NORTH CAROLINA REPORTS.

VOL. 5.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

1804 TO 1810

(INCLUSIVE).

REPORTED BY

A. D. MURPHEY.

ANNOTATED BY

WALTER CLARK.

REPRINTED BY THE STATE.
E. M. UZZELL & CO., STATE PRINTERS AND BINDERS.
1910.

CITATION OF REPORTS.

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N.C.Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
1 Hawks	"	8	"	3 " "	"	38	"
2 "	"	9	"	4 " "	"	39	"
3 "	"	10	"	5 " "	"	40	"
4 "	"	11	"	6 " "	"	41	"
1 Devereux Law	"	12	"	7 " "	"	42	"
2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUDGES OF THE SUPREME COURT

DECEMBER TERM, 1804, TO JULY TERM, 1810,
INCLUSIVE.

SPRUCE MACAY, JOHN LOUIS TAYLOR,

JOHN HALL, FRANCIS LOCKE,

DAVID STONE, SAMUEL LOWRIE,

BLAKE BAKER,[1] LEONARD HENDERSON,[2]

JOSHUA GRAINGER WRIGHT.[3]

[NOTE.—The Fifth and Sixth Districts were added in 1806. DAVID STONE and SAMUEL LOWRIE were elected.]

ATTORNEY-GENERALS:

HENRY SEAWELL, OLIVER FITTS.[4]

SOLICITOR-GENERAL:

EDWARD JONES.

REPORTER:

ARCHIBALD D. MURPHEY.

---

[1]Appointed 1808, *vice* MACAY, died.
[2]Elected 1808, *vice* BAKER, not confirmed.
[3]Elected 1808, *vice* STONE, resigned.
[4]Elected 1808, *vice* SEAWELL, resigned.

CASES REPORTED.

CASES CITED.

CASES

ARGUED AND DETERMINED IN THE

COURT OF CONFERENCE

OF

NORTH CAROLINA

DECEMBER TERM, 1804.

SAMUEL HOLDING, EXECUTOR, ETC., AND OTHERS, v. FREDERIC HOLDING.

Where a bill was filed to enjoin a judgment of the County Court in a cause in which equity jurisdiction had been conferred upon it by act of Assembly, it was dismissed because the County Court had jurisdiction of the question, and there was no allegation of fraud, surprise or mistake.

IN EQUITY. Samuel Holding, Sr., the testator, on 9 May, 1797, made and published his last will and testament, and therein, amongst other things, devised a tract of land to the defendant, and other tracts to the complainants, Arthur and John Holding, his sons; and directed that the several parcels of land thereby given to his three sons, Frederic, Arthur and John Holding, should be valued by good men, as woodland unimproved, and that the valuation so made should be kept by them until after the death of his wife. He further directed that after the death of his wife his executors should sell, at twelve months' credit, all his personal estate not before given away, and distribute the money in the following manner, that is to say: Pay the legacies named in the will, and after consulting the appraised value of the lands thereby given to his said three sons, pay unto him or them, as the case might be, such sum or sums of money so as to make each lot of equal value.

The testator, some time after the execution of the will, with an intention of passing to the said Frederic, immediately, all the interest and benefit which he intended him to (10) take under the will, and having in the interim advanced considerable sums of money to him, by deed, in consideration

of affection and twenty shillings, conveyed the lands mentioned in the will, and ten acres more, to Frederic, in fee simple, *"as a portion of testator's estate."*

The bill charges that the said conveyance was, at the time of its execution, understood and intended to be in full and complete satisfaction of all benefit intended to the said Frederic by the will; and that it was understood by the parties that the said Frederic was to relinquish all further claim on his father's estate by the will or otherwise.

The testator died, his will was proved; the widow died, and the executor sold the personal property bequeathed to her, as directed by the will. The present defendant, some years afterwards, preferred a petition to the County Court of Wake, praying a decree for the deficiency in value between the land devised and conveyed to him as aforesaid, and that devised to each of his brothers, and had a decree to that amount. The complainants prayed for and obtained an injunction.

L. Henderson for defendant.

BY THE COURT. No circumstances of *surprise, accident or fraud* appear to have intervened in this case to prevent the party from having a full hearing in the County Court, upon the points which form the ground of the application to the Court of Equity. Of these points the County Court, (11) upon petition, have *equal and concurrent* jurisdiction with the Court of Equity. The bill is, therefore, dismissed with costs.

Cited: Iredell v. Langston, 16 N. C., 395.

WILCOX'S ADMINISTRATOR v. WILKINSON'S EXECUTOR.

A second rehearing will be granted to reverse the judgment upon the first rehearing, if justice demands it.

THE complainant's intestate filed his bill against the defendant's testator, the object of which was to set aside an award which had been made between the parties, and to open accounts on which the award was founded; and the court, many years ago, passed an interlocutory decree to that effect. The defendant preferred a petition praying a rehearing, which was had, and his petition overruled. The accounts were referred to a master, who reported a large sum against the defendant. He filed exceptions to the report, which had stood some years for

argument, when he preferred a second petition praying a rehearing of the interlocutory decree. This petition was objected to on the ground that a second petition praying a rehearing of the same question would not lie.

This case was several times argued in the District Court and also in this Court.

BY THE COURT. The act of Assembly establishing the courts of equity in this State is silent with respect to the mode of proceeding on rehearing; but in order to ascertain the authority they are to exercise, and the course of procedure in cases not especially provided for, a general reference is made to the former court of chancery, and to the power rightfully incident to such a court.

It would be extremely difficult to discover the rules of practice which formerly obtained here, as well from the total want of any memorials of the decisions of this Court as from the loss or dispersion of the records.

The practice in England will be found unsuited and inapplicable, in a variety of instances, to the existing constitution of our courts of equity, which have therefore been obliged to make, occasionally, such rules as were necessary to (12) expedite the decision of causes, the details of which the Legislature did not enter into, but left to be arranged by the courts, under the above general reference.

But the shortness of time allotted to the equity business, and the consequent accumulation of suits in many of the districts, have concurred with other causes in rendering this branch of our jurisprudence little indebted to precedents of our own, and in compelling a frequent resort to the books to ascertain the practice in correspondent cases.

Upon the question now under consideration, no aid can be derived from any former decision in our courts, and it is probable that one of the kind has not before occurred. It must therefore be decided by an inquiry into the usual course of courts of chancery and the powers and authorities rightfully incident to them.

When we consider, however, that equity is administered in England in tribunals exclusively established for that purpose, possessing a ready access to all the means of information by which the science is illustrated, by men who make it the principal business of their lives, assisted, too, in difficult cases, by the common-law judges, and from whose decision there is nevertheless an appeal, it seems obvious that whatever liberality there is in rehearing causes there, ought more strongly to pre-

vail in our courts, destitute as they are of all these advantages.

It appears that this cause, so far as it respects the interlocutory decree complained of, has been once reheard; but that circumstance does not appear, in itself, of such decisive weight as to prevent a rehearing, more especially as it must have been at the time reheard before the same judges that made the decree. For it is laid down by a great judge of equity in England to be the practice there, that when a petition of rehearing is signed by two counsel, such credit is given by the Court to their opinion that the cause ought to be reheard, so as to order it to be
(13) set down. Ambler, 91. It is therefore entirely a matter of course to grant a rehearing, if counsel will certify in its favor. Yet the defendant might have appealed to the chancellor, if the decree had been made by the master of the rolls, or to the House of Lords, if made by the chancellor. Do not the principles of justice, then, plainly dictate when substantial reasons are shown against a decree, which when enrolled is final and unappealable, a second rehearing ought to be granted? It is not a matter of course to grant a second, as it is to grant a first; but whenever the court is satisfied with the reasons offered, it is apprehended that a second ought to be granted. And independently of the additional reasons in support of this mode of proceeding arising from the constitution of our courts of equity, there are several cases in the books which, when attentively considered, will go a great way towards authorizing it. In the case of Falkland and others against Cheney and others, in 1 Bro. Par. Cases, there was hearing and rehearing at the rolls, and upon both occasions the decree was in favor of the defendants, and the petition for the rehearing was by the plaintiffs. There was afterwards a rehearing before the chancellor, who confirmed the decree at the rolls, and after this there was a further rehearing before the Lord Keeper.

In *Porter v. Hubert,* in 2 Chan., 85, and 3 Chan., 78, the decree was made by a judge sitting for the Lord Keeper, who afterwards on the petition of the defendant, heard the case himself, assisted by judges. There was afterwards a second rehearing before the chancellor, assisted by judges.

In *Parker v. Dee,* 2 Chan. Cases, 210, there was a hearing and decree at the rolls, and upon the defendant's appeal, the cause was again heard before the Lord Keeper. On this, another hearing was granted on the plaintiff's petition, upon which the cause was heard by the chancellor, assisted by a judge;
(14) and the chancellor making a decree different from both the former decrees, the plaintiffs prayed a still further rehearing, and obtained it. These cases, even if there were no

others, strongly demonstrate how cautious the equity courts in that country are in revising and reconsidering decrees, and that before enrollment they are considered within the discretion of the court to order a rehearing.

Noel v. Robinson, 1 Vernon, 90, 453, 560, 466, also in 2 Chan. Cases and 2 Ventris, is a precedent of a second rehearing. There were three hearings and two decrees by Lord Nottingham. Lord North reheard the cause, and reversed Lord Nottingham's decree. But the cause was again reheard by Lord Jeffries, who reversed Lord North's decree, and affirmed Lord Nottingham's.

So it appears in *Nutt v. Hill,* 1 Vern., 16, and 2 Chancery Cases, 120, that there were two rehearings, one before Lord North, the other before Lord Jeffries.

The Court is, therefore, of the opinion that a petition for rehearing will lie, notwithstanding a former petition preferred and denied, if the justice of a case demands a rehearing. They are led to believe that the justice of the case requires it here, and therefore direct a rehearing before the Superior Court of Hillsborough District.

DEN ON DEMISE OF STANLEY v. TURNER.

From New Bern.

Seven years' possession without color of title is no bar to the right of entry.

EJECTMENT. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case, to wit:

"The plaintiff, and those whose estate he hath, owned the lot mentioned in the declaration, distinguished in the plan of New Bern by the No. 122, extending on Grave Street one hundred and seven feet three inches, and back in depth two hundred and fourteen feet six inches. The defendant, and those whose estate he hath, owned a lot distinguished by the No. 117, (15) adjoining the plaintiff's on the back end, being of the same width, and extending to another street one hundred and fifty-six feet six inches; both lots lay open and uninclosed until the year 1776, when the defendant, and those whose estate he hath, inclosed his lot with a plank fence, and in the inclosure included sixty feet of that part of the plaintiff's lot which adjoined his; and the defendant hath kept up the said fence and had an adverse possession of the said sixty feet of the plaintiff's lot in his inclosure ever since."

Upon this case the jury prayed the advice of the court "Whether such possession unaccompanied by any other title or color of title be sufficient to bar an ejectment." If the opinion of the court be in favor of the plaintiff, they find the defendant guilty, and assess sixpence damages and sixpence costs; if in favor of the defendant, they find him not guilty.

MACAY, J. The question is, whether an adverse possession for seven years without color of title bars the right of entry. The law in this case I had considered as settled, until lately, when it has been alleged that a naked adverse possession, without color of title, does not bar the right of entry.

To investigate this subject, it will be necessary to compare our statute of limitations, passed in 1715, with the statute of limitations in England, 21 Jac. I., ch. 16, that it may appear how the decisions upon this latter statute apply in principle to the cases affected by our own statute of limitations.

The act of 21 Jac. I., ch. 16, entitled "An act for limitation of actions, and for avoiding suits at law," declares in the first section, "That for quieting men's estates and avoiding suits at law, etc., all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements,
(16) hereditaments, whereunto any person or persons now hath or have any title or cause to pursue, or have any such writ, shall be sued and taken within twenty years next after the end of this present session of Parliament; and after the said twenty years expire, no such person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements or hereditaments; and that all writs of formedon in descender, formedon in remainder and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any right or title of entry into any manors, lands, tenements or hereditaments, now held for him or them, shall thereinto enter but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments but within twenty years next after his or their right or title, which shall hereafter

first descend or accrue to the same; and in default thereof such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former laws or statutes to the contrary notwithstanding."

And in the second section the statute declares: *"Provided, nevertheless,* that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert, non compos mentis,* imprisoned, or beyond the seas, that then such person and (17) persons, and his and their heir and heirs shall or may, notwithstanding the said twenty years expired, bring his action or make his entry as he might have done before this act, so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

Our statute of limitations passed in 1715, ch. 27, entitled "An act concerning old titles of lands, and for limitation of actions, and for avoiding suits in law," declares:

"SECTION 1. Whereas suits, debate and controversy hath heretofore been, and may hereafter arise by means of ancient titles to land derived from patents granted by the Governor of Virginia, the conditions of which patents have not been performed, nor quit-rents paid, or the lands have been deserted by the first patentees, or for or by reason or means of former entries or patents granted in this Government; for prevention whereof, and for quieting men's estates, and for avoiding suits in law:

"SEC. 2. Be it enacted, etc., that all possessions of or titles to any lands, tenements or hereditaments whatsoever, derived from any sales made, either by creditors, executors or administrators, of any person deceased, or by husbands and their wives, or husbands in right of their wives, or by indorsement of patents or otherwise, of which the purchaser or possessor, or any claiming under them, have continued, or shall continue in possession of the same for the space of seven years, without any suit in law, be and are hereby ratified, confirmed and declared good and legal to all intents and purposes whatsoever, against all and all manner of persons, any former or other title or claim, act, law, usage or statute to the contrary notwithstanding.

"SEC. 3. That no person or persons, nor their heirs, (18) which hereafter shall have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make

claim, but within seven years next after his, her or their right or title, which shall descend or accrue; and in default thereof, such person or persons so not entering or making default shall be utterly excluded and disabled from any entry or claim thereof to be made.

"SEC. 4. *Provided, nevertheless,* that if any person or persons that is or hereafter shall be entitled to any right or claim of lands, tenements or hereditaments shall be, at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned or beyond seas, that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her or their suit, or make his, her or their entry, as he, she or they might have done before this act; so as such person or persons shall within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times or limitations herein specified; but that all possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatsoever, that the expectation of heirs may not in a short time leave much land unpossessed and titles so perplexed that no man will know of whom to take or buy land."

Under the statute of 24 Jac. I. it has been held, "that no person can in any case bring an ejectment, unless he has in himself a right of entry; for as he is supposed to have entered with a good title on the land and made a good lease to the fictitious lessee, the law will not suppose an entry made to make a lease whereby the title is to be tried. Esp., 430; 3 Bla., 206. Therefore, when it happens that the person claiming title to the lands has no right of entry, he cannot maintain this action."

(19) But though a good and lawful title may in fact subsist in the plaintiff, yet he may be barred of his entry, and so of his recovering by this action, under 21 Jac. I., ch. 16, which enacts that no person shall make an entry into lands, etc., but within twenty years after his right and title shall accrue, with the usual savings of *feme coverts,* infants and persons insane, etc." "Therefore, if the lessor of the plaintiff is not able to prove himself or his ancestors to have been in possession within twenty years before the action brought, he shall be nonsuited."

"The possession or entry of the lessor of the plaintiff within twenty years, which is necessary to give him title, must be an actual possession or entry, not a presumptive or implied one.

Esp., 432. So that the twenty years' possession, which is sufficient to bar the ejectment or to give a title, must be an adverse possession, for when it appears not to be adverse, the statute of limitation does not run." *Id.*, 433. In *Reading v. Royster*, 2 Salk., 423, this doctrine is more fully explained. Also, in Cowp., 217. It is to be submitted to the jury to say what is an adverse possession. It is not necessary that a man should be expelled from his possession with force. The getting of possession lawfully, but afterwards holding against the will of the owner, will amount to an adverse possession. Proof of possession within twenty years is not only necessary to support the title of the lessor of the plaintiff, but such possession for twenty years without interruption is a good title in itself, to recover in ejectment, without any other; for an uninterrupted possession for twenty years is like a descent which tolls an entry, and gives a right of possession, which is sufficient in ejectment. So that, though the defendant be the person who has the legal right to the premises, yet he cannot justify ejecting the plaintiff, who has had twenty years previous peaceable possession.

Let us now examine how much stronger is our statute of limitations in favor of a naked possession, if the expression be allowable. It appears from the preamble of the act that it had been the practice of the Governor of Virginia to (20) grant lands lying in North Carolina, which grants oftentimes covered lands granted by this Government, and possessions being held under such grants, titles to lands became so doubtful that no person knew when he was safe in purchasing. It was highly necessary to encourage the settlement of the country, which could not be done unless men could be secured in their possessions, which they then had or might afterwards acquire. This act was passed to effect this object. Taking this act as it regards possessions only, it will read and be construed in this manner: "That all possessions of lands, tenements and hereditaments whatsoever, derived from any sales made by creditors, executors or administrators of any person deceased, or by husbands and their wives, or husbands in right of their wives, or by indorsement of patents, or otherwise, of which the possessor, or any claiming under him, have continued, or shall continue in possession of the same, for the space of seven years without any suit in law, shall be and are hereby ratified, confirmed and declared good and legal to all intents and purposes whatsoever, any former title or claim, act, law, usage or statute in any wise notwithstanding." The act would have the same reading with respect to titles made by creditors, executors, etc., and have the same construction. But

this act has an expression which seems to guard every possible case, *"or otherwise,"* so that the possession for seven years, no matter how acquired, would be a good title, unless the law would look upon and consider that possession, the possession of both, or, in other words, the defendant holding the possession for the lessor of the plaintiff.

In no part of this act is the color of title mentioned, nor does it appear that it ever was deemed necessary. It has been said that a title to lands, defective in itself, but attended with seven years of peaceable possession, shall ripen into a good title; but if the title be ever so old, and seven years of peaceable possession have not accompanied it, the title is good for
(21) nothing. Then the possession makes the title valid. Why, then, should not the seven years' possession be good? It is surely the substantial part of the title, and that which gives it validity, under the statute of 21 Jac. I., and in my opinion it does the same under our own statute. I have understood it was so considered before the revolution of 1776, but of this I have no knowledge, except from the old practitioners.

But admitting the second section has no relation to the present question, the third section makes it absolutely necessary that every person shall enter or make his claim within seven years after his right or title shall descend or accrue, otherwise he shall be utterly excluded and disabled from any entry or claim thereafter to be made. In the latter part of the proviso, "But that all possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatsoever, that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land," in my opinion, clearly establishes that the General Assembly had only a possession in contemplation, and that possession unattended with any color of title whatever. Giving our act of Assembly this construction, all the cases on this point arising on the statute of 21 Jac. I. apply to our act of limitations; and seven years' adverse possession will vest in the lessor of the plaintiff such title that if he should be turned out of possession, or deprived of his possession, he could recover the same in ejectment. I am therefore of opinion the plaintiff ought not to recover. But by

TAYLOR, HALL and LOCKE, JJ. Seven years' possession without color of title is not sufficient to bar the plaintiff in ejectment.

STANLEY *v.* TURNER.

JOHNSON, J.* The act of 1715, ch. 27, has two objects in view, as appears from its title. The first is to cure (22) defective titles, after a possession of seven years; and for this purpose the second section enacts that *all possessions or titles,* etc., derived from any *sales* made, etc., where the purchaser, etc., have continued or shall continue in possession seven years, without, etc., shall be declared good, etc. The words of the act being *possessions or titles,* in the disjunctive, if *by title* is intended *conveyance,* perhaps a seven years' possession under a sale without a conveyance might be held a good title under this act, and extend so far as to bar not only an ejectment, but a writ of right also.

The case in question comes under the third section, which provides for the second object of the act, *Limitation of Actions.* It takes away the entry or claim within seven years after the right accrues; it says nothing of *sales or title.* It seems intended to extend further and embrace cases not within the provision of the second section, and is surely a copy of the statute of 21 Jac. I., ch. 16. The only difference which I have been able to discover is that the word *"claim"* is inserted in our act of Assembly, but is not to be found in the statute. This section, therefore, of the act of Assembly may very well be construed by the rules laid down in decisions on that statute, which was certainly in force in this country at the time of making the act, as our charter does not bear date until many years after 21 Jac. I.; and it has been uniformly held under this statute that a naked possession of twenty years will bar an ejectment. Bac. Abr. under the title *Limitation of Actions;* Vin. Abr. *Limitation;* Jenk., 16, pl. 28; 3 Com. Dig., Ejectment A. And it is laid down in 2 Salk., 421, that a man may recover in ejectment on showing a possession of twenty years, and that he was afterwards ejected. It therefore appears to me that a possession of seven years without any actual *sale or conveyance* will bar an entry, and is a good title in ejectment under our act of Assembly.

NOTE.—The reasoning which determined a majority of the judges to the opinion "that seven years' possession without color of title will not bar an ejectment," will be found in the following observations of John Haywood, Esq., late one of the judges of the Superior Courts of Law and Courts of Equity in this State. The case of *Armour v. White,* tried before his Honor, *Alfred Moore, Esq.,* at Edenton, in April, 1799, gave rise to these observations. In that case Thomas Stanton, being seized of a tract of land, conveyed 100 acres thereof to William Armour, from whom the same descended to the lessor of

*When this case was argued and submitted, JOHNSON, J., was on the bench, and before he resigned his seat he drew up this opinion, which was filed with the clerk of the Court.

the plaintiff, who in 1768 removed to South Carolina, and never made any claim after his removal until a little time before the commencement of this suit. The defendant also claimed under Stanton,
(23) who in 1714 assigned to Guthrie the land comprised in a certain plat. Guthrie obtained a patent for the same in 1716. This patent was for 110 acres, the lines of which included part of the 100 acres in dispute; and under this patent the defendant claimed the whole 100 acres. He and those under whom he claimed had possessed a part of the 100 acres upwards of forty years. They had cleared and cultivated part of an adjoining tract and extended their clearing and cultivation over a small part of the 100 acres lying within the limits of Guthrie's patent; and the defendant proved by several old deeds for lands adjoining that part of the 100 acres which was not included in Guthrie's patent, that the lines of the 100-acre tract on that side were reputed the lines of those under whom he claimed.

MOORE, J. The possession of a part of a tract circumscribed by marked lines is a possession of the whole tract within these lines. If the defendant and those under whom he claims possessed the part mentioned in the evidence, claiming under Guthrie's patent, their possession extends to the lines of that patent and no further; but if they possessed this part, claiming as far as the lines of the 100-acre tract, then their possession extends to the whole tract. "A naked possession for seven years, without entry or claims, will bar the right of entry of all adverse claimants; and a possession with a color of title for seven years will give to the defendant in possession an absolute right against all others forever."

This distinction, observes Mr. Haywood, between a seven years' naked possession and a seven years' possession with color of title is, as I apprehend, founded upon a wrong construction of the act of limitations. It supposes the second section was intended to operate upon future cases in such manner as to give a right to the defendant, and that the third section was intended to operate by tolling the plaintiff's entry, or taking away his rightful possession, so as to disable him from recovering in ejectment, without affecting the property or mere right, which he may recover in a writ of right. I shall attempt to show that this construction is erroneous, and to point out the genuine and true meaning of the act, it being of very great importance to the public that this act should not be misunderstood.

First, then, as to the second clause: It was passed in the year 1715, prior to which period no office for the registration of deeds and mesne conveyances had been established; consequently, bargains and sales were not used in this country, for they were void unless enrolled within six months. The act of 1715, ch. 28, first established these offices. Fines and recoveries were not in use. That is declared in the preamble of the act of 1715, ch. 28: Feoffments or livery and seisin are spoken of in the sixth section of 1715, ch. 38, as a mode of conveyance practiced in Great Britain, implying that it was not in this country. There is no vestige upon the records of any court to show it ever was practiced in this country prior to 1715. There could not have been, then, any certain known mode of conveyance by which one individual could convey lands to another; and this difficulty, we may readily suppose, was rendered not the less perplexing by the illiterateness of the first settlers. All or the

greater part of the conveyances which had been made must have been liable to be invalidated for want of legal forms and solemnities. We learn from the act itself that the creditors had sold or caused to be sold the lands of their debtors, though there was no law for the sale of debtors' lands until 5 Geo. II., ch. 7, in 1732. Executors and administrators had sold lands, which no law justified; husbands and wives had sold the lands of the wives, which was illegal before the act of 1715, ch. 28; or husbands had sold the (24) lands of their wives, for which there never was any law; and sometimes, patentees, knowing of no better mode, had conveyed by indorsement of patents, or by some other similar means. All such conveyances were invalid; every possessor under such titles was liable to be ousted. Under such circumstances the country must necessarily have been in a state of great inquietude. There existed two great evils, demanding the interposition of the Legislature: first, the want of a certain established mode of conveyance; secondly, a confirmation of the titles thus irregularly obtained. The first they remedied at this session by the two acts of 1715, ch. 28, entitled, "*Feme coverts*, how to pass lands," and 1715, ch. 38, entitled, "An act to direct the method to be observed in conveying lands," etc. The latter they provided for by the clause now under consideration. All possessions of or titles to any lands derived (not which shall be derived) from any sales made, either by creditors or administrators of any person deceased, or by husbands and their wives, or husbands in right of their wives, or by indorsement of patents or otherwise, of which the purchaser or possessor or any claiming under them have continued or shall continue in possession of the same for seven years, without any suit in law, be and are hereby ratified, confirmed and declared good and legal to all intents and purposes whatsoever, against all and every manner of persons, etc. Here is not any exception in favor of infants, *feme coverts*, etc. When speaking of titles, it mentions them in the perfect tense, "derived," equivalent to "already derived," because such only were the titles they intended to ratify. But, considering that some such titles had been derived within seven years next before that session, and would not be ratified for want of a seven years' possession, unless provision were made for them, when they came to speak of that they use both the perfect and future tense, "have continued or shall continue," the former relating to titles made more than or as long as seven years before; the latter to titles derived within seven years before, but which were equally with the others to be ratified, provided a seven years' possession should be completed, though part of it might be after the act. They speak of them as invalid titles (though many of them, such as those by indorsement of patents and by husbands and wives, came from those who actually had the title and were certainly good unless for want of legal form), which shall be ratified and declared good and legal, importing that they were not so but for the act. Now, the General Assembly could not mean to ratify and confirm such illegal conveyances if made afterwards; for, in order to prevent the like inconveniences and inquietudes for the future, they at this session declared how lands shall be conveyed; and, moreover, that no conveyance shall be good unless acknowledged or proved and registered. Shall all such unproved, unacknowledged and unregistered titles as those mentioned in the second clause, and which are here expressly prohibited, be still continued and still practiced and confirmed? Did they suppose, notwithstanding the act

pointing out and ascertaining the legal method of conveyance, that the irregular methods mentioned in the second clause would still be used? The contrary is certainly evident. They could not have supposed that after this session the people of this country would so generally disregard the mode prescribed as to make it expedient beforehand to provide for such irregularities; and, therefore, the second clause must have been made with a retrospective view. Again, there is no exception in this clause in favor of *feme coverts*, etc. But the titles here spoken of are to be confirmed and declared good and legal against all and all manner of persons. The object of the Legislature, that of quieting the country with respect
(25) to all existing causes of uneasiness, requires that no exception should be made; for then *feme coverts*, infants and the heirs of such, might still be a cause of apprehension to great numbers of settlers, and the remedy would be partial and incomplete. Whereas, they intended an effectual and complete one, which in three or four years should put all things in quietness. Therefore, the exception was designedly omitted out of this clause, and the strong expression, "all and all manner of persons," inserted, though that exception is made in the third clause. Now, to try the effect of the second clause: let it be admitted that it has an operation upon future cases, and suppose a husband has conveyed the land of the wife since the act, and that the possessor has continued seven years in peaceable possession, the wife being alive all the time: will such a possessor have a good right forever, against all and all manner of persons, the *feme covert* not excepted, although in the exception to the third section her title is saved to her till after the coverture? Either the possessor will not have a title under the second clause or the *feme covert* will lose hers, though saved by the fourth; or the repugnance must be avoided by giving to the second clause a retrospective and not a future operation, in which case the whole is consistent. Again: Let us suppose that the husband and wife, since the act, have joined in a conveyance of the wife's lands, as directed by 1715, ch. 28: would not such conveyance be good without the aid of the act of limitations? And would it not follow that the Legislature were occupied to no purpose when busied in declaring that such conveyance should be confirmed when or after the lands should have been possessed for the space of seven years? And as such a conveyance, before the act, did really stand in need of assistance *aliunde*, is it not fair to conclude the clause in question respected such a conveyance made before the act, but not such a one when made after it? It may be further observed that if by this clause the defendant's title be ratified forever as to future cases, it is a perpetual bar to the plaintiff; and then, if it can be shown as to future cases that the third clause operates also as a bar to the plaintiff, it follows either that both clauses are for the same purpose (which cannot be imagined) or that the second regards past transactions, whilst the third and fourth regard future ones; and it will also follow that the second bars perpetually, when there is possession with color of title; and the third bars by possession without color, as the opinion I am controverting supposes; that either the second is useless (for why require color of title, when the next clause dispenses with it altogether, and forms a complete bar without it, producing the very same effects without as the former does with it?) or that the second respects past transactions only. Now, what say the third and fourth clauses? No person shall enter or make claim but within seven

years, and in default shall be disabled from any claim thereafter to be made, except *feme coverts*, etc., who have a longer time allowed: "But that all such possessions, without suing such claim as aforesaid, shall be a perpetual bar, etc." If a naked possession, as the opinion supposes, under these clauses, will work a bar, is not that bar, however operated, a perpetual one? And admitting the plaintiff to be perpetually barred, the defendant's title is perpetually confirmed; and then the third and fourth clauses, without any color of title, operate the same effects precisely as the second clause with color of title, and consequently the second was never of any use, unless it related to titles before the act; which, if it did, it was as beneficial and as useful a clause as any in the act. These considerations seem to me to prove that the second clause has not a prospective view, and that with regard to it as relating to cases after the act, it is erroneous to say a color of title with seven years' possession will give a right in fee. For, though a color of title with seven years' possession does, as I contend, really have that opera- (26) tion, it is not by reason of anything contained within the second clause, but arises from the true construction of the third and fourth clauses. I think it may therefore be fairly concluded that the latter member of the above distinction, as founded on this clause, is not warranted by it.

