Sovereignty; to establish banks, is an act of ordinary Legislation. To do the former, or to regulate its value, is not within the ligitimate power of the Legislature. The people of North Carolina, in solemn convention, have transferred that sovereign power to the Government of the United States. Bank bills are not money, but the representative of money; nothing more than promissory notes; differing from those made by a private individual, only in being issued by a corporate body; no one is compellable to receive them, and they are current only by common consent, not by law. Where the Legislature creates a corporation, it is in their power to lay the corporators under any restriction they think the public interest requires; but having made the compact, it is no more in their power to alter it, without the consent of the corporation, than they can alter one made by and between private

individuals. That the power to issue bills of the denomination of one dollar, is felt by the Bank of Fayetteville to be important and valuable, is evidenced by the care they have taken in the defence of what they consider their rights. As it regards the policy of the power granted, I have nothing to say; nor have I any concern with the motives which induced the Legislature to grant it to the bank of Fayetteville and deny it to other banks. It is sufficient for me that they have done it.

I have treated this question as if the bank of Fayetteville was, by proper proceeding, the defendant here. To grant to the corporation power to issue bills of the denomination of one dollar, and to make it penal, by a subsequent act, for any one to pass or receive them, would indeed be a sheer mocking of justice. The defence rests upon the power of the bank to issue them after the act of 1854.

In my opinion, the judgment below ought to be reversed, and a *venire de novo* granted.

PER CURIAM. Judgment affirmed.

Doe on dem. of JOHN R. TAYLOR *vs.* JOSEPH H. GOOCH.

A possession of seven years, under color of title, gives a good title against all the world, except the State, and a subsequent possession of thirty years, makes good the title against the State; although a large part of this thirty years possession was adverse to the person suing, who is saved from its effect by the accumulated disabilities of infancy and coverture.

ACTION of EJECTMENT, tried before his Honor, Judge PERSON, at the Spring Term, 1856, of Warren Superior Court.

Solomon Walker took possession of the land described in the declaration, under color of title, in 1790, and died in 1791, leaving an only son, John Walker, who continued in possession under his father's title, until his death, in 1802. In the same year, and after the death of John Walker, John Washing-

ton took possession, and claimed and used the land, as his own, until his death, in 1826; and, by his last will and testament, devised it in fee to his widow, Delphia Washington, and she continued in possession, claiming it as her own, till 1849, when she conveyed it in fee to the defendant, Joseph H. Gooch, who has been in possession ever since. John Walker left him surviving, his infant daughter, Betsy, who intermarried with one Hopgood in 1817, under the age of twenty-one years, and died covert, in 1831, leaving her daughter the feme lessor surviving, who afterwards, in 1842, intermarried with John R. Taylor, under the age of twenty-one. Hopgood moved away from the State in 1842, and has not been heard of since. In 1815, John Washington was appointed guardian of Betsy Walker, by the County Court of Granville.

Upon this state of facts, the Court charged the jury that the plaintiff was not entitled to recover. Plaintiff excepted.

Verdict and judgment for the defendant, and appeal by the plaintiff.

Winston, Sen'r., for plaintiff.
Moore, for defendant.

BATTLE, J. The rule that the plaintiff in ejectment must recover on the strength of his own title, either as being in itself good against all the world, or good against the defendant by estoppel, is too well established in the law of this State, to be in the slightest degree shaken by the elaborate argument of the plaintiff's counsel. *Duncan* v. *Duncan*, 3 Ire. Rep. 316; *Clark* v. *Diggs*, 6 Ire. Rep. 159. As early as the year 1816, it was said by *Mr. Mordecai*, who argued for the plaintiff in the case of *Shepherd* v. *Shepherd*, N. C. Term, Rep. 108, that he did not intend to controvert the rule so long established, that the plaintiff in ejectment must recover on the strength of his own title. We do not intend to weaken the foundation of the rule by supposing it to be, at this day, open for discussion.

We are as little convinced, by the argument of counsel

that Mr. Washington, who entered upon the land and claimed it as his own for several years, became the possessor of it for the infant heir of the ancestor of the plaintiff's lessor, by the mere fact of being appointed by the County Court her guardian.

It is unnecessary, however, to discuss this question, because we are satisfied that the plaintiff is entitled to recover upon other principles which are well established by the decisions of this Court. In the case of *Fitzrandolph* v. *Norman*, N. C. Term, Rep. 134, one of the questions was, whether a grant from the State, in favor of the defendant, could be presumed from the possession of tenants, between whom and the defendant no privity could be shown. SEAWELL, J. said the Judge did right in leaving the facts of the possession in 1768 and 1769 to the jury, though there was no connexion proved between such possession and that under which the defendant claimed. For, as against the State, it was a circumstance from which it might be inferred that the State had parted with a right, as well as if those in possession had been successive claimants from one another. The evidence offered in such a case, was not to make a title in the defendant, but to oust the claim of the State. DANIEL, J. remarked, that "the defendant rested his defense upon length of possession, connected with a chain of circumstances as evidence to presume a grant had once been issued. And it was quite immaterial whether the grant issued to that person under whom he immediately claimed, or whether it issued to any person or persons no way connected with him." RUFFIN, J. concurred, for the reasons given by SEAWELL, J. The principle decided in this case was referred to and confirmed in *Chandler* v. *Lunsford*, 4 Dev. and Bat. Rep. 407, and again in *Reed* v. *Earnhart*, 10 Ire. Rep. 516. In the last case the Court went further, and held, that a continuous unceasing possession is not necessary to raise the presumption of a grant. The leading idea, in the opinion of the Court, is that, "when land has been for a long time treated and enjoyed as private property, the presumption must be made that the State has parted with

its title, unless the presumption is repelled by proof, that such is not the fact." The presumption being made that the title is out of the State, the contest between individual claimants must be decided according to the well-established rules of property, applicable to each case. For the purpose of illustrating this idea, PEARSON, J. made the following suppositions: "A plaintiff in ejectment shows color of title, and seven years possession in the lessor, he then shows a grant in the *defendant;* this entitles him to recover. So, if he shows that the defendant was in possession under color of title, twenty-one years, or without color of title, thirty years, or, that the defendant was in possession twenty-four years when the lessor evicted him, the defendant's possession for twenty-four years, added to the lessor's possession of seven years, takes the title out of the State, which is sufficient for the purpose of the plaintiff; the State is presumed so have parted with her title, because A is permitted to keep possession twenty-four years, and B, who evicts him, seven years." The principle deducible from these supposed cases is, that a possession of land for more than thirty years, raises a presumption that the State has made a grant of the land to some person, but without fixing on any particular person, leaving that to be settled by other rules of law. Apply this to the present case. The seven years possession, under color of title, of the feme lessor's ancestors, Solomon and John Walker, gave the latter a good title against all the world except the State. The subsequent possession of the defendant, and those from whom he claimed, for more than thirty years, raised the presumption that the State had parted with its title, and yet, did not bar the title of the feme lessor, because she, and her mother, from whom she claimed, were all the time under the disabilities of non-age and coverture; indeed, the possession of John Washington, did not avail anything as against the title under which the feme lessor claimed, because it was unaccompanied by color of title. The possession of his widow as devisee under his will, was otherwise, but could not ripen into a good title, for the reason given above, that the feme lessor and her

mother were laboring under disabilities. If these principles be correct, it follows that the charge of his Honor, in the Court below, was erroneous, and the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

RODERICK CARROLL *vs.* JOHN HANCOCK *et al.*

A testator, after giving a woman slave to one absolutely, has a right to dispose of her children then unborn.

Where a life-estate is given with a limitation over to a class, the matter is kept open until the termination of the particular estate, so as to include as many of the objects of the testator's bounty as possible. It is otherwise where there is no particular estate.

THIS was a petition for the partition of slaves, heard before his Honor, Judge PERSON, at the Spring Term, 1856, of Pitt Superior Court.

William Haddock died in 1821, having made his will, in which he bequeathed as follows: "Item, I lend to my beloved wife, Martha Haddock, my dwelling-house and plantation whereon I now live, and three feather-beds and furniture; also the rest of my household furniture; also one negro woman named *Chane*, and one boy named Moses, and all my stock of cattle and hogs during her natural life; and also my will and desire is, that after the death of my wife, for Zilpha Harrington to have the negro woman Chane, that I lent to my wife, to her and heirs for ever; also my desire is, that Chane's increase, if she has any, to be given to Zilpha Harrington's daughters after her decease."

Chane had increase, six children, after the death of the testator, and before that of Zilpha Harrington. Martha Haddock, the widow of William Haddock, died in 1830.

Zilpha Harrington died in 1855; her husband, Joab Harrington, had possession of Chane and her children under and

by force of this bequest, with the assent of the executor of William Haddock, at the time of her death.

The children of Zilpha Harrington, living at her death, were six daughters: Elizabeth, who intermarried with the plaintiff, Roderick Carroll, Martha, who intermarried with John Hancock, Penny, intermarried with Barnes Summerlin, Susan, intermarried with Allen Jackson, Mimesy, intermarried with Amariah B. Cox, and Nancy Harrington, a single woman.

Shortly after the death of her mother, Elizabeth Carroll, the wife of the plaintiff, died intestate, and he took out letters of administration on her estate. This petition was filed by him as administrator, claiming to be a tenant in common with the five other daughters of the testator.

The defendants answer, and deny that they are tenants in common with the plaintiff as the representative of his wife. They insist that, by the will of William Haddock, the said slaves were the absolute property of Joab Harrington, the husband of Zilpha Harrington, and they allege that the same have been conveyed, by deed properly executed, and for a valid consideration, to the defendants.

Upon consideration of the above case, his Honor declared it to be his opinion, that the plaintiff is a tenant in common of the slaves mentioned in the pleadings, with the defendants, and adjudged that he is entitled to partition as prayed.

From which judgment, defendants appealed.

Bryan, for plaintiff.

Rodman, for defendants.

PEARSON, J. A negro woman is bequeathed to A for life, and then to B, and her heirs for forever. The "increase" of the woman, "if she has any," is bequeathed to the daughters of B, after her death. The woman has six children after the death of the testator; A dies, and B dies, leaving her surviving six daughters; one of them dies, her administrator claims

to be tenant in common with the other five, and prays for partition.

There can be no doubt that the testator, after giving the woman absolutely to B, had a right to dispose of her children then unborn. *Pearson* v. *Taylor*, 4 Dev. and Bat. 60; *Nelson* v. *Nelson*, 6 Ire. Eq. 417.

The suggestion, that "increase" has a broader meaning than children, and includes descendants to any indefinite future period, and so the limitation over is void to prevent a perpetuity, is not well founded. What negroes the daughters of B are to take, will be determined at her death, or at all events, at the death of the negro woman; so the limitation over must take effect within a life, or lives in being.

There is also no doubt that, at the death of B, the legacy vested in her daughters then living; consequently, upon the death of one of them, her estate was transmitted to her personal representative. It is well settled, that where a life-estate is given with a limitation over to a class, the matter is kept open, until the termination of the particular estate, so as to include as many of the objects of the testator's bounty as possible. This can be done; because the tenant for life fills the ownership, and there is no necessity for ascertaining who constitute the class, until they are called on to take the ownership. It is otherwise when there is no particular estate, for then the call is made at the death of the testator, and those take who then answer the description.

The daughters being then tenants in common, the bill of sale, taken by the surviving five from the husband of B, did not have the effect of making the possession adverse.

PER CURIAM. Judgment affirmed.

Den on the Demise of MOSES ERNULL *vs.* D. P. WHITFORD.

What constitutes an heir-at-law is strictly a question of law; but the facts on which such point of law arises, must be left to the jury for their decision, and there is no error in leaving it to a jury to say, from the facts stated, whether a particular person died without children, and whether another was his oldest nephew.

This Court can be influenced by no complaints of the tone or manner of a Judge below, not noticed in the bill of exceptions.

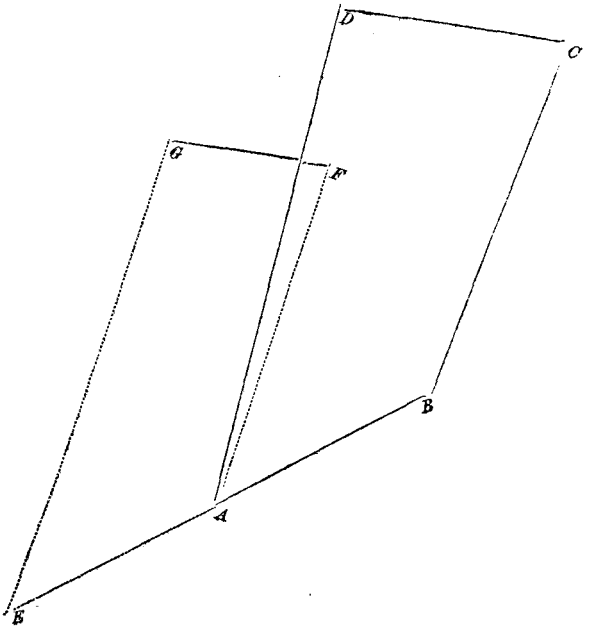
Where the testimony excepted to is immaterial, this Court will not enquire whether it was properly or improperly admitted.

ACTION of EJECTMENT, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1856, of Craven Superior Court.

The plaintiff claimed title under John Hill, and offered the copy of a grant to Hill for one hundred acres, dated in 1743. He also offered in evidence, a copy of the record of certain proceedings had in the County Court of Craven, to correct an error in the third course of the patent, in which the father of the defendant, and under whom he claimed, was a party, the purpose of which proceeding was to correct an error, so as to run the third line of the patent North forty-five degrees *West* 80 *poles*, instead of running it North forty-five degrees *East* 60 *poles*: this is the line D, C, in the annexed diagram. There was no evidence of any order of the Court for a certificate, or of a certificate being filed in the office of the Secretary of State. The copy of the grant and proceedings were objected to, but received by the Court. Exception by the defendant.

The deposition of one *Jacob Burch* was taken by consent of parties, subject to all legal exceptions. He deposed "that he is in the eighty-fourth year of his age, that he has always lived in Craven county, a large portion of the time in the neighborhood of the Ernull family, to which he is related. That he knew Moses Ernull, the father of the plaintiff, the present Moses; that he was said to be the nephew of John Hill by the family and neighbors. Moses Ernull, the father of the plaintiff, had brothers and sisters; Moses Ernull being

the oldest, heired the lands of his uncle John Hill, who owned several tracts of land on Swift creek in Craven county. The witness further sayeth, that he does not know the year John Hill died, but he believes it was during the Revolutionary war," signed, &c. The defendant objected to so much of this deposition as stated that the ancestor of the lessor of the plaintiff was heir to John Hill.



The counsel for the defendant, in opening his defence to the jury, argued to the Court that there was no proof of John Hill's death without children, or that plaintiff was his heir-at-law; to which the Court replied at the time, that the jury might infer it from the facts stated: that plaintiff was reputed to be his oldest nephew, from the proceedings had on a division, and the long acquiescence in that division. Here the

matter rested, nothing more being said on the point by either of the defendant's counsel.

In the location of the grant, the plaintiff contended for the lines A, B, C, D, as represented in the diagram, the defendant for the dotted lines E, A, F, G; the plaintiff, that A was the beginning corner, which was a marked pine; the defendant, that E was the beginning corner, and that A was the second corner. A was spoken of by all the witnesses as a corner. The defendant's counsel said that his client had, at all times, admitted that A was a corner of the tract, and so admitted then.

The Court, in its charge, said that the defendant's counsel had admitted, as from the evidence they were forced to admit, that A was a corner, and the point in dispute was, whether it was the beginning or second corner. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Bryan, for plaintiff.
Donnell, for defendant.

NASH, C. J. There is no error. In the course of the trial it became important to the lessor of the plaintiff to prove that he was the heir-at-law of John Hill, the patentee of the land in dispute. The deposition of John Burch, a very aged man, proved that John Hill died during the war of the Revolution; that he was well acquainted with Moses Ernull, the father of the lessor of the plaintiff, and heir-at-law, and that he was related to the Ernulls. The defendant contended that there was no evidence of the death of John Hill without children, or that the lessor of the plaintiff was his heir-at-law. His Honor left it to the jury, under the evidence, to ascertain the facts. In this, there is no error. What constitutes an heir is strictly a question of law, but the facts upon which a person claims to be heir to another is an enquiry for the jury. His Honor might have been more precise in his charge, but we think he was sufficiently so not to mislead the jury, and not to devolve upon them a duty which rightly belonged to

him. If the lessor of the plaintiff was his oldest nephew, and John Hill had died without children, (which the jury, under the circumstances, were at liberty to presume, particularly as such was the understanding of the community,) then the lessor of the plaintiff was his heir-at-law. The evidence of Buerh is that Hill died previous to the act of 1784.

The record of proceedings in the County Court of Craven, to correct a line of the patent of John Hill, was offered by the plaintiff, and objected to by defendant's counsel, upon the ground that "there was no evidence of an order of the Court for a certificate, or of a certificate being filed." The objection was properly overruled. There was no necessity for the proposed amendment, as the calls of the patent would carry the line to the pine tree to which it was proposed to carry it by the amendment. See *Rountree* and *Person* in Note to ——— v. *Beatty*, 1 Hayw. 378. The introduction of the record was entirely immaterial.