And this brings us to the other part of the distinction, namely, that a naked possession for seven years tolls the right of entry of the plaintiff, and bars his ejectment, but not his writ of right. This is a construction upon the third and fourth clauses, and I shall endeavor to show that it is equally erroneous with the other. In addition to controversies arising from informal conveyances, there were others of a different complexion: conveyances made or to be made by persons having no title, though seeming to have one, or being understood to have it. Before the extension of the boundary line between Carolina and Virginia, lands supposed to lie in Virginia had been granted by the Governors thereof, and had been neglected and deserted by the patentees, and had been again granted by the lords proprietors. Entries of lands had been made in the land office, and the same lands were afterwards entered by others. All this appears in the preamble of the act; and by such means (as another part of the act complains of) titles had become so perplexed that no one knew of whom to take or buy lands. If he purchased from a patentee or grantee under him, an elder title might be produced and he be turned out of possession. Thus it happened, as the act also complains, that the dread of elder titles and the expectation of heirs, under dormant deeds and grants, were "likely in a short time to leave much land unpossessed." It was necessary to remove these obstacles to population, and to that end to provide some criterion by which a man might know of whom to buy lands, notwithstanding the several conflicting grants or deeds for the same; and to insure him of security, notwithstanding there might be unknown prior grants to that under which he purchased. Every instance given, either in the preamble or body of the act, evinces an intention to settle disputes between claimants under opposite deeds or grants for the same land. Ancient titles to lands granted by the Governor of Virginia were likely to disturb those who had obtained titles here (for I understand such grants were legalized by compact between the King and the lords proprietors); or the lands had been deserted by the first patentees and a later patentee had taken possession; or

former entries or patents threatened the titles or possessions under later entries or patents, and proves that the person to be protected by the provisions of the act was one who had an appearance or color of title by a subsequent deed or grant, as well as the person to be barred. Such were the evils to be remedied, and such the design of the Legislature. And they have applied the remedy in the following words: "No person nor persons nor their heirs, who hereafter shall have any right or title to any lands, tenements or hereditaments, shall enter thereunto, or make claim, but within seven years next after his, her, or their right or title which shall descend or accrue; and in default thereof such person or persons so not entering or making default shall be utterly excluded and disabled from any entry or claim thereafter to be made. If any person that is or shall be entitled to any right or claim of lands, tenements or hereditaments shall be at the time the said right or title first descended or accrued, come or fallen, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned or beyond seas, that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her or their suit, or make his, her or their entry, as he, she or they might have done before this act; so as
(27) such person or persons shall within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas within eight years after the title or claim becomes due, take benefit and sue for the same; and at no time after the times and limitations herein specified. But that all possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatsoever; that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed that no man will know of whom to take or buy lands." Upon these clauses the opinion in the case of *Armour v. White* admits that an adverse possession is necessary, for this is implied in the words "enter or claim," each of which technically signifies a getting of the legal possession from one who is actually in possession, either by going upon the land or claiming as near to it as he dare go, for fear of the possessor; and is unequivocally expressed in the exception to the third clause, "but that all possessions held without suing such claim as aforesaid," etc., referring to the terms used in the third clause, and signifying the understanding of the Legislature to be that such claims as are spoken of in the third clause were to be exerted within the limited time against some actual possession. So far, the opinion is right; for it would be absurd to say a good title shall be barred by not entering within seven years, when no adverse claim or possession hath been set up. But whence is it inferred that these claims bar the right of entry only? The policy of the act was that settlers should know of whom to purchase with safety—not a temporary title, capable of resisting an ejectment only, but a permanent one, capable of encouraging to clear, cultivate and improve the lands, and such as they might transmit to posterity; and answerable to this policy, the possession here spoken of "shall utterly exclude and disable" the party out of possession from any entry or claim thereafter to be made. And for fear these words were not sufficiently expressive, it is added that all such possession shall be a perpetual bar to all persons, etc. It might possibly have been understood from the wording of the former clause, "shall be utterly excluded from any entry or claim thereafter to be made," that the Legislature meant only to prevent

the entry or the action founded upon the right of possession, leaving the property or mere right unaffected, and to obviate such a mistake they have in the next clause carefully varied the expression, "shall be a perpetual bar to all and all manner of persons"—not only the claim and entry, but all persons shall be barred. Of what? Not of any particular action or means of getting possession, but generally and perpetually. Again: *Feme coverts* and the like persons "shall sue" within the time limited for them, "and at no time afterwards." Can it be meant that they shall never sue nor have any action whatsoever afterwards, and that all others may sue after the time limited for them, in a writ of right! When their disabilities are removed, they stand, in the view of reason and justice, in the same predicament as other claimants—certainly in no worse; they are not more in fault for not suing within the prescribed time than other claimants, yet they shall never bring any action afterwards: they are excluded from the privilege of suing, forever; and, consequently, so also must all others be, unless a sufficient reason can be assigned for placing these favored persons on a worse footing than others. Supposing this to be law, it were far better for them that the exception intended to benefit them had not been made; for, then, after the seven years were expired they might still sue a writ of right within sixty years, as the opinion supposes others may. Since, then, the bar formed by these clauses is a *perpetual* bar against all *claims*, all *entries*, all *persons* and all *suits*, it takes from the plaintiff all remedy, and consequently all title and right, and vests in the defendant, necessarily, the absolute dominion forever; or, in the (28) language of the law, an indefeasible fee simple. And as this accomplishes the object of the Legislature, which was to quiet possessions and to furnish the means of knowing with certainty from whom out of many claimants to purchase or buy lands with safety, and as that object would not be accomplished were the bar only temporary and the title still liable to be questioned in a writ of right, it seems to me that there can be little or no doubt but that is the true operation of the act, and of course that it is a mistake to say it bars the right of entry only. This reasoning is confirmed by the fact that there is no instance to be found in the judicial records of this country where a writ of right was ever instituted and maintained. If it were a sound position that the bar is but temporary, there must have been a great number of occasions rendering the use of that writ essential to the recovery of lands, the right of possession to which had been lost, though not the right of property; and there not being a single instance since 1715, is strong evidence to prove that it cannot be used, and that the exposition given by our ancestors, who were cotemporary with the first operations of the act, was that the clauses in question operated a perpetual bar. Upon no other ground can it be accounted for that the writ of right was never used; and, indeed, no reason can be assigned why the Legislature should desire that the plaintiff should be barred of his ejectment, but at the same time be able to recover in a writ of right. What motive could they have? How would that have promoted the design which influenced them in passing the act? Their design was to do away with the obstacles which opposed the settlement of the country. These were the uncertainty and perplexed situation of titles and the expectation of heirs under former grants. Was it promotive of this design that the possession introduced by the act should not render the title complete to all purposes, but should leave the possession

as much exposed to those heirs and their actions as before? and those who purchased under such possessions, no more certainty of an indefeasible title than before? I forbear to say anything of the nature and form of a writ of right, and of those by whom it is to be used, and of other circumstances incident to it; it is sufficient for my present purpose to be enabled to discover no substantial reason for preferring a recovery under that writ to a recovery in the action of ejectment, and it appears clear to me that such a distinction could not have been intended for any purpose, and therefore that it was not intended at all.

That a naked possession will operate the bar spoken of in the third and fourth clauses is as unfounded as the rest of the position. The remarks already made upon the causes of passing the act show that it was made to settle disputes among claimants under different grants for the same lands, and with that view only. This is the very reason why it never extended to the lords proprietors, so as to bar them by a naked possession of their lands, as it would have done (they being equally subjects with the settlers of the country) had it reached the case of disputes arising upon possessions unaccompanied with deeds or grants, or *naked* possessions. In the times preceding the act none pretended to hold lands by possession against a title by a deed or grant, nor was it conceived that possession could either make or bar a title. How could it, when no law existed for that purpose? 21 Jac. I., ch. 16, was not in force, nor, indeed, any statute made after the fourth year of his reign in the year 1607, that being the era of the settlement of the country legally authorized and continued. For want of such a property inherent in possession naturally, the act was passed to give it that property in certain instances and under certain restrictions. Before this period (29) no disputes were known between claimants by grant on the one hand and bare possession on the other. The law of those days rendered the grantee's title incontestable, when opposed by an adverse naked possession; no danger was to be apprehended in purchasing from such a grantee on account of the adverse possession. It is impossible in the nature of things that the act could have had for its object any disputes of that nature, which had not then been known or heard of, nor were foreseen. The idea of title by naked possession arose after the act, and originated in a misconception of its meaning, and has become a new source of litigation unknown to former times and not anticipated by the framers of the act. The claiming of lands by a naked possession against a title by a deed or grant has encouraged those having no title, colorable or otherwise, to settle upon the lands of others and commit trespasses, with a view of acquiring a title by a continuation of such trespasses for seven years together, and has made men believe that actions must be instituted against such trespasses to prevent the acquisition of title. Thus, an act which breathes the spirit of peace and quietness, which flowed from the solicitude to prevent lawsuits, as far as possible, and to remove the causes which perplexed men's titles, has been made the disturber of repose, the mother of inquietude, the stirrer up of controversies, and a net to entangle men's titles. Instead of discountenancing attempts to get lands by unfair means, without purchasing from the lords proprietors, or from those who have purchased from them; instead of repressing any practice of settling upon the lands of an honest purchaser, knowing that the settler commits a trespass in doing so, and the land belongs to an-

other and not to himself, it is made to encourage and to cherish such attempts and practices. We may perceive the soundest policy and justice in protecting the possessions and confirming the titles of those who have paid for their lands, obtained grants and deeds, and settled down upon them, and who have cleared, cultivated and improved them for seven years together, believing them to be their own; and who in all that time have received no information from a prior grantee or those standing in his place, of their better title. But we can perceive no motive for extending the same protection to a naked possessor or trespasser. A design of that kind is not to be inferred either from the nature of those controversies which existed prior to the act, the causes which gave birth to the act, or from any of the terms employed by it to signify its meaning, when compared with and explained by other parts; and therefore there is no ground to believe it to have actuated the makers in any degree: the less so, as the immediate consequences of the doctrine, the incompetency of the ejectment but the competency of the writ of right after the seven years, fabricate an arbitrary distinction, unfounded when applied to our circumstances, in any principle of convenience, policy or justice. For, with respect to the intention, why not recover in the ejectment after the seven years as well as in the writ of right? A distinction which has never been recognized by the practice of those who have gone before us has never been found necessary to be admitted as a part of our law prior to 1715 to 1799, during all which time the landed interests and rights of the people have been satisfactorily secured and protected, without the aid of the writ of right.

Innovations in law, like innovations in government, are dangerous experiments, since the extent of their influence cannot be foreseen. And it is now much to be doubted, since the act of 1778, ch. 5, whether, supposing a writ of right to be necessary, it can be deemed a part of the law of this State. From the foregoing remarks, admitting them to be just, it is to be collected that the second section of the act of limitations regards irregular, invalid and (30) informal conveyances, made before the act passed; that the third and fourth sections relate to cases where several persons have deeds or grants perfect enough in form for the same tract of land, and some of these persons under deeds or grants of a posterior date take and continue the possession for a considerable length of time; and that the true meaning and operation of the latter clauses are to confirm forever the title of all such persons having a color of title, who may continue in possession under such title for seven years without entry or suit in law, except as against persons laboring under incapacities mentioned in the fourth clause, and as against them, also, if they shall not sue within the time limited after the disabilities shall be removed, but not to create any title *de novo*, upon the ground of possession or otherwise.

The foregoing observations of Mr. Haywood have had the effect of changing the current of decisions and unsettling the opinions of the profession as to the construction of the act of limitations; and at the distance of an hundred years from the passage of this act, more diversity of opinion seems to exist as to its true meaning and operation than at any preceding period; and perhaps nothing short of legislative interference will remove difficulties which present themselves in any view which has been taken of this act. It may be doubted whether in the present condition of the country, whilst men

claim title to large tracts of land and have the actual possession of only a small part thereof, and when the lines of those tracts are neither distinctly marked nor generally known, it be practicable to establish any rule upon the subject which will not be liable to abuse and attended with inconvenience.

Upon general principles, regardless of the phraseology of the act of limitations, a possession which is to bar one man of his right and vest that right in another ought (1) to be an honest possession, or at least honestly acquired; (2) the extent of the claim of the possessor ought to be ascertained and notorious; and (3) the possession should be continued for such time as would raise a violent presumption that no adverse claim exists; and it is fair to presume the Legislature intended that the possession under the act of 1715 should be of this character. The Legislature could not have intended to protect fraudulent possessions, nor possessions evidencing no certain extent of claim. It would seem strange that the law, which searches fraud in all its recesses and delights in expelling it wheresoever else it can be found, should in cases of possession spread over it the mantle of protection; and it would seem equally strange that the law should give any operation to a possession which does not furnish to the world any evidence of the extent of the possessor's claim—to a possession which gives no notice whether the possessor claims five hundred or a thousand acres. In England (and it may be the case in this country an hundred years hence) little inconvenience exists upon this point; the extent of every possessor's claim is notorious. But here it often happens that a man settles down upon a tract of land without making known the boundaries to which he claims, and he subsequently sets up a claim to suit his convenience. This evil seems to have determined the judges to the opinion (so far as that opinion was founded upon reasons of policy) that color of title was necessary to give operation to a seven years' possession. The experience of several years has rendered it very questionable whether there was not more policy in the rule formerly enforced, "That seven years' possession, with a claim to known and marked boundaries, should be operative to bar the entry of
(31) adverse claimants." For, under this rule, to enable a man to ripen his possession into a title, it became necessary for him to have known and marked lines or natural boundaries, and to make known his claim to those lines or boundaries for the space of seven years together. Whereas, under the present rule, a man may settle down upon a tract of land under color of title and claim to the boundaries called for in his title, without even knowing where those boundaries are. A beginning corner is marked, and the lines of his land have not been surveyed; a plat of the lines is made out by the surveyor and the deed written from the plat. This rule substitutes the color of title, and the place of "the claim to known and marked lines or natural boundaries" required by the former rule. Which rule best ascertains the extent of the possessor's claim? The possessor with color of title is supposed to claim to the lines called for in his deed; but the rule now enforced does not require the possessor to make out those lines, nor to make his claim to them notorious, nor even to register his deed, that others may be informed what lines are called for in it. What is the consequence? A man having a deed for a large tract of land settles down upon one corner of it and resides there for seven years, during all which time he neither has his land surveyed, the lines marked, nor his deed registered; at

the end of seven years he registers his deed, has his land surveyed, and the lines are found to include one-half of an adjoining tract for which his neighbor has an elder deed, but not the actual possession; and upon the principle that the possession of part is the possession of the whole tract covered by his deed, he gets his neighbor's land without having given to him or to any other person notice that he had a claim to it. The rule requiring color of title is thus made to work the most manifest injustice, and become a most convenient means of effecting fraud. It surely, then, is an object worthy of further judicial inquiry, whether there be anything in the act of 1715 imperatively demanding color of title to give effect to a seven years' possession; and, if there be not, whether the interest of the community will not be consulted by reviving and enforcing the former rule, and enlarging its operation, by permitting the man against whom the seven years' possession is set up to defeat this possession by showing that it had been fraudulently acquired; that the possessor knew at the time he acquired possession the title was in some other person; in other words, that he had such notice as was sufficient to put him upon an inquiry as to the title of the true owner.

The statute of 21 Jac. I., ch. 16, had been in operation for more than a century when the act of 1715 was passed. Its construction had been settled; and if it be admitted that it was not in force in this State, it cannot be denied that its construction was well known to the framers of the act of 1715. They knew that under that statute the courts had uniformly held that twenty years' naked possession barred the entry of adverse claimants, except of those laboring under the disabilities enumerated in the statute. When, therefore, they drew the third and fourth clauses of the act of 1715 (which were to operate upon future cases) in the same words, to every substantial purpose, with the statute of 21 Jac. I., they must have intended that those clauses should receive the same construction with the like clauses in that statute. The earliest accounts which have been transmitted to us of the construction which the courts in this State gave to this act, inform us that they had adopted the construction which had been given to the statute of 21 Jac. I. upon this point. The construction continued to be given to the act for more than twenty years after the American Revolution, when the doctrine of color of title was advanced, which, being urged with much zeal and ability, gained converts, until it supplanted the construction which the act had received for nearly a century. It is not intended to discuss this point at length, but to invite further attention to it, that something more may be done by the proper tribunals "to quiet men in their possessions and to avoid suits in law."

JAMES CRITCHER v. WILLIAM PANNELL.

A horse-racing contract must be in writing, and parol evidence is not admissible to contradict it.

THE plaintiff and one George Parker, on 24 Decem- (32) ber, 1799, by articles under their hands and seals, agreed

to run a horse race, one quarter of a mile, on the first Thursday in May, 1800, on Rice's path: Parker's nag to carry one hundred and forty-five pounds, and Critcher's nag *one hundred and thirty pounds,* for $500, to be staked on the day of the race, in cash, good property or bonds; the nags to be turned thirty feet from the starting poles, and to turn and *run the first time locked,* and judge the difference.

The parties met at the time and place stipulated, staked their bonds in the hands of the defendant, and weighed their riders, according to the terms of the articles. They then attempted to start the nags, and made many attempts to do so without success; Parker's nag being very restive and ungovernable, and refusing to start from a standing position (as it had usually done before on like occasions), but would have started readily if walked down the paths. Critcher's nag was easily managed, and would have run off without difficulty if walked down the paths with Parker's; this he refused to do, or to make any other effort to lock the other nag, further than by placing his own in a proper situation to be locked, which he frequently did; but always when the other was standing. The plaintiff in the evening ran his nag over the ground without being locked, demanded the stakes, and brought this action of detinue to recover them.

On the trial the defendant offered testimony to prove that Parker used every effort in his power to lock the other nag and start; that his conduct was fair, and not fraudulent, and that his failure to lock was entirely owing to the restiveness of his nag. This evidence the court rejected, holding him bound to lock the other nag and run.

The defendant's counsel then took two exceptions to the plaintiff's right of recovery. First, that the nags had never been locked, and that, by the terms of the articles, they were not bound to run until the nags were locked. It appearing that the plaintiff had frequently put his horse in a situation that Parker might have locked him, if his nag had not been restive and unruly, and that Parker had never put his nag in a situation to be locked, the court was of opinion that Parker was bound by his agreement to lock the other horse, and that the restiveness of his own was no excuse for him. Secondly, that the plaintiff had not weighed his rider after he ran his nag over the ground. To account for this neglect, the plaintiff offered to prove a parol agreement, made the day the race was run, to wit, that as it was a rainy day, and they carried live weight *except their saddles,* the riders should not be weighed at the coming out. This evidence was rejected by the court, because it would establish, by parol testimony, a material fact variant from the writ-

ten obligation. The plaintiff then proposed that it should be submitted to the jury, on the presumption that he had (33) carried his weight, as his rider and saddle had been weighed before his horse was run over the ground, and he had carried the rider and saddle through the poles. And to support this presumption a Mr. Hunter, said to be skilled in horse racing, was sworn, who stated that if there was reasonable ground to believe the plaintiff's horse had carried his weight, it was sufficient.

The evidence was submitted to the jury, and they found a verdict for the plaintiff. The defendant's counsel moved for a new trial, and the cause was referred to this Court.

TAYLOR, HALL and LOCKE, JJ. The weight to be carried by the plaintiff's nag being a certain number of pounds, his rider ought to have been weighed after he came through the poles. The parol testimony offered by the plaintiff, of an agreement not to weigh out, was properly rejected by the court. The plaintiff was as much bound to lock Parker's nag as Parker his; and having run his nag without being locked, and without any fraud on the part of Parker, is not entitled to recover. Therefore, the rule for a new trial is made absolute.

JAMES MOORE v. RICHARD SIMPSON.

The decision of the judges at a horse race may be set aside for error or fraud.

THIS was an action on the case brought by the plaintiff against the defendant, as stakeholder at a course race.

The plaintiff and one Chartres started their horses, and in running the last round of the first heat, at the commencement of the straight, the horse of Chartres left the track and ran within the poles, but was reined into the track in time to be within less than a distance of Moore's horse when he passed the poles. The rider of Chartres' horse then alighted, and was some time in the crowd before he was weighed. The plaintiff claimed the race upon two grounds: 1. That according (34) to the rules of racing, Chartres' horse was to be considered a *distanced* horse. 2. That the rider of Chartres' having alighted without being *immediately* weighed, and being bound to carry a certain weight, he had thereby forfeited the race. And the opinions of many gentlemen well acquainted with the

rules of racing, examined in court, were for the plaintiff on both those points, notwithstanding it appeared that Chartres' horse had run a greater distance by running within the poles than he would have done by keeping the track.

The defendant showed that it was provided by the 7th article in the rules of the turf on which the race was run, that "The judges each day shall be chosen by the parties starting horses, or a majority of them, who shall determine all disputes and controversies that may take place respecting the race by them judged." And by the 11th it was in like manner provided that "the races shall be conducted agreeably to the rules of New-Market, except where the cases are or shall be altered by the Jockey Club."

And that the judges chosen, according to the 7th article, determined against the plaintiff upon both the points above stated, and gave leave to Chartres to start his horse for the second heat; the plaintiff believing he was entitled to the race, refused to start his horse again; and Chartres' horse being galloped around the ground alone, the judges directed the defendant to pay the money over to Chartres.

The question submitted to the court was, "Whether by the 7th article aforesaid the plaintiff is concluded, by the opinion of the judges, from suing in a court of justice, and recovering upon the opinion of sportsmen and bystanders, contrary to the opinion of the judges."

If the court shall be of opinion for the plaintiff, judgment to be entered for him; otherwise, a new trial to be awarded.

BY THE COURT. The opinion of the judges chosen by the parties to a race is not conclusive, and if they are mistaken,
(35) or corrupt, such opinion ought to be set aside, and the justice of the case disclosed by other testimony; they are, therefore, of opinion the testimony was well received by the court, and that judgment be entered for the plaintiff.

THOMAS ORMOND v. KINCHIN FAIRCLOTH.

A sheriff cannot purchase property at his own sale.

THIS was an action for detinue for a negro, to which the plaintiff deduced the following title: The negro was the property of William Faircloth, deceased, at his death, and came to the hands of his administrator.

ORMOND *v.* FAIRCLOTH.

Benjamin Sheppard obtained two judgments against the administrator, in the County Court of Lenoir, upon which writs of *fi. fa.* were issued to the sheriff of Glasgow, and levied on the negro in question, amongst others, of which levy a return was made, and the sale of the property was stayed by consent of the plaintiff. After this levy a distribution was made, and the negro allotted to defendant.

At a subsequent term, writs of *venditioni exponas* issued, bearing test the first Monday in January, 1793, and returned the first Monday in March following, upon which writs the sheriff of Glasgow, after the test and before the day of return, exposed the negroes to sale at public vendue, and bid off, himself, the one in question. On a subsequent day, before the day of return of the writs of *vend. expo.*, the sheriff sold at private sale and delivered the negro in question to John Grimsley, for the full worth of him. Grimsley continued in possession of the negro about four years, and delivered him to his daughter, wife of the plaintiff. The plaintiff had him in possession till the first day of May, 1802, when the defendant took him.

Upon the trial, the court instructed the jury that the purchase of the sheriff, at his own sale, was void, and that the subsequent sale made by him to Grimsley could not operate as a sheriff's sale, because it was not made at public (36) auction; whereupon the jury found for the defendant.

The plaintiff moved for a new trial, on the ground of misdirection to the jury, and obtained a rule to show cause.

BY THE COURT. A sheriff cannot purchase property at his own sale. If he bids off property, the bidding is void. Nor can a sheriff sell, at private sale, property levied on by him by virtue of an execution. The rule is therefore discharged.

Cited: McLeod v. McCall, 48 N. C., 89.

JACOB BLOUNT'S ADMINISTRATOR v. CHARLES JOHNSTON'S EXECUTOR.

The words of this will indicate no intention to give the executor the rents and profits for his personal benefit.

ANN JOHNSTON by her last will, amongst other things, devised as follows: "I give and bequeath unto my beloved nephew, Charles Earl Johnston, all my lands, as follows: One tract of land in Chowan County, lying on Indian Creek, called and known by the name of Boydsborough, containing 600 acres; the other tract lying on Chowan River, in the county aforesaid, containing 200 acres, and known by the name of the Rice Banks. Which said two tracts or parcels of land I give and bequeath unto him, the said Charles Earl Johnston, and his heirs forever, etc." And after several bequests of personal property, she further devised and directed as follows, viz.: "I hereby make and ordain my worthy and trusty friend, Jacob Blount, the whole and sole executor of this my last will and testament; and I do also hereby authorize and empower my before named executor to take upon himself the sole and whole management *and disposal* of the rents and profits of the several tracts of land, so as aforesaid devised, *absolutely* and *exclusively*, inasmuch as he may manage and *dispose* of the rents and profits of the said tracts of land, so as aforesaid devised, of whatever kind soever, *without the restraint or constraint* of any person or persons whatever, until my said nephew, Charles Earl
(37) Johnston, shall arrive at the age of twenty-one years."

It was admitted that the said Charles E. Johnston, at the time of making the above will, lived with his father, Charles Johnston, Esq., who possessed a large independent fortune, and maintained and educated his son, the devisee, in a genteel and liberal manner.

The question was, whether Jacob Blount, the executor, or the devisee, was entitled to the profits of the lands devised during the minority of the devisee.

BY THE COURT. There is nothing upon the face of this will which warrants us to believe that it was the intent of the testator to give the profits to the executor for his private benefit. It seems to be a naked authority to manage and dispose of the profits, but to do so for the benefit of the devisee.

JOHN MOORE v. DANIEL PARKER.

1. A racing contract must be in writing.
2. A deed may be shown to have been delivered in escrow without pleading it.

ACTION of debt on a bond. Plea, *non est factum,* payment, set-off and the act of Assembly directing the manner in which bets on horse races shall be recovered.

The subscribing witness proved the signing and sealing of the bond; that it was given for money won on a horse race, to wit, the best two in three heats, one mile. The defendant's counsel then asked if the bond was delivered by the defendant to the plaintiff, or to any other person, upon conditions. To this question the counsel for the plaintiff objected, on the ground that it was intended to show the bond was delivered as an escrow, without pleading that it was so delivered. The court overruled the objection, and the witness answered that the bond was delivered to one Copeland, to be the deed of the defendant if the plaintiff won the race. The plaintiff could not show articles in writing containing the terms of the race, and that he had won the race; and, therefore, the (38) defendant had a verdict.

It was, in the course of the trial, contended by the plaintiff's counsel that this case being within the first section of the act of Assembly, and the race a course race, within the proviso of the act, he was entitled to a verdict.

BY THE COURT. The evidence of the subscribing witness, proving the deed to be delivered to a third person, was properly received by the court; and in all racing contracts it is incumbent on the plaintiff to bring his case within both sections of the act of 1800; and, therefore, the rule for a new trial must be discharged.

ELIZABETH WYNNE v. MISHAW ALWAYS.

The appointment of a guardian rests in the discretion of the court.

APPEAL to New Bern Superior Court, on a guardianship. The questions reserved for the opinion of this Court were, "Whether the choice of a guardian, made by a person between the ages of fourteen and twenty-one years, is absolute so as to preclude the exercise of the judgment of the County Court on

any point not relative to the security to be given." If this question be determined in the negative, "Whether the court, who rejects the choice, is not to give leave to the minor to nominate a more proper person," or "Whether the court may not appoint the person to them most proper."

If the court are of opinion that the County Court may appoint without regarding the choice of the infant, or offering him a second nomination, the judgment to be for the defendant; otherwise, for the plaintiff.

BY THE COURT. Guardianship in socage departed with tenure in socage. The court is not bound to appoint the next of kin, or the person chosen by a minor above fourteen years of age; but by virtue of the act of Assembly may and ought to appoint that person who, in their discretion, they believe
(39) will best execute the duties of the appointment.

CHURCHILL AND LAMOTTE v. ADMINISTRATOR OF ABRAHAM COMRON.

In a suit against an administrator a plea of judgment confessed since last continuance is bad on demurrer.

The plaintiffs sued out a writ against A. C., returnable to Jones County Court, November session, 1799. The writ was executed; the defendant died before the return, and at the return a *sci. fa.* issued against his administrator. The *sci. fa.* was returned to February sessions, executed, and the administrator appeared and plead, "Set-off, fully administered generally and specially, former judgments, *no assets but to the amount of £120, which are liable to a suit, Slade and Jocelyn against defendant.*" At May session, 1800, the defendant plead *"a judgment confessed in favor of Slade and Jocelyn, and other judgments since the last continuance, and no assets over."* To this plea the plaintiffs demurred generally.

The County Court gave judgment on the demurrer for the defendant; the plaintiffs appealed to New Bern Superior Court, and by their order the case was referred to this Court.

BY THE COURT. The plea is not good; let judgment be entered for the plaintiffs on the demurrer.

Cited: Hall v. Gully, 26 N. C., 347.

ELISHA STOCKSTILL v. JOHN SHUFORD ET AL.

Where defendants in a civil action sever on their defense, those who succeed will recover costs.

THE plaintiff brought an action of trespass, assault and battery against six defendants; they employed different counsel, and severed in their defense, each pleading *not guilty* severally. The issues were all submitted to the jury at the same time, who found four of the defendants *guilty,* and the other two *not guilty.*

The question referred to this Court was, "Whether the defendants who were found *not guilty* were entitled (40) to their costs, and what costs?"

BY THE COURT. The defendants found *not guilty* are entitled to their costs separately, including each an attorney's fee.

Cited: Sharpe v. Jones, 7 N. C., 311; *McNamara v. Kerns,* 22 N. C., 70.

COMMISSIONERS OF FAYETTEVILLE v. WILLIAM JAMES.

The number of times the verdict shall be set aside and a new trial granted is in the discretion of the trial court.

VERDICT for the defendant. Rule to show cause why a new trial should not be granted.

A new trial had been granted the plaintiffs in this cause, and the jury having found another verdict for the defendant, the court doubted the propriety of granting a second new trial, and referred the question to this Court.

BY THE COURT. A new trial is granted, on payment of the costs.

JUDGES

OF THE

COURT OF CONFERENCE

OF

NORTH CAROLINA

DURING THE YEAR 1805.

SPRUCE MACAY, Esquire,
JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire.

HENRY SEAWELL, Esquire, Attorney-General.
EDWARD JONES, Esquire, Solicitor-General.

CASES

ARGUED AND DETERMINED IN THE

COURT OF CONFERENCE

OF

NORTH CAROLINA

JUNE TERM, 1805.

WALKER v. MEBANE AND RAINEY.

From Hillsborough.

A gave a negro slave to his niece B, and agreed to keep the slave at his own expense during his life. Before A's death, B intermarried with C, who, after A's death, brought an action of detinue for the slave in his own name. The possession of the slave having vested in B by the gift, and A having held her during his life for the use of B, C can maintain the action in his own name.

THIS was an action of detinue for a negro girl slave; and upon the trial it appeared that William Mebane gave to his niece, Jennet Graham, the negro slave in question when she was a small girl, and not wishing to separate her from her parents during his life, he agreed with his niece to keep the negro girl at his own expense during his life. She remained with him accordingly. Before his death, his niece, Jennet Graham, intermarried with the plaintiff, John Walker, who, after the death of William Mebane, brought this suit against the defendants Mebane and Rainey, who, as executors of said William Mebane's will, had taken the negro girl into their possession. A question arose upon the trial, and was sent to this Court for the opinion of the judges, "Whether the plaintiff could maintain this action in his own name, and whether it ought not to have been brought in the names of himself and his wife, Jennet."

By MACAY, TAYLOR and LOCKE, JJ. We are of opinion that the action will lie in the name of the husband alone, and that the name of the wife need not be joined.

HALL, J., *contra.*

MATTHEWS' ADMINISTRATOR, ETC., v. DANIEL, EXECUTOR, ETC.

A bequeaths a negro and horse to B, and declared that if B should depart this life *without heir lawfully begotten of her body,* the negro and horse should belong to C. The limitation to C is too remote.

(42) THE bill charged that Judith Brinkley by her last will bequeathed "to her daughter, Elizabeth Harris, a negro fellow named Bob and a bay horse, and declared that if her daughter should depart this life without heir lawfully begotten of her body, the said negro and horse should belong to Anne Daniel." That the complainant, James Matthews, intermarried with the said Elizabeth Harris, who some time afterwards died, and complainant obtained letters of administration on her estate; that the defendant, Lewis Daniel, was at the time of the bequest aforesaid intermarried with the said Anne Daniel, and was appointed executor of the last will of the said Judith Brinkley; that he had proved the will and qualified as executor; and since the death of complainant's wife Elizabeth, had set up a claim to the said negro and horse under the will of Judith Brinkley, and refused to deliver the said negro and horse to complainant. The bill charged that complainant was advised the absolute property of the said negro and horse vested in Elizabeth, the legatee first named in the said bequest, and prayed that defendant might be compelled to deliver them to complainant or to submit to such other decree as the court might make in the premises. To this bill the defendant demurred, and the complainant having joined in demurrer, the case was sent to this Court for the opinion of the judges.

BY THE COURT. Anne Daniel was to take the negro and horse, if Elizabeth Harris should depart this life "without heir lawfully begotten of her body." This is in substance a limitation over after a dying without issue. The limitation is too remote. The absolute property vested in the first legatee, and the demurrer must be overruled.

Cited: Rice v. Satterwhite, 21 N. C., 71.

NOTE.—If this decision be correct, it would seem that in construing devises the court will not look to the subject-matter of the devise as a circumstance from which the intention of the testator may be inferred; for it is evident that in limitations of interests in individual animals, whose period of existence is shorter than that of man, the limitations over must vest, if at all, within the period of a life or lives in being and twenty-one years afterwards. In constru-

ing devises, the object of the court is to ascertain the intention of the testator, and, if legal, to give it effect. In inferring this intention from circumstances, where it is not plainly expressed, courts are governed by certain technical rules, which have been established for the purpose of aiding the court to find out the intention. Among these rules, one which seems to have the most extensive influence is this, "that wherever an executory devise is limited to take effect, *after a dying without heirs or without issue*, subject to no other restriction, the limitation is void; because in such cases the testator will be presumed to have intended to render the estate unalienable until there should be a general definite failure of issue." This rule, however, was found in its application often to defeat the intention of testators, and some exceptions were made to it: one in particular, that if the subject-matter of the devise was *real estate*, and the devise made in words which created an estate tail by implication, the limitation over shall be void; but if of *personal estate*, the court will consider the intention of the testator, and support the limitation over, if there be the most trifling circumstance to show the intention to be legal. This exception is founded upon the fact that in construing devises the court will look to the subject-matter of the devise. In the above case the bequest to Elizabeth Harris is in words which, if applied to a freehold, would not create an *express* estate tail; they create such estate by *implication* only. There is no such limitation as *must*, in its legal operation, constitute an estate tail. Then, it is open to the court to consider the intention of the testatrix. 1 Term, 593. And if we look to the subject-matter of the bequest, can we doubt the intention? When the testatrix limits over a negro man slave, "after a dying without heir of the body of Elizabeth Harris," can she be supposed to have intended that this limitation should not vest until a longer period than a life in being and twenty-one years afterwards, when the negro could not by possibility live so long? The same question may be asked more emphatically as to "a horse." If the intention of a testator is to be collected, in the language of *Mr. Justice Wilmot*, 3 Bur., 1533, "from the whole of the will, *ex visceribus testamenti*," and circumstances are to be looked to for this purpose, does not the subject-matter of the devise often constitute one of the most decisive? It would seem strange that in construing devises the court would take notice whether the estate be real or personal, and give a different construction as it might be the one or the other, and yet refuse to take notice that the personal estate is of such kind that it cannot by possibility of nature be *in esse* after the period of a life in being and twenty-one years afterwards. In the above case of *Matthews v. Daniel*, the Court must have founded their judgment upon one of two grounds: first, that the technical rules of construction forbade them from considering the intention of the testatrix; or, secondly, that in cases open for considering the intention, the subject-matter of the devise will not be looked to as a circumstance from which the intention may be inferred. It is not probable their judgment was rested upon the first ground; for the technical rule is, "that where there is *an express* limitation of a chattel *by words*, which, *if applied to a freehold*, would create an *express* estate tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect; but where there is no such *express* legal limitation, *the court will consider the intention of the testator*." *Lyde v. Lyde*, 1 Term, 593. In the above case there is no such *express*

legal limitation; the words, if applied to a freehold, would create an estate tail by implication only. The technical rule therefore left the court at liberty to consider the intention of the testatrix, to reject the artificial and technical sense of the words "dying without heir lawfully begotten of her body," and of using those words in their natural meaning and for that purpose which is in favor of common sense; and for using those words in this meaning and for this purpose, *Lord Chief Justice Wilmot* observes, in *Kelly v. Towler*, the most trifling circumstance is sufficient in all cases where the court is at liberty to consider the intention of the testator. In the selection of circumstances to ascertain the meaning of the testator, no reason can be assigned why the subject-matter of the devise, which in many instances is more indicative than any other circumstance, should be excluded.—REPORTER.

---

(43)

COLSON'S EXECUTORS v. WADE'S EXECUTORS.

From Fayetteville.

After judgment by default and before the execution of a writ of inquiry, the defendant dies. The plaintiff executes his writ of inquiry, and final judgment is rendered in his favor. This judgment is erroneous and void in law, and reversible upon a writ of error.

THIS was a writ of error brought to reverse a judgment recovered by Thomas Wade against John Colson and others in Anson County Court in 1782. The facts were that Thomas Wade sued out an original attachment against John Colson, Isaac Fortenberry and others, returnable to the County Court of Anson, which attachment being levied and returned, and the defendants failing to appear and replevy the property levied on, judgment by default was entered against them at July Term, 1782, and a writ of inquiry awarded. On 1 August, 1782, Isaac Fortenberry, one of the defendants, died, and at October term of the same year the writ of inquiry was executed; the plaintiff's damages were assessed and judgment rendered against the defendants. The error assigned was that before the giving of the said judgment, Isaac Fortenberry,
(44) one of the defendants, died, and the jury having found that he died in August, 1782, subsequent to the judgment by default, but before the rendering of the final judgment upon the execution of the writ of inquiry, the case was sent to this Court upon the question, "Whether the said judgment was erroneous and ought to be reversed."

BY THE COURT. The judgment in this case is erroneous and void in law. Let it be reversed and the plaintiffs in error be restored to all things which they have lost thereby, and the defendants in error pay the costs.

Cited: Burke v. Stokely, 65 N. C., 571; *Lynn v. Lowe,* 88 N. C., 481.

MALLISON v. HOWARD.

From New Bern.

Upon the suggestion of a defendant's death, his administrator ought to be made a party by a *scire facias,* and an order "that the administrator be made a defendant, unless he shows cause," being served upon the administrator, he appeared and showed for cause that the order was irregular and improper; whereupon the rule for making him a party was discharged.

THE death of defendant being suggested, an order was made "that Sally Howard, administratrix of George Howard, deceased, be made defendant in this case, unless cause shown to the contrary at next term." A copy of this order having been served on Sally Howard, she appeared and showed cause, to wit, that the said order was irregular and not conformable to the provisions of the statute in such cases made and provided; that the representatives of the defendant, George Howard, must be made a party by a *scire facias,* and therefore she prayed to be dismissed. Whereupon it was submitted to this (45) Court, "Whether the mode adopted was regular and proper." If the Court should be of opinion that the mode was irregular and improper, the rule to be discharged; otherwise, to be made absolute.

BY THE COURT. The object of a *scire facias,* which the act of Assembly directs to be issued in cases like the present, is to enable the executor or administrator to show cause why he should not be made a party, and no peremptory order is made that he shall be made a party until an opportunity is afforded to show cause, upon the return of the *scire facias.* The order made in this case was irregular and improper; the rule must therefore be discharged.

ALSTON'S EXECUTORS v. JONES' DEVISEES.

From Hillsborough.

A, as attorney in fact for B, conveys lands to C, and afterwards he conveys the same lands to D. Upon the trial of an issue directed by the Court of Equity, "whether the conveyance to B was made to him upon a valuable consideration as a purchaser before the execution of the conveyance to D," A is a competent witness.

JOSEPH LANDRUM being seized in fee of a tract of land lying in Chatham County, constituted and appointed Samuel Landrum his attorney in fact to sell and convey the same; and the said Samuel as attorney for the said Joseph conveyed the land to Matthew Jones, by deed bearing date 20 April, 1775. This deed purported to be absolute and for a valuable consideration. In 1777 Samuel Landrum executed another deed for the same land to Thomas Brooks, who conveyed to Joseph John
(46) Alston, and he by his last will and testament devised the said land to complainants, who filed their bill in the Court of Equity for Hillsborough District against the devisees of the said Matthew Jones, and therein charged that the conveyance from Samuel Landrum to Matthew Jones was executed for no other purpose than to enable Jones to sell and convey the land for the benefit of Landrum; that no valuable consideration was paid nor agreed to be paid, and that Jones held the legal estate in the land in trust for Landrum and his assignees. That Thomas Brooks was a purchaser from Landrum for a valuable consideration, and those claiming under him were entitled in equity to have the legal estate decreed to them, etc.

To this bill the defendants answered and alleged that it was expressly agreed between their testator, Matthew Jones, and Samuel Landrum, at the time of the conveyance aforesaid, that Jones might either sell the land or hold it himself, he paying to Landrum the purchase money named in the deed; that Jones had elected to take the land, and had paid part of the purchase money before the conveyance was made by Landrum to Brooks. It was further insisted that various artifices were resorted to to induce Landrum to convey the land to Alston, and that this conveyance was procured by false representations and without any valuable consideration, either paid or secured to be paid to Landrum, etc.

The cause was set for hearing, and the court having ordered an issue to be tried, "Whether the conveyance to Matthew Jones was made to him upon a valuable consideration, as a purchaser, before the execution of the deed to Thomas Brooks," the de-

fendants offered in evidence sundry depositions, and, among others, that of Samuel Landrum, which was admitted by the court, and the jury found that the conveyance to Matthew Jones was made to him upon a valuable consideration as a purchaser, before the execution of the deed to Thomas Brooks. Whereupon the court ordered the bill to be dismissed with costs. Upon motion of the complainant's counsel, the case was (47) sent to this Court upon the whole evidence, and upon the question, "Whether Samuel Landrum was a competent witness upon the trial of the issue aforesaid."

BY THE COURT. We are of opinion that the deposition of Samuel Landrum was properly admitted in evidence upon the trial of the issue in the court below; and the jury having found that the conveyance to Matthew Jones was made to him as a purchaser for a valuable consideration, before the execution of the deed to Thomas Brooks, the decree of the court below must be confirmed and the bill be dismissed with costs.

OVERTON v. HILL.

From Fayetteville.

Money paid into the office upon an execution cannot be attached in the hands of the clerk at the instance of a creditor of the plaintiff in execution. Motion to stop money *in transitu*, which has been paid into the office upon an execution at the instance of B, and to apply the money to the discharge of a judgment against B, is not allowed, of course, and will not be granted unless good cause be shown.

THOMAS OVERTON having recovered a judgment against John Hill, in Fayetteville Superior Court, execution was issued and the money levied, and on the return day of the execution the money was paid into the office. On same day the clerk of the court was summoned as a garnishee at the suit of Hector McAlister against the said Thomas Overton, on an attachment returnable to the County Court of Cumberland. The attorney in fact for Thomas Overton applied to the clerk for the money which had been paid into the office upon the aforesaid execution against Hill; and Patsy Glascock having recovered a judgment against the said Overton in the said court, which judgment remained unsatisfied, a motion was made to the court on her be-

half, that the balance of the said money, after the judgment to be recovered upon the attachment aforesaid should be satisfied, should be applied towards the discharge of her said judgment. The case was sent to this Court upon the following questions:

First, whether the money paid into the office upon the
(48) execution against Hill was liable to be attached at the instance of McAlister, in the hands of the clerk; and, secondly, whether the court will apply the money paid into the office for Overton to the discharge of Patsy Glascock's judgment against him.

BY THE COURT. The money paid into the office upon the execution against Hill cannot be attached at the instance of Overton's creditors; nor will the court apply this money to the discharge of the judgment which Patsy Glascock recovered against Overton, no reason being shown to the court why this money should be stopped *in transitu,* and such an application not being allowed as of course.

Cited: Hunt v. Stevens, 25 N. C., 365; *Coffield v. Collins,* 26 N. C., 491.

Overruled: Jeffreys v. Lea, 30 N. C., 96; *Gaither v. Ballew,* 49 N. C., 493; *Williamson v. Nealy,* 119 N. C., 341.

MORELAND ET AL. V. MAJORS, EXECUTOR OF MORELAND.

From Hillsborough.

A devises "to his son Thomas during his natural life a negro girl; and after his decease he gives the said negro and her increase to his grandson Francis, to him and his heirs forever; and *in default of such issue,* the said negro and her increase to be equally divided among his brothers and sisters *then living.*" The limitation over to the brothers and sisters of Francis is valid, and the words "in default of such issue," mean the failure of issue at the death of Francis; the word "then" is here used as an adverb of time, and points to the default of issue at the death of Francis.

THIS was an action of detinue for sundry negro slaves. The jury found a verdict for the plaintiffs, subject to the opinion of the court on the following case:

"Francis Moreland, of the county of Dinwiddie and State of Virginia, departed this life in 1765, having previously published

in writing his last will and testament, in which is contained the following clause, to wit: "I lend to my son Thomas, during his natural life, one negro girl named *Phebe,* and after his decease I give the said negro and her increase to my grandson Francis Moreland, son of the said Thomas, to him and his heirs forever; *and in default of such issue,* the said negro and her increase to be equally divided amongst his brothers and sisters *then living.*" Francis Moreland died in 1802, without having had any issue, and his brothers and sisters living at the time of his death brought this suit to recover the negro woman Phebe and her increase; and it was referred to this Court to decide "whether the limitation to the plaintiffs was valid."

This case was argued by Brown and R. Williams for the plaintiffs and Haywood for the defendant. The (49) authorities relied upon are noticed in the opinion of the Court.

TAYLOR, J., delivered the opinion of the Court. The decision of this case depends upon the construction of the third clause of the will of Francis Moreland. On the part of the plaintiffs it is contended that the limitation to the brothers and sisters is so expressed that it must take effect, if at all, at the death of Francis Moreland, and that, consequently, it is within the limits prescribed by law for the vesting of an executory devise. On behalf of the defendants, it has been argued that the limitation to the brothers and sisters is void, as being to take effect after an indefinite failure of issue of Francis Moreland, to whom, likewise, the negroes are given by such words as, if applied to real estate, would amount to an estate tail, which therefore transfers an absolute interest in chattels. Upon the first argument of this case, the Court inclined to the latter opinion; but upon maturely considering the cases cited, a majority of our brethren have been led to think differently. I will state the grounds upon which their present opinion is formed, in doing which it will not be necessary to notice particularly every case that has been read, because, however proper and apposite they might be, according to the manner in which the argument has been conducted by the counsel, they are not necessary to be resorted to in the views which we have taken of the subject.

Executory devises of chattels are a departure from the ancient common law, according to which the gift of a chattel for any period of time amounted to an absolute disposition of it, and any limitation over was void. The distinction between the use of a thing and the thing itself, continued, as applied to chat-

tels personal, even after it was overruled as to chattels real; and whether an executory devise could be created of the former was questioned after the decision of the *Duke of Norfolk's case*
had finally established its competency with respect to
(50) the latter. This appears from 1 P. Williams, 1, and 2
Vern., 331. Since the period of these decisions it has not been doubted that future interests in the nature of remainders may be created in chattels personal by the means of trusts and executory devises.

The convenient and beneficial manner in which provision could thus be made for families and children's portions induced the courts to countenance executory devises; but on the other hand, it was foreseen that an unlimited indulgence of them might introduce all the mischief which it was the policy of the statute *de bonis* to sanction, since there was no way of destroying entails created in this form. It was settled at a very early period of their adoption that entails by executory devise could not be barred by fine or recovery. If they consisted of real estate the devise could not be barred by fine, because the title of the devisee was independent of the immediate taker; nor could the estate of the devisee be destroyed by recovery, because the recompense, which, in this fictitious mode of proceeding, is the ground of barring the issue in tail and those in remainder and reversion, doth not extend to an executory devise. Cro. Jac., 590. If they were of personal estate, they could not, from the nature of the property, be the subject of either fine or recovery. Hence, it became necessary to limit and confine this mode of settlement, that entails so made should not last longer than the law permits where they commence by creating estates for life and estates tail with remainders over. It is therefore in analogy to the rule which prevails at law in relation to strict entails which cannot be protected from fine and recovery longer than the life of tenant for life and the coming of age of his first issue, that a principle is applied to executory devises, with regard to the time of their vesting. This must be a life or lives in being and twenty-one years after, to which are added a few months for the case of a posthumous child. Every contingency, therefore, which must happen, if at all, within that period of
time, is sufficient to support a limitation over. But an
(51) executory devise cannot be limited on a failure of issue
of the person named, whenever it happens. It is, however, to be remarked, that although a fine or recovery will not bar the entail of a chattel on account of the nature of the property, the danger of perpetuity is nevertheless avoided by the

operation of the principle which declares the vesting of an interest, which would be an estate tail, bars the issue and all subsequent limitations.

The rule, therefore, fixing the time within which an executory devise must take effect is equally clear and well settled; but from the language in which wills are sometimes penned, a difficulty has arisen in most of the cases to ascertain whether the rule is observed or transgressed. Rules of construction have therefore been resorted to, and have been employed in a great variety of cases for the purpose of effectuating the intention of the testator. A few of these which may be considered as undoubted law, I shall cite and adopt as the ground of our opinion.

1. That such a construction ought to be put upon the words of a will as, upon a fair consideration of the whole context, it is evident the testator intended they should receive, unless some rule of law is thereby violated.

2. That where personal estate is limited after a dying *without issue,* those words do not necessarily import a general failure of issue, although the first devise may be of an express estate tail. Nor in the case of an estate tail by implication, do they necessarily signify a dying without issue living at the death of the first devisee. If, however, the construction entirely depend on those words, the limitation in both cases is too remote; but, in one case as well as in the other, the words may be confined to a dying without issue then living, if there be anything in the will from which such an intention can be inferred.

3. The inclination of the court should be in favor of such a construction as will support the limitation over, if it can be done; and they should lay hold of any opportunity of (52) referring such words to the want of issue at the time of death.

It may be inferred from the phraseology of several clauses in this will, that the testator was apprised of the rule of law which renders limitations void after an indefinite failure of issue, since he has by apt and significant terms confined the failure to the death of the first taker. This he has done in every instance where the first devise is to one son and the limitation over is to another. Upon the first, second and fourth clauses of the will the limitations over must vest, if at all, at the end of a life in being. The words are, "if my son should die without issue living at the time of his death." In every instance where the limitation over is to one person, and that person is a son, the failure of issue is most carefully tied up to the death of the first taker. In the third and fifth clauses, where sons are the first takers and the limitations over are to grandchildren, a diversity

of phraseology is introduced. The testator, however, manifestly intended to make a substantial provision for his grandchildren in the event of his sons dying without leaving issue. The supposition that the clauses in their favor are inserted in the will, with a knowledge and belief that they are nugatory and could have no legal operation, is wholly inadmissible.* But it may be asked,

*The clauses of the will referred to by the court were in the following words:

1. I give and bequeath to my son Thomas, and the heirs of his body lawfully begotten, the following negro slaves, to wit: Jenny, Sue, etc., and their increase; but if my said son Thomas should die without issue living at the time of his death, then I give the said negroes and their increase to my son Francis Moreland and his heirs forever.