The last objection, on the part of the defendant, is to the charge of the Judge. The controversy between the parties mainly turned upon the location of a particular corner. The plaintiff contended that the corner designated on the survey as A, was his beginning corner; and the defendant insisted that the corner at A was not the beginning corner of the grant to Hill. It was admitted on both sides that there was a corner at A. In his charge his Honor observed to the jury that "the counsel of the defendant had admitted, as from the evidence they were forced to admit, that A was a corner." In the argument here, it was insisted that this observation was said in a manner so significant as was well calculated to throw discredit upon the whole defence. We are necessarily confined to the record, and cannot look beyond it. It certainly can be no error for a Judge to state to the jury the admissions of the parties. It is, indeed, his duty so to do. It strips the case of extraneous matters, simplifies the duties of the jury, and expedites the trial. But a Judge ought to be careful not to throw into his observations, by words or actions, anything which may be calculated to influence the jury

upon points that are in contest between the parties. We do not perceive in what way the expressions of the Judge in this case could have had such an effect; the language is not selected with that care which an anxious desire to keep within the provisons of the act of 1776 would dictate; the words, "as they were forced to admit," may have been discourteous and grating to the feelings of the counsel, but as they could have had no effect upon the points really in dispute, we cannot say that his Honor violated the act of 1776.

We have examined the authorities brought to our notice by the defendant's counsel, on the various points in controversy, and do not see that this opinion is in conflict with them.

PER CURIAM. There is no error, and the judgment is affirmed.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1856.

J. W. P. McFADDEN *vs.* ROSS B. TURNER.

A conveyance of a chattel in writing, absolute in the conveying part, to which is added a condition, that it shall be void if the vendor pay to the vendee a certain sum of money which he owes him, is a mortgage, and is void against creditors if not registered.

ACTION of TROVER, tried before his Honor Judge BAILEY, at the Spring Term, 1856, of Cleaveland Superior Court.

William Moore was the owner of a horse, and sold the same by the following instrument of writing, viz: "Know all men by these presents, that I, William Moore of Cleaveland county, and State of North Carolina, do sell unto J. W. P. McFadden of the county and State aforesaid, one sorrel horse, for the sum of forty-five dollars and fifty-three cents, which horse I warrant the title good, free from any person or persons whatsoever, in witness whereof I set my hand and seal. This instrument to be void on condition that, I, William Moore, pay him, J. W. P. McFadden, the sum of forty-five dollars and fifty-three cents with lawful interest; but if not paid, to re-

main J. W. P. McFadden's horse. In witness my hand and seal, this 24th March, 1854."

This instrument was not registered.

William Moore, the vendor, was examined as a witness for the plaintiff; he stated that at the time of the sale, he was indebted to the plaintiff in the sum of $45.53, in two or three promissory notes; that when the bargain was made with the plaintiff, these notes were surrendered to him, and it was agreed that witness might keep the horse to cultivate the crop, and until he called for it. He further stated, that he was indebted to the King's Mountain Iron Manufacturing Company.

The defendant produced in evidence, a judgment in favor of the above mentioned company, against Moore, dated in April, 1854, and an execution issuing thereupon, under which the horse in question was duly sold and bought by him.

In behalf of the defendant it was insisted, that the instrument set forth by the plaintiff, was, in law, a mortgage, and that not having been registered, it was void as to creditors. Of this opinion was his Honor, and he so expressed himself on the trial.

In submission to the opinion of the Court, the plaintiff took a non-suit and appealed.

Avery and *Lander*, for plaintiff.
Baxter, for defendant.

PEARSON, J. In *Ballew* v. *Sudderth*, 10 Ire. Rep. 176, the case of *Gaither* v. *Teague*, 4 Ire. 165, is referred to with this remark, " the decision in that case, assumes that the property remained in the vendor," &c., and an intimation is made that the decision opened a door for the evasion of the statute, to which the attention of the Legislature is called. In our case there is no ground whatever for the assumption that the property remained in the vendor; on the contrary, there is a formal bill of sale with warranty, by which the title passes to the vendee, subject to be divested upon the performance of a

condition subsequent; so that it is, to all intents and purposes, a mortgage. There is no error.

PER CURIAM. Judgment affirmed.

C. L. HARRISS *vs.* L. M. WILLIAMS.

Where A agreed to deliver a horse to B on a given day, at a stipulated price, but before the day, sold it to another, and did not deliver it on the day appointed, it was *held*, that B was entitled to maintain an action for the breach of the contract, without averring or proving his readiness and ability to pay the money; the wrongful act of A having excused him from making such averment and proof.

THIS was an ACTION of ASSUMPSIT, tried before his Honor, Judge BAILEY, at the Spring Term, 1856, of Rutherford Superior Court.

The defendant owned a horse which he proposed to sell to the plaintiff for sixty-five dollars. The plaintiff agreed to take it at that price. It was further agreed that the defendant should ride the horse home, but was to deliver it to the plaintiff on the next day, when the plaintiff was, by the agreement, to take it at the price above mentioned, provided the defendant would deliver it, and not ride it too hard.

On the same day on which this agreement was made, the defendant sold the horse in question to another person, at the price of eighty-five dollars, and did not deliver it to the plaintiff on the next day as stipulated in the agreement. The plaintiff issued his writ, which was in the hands of the sheriff when he demanded the property, and averred his readiness and ability to comply with his part of the contract. The plaintiff proved that he was a man of large property, but did not show, that on the next day, or at any time before the issuing of the writ, he had any money wherewith to pay the price agreed on.

On this state of facts the Court reserved the question,

whether the plaintiff was entitled to recover. A verdict was rendered in favor of the plaintiff, with leave to set it aside and enter a nonsuit, if his Honor should be of opinion against the plaintiff on the point reserved.

On consideration of the question reserved, his Honor decided in favour of the defendant, and ordered a nonsuit, from which judgment the plaintiff appealed.

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

BATTLE, J. It is contended by the counsel for the defendant that the alleged contract for the breach of which the suit was brought, was never completed; that it was never finally assented to by the parties. In that, he is clearly mistaken. The defendant offered to sell his horse for the sum of sixty-five dollars, and the plaintiff agreed to give it. This certainly created an executory contract between them, which neither of them could rightfully dissolve without the consent of the other. The defendant had the right, then and there, immediately to tender the horse and demand the price; and the plaintiff had the corresponding right to tender the money and demand the horse. But, for the defendant's convenience, he was permitted by the plaintiff to ride the horse home, upon his agreeing to return it the next day, when the plaintiff was to receive it, if returned uninjured. This arrangement was not intended by the parties to put an end to the contract, but only to postpone, until the next day, their mutual rights to enforce it. The defendant then, on the same day, sold the horse to another person at an advanced price, and thereby, very clearly committed a breach of his agreement, for which the plaintiff could sue him, unless he had omitted something which it was necessary that he should do to entitle him to maintain his action. The counsel for the defendant contends that the plaintiff has failed to show that on the day when the horse was to be delivered he had tendered to the defendant the price, or was ready and able to do so,

and that consequently he cannot recover in this suit; and for this position he relies on the case of *Grandy* v. *McCleese*, 2 Jones' Rep. 142. That case would be in point if the defendant had returned the horse at the time appointed, and the plaintiff had not then tendered the price or been ready and able to do so. But after the defendant had, by selling the horse, put it out of his power to comply with his contract, the plaintiff was discharged from the duty of tendering the money, or showing his readiness and abilty to do so. This clearly appears from the case of *Grandy* v. *McCleese* itself, where it is said, "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.*" See, also, *Abrams* v. *Suttles*, Busb. Rep. 99. The judgment of nonsuit was erroneous and must be reversed, and judgment must be given for the plaintiff.

PER CURIAM. Judgment reversed.

ALEXANDER FOX *vs.* JOSEPH WILSON.

To say of actionable words spoken, which are barred by the statute, "I never denied speaking those words, and I will stand up to them," is not a repetition of the charge, and though said within six months before bringing the suit, it will not support the action of slander.

ACTION of SLANDER, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Buncombe Superior Court. Pleas, general issue, statute limitations.

The words charged to have been spoken by the defendant were in relation to the taking of a horse which had belonged to the plaintiff, which had been levied on by an officer and left in the custody of the defendant, and which the plaintiff had secretly taken from out of his possession. The defendant,

in speaking of this transaction to one Roberts, called it stealing. This conversation was more than six months before the suit was brought. But afterwards, within the time prescribed by the statute, on being informed by Roberts that the plaintiff threatened to sue him for slander if he could get evidence enough, the defendant said in reply, that he had never denied what he had said to Roberts, and that he would "stand up to it."

The Court was of opinion that the words to Roberts were not actionable, and if they were, the subsequent conversation was not a repetition of them. In submission to this opinion, the plaintiff took a nonsuit and appealed.

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

BATTLE, J. We agree with his Honor that what the defendant said to the witness Roberts, within six months before the commencement of the action, was not a repetition of the charge which he had previously made to the same witness against the plaintiff. It was nothing more than an acknowledgment of the fact that he had spoken the words on a former occasion; and that speaking having been more than six months before the suit was brought, the statute of limitations was a bar to it.

This makes it unnecessary for us to decide whether the words were actionable, and upon that question, therefore, we do not express an opinion.

PER CURIAM. Judgment affirmed.

BARNETT BURNETT *vs.* WM. H. FULTON.

The principle, that a bailee shall not be heard to deny the title of his bailor before surrendering the possession, does not apply where the bailee sets up a deed in trust made for his benefit after the bailment.

ACTION of TROVER, tried before his Honor, Judge ELLIS, at the Special Term, (June, 1856,) of Henderson Superior Court.

Plaintiff declared for the conversion of a wagon. One Cook had formerly owned it; he loaned it to Fulton, the defendant, who was to use it and return it in as good plight as it was in when he received it. Cook sold the wagon to plaintiff, who demanded it of the defendant, showing him authority from Cook to demand and receive it. The defendant refused to deliver it, upon the ground, that he had a mortgage on it for the payment of a debt which Cook owed one Jones, and in which he was interested. A deed in trust for this property, to one Davenport as trustee to secure said debt, executed by Cook, after the bailment, and before the sale to the plaintiff, was produced in evidence by the defendant. Davenport testified that Cook had delivered him the deed in trust, but that he had done nothing under it, but left the wagon in the defendant's possession as formerly.

His Honor left it to the jury to say whether there was a bailment of the property in question to the defendant by Cook the vendor of the plaintiff; and instructed them, that if they should so find, the defendant could not be heard to dispute the title of his bailor, nor of one claiming under him, until the possession should have been surrendered to him. Defendant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

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

NASH, C. J. It is a well-established principle that a bailee cannot, while the bailment still subsists, deny the title of his bailor or of any one claiming under him. This principle was, however, improperly applied in this case. The defendant did not deny the right of Cook, his bailor, but in fact affirmed it. When applied to by the plaintiff for the wagon to whom Cook had sold it, he refused to deliver it to him, because Cook, before he sold it to the plaintiff, had mortgaged it to one Da-

venport to secure a debt which he owed one Jones, and for the payment of which, we presume, he, the defendant, was bound as surety. In refusing to deliver to the plaintiff for the reason assigned, he was affirming the right of Cook. Davenport had never taken the wagon into his possession, but left it with the defendant, with notice of his claim. A demand and refusal, where an article is bailed, is not a conversion, but simply evidence of it; and the refusal here sufficiently explains the conduct of the defendant and does not make him a wrong-doer.

It is unnecessary to refer to authorities to support these positions. The principle announced by his Honor was perfectly correct, but was misapplied. Both parties claimed under Cook, and the defendant, who held for Davenport the trustee, had the better title.

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

THE STATE *on the relation of* NIMROD S. JARRETT *vs.* H. H. KINGZEY, *et al.*

Under the act of 1852, ch. 169, entitled, "An act to bring into market the lands pledged for the completion of the Western Turnpike Road," it is the duty of the entry-taker to demand and receive bonds for the purchase money for the land before he takes the entry.

THIS was an ACTION of DEBT, tried before MANLY, J. at the Fall Term, 1855, of Macon Superior Court.

The action was brought upon the official bond of the defendant as an entry-taker in the County of Haywood. Pleas, covenants performed, and not broken.

The breach assigned was a refusal to take an entry tendered him by the relator.

It appeared in the case, that an entry of land was tendered by the relator to the defendant, Kingzey, which he refused to

receive, unless the relator would, at the same time, give bonds for the purchase money. The relator tendered the fees due, but declined giving the bonds demanded, until he could make a survey and ascertain the number of acres.

The defendant contended that, according to a proper construction of the act of 1852, he was not bound to receive the entry, until bonds were given for the purchase money.

But his Honor was of a different opinion, and so charged the jury; for which the defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Gaither, for plaintiff.
N. W. Woodfin, for defendant.

BATTLE, J. This case depends upon the proper construction of the act of 1852, ch. 169, entitled, "An act to bring into market the lands pledged for the completion of the Western Turnpike Road." See pamphlet acts of 1852, p. 616.

The first section of this act provides for the opening of an entry-taker's office, and the election of an entry-taker in the County of Cherokee; and the second authorises the entry of the unsold lands in that County, at certain rates therein specified. The third section declares "that it shall be lawful for all enterers of vacant land in said County of Cherokee, to file their bonds, with approved security, with the entry-taker, payable to the State in four equal annual instalments, which shall, when paid, be in full of the purchase money, for the tract or tracts so entered; and, upon proof of such payment as herein provided, the Secretary of State shall issue the grant or grants according to the entry and survey thereon," &c. The fifth section enacts "that all the vacant lands in the Counties of Macon and Haywood may be entered under the provisions of this act at the present rates, and all the land in the said Counties heretofore entered and not paid for, may be paid for as herein provided for the lands lying in Cherokee County, and all the money and bonds that may be received by the

entry-taker of either of the said Counties of Cherokee, Macon and Haywood, shall be paid to contractors for making the said Western Turnpike Road, on the certificate of the agent for making the said road, until the same is completed." It is unnecessary to notice the other sections of the act, as they have no bearing upon the case.

The object of this act is manifest. The Western Turnpike Road had been commenced, and it was necessary to provide means for paying the contractors. For this purpose, certain unsold lands, lying in the Counties of Cherokee, Macon and Haywood, through which the road passed, were directed to be brought into market. To enhance the price, they were allowed to be taken up by the purchasers, and bonds payable to the State in four equal annual instalments, were to be filed with the entry-taker. These bonds, together with all monies which they might receive, these entry-takers were required to pay to the contractors upon the turnpike road. To enable them to perform this duty, they must have the power to demand from the enterers, the bonds which they were required to give. The act does not declare in express terms that the bond must be filed with the entry-takers at the time when the entries are made, nor does it specify any other time. The relator contends that the bonds were not to be filed until surveys could be made, so as to ascertain the precise amount to be paid. We cannot adopt this construction, because it would, in a great measure, defeat the main purpose of the act. If the enterers of the lands were to be governed by the general law concerning entries and grants, the delay in having the surveys made, and then the credit upon the bonds for the purchase money would very materially diminish the value of the funds which the act intended to provide for the payment of the contractors upon the road. The provision for the payment of the bonds and money to the entry-taker, instead of into the public treasury, and that such bonds and money should be paid out by the entry-takers, shows that dispatch in the collection of a fund for the contractors was intended. The same policy would require that the bonds should be filed

with the entry-takers, at the time when the entries were made; and the third section of the act is clearly susceptible of that construction. The bonds might be in a penal form, until the surveys should be made to ascertain the exact quantity of land, and then it would be the interest of the enterers to have the surveys made before the bonds became due, so that they might not be compelled to pay too much. Upon the whole, we are of the opinion that the entry-taker did not, in the present case, commit any breach of his official bond, by refusing to take the entry of the relator until he should file his bonds for the purchase money of the land, as required by the third section of the act in question.

The judgment against the defendants must be reversed, and a *venire de novo* awarded to them.

PER CURIAM. Judgment reversed.

GEORGE W. HALCOMBE *vs.* SAMUEL LOUDERMILK.

Where property not belonging to the defendant in an execution, was levied on and sold by the officer to satisfy the same, and bought by the plaintiff in the execution at a price sufficient to pay the debt, this was *held* to be a satisfaction, although the property was recovered from the plaintiff in a suit by the owner, and although there was no entry of satisfaction on the execution or judgment.

The plaintiff's remedy in this case was under the act of Assembly. Rev. Stat., ch. 45, sec. 22.

ACTION of DEBT on a former judgment brought up to the Superior Court of Cherokee, by *recordari*, from the judgment of a justice of the peace, and tried at the Fall Term, 1855, of that Court, before MANLY, Judge.

The following is a case agreed and submitted for the judgment of the Court.

"The plaintiff had a magistrate's judgment, dated in 1849, in his own behalf. A *fi. fa.* was issued thereon, and levied

on a sorrel mare, as the property of the defendant. This property was claimed by one *Mercer Fain*, but was sold by the officer under the plaintiff's execution, and bought by him at a price sufficient to pay the debt. Fain brought an action against the officer for taking the mare, and recovered the value of the property; which recovery, under an agreement to indemnify the officer previously made, the plaintiff paid. On the trial of that suit, the present defendant was examined as a witness, and swore that the property was not his, but was Fain's. There was no money paid to the officer, and no application of any to this debt, nor was there any entry of satisfaction on the *fi. fa.* It was agreed, that if his Honor should be of opinion that the above state of facts, in law, amounts to a satisfaction of the judgment, that judgment of nonsuit should be entered against the plaintiff, otherwise, that he should recover the amount of the judgment and interest."

The Court gave judgment for the plaintiff, and the defendant appealed.

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

BAILEY, J. If a sheriff or other officer have an execution of *fieri facias* in his hands, payment to him discharges the execution. So, if he levy upon and sell property, and receive the money; and the result will be the same, even if he do not receive the money; because, by the sale, he becomes liable for it to the plaintiff in the execution, and the defendant is discharged by the seizure and sale of his goods. The execution thus becoming *functus officio*, the judgment upon which it was issued must be deemed satisfied, otherwise, (as was said in the case of *Murrell* v. *Roberts*, 11 Ire. Rep. 424,) the officer "might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again, by sale after sale." See, also, *Hammatt* v. *Wyman*, 9 Mass. Rep. 138.