2. I give to my son Thomas Moreland, and the heirs of his body lawfully begotten, my plantation where I now live, containing by estimation 200 acres, and in default of such heirs living at the time of his death, I give and devise the same to my son Francis and his heirs forever.

3. I lend to my son Thomas during his natural life one negro girl named Phebe, and after his decease I give the said negro and her increase to my grandson Francis Moreland, son of the said Thomas, to him and his heirs forever; and in default of such issue the said negro and her increase to be equally divided amongst his brothers and sisters then living.

4. I give and bequeath to my son Francis Moreland and his heirs the following slaves, to wit: Jude, Patt, etc., and their increase; but if my said son Francis should die without issue living at the time of his death, then I give the said negroes to my son Thomas Moreland and his heirs forever.

5. I lend to my son Francis during his natural life one yellow girl named Patt, and after his decease I give the said negro and her increase to my grandson John, son of the said Francis, to him and his heirs forever, and in default of such issue the said negro to be equally divided among his brothers and sisters.

6. I give and bequeath to my son-in-law, James Oliver, and his heirs, the following negroes, to wit: Patt, Hannah, etc., and their increase; but if my said son-in-law, James Oliver, should die without issue by my daughter, Anne Oliver, living at the time of his death, then I give the said negroes to the children of my two sons, Thomas and Francis Moreland, to be equally divided.

7. I lend to my daughter, Anne Oliver, during her natural life, one negro girl named Dinah, and after her decease I give the said negro girl and her increase to my granddaughter, Mary House, to her and her heirs forever.

8. I lend to my daughter, Anne Oliver, during her natural life, one negro boy named Dick, and after her decease I give the said negro boy to her son, Francis Oliver, and the heirs of his body lawfully begotten, and in default of such issue the said negro to be appraised and the money equally divided amongst his brothers and sisters.

9. I give all the rest and residue of my estate to be equally divided among my children then living.

as the testator knew the necessity of restraining the failure of issue to the death of the first taker, and has in other instances used adequate terms for that purpose, why has (53) he not been equally cautious in the clause under consideration? To my mind, the answer is clear and satisfactory. When he gives property to one son and his issue and afterwards to another, the chance was equal that the last might die before the first taker, and if he died leaving issue in the lifetime of the first taker, the testator was desirous that the bequest should be so expressed as to be transmissible to that issue, in the event of the subsequent death of the first taker without issue. Hence, to the limitation over he has annexed words of perpetuity, and to the first disposition words of proper restrictive import. When, however, the limitation over is made in (54) comprehensive terms, to several grandchildren, who were all alive at the making of the will, it was to be expected, according to the ordinary chances of human life, that some of them would survive their brother; that consequently it would be determined during the lifetime of some of them whether the first taker died with or without issue; and as all the lives were in being, it seemed less necessary to use the words "without issue living at his death," because the intention was, if he died without issue in the lifetime of any of his brothers and sisters. And it was of no importance that the failure of issue was made to depend on several heirs, for the case seems to show that any number of lives may be taken, provided they are all in being when the will is made. From these observations I deduce the conclusion that the testator believed when he wrote this clause that he had adopted language sufficiently expressive and of force equivalent to that which he had used in making the bequests to his sons, but varied in order to correspond with the relative situation of his grandchildren. To those who should be alive when his grandson Francis might die without issue, he intended a personal benefit; and that some of them would survive him, he contemplated as a probable event. The case of *Hughes v. Sayer,* 1 P. Williams, 534, though not a direct authority in this case, resembles it with respect to the principle I now advert to. There, one having nephews A and B, devises his personal estate to A and B, and if either die without children, then to the survivor. The master of the rolls decided that the words, "dying without children," must be construed living at the death of the party. That they could not signify when there should be a failure of issue, because the limitation over was to the surviving devisee; and it was not probable that if either of the devisees should die leaving issue, the survivor

should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure forever; and, therefore, by reason of the limitation over in case of either of the devisees dying without children, then to the sur-
(55) vivor, the testator must have intended to mean a dying without children living at the death of the parent; consequently the devise was good. To the same effect is *Nichols v. Skinner,* Prec. in Chan., 528. Where a legacy was given "to A, B, etc., and if any of them die without issue, his or her share to go over to the survivors or survivor," the limitation over was supported on the ground that the testator intended a personal benefit to the legatee over, and therefore meant to confine the failure of issue to their lives. The sixth clause in the will is the only one where, before a limitation to grandchildren, he confines the failure of issue to the death of the first taker. That, however, seems to have arisen from the peculiar nature of the disposition he was desirous of making to his son-in-law, Francis Oliver; the legacy is confined to the children he might leave by the testator's daughter, and therefore he particularly confines it to such children of that description as he might leave at the time of his death. Had he designed that any issue of Francis Oliver should enjoy the bequest, it is probable he would have contented himself with using the words "and in default of such issue," as he uniformly does in the other clauses relative to grandchildren.

It is generally true that a limitation of personalty after *a dying without issue* is void, and if there are no other expressions to resort to for the construction of those words, the devise over cannot be supported. The intention of the testator must be regarded where there is no express legal limitation, and although the words import an estate tail, yet, if there be any circumstances from which it can be fairly inferred that such was not the intent of the testator, the devise over is sustainable. The language of this clause of the will would, if applied to real property, create an estate tail; not because it is a formal legal limitation of such an estate, but because there could not be a default of the heirs of Francis Moreland while his brothers and sisters were living; and the testator must, therefore, have meant lineal heirs. Cro. Jac., 475; Cowp., 234. But there are other words in this clause which are to be brought into view in
(56) order to form a just construction, and from them it will probably appear that the testator meant to restrain the failure of issue to the lives then in being. These words are, "to be equally divided amongst his brothers and sisters then living." The inquiry therefore is, What did the testator mean

by those expressions? If he meant to devise the negroes over to the brothers and sisters that might be living when the default of lineal heirs might happen, whenever that might be, it is clearly too remote. But if he meant the brothers and sisters living at the death of Francis Moreland without lineal heirs, then it is properly restrained, and the plaintiffs are entitled. That he designed the latter, I infer, first, from the manner in which he has used the same expressions in the last clause of his will; secondly, from the meaning which has been put upon these words in several authorities.

1. In the last clause of the will the testator gives "all the rest and residue of his estate to be divided among his children then living." It is evident that in this instance the testator has used the words as referring to the time of his own death. They will not admit of any other possible construction, nor is it necessary to seek for any other, for the operation of the will is precisely the same with or without these words. They were probably inserted from abundant caution, but being used in an unambiguous sense and in reference to the event of death, in this clause, the conclusion is entirely fair, obvious and natural that he meant to use them in reference to the same event in the third clause of his will. Such a meaning is the more strongly forced upon us when we consider that it is rendering the construction subservient to the intention.

2. The construction which the expressions in this will or similar ones have received seems to have arisen from a principle which has now become a fixed axiom in a court of chancery, and is thus stated in 2 Fearne, 186: "That with respect to executory devises of terms for years or other personal estates, that court has very much inclined to lay hold of (57) any words in the will, to tie up the generality of the expression of 'dying without issue,' and confine it to dying without issue *living* at the time of the person's decease." *Target v. Gaunt,* 1 P. Wms., 432, is an instance of this mode of construction; and, indeed, the cases are so numerous that I shall barely refer to *Fletcher's case,* 1 Eq. Abr., 193, where there was another event besides that of death to which the words "then living" might have related, and to which they referred in strict grammatical construction; yet, for the sake of supporting the limitation over, they were interpreted a dying without issue living at the time. Without taking up more time upon this part of the case, I will only add that it appears to the majority of our brethren, the intention of the testator, to be collected from the whole will, was that the brothers and sisters of Fran-

cis, who should be alive at the time of his death without actually leaving issue, should be entitled, and that consequently the plaintiffs are entitled, in the judgment of the Court.

HALL, J., *contra.* Brothers and sisters *then living,* mean brothers and sisters who shall come into being, as well as those already in being, where they are to take on a future event: if to take a present interest, they mean brothers and sisters in being. Cowp., 312. Consequently, as the brothers and sisters here spoken of were to take on a future event, should it happen, all those born after making the will, who shall be living when the event occurs, have an equal claim with those in being when the will was made. As to the ulterior limitation, to be good it must be such as must take effect, if at all, in a life in being and twenty-one years after. Now, here, suppose Francis died, leaving a son, and then Thomas had issue; another brother or sister of Francis, and twenty-two years after the death of Francis his son should die without issue under the terms used in the limitation now under consideration, the issue of Thomas, born after the lifetime of Francis, would take, although the event upon which the ultimate limitation depended did not take
(58) place until twenty-two years after the life of Francis, or it might have been forty or fifty years after; for the issue born after the death of Francis might have lived fifty or sixty or even eighty years, and the son of Francis or the son of that son might have then died without issue sixty or eighty years after the death of Francis. A brother or sister of Francis might be then living, and might say, The estate is mine, for I am a brother living at the period when Francis is dead without issue. Whenever the issue of Francis fails, he is in law said to be dead without issue. This, then, is not such a limitation over as must take effect, if at all, within a life in being and twenty-one years after; it may take effect if allowed to be a valid limitation fifty or sixty years after that period; and I am therefore of opinion it is void in law. The words "then living," used in the other parts of the will, tie up the event to the death of the legatee for life, in precise terms, which proves that the writer of the will well knew how to confine the limitation over to that event when he wished to do so, and proves to my mind that he did not mean it in the present instance. He meant, as the words import, that the portion of Francis should go to all the children of Thomas, born and to be born, who should be living when the line of Francis failed. He had no reason for preferring the children of Thomas who were born to those who were not so; he has not intended such preference.

DEN ON DEMISE OF THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA v. FOY AND BISHOP.

From Wilmington.

Section 41 of the Constitution declares that "schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices, and all useful learning shall be duly encouraged and promoted in one or more universities." In obedience to this injunction of the Constitution, the Legislature established an university, and in 1789 granted to the Trustees of the University "all the property that had theretofore or should thereafter escheat to the State." In 1800 the Legislature repealed this grant. This repealing act is void, it being in violation of section 10 of the Bill of Rights, which is a part of the Constitution, and declares "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land."

THIS was an action of ejectment brought to recover the possession of certain escheated lands in the district of Wilmington. The defendants pleaded in bar of the act of 1800, ch. 5, entitled "An act to repeal so much of the several laws now in force in this State as grants power to the Trustees of the University of North Carolina to seize and possess for the (59) use of the said university any escheated or confiscated property." To this plea the plaintiff demurred, and the defendants having joined in demurrer, the case was sent to this Court for the opinion of the judges.

Haywood for plaintiff.
Duffey and *Jocelyn* for defendants. (81)

LOCKE, J., delivered the opinion of the Court. The Legislature of North Carolina in 1789 granted to the Trustees of the University "all the property that has heretofore or shall hereafter escheat to the State." Ch. 21, sec. 2. And by another act, passed in 1794, they also granted "the confiscated property then unsold." Ch. 3, sec. 1. By an act passed in 1800 they declared, "that from and after the passing of this act, all acts and clauses of acts which have heretofore granted power to the Trustees of the University to seize and possess any escheated or confiscated property, real or personal, shall be and the same is hereby repealed and made void.

"*And be it further enacted,* That all escheated or confiscated property which the said trustees, their agents or attorneys, have

not legally sold by virtue of the said laws shall from hence revert to the State, and henceforth be considered as the property of the same, as though such laws had never been passed." Chapter 5.

The Trustees of the University in pursuance of the powers vested in them by the act of 1789, have brought this suit to recover the possession of a tract of land escheated to the State before the passing of the repealing act in the year 1800. The defendants have pleaded this repealing act in bar, by
(82) which they allege the power of the trustees to support this action is entirely destroyed. It is therefore now to be considered how far the trustees have title under the act of 1789, and, in the next place, how far they are divested of that title by the repealing act of 1800.

To determine the first question, it may be necessary to take into view the objections stated to the title of the trustees, independent of the operation of the repealing act, and these are two: first, that no title to escheated lands vests in the State until an inquisition or office found; and, secondly, that if the State had title, yet the trustees have derived none by the act of 1789, because the State attempted to convey the right by act of Assembly and not by grant, as required by section 36 of the Constitution. With regard to the first objection, the Court think it a sufficient answer to say that on this subject the law has been supposed to be long settled, as this objection has been made in almost every suit heretofore brought by the Trustees of the University, and always overruled. The Court approve of the decisions upon this point, and will observe the ancient and wise maxim *"stare decisis."* 2 Black., 245; 2 Co. Rep., 52.

As to the second objection, the words of the Constitution are, "All commissions and grants shall run in the name of the State of North Carolina and bear test and be signed by the Governor," etc. It seems to be a fair and clear exposition of this part of the Constitution to say that when the State conveys land by grant, the grant shall have the requisites prescribed, to wit, run in the name of the State, bear teste and be signed by the Governor, etc., and that all grants otherwise authenticated shall be void. It became necessary that the officer whose duty it shall be to sign and authenticate grants should be pointed out, and that their form and substance should be ascertained, in order to give uniformity to such grants and to avoid that variety which would be produced by the judgment of
(83) different officers. But the Court sees nothing in this clause restricting the Legislature to this single mode of conveyance; they are left free from any control in the mode or

manner of transferring their property, unless they should adopt the one pointed out in the Constitution, and then the form and ceremony are prescribed. This opinion is warranted not only by the expressions contained in the clause itself, but by the many and repeated acts of Assembly passed, since the making of the Constitution, for the purpose of transferring property. Many of these acts have been mentioned and referred to by the counsel for the lessors of the plaintiff. We are therefore of opinion that the land in question vested in the State without an inquisition or office found, and that the Legislature were competent to pass the interest in the same to the Trustees of the University by the act of 1789; and that the trustees have a good and valid title, unless the operation of the repealing act of 1800 has destroyed it.

The operation of this act is next to be considered; and it may be necessary to premise that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and these they have expressed in the Bill of Rights and the Constitution. The preamble to the Constitution states, among other things, that "We, the representatives of the freemen of North Carolina, chosen and assembled in Congress for the express purpose of framing a constitution, under the authority of the people, most conducive to their happiness and welfare, do declare, etc." Section 13 directs the General Assembly to elect several officers of State. Section 15 directs the election of a Governor. Section 38 directs that there shall be a sheriff, coroner or coroners and constables in each county. It became necessary for the Legislature to appoint these officers or to pass such laws as would secure to the people such officers as would carry this form of government into effect. The framers of this instrument appear to have been well acquainted with the importance and necessity of education, and lest this object might escape the attention of the Legislature or be by them neglected, section 41 declares, "That a school or schools (84) shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct at low prices; and all useful learning shall be encouraged and promoted in one or more universities." By this section as strong an injunction was imposed on the Legislature to establish an university as by the preceding clauses to appoint the several officers of government; these objects seem to be regarded by the framers of the Constitution with equal solicitude; they have, therefore, in the same imperative style declared that there shall be an university,

and that there shall be a Governor, leaving to the Legislature to make such appropriations and create such funds for the endowment of the institution as would be sufficient to effect the purposes for which it should be established. In 1789 the Legislature obeyed this constitutional injunction and made an appropriation of escheated lands, and appointed trustees for the management of the concerns of the institution. By the act of 1800 the Legislature declared that this property should be taken from the trustees and revert to the State. Is, then, this last act authorized by the Constitution, or does it destroy a right which that instrument gave to the people, a right highly esteemed in all civilized nations, that of educating their youth at a moderate expense? a right of acquiring knowledge and good morals, which have always been deemed most conducive to the happiness and prosperity of the people?

Some light will be thrown upon this subject by examining the nature of corporations: how property can be taken from them, and how they can be dissolved. Corporations are formed for the advancement of religion, learning, commerce or other beneficial purposes. They are either aggregate or sole, and created by grant or by law. When they are once erected, they acquire many rights, powers, capacities, and some incapacities (1 Black. Com., 495), as, first, to have perpetual succession; and, therefore, all aggregate corporations have necessarily the power of electing members in the room of those who die, to sue
(85) and be sued and to do all other acts as natural persons. Second, to purchase lands and to hold them for the benefit of themselves and successors. Fourth, to have a common seal. Fifth, to make by-laws for the better government of the corporation. These corporations cannot commit crimes, although their members may in their individual capacity. The duties of those bodies consist in acting up to the design for which they were instituted. Let us next inquire how their corporate property can be taken from them and how they may be dissolved. A member may be disfranchised or lose his place by his own improper conduct, or he may resign. A corporation may be dissolved by act of Parliament, which is boundless in its operation; by the natural death of all its members, in case of an aggregate corporation; by surrender of its franchises into the hands of the King, which is a kind of suicide; by forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges the body politic to have broken the condition on which it was incorporated, and therefore the incorporation to be void; and the regular course is to bring an information in the nature of a *quo warranto,* to inquire by what

authority the members now exercise their corporate power, having forfeited it by such and such proceedings. 1 Black. Com., 485; 3 Black. Com., 263. None of these prerequisites have been done in the present case. We are then led to inquire into the soundness of an argument greatly relied on by the defendant's counsel, that those who create can destroy. The Legislature have not pretended to dissolve the corporation, but to deprive them of a part of the funds that were deemed to be vested in them and to transfer those funds to the State. In England the King's consent to the creation of any corporation is absolutely necessary, either given expressly by charter or by act of Parliament, where his assent is a necessary ingredient or implied by prescription. 1 Black. Com., 472, 473. The King may grant to a subject the power of erecting a corporation; and yet it is the King that erects—the subject is but the instrument. 1 Black. Com., 474. Where there is an endowment of lands, the law distinguishes and makes two species of foundation: the first, *fundatio incipiens,* or the (86) corporation; in which sense the King is the founder of all colleges and hospitals; the other, *fundatio proficiens,* or the dotation of it, in which sense the first gift of the revenues is the foundation, and who gives them is the founder. 1 Black. Com., 431. The Constitution directed the General Assembly to establish this institution and endow it; then it would seem from the principle upon which all this doctrine is predicated, that the Constitution and not the Legislature had erected this corporation; the Legislature being only the agent or instrument, whose acts are valid and binding when they do not contravene any of the provisions of the Constitution. We view this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by the common law, but sanctioned by the Constitution. It cannot be considered that the Legislature would have complied with this constitutional requisition, by establishing a school for a month or any determinate number of years, and then abolishing the institution; because the people evidently intended this university to be as permanent as the Government itself. It would not be competent for the Legislature to declare that there should be no public school in the State, because such an act would directly oppose that important clause in the Constitution before mentioned. But if the Legislature can deprive the university of the appropriated and vested funds, they can do that which will produce the same consequences; for, deprive the institution of funds already vested and refuse to make any additional appropriations, and

there never can exist in the State a public school or schools; and thus the Legislature may indirectly effect that purpose which, if expressed in the words before mentioned, they could not do. Besides, when the Legislature have established an university, appointed trustees and vested them with property which they were to hold in trust for the benefit of the institution, have they not discharged their duty as the agents of the people and transferred property, which is afterwards beyond their control? From that moment the trustees became
(87) in some measure the agents of the people, clothed with the power of disposing of and applying the property thus vested to the uses intended by the people, but over which the power of the Legislature ceased with the discharge of the constitutional injunction; unless it might be necessary in the course of time to make other or further appropriations to continue and support the institution; and this we consider to be their duty at all times, when such necessity shall exist, that the expectation of the people, as expressed in the Constitution, may not be disappointed.

But one great and important reason which influences us in deciding this question is section 10 of the Bill of Rights, which declares "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." It has been yielded on the part of the defendant that if the Legislature had vested an individual with the property in question, this section of the Bill of Rights would restrain them from depriving him of such right; but it is denied that this section has any operation on corporations whose members are mere naked trustees, and have no interest in the donation, and especially on a corporation erected for a public purpose. It is also insisted that the term, "law of the land," does not impose any restrictions on the Legislature, who are capable of making the law of the land, and was only intended to prevent abuses in the other branches of Government. That this clause was intended to secure to corporations as well as to individuals the rights therein enumerated, seems clear from the word *"liberties,"* which peculiarly signifies those privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word *"liberty,"* which refers to the personal liberty of the citizen. We therefore infer that by this clause the Legislature are as much restrained from affecting the property of corporations as
(88) they are that of a private individual, unless the "law

of the land" should receive the construction contended for on the part of the defendant. It is evident the framers of the Constitution intended the provision as a restraint upon some branch of the Government, either the executive, legislative, or judicial. To suppose it applicable to the executive would be absurd on account of the limited powers conferred on that officer; and from the subjects enumerated in that clause, no danger could be apprehended from the Executive Department, that being entrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply to the judiciary would, if possible, be still more idle, if the Legislature can make the *"law of the land."* For the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of laws. They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the Legislature as far as they are binding or do not contravene the Constitution. If, then, this clause is applicable to the Legislature alone, and was intended as a restraint on their acts (and to presume otherwise is to render this article a dead letter), let us next inquire what will be the operation which this clause will or ought to have on the present question. It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution. Although the trustees are a corporation established for public purposes, yet their property is as completely beyond the control of the Legislature as the property of individuals or that of any other corporation. Indeed, it seems difficult to conceive of a corporation established for merely private purposes. In every institution of that kind the ground of the establishment is some public good or purpose intended to be promoted; but in many the members thereof have (89) a private interest, coupled with the public object. In this case the trustees have no private interest beyond the general good; yet we conceive that circumstances will not make the property of the trustees subject to the arbitrary will of the Legislature. The property vested in the trustees must remain for the uses intended for the university, until the judiciary of the country in the usual and common form pronounce them guilty of such acts as will, in law, amount to a forfeiture of their rights or a dissolution of their body. The demurrer must therefore be allowed, and the plea in bar overruled.

HALL, J., *contra.* A question of more importance than that arising in this case cannot come before a court. It is nothing less than one branch of the Government undertaking to decide whether another branch of the same Government has or has not transcended its constitutional powers; a question which in its discussion should at all times command the best energies of the head and heart. When this shall be the case, although a difference of opinion may sometimes exist, it will be an honest one, and cannot fail to find its remedy in mutual tolerance and concession. But well convinced, indeed, ought one person to be of another's error of judgment before he passes sentence of condemnation on it, when he reflects that each has given the same pledges to support the Constitution. Before a law enacted by the Legislature should be pronounced unconstitutional, it ought to appear to the Court to be palpably so. If an honest doubt can be entertained on the subject, we owe it to ourselves, as well as to the Legislature, to carry it into effect. Far be it from me, if it were in my power, to damp that laudable and honest zeal which characterized the argument of the defendant's counsel; it cannot be too much extolled or too widely circulated; but I speak it with deference to the opinions of my brethren, that I think occasions might occur when its influence would be
(90) more happily felt and lead to more useful and correct results. In the opinion which I have formed on this question I am probably mistaken, as I have the misfortune to differ from the rest of the Court; but from the best consideration I can give to it, I am bound to say that I believe the law in question is not unconstitutional.

I feel no disposition to controvert many things urged in argument by the defendant's counsel; he has had recourse, however, to one argument which I think militates against him. It is drawn from section 41 of our Constitution, which is in the following words: "A school or schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities." He endeavors to strengthen his general proposition, namely, "That any law taking away the property of an individual or a common corporation is unconstitutional," by stating, in addition, that there was a constitutional obligation on the Assembly to set apart funds for the support of the university; and if it were constitutional and right for them to do so, it is unconstitutional and wrong to take away those funds. If the framers of the Constitution intended by that section that the Legislature

should establish one or more universities and schools, and vest in them certain funds, which might be deemed sufficient at the time for the support in a constitutional view; if it were intended that by doing this the Legislature had completely discharged their duty, and had nothing more to do with such schools and universities, whatever misfortunes might afterwards attend them, there might be something in the argument. I think, however, this section of the Constitution was intended for a very different purpose. It became the duty of the Legislature, created by and acting under that Constitution, to establish seminaries of learning, with salaries to the masters, etc., and afterwards to support and cherish them as long as the Constitution shall exist. If by accident the funds set apart for their support should be destroyed, it would be the duty of the (91) Legislature to endow them with others. The Legislature is the constitutional guardian of these seminaries of learning, and should at all times keep them under their inspection and control. This is a duty which they cannot delegate or transfer to any one, and can only end with the Constitution itself. Suppose, then, that property should be given to the Trustees of the University (whom I consider in no other light than as agents of the Legislature), which property was not very productive, but sufficiently so for the support of the university; and afterwards it were to become so much so that one-third of the profits arising from it would be adequate to the wants of the institution: who would have a right to the surplus? Let us reverse the case and suppose the profits of property given to the trustees to decrease or fail altogether; would it not be the duty of the Legislature to provide other funds or give other property which would be sufficiently productive? I think it would. If so, can it be doubted but that the surplus profits would be at the disposition of the Legislature? It may be said that the trustees have no surplus funds; that the profits of their property are not equal to the wants of the institution. That may be the case; but who is to judge of it? I answer, not this Court; the Constitution gives it no such power. The Legislature must be the judge. It would be going too far to say that there was a constitutional obligation on the Legislature to do a certain thing, and that this Court and not the Legislature should decide when it was properly done. If, then, the Legislature must judge how large the funds of the university ought to be, add to them when they are too small and take from them when too large, this Court are not the proper judges in such cases; and if not, how can we undertake to say that the law in question is unconstitutional? It cannot, I think, be denied that the General Assembly

have a right to take from the trustees property of which the university stands in no need, and that for the best of reasons—because they are bound to furnish it with additional
(92) funds, as those which it already possesses may decrease or as its wants may increase. I have said that the General Assembly cannot delegate this constitutional power; that is, that they cannot, by giving to the trustees any quantity of property or any given sum of money, exonerate themselves from the trust and confidence which the Constitution reposed in them. It is true, they may appoint trustees as their agents to act for them, and their trustees or agents are amenable to them for their conduct: they have a naked authority without any interest. The law can have no bearing upon them as individuals; it can only affect them in their public character as trustees. And how is it to do this? They were entrusted with property for the purpose of supporting an university in conformity with the directions of the Constitution, and the General Assembly are about to take this property from them, which they contend they have no right to do. If the Assembly are bound in any event to furnish funds to support the university, they have a right to take away surplus funds. If it be said that the property in question is not of that description, I answer, who are to judge of this, but the General Assembly, on whom there is a constitutional obligation to establish and superintend an university? On the trustees no such obligation is imposed; they are the mere agents of the Legislature; and as well might it be said that any other citizens equal in number to the trustees should be placed paramount to the Legislature. I therefore can see no analogy between this case and that of a gift made to an individual or to an ordinary corporation. My opinion upon the whole case is founded upon the provisions of the Constitution, and regarding the trustees as mere agents for the management of the concerns of the university under the direction of the Legislature, I think the demurrer should be overruled and the plea in bar sustained.

Cited: Robinson v. Barfield, 6 N. C., 423; *Hoke v. Henderson,* 15 N. C., 16; *Lowe v. Harris,* 112 N. C., 484; *Bryan v. Patrick,* 124 N. C., 660; *Wilson v. Jordan, ib.,* 715.