In the case before us, the plaintiff in the judgment and ex-

ecution was the purchaser of the mare, at a price sufficient to discharge his debt; and we think that the law immediately appropriated the money to the discharge of the execution and the satisfaction of the judgment. The question then, is, could the judgment be revived by the subsequent proceedings? We think that it could not; and that it made no difference that the defect in the title to the mare was proved by the defendant in the execution himself. The plaintiff in the execution had a clear remedy; but not upon his original judgment. The forty-fifth chapter of the Revised Statutes, section 22, (see, also, Rev. Code, ch. 45, sec 27,) provides, that where the purchaser at any execution sale, may, in consequence of a defect in the title of the property, have been deprived of it, "or may have been compelled to pay damages in lieu thereof to the real owner," then, and in every such case, it shall be lawful for such purchaser, his executors, &c., to sue the defendant in the execution, or the person legally representing him, in an action on the case, and recover such sum as he may have paid for such property, with interest thereon, from the time of such payment.

There was error in allowing the plaintiff to recover on the judgment, instead of pursuing the remedy given by the statute, and the judgment in his favor must be set aside, and, according to the case agreed, a judgment of nonsuit must be entered.

PER CURIAM. Judgment reversed.

ROBERT THOMPSON *vs.* PENEL GILREATH.

A note without a seal, payable to bearer, is transferred by delivery to several holders successively, and after three years from its maturity a suit is brought on it; a new promise, made to a previous holder, cannot avail a subsequent holder, to repel the statute of limitations.

ACTION of ASSUMPSIT, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Henderson Superior Court.

The suit was commenced by a magistrate's warrant, and was brought up by successive appeals. The plaintiff declared on an unsealed note for $27, payable one day after date to Benajah Durham or bearer, and dated 21st November, 1843. This note was transferred, without endorsement, to one Hawkins, and in like manner from Hawkins to the plaintiff. The defendant pleaded the general issue and the statute of limitations.

The plaintiff proved the execution of the note; and to repel the statute of limitations, he proved by Hawkins, the former holder of the paper, that while he owned the note, and within three years before the suit was brought, the defendant said that the note was a just one, and he would pay it.

The defendant contended that the evidence of Hawkins was not sufficient to repel the statute of limitations, for the reason that it was not made to the plaintiff, and could not avail him; but his Honor was of a different opinion, and so instructed the jury. The defendant excepted to this instruction.

Verdict for the plaintiff. Judgment and appeal by the defendant.

Baxter and *Jordan*, for plaintiff.

N. W. Woodfin, for defendant.

PEARSON, J. Serjeant Williams, in the conclusion of his note of *Hodsden* v. *Harridge*, 2 Saunders Rep. 64 b., in reference to the statute of limitations, remarks, "after all, it might perhaps have been as well, if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which the security of all men depends, and is, therefore, to be favored; and although it will, now and then, prevent a man from recovering an honest debt, yet, it is his own fault that he postponed his action so long; besides which, the permit-

ting of evidence of promises and acknowledgements within the six years, seems to be a dangerous inlet to perjury."

The justness and force of this remark, by a most judicious and learned writer, has, of late years, been admitted and yielded to by the courts; and the inclination now is to adhere to the letter of the statute, except when a departure from it is firmly fixed by a direct authority.

No case can be cited to support the position that the bar of the statute can, under any circumstances, be repelled by a promise to another than the plaintiff. At no time, not even when the notion of a new promise be carried to its utmost extreme, was the idea that the new promise was negotiable and could be transferred, so as to give or support a right of action in a third person. The doctrine that the statute of limitations can be repelled by proof of a new promise is confined to "actions on promises." *Governor* v. *Hanrahan*, 4 Hawks' Rep. 44; *Morrison* v. *Morrison*, 3 Dev. 402; *A' Court* v. *Cross*, 11 E. C. L. Rep. 124. Where a bill or promissory note is the ground of action, the declaration sets out the liability of the defendant according to the tenor and effect of the instrument, and avers that "being so liable, the defendant, in consideration thereof, *afterwards promised*," &c. If the defendant pleads the statute of limitations it may be repelled by proof of a promise within the six years without a variance, or departure in pleading. *Leaper* v. *Tatton*, 16 East's Rep. 420. But in order to answer this purpose, the promise must be *between the two parties to do the same thing*. *Falls* v. *Sherill*, 2 Dev. and Bat. Rep. 374; *Finn* v. *Fitts*, *ibid* 236. If the new promise is to deliver a horse, or other specific thing, in consideration of the old debt, of course the action must be on the new promise; so, if the debt was due to the testator, and the new promise is to the executor. *Hickman* v. *Walker*, Willes' Rep. 27. *Dean* v. *Crane*, 1 Salk. Rep. 28; 6 Mod. Rep. 309. So in an action of assumpsit by the assignee of an insolvent debtor for money due to him before his insolvency, stating all the promises to have been made to the plaintiff, the defendant pleaded that he did not undertake and promise, in manner

and form, as the plaintiff complained against him, at any time within six years; upon which the replication takes issue; the defendant cannot rejoin that the cause of action first accrued to the insolvent before the plaintiff became assignee, and that six years had elapsed after the cause of action first accrued to the *insolvent*; for the rejoinder would be a plain departure from the plea. *Kinder* v. *Paris*, 2 H. Black., note a. That case is the reverse of ours, but it fully illustrates the principle that the new promise must be made to the *same person*, in order to support an action on the old promise. There, the plaintiff had the precaution to avoid the difficulty by declaring upon the new promise; here, the plaintiff could not have avoided it in that way, because the promise was made to Hawkins, and was not assignable, being by parol. Possibly Hawkins would have brought the action, except for the fact that he was needed as a witness to establish the new promise. There is error.

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

Den. on dem. of D. D. CORN *vs.* CHARITY McCRARY.

The line of another tract of land called for, controls course and distance, and it makes no difference whether such line be marked or unmarked.

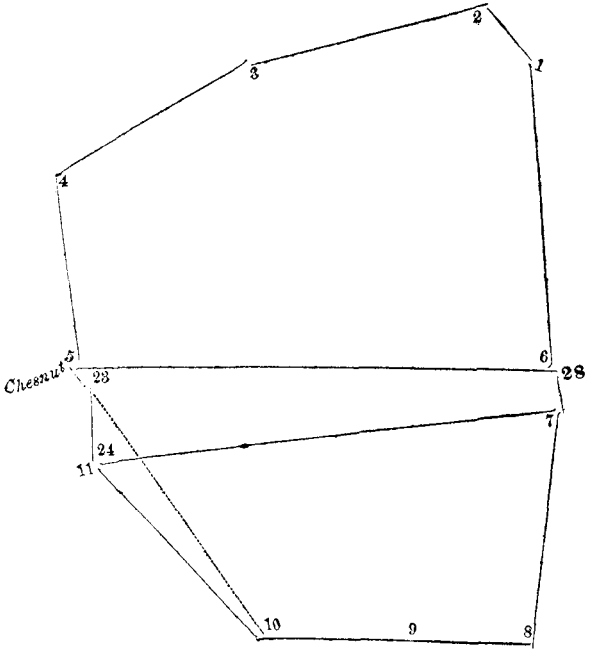
ACTION of EJECTMENT, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Henderson Superior Court.

The title of the plaintiff's lessor consisted of a grant from the State for the land comprised within the lines 23, 28, 7, 24, and thence back to 23, in the annexed diagram, and showed the defendant in possession of the *locus in quo*.

The defendant showed title to the land contained in the figures 1, 2, 3, 4, 5, 6, and thence back to 1, by a grant to one Jacob Shipman for three hundred acres, dated in 1794.

The defendant also showed title to a tract of land of one

hundred acres, lying south of the last mentioned tract, granted to Edward Shipman, in the year 1802, which contains the following clauses in the description of it: "joining the lands he now lives on"—"beginning in said Shipman's line of the land where he now lives," which the defendant says, in the diagram, is about 6 or 28, (these lying close together,) "and runs south one hundred poles to a black oak at a rock below a cliff," (which is alleged to be at 8,) "then west one hundred and fifty poles to a stake (10,) then north sixty-seven degrees west 145 poles to a stake," (claimed by the defendant to be at 5, but by the plaintiff at 11,) "thence with the said Shipman's line north eighty-two degrees east two hundred and ninety



poles to the beginning." There was no evidence of any marks or other indicia between the corners 5 and 6, but this was taken and considered in the case to be *established* as the true

line of the three hundred acre tract. The call of this line in that grant is "N. 82 degrees E. 300 poles to the beginning.

The defendant contended for a beginning in the line 5, 6, and then to run round to 8, 9, 10, then the course and distance called for to 11, thence the nearest distance to the line 5, 6, then along it to the beginning. This running would include the *locus in quo* in the defendant's title, and acquit her of the alledged tresspass. The Court was of opinion that this was the proper way of locating that grant according to its calls, and instructed the jury to that effect. Plaintiff excepted.

Verdict for defendant. Judgment and appeal.

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

PEARSON, J. The only point presented by the case is in reference to the location of the last line of a grant to Edward Shipman for one hundred acres, dated 1802. The location of the grant to Jacob Shipman for three hundred acres, dated 1794, is assumed to be as represented on the plot; and it is assumed that the south line of that grant, from the chestnut corner near 5, to 6, is the Shipman line called for in the grant of 1802. That line was not marked, and was a "*mathematical line between established corners.*" The third line of a grant of 1802, from a stake at 10, on the plot calls, "thence N. 67 deg. W. 145 p. to a stake;" and the 4th line calls, "thence with *said Shipman's line* North 82 degrees East 290 poles to the beginning." The distance of the third line gives out at 11 on the plot, without reaching the line 5, 6; and running from 11 to the beginning, the grant of 1802 does not include the *locus in quo*. The defendant contended that the third line should be extended to the line 5, 6, and run with that line and go to the beginning, which would include the *locus in quo*. But the plaintiff insisted that as the line 5, 6, was not marked, and was a mere mathematical line, it could not control the course and distance of the third line of the grant

of 1802. His Honor was of opinion with the defendant, and in that opinion we concur.

The line of another tract which is called for, controls course and distance, being considered the more certain description, and it makes no difference whether it is a marked or an unmarked, or mathematical line, (as it is termed in the case,) *provided it be the line which is called for.* In deciding whether it be the line called for, the fact of its being a marked line, or an unmarked line, may have an important bearing; but in our case it is assumed to be the line called for, which disposes of the question.

There is no doubt that it was properly assumed to be the line called for, although it was unmarked, from the facts that are set out in the grant of 1802, i. e.: Edward Shipman then lived on the three hundred acre grant, and it is plainly to be inferred that he owned it; and in taking his grant in 1802, it is reasonable to suppose that his intention was to have the new tract extend up to that on which he then lived, and not to leave a small strip of vacant land between his two tracts, to be the subject of future controversy. But he did not choose to leave this as a matter of supposition merely; as a part of the description of the new tract, it is set out in the grant, that "*it adjoins the land he now lives on.*" This makes it certain that the line of the land he then lived on was *the line* called for in his grant of 1802; and whether that line is properly located at 5, 6, or should be at 11, 7, or any intermediate points, it is a *fixed fact* that the line of the grant of 1802 extends to it, so as to leave no vacant land between them. From abundance of caution, he not only sets out the above general description of the new tract, and the particular description of his last line, "thence with said Shipman's line North 82 degrees East 290 poles to the beginning," (which is the corner of the line of the three hundred acre tract, and also the distance, except ten poles, between the chestnut and 5); but the grant sets out, also, that its beginning corner is "on said *Shipman's line* of the land *where he now lives.*"

Our attention was called to *Carson* v. *Burnett*, 1 Dev. and

Bat. 558, where it is held, that an unmarked line of another tract did not control the course and distance of a line of the grant then under consideration. That decision recognises the principle that a line of another tract, which is called for, controls course and distance, whether it be a marked or an unmarked line; and is put expressly on the ground that the line by which it was attempted to control course and distance was not, *in fact, the line* called for, for these, among other reasons: it was unmarked, and not otherwise known or established; as, by a possession claiming up to it; it was the line of some other person; it was a great distance off; to get to it, the land of the third person would have to be crossed; it would be necessary to add another line to the grant; it would take in a much greater quantity of land, and no good reason could be assigned why the grantee should have intended so to extend his lines. In all these particulars, except that of the line being unmarked, our case differs. In *Kissam* v. *Gaylord*, Busb. R. 116, there was no call for the line of another tract, and the attempt was to control distance by the general words, "the upper parts of lots 154 and 155," &c., which, for the reasons there given, was not conceded. In *Spruill* v. *Davenport*, Ibid. 134, the call was for Thomas Mackey's line; and it was attempted to control course and distance by extending the line to William Mackey's line; and the question of fact was, whether *William* Mackey's line was the line called for; and it is held to be error to submit that question to the jury; because, in that case, there was no evidence to support such a conclusion.

Note the diversity! Thus all the cases are reconciled.

PER CURIAM. Judgment affirmed.

W. C. HILL & CO. *vs.* WM. M. ROBISON, *et. al.*

A receipt is not conclusive between the parties, but may be explained.

Where ten sacks of salt were bought and paid for with the means of A, and five others were bought with the means of B, and they were all delivered to B unmarked, and without any separation or distinct appropriation of any particular sacks to either, and C, having received the whole from B. converts them, A cannot maintain an action of trover.

ACTION of TROVER, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Haywood Superior Court.

This was an action of trover to recover for the conversion of ten sacks of salt. It appeared in evidence that the plaintiffs, W. C. Hill and Leander Hill, were partners in trade; that four firkins of butter were entrusted to one Howell to haul to market, and the following receipt taken, viz: "Received of W. C. Hill four firkins of butter, weighing 425 lbs., gross, which I am to deliver to G. F. Mason, at Greenville, S. C. October, 1854." The butter was not delivered to Mason, but carried on to Augusta, Georgia, and there, with other produce belonging to Howell, sold by him, and fifteen sacks of salt laid in with the proceeds. It also appeared that Howell was arrested and imprisoned in South Carolina for a breach of the peace, whereupon he delivered his wagon and team with the load, including the salt, to the defendant, Robison, who was his creditor. His instructions to Robison were, that he should deliver to the plaintiffs their ten sacks, and to his wife as much of the five sacks as she wanted, and to make sale of the remainder of the salt and the wagon and team, and to satisfy his (deft's.) debt out of the proceeds.

Howell stated in evidence that he was indebted to the plaintiff in account, and that the charge for freight which was coming to him for the butter and salt, was settled by this counter charge, which made the plaintiffs and him about even. There was no evidence that the sacks of salt had any marks about them to distinguish which were Hill's and which were Howell's; the sacks were of the same appearance, and each contained about the same quantity of salt, to wit, about three

bushels. There was a demand, and a refusal upon the ground that the salt belonged solely to Howell.

I. The defendant contended that the plaintiff could not recover in the name of the firm, the receipt being given to Hill alone.

2. That Howell acted without authority in taking the butter to Augusta; that plaintiffs were not bound by his acts, and that no title vested in them until they assented to his purchase, and a particular portion of the salt set apart for them.

3. That if the title vested in them, they could not recover without paying or tendering the freight.

His Honor declared, in the presence of the jury, his opinion of the law to be, that the receipt did not constitute the whole evidence; that, in view of the whole evidence, it was a question of fact for the jury to determine whether the agency was undertaken for the firm, or for one of them only; that it was not necessary, in a case like the present, that the plaintiff should expressly ratify the acts of the agent prior to the conversion, or that there should be a separation of the property; that a tender of freight for hauling was not necessary under the circumstances of the case; 1st., because it was not claimed by him to whom it was due; and secondly, because that was not the obstacle in the way of a settlement, as disclosed by the declarations of the defendant on the plaintiffs' demand. Then, addressing himself to the jury, he told them to enquire whether Howell (after Mason had declined receiving the butter) had undertaken to sell it on account of the plaintiffs, and to buy salt for them with the proceeds; and, if they found he had undertaken such an agency, and had accordingly laid in ten sacks of salt with the proceeds of the butter, the plaintiffs had a property in them, at their option, and might recover for a wrongful conversion of them, although there had been no separation of the sacks of the plaintiffs from those of Howell; that it would be otherwise if, upon the refusal of Mason to take the butter, Howell had converted it himself, and laid in the salt with its proceeds, on his own account. The defendant excepted to this charge.

The jury found a verdict for the plaintiff. Judgment and appeal.

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

NASH, C. J. The plaintiffs' declaration contains but one count, and that in trover. A man by the name of Howell received from W. C. Hill, one of the plaintiffs, a quantity of butter to haul to market, for which he gave the receipt set out in the case, in which he contracted to deliver the butter to G. F. Mason, in Greenville, South Carolina. Howell did not deliver the butter to Mason, but it was taken on by him to Augusta, and there sold; and with the proceeds of the butter, and of other articles belonging to Howell, the latter purchased fifteen sacks of salt. Howell, being unable himself to return to North Carolina, delivered his wagon and team, and the salt, to the defendant, Robison, to whom he was indebted, with directions to deliver to W. C. Hill ten of the sacks of salt, as he had purchased that quantity for him, and after delivering to his wife as much of the remainder as she might need, to sell the residue and the wagon and team, and pay what was due him. Upon demand, the defendant, Robison, refused to deliver to the plaintiffs any portion of the salt, and this action of trover was brought.

The first objection raised by the defendant to the plaintiffs' recovery is, that the contract of Howell was not made with the firm, but with W. C. Hill alone. His Honor's decision on this point was correct, and the plaintiffs were not estopped by the receipt from showing in any other way, if they could, that the butter was the property of the firm. A receipt is not conclusive upon the parties, but it may be explained. See *Love* v. *Wall*, 1 Hawks. 313; 4th pt. Starkie on Evidence, 1044, 1272.