CASES

ARGUED AND DETERMINED IN THE

COURT OF CONFERENCE

OF

NORTH CAROLINA

DECEMBER TERM, 1805.

THE HEIRS OF ANTHONY B. TOOMER v. THE HEIRS OF HENRY TOOMER.

From Wilmington.

In making partition, so much of the ancestor's lands acquired by him after making his will as are conveyed to a child by way of advancement, are to be valued according to their worth at the time of the conveyance; and the residue of the lands be valued at the time of the ancestor's death.

HENRY TOOMER made his will in 1789, in which, after several devises and bequests, he directed that the remainder of his estate, real and personal, should be divided among his four children, Anthony, John, Lewis and Elizabeth. The testator died in 1799, having, after the making of his will, acquired other lands and real estate not mentioned in his will. After the making of his will he gave to his son Anthony B., by way of advancement, a plantation called the brick-yard plantation. Anthony B. Toomer died in 1805, and the petitioners, being his children and heirs at law, claimed a share of the real estate of said Henry Toomer which was acquired after said will was made, and filed a petition praying for a partition thereof. They insisted, first, that they were not bound to bring the said brick-yard plantation into hotchpot, because the said Henry Toomer did not die intestate, and that the rule relative to bringing lands into hotchpot holds good only in those cases where the ancestor dies totally intestate. Secondly, that if this plantation should be brought into hotchpot, it ought to be valued at the time of the gift.

The defendants contended that Henry Toomer did die intestate as to those lands which he acquired after making his will, and which were not disposed of by the same within the words and meaning of the act of 1784, ch. 22; that the brick-yard plantation ought to be brought into hotchpot and valued according to its worth at the time partition is made, or at the time of the death of Henry Toomer.

BY THE COURT. The brick-yard plantation ought to be brought into hotchpot and valued at the time it was conveyed to Anthony B. Toomer. The other lands purchased by Henry Toomer after making his will ought to be valued at the time of his death.

Cited: Dixon v. Coward, 57 N. C., 357.

SUTTRELL'S EXECUTORS v. DRY'S EXECUTORS.

(94) *From Wilmington.*

The court will not grant a new trial upon an affidavit of one of the jurors, that he did not assent to the verdict.

THE plaintiffs brought an action of debt against defendants, upon a bond given on 17 February, 1777, by defendant's testator, for £200, money of North Carolina, payable on 7 February next ensuing. A verdict was rendered for the plaintiff, and upon motion of defendant's counsel a rule was obtained upon the plaintiff to show cause why a new trial should not be granted, upon the ground that one of the jury who tried the cause had not assented to the verdict; and the affidavit of the juror was offered to the court, setting forth that he did not consent to the verdict; that he thought the money mentioned in the bond ought to have been scaled according to the scale of depreciation, and that the full value called for in the bond ought not to have been given.

BY THE COURT. Applications like the present for new trials have always been rejected. Were they to be listened to by the court, they would open a door for much corruption. The rule for a new trial must therefore be discharged.

FRYER v. BLACKMORE'S ADMINISTRATOR.

From Wilmington.

A, being administrator of B, is summoned as a garnishee in a case pending in the County Court. He is examined and an issue made up and found against him; he prays an appeal, but does not give bond for the appeal until the next term, in consequence of which the appeal is dismissed. A writ of *certiorari* will lie to remove the cause to the Superior Court.

THE defendant was summoned as a garnishee in a cause pending in the County Court; he was examined and an issue was made up and tried between him and the plaintiff, and the jury found in favor of the plaintiff at April Term, 1804. The defendant prayed for an appeal to the Superior Court, but did not execute an appeal bond until July term following. The record was transmitted to the Superior Court and the appeal was there dismissed, because the appeal bond had not been executed at the proper time; at the same term in which the appeal was dismissed, the defendant obtained a writ of *certiorari* to have the record certified to the Superior Court, and upon the return of this writ his counsel moved to have the (95) cause placed on the trial docket, which, being objected to, the cause was sent to this Court upon the question whether the writ of *certiorari* was the proper remedy in this case.

BY THE COURT. The writ of *certiorari* is the proper remedy for the defendant in this case, and we concur in the opinion expressed by the judge upon the hearing of this cause in the court below, that the cause should be placed on the trial docket.

ARTHUR BELL v. BENJAMIN BELL.

From Fayetteville.

The defendant having pleaded in abatement that the plaintiff resided in the State of Georgia, and that he, the defendant, resided in the district of New Bern and ought not to be compelled to answer the suit in Fayetteville District Court, the plaintiff replied that one A. B. had the beneficial interest in the suit, and that he resided in Fayetteville District. The defendant demurred to this replication. Demurrer overruled.

THIS was an action on the case, to which the defendant pleaded in abatement that the plaintiff resided in the State of

Georgia; that he, the defendant, resided in the district of New Bern, and this not being a local action, that he ought not to be compelled to answer thereto in any other court than that of the district in which he resided. To this plea the plaintiff replied that the beneficial interest in the suit was in Joshua Bell, and not in Arthur Bell, the nominal plaintiff; that the said Joshua Bell was at the time of issuing the writ in this case an inhabitant of and resident in the county of Anson within the district of Fayetteville, etc. To this replication the defendant demurred, and the plaintiff having joined in demurrer, the case was sent to this Court for the opinion of the judges.

By MACAY, TAYLOR and LOCKE, JJ. Let the demurrer be overruled with costs.

HALL, J., *contra*. Anthony Bell is the plaintiff of record, and the act of 1777, ch. 2, directs that "where the plaintiff shall reside beyond seas, or in a different State, the suit shall be brought to the court of the district where the defend-
(96) ant resides; and where suit is brought otherwise than is therein directed, it may be abated, on the plea of the defendant." A court of law will not take notice of the trust between Anthony Bell and Joshua Bell, and recognize the latter as plaintiff when the record declares that the former is plaintiff.

MARY JONES v. WILLIE JONES' EXECUTOR.

From Halifax.

A widow dissents from her husband's will, and claims a distributive share of the crops growing on lands devised. She files a bill in equity against the executor for an account of the crops and a distribution of them, but charges no fraud, etc. Bill dismissed on the ground that a court of equity has no original jurisdiction over the case. Widow's remedy is prescribed by the act of 1791, ch. 22.

WILLIE JONES, being seized and possessed of large real and personal estates, made his last will and testament, and therein devised all his lands to his two sons in severalty, some tracts to the one and some tracts to the other, and in a subsequent, separate and distinct clause, devised the crop, either growing or in the granaries, together with all the residue of his personal property, to be divided between his said two sons when the eldest arrived at age. He appointed Allen Jones executor of his will,

who after his death proved the same and undertook the execution thereof. Mary Jones, the widow, dissented from the will and claimed a distributive share of the crops growing on the lands of her husband at the time of his death. The executor resisted the claim upon the ground that the crops passed with the lands on which they were growing to the two sons under the devises in the will. The widow filed a bill in equity for an account and distribution of the crops, and the case was sent to this Court for the opinion of the judges.

BY THE COURT. If the widow's claim to a distributive share of the crops growing on the lands of her husband at the time of his death be well founded (upon which point we shall give no opinion), she must seek to enforce it in the way pointed out by the act of 1791, ch. 22. A court of equity cannot exercise any original jurisdiction over the claim which she sets up. There is no charge of fraud in the executor, nor such matter of account as will authorize the Court to take cognizance (97) of the case. The bill must therefore be dismissed.

THOMPSON v. TATE.

From Hillsborough.

The vendor of goods is liable for affirming the goods to possess a quality which would increase their value, if it turns out that the goods do not possess this quality, although the vendor did not know that the affirmation was false.

RULE for a new trial, on the ground of misdirection by the presiding judge. The question of law arising on the trial of this cause was, whether the vendor of personal property affirming at the time of the sale that the property sold has any particular quality, which if it possessed would increase its value, and it turns out that it does not possess this quality, be liable to an action on an express or implied warranty, although he did not know such affirmation to be false. Upon the trial the judge instructed the jury that the vendor was liable.

BY THE COURT. Upon this question there can be no doubt: the vendor is clearly liable, and the rule for a new trial must be discharged.

Cited: McKinnon v. McIntosh, 98 N. C., 92; *Wrenn v. Morgan,* 148 N. C., 105.

CARDWELL'S HEIRS v. BRODIC.

From Hillsborough.

Judgment of execution against the real estate of a deceased debtor in the hands of the heirs and devisees, reversed, because it was not found that the executrix had fully administered, had no assets or not sufficient to satisfy the creditor's demand.

THIS was a writ of error brought by the plaintiffs to reverse a judgment recovered against them by defendant in Granville County Court. John Brodic, the defendant, brought an action of trespass on the case against Mary Cardwell, executrix of Thomas Cardwell's will, and the said executrix failing to make any defense, Brodic took judgment by default, and damages were assessed upon a writ of inquiry. A *fieri facias* was sued out against the goods and chattels of Thomas Cardwell, deceased, in the hands of his executrix, the said Mary, which was returned by the sheriff to November Term, 1805, of
(98) Granville County Court, having the sheriff's indorsement thereon "that no goods nor chattels of Thomas Cardwell were to be found." Brodic then sued out a *scire facias* against the heirs at law and devisees of Thomas Cardwell, deceased, to show cause why he should not have judgment of execution for his debt and costs against the real estate of the said Thomas Cardwell, deceased, in the hands of the said heirs and devisees. Upon this *scire facias,* judgment was rendered in favor of Brodic; and some time afterwards the said heirs and devisees brought a writ of error to reverse this judgment. They assigned for error, first, that it did not appear from the record and proceedings in the cause that the executrix, Mary Cardwell, had fully administered the estate of her testator, or that she had no assets, or not sufficient to satisfy the recovery of the defendant in error in the suit brought against her; second, that the jury did not find upon the trial of the said suit that the said executrix had fully administered, or had no assets or not sufficient to satisfy the recovery aforesaid. The defendant in error having pleaded that there was no error in the proceedings in the cause, etc., the case was sent to this Court for the opinion of the judges.

BY THE COURT. The act of 1784, ch. 11, was passed to remove doubts "which were entertained whether the real estates of deceased debtors in the hands of their heirs or devisees should be subject to the payment of debts upon judgments obtained

against the executors or administrators, and to direct the mode of proceeding in such cases." It is declared in section 2 of this act, "that in all cases at law where the executors or administrators of any deceased person shall plead fully administered, no assets, or not sufficient to satisfy the plaintiff's demand, and such plea shall be found in favor of the defendant, the plaintiff may proceed to ascertain his demand and sign judgment; but before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* shall and may issue, summoning the respective heirs and devisees (99) of such deceased debtor to show cause why execution should not issue against the real estate for the amount of such judgment, or so much thereof as there may not be personal assets to discharge; and if judgment shall pass against the heirs or devisees, or any of them, execution shall and may issue against the real estate of the deceased debtor in the hands of such heirs or devisees against whom judgment shall be given as aforesaid." The Legislature intended that the real estates of deceased debtors should not be subject to the payment of their debts until the personal estate was exhausted; and the Court have no power to award execution against the real estate in the hands of the heirs or devisees until "it shall be found upon the plea of the executors or administrators that they have fully administered, have no assets, or not sufficient to satisfy the creditor's demand." The judgment, therefore, rendered against the plaintiffs in error was not rendered according to the mode of proceeding directed by the Legislature. It is erroneous, and must be reversed.

DICKENSON ET AL. v. STEWART'S EXECUTOR.

From New Bern.

The probate of a will may be set aside after the term expires at which the will was proved and a second probate be ordered by the same court. The court will look to all the circumstances of the case, to aid its discretion in ordering a second probate.

THIS was a petition to the County Court of Pitt, to set aside the probate of a paper-writing which had been proved in said court as the last will and testament of James Stewart, deceased, and to contest the said will upon an issue to be made up under the direction of the court. The petitioners were the heirs at

law and next of kin of the said Stewart. Joel Dickenson, one of the petitioners, resided in the town of Greenville, where the court was held, and on the first day of the term was informed by John Spier, the executor, that he would have the said will proved on that day, which was accordingly done, and the court continued to sit for four days afterwards. Dickenson (100) neither caveated the probate nor during the term made any application to the court upon the subject. William H. Williams, the other petitioner, resided in Fayetteville and had no previous notice of the said probate, but was informed of it shortly afterwards. The will was proved at November Term, 1802, and at February Term, 1804, the petitioners filed their petition to set aside the probate of the said will and to require the executor to exhibit the said will for probate again in the said court. The case was taken to the Superior Court of Law for New Bern District, and by that court was sent to the Court of Conference upon the question "whether the probate of a will in the usual form can be set aside after the term has expired at which it was proved, and a second probate ordered by the same court; and if so, at what length of time it may be done.

Gaston for petitioners.
Harris for defendant.

BY THE COURT. We are of opinion that the probate of a will in the usual form may be set aside after the term has expired at which the will was proved, and that a second probate may be ordered by the same court. As to the length of time at which this may be done, that must depend upon the particular circumstances of the case. The court will look to all circumstances which can aid its discretion in ordering a second probate.

Cited: Redmond v. Collins, 15 N. C., 439; *Armstrong v. Baker,* 31 N. C., 112; *Crump v. Morgan,* 38 N. C., 99.

HOWARD v. PERSON'S ADMINISTRATORS.

From Halifax.

Rule for a new trial entered *nunc pro tunc*, the clerk having omitted to enter it at the proper time.

THIS was an application to the court to amend the record, by entering a rule for a new trial now as of the time when it ought to have been entered.

HOWARD *v.* PERSON.

Howard having recovered a judgment against the administrators of Thomas Person, deceased, the defendants by their counsel moved for a rule upon the plaintiff to show cause why a new trial should not be granted. The clerk (101) omitted to enter the rule. The presiding judge took time to consider whether the rule should be made absolute, and having some doubts upon the case, he declined giving an opinion until he could consult with his brethren of the bench at the next Court of Conference. He addressed a letter to the clerk, informing him of his intention to consult his brother justices at the next Court of Conference upon the rule for a new trial, and directing him to forbear to issue an execution until the opinion of the judges could be known. The judges were of opinion that a new trial should be granted; but in the meantime Howard, the plaintiff, applied to the clerk for an execution, and as the rule for a new trial was not entered on the record, the execution was issued. The administrators of Person filed an affidavit setting forth in substance the above facts, prayed for a *supersedeas* to stay the execution, and that the Clerk of Halifax Superior Court (in which the court cause was tried) might be directed to enter the rule for a new trial now as of the time when it ought to have been entered. The question arising upon this affidavit and this application to amend the record was sent to this Court.

BY THE COURT. Let the Clerk of Halifax Superior Court enter the rule for a new trial, now, as of the time when it ought to have been entered; and let the judgment which he has entered upon the verdict in this case be set aside.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1806.

SPRUCE MACAY, Esquire,
JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire.

HENRY SEAWELL, Esquire, Attorney-General.
EDWARD JONES, Esquire, Solicitor-General.

By an act of the last session of the General Assembly, the name and style of the Court of Conference were altered to that of the "Supreme Court of North Carolina."

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1806.

(102)

ARRINGTON, ADMINISTRATOR OF PHILLIPS, v. COLEMAN.

From Halifax.

1. Administrators not liable for costs incurred in a suit brought by their intestate, and prosecuted by them after his death. Where executors or administrators sue in *auter droit*, they are not liable for costs *de bonis propriis;* they are liable where they sue in *their own right*, although they name themselves executors or administrators.

2. Where they sue in *auter droit* and fail, having no assets, costs are lost, unless they give bond and security for the costs, and then the security is liable.

ON MOTION to dismiss the *supersedeas* obtained in this case by Arrington, administrator of Phillips, it was ordered that the case be sent to the Court of Conference upon the question whether an administrator is liable for costs incurred by his intestate in carrying on a suit at law before he (the administrator) became a party to the suit; and whether he is liable for costs incurred in the time of his administration; and out of what estate or effects the said costs are to be paid in case there be no assets of the intestate.

LOCKE, J., delivered the opinion of the Court. The rule with regard to costs in England seems to be accurately laid down in 2 Bac. Ab., 446, and in the cases there referred to. Executors and administrators, when plaintiffs, pay no costs, for they sue in *auter droit*, and are but trustees for the creditors; they are not presumed to be sufficiently cognizant of the personal contracts of those whom they represent, and are therefore not with-

in the statutes or acts of Parliament relative to costs. Wherever they sue in *auter droit,* they pay no costs; but if they bring suit in their own right, they shall pay costs, though they (103) name themselves executors or administrators; for this is but surplusage. *Elwis v. Mocato,* Salk., 314. To apply this rule to the present case, it would seem clearly to result that the administrator is not liable to pay, *de bonis propriis,* the costs incurred during the time of his intestate being a party or during his own time. But the Court think he is liable and ought to pay both out of the assets in his hands, if any such remain; for all the costs incurred during the pendency of the suit became a debt for which the estate of the intestate ought to be responsible.

In cases, therefore, where administrators sue in *auter droit* and fail, having no assets of the deceased wherewith the costs can be discharged, the Court are of opinion that the costs are lost, as there is no person properly liable to pay them, unless such administrators should give bond and security for payment of costs, and then such security is liable, on the principle of the case determined by this Court at this term, *Hostler v. Smith, post,* 103.

HOSTLER'S ADMINISTRATOR v. SMITH.

From Wilmington.

An executor appeals from the judgment of the County Court and enters into bond with security. The bond is binding on the parties, and on a *scire facias* against the security founded on the appeal bond and on a judgment in the Superior Court against the executor, judgment given in favor of the plaintiff.

THE plaintiff brought suit against the executors of John Howell in the County Court, and obtained judgment, by which judgment assets were considered to be in the hands of the defendant sufficient to satisfy the plaintiff's demand. The defendants appealed to the Superior Court, and the defendant, Benjamin Smith, became bound in an appeal bond as their security under the acts of Assembly requiring appellants to give security. In the Superior Court judgment was again rendered in favor of the plaintiff; one of the executors afterwards (104) died, and the plaintiff sued out a *scire facias* against Smith, the security for the appeal, to show cause why judgment should not be entered against him for the debt and

costs recovered against the appellants. The case was sent to this Court for the opinion of the judges on the question whether the plaintiff is entitled to have judgment entered against the defendant upon this *scire facias.*

Jocelyn for plaintiff.
Haywood and *Duffey* for defendant.

LOCKE, J., delivered the opinion of the Court. In de- (113) ciding the question whether the plaintiff is entitled to judgment upon the *scire facias* against the defendant, it is not necessary to determine a previous question made by the counsel for the parties and argued at much length, to wit, whether executors or administrators, when appellants, are bound to enter into bond with security; for we are of opinion that whether they are thus bound or not, if they enter into bond and give security, such bond is obligatory upon the parties. The cases cited from 2 Ld. Ray., 1467, and 2 Strange, 1745, establish this principle beyond all doubt. *Waller v. Pitman,* 1 N. C., 324, relied on by defendant's counsel, is not applicable to the present case. There the bond executed by the appellant and his securities contained none of the substantial parts prescribed by the act of Assembly; it was totally variant, and on that account was declared by the Court to be insufficient to ground a judgment on. In the present case the bond is in perfect conformity with the act, and in itself complete, but is attempted to be avoided on the ground that the executors, who appealed, were not bound to give security. The cases cited from Lord Raymond and Strange show that the bond cannot be avoided on this ground. Let judgment be entered for the plaintiff.

Cited: Arrington v. Coleman, ante, 103.

SIMMONS v. RATCLIFF.

From Halifax.

On the abatement of a suit by the death of the plaintiff, execution for the costs ought not to be issued until a *scire facias* has issued to the representatives of the plaintiff.

THE plaintiff instituted an action of trespass *quare clausum fregit* against the defendant, and pending the suit he died.

The suit was not revived by his representatives, and a *fieri facias* was issued against the property of the plaintiff
(114) for the costs. A motion was made to set aside this execution, on the ground that no *scire facias* had issued against the plaintiff's representatives to show cause why the execution should not be issued. The case was sent to this Court upon the question whether a *scire facias* ought not to have been issued against the plaintiff's representatives before suing out the execution.

BY THE COURT. A *scire facias* ought to have been issued against the representatives of the plaintiff before suing out execution, and an opportunity afforded them of making defense and pleading thereto. This execution has therefore been issued erroneously, and must be set aside.

DEN ON DEMISE OF GIBSON v. SHEARER.

From Salisbury.

Deed for lands in the actual adverse possession of another person is totally void.

THE lessor of the plaintiff claimed the land in question under the Trustees of the University of North Carolina; he obtained a deed for the land when Shearer, the defendant, was in the actual possession, claiming the land as his own. The question in the case was whether this deed was valid.

LOCKE, J., delivered the opinion of the Court. This deed is totally void, inasmuch as the common law does not permit a right of entry to be transferred or sold, and for the reason assigned in Co. Lit., 214, "to avoid maintenance, suppression of right, and stirring up suits; and therefore nothing in action, entry or re-entry can be granted over; for so under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth; as men to grant before they be in possession." This question has been so often decided in this State that the Court thought it had long since been at rest and would never be revived. Let judgment be entered for
(115) the defendant.

NOTE.—This has been changed by statute, Rev., 400; *Burnett v. Lyman*, 141 N. C., 500.—W. C.

PERSON'S HEIRS v. DAVEY.

From Hillsboro.

1. Upon the trial of a caveat the only question is, Who has the best equitable right to procure a grant for the land?
2. Facts known to a party before trial, but omitted to be proved upon a belief that the evidence offered was sufficient, no good reason for a new trial.

THE defendant entered a tract of land lying in Person County; the plaintiffs caveated the entry, and by consent of parties the caveat was tried in court, when a verdict was found for the defendant. The plaintiffs obtained a rule for a new trial upon an affidavit setting forth (1) that their ancestor, Thomas Person, in his lifetime, obtained a grant from the State for the lands in question, and therefore the jury ought to have found a verdict in favor of the caveators; (2) that the said Thomas Person had purchased an improvement on said land from the first occupant, and therefore had the prior equitable right to the land. But this evidence was not produced on the trial, because the caveators conceived the grant aforesaid to be sufficient. The case was sent to this Court upon the question whether the rule for a new trial should be made absolute or be discharged.

LOCKE, J., delivered the opinion of the Court. Upon the trial of a caveat, the question is not which of the parties has the better grant or title, but simply which has the best equitable right to obtain a grant. It is the peculiar province of the jury to determine this question from all the facts disclosed to them on the trial. The verdict of the jury, therefore, saying that the defendant Davey is entitled to a grant, cannot impair or destroy the grant of Person's already obtained; and if his grant be valid in law, his heirs will be able to secure the land in dispute. The Court therefore think that on this ground a new trial ought not to be granted, but that Davey should be permitted to obtain his grant and the parties be left at liberty to determine the validity of their respective grants by a trial in an ejectment or in such other mode as they may choose. The second reason assigned for a new trial is insufficient, as the fact (116) disclosed in the affidavit was known before the trial of the caveat and the proof of that fact omitted to be introduced through the negligence of the caveators. Let the rule for a new trial be discharged.

WILCOX'S HEIRS v. MORRIS ET AL.

From Hillsboro.

A creditor agrees with his debtor, after judgment, to levy his execution on the whole of the debtor's property and purchase it in at the sale and hold it as a security for his debt; equity will permit the debtor to redeem the property.

WILCOX, the ancestor, being indebted to Morris in a large sum, confessed judgment for the amount of the debt, upon a special agreement that Morris should levy the execution on all his property, purchase it in at the sale and hold it as a security for the payment of his debt, and that Morris should recover the property when the debt was paid. Morris, by his agent, McClain, purchased in the property and sold a great part thereof to purchasers for a valuable consideration without notice of this trust. Wilcox filed this bill against Morris, McClain and the sub-purchasers, in order to redeem the property sold and to have a reconveyance enforced; also to have an account of the profits and amount of sales, charging that the whole of the debt has been paid. On the hearing of this cause three questions were reserved and sent to this Court: 1. Whether the contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution redeemable. 2. Whether an account stated and liquidated between Wilcox and Morris ought not to be set aside, on account of an imposition alleged to have been practiced on the latter in said settlement, owing to his old age and imbecility of mind. 3. Whether the bill ought not to be dismissed as to McClain and the sub-purchasers, because the first was a mere agent and received money and conducted the business for Morris, the principal,
(117) and because the latter were purchasers for a valuable consideration without trust.

LOCKE, J., delivered the opinion of the Court. The contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution is redeemable. No particular words or form of conveyance are necessary to give to the contract the qualities of a mortgage. It may be laid down as a general rule, subject to few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage, and the estate redeemable, even though there be

an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. A court of equity, in applying this rule to particular cases, will often ascertain the fact whether the conveyance was intended as a security for money, however absolute it may appear, and will lay hold of all the circumstances of the transaction to ascertain this fact, such as the value of the estate conveyed and the sum given therefor, the bargainee not being let into the immediate possession of the estate, his accounting for the rents and profits to the bargainor, etc. In the present case there was a special agreement in writing that the complainant should be at liberty to redeem the property when the debt was paid. We are also of opinion that the account referred to ought not to be set aside, there being no evidence of any fraud or imposition practiced on Morris. The suggestion of his old age and imbecility of mind is not sufficient to set the account aside, but leave is given to surcharge and falsify the same. As to the third point, we think the bill ought to be dismissed as to the sub-purchasers without notice of the trust; but as to the representatives of McClain, the agent, the bill ought to be retained, that an account may be taken of the money which he received, (118) great part of which complainant alleges was never by him accounted for to his principal. Let this account be taken and the bill, as to sub-purchasers, without notice of the trust, be dismissed with costs.

Cited: Bunn v. Braswell, 142 N. C., 116.

HAWKINS v. THE COUNTY OF RANDOLPH.

From Hillsboro.

The County Court rejected a petition for an order to lay out a public road; the petitioner appealed to the Superior Court. The appeal cannot be sustained.

The plaintiff exhibited a petition to the County Court of Randolph for the purpose of obtaining an order to lay out a public road in said county. The court rejected the prayer of the petition and the plaintiff prayed an appeal to the Superior Court. The question submitted to this Court was whether the appeal ought to be sustained.

LOCKE, J., delivered the opinion of the Court. The act of 1784, ch. 14, declares that "from time to time and at all times thereafter the courts of the several counties in this State shall have full power and authority to appoint and settle ferries and to order the laying out of public roads where necessary, and to appoint where bridges shall be built, and to discontinue such roads as then were or thereafter should be found useless, and to alter roads so as to make them more useful as often as occasion shall require." By this act the power and authority to lay out public roads is vested in the county courts; they are clothed with the power of judging where roads shall run, when or how to be changed or discontinued. When they have exercised this power and declared a public road shall be laid out, the third section of the act directs "that it shall be laid out by a jury of freeholders, to the greatest advantage of the inhabitants, and the jury shall assess the amount of damages which private persons may sustain by such road passing through their land." This section directs how the order of the County
(119) Court shall be executed; but no judicial authority is vested in the jury with regard to the propriety or impropriety of such road; that power rests with the court, and, when once exercised, the jury are bound to carry their order into effect. It is not necessary to examine the reasons which induced the Legislature to vest the sole authority on this subject in the county courts; it is sufficient to say they have done so. But the reason probably was that the county courts had a more perfect knowledge on this subject; they are held by all the justices of the county, who reside in different parts thereof, and few applications can be made for orders to lay out roads without some member of the court being able to judge of the necessity or utility of such road. The Superior Courts would in almost all instances be compelled to form an opinion upon the representations of men who were in some way interested, or influenced by their prejudices and partialities. The act of Assembly has, therefore, for good reasons, given jurisdiction in such cases to the county courts; their means of information to enable them to exercise this jurisdiction beneficially are superior to those of any other tribunal.