The second objection is fatal to the plaintiffs' action. The fifteen sacks of salt were purchased with the joint funds of the plaintiffs and of Howell—five for the latter, and ten for

the former; but no specific bags were set apart, either by Howell or Robison, as the property of the plaintiffs, and until that was done an action of trover could not be sustained by the plaintiffs for any portion of the salt. In an action of trover the plaintiff must show title to the specific property converted at the time of the conversion, or of his then present right of possession. In this case no portion of the salt has been so set apart as the property of the plaintiffs; no specific part, therefore, vested in him. If A sell to B all the corn in a particular barn, and afterwards refuses to deliver it, B may maintain an action of trover for the conversion of the corn; but if the contract is for a portion less than the whole, then B could maintain an action for a violation of the contract in the refusal to deliver, but not an action of trover. *Jones* v. *Morris*, 7 Ire. Rep. 370. On this part of the case his Honor instructed the jury, that if Howell, as the agent of the plaintiffs, had, with the proceeds of the butter, purchased for the plaintiffs ten bags of salt, the plaintiffs had a property in them at their option, and might recover for a wrongful conversion, although there had been no separation of the sacks belonging to each from the other. In this there is error. All the bags were alike—each holding about three bushels of salt; none of them were marked for the plaintiffs. Until such separation they were tenants in common, and neither could maintain an action of trover.

For the reasons assigned by his Honor, the third exception cannot avail the defendant.

Per Curiam. Judgment reversed, and a *venire de novo*.

WILLIAM WOODBURY *vs.* ABRAHAM TAYLOR.

Where in reply to the presumption of payment arising from the length of time, which was eleven years, it appeared that for seven years of that time

the defendant was totally insolvent, *Held* that the presumption did not arise.

What will repel the presumption of payment arising from the length of time, is a question of law, and it is error in a Judge to leave that question to the decision of the jury.

Where a jury decide a point of law, which was erroneously submitted to them by the Court, correctly, it is no ground for a *venire de novo*.

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

The plaintiff declared on a judgment rendered against the defendant in the Circuit Court of Blount County, Tennessee, in the year 1842, for $——. Execution issued on this judgment, and all the defendant's property was sold under it. The last execution issued returnable to Spring Term, 1843. The writ in this case was issued on the 13th of June, 1853. The defendant resided in Tennessee when the judgment was rendered, and he continued to reside in that State until the year 1849, when he removed to Cherokee county, N. C., and has lived in that county ever since.

The defendant relied upon the presumption of payment.

For the purpose of repelling the presumption, the plaintiff proved that, from 1842 up to 1849, the defendant was totally insolvent. The plaintiff then introduced a Mr. *Holloway*, who had been a constable in Cherokee county, who proved that he had known the defendant for about six years, that as an officer he had claims in his hands against him, and he was always able to collect them; that he thought as much as $150 might have been collected out of him at any time during the last four years.

The amount of principal and interest on the debt in question, was, when the defendant left Tennessee in 1849, $340.

The Court instructed the jury, that the judgment being obtained in 1842, and more than ten years having elapsed since the last execution thereon before this suit was brought, the law presumed the judgment was satisfied; that this presumption was not conclusive, but it was sufficient to throw the burthen of proof upon the plaintiff to repel it; that the testimony

was submitted to them; that if they were satisfied from this testimony, that the presumption was repelled, they would find for the plaintiff, but that if the evidence had not satisfied them upon this point, they should find that the debt was paid.

The defendant's counsel asked the Court to instruct the jury, that upon the plaintiff's own showing, the defendant was in law entitled to a verdict.

The Court declined to give such instruction. The defendant excepted to the whole charge.

Verdict for the plaintiff. Judgment and appeal.

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

Nash, C. J. There is no error. By the common law, when a claim, founded on a sealed instrument, remained dormant for twenty years, a presumption of payment arose, and was so strong, that the defendant, in an action brought upon it, could plead payment, and rely upon the lapse of time as proof of the fact. Our act has cut down the time which raises this protection against stale demands, from twenty to ten years. This lapse of time, however, is but presumptive evidence of payment of the demand, leaving to the plaintiff the right of showing, if he can, that the presumption is met by a counter presumption, that the debt has never been paid. Of these latter, the fact of the insolvency of the debtor for ten years next preceding the bringing of the action, or from the last judgment, is one, for in that case a countervailing presumption is raised that the debt has never been paid. In the case before us, the plaintiff's judgment was obtained in 1842, upon which all the property of the defendant was sold without satisfying the judgment, and the last execution was returnable to the Spring Term, 1843, of the Court where the judgment was obtained. This action was brought in March, 1853, more than ten years after the last execution. The defendant resided in Tennessee, where the judgment was obtained, and continued so to reside, until 1849, when he remov-

ed to this State, and during all that time was insolvent, but after removing to this State, his circumstances were improved, and small sums, from time to time, were raised from him by officers.

His Honor instructed the jury that if, from the testimony, they were satisfied that the presumption of payment from lapse of time was repelled they would find for the plaintiff, otherwise, for the defendant. In this there is error. What was presumption of payment was a matter of law, and what would repel it, was likewise a matter of law. It is error in a Judge to submit a question of law to a jury as a matter of fact. His Honor ought to have instructed the jury that the time which elapsed after the second execution, while the defendant remained in Tennessee, and entirely insolvent, being but about six years, did not support the defendant's plea; and that the time he resided in this State, being not more than four years, during which it was shown he was able ble to pay the plaintiff's debt, did not bring the case within the act of presumptions; in other words, though ten years had elapsed after the last execution, before the bringing of the action, the presumption of payment was repelled by the fact, that from 1843 to 1849 the defendant was wholly insolvant, and that after his removal, not more than four years had elapsed before the action was brought.

The error committed by the Court was, however, corrected by the jury, who returned a verdict for the plaintiff.

In my opinion the judgment should be affirmed.

PEARSON, J. 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. But it is well settled that this presumption may be repelled; and it is a question of *law for the Court* what circumstances, if true, are sufficient to repel it. There can be no doubt that proof that the debtor was, during *all the time*, *unable* to pay the

debt, or any part thereof, is sufficient, if true, to repel the presumption, because it amounts to a demonstration that it has not been paid. So, I take it, there can be no doubt that proof that the debtor, from the year 1842, when he was sold out, up to the year 1849, was unable to pay the debt, or any part thereof, repels the presumption that it was paid during that time; and although, without explanatory evidence, the lapse of time from 1842 to 1853, when the writ issued, would have raised the presumption, yet, the *first seven* years of the time being disposed of, it being demonstrated that during those years there had been no payment, it follows, conclusively, that the presumption is completely repelled, inasmuch as the lapse of the *last four* years cannot raise it.

There is another view. The creditor having, in 1842, taken judgment, and by means of executions, enforced the payment of all that could be made, shows himfelf *vigilant;* and proof of the debtor's inability to pay, up to the year 1849, accounts for his inactivity during that time, because any further steps would have been both useless and expensive. It is surely unreasonable to have a presumption running against him while it was out of his power to compel the debtor to pay, or renew the evidence of debt, or even to acknowledge it. Under such circumstances, the most vigilant of creditors would have forborne further proceedings. So, the presumption of payment has nothing to support it but the lapse of the last four years.

PER CURIAM. Judgment affirmed.

JOB RAMSAY AND WIFE *vs.* JOHN WOODARD.

An agreement growing out of the division of the estate of a deceased person, without the qualification of an executor, and without administration on such estate, is void.

ACTION of ASSUMPSIT, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Buncombe Superior Court.

In 1842, William Woodard made his will, by which he gave all his property to his wife for her life, with power to dispose of the same, so as to be equally divided among their five children after her death, and appointed two persons as executors to the will. After executing his will, Woodard became paralytic and entirely bereft of understanding, from which he never recovered. While in this condition, about a year before his death, his family, except B. Robison and his wife, (the latter of whom was his daughter,) assembled together, and with the aid and concurrence of one of the persons named as executor, made a division of the property. By this division, Robison was required to pay to the plaintiffs four hundred dollars as an excess of his share over that of the plaintiffs. About one year after this arrangement, viz., in 1847, the testator died, and his will was admitted to probate; but the executors named therein, did not qualify, nor did any one administer on the estate with the will annexed. About a year after the death of Woodard, Robison made known his dissent from the arrangement, but afterwards sold his interest in the estate to the defendant, who undertook and promised to pay to the plaintiffs the four hundred dollars which had been assessed against Robison's share, which he failed to do, and for which failure this suit was brought. The defendant contended below,

1st. That there was no consideration to support the promise.

2nd. That it was void as being a parol promise to pay the debt of another person.

3rd. That the promise was to Job Ramsay, and not to him and wife; so he alone should have sued.

The Court intimated an opinion against the plaintiffs upon the first point especially, but by consent of the counsel, with a view to having a final disposition of the cause, a verdict was entered for the plaintiffs for $400 and interest, subject to be set aside, and a nonsuit entered, in case his Honor should be of opinion against the plaintiffs' right to recover.

The Judge afterwards entered a nonsuit, and the plaintiffs appealed.

N. W. Woodfin, for plaintiffs.
J. W. Woodfin, *Avery* and *Gaither*, for defendant.

NASH, C. J. The case of *Sharp*, *Adm'r.*, v. *Farmer*, 4 Dev. and Bat. 122, is decisive of this. There, upon the death of one Jerusha Farmer, intestate, her next of kin, without any letters of administration being taken out, agreed with the defendant that he should collect the estate and sell it, and after paying the debts, divide the estate among those entitled to distribution. The defendant collected the assets, and after paying the debts there remained a surplus in his hands; and the action was brought in assumpsit to recover from him the distributive share of the plaintiff, he being one of the next of kin of the deceased. The Court say, "After a vast number of cases upon the subject, it seems to be now perfectly settled, that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute." The agreement in this case among the next of kin of Jerusha Farmer, is against the express prohibition of the Act of 1715, 1 Rev. Stat. ch. 46, sec. 8, under a penalty of one hundred dollars. That section declares that no person shall enter upon the administration of any deceased person's estate until there shall have been letters of administration, under the penalty of one hundred dollars. See *Hairston* v. *Hairston*, 2 Jones' Eq. 123.

The promise made by the defendant upon which the action is brought is void, and no action can be sustained upon it.

PER CURIAM. The judgment of nonsuit affirmed.

ELIZABETH JINKINS *et. al. vs.* SAMUEL SAPP.

If the widow of an intestate fail to make application for administration for an unreasonable length of time, and the Court, after such delay, give the ap-

pointment to some other person, she has no further right, and the Court ought not, at her instance, to revoke and declare void such appointment.

THIS was an application to the County Court to have letters of administration set aside, heard before his Honor, Judge SAUNDERS, at the Fall Term, 1854, of Ashe Superior Court; brought up by successive appeals.

It was a contest for administration on the estate of Joseph Jinkins. The petition set forth that, at November Term, 1850, letters of administration were granted to the defendant, Samuel Sapp; that the petitioner is the widow of said Jinkins, and as such was entitled to the office; that she had no notice of the defendant's intention to apply; that said Jinkins did not have, at his death, sufficient personal estate to constitute a reasonable year's allowance for her as his widow; that, since his appointment, the defendant has brought suit against her and Reuben Sutherland, her son-in-law, for the property which she has retained from the estate of her husband. The petition prays that the letters may be revoked, and that letters of administration may be granted to her.

The answer of the defendant denies that the plaintiff did not have notice. It avers that the plaintiff, for six or seven years before his death, had abandoned her husband, and had lived separately from him; that the defendant was a creditor, and after waiting a reasonable length of time, was entitled to administer; that he did wait more than two years before making application, and, several times before this, requested the plaintiff to administer, which she refused to do; it admits that a suit has been brought against the petitioner for the property of the estate, but denies that this suit was brought to harrass her, and says it was done *bona fide* to collect the assets of the estate; that it was more than five years from the death of the intestate before this application was made by the petitioner, to set aside the letters granted defendant. The answer retorts upon the plaintiff that she is seeking to avoid the effect of this suit by assuming the character of administratrix, so that she may continue to hold the estate without paying

the debts; and avers that there is sufficient of the estate, if properly managed, to answer all claims against it.

It appeared in the case that the property was very small—not more than sufficient to amount to a decent year's provision for the plaintiff. There was replication and proofs taken. The case was heard upon the petition, answer and proofs, and his Honor was of opinion that the letters granted to defendant should be set aside, and administration granted to the plaintiff; from which judgment the defendant appealed.

Lenoir, for plaintiff.
Boyden and *Neal*, for defendant.

PEARSON, J. This case is governed by *Stoker* v. *Kendall*, Busb. Rep. 242. It is there held that the object of appointing an administrator is to have the estate of the intestate taken care of; and if the next of kin do not apply for the appointment in reasonable time, the Court should give it to some other person. If any thing, this is a stronger case than *Stoker* v. *Kendall*, for, here the widow has taken possession of the property under the privilege given to her by the Act of Assembly, and for two years, in direct violation of the requirement of the law, has failed to apply for administration, during which time she has held possession in defiance of law, so as to make it necessary for a creditor to seek the appointment, and bring suit against her and her son-in-law (the defendant Sutherland) in order to collect in the estate and have it settled, (*Sharpe* v. *Farmer*, 1 Dev. and Bat. 122; *Ramsay* v. *Woodard*, ante 508, at this term); and some five years after the death of her husband, for the purpose of getting rid of the action in the name of his administrator against them for wrongfully intermeddling with the estate, they file this petition! The only ground to sustain the order of the County Court, granting the prayer of this petition, and revoking the letters of administration theretofore granted to the defendant, is the suggestion, based on affidavits, that the intestate did not leave more than enough property for the widow's year's provision. So

far from that being a reason why the widow should be allowed, without ceremony, to step in and *help herself*, it shows the propriety of having the estate represented by a creditor, whose interest it is to see that some regard is paid to the forms and requirements of our several statutes, in such cases made and provided.

The order of the Superior Court affirming the order of the County Court, must be reversed, and the petition dismissed with costs.

PER CURIAM. Judgment reversed.

ABRAM HARSHAW *vs.* THOMAS TAYLOR.

Where the executive officers of the State have authority and jurisdiction to issue grants, such grants cannot be impeached collaterally; but it is otherwise where such officers have not such authority, or where they exceed it.

Where a *general* authority and jurisdiction is conferred on a tribunal, the action of such tribunal is presumed to be right until the contrary is shown; but where such authority is *special*, it must be shown by the party asserting the validity of its action, that the prescribed state of facts existed which called for such action.

The acts of Assembly relating to the sales, &c., of Cherokee lands, prior to that of 1852, confer *special* authority and jurisdiction; to give effect, therefore, to a grant issued by virtue of these acts, the cases towhich they are restricted must be shown.

THIS was an action of EJECTMENT, tried before his Honor, Judge BAILEY, at the Spring Term, 1856, of Cherokee Superior Court.

The plaintiff introduced a grant from the State for the land in controversy, dated February, 1852, and proved that the defendant was in possession.

The defendant proved that he was a purchaser of the tract in question, and produced in evidence a certificate of purchase, signed by Charles L. Hinton and Samuel F. Patterson, who had been commissioners to sell these lands. He showed

further, that this purchase was at the public sales, made by the said commissioners, in the year 1838; and he proved by Mr. Siler, the State's agent for the Cherokee lands, &c., that he had never been reported by the board of valuation to be insolvent.

A verdict was, by consent, rendered in favor of the plaintiff, with leave to set the same aside and enter a nonsuit, if the Court, on further consideration of the question, should be of opinion against the plaintiff.

Subsequently, in the term, the Court gave judgment for the plaintiff, and the defendant appealed to this Court.

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

PEARSON, J. It is a well-established distinction, that where the "executive officers" have authority and jurisdiction to issue a grant for land, the grant cannot be collaterally impeached for defects or irregularity in any preliminary proceeding, or for fraud in obtaining it; because it is the act of the sovereign, and stands on the footing of a record, and is valid, until set aside by a direct proceeding. But where the executive officers have no authority, or exceed their jurisdiction, the grant is absolutely void, and may be so treated in an action of ejectment. *Stanmire* v. *Powell*, 13 Ire. Rep. 315, and the cases there cited.

It is also a well-established distinction, that where an authority or jurisdiction is *general*, the action of the tribunal, upon whom it is conferred, is taken to be within its authority or jurisdiction, unless the contrary is shown. But where the authority or jurisdiction is *special*, in order to give effect to the action of the tribunal, it is necessary to show its authority or jurisdiction to do the act. *Williams* v. *Harrington*, 11 Ire. Rep. 621; *Harriss* v. *Richardson*, 4 Dev. Rep. 279; *Jennings* v. *Stafford*, 1 Ire. Rep. 404.

Upon these two distinctions our case is easily disposed of. The Act of 1852, confers a *general* authority. It extends to

all unsold land at a fixed price per acre. But it was properly admitted by the plaintiff's counsel, that the grant to him could not be supported by the aid of that statute; for two reasons: the statute only authorises the entry and grant of vacant and *unsold* land, whereas the land in controversy had been previously surveyed and sold according to the provision of the statutes in reference to land lying in the county of Cherokee; and in the second place, the grant issued before that act went into operation.

The acts of 1783, 1819, 1836, and other acts in reference to lands lying in the county of Cherokee, prior to the act of 1852, confer special authority, restricted to such land as is surveyed and sold, the price in each case to be ascertained by public biddings, and require that the land shall be disposed of at public sale by commissioners, upon whose certificates, &c., &c., power is given to the executive officers to issue grants to the purchasers or their assignees. So that in order to give validity to a grant issued under these statutes, the authority of these executive officers must be shown; in the same way, that in order to support a deed by the sheriff, his authority must be shown, by the production of an execution, or by showing that the land was liable to be sold for taxes, and that a state of things existed, which gave him authority under the several statutes, to sell and convey the same.

In our case the defendant went further than he was required, and proved that the executive officers had no authority to issue the grant under which the plaintiff claimed, for that he (the defendant) was a purchaser of the lands at the public sales in 1838; in evidence of which, he offered the certificate of Messrs. Hinton and Patterson, commissioners, who made the sale, and also proved that he had never been reported by the board of valuation to be insolvent. There is no principle upon which he could be required to do more, and prove that he had not *assigned* or transferred to the lessor of the plaintiff his rights under his certificate of purchase, and without such assignment there was no authority to issue the grant.

Judgment reversed. Verdict set aside, and judgment that the plaintiff be nonsuited.

PER CURIAM. Judgment reversed.

EZEKIEL BROWN AND GEORGE W. BRISTOL *propounders, vs.* ANDREW BEAVER AND OTHERS, *caveators.*

It is no objection to the probate of a script as a holograph, that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses.

ISSUE of *divisavit vel non*, to try the validity of the will of Ephram Ammonds, before MANLY, Judge, at the Fall Term, 1855, of Cherokee Superior Court.

The instrument offered for probate appeared to be attested by the requisite number of witnesses, but one of them was, upon inquiry by the Court, pronounced incompetent upon the score of his religious sentiments; whereupon the propounders proposed to prove the paper as a holograph, according to the statute. This was objected to by the caveators, upon the ground that the decedent had intended to attest his will by subscribing witnesses, and that it could not be established in any other way.

The Court admitted the evidence and the caveators excepted for error.

The will was then proved by three witnesses to be all in the hand-writing of the deceased, and deposited by him with a neighbor for safe-keeping. The case then turned upon the question of capacity, and after instructions from the Court, to which there was no exception, the jury found in favor of the propounders. Judgment of the Court accordingly, and an appeal by the caveators.

Baxter, for the propounders.

J. W. Woodfin, for the caveators.

BATTLE, J. In the case of *Harrison* v. *Burgess*, 1 Hawks' Rep. 384, a script was offered for probate as the holograph will of one Irvine. The caveators objected, because it was attested by one subscribing witness. The Court over-ruled the objection with this short and emphatic remark: "The will is certainly not worse by having one subscribing witness; it will certainly answer the purpose of more certainly showing that this is the paper which she (the witness) saw deposited in the bureau. Going beyond the requisition in respect of proofs, certainly cannot annul that which comes up to them." This reason is *certainly* decisive of the present case, and shows that his Honor was right in admitting proof of the script as a holograph will. This renders the question as to the competency of one of the subscribing witnesses, unnecessary, and makes it improper for us to express an opinion upon it.

PER CURIAM. Judgment affirmed.

JOHN B. O'NEAL *vs.* JOHN KING.

A condition precedent in a bond for the payment of a subscription to rail-road stock, that the road is to be *completed* to a certain village, is substantially complied with, when it is made to the suburbs of that village in such a manner as to bear daily trains on it, carrying all the freight and travellers that offer, although some portion of the work is intended to be replaced with other and better materials.

THIS was an action of DEBT, brought upon a penal bond, and tried before ELLIS, Judge, at the special Term, June, 1856, of Henderson Superior Court.

It appeared in the case that the bond declared on was given to the plaintiff, as President, for the defendant's subscription of stock to the Columbia and Greenville Rail Road Company, under a provision in the charter of the company, which gave the subscribers the option to pay the installments as the same were called for, or to give a bond to pay the whole when

the road was finished to Greenville Court House, with interest from the date of each installment's falling due. The subscription of the defendant was $200, and the penalty was $400, and that part of the condition which relates to this case is as follows: "To pay the whole amount of stock so subscribed, with interest thereon at seven per cent from the respective days on which the said installments may have been required to be paid, on or before the day on which the construction of the said road shall be completed to Greenville Court House, South Carolina." It appeared further, that the road in question had, before the bringing of this suit, been constructed so that locomotives drawing trains of cars could, and did pass, daily, over the same, to within half a mile of Greenville Court House, measured by a straight line, and between one half and three-quarters of a mile, by the usually travelled road, carrying all the freight and passengers that offered; that the entire village at that place is called "Greenville Court House;" that some of the buildings were out as far as the terminus of the road; built there since the road was made; that a part of the road had been laid with T iron, and part with an inferior iron which was to be replaced with T iron; that some of the fills on the road had not yet been made, but trestle-work had been constructed at such places, upon which the rails were laid; that this was done with the intention of filling in with earth, conveyed upon the cars, at such times as might be convenient; that this was thought the cheapest; that such trestle-work answered the purpose of working the road, but the speed of the trains was lessened in passing over it.

The defendant contended that the plaintiff could not recover, because the road had not been *completed* to Greenville Court House, and asked his Honor so to instruct the jury.

But the Court was of opinion that the condition precedent had been complied with, and so charged the jury. Defendant excepted.

Verdict for plaintiff. Judgment and appeal.

Baxter, for plaintiff.

N. W. Woodfin, and *J. W. Woodfin*, for defendant.

NASH, C. J. We see no reason to disturb the judgment rendered below in this case. The conditions of the bond on which the action is brought, have been complied with by the plaintiff. The defendant contends that the road has not been completed to Greenville, and until that is done he is not bound to pay the money secured by the bond. The completion of the road to Greenville Court House is a condition precedent, and it must be averred by the plaintiff in his declaration, and proved. The only question is, was the road so completed before the action was brought? It appears from the case that the village of Greenville is called the Court House, and the road has been built so as to carry freight and passengers, since 1854, up to the suburbs; but that on different parts of the road, fills are not made, the road being carried over trestle-work. If this be a sufficient reason why the road is not completed, there is scarcely a road in the southern country, which is, or probably ever will be, completed. The line of roads in the eastern part of the southern States, I believe, without exception, encounter or run through swamps and other low places, where the only practicable mode of construction must be on trestle-work. What did the parties mean when they used the word "*completed*" in the bond? Did they mean that, in every particular, however minute, the road should be perfect, before the defendant's liability to pay should arise? Did they use the word in its full and critical sense, that no piece of iron or unsound sill should be found in the whole line of road? Or did they use it in its plain, common-sense meaning? *Qui hæret in litera hæret in cortice*, is an ancient maxim of the common law, and hence the rule, that the law in such a case as this, is satisfied with a substantial performance of the condition. When, therefore, it is said in the contract, that the road shall be completed to Greenville Court House, and it is shown that the whole village is called by that name, and that the road is brought to the suburbs of the village, that part of the condition is complied with; and where it is shown that the whole of the road is finished so as to authorise the company to carry freight and passengers, and

to demand and receive pay therefor, we hold that the condition of the bond is complied with, and that in the language used, the road is completed to Greenville Court House.

We concur with his Honor in the view he took of the case, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

DAVID MOSES *vs.* RACHEL PEAK *et al.*

A description in a deed "of a piece of the Abraham Moore tract of land" "that belongs to the heirs of Z. P., lying and being in the county of M, on the Elijah creek and its waters in district eleven," "as we inherited it at the death of Z. P. as heirs of him," is sufficient to authorise the introduction of parol proof to identify the land that answers that description.

THIS was an action of COVENANT, tried before MANLY, Judge, at the Fall Term, 1855, of Macon Superior Court.

The plaintiff declared on the covenant of quiet enjoyment contained in the following deed: "This indenture, made this 31st day of October, one thousand eight hundred and fifty, between Rachel Peak, Isaac Peak and James M. Peak, of the State of North Carolina, Macon county, and David Moses of the State and county aforesaid, of the other part, witnesseth, that for and in consideration of the sum of one hundred and sixty-five dollars to them in hand paid, the receipt whereof is hereby acknowledged, hath bagained, sold and conveyed unto said David Moses, his heirs and assigns forever, all our right, title, interest and claim of one-eighth part to each of us that we have in and to certain tracts of land that belongs to the heirs of Zachariah Peak, deceased, lying and being in the county of Macon and State of North Carolina, lying on the Elijah creek and its waters in district eleven, the said land containing six tracts, to have and to hold the said bargained premises, with all woods, waters, minerals,

hereditaments and appurtenances to the said land belonging so far as one-eighth part to each of us *goes*, to the said Moses, his heirs and assigns in fee simple; and we, the said Rachel Peak, Isaac Peak and J. M. Peak, doth covenant and agree to and with the said David Moses to warrant and ever defend, and we the said Rachel Peak, Isaac Peak and J. M. Peak, do bind ourselves, our heirs, executors, administrators and assigns to warrant and ever defend the right, title and interest that we had in the above mentioned six tracts, and a piece of land of the Abraham Moore tract of land clear and free from ourselves and all manner of persons whatsoever claiming the same, unto the said David Moses, his heirs and assigns forever; and we, the above mentioned heirs of Zachariah Peak, deceased, do relinquish all our rights and title to the above parcel of land, as we inherited it at the death of the said Zachariah Peak, as heirs of him at his death, in witness," &c.

The plaintiff introduced evidence, that at the time of the execution of the deed, the defendants and other heirs-at-law of Zachariah Peak, were in possession of the several tracts of land described as six tracts, also of five or six acres of the tract known as the Abraham Moore tract; that Moses, the plaintiff, was put in possession of all these several parcels in pursuance of his deed; that he, Moses, was afterwards sued and ejected by paramount title from the five or six acres, known as a part of the Abraham Moore tract.

The defendants contended below, that the deed was too indefinite and vague in its terms, to convey the part of the Abraham Moore tract from which the plaintiff was ejected.

And, at any rate, the warranty did not embrace it, but only such lands as the bargainors had a good title to.

The Court was of opinion that the deed was sufficient for the conveyance of that part of the Abraham Moore tract which the bargainors claimed and possessed, and that there was in the deed a covenant of quiet enjoyment of the part known as the Abraham Moore tract. Defendants excepted. Verdict for plaintiff. Judgment and appeal.

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

PEARSON, J. The description, "a piece of the Abraham Moore tract of land," standing by itself, would certainly be too vague and uncertain; but the deed contains this further description, "that belongs to the heirs of Zachariah Peak, deceased, lying and being in the County of Macon, State of North Carolina, on the Elijah Creek, and its waters in district eleven," and in another place, "as we inherited it at the death of Zachariah Peak, as heirs of him." Putting these together it makes this description: That piece of the Abraham Moore tract of land in Macon County, on the Elijah Creek, and its waters in district eleven, which belonged to Zachariah Peak and descended to us as his heirs. This makes the description sufficiently certain. Parol evidence may then be resorted to, for the purpose of identifying the particular piece of land that answers this description; or, as is said in *President of the Deaf and Dumb Institute* v. *Norwood*, Busb. Eq. 65, of "fitting the description to the thing." The doctrine is so fully discussed in that case, as to save us the trouble of again elaborating it. Accordingly we have this evidence: a piece of five or six acres of the Abraham Moore tract, which is identified, descended to the heirs of Zachariah Peak, who were the defendants and others. The heirs took possession, and after the execution of the deed, put the plaintiff in possession of this five or six acres, as the piece of the Abraham Moore tract, that was described in the deed. This removes all ambiguity whatever.

Upon the second point made, we also concur with his Honor. The idea that the warranty does not embrace any land except such as the bargainors had good title to, makes the insertion of it ridiculous and absurd. The proper construction of the words "warrant and defend the right, title and interest that we had in the above mentioned land," &c., "clear and free from the claim of all persons whatever, &c., as we inherited it," &c., is that the warranty as well as the conveyance of

the defendants, who were only a portion of the heirs, was to extend only to their eighth part, and was not to extend to the whole tract. Such would have been the construction without those words; but the deed is inartificially drawn, and they were inserted out of abundance of caution.

PER CURIAM. Judgment affirmed.

MARGARET JOHNSTON *vs.* THOMAS J. ROANE, *et. al.*

It is not necessary that the water of a mill-pond should actually overflow the land of a person, to entitle him to recover damages by petition under the statute. (Rev. Stat., ch. 74, sec. 9.) Where a mill-dam so obstructs the water as to prevent land from being drained, the owner is entitled to damages under the statute.

THIS was a petition for DAMAGES against the proprietors of a mill, for ponding water back on the petitioner's land, brought up from the County Court of Macon, by successive appeals, and tried in the Superior Court, before MANLY, J., at the Fall Term, 1855.

The petition alleges that by the erection of the defendant's mill-dam, the water in Chatooga Creek was ponded back against her land, so as to saturate it, and prevent her from draining the same, by which a part thereof was rendered valueless.

The proof was, that no part of the land was actually covered with the back water; but there was evidence tending to show that the plaintiff was prevented, by such backing of the water, from draining a part of her land that needed draining.

The Court being of opinion that this mode of proceeding was given only in the case of some overflow of the land by the water of the pond, so instructed the jury. The plaintiff excepted to the instruction.

There was a verdict for the defendants. Judgment and appeal.

J. W. Woodfin, for plaintiff.
N. W. Woodfin and *Gaither*, for defendant.

BATTLE, J. It is said in the argument here, that the opinion of his Honor in the Court below, was founded upon the authority of the case of *Waddy* v. *Johnston*, 5 Ire. Rep. 333. In that case it was held by a majority of the Court, that none but a person whose land is overflowed by a mill-pond, can have the remedy to recover damages by petition for the injury sustained by the erection of the mill, as provided in the Revised Statutes, ch. 74, sec. 9, *et. seq.* But it was held further, and we presume by the whole Court, in accordance with the previous decisions of *Gillet* v. *Jones*, 1 Dev. and Bat. Rep. 339, and *Pugh* v. *Wheeler*, 2 Dev. and Bat. Rep. 50, that when the land is so overflowed, the owner may recover full compensation for all the injury he has sustained thereby, whether it be more or less direct; whether it affect his dominion in the land, by taking away its use; or impair the value of that dominion by rendering the land unfit, or less fit, for a place of residence; or whether the injury, reaching beyond its immediate mischief, extend also to the person, or the personal property, of the petitioner. In each of the three cases to which we have referred, the policy and meaning of the statute have been discussed at length, and with much ability; and in the construction of the statute, with reference to the questions therein established, we entirely concur.

But the present case presents another question: whether the Court, in the case of *Waddy* v. *Johnston*, by the use of the terms, "land overflowed by a mill-pond," meant that the land must be literally covered by the water of the mill-pond; and we are satisfied that they did not. The statute does not, in a single instance, employ the word overflow. It speaks of a person injured by the erection of a public grist-mill, or mill for domestic manufactures or other useful purposes, and of damage done to his land; but it no where says that the damage must be caused by the land being overflowed, or covered by the water of the mill-pond. Now, it is certain that dam-

age may be done to land by a mill-pond which prevents its being drained, as well as by one which overflows it; and there is nothing in the language, or in the policy of the statute, which makes it more applicable to the one case, than to the other. The *principle* established in the case of Waddy v. Johnston, is that the proprietor of land to which no damage is done by the mill-pond of another, cannot recover in this mode of proceeding, for an independent injury to the health of himself and his family; but we do not understand the Court to decide that the overflowing of land is the only (though it is the most common) injury which can be done to it by the erection of a mill.

In this case there was some testimony tending to show that the land of the petitioner was injured by the mill-pond of the defendant's preventing a part of it from being thoroughly drained; and we think that his Honor erred in not leaving that testimony to the jury; for, we think, that if the land were thus injured, the plaintiff was entitled to the remedy provided by the statute. There must be a *venire de novo.*

PER CURIAM. Judgment reversed.

ISAAC MURRELL *vs*, ALLEN WEATHERS.

A covenant entered into by the buyer of a slave, that he would give the seller the refusal, at a given price, if he ever wished to dispose of it, is a valid stipulation. But it is no breach of such a contract to loan the slave, for a week, twenty miles out of the State, if done *bona fide.* Neither did the sale of the slave, by such bailee without the knowledge or consent of the covenantor, a few days before the writ issued in this case, although ratified by him after the suit was brought, amount to a breach that could be recovered for in the action then pending.

It would have been otherwise if the suit had been brought after the ratification.

ACTION of COVENANT, tried before his Honor, Judge ELLIS, at the Spring Term, 1856, of Gaston Superior Court.

The plaintiff declared for the breach of the following covenant:

"Know all men by these presents: that Isaac Murrell, of the County of Gaston, State aforesaid, hath bargained and sold unto Allen Weathers, one negro woman named Beck, aged from forty-two to forty-five years, for which I, Isaac Murrell, doth warrant and defend against the claim or claims of all persons whatever, to the said Allen Weathers, for the sum of two hundred and twenty-five dollars, in hand, paid to the said Isaac Murrell.

The condition of the above obligation is such that, if Allen Weathers ever wished to dispose of the aforesaid negro woman, that he is to give to the said Isaac Murrell the refusal of the said negro woman, for the sum of two hundred and twenty-five dollars; and Allen Weathers further binds himself, not to ever sell or dispose of the aforesaid negro woman, to any speculator whatsoever, in witness," &c.

The breach complained of was, that defendant without giving plaintiff the refusal of the slave, had parted with her secretly in a distant State.

The proof was, that the parties lived in Gaston County; that the defendant loaned the slave in question, for a week, to his son, who lived about twenty miles distant from his father's residence, in the State of South Carolina, to assist him upon his farm; from thence she was removed by his son to the State of Alabama, and sold, without the knowledge, and contrary to the wishes, of the father. This sale took place a few days before the writ was issued. After the action was begun, the son returned to Gaston County, and informed the defendant of what he had done, which was the first information he had of where the slave was, or what had been done with her. The son then offered to pay the defendant for the slave, which he agreed to.

The plaintiff's counsel contended, and asked his Honor to charge: 1st., that loaning the slave to his son to be carried out of the State, was a breach of the covenant.

2nd. That in assenting to the sale in Alabama, after he had

been informed of it, though after the writ had been issued, carried the effect of the sale back to the time of the sale in Gaston, and made that a breach of the covenant.

His Honor declined so to instruct the jury, but signified his opinion that the plaintiff could not recover. In submission to this opinion, the plaintiff took a nonsuit and appealed.

Hoke, for plaintiff.
Lander and *Avery*, for defendant.

PEARSON, J. The agreement of the defendant, "if he ever wished to dispose of the slave, to give the plaintiff the refusal at the price of $225," was a valid stipulation, for a breach whereof, the plaintiff would have a good cause of action; and the question is, was there a breach at the time the plaintiff sued out the writ?