The next and important consideration is whether, although jurisdiction on this subject is given to the county courts, the party praying for the order may not appeal from their decision and have his claim examined in the Superior Court. The act of 1777, ch. 2, sec. 82, declares "that when any person or persons, either plaintiff or defendant, shall be dissatisfied with the sentence, judgment or decree of any county court, he or they

may pray an appeal from such sentence, judgment or decree, to the Superior Court of the district where such county court shall be." And section 99 provides that all persons in whose favor judgment shall be given shall be entitled to full costs. When the Legislature have prescribed the jurisdiction of the county courts, and in several instances have declared the right of appeal to the party dissatisfied with their judgment, it may fairly be inferred that an appeal will never be (120) sustained in a Superior Court, except in those instances directed by the Legislature. With regard to the subject of roads, jurisdiction over it is not given by the Legislature unless the case can be brought within the provisions of section 82 of the act of 1777. This clause seems to be confined to causes regularly brought before the court, where there are a plaintiff and defendant to be affected by the judgment. Is the present such a case? Who is the plaintiff and who is the defendant? Hawkins, who merely files a petition to obtain an order for laying out a road, cannot be considered a plaintiff within the meaning of the act, and surely the County Court of Randolph cannot be considered as defendant, merely because in their individual capacities they have delivered an opinion with which Hawkins is dissatisfied. This seems to be a case without either plaintiff or defendant, and therefore not within the meaning of the act. To show this more clearly, let us observe that section 82 of the act of 1777 requires the appellant to give bond and security to prosecute his appeal with effect, and to perform the judgment of the Superior Court. To whom ought the bond to be given in this case? Process has been served on no person; the court are to grant the appeal and to judge of the sufficiency of the securities offered by the appellant; they cannot therefore be considered as parties defendants. Hawkins, then, cannot give such bond as is required, and until such bond is given an appeal cannot be obtained. But suppose the appeal should be sustained, and the Supreme Court should order the laying out of the road as prayed for, Hawkins would be entitled to full costs. Against whom shall judgment be entered for their costs? Shall judgment be rendered against the County Court for costs, because they have given an opinion on the subject of a road which the Superior Court have reversed? This certainly cannot be done. Costs, then, cannot be (121) decreed to Hawkins, although he should prevail. But the right to costs is conferred on the party in whose favor judgment is given, by the very act which authorizes the appeal, and if within its provisions in one part, ought to be so in all.

But it is said there is a necessity for such provision; for that the members of the County Court might collude and refuse an order for the most useful road. If such necessity does exist, the remedy lies with the Legislature and not with the Court, whose business it is to administer and expound the law, not to make it. The appeal cannot be sustained, and must therefore be dismissed.

Cited: Atkinson v. Foreman, 6 N. C., 57; *Ladd v. Hairston,* 12 N. C., 369; *Gatling v. Liverman,* 23 N. C., 63; *Attorney-General v. Justices,* 27 N. C., 331; *S. v. Bill,* 35 N. C., 378; *Smith v. Harkins,* 39 N. C., 491.

MERRIL v. SLOAN.

From Salisbury.

The principle that notice to an agent is notice to his principal, does not apply to the case of surveys of entries of land made by public surveyors in the discharge of their public duties. The rule applies only to cases where there is a special trust or confidence reposed in the agent at the time of the transaction, or after, by the acceptance of the purchase by the principal. Entry-taker's books no notice of an entry having been made.

THIS was a bill in equity, brought by complainant Merril against defendant Sloan, for the purpose of having a tract of land conveyed to the complainant, upon the ground that the defendant had fraudulently procured a grant from the State for the said land. The bill charged that one Thomas White, under whom complainant claimed, had made the first entry of the land, and the defendant, having notice of this entry, entered the land and obtained the grant. The question referred to this Court was whether defendant had notice of Thomas White's entry at any time before he obtained his grant. To show that defendant had notice, three grounds were relied on by complainant: 1. That the surveyor, at the time he surveyed the land for the defendant, had express notice of White's entry; for White went upon the land and told him of the entry and forbade him to return the warrant and certificate of survey to the Secretary of State. That the surveyor in this respect is to be considered the agent of Sloan, the principal, and that notice to the agent is notice to the principal. 2. That the entry of Sloan expressly de-
(122) scribed the *improvement* of one Gadbury, which was in

truth the *improvement* of White, who permitted Gadbury to live thereon in consideration of his clearing some of the land and planting some fruit trees; and that this improvement was notice. 3. That the entry-taker's book, containing a description of the land entered, was also notice, for by examining them Sloan could easily have discovered the entry of White.

LOCKE, J., delivered the opinion of the Court. The cases cited by complainant's counsel proving that notice to an agent is deemed in law notice to the principal are not to be controverted; but whilst the Court admit the correctness of the decision in these cases, they think them inapplicable to the case now before the Court, and cannot consider the surveyor in the light of an agent of the defendant. In all cases of constructive notice, it is necessary there should be a special trust and confidence reposed in the agent, either at the time of the particular transaction or after, by the acceptance of the purchase by the principal. The cases cited from Equity Cases Abridged embrace two principles. The first class of cases go to show that if a scrivener or attorney who draws a mortgage to secure the payment of money had notice of a prior mortgage, this shall be constructive notice to the last mortgagee. And why? Because the mortgagee selects the scrivener or attorney from his knowledge of his integrity and candor; and being one of his own choice, the law presumes that whatever is known to such attorney will be fairly and honestly communicated to his client, and that such attorney will not suffer the friend who places this confidence in his integrity, skill and honesty, to be defrauded. The second class of cases show that where the father or other person, having notice that lands were contracted to be sold, purchases the lands and takes a deed to his son and heirs. Here it is said there is no trust or confidence placed in the father by the son, and yet such notice shall affect the son. But it is observable that here the conveyance is merely voluntary, (123) nothing being paid by the son towards this land; and the case of *Manull v. Manull,* 2 Wills., 613, shows that if persons claiming under a breach of trust have notice of it, they are subject to the same trust. So if the conveyance be voluntary and without valuable consideration. 3 Eq. A. B., 685. Neither of these classes of cases, in the opinion of the Court, ought to govern this case. The first ought not, because the surveyor is a public officer, to whom the individual must resort to have his business transacted, and there is no particular trust or confidence existing between the surveyor and the man who employs him as a public officer to survey an entry of land. The second

ought not, because here the defendant was a purchaser for a valuable consideration, and, as he states in his answer, without notice; and notice to the surveyor does not affect him, because not within the reason and grounds upon which notice to an agent is to be deemed notice to the principal.

As to the second ground taken to prove notice to defendant, to wit, that there was an *improvement* on the land and that Gadbury was residing thereon previous to the entry and survey made by defendant, the Court have looked into the evidence upon this point and find that it was satisfactorily proved that Gadbury contracted with White to live on the land for the consideration expressed in the statement of this case; it was also proved, and by the deposition of Gadbury himself, that he never considered himself the tenant of White, but that he resided on the land in his own right. The Court are of opinion that, although Gadbury made this contract with White, yet, as Gadbury afterwards claimed the land in question in his own right, and there being no evidence whatever to show that defendant ever knew this improvement to belong to White, it ought not to amount to notice to him. For on seeing the improvement and Gadbury residing thereon, his inquiries would naturally be directed to Gadbury respecting the right, (124) and as Gadbury swears that he did not consider the improvement to belong to White, the inference to be drawn would be that it was Gadbury's, and when he abandoned it, might well be entered by defendant without any notice of complainant's equitable title.

The Court are also of opinion that the books of the entry-taker ought not to amount to notice: first, because most entries are made in so loose and vague a manner that they do not furnish any sufficient evidence of the precise land entered; and, secondly, because all the acts of Assembly respecting titles to land, though they do not prescribe a precise and limited time for surveying and obtaining grants, yet hold out the idea of one or two years; or, at least, that the grants should issue within a reasonable time. Iredell's Revisal, 296, 293, 351, 368. It would therefore only direct the attention of the enterer to such entries as had been made within one, two or three years, at most, and ought not to operate in a case like the present, when a lapse of ten or eleven years intervened between the date of White's entry and the time of his obtaining a grant, and especially as White knew of defendant's survey and could have procured a suspension of his grant, and upon a caveat had his right fairly tried by a jury. As no notice is proved on defendant, the bill must be dismissed with costs.

THE STATE v. STRAT.

From Hillsboro.

Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned as to his answer.

THE defendant was indicted for perjury, and found guilty, subject to the opinion of the court on the following case:

The defendant prosecuted one Zephariah Tate and others for a riot. On the trial of the indictment the defendant was examined as a witness, and was asked whether he did not present a gun at Zephariah Tate, or threaten to shoot him. He was cautioned by the counsel who propounded this ques- (125) tion, to take care how he answered it. He answered that he did not present a gun at said Tate or threaten to shoot him. He was then cautioned to take care how he answered this question, and the question was propounded to him a second time. The defendant again answered in the negative. The answer given by defendant to this question was the perjury assigned in the indictment. The question and answer had no immediate relation to the question of guilty or not guilty on the indictment for the riot; but the question was asked in order to lay a foundation for the introduction of witnesses on the part of the defendants, proving the answer to be false, and thereby impairing the credit which his testimony might have with the jury on other facts which were material and important to the issue. The question for the consideration of the court was whether the oath taken as aforesaid could be considered so material to the issue as to amount to the crime of perjury.

LOCKE, J. It cannot be doubted that if the oath be wholly foreign to the issue, or altogether immaterial and by no means pertinent to the question, not tending to aggravate or extenuate the damages or fine, nor likely to induce the jury to give a readier credit or to lessen the credit to the substantial part of the evidence, it cannot amount to the crime of perjury. Hawkins Pleas of the Crown, 323, has put several instances to illustrate this position. "As where a witness being asked by a judge whether A brought a certain number of sheep from one town to another altogether. Answered that he did so; whereas he had brought part at one time and part at another. Yet such witness was not

guilty of perjury, because the substance of the question was whether A did bring them at all or not, and the manner of bringing them was only a circumstance." He cites many other instances, and adds: "But, perhaps, in all these cases it ought to be intended that the question was put in such man-
(126) ner that the witness might apprehend that the sole design of putting it was to be informed of the substantial part, which induced him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for, otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, which afterwards appear to be false, surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence than his proving to have an exact and particular knowledge of all the circumstances relating to it.

If in the doctrine here laid down the author be correct, it would seem that the oath taken by the defendant does amount to perjury. For the question was asked for the purpose of sifting the defendant's knowledge of the substance, by examining him strictly as to circumstances, and in such a manner as to inform the defendant of this purpose, and with a design to lessen the effect of his testimony on those parts of the case which were material and important; and although it related nothing to the merits of the cause then on trial, yet, inasmuch as his giving such an answer in a thing immaterial had such a direct tendency to lessen his credit concerning what was most material and consequently beneficial to the defense of the then defendant, equally criminal in its own nature and equally tending to abuse the administration of justice as if the matter sworn had been the very point in issue, there does not seem any good reason why it should not be equally punishable. This case is precisely similar to the case of *S. v. Doty,* determined some years go in Salisbury Superior Court. One Harmon preferred an indictment against Doty for petit larceny; to support which there was but one witness, named Patterson. To render Patterson infamous and thereby disqualify him from giving testimony, Doty preferred an indictment against him for larceny. Pending these prosecutions, Doty offered
(127) Patterson a horse, saddle and bridle to abscond and not appear as a witness against him; which offer was rejected by Patterson. On the trial of the indictment, *S. v. Patterson,* Doty was asked if he had not made this offer to Patterson; he answered positively that he had not. For this

oath Doty was indicted, tried, convicted and punished, although the same exception was taken and solemnly argued by counsel which is taken in the present case. The question had no relation to the larceny, but was asked with the express design of impairing the credit of Doty's testimony on those parts of the case which were material and important. The Court believing the decision in *Doty's case* to be correct, are of opinion that judgment should be entered for the State.

Cited: S. v. Cline, 150 N. C., 857; *S. v. Lewis,* 93 N. C., 584.

Doubted: Studdard v. Linville, 10 N. C., 479.

WINDOWS v. MITCHELL.

From Salisbury.

A, on his deathbed, directed B to go into his field to a place pointed out and get a sum of money there deposited, which in the event of A's death, B was to divide among A's children. This is not a "*donatio mortis causa*" to A's children. Defendant's acknowledgment of the above facts and of his having received the money is not good evidence thereof to vest the money in him as trustee for the use of A's children, and defeat the statute of distributions.

This was an action on the case for money had and received to the use of the plaintiff. Adam Windows, the father of the plaintiff, on his deathbed gave directions to the defendant to go into his cornfield to a particular place therein pointed out and get a certain sum of money which he had deposited there, and, in the event of his death, to divide the money among his six children, the plaintiff being one. Mitchell, the defendant, went to the place pointed out and found $701.35. Adam Windows then made his will and therein took no notice of this money. The only evidence adduced by the plaintiff to prove the direction to the defendant to go into the field and get the money, and, in the event of the death of Adam Windows, to divide it among his children, also the defendant's having received the money and the amount thereof, was the acknowledgment of the defendant, who told one of the witnesses, in addition to these facts, that he intended to discharge the plaintiff's demand. The defendant was the executor of Adam Windows' will.

(128)

The following questions were made in this cause and sent to this Court for the opinion of the judges: 1. Whether the money claimed by the plaintiff can be considered as a *"donatio mortis causa."* 2. Whether the defendant's acknowledgment of the facts stated in the case shall be deemed sufficient to defeat the statute of distributions and to vest the money in him as trustee for the use of Adam Windows' children; and his acknowledgment of this fact be good and sufficient evidence thereof. 3. Whether an action at law can be maintained for the recovery of this money, it being in the nature of a legacy.

MACAY and HALL, JJ., gave judgment for the defendant on the two first points. No opinion was given on the third point. TAYLOR, J., *contra,* on both points.

LOCKE, J., having been of counsel in the cause, gave no opinion.

WHITHEAD (WIDOW) v. CLINCH'S HEIRS AND EXECUTORS.

From Halifax.

Dower having been assigned to the widow upon a petition at law, equity will not entertain a bill for the mesne profits during the detention of the dower, unless there be some equitable circumstance, such as loss of title deeds, or detention of such deeds, or a discovery is necessary. Damages for the detention of the dower are to be prayed for and recovered when the dower is allotted. If defendant to a suit at law or dower die pending the suit, damages are lost, and dower alone recovered.

JACOB WHITHEAD died in 1783, seized and possessed of a tract of land in Nash County, leaving the complainant, Martha Whithead, his widow, who some time in 1786 filed her petition against Joseph John Clinch, who was then in possession of the said tract of land, praying that her dower therein might be allotted to her. Clinch contrived to delay the hearing of the petition until 1794, when he died, having previously made a will and appointed executors. The petition was carried on against the heirs of Clinch until 1800, when judgment was rendered in favor of the petitioner, and her dower in the
(129) said land was accordingly allotted to her. During the pendency of this suit the land was possessed and the profits received by Clinch during his life and by his heirs after his death. When the writ of dower was executed, no damages

for the mesne profits were recovered, owing in part to the doubt whether, as the suit was originally instituted against the ancestor and afterwards carried on against the heirs, any damages could be given, and as the act of Assembly regulating the proceedings upon petition for dower had made no provision upon this point. Clinch died possessed of property more than sufficient to satisfy the complainant's demand, which property came to the hands of his executor. Martha Whithead, the widow, filed this bill against Clinch's executors and heirs at law, praying for an account of the mesne profits, and that one-third part thereof might be decreed to be paid her.

To this bill the defendants demurred and assigned for causes of demurrer that if complainant were entitled to damages, she ought to have demanded and recovered them with her dower at law; and that complainant had not shown that she was entitled to any damages for the detention of her dower, either in law or equity. The executor assigned another cause, to wit, that complainant's dower was recovered from the other defendants, who were the tenants in possession, and that damages in dower could by law be recovered from him. The complainant having joined in demurrer, the case was sent to this Court.

In support of the demurrer it was urged that without some equitable circumstance, such as defendant detaining title of deeds, loss of such deeds, or where a discovery from the defendant is necessary, a court of equity will not entertain a bill for mesne profits. 2 Vern., 519; 3 Atk., 340; 1 Atk., 524. That in this case no equitable circumstances existed or were set forth in the bill. It was further urged that this being a case which originated previous to the act of 1784, which regulated proceedings in cases of dower, it ought to be decided by (130) the law as it stood previous to the act of 1784. By this law, if the defendant in a writ of dower die pending the suit, damages are lost and judgment will be given for dower only. 2 Ba. Ab., 392, 294. And although cases are numerous where plaintiff or defendant at law, in a suit for damages, has died, it has always been conceded that damages were lost at law, and equity has never given relief. The case from 2 Brown Ch., 620, etc., is a case which was first instituted in a court of equity, and not in a court of law.

No damages or mesne profits were recoverable at common law in real actions, of which dower is one, on the principle that they were necessary to enable the tenant in possession to answer the demands of the lord. The statute of Morton, 20 Hen. III., first gave damages in dower to widows, and that only where the husband died seized of the land. Co. Lit., 33, 32 b. (2); 2

Ray., 1384; 2 Ba. Ab., 392; 3 Dyer, 284 and b. 33. No case can be produced where widows whose husbands did not die seized of the land of which they prayed dower recovered mesne profits, except two or three, which were afterwards reversed for error on that very account. No damages are prayed against a purchaser in the husband's lifetime. 3 Bro. Ch., 264; and in Beenbury, 57, is a case where the bill in almost every particular like the present was on demurrer dismissed.

BY THE COURT. Let the demurrer be sustained and the bill dismissed with costs.

(131)

KING'S ADMINISTRATOR v. BRYANT'S EXECUTOR.

From Halifax.

Plaintiff having lost the bond declared on after an appeal from the judgment of the County Court, is permitted to prove the contents thereof upon the trial in the Superior Court, and to recover a judgment without amending his declaration.

THIS was an action of debt brought in the County Court of Northampton, and the bond declared on was produced on the trial and the execution thereof duly proved. Verdict and judgment were rendered for the plaintiff, and the defendant appealed to the Superior Court of Law for Halifax District. Subsequent to the appeal and before the trial of the cause in the Superior Court, the bond declared on was lost. No application was made to the court to amend the declaration, and upon the trial in the Superior Court a question arose whether, as the declaration set forth a *profert* of the bond, the production of the bond could be dispensed with and the plaintiff be permitted to prove the contents thereof. The jury gave a verdict for the plaintiff, and upon a rule for a new trial, the case was sent to this Court.

BY THE COURT. Let the rule for a new trial be discharged.

MUMFORD v. HODGES.

From Fayetteville.

The judgment of the County Court, not being lessened in the Superior Court, bears 10 per cent interest up to the time of rendering judgment in the Superior Court.

THIS was an action of debt, and the plaintiff having recovered a judgment in the County Court, the defendant appealed to the Superior Court of Law for the district of Fayetteville, in which court, having failed to diminish the sum recovered in the County Court, the plaintiff's counsel moved for judgment against the defendant for the additional interest given by the act of Assembly; and the question, for what space of time the judgment obtained in the County Court is to bear 10 per cent interest, was referred to this Court.

BY THE COURT. Under the act of Assembly on this subject, the judgment of the County Court is to bear interest at the rate of 10 per cent from the time of obtaining the (132) same in the County Court up to the time of obtaining judgment in the Superior Court.

BYNUM & PARKER, ADMINISTRATORS OF BRANCH, v. BOWEN BRANCH, ADMINISTRATOR DE BONIS NON OF JOHN BRANCH, DECEASED.

From Halifax.

A bequeathed two negro slaves by name to his widow during life; and in a subsequent clause of his will he bequeathed "the negroes therein mentioned, Pat., King, etc. (naming them, but omitting the names of the two given to his widow during life), to five of his children," and adding that "*the above* that are not heretofore given away shall be equally divided among his said children." The negroes in the first clause are included in the second clause of the will and after the death of the widow go to the five children—two of the children having died intestate before a distribution of the negroes was made, the next of kin cannot have a decree for distribution of their shares of the said negroes, against the administrator *de bonis non cum testamento annexo* of the testator until the representatives of the deceased children are made parties.

JOHN BRANCH, by his last will, gave to his wife, Mary, "one negro fellow by the name of Curtain, also one negro girl by the

name of Queen, during her natural life, and no longer"; and by a subsequent clause in his will he directed "that the *negroes therein mentioned,* Patty, King, etc. (not mentioning either Curtain or Queen), should be divided between his children, Polly, Bowen, Thomas, Norman and Rebecca, when they should arrive at age or marry," adding that *"the above* that are not heretofore given away should be so divided." The testator appointed his son Burrel Branch and two others executors of his will, who after his death proved the same and undertook the execution thereof; and Benjamin Branch, the survivor of the said executors, having died intestate, administration *de bonis non* with the will annexed was granted to Bowen Branch, the defendant in this case. Polly and Rebecca, two of the testator's children and legatees as aforesaid, died unmarried and intestate, leaving four brothers, Burrel, Bowen, Thomas and Norman, and one sister named Elizabeth, them surviving. Administration of the estate of Burrel Branch, deceased, was granted to Bynum and Parker, who brought this bill in equity against Bowen Branch, the administrator *de bonis non* of John Branch, deceased, and therein claimed on behalf of their intestate his distributive share of the negro slaves aforesaid, as one of
(133) the next of kin of his deceased sisters, Polly Branch and Rebecca Branch. Upon the hearing of the cause two questions arose which were referred to this Court: 1. Whether the negro slaves Curtain and Queen (mentioned in the first clause of the will of John Branch, deceased), bequeathed to the widow during life, are included in the second clause of the will. 2. Whether the complainants can sue for the shares of Polly and Rebecca Branch, and claim a distributive part thereof on behalf of their intestate, without having the administrators of said Polly and Rebecca before the court.

BY THE COURT. We are of opinion that the negro slaves mentioned in the first clause of the will, after the death of the widow, belonged to the children named in the second clause; but that the representatives of Polly Branch and Rebecca Branch must be made parties before complainants can have a decree for a distributive share of their estate.

Cited: Martin v. McBryde, 38 N. C., 533; *Coppersmith v. Wilson,* 104 N. C., 32.

NEIL, ASSIGNEE, v. NEW BERN.

From Edenton.

An executor or administrator may assign the security of his testator or intestate, without naming himself executor or administrator.

VERDICT for the plaintiff and rule for a new trial.

The question in this case referred to this Court was whether an executor or administrator can assign the securities of his testator or intestate, without naming himself executor or administrator. Elizabeth Raimeke, executrix of the last will of her deceased husband, assigned the bond on which the suit was brought, to Neil, the plaintiff, without adding to her name the word *executrix*. On the trial the plaintiff proved the execution of the bond and gave in evidence the will of Raimeke, the testator, and a certificate of the qualification of the executrix, and also proved the assignment. (134)

BY THE COURT. Let the rule for a new trial be discharged.

THE STATE v. BRIDGES.

From Halifax.

Indictment contains two counts: one for a mayhem under the statute, and charges the defendant with aiding and abetting the mayhem; the other for an assault and battery. Defendant acquitted upon the first count and convicted upon the second. Judgment cannot be rendered against defendant upon this conviction.

THE indictment contained two counts: the first charged that one James Philips and the defendant, Daniel Bridges, with force and arms, of malice aforethought, unlawfully did make an assault upon one James Blackwell, with an intent to maim and disfigure the said Blackwell; and that Philips, of his malice aforethought, unlawfully put out the right eye of the said Blackwell with intent to maim and disfigure him; and that the defendant, Bridges, at the time thereof, knowing and privy to the putting out of the eye of the said Blackwell by the said Philips, with force and arms, and of his malice aforethought,

unlawfully was present, counseling, aiding and abetting the said Philips to put out the right eye of the said Blackwell, contrary to the act of Assembly, etc. The second count charged that the defendant, Bridges, with force and arms, made an assault upon the body of the said Blackwell, and him, the said Blackwell, did beat, wound and ill-treat, etc. The jury found the defendant guilty upon the second count and not guilty upon the first. It was submitted to the Court, whether the judgment could be rendered against the defendant upon this verdict.

BY THE COURT. Upon the statement of facts in this case, judgment must be rendered in favor of the defendant.

THE ADMINISTRATOR DE BONIS NON WITH THE WILL ANNEXED OF RICHARD KAY, DECEASED, v. WEBB ET AL.

From Halifax.

The purchaser of a tract of land dies before he pays the purchase money or receives a title, and by his will devises the land to aliens, who are his heirs at law, his representative having been compelled to pay the purchase money, those who take the land after his death take it subject to this charge, and are bound to reimburse the purchase money to his representatives. And the land being sold by an order of the County Court upon the application of the guardian, for the purpose of discharging demands against his ward's estate, the ward being made a party defendant to the bill filed for the purpose of having the purchase money reimbursed, demurred to the bill. The demurrer overruled.

BENJAMIN EDWARDS, guardian of William E. Webb, an infant under the age of twenty-one years, having notice of
(135) debts and demands against the estate of his ward, applied to the County Court of Halifax, wherein his guardianship had been granted, for an order to sell so much of the real estate of his ward as might be sufficient to discharge such debts or demands, and the said court, in consequence of such application, made an order particularly specifying that the said Benjamin might for the purposes aforesaid sell a tract of land belonging to his ward, lying in the county of Halifax and containing by estimation 400 acres. Edwards, in virtue of the premises, and of the act of Assembly in such case made and provided, exposed the said tract of land to public sale on six months' credit; at which sale Richard Kay became the pur-

chaser. Before Kay either paid the purchase money or received a title, to wit, in 1794, he departed this life, having previously made and published his last will and testament in writing, duly executed to pass his real estates, and thereby devised his property, both real and personal, to his sisters, who were his heirs at law, subjects of the King of Great Britain, resident in England and aliens.

After the death of Kay, Edwards brought suit against Thaddeus Baines, executor of Kay's will, for the purchase money aforesaid, and in Halifax Superior Court obtained judgment for the sum of £632 18s. 11d. Thaddeus Baines dying soon afterwards, administration *de bonis non,* with the will annexed of Kay, was granted to Sterling Marshall, who in 1799 paid to Edwards the amount of the said judgment, together with the sum of £39 18s. 8d. costs of suit. Webb, the ward, having afterwards arrived at the age of twenty-one years, and Edwards, his guardian, having died, the administrator of Edwards some time in the year 1802 came to a settlement with Webb concerning the guardianship aforesaid, and in that settlement was included and fully accounted for the amount of the judgment aforesaid received by Edwards.