The fact that the defendant loaned the slave to his son, who resided out of the State, to labor for him for one week, certainly did not, of itself, constitute a breach, if done *bona fide*, and without any ulterior intent thereby, indirectly, to dispose of her, and put it out of his power to perform his stipulation with the plaintiff. It may be, from what afterwards occurred, there was evidence which entitled the plaintiff to insist that the question of intent should be submitted to the jury, but as the case is stated, it does not appear that this point was made on the trial. It is now too late for the plaintiff to avail himself of it; for the case seems to be stated with the view solely of presenting the two points made below.

Upon the second point we are also against the plaintiff. The sale by the son of the defendant was made a few days before the writ issued, but the defendant had no knowledge of it, and did not ratify it until *after the writ issued;* consequently, although this ratification was a clear breach of the agreement, yet, the plaintiff sued out his writ before he had a cause of action. The suggestion, that as the sale was made good by this ratification, and the title thereby enured to the purchaser from the date of the sale by relation, the same

effect must follow in regard to the breach, so as to carry that back to the date of the sale, under the maxim, *omnis ratihibitio retro trahitur et mandato equiparatur*, is not well founded. The maxim is misapplied in respect to the relation back, so far as it regards the breach; its only proper application is, as between the owner of the property and the purchaser, for the protection of the latter, the ratification is considered as equivalent to a prior command, or authority, to the son; but in regard to third persons there is no general inconvenience or policy making this fiction necessary, and they must be content to stand or fall by the actual facts, which, in our case, are that the defendant had not parted with the title, or disposed of the slave in violation of his agreement, when the plaintiff commenced his action, but could, at that time, have recovered the slave from the purchaser, if he had seen proper, and so, had not then put it out of his power to perform his agreement.

PER CURIAM. Judgment affirmed.

HENRY W. FULENWIDER *vs.* SAMUEL POSTON.

Where the seller of a slave refuses to insert a warranty of soundness in a bill of sale, but is willing to warrant the title, and a neighbor informs the buyer that the negro is unsound, the symptoms being not hidden or hard to discover, the maxim of *caveat emptor* applies; and it was error in the Judge below to make the case turn on the question whether the plaintiff relied actually on the assertions of the defendant or the information given him by others.

ACTION ON THE CASE for a deceit in the sale of a slave, tried before his Honor, Judge BAILEY, at the Spring Term, 1856, of Cleaveland Superior Court.

It appeared in evidence that the plaintiff, who was a trader in slaves, had been to the defendant's house, and had an interview with him in relation to purchasing the slave in ques-

tion, some three weeks before the trade took place; that on the day before the trade, he took with him a practicing physician, a relation of his, to see and examine the slave. On their way they met with one *Elliott*, who informed them that he had heard the slave had some "religious monomania," and "occasional spells in the head." The defendant was not at home when the plaintiff arrived there with the physician. On the next day the defendant went to a neighboring village, and there the physician above referred to, acting under the instructions of the plaintiff, had an interview with the defendant in relation to the purchase of the slave. In the course of this negotiation the defendant stated that the negro was sound, but he would not warrant him; that a brother of his had sold a slave to one *Slade* and warranted him, whereby he came near getting into a lawsuit. The defendant tendered to the plaintiff the following bill of sale, "Received of H. W. Fulenwider eight hundred and fifty dollars, in full consideration for a negro boy named Lewis, aged 33 years, the title of which I hereby warrant and defend to the said Fulenwider, but don't warrant him to be sound in any way whatever," and stated that unless he would take the slave with that bill of sale, he would not trade at all. The trade was then concluded on these terms, and the bill of sale delivered.

The only deficiency of the slave, attempted to be proved, was a peculiar religious fervor, for which two physicians testified, "there was no name in the medical books, and the symptoms of which manifested themselves in actions and motions of the head, which, in their opinion, depreciated his value." They considered the negro unsound, and the disease an affection of the nerves and brain.

The Court instructed the jury, that before the plaintiff could recover, he must prove to the satisfaction of the jury that the slave was unsound at the time of the sale, and that the defendant knew it, and represented falsely, with the intention to defraud the plaintiff, that the slave was sound, and thereby induced the plaintiff to make the purchase; and they must further believe, from the testimony, that the plaintiff

did not know, nor had reason to believe, that the slave was unsound.

The defendant's counsel insisted that the facts disclosed to the plaintiff, before his purchase, were a sufficient notice to put him upon a diligent enquiry, and enable him thereby to ascertain the truth, and, therefore, that he could not recover.

On this point his Honor charged the jury, that if the plaintiff did not believe, or rely on the information received from other sources, but did rely on the statements made by the defendant, and if they should find that the representations of the defendant were false, and intended to deceive, and did deceive, they should find for the plaintiff. To this charge defendant excepted.

Verdict and judgment for the plaintiff. Defendant appealed.

Lander and *Avery*, for the plaintiff.
Baxter and *Guion*, for the defendant.

PEARSON, J. We do not concur with his Honor in the view taken by him of this case in the latter part of the charge. The bill of sale would have been, of itself, sufficient to put most men upon enquiry, so as to prevent them from concluding the purchase, unless there was an overweening desire to rush into a lawsuit, which it is the policy of the common law to prevent. Hence the maxim "*caveat emptor*" is applicable whenever the purchaser is put on enquiry, or has reason to believe that the property is unsound. But besides the bill of sale, the witness, Elliott, gave the plaintiff express notice of the unsoundness of the slave. And besides all this, the plaintiff had an opportunity of having the slave examined by a physician in his presence, and the symptoms were by no means hidden or hard to be discovered. Under these circumstances the plaintiff could not be allowed to say that he relied on what the defendant said as to the soundness of the slave. He ought to have required a warranty, or refused to buy; and has no right to insist that the jury should be requir-

ed to find whether he relied on what the defendant said, or upon his other sources of information. Any prudent man would have relied upon the latter, and if the plaintiff did not, it is his own folly!

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

WILLIAM LARGENT *et. al.* ADM'RS. *vs.* ARCHIBALD C. BERRY.

A father who died intestate, had put a slave into the actual possession of his child, which remained in possession of such child at the time of his death, without revocation of the gift, or other termination of the bailment; this is an advancement; although the father, before his death, had become *non compos mentis*, and had a guardian appointed for him, who, as far as he could, revoked the bailment and demanded possession before the father's death.

ACTION of TROVER, for the conversion of a female slave, tried before his Honor, Judge MANLY, at the last Fall Term of Burke Superior Court.

The action was brought in the name of Elijah Largent, a person of unsound mind, by his guardian, William Largent. Pending the suit, the plaintiff, Elijah Largent, died, and the said William and E. J. Largent administered on his estate, and were made parties.

The defendant married one of the daughters of Elijah Largent, in the year 1846, and about the same time the said Elijah, being then sane, gave the slave in question to the defendant by parol, and put her into his possession, where she remained up to the time of his death, without any revocation of the gift, or other termination of the bailment on his part.

Elijah Largent became *non compos mentis* about the fall of the year, 1853, and upon an inquisition of lunacy, ordered by the County Court of Burke, in January, 1854, was so found by a jury; upon which there was a judgment of the Court, and a guardian appointed as above stated. He demanded

the slave in question of defendant, who refused to surrender her. It was agreed that there should be a verdict in favor of the plaintiff for $700, with leave for the Court to set it aside and order a nonsuit, in case he should be of opinion against the right of the plaintiffs to recover on the foregoing facts.

His Honor, being of opinion against the plaintiffs, ordered a nonsuit. Plaintiffs appealed.

Gaither, *Avery* and *Dickson*, for plaintiffs.
T. R. Caldwell and *N. W. Woodfin*, for defendant.

BATTLE, J. We have no hesitation in expressing our concurrence in the opinion given by his Honor in the Court below. The parol gift made by the plaintiffs' intestate of the slave in question to the defendant, was, it is true, a mere bailment, which the intestate might have terminated at any time during his life. The possession of the donee, though held subject to the reclamation of the donor, yet, so far conferred an inchoate right upon the donee, that it might become a complete title by the death of the donor intestate, and without having revoked the gift. Such is manifestly the effect of the proviso to the 17th section of the 37th chapter of the Revised Statutes. This inchoate right was originated by the intention of the donor, exhibited by his putting the slave into the actual possession of the donee; and the title could be prevented from becoming perfect only by a change of that intention, manifested in a proper manner. How could that intention be changed after the donor ceased to have the power of volition? His committee, after he became *non compos mentis*, had the charge of his person and of his estate, but not of his mind. The committee could no more revoke such a gift, made by a *lunatic*, than he could revoke a will made by him, during a lucid interval, or before he became *non compos mentis*. The analogy between the two cases, as was well contended by the defendant's counsel, is very strong, and the same reason which prevents the will from being revoked, applies with equal force to the gift. In England the committee of

a lunatic's estate "can neither bring nor defend actions or suits on the behalf of the *non compos mentis* without previously obtaining the permission of the Court to do so." Stock on *Non Compotes* 211, (15 Law Lib. 117.) We are not aware that our statute, concerning Idiots and Lunatics, confers any greater power on their guardians. See 1 Rev. Stat., ch. 57. There was no such power as was claimed by the guardian in the present case, conferred in express terms, and we cannot imagine any good reason why it should be implied. On the contrary, many cases might be stated in which much confusion and mischief would be caused by the exercise of such a power by the guardian, in disturbing the parol gifts made by a lunatic father before the commencement of his infirmity.

The judgment of the Court below, being in accordance with these views, must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM HYATTE *vs.* JOHN B. ALLISON.

A writ cannot be legally returned on Thursday of the term to which it is made returnable.

A sheriff may be amerced at a subsequent term to that at which the process was returnable, for not having made his return at a previous term.

SCIRE FACIAS to make absolute an amercement *nisi*, heard before his Honor, Judge MANLY, at the Fall Term, 1855, of Haywood Superior Court.

The defendant pleaded *nul tiel record;* that he made due return of the process issued to him; and specially, that the return in the case was made to, and received at, the return term thereof, and acquiesced in by the plaintiff.

The record states that the Court adjudged there is such a record as that mentioned in the sci. fa.; that a jury was empannelled, who found all the issues in favor of the plaintiff.

The parties below made a special case agreed for the decision of his Honor, viz: That a *capias ad respondendum* issued in favor of Wm. Hyatte against Thomas Browning; that the same came to the hands of the defendant's deputy, twenty days before the Spring Term, 1851, of the Court to which it was returnable, and the said writ was not returned till Thursday of that term.

At the next term of the Court, to wit, at Fall Term, 1851, an affidavit was filed stating the facts, and a judgment *nisi;* was entered against defendant for $100, upon which this sci. fa. issued.

The defendant contended,

1st. That he was not obliged to return the writ before Thursday.

2nd. That the Court might indulge him; and this was to be presumed, as the writ was then returned and docketed.

3rd. That the *nisi* judgment could not be entered at the term subsequent to that of the Court at which the process was returnable.

The Court, holding these objections to be untenable, gave judgment for plaintiff, from which the defendant appealed.

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

Nash, C. J. There is no error. The deputy sheriff had in his hands a writ, issued at the instance of the plaintiff against Thomas Browning, returnable to the Spring Term, 1851, of Haywood Superior Court, which writ was returned by him on Thursday of the said term. At the Fall Term of the Court, a judgment *nisi* was rendered against the defendant for the sum of one hundred dollars, for not having returned the writ according to law.

The first objection raised by the defendant cannot be sustained. By 53 sec. of the 31 ch. of the Rev. Stat., it is enacted that, "All writs and other civil process, except subpœnas, returnable immediately, shall be returned the first day of the

term to which they are returnable," &c. By this section it is made imperatively the duty of the officer to return the writ on the day of the term designated, which is in law the return day of the term; and it is as much a neglect of duty on his part not so to return it, as not to return it at all.

As to the second objection; without enquiring into the power of the Court to permit a return on any other day, it is sufficient to say, there is nothing in the record to show, that the return on Thursday was the act of the Court; all that the record shows is, that the writ was returned on that day. The principle of "rite acta" does not apply.

The third objection is alike untenable. By the 61 sec. of the same Act, it is enacted that, "Every sheriff, &c., who shall fail duly to execute and return all process to him directed, shall be subject to a penalty of one hundred dollars, &c., to be paid to the party grieved by order of the *Court*, &c., to which the same is returnable, unless the sheriff, &c., can show sufficient cause to the Court for his failure at the Court next succeeding such order." The Act does not require that the judgment *nisi* shall be rendered at the same term to which the writ is returnable, but *to the Court* to which it is returnable, and the officer has until the next term succeeding the order, to make his excuse. *Halcombe* v. *Rowland*, 8 Ire. R. 240.

PER CURIAM. Judgment affirmed.

CHARLES McDOWELL *vs.* J. A. ROBISON.

Upon a *fi. fa.* issuing with a *venditioni exponas* upon the return of a former fi. fa. levied on property which was not sold, it is sufficient to return "no property except what heretofore has been levied on and sent to your office."

SCI. FA. upon an amercement *nisi*, tried before MANLY, Judge, at the Fall Term, 1855, of Burke Superior Court.

The allegation was, that a certain *fi. fa.* in favor of Charles

McDowell against one J. R. Dyche, had issued from the office of the Superior Court of Burke. A previous *fi. fa.* had been issued in the case, which had been returned levied on a house and lot in the town of Murphy, and thereupon two writs were issued, that is, the *fi. fa.* above mentioned and a *venditioni exponas* to sell the property levied on. Upon the *fi. fa.* the defendant, as sheriff, returned as follows: "Due search made by me and no other goods, chattels, lands or tenements to be found in my county, subject to execution, except what heretofore has been made and sent to your office." To the venditioni exponas he returned "no sale for the want of bidders," and it was insisted that the return to the *fi. fa.* was a nullity, and that for the want of a return, the plaintiff was entitled to judgment for $100.

But the Court, being of opinion that the return was sufficient, gave judgment for the defendant, from which the plaintiff appealed.

N. W. Woodfin, for plaintiff.
Gaither, for defendant.

NASH, C. J. We see nothing in the case to induce us to disturb the judgment rendered in the Court below. No reason has been shown why the return of the sheriff was not according to law; nor can we well perceive how the sheriff could make any other return if the facts were as he stated them, and they are not disputed. A *fieri facias* had come to his hands, in favor of the plaintiff, against a man by the name of James R. Dyche, which he had duly returned, levied on certain property. From the term of the Court to which the process was returned, the clerk issued two writs, one a *venditioni exponas* and the other a *fi. fa.* Upon the latter, the defendant returned that there was no property of the defendant upon which he could levy it, but that upon which he had previously levied, under the first *fi. fa.*; and upon the former, no sale for the want of bidders. The regular course of the Clerk of the Superior Court of Burke to have

pursued upon the return of the first *fi. fa.*, would have been to have issued a *venditioni exponas* with the *fi. fa.* clause. If he had done so, the returns upon it, supposing the facts to be as alleged, would have been precisely what he has returned—no sale for the want of bidders under the *venditioni exponas*, and no property of the defendant to be found except that already levied on under the previous *fi. fa.* It can make no difference that the writs were on different pieces of paper. The sheriff's return was duly made, and there is no error in the judgment of the Court below.

PER CURIAM. Judgment affirmed.

Den. on dem. of ALEXANDER JIMMERSON *vs.* JAS. H. DUNCAN.

Where a son bought a tract of land with the money of his father, and took the deed in his own name, but really for the use and benefit of his father, and for the purpose of defrauding his father's creditors, such land is not liable to be sold under the Act of 1812, upon an execution against the father. The creditor's remedy in such a case is in Equity.

ACTION of EJECTMENT, tried before BAILEY, Judge, at the Spring Term, 1856, of McDowell Superior Court.

The land in controversy had belonged to John Duncan, who conveyed the same to A. L. Erwin, in trust, to secure certain debts due by him. The trustee made sale of the premises, when James H. Duncan, a son of grantor, became the purchaser, paid the purchase money, and took a deed for the land from the trustee, dated in 1838.

The plaintiff claimed this land as a purchaser at sheriff's sale, under an execution against John Duncan, the father. The Judgment on which this execution issued, was rendered in 1841, and a levy and sale made subsequently thereto. The sheriff's deed to him was dated 9th December, 1850.

The plaintiff then offered evidence to show, that although the defendant was the ostensible purchaser at the trustee's

sale, yet, that it was, in truth, a purchase for the benefit of the father, and that the father, John Duncan, furnished the whole of the purchase money; that this was done upon a secret trust, and with the fraudulent design of hindering, &c., the creditors of said John, in the collection of their debts.

Upon an intimation from the Court, that the land in controversy, was not liable to be sold under execution according to the Act of 1812, the plaintiff took a nonsuit and appealed.

Avery and *N. W. Woodfin*, for plaintiff.
Baxter and Gaither, for defendant.

BATTLE, J. We are unable to distinguish this case from those of *Gowing* v. *Rich*, 1 Ire. Rep. 553, and *Gentry* v. *Harper*, 2 Jones' Eq. 177; and we think, therefore, that the judgment of nonsuit was right. It is not pretended that the conveyance to A. L. Erwin, as trustee, was not *bona fide* and fair. Admitting that conveyance to be good, the legal title of the land in question was transferred from John Duncan, the grantor in trust, to the trustee, and then the purchase from him by the defendant, James H. Duncan, supposing it to have been with the money of his father, created exactly such a trust as those of *Gowing* v. *Rich*, and *Gentry* v. *Harper*, in which it was held that the remedy of creditors was not by a sale of the debtor's interest at law, but by a bill to subject it in Equity.

Dobson v. *Erwin*, 1 Dev. and Bat. Rep. 569, and *Morris* v. *Allen*, 10 Ire. Rep. 203, cited for the plaintiff, were cases where sales by sheriffs were successfully impeached for the fraudulent contrivances of the debtors and ostensible purchasers, in consequence of which, it was held that the legal title of the lands still remained in the debtors, and of course subject, at law, to be sold under execution, at the instance of creditors.