Kay was in the possession of the said tract of land at (136) the time of his death. There was no actual occupancy of it afterwards until 1803, when Webb entered upon and became possessed of it. Marshall, the administrator *de bonis non,* etc., having died, administration with the will annexed of all and singular the goods and chattels, rights and credits, which were of the said Richard Kay, unadministered by the aforesaid Thaddeus Baines and Sterling Marshall, was committed by Halifax County Court to John Eaton, who, being advised that it was doubtful whether the real title to the said tract of land remained in Webb, or had escheated and vested in the Trustees of the University of North Carolina, or belonged to the State; and also advised that whoever became entitled to it on the death of Kay took it subject to the burthen of paying the purchase money aforesaid; and as the estate which he represented had been compelled to pay the judgment for the said purchase money and costs of suit, that the person or persons entitled to the land ought to reimburse to him the said judgment and costs with the interest, or permit the said tract of land to be sold for that purpose in the first instance, filed a bill in the Court of Equity for Halifax District against the said William E. Webb and the Trustees of the University of North Carolina, and therein prayed that the Attorney-General of the State, being attended with a copy of the bill, might appear and

put in his answer thereto on the part of the State; that the person or persons entitled to the land might be decreed to pay to him the amount of the aforesaid judgment and costs with interest, or that the land might be decreed to be sold in the first instance for this purpose; and that all proper parties might be decreed to join in a conveyance to the purchaser under the said sale.

To this bill Webb demurred, and the complainant joined in demurrer. Seawell, the Attorney-General, put in an answer on the part of the State, stating that he had no knowledge of any of the facts set forth by complainant, and prayed (137) that the interest of the State might be protected, by complainant's being put to full proof of his case, etc. The case was sent to this Court upon the question whether the demurrer filed by Webb ought to be allowed.

BY THE COURT. Let the demurrer be overruled.

JACKSON v. ANDERSON ET AL.

From Halifax.

The articles of a horse race being for $500—play or pay—parol evidence admitted to prove by the rules of racing the money should be staked; and parol evidence cannot be admitted to show that a bond given at the same time for $500 had relation to the articles, and that the meaning of the parties was that the money should not be staked.

THIS was an action of debt brought on a bond given by defendant to the plaintiff for the sum of $500, to which the defendant pleaded that the bond was delivered as *an escrow*. The jury found that the bond had been delivered as an escrow, but that the conditions on which it had been delivered had been performed, and assessed the plaintiff's damages, etc., subject to the opinion of the court on the following case: The plaintiff and defendant Anderson entered into a horse-racing contract and executed articles. The articles were for $500, *play or pay;* and parol testimony was offered and received, which proved that in such cases, according to the rules of racing, the money shall be staked, which had not been done. It was then urged for the plaintiff that the bond given at the same time explained the meaning of the parties to be that the money need not be

staked; to which it was objected that parol evidence could not be given to show the bond had relation to the articles. If such testimony ought to have been received, the verdict to stand; if otherwise, a nonsuit to be entered.

BY THE COURT. Let a nonsuit be entered.

DEN ON DEMISE OF THE HEIRS OF DENNIS v. FAN.

From Wilmington.

Part of the lands to which the defendant set up claim were included within his fence and he was in the actual adverse possession thereof at the time of the conveyance to the lessors of the plaintiff. The plaintiff is not entitled to judgment for the lands lying within defendant's fence.

WATSON and wife conveyed to the lessors of the plain- (138) tiff a tract of land lying in Onslow County, on a part of which the defendant had erected a house, cleared and inclosed a plantation, and was in the actual adverse possession thereof at the time of said conveyance. The defendant set up a claim and defended for more of the land than was then inclosed. The jury found a verdict for the plaintiff, subject to the opinion of the court on the question "whether the plaintiff was entitled to recover such parts of the premises as were under fence and in actual adverse possession of the defendant at the time Watson and his wife conveyed to the lessors of the plaintiff."

BY THE COURT. This question has been often decided. The plaintiff is not entitled to judgment for the land lying within defendant's fence.

LANIER v. AULD'S ADMINISTRATOR.

From Fayetteville.

An express warranty excludes an implied one. In the contract of sale the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title where the vendor is in possession at the time of the sale.

LANIER *v.* AULD.

AULD sold a negro named Jim to Lanier, at the price of £160, and at the same time executed the following writing, to wit:

This is to certify that I have sold a negro man by the name of Jim for the sum of £160 in hand paid by Isaac Lanier; and I doth warrant the aforesaid slave Jim to be sound and healthy, not over twenty-five years of age. Given under my hand, 12 July, 1796. JOHN AULD.

Teste: FANNY DICKSON.

The negro was delivered to Lanier, and Auld shortly afterwards dying intestate, Harrington obtained letters of ad-
(139) ministration on his estate. The negro Jim at the time of the sale, and long before, was a freeman and not a slave. Lanier brought an action of *assumpsit* against Auld's administrator, and declared upon a warranty that the said negro Jim was a slave; and the questions arising in this case and referred to this Court were, whether the above writing executed by Auld contained a warranty that the negro Jim was a slave, and if it did not, whether the law implied such warranty in the contract of sale in this case.

BY THE COURT. The plaintiff has declared, first, upon an express warranty; and, secondly, upon an implied warranty. The writing signed by Auld contains no warranty that the negro Jim is a slave; it contains a warranty that he is sound, and also that he is not over twenty-five years of age, but is silent as to other qualities. It is true that the word *slave* is used, but it is evident that this word is merely descriptive of the person to whom the warranty of soundness, etc., was applied. As to the second question, we are of opinion that the law will not imply what is not expressed, where there is a formal contract. Evans' Essay, 32; 1 Fonbl., 364; Doug., 654; 6 Term, 606. The express warranty as to soundness and age excludes any implied warranty as to other qualities. The contract of sale implies no warranty as to the quality of the goods sold, although it may imply a warranty of title when the vendor is in possession at the time of the sale. The plaintiff, however, is not without a remedy; and he having applied to the court for leave to amend his declaration by adding a count for money had and received, we are of opinion that such leave should be granted to him upon such terms as the court below shall direct.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1806.

(140)

WILCOX v. MACLAINE, EXECUTOR, ETC.

From Hillsboro.

This cause was heard upon bill and answer in 1787, and a decree made in favor of complainant. Two reports have been made in his favor since. On petition by defendant in 1802 a rehearing was directed on the ground that the answer denied the equity of the bill and was to be taken as true, it not being replied to. Leave to reply to the answer now, is refused on account of the distance of time and death of parties and witnesses.

THIS cause coming on to be heard at October Term, 1787, upon bill and answer, a decree was made in favor of complainant; and since that time two reports were made by the master in his favor. At October Term, 1802, the defendant petitioned for a rehearing on the ground that the answer denied the equity of the bill, and ought to have been taken as wholly true. The Court of Conference directed a rehearing, and now the complainant moved for leave to reply to the answer, and whether such leave should be granted was referred to this Court.

BY THE COURT. At this distance of time, when some of the parties, and probably many of their witnesses, are dead, leave cannot be granted to the complainant to reply to the defendant's answer.

PEARSON v. HADEN'S EXECUTORS.

From Salisbury.

The sum levied upon an execution, being insufficient to discharge the plaintiff's judgment, must be applied solely to his use; and the costs of defendant's witnesses are not to be paid out of the sum thus levied.

PEARSON having recovered a judgment against Haden's executors for £2,500, execution was sued out, upon which the sheriff levied the sum of £1,089 10s., which sum being insufficient to discharge the judgment, a question arose whether the costs for the attendance of defendant's witnesses should be paid out of the moneys levied, or the said moneys be applied solely to the plaintiff's use.

BY THE COURT. The costs of defendant's witnesses ought not to be deducted out of the money levied upon the plaintiff's execution. The sum levied, being insufficient to discharge the plaintiff's judgment, must be applied to his use only.

---

(141)

GAY v. HUNT.

From Halifax.

A, being subject to intoxication and on that account liable to imposition, and fearing that in some unguarded moment some person might obtain from him a conveyance of his lands, agrees with B to convey the lands to him by an absolute deed, and B agrees to hold the land as a trustee for C, one of the children of A. The conveyance being executed, C and his agents remain in possession of the lands and B does not call them to account for the rents and profits. B dies and devises the lands to C and D as tenants in common. C files a bill charging the above facts. D answers and denies the trust, and insists that the premises were purchased by B for a valuable consideration. Parol evidence will be admitted to prove the trust, as B did not take possession of the premises nor call C to an account for the rents and profits.

SHERWOOD GAY, an infant, by his next friend, Rebecca Stallions, filed a bill in the Court of Equity for Halifax District, against Charity Hunt, and therein charged that his father, Elias Gay, being seized in fee of a tract of land situate in the county of Franklin, and being a man much addicted to intoxi-

cation, and on that account often liable to imposition, and fearing that in some unguarded moment some person might obtain from him a conveyance of his said land, and desirous to secure the same so that complainant might have the benefit thereof, agreed with one William Brinkley to convey the same to him in fee, he, the said William, agreeing on his part to hold the said land in trust for the benefit of complainant and to convey the same to him whenever he should be thereunto requested. That in pursuance of this agreement Elias Gay conveyed the land to Brinkley, but that Brinkley did not give any valuable consideration for the land; that Brinkley had since died, having made his last will and testament, and therein devised the said land to complainant and the defendant Charity Hunt, to hold the same as tenants in common. That, notwithstanding the conveyance to Brinkley, complainant's friends and agents had continually kept the possession of the said land; that defendant well knew that Brinkley held the said land only as a trustee for complainant, yet that she had lately filed a petition in the County Court of Franklin for the purpose of having partition made of the said land. The bill prayed for an injunction and that defendant might be compelled to convey to complainant the legal title and claim which she had in the land.

To this bill the defendant answered that she had no knowledge of any of the facts therein charged, but that she had been informed and believed that Brinkley purchased the land from Elias Gay, and paid a full and valuable consideration therefor; and that the said purchase was made and the deed executed without any trust, and subject to no condition whatever.
The answer admitted that Patsey Gay, the mother of (142) complainant and also of defendant, had kept possession of the land, but alleged that this possession had been suffered from motives of affection for a parent.

Sundry depositions were taken in the cause, which proved the agreement and trust charged in the bill; and the cause coming on to be heard, the question was made and sent to this Court, whether as the deed to Brinkley purported to be absolute and for a valuable consideration, and the agreement and trust charged in the bill were expressly denied by the answer, parol evidence could be admitted to prove the agreement and trust.

BY THE COURT. The conveyance to Brinkley was not made with any fraudulent intent or from any motive of moral turpitude. This case is therefore free from the common objections

to relief in cases of secret trust. Whether parol evidence will be admitted to set up a trust, where a deed is absolute, depends much upon the particular circumstances of each case in which it is attempted. In the present case the Court are of opinion that the parol evidence should be admitted, as Brinkley did not take possession of the premises conveyed to him, nor call upon those in possession for an account of the rents and profits; and this "being contrary to the ordinary effect of a sale, gives an impression of a trust of some kind, between the parties, and admits the introduction of evidence to explain the trust." 1 Wash., 14.

Cited: Clement v. Clement, 54 N. C., 185; *Ferguson v. Haas,* 64 N. C., 778.

BRYSON ET AL. v. DAVIDSON'S EXECUTOR.

From Salisbury.

A devises his estate to his "daughter B, and if B dies without having heirs, then and in that case, to the nephews and nieces of A." The limitation over to the nephews and nieces is too remote.

(143) THIS was a petition for a legacy claimed under the following clause of the will of Thomas Davidson, deceased: "I give and bequeath to my well-beloved daughter, Mary Long Davidson, my negro woman named Nancy, and all her children, together with all my lands and tenements, and the remaining half of my household furniture and personal estate; also my will is, that she be allowed out of her own part what my executor may think a sufficient sum for clothing, schooling and boarding with her mother according to her income, or the interest of her money; likewise, my will is, that if the said Mary Long Davidson *dies without having heirs, then* and in that case the property bequeathed to her shall be divided into four equal parts between my brother James, John, Samuel, and Hugh Bryson's children, that is to say, each of my brother's and sister's children." Mary Long Davidson died in her infancy, without having had any issue; and this petition was filed by the nephews and nieces of the testator against his executor for an account and distribution of the personal estate; and the only question in the case was whether the limitation to the nephews and nieces, in the event of Mary Long Davidson *dying without having heirs,* was valid.

For the petitioner it was urged that the ulterior devise being to the collateral heirs of Mary Long Davidson, the testator must have intended to use the word *"heirs"* in a limited and not a general sense, and to have meant "heirs of the body" of Mary Long Davidson, and not her heirs general. It is a settled rule of construction in executory devises that when the devise over is to a collateral heir of the first devisee upon the failure of his or her heirs, or for the want of heirs, etc., the word *heirs* shall always be taken to mean *heirs special* and not *heirs general.* Cro. Jac., 416; Doug., 216; 2 Fearne, 153, Notes. The testator, therefore, intended that the estate should go over to his nephews and nieces in case his daughter Mary (144) should die without having issue.

The term, "dying without having issue or children," in common parlance is understood in two senses: first, dying without having had issue; secondly, dying without having issue living at the time of the death. It is difficult to determine in which sense the testator, Thomas Davidson, used the term. It is obvious that the two meanings of the term are very different; but it is immaterial in this case which meaning he adopted; for either will entitle the petitioners to a decree, the limitation to them being to vest, if at all, upon the death of Mary, the first devisee.

The word "having" is a participle of the present time, and may therefore be considered as being used by the testator as expressive of *present time;* that is, the time of Mary's death: "if she should die without having heirs"; and taking the word "having" in this devise as a participle of the present time, it means not only the birth of issue, but that that issue should be in *esse* at the time of her death. For unless the issue were living at the time of her death, she could not then be said to *have issue.* If the testator used the word "having" in this sense, the limitation to the nephews and nieces is not too remote, for it is to take effect immediately upon the death of Mary without issue at her death. The word "having" is sometimes used as past time, and then it has the same meaning as the perfect past participle of the verb "to have," to wit, "having had." If the testator intended to use it in this sense, his meaning was, that if Mary Long Davidson should die without *having had* any heirs of her body, then the estate should go over to his nephews and nieces; and then the devise to Mary is conditional, the condition being, *"her having had heirs of her body."* Until she has heirs of her body, her estate is conditional; as soon as issue is born the condition is performed and her estate becomes absolute. Mary's estate resembles the ancient fee-simple conditional at the common law; the moment that issue was (145)

born to the donee, his estate in the land became absolute, the condition of the gift being performed. If, then, the participle "having" be taken as a participle of past time, it must relate to time anterior to Mary's death, within which she might have issue; as a participle of the present time, it must relate to the time of Mary's death. In no way can the grammatical or vulgar meaning of this participle be construed to extend to time posterior to Mary's death, much less to include such a quantum of time as twenty-one years subsequent to that event.

If the word "having" did not determine with sufficient precision the time when the ulterior limitation was to vest, if at all, that time would be pointed out by the word *"then"* used in the devise. It is not here used as an adverb of reference, otherwise the subsequent words *"and in that case"* would not have been used. It is here used as an adverb of time, and can be referable only to the time of Mary's death. There seems to be no ground whatever to put this case upon the remoteness of the second limitation; it being clear in every way in which the words of the devise can be construed, that if the second limitation is to take effect, it must be at Mary's death. In *Weakly v. Rugg,* 7 Term, 322, the devise was to the testator's "daughter Anne, but if she should happen to die without *having child or children lawfully begotten,* then to his daughter Mary, and after her to such child or children as she should happen to have lawfully begotten." Anne married and had three children, who as well as the husband died in Anne's lifetime. The question was whether Anne was entitled to the whole interest in the estate devised. And the Court held that as Anne had had issue, the condition was performed and the estate vested absolutely in her upon that event. The case differs in no respect from the case before the Court, except in the birth of issue.
(146) The devise in each is to a favorite daughter; the words expressing the contingency upon which the limitation over was to vest are in substance the same; one testator using the words *"without having child or children lawfully begotten,"* the other "without having heirs," evidently meaning heirs of the body. If, therefore, in *Weakly v. Rugg* it was held that Anne, the first taker, was entitled to the whole interest in the estate devised, because she had had issue, she surely would not have been thus entitled if she had had no issue; and Mary Long Davidson, having had no issue, the whole interest never vested in her absolutely, but upon her death vested absolutely in the ulterior devisees.

BY THE COURT. The limitation over to the nephews and nieces is too remote, and therefore void.

HUGHES v. HOLLINGSWORTH.

From Morgan.

Pending a suit, the attorney at law for the plaintiff gave to the bail of the defendant a paper-writing, in which he "agrees that the plaintiff shall release and discharge the bail." This is a discharge of the bail.

JOHN HUGHES brought suit against Abraham Hollingsworth in Morgan Superior Court and recovered a judgment. Samuel Hollingsworth was the bail of the defendant, and pending the suit, Joseph Spencer, attorney at law for Hughes, the plaintiff, gave to Samuel Hollingsworth a paper-writing in the following words, to wit:

I agree with Mr. Samuel Hollingsworth, on behalf of Mr. John Hughes of Burke, as empowered by the said Hughes, that the said Hughes shall and will release and discharge the said Samuel Hollingsworth from being security for Abraham Hollingsworth in a suit which is now pending in the Superior Court of Morgan District, John Hughes against Abraham Hollingsworth. JOSEPH SPENCER.

Hughes sued out a *scire facias* against Samuel Hollingsworth, as bail of Abraham Hollingsworth, to which the defendant pleaded "a release by the plaintiff's attor- (147) ney"; and whether the paper-writing, signed by Joseph Spencer, the attorney at law for Hughes, discharged the bail, was referred to this Court.

BY THE COURT. We are of opinion that the paper-writing signed by the attorney at law for the plaintiff is a discharge of the bail.

THE STATE v. ELIZABETH GRAY.

From Hillsboro.

Females are entitled to the benefit of clergy.

In this case the only question was whether the defendant, who was convicted of grand larceny, was entitled to the benefit of clergy.

BY THE COURT. No reason can at this day exist why females shall not be entitled to the benefit of clergy, as well as males. We are therefore of opinion that the defendant is entitled to the benefit of clergy, upon praying the same to be extended to her.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1807.

---

*SPRUCE MACAY, Esquire,

*JOHN LOUIS TAYLOR, Esquire,

JOHN HALL, Esquire,

FRANCIS LOCKE, Esquire,

‡DAVID STONE, Esquire,

‡SAMUEL LOWRIE, Esquire.

HENRY SEAWELL, Esquire, Attorney-General.

EDWARD JONES, Esquire, Solicitor-General.

*Judges Macay and Taylor were absent at this term.

‡At the last General Assembly the Judiciary System of North Carolina, which had existed with little alteration since the year 1777, was amended, and a Superior Court of Law and Court of Equity were established in each county. This alteration required an additional number of judges, and David Stone, Esq., and Samuel Lowrie, Esq., were appointed to the Bench by the General Assembly.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1807.

WINAUT'S HEIRS v. WINAUT'S DEVISEES.

From Edenton District.

A, to whom testator devises permission "to live six months in his house, is she chooses," is a competent witness to prove the will as to the real estate.

THE testatrix, Penelope Winaut, duly published her last will and testament in writing, in the presence of James Ward and Margaret Haughton, the only subscribing witnesses thereto, in which will was contained the following clause, to wit: "I give and bequeath unto Margaret Haughton one woolen wheel, one white round table, all my chairs, and six months to live in the house, if she chooses." Margaret Haughton was one of the subscribing witnesses to the will, and the question referred to this Court was, whether the said Margaret (149) was competent to prove the will as to the real estate.

BY THE COURT. The devise to the witness Margaret Haughton, of permission to stay six months in the house, if she chooses, conveys to her no title either to the house or land; and the will being sufficiently proved as to the personal estate by the other witnesses, there appears to be no such interest in Margaret Haughton as to destroy her competency as a witness to prove the will for the land.

NELMS AND McCULLOCH, ASSIGNEES OF BAKER, BANKRUPT, v. PUGH.

From Halifax District.

1. Under the bankrupt law of the United States the arrest and imprisonment of the debtor are both necessary to constitute the act of bankruptcy, which act is not complete until the time of imprisonment prescribed by law be completed.

2. The court has no authority to establish any other act of bankruptcy than the one on which the commission issued.

THE jury found a verdict for the plaintiffs, subject to the opinion of the court upon the following case:

The bankrupt, Henry Baker, on 24 August, 1803, was arrested on a writ of *capias ad satisfaciendum,* bearing teste the third Monday of August, and committed to jail. Two days afterwards a writ of *fieri facias,* bearing equal teste with the aforesaid writ of *ca. sa.,* was delivered to the said sheriff, who levied the same upon the goods, etc., of the bankrupt, Baker, at the instance of the defendant, Henry Pugh, and before two months expired after Baker was arrested, sold the said goods, etc. Baker remained in jail upwards of two months, and was afterwards duly declared bankrupt, on a petition and commission founded on the said imprisonment, and continued in prison, and proof made thereof. On 6 April, 1803, for a debt then due by the bankrupt to Marmaduke Norfleet, he by deed conveyed to said Norfleet all his real estate; the suits of John and William Bell, of Andrew Flemming, etc., and the present defendant, then pending in Halifax County Court, in which suits judgments were obtained at the August term afore-
(150) said, and the bankrupt was indebted at that time more than he was worth.

Cameron for plaintiff.

(152) STONE, J., delivered the opinion of the Court. The question, whether the bankruptcy shall relate back to the arrest so as to avoid all intermediate dispositions of the bankrupt's effects between the time of the arrest and the completion of the term of imprisonment, considered by the law as amounting to an act of bankruptcy, can only be settled by the statute itself. That declares the arrest and imprisonment are both necessary to constitute the act of bankruptcy, and not that either independently of the other shall be sufficient; and they do not both exist until the term of imprisonment limited

for that purpose by the statute has expired. The authorities from the English books introduced to show that the bankruptcy is in England made to relate back to the arrest, are answered by the statutes of bankruptcy themselves. A statute subsequent to that of 5 Jac. Cap., 15, *vid.* the statute of 21 Jac. I., Cap., 19, expressly declares that the bankruptcy shall relate back to the arrest. The act of Congress contains no such provision.

The second point made, that a precedent act of bankruptcy existed, cannot differ the inference above, because we have no authority for establishing any other act as an act of bankruptcy than the one on which the commission issued. Judgment for the defendant.

DEN ON DEMISE OF EDWARD BRYAN v. JEREMIAH PARSONS, JR.

From New Bern District.

Plaintiff offered in evidence a copy of a registered deed, offering to swear that he had not the original, nor knew where it was. Defendant had given notice to plaintiff to produce the original; and leave was then given to him to show that the original had been altered before its registration, and had been since destroyed by the approbation of the plaintiff. Copy refused in evidence, and plaintiff nonsuited.

UPON the trial of this action of ejectment the plaintiff offered as evidence to the jury a registered copy of a deed from Martin and Edward Franks, to the plaintiff's grandfather, also called Edward Bryan. From him the land by said deed conveyed, as it was alleged, descended to John Bryan, the plaintiff's father, who, on 25 September, 1786, conveyed the same (153) to Edward Bryan, the plaintiff, John Hill Bryan, William Bryan, Frederick Bryan and Joseph Bryan, reserving to himself a life estate. The defendant alleged that in the deed from Martin and Edward Franks to the plaintiff's grandfather, an alteration had been made of one of the courses of the land previously to the registry of the deed, so that on the copy offered to the jury it appeared north 5° east, instead of north 45° east; objected to the copy as evidence, and insisted that the original deed should be produced. The plaintiff offered to swear that he had not the original, and knew not where it was. The defendant begged to be permitted to show to the court by testimony that the said original deed had been destroyed inten-

tionally, with the approbation of the plaintiff, to prevent the alteration of its course being seen; and he proved that he had caused a notice to be served upon the plaintiff that the production of the original deed at the trial would be insisted on. He was permitted to introduce the evidence to show the alteration of the deed, and the evidence being full and satisfactory that the deed had been altered, the plaintiff was nonsuited. A rule was obtained upon the defendant to show cause why the nonsuit should not be put aside and a new trial granted, on the ground of misdirection by the court, and the case was sent to this Court for the opinion of the judges.

BY THE COURT. The attempt of this plaintiff to introduce in evidence a copy of the deed under which he claims, connected with the circumstances of this case, certainly deserved no countenance from the court. The claim had once been tried (when the original deed was introduced), and failed on account of the marks of fraud and alteration upon the face of the deed. The plaintiff and those connected in title with him under the same deed afterwards declare that deed shall not again make (154) its appearance to defeat their title; and in conformity with that declaration the plaintiff now swears that he has not that deed in his possession, nor does he know where it is. All this may well comport with a fraudulent concealment or destruction of the deed; and the court will not presume favorably of an attempt so strongly marked with fraud. If this plaintiff and those connected in interest with him have so contaminated that evidence which the law considers the best to be submitted to the jury, the court will not aid them by permitting the introduction of inferior evidence where the marks of fraud do not appear. It seems to be a leading principle laid down in all the books on the subject of written testimony, that all original private deeds or other instruments (if in existence, and in the power of the party) shall be produced on the trial. But where the original has been destroyed or lost by accident, as where an original award was lost in a mail which was robbed, or being in the hands of the adverse party, and notice given to produce them, then an examined copy or even parol evidence of the contents, being the best evidence in the power of the party, may be received. Peak, 63. Yet this is always upon a principle of necessity, and to avoid injustice where the party has been guilty of no fraud; and to permit this plaintiff to give in evidence the copy which he offers would be to afford to him the very advantage intended by his fraud. Let the rule be discharged.

HOLDING'S EXECUTOR v. SMITH.

From Hillsboro.

To the plea of set-off there may be a double replication.

IN THIS CASE, among other pleas, the defendant pleaded a set-off. To this plea the plaintiff replied, first, there was no such set-off, and, secondly, the statute of limitations. To this replication the defendant demurred specially, and for cause of demurrer alleged that the replication was double. (155)

LOCKE, J., delivered the opinion of the Court. According to the strict rule of pleading upon common-law principles, this replication is certainly bad; but it appears to be good under the provisions of our act of Assembly. Iredell, 305. This act does not warrant a double replication to every plea, and perhaps allows it to no plea but that of set-off. This plea was allowed in England by Stat. 2, Geo. II., ch. 22, and adopted by our act of 1756, the preamble of which states that the object of introducing the plea was to prevent multiplicity of lawsuits; and wherever there were mutual debts subsisting, instead of compelling each party to sue, one debt was allowed to be set off against the other, and this in lieu of an action, or rather cross-action. Every defendant, therefore, pleading a set-off is to be considered (so as respects this plea) in the light of a plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character; and, consequently, the plaintiff against whom the set-off is pleaded ought to be permitted by way of replication to make the same defense which the law would permit him to enter by way of plea, had he been originally sued. If, then, the present defendant had sued the plaintiff on this account, would he not, in the character of defendant, have been permitted to plead the general issue and statute of limitation? He surely would, and if so, he may reply the same to the set-off. Let the demurrer be overruled.

(156)

THE STATE v. JOSEPH STREET.

From Hillsboro District.

In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be legally set forth.

STATE *v.* STREET.