PER CURIAM. The judgment is affirmed.

PATTON & BURGIN *vs.* ALEXANDER PORTER.

A warranty of soundness of a slave contained in a bill of sale, is not evidence that the party making it at that time, admitted the soundness of the slave.

Immaterial evidence, when calculated to mislead the jury, is a ground for a *venire de novo*.

ACTION ON THE CASE for breach of a warranty of soundness of a slave, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Buncombe Superior Court.

The action was brought for the breach of a warranty of soundness of a negro slave named Lawson, contained in a bill of sale not under seal, dated 3rd of March, 1851.

The defendant had bought the same slave from the plaintiffs, and took from them a bill of sale, with a warranty nearly in the same words as that declared on, dated February 10, 1850. This bill of sale was offered in evidence by the defendant, but objected to by the plaintiffs.

His Honor admitted the evidence as a declaration of the plaintiffs, that at the date of the bill of sale made by them, the slave was sound. The plaintiffs excepted.

Verdict and judgment for defendant. Appeal.

W. W. Woodfin, *Gaither* and *Baxter*, for plaintiffs.
J. W. Woodfin and *Avery*, for defendant.

BATTLE, J. The only question which we shall consider is, whether the warranty of soundness contained in the bill of sale from the plaintiffs to the defendant, was admissible as evidence of their declaration, that the slave was sound at the time when it was made. A warranty is a contract by which the person who makes it engages to become responsible to the other party for any damage which he may sustain by a breach of it. It does not necessarily include a declaration by the maker that the fact is so, but merely that he will be responsible if it shall prove not to be so. If it implied an assertion in all cases of the truth of the fact, then, in many instances, a conscientious man could not make it at all. Suppose

a person to buy a horse which he never saw or heard of before, and another, on the same day, offers him an advanced price for the horse if he will warrant him to be sound, cannot the seller make the warranty, without declaring that the animal is sound? Would it not be distinctly understood between the parties that neither of them knew, or asserted that he was sound, but that the seller would, in consideration of the advanced price, take upon himself the responsibility that he was sound? In 1 Selwin's Nisi Prius, 687, it is said that "a horse being an animal subject to secret maladies, which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness; for if a horse, having a secret malady, is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy." In taking such warranty, does the buyer care whether the seller declares the animal to be sound or not? Would he hesitate to take the warranty if the seller declare expressly that ke knows nothing about the horse? Certainly not. The warranty ought never to be used then, for any other than its legitimate purpose of imposing upon the seller the responsibility of making good any damages which the buyer may sustain by reason of the breach of it.

But it has been suggested in this case, that as the warranty offered in evidence was made about thirteen months before that upon which the suit was brought, it was such slight testimony of the unsoundness of the slave, at the time when the latter warranty was given, that it was immaterial, and could do no harm. It is true, that if it were testimony at all, it was too slight to have any legitimate effect upon the minds of the jury; but yet it may possibly have misled them, by inducing them to find for the defendant, upon the principle of setting off the one warranty against the other. That was, of course, improper, and as the jury may have been misled, we think that the plaintiffs are entitled to a *venire de novo*.

PER CURIAM. Judgment reversed.

GEORGE W. SCOTT *vs.* MOSES L. BROWN.

One of two persons jointly entitled to damages for a deceit in the sale of property, cannot release or assign his interest to the other so as to enable him to sue alone.

Of course, such joint-purchaser could not become a competent witness for his co-purchaser by means of such release.

In actions of *tort* arising *ex contractu*, a non-joinder of a party plaintiff may be taken advantage of by motion in arrest of judgment, or by a writ of error, or on the trial upon the general issue.

THIS was an ACTION for a DECEIT, in the sale of a jackass, tried before ELLIS, Judge, at the Spring Term, 1856, of Cabarrus Superior Court.

The plaintiff offered one Cyrus Scott to prove the contract of sale.

The defendant called testimony, and showed to the satisfaction of his Honor, that the proposed witness was a joint-purchaser of the property from Brown, and he was, therefore, pronounced incompetent. The witness then executed a release and delivered it to the plaintiff; but the defendant still opposed the admissibility of the witness, upon the ground that the objection went to the whole character of the action, and insisted that the witness ought to have been a party, and for not having been such, he moved that the plaintiff be nonsuited.

His Honor declined to order a nonsuit, but admitted the witness to be sworn; to which ruling the defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

No counsel appeared for the plaintiff.

Boyden, for defendant.

NASH, C. J. The action is in tort, for a deceit in the sale of a jack. The plaintiff and his brother, Cyrus Scott, were the joint-purchasers of the jack. The action is brought by G. W. Scott alone. On the trial, the brother, Cyrus, was offered by him as a witness, and, upon objection, was set aside by the Court. Cyrus then executed a release to to the plaintiff of all his interest, and the Court held he was then a competent witness. In this there is error.

In all actions on contracts, all in whom the legal interest vests should, in general, be made parties plaintiff; and if any be omitted, whom the law requires to be joined, the defendant *may* take advantage of the omission on the trial, under the general issue, as the contract proved will not be the same declared on; or he may move in arrest of judgment, or proceed by writ of error if the defect appear on the record. In an action simply of tort, as in trespass to property, real or personal, the defendant must plead in abatement the non-joinder of a part-owner, and cannot take advantage of the defect, by way of nonsuit on the trial; because one joint-owner may recover his aliquot portion of the damages sustained, if no notice by plea is given him that the defendant intends to rely upon the defect. There is yet a third class of cases under which this arranges itself; they are actions of tort arising *ex contractu.* There the defendant *may* plead in abatement, or take advantage on the trial, as in an action purely of contract. 1 Bos. and Pul. 71, and 2 N. R., which is the 3rd vol. of Bos. and Pul. Story on Pleading, pp. 20, 87.

This is an action *quasi ex contractu*, in which the defendant may take advantage of the non-joinder, under the general issue, on the trial. It was necessary for the plaintiff to prove his contract, in order to sustain his action; for, if there were no sale, there could be no fraud. See *Gwynn* v. *Setzer*, ante 382. In doing that, he necessarily showed that Cyrus, his brother, was a joint-purchaser with him, and his Honor ought to have ordered a nonsuit; and if the plaintiff objected, he ought to have directed the jury, that the plaintiff could not maintain his action. It must have been upon the ground that the witness was a necessary party plaintiff, that he was regarded incompetent in the first place; for his release to the plaintiff could not confer upon him any interest which he did not at the time possess. The witness' interest in the damages sought to be recovered, was a mere chose in action, and not the subject of an assignment at law. Suppose one of two obligees in a bond, assign to his co-obligee all his interest in the bond, could the assignment authorise the co-obligee to

sue in his own name alone? Surely not. The action would still have been in the name of both, unless one were dead. After the release then, in this case, the rule of pleading remained still the same. Cyrus was a necessary plaintiff to the action. If it were not so, it would be very easy, where there are two obligees, for one to bring the action, and then to introduce as a witness, his joint-partner in the contract, upon the latter's executing a release, which would, at law, have no operation.

That his Honor considered the action as resting on the contract, is evidenced by his suffering the plaintiff to recover full damages, which would have been error if it had been for a mere tort.

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

RICHARD O. LEDBETTER *vs.* ISAAC MORRIS.

Where B, as the agent of certain makers of a promissory note, payable to A, by fraud and misrepresentation, prevails on A to accept of insolvent notes in satisfaction of his note, and thus procures from A a receipt in full discharge of his note, although A's note was also insolvent, and was never actually delivered to the debtors, (being filed in the clerk's office,) still A is entitled to nominal damages.

ACTION ON THE CASE, tried before BAILEY, Judge, at the Spring Term, 1856, of McDowell Superior Court.

The plaintiff declared for a deceit in procuring a receipt from his intestate for a note of $327, which he held on Thomas Green, E. D. Lewis, and John Bright. It appeared in evidence that the plaintiff's intestate held a note of the above amount on the persons above stated, and that, in the Fall of 1842, Green, one of the makers, absconded, and that the others had no visible effects. An attachment was issued on the note at the instance of the plaintiff's intestate, and was levied on property alleged to belong to Green. While this suit was pending in the County Court of Rutherford, Lewis, being about to avail himself of the benefit of the insolvent debtor's

act, procured the defendant to take a parcel of insolvent notes, amounting to about $1000, to the intestate of the plaintiff, who resided about eighteen miles distant, for the purpose of exchanging a portion of them for the note of $327. It further appeared that the intestate was an aged man, and afflicted so that he went little from home, and was unacquainted with the makers of these notes; that the defendant, in strong terms, represented them as solvent. The exchange was agreed to be made. The plaintiff's intestate received of the notes offered, several amounting to more than his note. He gave a receipt against the note, which was not present, and a conditional note for the difference, which was about three dollars. It appeared further that the attachment remained on the docket till February Term, 1844, when it was dismissed at the cost of the plaintiff, but the note was filed away in the ofice of the clerk, and remained there. It was proved that all the notes taken by plaintiff's intestate in exchange were insolvent, as was the note which he parted with.

Plaintiff's counsel insisted: 1st. That he was entitled to recover to the amount of the notes transferred, with interest.

2nd. But if not so, he was entitled at least to the $327 and interest.

The defendant's counsel contended that plaintiff could not recover at all, for the reason that he still had control of his note, and, that if cheated in the transaction, he could still show it, and avoid the receipt as evidence of payment; and, for the further reason, that his own note was insolvent.

His Honor instructed the jury, that if the defendant knowingly misrepresented the condition of the makers of the notes passed to the intestate, and fraudulently obtained from him the receipt mentioned, the plaintiff would be entitled to recover at least nominal damages; and if they believe that the whole, or any part, of the note obtained of the intestate could have been collected, that sum, with interest, would be the measure of plaintiff's damages.

The jury returned a verdict for nominal damages. Judgment and appeal by the defendant.

Baxter and *Gaither*, for plaintiff.
N. W. Woodfin and *Avery*, for defendant.

BATTLE, J. When this case was before the Court at August term, 1854, (see 1 Jones' Rep. 545,) it was held that the instrument upon which the plaintiff's action was founded, and which was called a receipt, was not, in fact, a receipt for the payment of money, but was in the nature of a contract, by which the parties were compromising their rights. Taking it as a contract between the parties, if the plaintiff's intestate had sustained substantial damages by having been induced to enter into it by the fraudulent misrepresentations of the defendant, we do not see why he might not recover such damages upon the general principle decided in *Pasley* v. *Freeman*, 3 Term Rep. 51, and that class of cases, many of which are referred to in *March* v. *Wilson*, Busb. Rep. 143. So we cannot see why, upon failing to prove that he had sustained substantial damages, he cannot recover nominal damages upon the jury's finding that he did commit a fraud in the transaction alluded to. Assuming that the note or bond which the intestate held was upon insolvent persons, yet, the law would imply that he had sustained some damage by having it taken from him by the fraud of another person. And in such case, the person perpetrating the fraud, cannot escape from the consequences of his act by saying that the intestate might recover his bond. The trouble and expense of doing so would be a damage for which, at least, the defendant ought to be responsible.

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

JOHN PRICE *vs.* LEVI GRAHAM *et al.*

A warrant issued in a county bordering on the State of South Carolina, charging that the defendant "committed murder somewhere between this place and the State of Texas," is void, as being too vague and indefinite.

A warrant to arrest a fugitive from justice, under the 35 ch. 5 sec. of the Re-

vised Statutes, is required to be made and issued by *two* magistrates, and if issued by *one* is void. (Altered by Rev. Code, ch. 35, sec. 5.)

For an arrest under a void warrant, *trespass vi et armis*, and not *case*, is the proper remedy.

ACTION on the case for a malicious prosecution, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Henderson Superior Court.

The declaration set forth an arrest of the plaintiff under the following warrant, taken out at the instance of the defendants, viz:

"State of North Carolina, }
Henderson County. }

"Personally appeared before me, —— Graham, and made oath that he has reason to believe that John Price murdered John Graham, somewhere between this place and the State of Texas:

"These are, therefore, to command any lawful officer of the said county, to arrest the body of the said John Price, and him safely keep, so that you have him before me, or some other justice of the peace of said county, to answer the above charge. Fail not. Given under my hand and seal, this," &c. Signed by the justice of the peace with a seal annexed.

The plaintiff was arrested by virtue of this warrant, and being brought before two justices of the peace, was discharged.

The defendant objected, that this warrant was a nullity, and that therefore, the present form of action could not be sustained. But his Honor being of a different opinion, so instructed the jury. Defendants excepted.

Verdict and judgment for plaintiff. Appeal.

J. W. Woodfin, for plaintiff.

Baxter and *Dickson*, for defendants.

PEARSON, J. We think the action was misconceived, and should have been trespass vi et armis for false imprisonment; upon the ground that the warrant under which the plaintiff was arrested is void and of no force and effect.

The warrant is void for one of two reasons. It is either so vague and indefinite as to locate the commission of the of-

fense at no place; for, somewhere between this place, (to wit, the county of Henderson whence it purports to be issued) and the State of Texas," is so general and uncertain as to amount to "nowhere in particular"; or else, as the county of Henderson adjoins the State of South Carolina, the commission of the offense is located necessarily beyond the limits of this State; so that upon the face of the warrant, the justice of the peace had no jurisdiction.

If it were intended to be a warrant to apprehend a fugitive from justice, it is void; for at the date of the warrant, the statute required it to be issued by two justices of the peace.

PER CURIAM. Judgment reversed.

RACHEL POWELL *vs.* DANIEL JENNINGS.

An agreement between the widow of a soldier of the revolution, entitled to a pension under the act of Congress of 1848, ch. 120, and an agent, that the latter was to receive a certain part of the pension money for his services in obtaining it, is void, and money received under such an agreement can be recovered by the pensioner in an action of assumpsit.

THIS was an action of ASSUMPSIT, tried before ELLIS, Judge, at the last Wilkes Superior Court.

The plaintiff declared for money had and received to her use. The proof was, that the plaintiff was the widow of an old soldier of the war of the revolution, and as such, had been put upon the pension-list under the laws of Congress; that there was due her from four to five hundred dollars of back-pay at the time her right was first allowed. One Mastin, together with the defendant, had assisted her in establishing her claim, and it was agreed between the parties that Mastin was to receive for his services one hundred dollars, to be deducted from the first payment, and the defendant all the balance of the back-pay for what he was to do in collecting evidence, and the plaintiff was to pay no part of the expense in case of failing to establish her claim. The parties proceeded under this contract. The defendant collected the evidence, and Mastin succeeded in having her name placed on the pension

roll, and received all the back-pay. He took one hundred dollars, and, after deducting some expenses in Washington and Fayetteville, paid over all the remainder, (about $400,) to the defendant, in pursuance of the original agreement. After the money was received, and before that event, the plaintiff declared to several persons, that she had given it to the defendant. It also appeared that some time before the subject of the pension was agitated, the plaintiff went to live with the defendant, under an agreement that he was to support her for life, and she was to contribute what money she might make by practicing as a mid-wife, and whatever monies she might receive from other sources, as a compensation. The question was, whether upon this evidence, the plaintiff could recover.

His Honor was of opinion, and instructed the jury, that the agreement touching the pension was void under the act of Congress, and that the plaintiff was entitled to recover. The defendant excepted to this charge.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Boyden and *H. C. Jones*, for plaintiff.

Mitchell, for defendant.

NASH, C. J. This case is governed by the act of Congress passed in 1848, ch. 120, entitled an act for the relief of certain surviving widows of officers and soldiers of the revolutionary army. The first section grants a pension to all such widows. The second section is as follows: "That any pledge, mortgage, sale, *assignment* or *transfer* of any right, claim or interest, *in any way granted* by this act, shall be utterly void and of no effect." The object of the act cannot be mistaken; it was to secure to the widows of those, by whose sufferings and valor, the liberties we are now enjoying were secured, a provision for the few years they could remain here. So anxious were they to effectuate this purpose, that, in the same section, they exempt the pension from any liability to the debts of the pensioner, either in law and equity.

The case sets forth that the plaintiff, a widow of a soldier of

the revolution, and entitled to be placed on the pension-list, was entitled to $500 as back-pay. It was agreed between her and one Mastin and the defendant, that Mastin should receive the money, and retain, as pay for his trouble, one hundred dollars, and that, *in pursuance of said agreement*, he should pay all the balance, $400, to the defendant, for his trouble in procuring the testimony necessary to have her name enrolled on the pension-list. Both the parties and the witnesses lived in Wilkes county. Mastin received the $500, and paid to the defendant $400 of it. The action is brought to recover that money.

It is urged that this case does not come within the act of Congress; that the act did not intend to prevent the pensioner from disposing of her pension-money, after she had received it, as she might think proper. Unfortunately for the argument, the case sufficiently shows that the agreement was entered into before the pension-money was received, and that the payment of the $400 to the defendant, was made to him in pursuance of said agreement. No part of the money ever came to her hands; but it was drawn by Mastin, by her assignment or transfer of her right to receive it, and a portion paid by him in compliance with the previous agreement. If the act is to receive the construction contended for by defendant, it is a dead letter, so far as securing the pension-money to the widow is concerned, and might as well be at once repealed. The act, being for the protection of those, who, in ninety-nine cases in a hundred, are poor, needy and ignorant, should receive such a construction as will carry out the benevolent intention of the donors of the bounty. Like the statute of frauds, it should receive a liberal construction; such a construction as is consistent with the words, and as will suppress the mischief—the mischief of preying upon the necessities of the poor and ignorant.

It is again said, if the act is to receive the construction contended for by the plaintiff, the bounty of the country will, in many cases, prove illusory. This may be so, and probably will be; but it is an evil, courts of justice cannot remedy.

To Congress belongs the power. The *intention of the act is* to provide for the widow, and not for the speculator.

Considering the money paid to the defendant Jennings as received by him, by virtue of the agreement made originally by the parties, which was null and void by virtue of the act of Congress, it was received by him in law to the use of the plaintiff.

We concur with his Honor who tried the case below, in his judgment, which is affirmed.

PER CURIAM. Judgment affirmed.

JOHN W. HENSON *vs.* JOHN CHASTINE.

An action of assumpsit for the non-performance of a contract may be begun by attachment.

Where the contract was, on the sale of a stallion, that the defendant was to give the earnings of the horse at two places, where he was to stand him for the season, as a part of the price of the horse, which was reckoned as equal to $100, on failure of the defendant to stand the horse at those places, *it was not error in the Judge to instruct the jury*, that they might give that estimated amount as damages, to wit, $100.

ACTION of ASSUMPSIT, tried before his Honor, Judge MANLY, at the Fall Term, 1855, of Cherokee Superior Court.

The plaintiff declared for a balance due upon the purchase of a horse according to a special contract. The suit had begun by attachment, but the defendant coming in and replevying, it was put at issue on the "general issue."

The evidence was, that the plaintiff offered to sell the defendant a horse for $300, which price the defendant was unwilling to give him, but offered $200 and the amount of the horse's earnings, as a stallion, at two designated stations, which it was reckoned would be equivalent to $100. The plaintiff agreed eventually to accept of this proposal upon the defendant's agreeing to keep and stand the horse at the stations men-

tioned, as well as the other places, and to do the best he could with him. It further appeared in evidence, that the horse was not kept by the defendant at these stations, except for two of the rounds appointed for him, and that he went into the hands of another person who claimed to have bought him, and who completed the season by visiting these stations as well as the others.

It was admitted that $200 had been paid, and the suit was brought for the price to be raised by the services of the stallion. A demand, and refusal to pay this amount, were proved. The defendant contended that the action, in this form, would not lie in consequence of its being commenced by attachment; and generally, that plaintiff was not entitled to recover; but if at all, only the sums realised by the defendant for the two visits to the designated stations as proved.

But the Court informed the jury, there was no valid objection to the form of the action; and as to damages, that if the defendant had put it out of his power to comply with his undertaking to keep the horse at the stations in question—if he had sold him, and did not keep him there, either by an agent or by himself, plaintiff was entitled to recover, and might recover the sum of $100, which was the sum estimated by the parties as being the amount of profits of the two stations. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal by def't.

J. W. Woodfin and *Gaither*, for plaintiff.
Baxter, for defendant.

PEARSON, J. The defendant, for a valuable consideration, agreed to keep and stand the horse at the two stations for the benefit of the plaintiff. This he failed to do; and we can see no reason, wherefore, he should not be made liable for a breach of his contract.

In regard to the measure of damages, as the amount of the horse's earnings was, or ought to have been, peculiarly within the knowledge of the defendant, it was proper, under the

circumstances, to allow the fact, that the parties had estimated it as equivalent to $100, to go to the jury, as some evidence upon the question of damages.

PER CURIAM. Judgment affirmed.

WILLIAM TIPTON *vs.* JONATHAN TIPTON'S EXECUTOR'S.

A compromise made by an infant legatee, whereby he receives specific chattles of less value than the legacy, is not obligatory on him; but he is bound to account for the value of the things received, and a deduction of that amount will be made from the legacy.

PETITION for a LEGACY, tried before MANLY, Judge, at the Fall Term, 1855, of Yancey Superior Court.

Jonathan Tipton died in the year 1850, having made and published his last will and testament, wherein the defendants were appointed executors, who took upon themselves the administration of the assets. Among other bequests, was one in favor of the plaintiff of a horse, saddle and bridle, worth seventy-five dollars, to be paid to him as soon as he should arrive at the age of twenty-one years.

The petition alleges that the plaintiff has arrived at the age of twenty-one; that he has called on the executors to comply with the bequest in the will, but that they have refused to do so. It further alleges that the estate in the hands of the executors is amply sufficient to pay the debts, funeral expenses, and charges of administering, and besides, to pay the legacies.

The prayer is, that the defendants may pay the said legacy, and for general relief.

The answer of the defendants sets forth that the plaintiff was an orphan, bound as an apprentice to their testator, at the age of three years, by the chairman of the County Court of Yancey, until he should arrive at the age of twenty-one; at which time the said Jonathan was to give him a horse, sad-

dle and bridle, worth seventy-five dollars; that the death of the testator occurred nearly three years before the expiration of the time of service, which was specified in the apprentice-bond, and immediately afterwards he quit the family and refused to render any further service. The defendants contend that the legacy was intended as an equivalent for the further service which the plaintiff was expected to render in his character of apprentice, and in lieu of what the testator was to give him under the apprentice-bond, when he should arrive at age; and they insist, that having failed for so great a length of time, when his services were most valuable, he thereby forfeited his legacy.

Nevertheless, they say that, being annoyed by the frequent demands of the plaintiff, they agreed to compromise, and did compromise it with him, by giving him a cow and calf, a sow and pigs, in full satisfaction of his claim for this legacy, and that he accepted the same as such.

The cause was heard upon the petition, answer and exhibits, and his Honor permitting parol evidence to be given, the compromise was proved as alleged in the answer, but it was also proved, that at the time it was made, the plaintiff was an infant.

Upon considering the case, the Court dismissed the petition, from which the plaintiff appealed to this Court.

Avery, for plaintiff.

No counsel appeared for the defendant in this Court.

Nash, C. J. There is error in the decree below. The plaintiff was, by the proper authorities, bound as an apprentice to Jonathan Tipton, who died nearly three years before the expiration of the indentures, having previously made his last will, and which, by the defendants, was duly proved in the proper County, and they qualified as executrix and executor thereof. By his will, the testator bequeaths to the plaintiff seventy-five dollars, in a horse, saddle and bridle, at his age of twenty-one. The defendants deny that the petitioner

has any right now, to call for his legacy, as he entered into a compromise with them, and received from them, in lieu of his legacy, a cow and calf, and sow and pigs. They further state in their answer, that at the time of this compromise, the petitioner was nineteen years of age.

There is no doubt, a legatee may receive from an executor, other things in lieu of the property devised to him; but to give to such compromise, such effect, the legatee must be of an age when the law authorises him to act for himself, and make a valid contract. As the petitioner was an infant, under the age of twenty-one, when it was made, this alleged compromise, therefore, was of no force and effect, and the petitioner is entitled to his legacy. But, though the compromise does not bind him, yet, having received a cow and calf, and sow and pigs, from the defendants, in place of his legacy, he cannot hold those and recover his full legacy; he must account for the property so received; and there must be a reference to the master, if the parties desire it, to ascertain the value of the property so received by the petitioner.

It was further alleged in the answer, that the legacy was intended by the testator to be in the place of the property he was bound by his bond to advance the petitioner at the expiration of his indentures, and that the legacy should not take effect, unless the petitioner should continue with the executrix all that time. There is nothing in the will to prove either suggestion.

The decree below, dismissing the petition, is reversed, and the case retained for further directions, and an account ordered.

Per Curiam. Decree reversed

APPENDIX.

The peculiar character of the question discussed in the following opinion of the Attorney General of the State, concerning, as it does, the individuals who constitute the tribunal, provided for the decision of such questions in the last resort, but who, in this case, from their relation to it, are forbidden to exercise their judicial functions; and the intrinsic importance of the question itself, are my apolgy for publishing it as an appendix to this volume. REPORTER.

To JOSEPH B. BATCHELOR, Esq.,

Attorney General of the State of North Carolina:

SIR:—At the request of my brethren of the Supreme Court I address to you the following note. By the 39th section of the Revenue law, passed by the Legislature at their late session, ch. 37, it is enacted that a tax be laid "on surgeon dentists, practicing physicians, practicing lawyers, *and all other persons*, (ministers of the Gospel excepted,) whose practice, salaries, &c." We ask your opinion upon the following questions:

1st. Do the words, "and all other persons" of themselves, embrace all persons holding office under the State Government?

2d. If so, was it the intention of the Legislature to embrace those officers, whose salaries are protected by the Constitution as well as those which are not?

3rd. If you should be of opinion that it was the intention to embrace each class of officers, is it your opinion that the act is constitutional so far as judicial officers are concerned?

You will at once perceive the delicacy of the position in which the act places the Judges of the State. No question on the subject can be brought before us, either individually or collectively, in which we shall not have a personal interest. To free ourselves from the embarrassment in which we are placed, we have concluded to submit the questions, arising under that section of the act, to the highest law officer of the government. Your position, as Attorney General of the State, entitles each officer of the government to your opinion upon questions arising under the Revenue laws. You will recollect that the time is rapidly approaching when every citizen will be called on to render, under oath, a list of his taxable property. This will prove to you a sufficient apology for troubling you at this time on the subject, and for the request that you will furnish us with your opinion as soon as your convenience will permit. Whatever may be your opinion it shall guide our action in the matter.

Respectfully,

F. NASH, Chief Justice of
the Supreme Court.

WARRENTON, N. C., May 6, 1856.

SIR: In a previous communication I expressed the opinion that it was the purpose of the Legislature, by the 39th section of the late Revenue act, to impose a tax on the salaries of the Judges of the Supreme and Superior Courts. I propose now to consider the second question addressed to me: Is this law constitutional?

The taxing power in its integrity and fulness, is an indispensable attribute of sovereignty; "and however absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature." The relinquishment of this power is never to be assumed where a deliberate purpose of the State to abandon it does not appear. Yet, it may be relinqushed, wholly or in part, or its exercise may be restricted by the fundamental law*. The right to

* Providence Bank vs. Billings, 4 Peters, 514.

tax the salaries of the Judges is claimed as a part of that general taxing power conferred on the Legislature, and which is now exercised, not for the purpose of diminishing them, but to impose on them their proper share of the public burden. It is said to be analogous to the tax imposed on the salary of any other officer or person who receives a salary. It is admitted that a law imposing a tax on the salaries of other officers comes within this general taxing power, and is not a law impairing the obligation of the contract between the State and the officer. The power to tax the salaries of these Judges is the same as that to tax the salary of any other officer; if there be any restriction or exemption in their favor, it must be found in the Constitution itself.

The 2nd clause of the 2nd section of the 3rd article of amendments to the Constitution is in these words: "The salaries of the Judges of the Supreme and Superior Courts shall not be diminished during their continuance in office." This was an amendment to the old Constitution, which provided that these officers "shall have adequate salaries during their continuance in office." What was an adequate salary, was, *exnecessitate* to be determined by the Legislature, which had the power of fixing it. As this was a discretionary power, that body could declare an "adequate salary" to be any sum it thought proper. This power was liable to abuse, and though it would have been a violation of the spirit of the Constitution to have fixed these salaries at a sum clearly inadequate, yet the Legislature, being unchecked by any other department of the government in the exercise of this discretion, could violate at will the spirit of this part of the Constitution. This is not the case with the amended Constitution. By it the power of reducing the salaries of the Judges during their continuance in office, is taken away. They may be increased, but cannot be diminished. But to secure them effectually against diminution, this provision should extend to indirect as well as to direct legislation. The power to lesson these salaries by direct legislation, is now nowhere claimed; yet the passage of this act is an assertion by the Legislature of the power to diminish them indirectly; and if the Legislature has such power it can be used to any extent to which, in its

wisdom, it may see proper to carry it. The consequence of this proposition shows at once its falacy. The Constitution declares that the salaries of the Judges shall not be lessoned during their continuance in office; and while it is admitted that this takes from the Legislature all power to affect them directly, yet it is contended that there is an indirect way to arrive at the same end, and under cover of the exercise of another unquestioned power, to destroy them entirely. Every part of the Constitution must be of equal obligation; it must be considered as one entire charter of power, and no one power should be so exercised as to violate or defeat the purpose of another. All parts should be exercised as one consistent whole, and the execution of one part should be effected in accordance, and not in conflict, with any other portion. This should be the case with the effects and consequences, as well as in the principal objects intended to be accomplished. The exercise of clear and unquestioned powers should not be such as to violate, indirectly or incidentally, other portions of the same instrument. The principal purpose should be one within the limits of authority. It should be accomplished in such a way as not to produce unconstitutional results. The power of the Legislature to impose a tax on all other salaries is not questioned, as a general proposition. It can tax them to any extent—even to the extent of rendering the offices and employments valueless. In such cases the security against abuse is in the "interest, wisdom and justice of the representative body, and their relation to their constituents." But the power to tax the salaries of the Judges would be, in effect, a power to diminish them, and would, therefore, violate this restriction. In this case the framers of the Constitution have not thought it wise to trust to such security alone, and they, therefore, added the amendment, as quoted, as a further security. It is a restriction imposed by the supreme law on the legislative branch of the government.

Under the old Constitution the Judges held their offices during good behavior. Before the convention, which met in 1835, for the purpose of amending the Constitution, the Judiciary had attained a very elevated position, and commanded the respect and confidence of the State, and of the whole na-

tion. Yet, in the opinion of that body, this tenure of office did not sufficiently protect it in the firm and impartial discharge of its duties, and it was seen that a way was left open by which it might be most successfully attacked, if the Legislature should at any time be inclined to do so. It was not probable that persons would be found to desire an office of great labor, and greater responsibility, unless provided with an adequate and certain salary; and if the salary was left at the control of the Legislature, it would nearly always be the case that the salary would be most uncertain when the highest character of firmness and integrity would be required in the discharge of judicial duties; and when these faculties would be called into most important exercise, it would be in opposing the action of that body which had entire control over the salary. While it was, therefore, the purpose of the convention to place the salaries of these officers, as well as the tenure of office, beyond the control of the Legislature, by direct legislation, it would be to attribute to them a degree of folly utterly opposed to the reputation for wisdom which they have long enjoyed, to conclude that they have left open this indirect way to accomplish the same purpose. The reason why this amendment was made to the old Constitution, the debates in the convention do not disclose to us; but it must have been that that body, influenced by the lessons of wisdom drawn from the experience of the past, desired to throw around the Judiciary another defence and protection against any attack which might be made on it by the other branches of the government, and to secure it against all influences which might sway it from the fearless, faithful, impartial and independent discharge of its duties.

The Judiciary is the weakest branch of the government; "it has neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise of this faculty." The legislative is the most powerful branch, and has a constant tendency to the accumulation of power. The judicial can never make encroachments on the other branches, but requires all the protection which can be given to it to defend itself from encroachments by them. Next to permanency in office, nothing can

contribute more to the independence of the Judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here,—"In the general course of human nature a power over a man's subsistence amounts to a power over his will. The enlightened friends of free government everywhere have seen cause to lament the want of precise and explicit precautions in the State Constitutions on this head. Some of these have indeed declared that permanent salaries should be established for the Judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasion. Something still more pointed and unequivocal was evinced to be requisite." Federalists, No. 79. A provision was, therefore, adopted in the Constitution of the United States, of which the amendment in the State Constitution is a copy; and the same learned and eloquent vindicator of the national Constitution remarks that, "this, all circumstances considered, is the most eligible provision that could have been devised." The article is quoted with approbation by Chancellor Kent and Judge Story; two of the ablest Judges whose labors have adorned the American bench, or illustrated American legal literature. The necessity for such a protection, when sustained by such authority, will hardly be denied at the present day. It would be most unwise to protect against open and direct attack, and leave unprovided for the indirect, now the most dangerous because concealed. To impair and destroy the efficacy of this protection now, is to forget, in an age of rapid progress and untried experiment, the lessons of experience, and to cease to look to the past for wisdom to guide us in the future.

The power to impose a tax on these salaries carries with it the power to authorise the County Courts to do so also. The result would be that a salary which the Constitution declares shall not be reduced, would be subject to a discretionary power of taxation in the County Court of any County in which the Judge might happen to reside.

There is no reason why the sheriff of each County should collect all the public revenue; the law might declare it the *duty of any other officer* to collect. Suppose, then, the Leg-

islature had required the public treasurer to retain a tax of twenty dollars out of the quarter's salary of the Judge, payable on the 1st day of July, would it not be a palpable diminution of the salary, and therefore unconstitutional? Is it possible for ingenuity to invent a distinction between this case and that where the Judge receives his entire salary from the Treasurer, and is afterwards compelled by law to pay a portion of it to the officer who happens to collect the public revenue in the County where he resides? We are not, however, without authority on this point. The Constitution of Pennsylvania contains a clause similar to this of ours. The Legislature of that State passed an act imposing a tax on the salaries of the Judges, which the Treasurer was required to retain. The act was decided by the Supreme Court of that State to be unconstitutional. Commonwealth ex. relation, *Kepburn* v *Mann*, 5 Wates and Sergt. 403. This decision has the approbation of Chancellor Kent, (1 Kent's Comm., 294,) and is the only one directly on the point which I have been able to find.

It is, perhaps, unnecessary that I should declare the diffidence I feel at expressing the opinion that an act of the Leglature is unconstitutional; which is increased by the fact that that body contained some of the ablest lawyers of the State. But while I am compelled to differ with them, I do so with entire respect. It may be, and probably was, that this clause of the act was passed without particular attention having been directed to this view of it. On further examination they may be led to the same conclusion to which I have arrived. We have a written Constitution which is the supreme law, and by it all acts of government must be judged. It is honorable to institutions like ours, that one branch may differ with—even interpose to arrest the course of, another, without producing even a jar in the system; it continues its course, dispensing the great blessings of good laws well administered upon all.

The reasons why this opinion has not been before delivered, have been communicated privately; it is useless to repeat them here. No tax has yet been collected under this clause

of the act; I hope, therefore, it will be in time to answer all practicable purposes.

I have the honor to be, with high respect, your obedient servant,

JOSEPH B. BATCHELOR,
Attorney Gen'l. of N. C.

To Hon. FREDERICK NASH, Chief Justice of the Supreme Court of N. C.

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