THE defendant was indicted for perjury; and the indictment charged "that at a certain *Superior Court* begun and holden for the district of Hillsborough on 6 October, 1805, in the town of Hillsborough, in the county of Orange, in the aforesaid district, before the Honorable Francis Locke, Esq., *judge of the said court,* on 16th of the said month in said year, a certain issue duly joined in the said court between the State and Zephariah Tate, and others, in a certain prosecution for a riot, came to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly sworn and taken between the parties aforesaid; and that upon the trial of the said issue so joined as aforesaid one Joseph Street, late of the county and district aforesaid, yeoman, appeared as a witness for and on behalf of the State, and was sworn, and then and there did take his corporal oath upon the holy gospel of God, before the said Francis Locke, Esq., judge as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matter in question in the said prosecution and issue aforesaid (the said Francis Locke, Esq., then and there having sufficient and competent power and authority to administer an oath to the said Joseph Street in that behalf)." The indictment then assigned the perjury, etc. The defendant was convicted, and Duffey, counsel for the defendant, filed the following reason in arrest of judgment, to wit: "That the style of the court or of the judge presiding therein when the perjury is alleged to have been committed is not duly or legally set forth; nor any jurisdiction shown to administer such oath as is alleged to have been taken falsely and corruptly"; and the case was ordered to be sent to this Court for the opinion of the judges.

(157) BY THE COURT. The indictment should set forth the legal style of the court before which the perjury is alleged to have been committed. The Judiciary Act of 1777, establishing the County and Superior Courts, gives the style of each, "Courts of Pleas and Quarter Sessions," and *"Superior Courts of Law."* The indictment in the present case charges the perjury to have been committed before "a *certain Superior Court* begun and holden for the district of Hillsborough." As the style of the court is not legally set forth, the indictment is defective and the judgment must be arrested.

Cited: S. v. Davis, 69 N. C., 496.

SINGLETON v. OGDEN, ADMINISTRATOR OF CASWELL.

From New Bern District.

A is indebted to B upon bonds, and in 1777 offers to pay in depreciated currency. The bonds are absent. B refuses to accept the depreciated money, but agrees that in consideration of A's having offered to pay, and the bonds being absent, no interest shall be thereafter charged until the bonds are produced and payment demanded in this State. Equity will enforce this agreement.

ON 10 May, 1774, Spier Singleton, for himself and Benjamin Caswell, his partner in trade, gave a bond to Samuel Caswell, then of New Bern in North Carolina, for the penalty of £1,080, proclamation money, conditioned for the payment of £540 like money on 10 March ensuing; and on or about 23 November, 1774, for himself, another bond for the penal sum of £2,796, proclamation money, conditioned for the payment of £1,397 13 like money, on 23 November in the year following. Several considerable payments were made towards the discharge of the said bonds, but a balance still remained unpaid, and before the day of payment of the last-mentioned bond, to wit, about August, 1775, the said Samuel Caswell voluntarily left the State, carrying the said bonds with him, and did not return until December, 1777; but he left his family and effects still remaining at New Bern aforesaid. On the return of Caswell, Singleton waited on him and offered to pay him the balance of principal and interest due upon the said bonds, and was proceeding to count the money to Caswell, who desired Singleton not to proceed, as he had not the bonds with him, and at the same time promised and assured Singleton that (158) although he could not receive the money (it being depreciated paper money) nor give up the bonds, yet in consideration that Singleton had offered to pay the money and the bonds were absent, no interest should be charged thereon from that day, until they should be produced and the payment demanded within the State. Caswell in a short time again departed, taking his family and effects from the State, and returned no more, but died in New York in 1781; nor were the bonds ever afterwards produced within this State nor the payment of them demanded until about May, 1798. Singleton was afterwards required to pay and did pay the balance of the principal and interest due upon the said bonds at the time of offering to pay the same to Caswell as aforesaid, to the commissioners of confiscated property in pursuance of the acts of the General Assembly, commonly called the confiscation acts.

In 1798 administration *de bonis non* on Caswell's estate was granted by the County Court of Craven to Robert Ogden, and shortly afterwards Singleton waited on Ogden and offered to pay the balance of principal and interest due upon the bonds aforesaid at the time of offering to pay the same to Caswell as aforesaid; but Ogden refused to settle unless interest was paid upon the bonds for the whole time without any deduction; and instituted suits upon said bonds and recovered judgments. Singleton filed his bill in equity, praying that an injunction might be granted as to the interest which had accrued upon the bonds from the time he offered to make payment to Caswell up to the time that he offered to make payment to Ogden as aforesaid. Ogden in his answer insisted that Caswell was a British subject; that after the declaration of American Independence in 1776, Caswell had retired from North Carolina, went to New York, where he continued within the lines and garrisons of His Britannic Majesty until his death, having retained his (159) allegiance, but taking no part in the war; that the debts due upon the bonds aforesaid were within the meaning and provision of the fourth article of the treaty of peace concluded between his Britannic Majesty and the United States, directing that creditors on either side should meet with no legal impediments to the recovery of full value in lawful money of all *bona fide* debts theretofore contracted; that Caswell was under no legal or equitable obligation to accept depreciated paper money in payment of the bonds aforesaid, and that his promise or agreement that no further interest should be charged was totally without consideration and ought not to be enforced. This case was transferred to this Court for the opinion of the judges upon the question whether complainant was entitled to the relief prayed for in his bill.

BY THE COURT. The defendant's intestate in this case promised not to demand interest at the time the depreciated currency was offered to him in payment; and the circumstance that he thereby avoided receiving what the law and the necessity of the times then made a legal tender, and which must unavoidably have sunk to nothing in his hands, affords such a consideration to support his promise as to entitle the complainant to the aid of a court of equity to enforce a compliance with it. The injunction must therefore be made perpetual, as prayed for by complainant.

(160)

THE ADMINISTRATORS OF RICHARD QUINCE, THE ELDER, v. THE EXECUTOR OF PARKER QUINCE.

From Wilmington District.

A pays to B, his coexecutor, a sum of money belonging to their testator's estate. A and B die. C, the administrator *de bonis non* of the testator, brings suit against the representatives of A, who survived B, for an account of testator's estate. The representatives of B who received the money must be made parties.

RICHARD QUINCE, the elder, died in 1778, leaving a last will and testament in which his sons, Parker Quince and Richard Quince, Jr., were named executors, who after his death proved the will and qualified as executors. Richard Quince, Jr., died in 1780, intestate. Parker Quince died in 1785, leaving a will in which Thomas Callendar was named executor, who qualified as such. The present bill was filed by John Davis, administrator *de bonis non* of Richard Quince, the elder, in 1787, against Thomas Callendar, executor of Parker Quince, and against Richard Quince and Rebecca Quince, infant children of Richard Quince, Jr., the deceased executor, by Thomas Davis, their guardian. The bill charges that Parker Quince and Richard Quince, Jr., executors of Richard, the elder, received into their hands property of their testator to a large amount, and prays that an account may be taken and a decree made in favor of complainant for whatever sum shall be found due. Thomas Callendar, executor of Parker Quince, filed an answer, and the accounts were referred to the master, who made a report, and therein among other things he charges the present defendant with a sum of money, said to have been paid by Parker Quince to Richard Quince, Jr., his coexecutor. On the hearing of the cause it was insisted by the defendant's counsel that Richard Quince, the coexecutor of Parker, having received into his separate possession some considerable property or sums of money belonging to the testator's estate, the representatives of said Richard Quince *alone* are liable, and not the estate of Parker; and that therefore no decree ought to be made until the representatives of Richard Quince were regularly before the court. The counsel for the complainants contended that it was not necessary that the representatives of Richard Quince, Jr., the deceased coexecutor, should be before the (161) court, upon the principle that Parker Quince being the surviving executor of Richard Quince, the elder, was liable for the whole amount of complainant's demands, and that the ex-

ecutors of Parker Quince and not the complainant were the proper persons to call the representatives of Richard Quince, deceased, to an account for any supposed balance due by them. The case was transferred to this Court for the opinion of the judges upon the question whether the representatives of Richard Quince, deceased, should be made parties before a decree was made.

BY THE COURT. In this case it is necessary, in order finally to settle the subject of litigation, that the representatives of Richard Quince, Jr., should be made parties previous to a decree. One of the principal items in the report of the master, against the present defendant, is a sum said to have been paid by Parker Quince to Richard Quince, Jr., his coexecutor. If this sum was applied by Richard Quince, Jr., for the benefit of the estate of Richard Quince, Sr., the present defendant should not be made accountable for it; and that an opportunity may be had to show this application, if made, the representatives of Richard Quince, Jr., should be before the court; they should also be in court, that if the money has not been so applied and the estate be solvent, a decree may be rendered against them for it in the first instance, to prevent circuity of remedy.

ELIZABETH GERARD v. SLADE PIERCE.

From Beaufort.

Where a *feme* defendant marries pending a suit, her husband must be made a party, or, on motion, the suit will abate.

THE plaintiff instituted a suit against defendant, and pending said suit she intermarried with Henry Hunter, between the January and July terms of the court in 1805. At
(162) January Term, 1806, the defendant pleaded this intermarriage in abatement, and that Henry Hunter had not been made a party plaintiff; to this plea the plaintiff demurred and the defendant joined in demurrer; and the demurrer was overruled and the plea sustained by this Court.

DEN ON DEMISE OF STROTHER v. CATHEY.

From Morgan.

1. A court of law will receive parol evidence to show that the officers of State have issued a grant for lands forbidden by law to be entered and granted; and will take notice that such grant is void and that nothing passes by it.

2. Where a grant has issued irregularly, the party wishing to avoid it must apply to a court of equity. The act of 1783, ch. 2, forbids entries or surveys to be made of certain lands set apart for the Cherokee tribe of Indians. In 1791 this tribe in a treaty made with the general government, "relinquish, release and cede these lands." The right of the Indian tribe to lands is regarded by the European and American governments as a mere possessory right; and the cession of this right by the Cherokee tribe vested the right in North Carolina, and the United States were the agents of North Carolina for that purpose.

THIS was an ejectment for lands lying within the bounds of the lands allotted to the Cherokee Indians by the act of 1783. The lessor of the plaintiff claimed title under a grant from the State, issued 19 May, 1803, upon an entry made in 1791. The defendant claimed title under a grant from the State issued 8 December, 1787. The act of 1783, ch. 2, having declared that "no person shall enter or survey any lands within the bounds set apart for the Cherokee Indians under the penalty of £50, and that all such entries and grants obtained therefor (if any such should be made) shall be utterly void," the first question in the case was whether, upon the trial of the ejectment, evidence could be received to show the circumstances which rendered the grant under which defendant claimed void; and upon this being shown, whether the court could declare the grant void; it being contended on behalf of the defendant that although the grant under which he claimed title to the land was void, yet a court of law will not receive parol evidence on a trial in ejectment to show the grant void, but that recourse must be had to a court of equity, or to that mode of avoiding grants prescribed by the act of 1798, ch. 7. As the plaintiff in ejectment must recover by the strength of his own title, and not through the weakness of his adversary's, it also became a question whether the grants to the lessor of the plaintiff conveyed to him a title; for the act of 1783, ch. 2, had (163) never been repealed by the Legislature. On 2 July, 1791, a treaty was made by William Blount on behalf of the United States with the Cherokee Indians, and it is stipulated in said treaty that "the chiefs and warriors of the Cherokee

Nation, for themselves and the whole Cherokee Nation, their heirs and descendants, for a consideration therein expressed, release, quitclaim, relinquish and cede all the lands to the right of the line therein described"; and within the bounds therein described is the tract of land in question. It was contended that this treaty revested in the State of North Carolina the lands which the act of 1783, ch. 2, had vested in the Cherokee Indians; that although the treaty contained no declaration that the cession and relinquishment of these lands were for the use of this State, yet that the treaty must necessarily receive this interpretation; and that the United States acquired no title to these lands by the said treaty.

LOCKE, J. To determine the questions arising in this case, it is necessary to consider the titles under which each party claims the land in dispute. The Legislature of this State in 1783 passed an act declaring "that all the lands comprehended within a line described in section 5 of said act shall be and are hereby reserved unto the Cherokee Indians and their nation forever," and in section 6 of said act further declaring "that no person shall enter and survey any lands within the bounds set apart for the Cherokee Indians under the penalty of £50; and all such entries and grants thereupon (if any such should be made) shall be utterly void." The defendant claims title to this land under a grant issued by the State of North Carolina to John Carson, bearing date on 8 December, 1787, whilst the above recited act was in full force, and before any treaty was made with the Cherokee Indians by which they surrendered or relinquished any of the rights reserved to them by the act of 1783. It has (164) been determined by this Court, in *Strother v. Avery* (not reported), that a grant obtained under circumstances like the present is utterly void, and can convey no title to the grantee, upon two grounds: first, because the words of the act are imperative and declare the grant to be utterly void; and, secondly, because the officers of State were not authorized to issue grants for lands of this description; the State having by the act of 1783 divested itself of all title to the same. But it is contended that although the grant be void, yet a court of law will not receive parol evidence on a trial in ejectment to show the grant void, but recourse must be had to a court of equity, or to the mode of proceeding prescribed by the act of 1798, ch. 7, establishing the court of patents. This Court entertains the opinion that it has always been competent for a court of law to receive parol evidence of the location of each tract of land described in a grant, and that in many cases it is

only by such kind of testimony a grantee can show the situation of the land mentioned in the plaintiff's declaration or in defendant's grant; and wherever it is shown that the land claimed by the defendant is situate within the bounds allotted to the Indian Nation, then the grant becomes *ipso facto* void; it requires no act to be done, no ceremony to be performed to avoid it, but it is of itself a mere nullity. Besides, it is competent for a court of law at all times to receive parol evidence to show that the officers of State, who have signed and attested the grant, were not authorized or empowered to issue a grant for lands of a particular description; for if they exceed the authority delegated to them by law, their acts have no force nor validity; and would it not be absurd to say that a grant issued by an individual not known as an officer of the Government, and clothed with no authority, could not be declared void in a court of law, but that recourse must be had to a court of equity? Grants of this description differ essentially from those where the officers had the power and authority by law to issue the grant, but which grant may have been obtained irregularly and without conforming to the requisites (165) prescribed by the act of 1777, which irregularity and want of conformity might render the grant voidable by the person injured thereby. Upon this difference courts of law have heretofore founded their decisions. In the first class of cases they have received parol evidence and declared the grants void. *University v. Johnson,* 2 N. C., 373. But in the second class of cases where the grant has been irregularly issued, they have said that the party wishing to avoid it must apply to a court of equity; that it would be productive of the most dangerous consequences to avoid it by parol testimony. *Reynolds v. Flinn,* 2 N. C., 107. The present case falls within the description of the first class of cases, and it is sufficient to say that in this case and between these parties, and on a title like the defendant's, a court of law will receive parol evidence and declare such a grant void, without deciding the general question or any other than the one submitted.

Having declared the power of the Court, upon a trial at law, to receive evidence to show the defendant's grant to be void, we are next to determine how far the title of the lessor of the plaintiff will enable him to recover. He claims title under a grant from the State of North Carolina bearing date 19 May, 1803, and founded on an entry made in 1791. To ascertain the validity of this grant, it may be necessary to take into view some proceedings of the General Government as well as of the

Legislature of this State relative to the lands allotted to the Cherokee Indians by the act of 1783. The first and most important is the treaty made by William Blount with the Cherokee Indians, on 2 July, 1791, William Blount then being Governor of the territory of the United States south of the River Ohio and superintendent of Indian affairs for the southern district. By the fourth article of this treaty it is de-
(166) clared "that the chiefs and warriors of the Cherokee Nation, for themselves and the whole Cherokee Nation, their heirs and descendants, for a consideration therein expressed, release, quitclaim, relinquish and cede all the land to the right of the line therein described." And within the bounds thus ceded is the tract of land in question. In 1791 the Legislature of North Carolina passed an act declaring "that a part of Rutherford and Burke counties should form a separate and distinct county by the name of Buncombe," and particularly describes the boundary lines of said county, which lines include the land covered by the plaintiff's grant. It is further declared by the said act, "that the justices of Buncombe shall have the same powers and jurisdiction as the justices of the peace have in any other county in this State." By the provisions of the act of 1777 (Iredell Rev., 292), it is made "the duty of the justices of the peace of each county to elect an entry-taker, who shall receive entries for any lands lying in such county which have not been granted by the crown of Great Britain or the Lords Proprietors of Carolina or any of them in fee before 4 July, 1776, or which accrued or shall accrue to the State by treaty or conquest." Under these provisions the lessor of the plaintiff, after the county of Buncombe was formed and the Indian claim extinguished by Blount's treaty, entered with the entry-taker of Buncombe County the land in question, and on 19 May, 1803, obtained a grant for the same. The validity of this grant is now to be decided, for the plaintiff in this action must recover by the strength of his own title, and not through the weakness of his adversary's. To the title thus adduced two objections are made by the defendant's counsel: first, that the act of 1783 remains unrepealed and in full force, and that section 6 of that act attaches to this grant with the same force as to the grant set up by the defendant; and, secondly, that by the treaty these lands were ceded to the General Government, and not to the State of North Carolina. As to the first objection, the answer is, that although the act
(167) of 1783 has not been expressly repealed by the Legislature, yet it is effectually and substantially repealed by the treaty. The act of 1783 was evidently made to preserve

peace with that tribe of Indians who by the extension of frontier settlements had become near neighbors to the inhabitants of the western part of Burke County, which peace would probably be broken, and the advantages contemplated by the Legislature in this donation entirely frustrated, if any individual was suffered to interfere with the rights secured to the tribe by the act of 1783. But when that tribe of Indians voluntarily and for a valuable consideration surrendered up their claim, no injury could ensue to the Indians by entering those lands; for whether they were occupied or remained vacant was to the Indians a matter of indifference from the moment of the ratification of the treaty. The reason and policy of the prohibition contained in the act of 1783 ceased, and with it the prohibition itself. The second objection seems to be equally unfounded. These lands having once belonged to the State of North Carolina and having been granted by the State to the use of the Indian Nation, revested in the State when that use expired and the Indians released all claim to the same. No expression is used in the treaty to convey these lands to the General Government; and although the Indian title was extinguished by the General Government, it does not follow that the title rests in them, for since the adoption of the Federal Constitution the power of making treaties is surrendered by each State to the General Government, and through them alone Indian claims are to be extinguished; and these lands lying within the boundary of this State, acknowledged by the Federal Government when received into the Union, must remain the lands of this State until she cedes them away. Judgment must therefore be entered for the plaintiff.

STONE, J. The defendant has certainly acquired no title by the grant to him from the State; and without entering into the consideration of the general question, whether (168) parol evidence may be introduced to invalidate a grant on all occasions, this case may be decided upon its own special circumstances. For the evidence which locates and points out a subject for the operation of the grant, at the same time proves that the land which it purports to convey was not, at the time it has date, subject to be so granted. Upon the second point it may be observed that neither the European governments nor the Government of the United States, nor that of North Carolina, have considered the Indian title other than a mere possessory right; and the Government of the United States as well as the governments of the several States have claimed and respected in each other the claim to exclusive

jurisdiction and title to territory occupied by the Indian tribes. The treaty of 1791, with the Cherokees, cannot be considered, therefore, as conveying a title to the soil of this land to the United States. It can only be received as a relinquishment of that possessory right which alone had been yielded to the Indians. This right did, of course, vest according to the precedent claims of North Carolina, known and admitted by the United States themselves. It is true, the treaty was made by the United States; because by the Federal Constitution the General Government had been made the agent of North Carolina for that purpose.

Let judgment be entered for the plaintiff.

Cited: Tyrell v. Mooney, post, 404; *Stanmire v. Powell,* 35 N. C., 315; *Lovingood v. Burgess,* 44 N. C., 408; *Barnett v. Woods,* 58 N. C., 433; *Dugger v. McKesson,* 100 N. C., 11; *Brown v. Brown,* 103 N. C., 219, 20, 21; *Gilchrist v. Middleton,* 107 N. C., 679; *Wool v. Saunders,* 108 N. C., 736; *Bd. of Education v. Makely,* 139 N. C., 37; *Frazier v. Cherokee Indians,* 146 N. C., 481.

THE GOVERNOR v. HENRY B. HOWARD.

From Wilmington District.

Where A sold to B a negro slave, knowing that the slave had been imported into this State, contrary to the act of 1794, ch. 2, he is liable to the penalty of £100, although he was ignorant of such fact when he bought the slave.

THIS was an action of debt brought on the second section of the act of 1794, ch. 2, to recover from the defendant the penalty of £100 for selling to Benjamin Smith a negro
(169) slave imported into the State contrary to the provisions of said act, knowing him to have been so imported. The defendant pleaded the general issue. The judge charged the jury that if the evidence adduced satisfied them that the defendant knew of the illegal importation at the time of his sale to Smith, they should find a verdict for the plaintiff, although it should appear that the defendant purchased the said slave honestly and without knowledge of the importation. The jury found a verdict for the plaintiff, and the defendant having obtained a rule to show cause why a new trial should not be granted, on the ground of misdirection by the court, the case was sent to this Court for the opinion of the judges.

GOVERNOR *v.* HOWARD.

The act of 1794, ch. 2, sec. 2, declares "that every person importing or bringing slaves or indented servants of color into this State after the first day of May the next ensuing, by land or water, contrary to the provisions of this act, shall forfeit and pay the sum of £100 for each and every slave or indented servant of color so imported or brought. And every person who shall knowingly sell, buy or hire such slave or indented servant of color shall in like manner forfeit and pay the sum of £100 for each and every slave or servant of color so sold, brought or hired; one moiety to him or them who shall sue for the same, to be recovered in the name of the Governor for the time being, by action of debt, in any of the Superior Courts of Law in this State." The defendant is charged with the forfeiture for having knowingly sold to Smith a slave imported contrary to the provisions of this act. He rested his defense upon this ground, that he was an honest purchaser of the slave without notice of his illegal importation, and that a sale to Smith under subsequent notice of this fact did not incur the forfeiture.

A. Moore for defendant.

BY THE COURT. Let the rule to show cause why a (172) new trial should not be granted be made absolute.

Cited: Hulin v. Biles, 4 N. C., 626; *S. v. Cress,* 49 N. C., 422.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1808.

JOHN LOUIS TAYLOR, Esquire,

JOHN HALL, Esquire,

FRANCIS LOCKE, Esquire,

*DAVID STONE, Esquire,

*SAMUEL LOWRIE, Esquire,

†BLAKE BAKER, Esquire.

HENRY SEAWELL, Esquire, Attorney-General.

EDWARD JONES, Esquire, Solicitor-General.

---

*Judges Lowrie and Stone were absent at this term.

†Judge Spruce Macay, Esquire, having died since the rise of the last General Assembly, Blake Baker, Esquire, was appointed to his place on the bench, by the Governor and Council, and took his seat in the Supreme Court at this term.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1808.

BACKHOUSE v. SNEED.

From New Bern District.

A, being the owner of a vessel "lately completely repaired," took on board for freight 270 bushels of corn. The rudder was broken by the sea, the vessel wrecked and the corn lost. The rudder presented an external appearance of soundness, but was internally rotten. And that fact not known to A. He is liable for the loss of the corn.

THE defendant sailed from the port of Wilmington to that of Topsail, both in this State, in a small schooner owned and commanded by himself and on a voyage for his own benefit, having on board property belonging to himself. At Topsail he was induced by request of plaintiff to proceed with his cargo to Swansborough, and to take on freight for the plaintiff 270 bushels of corn. Defendant sailed for Swansborough, but was compelled by stress of weather to put in at New River and to stay there two days. In going out, the rudder of the schooner was broken by the sea on the bar of New River Inlet; the vessel consequently went on shore, was wrecked and (174) her cargo lost. It appeared in evidence that the vessel had lately been completely repaired by a skillful workman; but the rudder, though presenting an external appearance of soundness, was internally rotten, and that the breaking of the rudder was owing to its rotten state. This defect of the rudder was not proved to have been known to defendant. No evidence was given nor was it pretended that defendant had ever before this occasion carried goods for freight.

The jury under charge of the court found a verdict in favor of the plaintiff for the value of the corn, and it is submitted to the Court upon this statement whether a new trial should not be awarded.

J. Stanly for plaintiff.
W. Gaston for defendant.

TAYLOR, J., delivered the opinion of the Court. Whatever doubts formerly prevailed as to the extent of a carrier's responsibility, the law seems now to be well settled that he is liable for all losses except such as happen by the act of God or the enemies of the State. All accidents which can occur by the intervention of human means, however irresistible they may be, he is considered as insuring against. And this was held to be law, although the charge of negligence stated in the declaration was expressly negatived. *Forward v. Pittard,* 1 Term, 27. The principle of this liability seems to be the public employment which carriers exercise, so that persons induced to confide in them in the course of business may receive all possible security. *Coggs v. Bernard,* 2 Ld. Ray., 117.

A stronger case cannot well be put than of *Dale v. Hale,* 1 Wills., 281, in which it was holden to be no excuse that the ship was tight when the goods were placed on board, but that a rat by gnawing out the oakum had made a small hole, through which the water had gushed. Sir William Jones, in dis-
(175) cussing this subject in his Law of Bailments, seems to consider that the exception as to the act of God and public violence is in truth part of the rule, and that the responsibility for a loss by robbers is only an exception to it, founded on a maxim of policy and good government to prevent confederacies between carriers and robbers. He holds that a carrier is regularly liable for neglect, and that such is the true principle of the decision in *Dale v. Hale,* although it is not mentioned by the reporter. *Lord Mansfield,* in *Forward v. Pittard,* concurs in the opinion of Sir William Jones as far as it extends, but in addition to the negligence for which he is liable and may be sued on his contract, he holds that a carrier is in the nature of an insurer by the custom of the realm, that is, by the common law, so that his contract binds him to due care and diligence; and even with the best care and diligence, the common law, applied to the nature of his employment, renders him responsible for inevitable accidents, if not occasioned by the act of God.

Admitting, however, that a carrier was liable only to the extent of his contract, and that ordinary negligence must be

proved against him in order to recover for a loss, it may be asked whether, if such negligence may be imputed in *Dale v. Hale,* the charge is not at least as well grounded in the present case. It certainly was as easy to guard against the defectiveness of the rudder by a proper examination as to prevent a hole being made in the bottom of the vessel in the other case, where the hold was charged with goods and the vessel pursuing her voyage. The declaration, however, in the case cited was founded on the contract and not on the custom, and the Chief Justice says that everything is negligence that the law does not excuse. Judgment for the plaintiff.

Cited: Parker v. Gilliam, 23 N. C., 551.

(176)

JOHN BATEMAN v. JOHN MARINER AND WIFE.

From Edenton District.

The testator signs his will; it is then attested in his presence by one witness. The testator inserts the "date" and the words "my dearly beloved," and has it attested in his presence by another witness. Testator then acknowledges the execution of the will in presence of both witnesses. This is a valid execution and good to pass testator's real and personal estate.

THE testator signed this will and it was attested in his presence by Levi Bateman. The testator then inserted the date and the words, *"my dearly beloved";* he then caused it to be attested in his presence by Woolsey Hathaway, and afterwards acknowledged in the presence of both of the witnesses that it was his act and deed for the uses therein mentioned. It was submitted to the Supreme Court to decide whether this will was good to pass the real as well as the personal estate of the testator.

LOCKE, J., delivered the opinion of the Court. The will being signed by the testator in the presence of one witness and afterwards acknowledged in the presence of the other, and finally acknowledged in the presence of both, has been executed with due solemnity and in a fair and valid manner; and although the testator, in the interval between the attestation of the first and second witness, inserted these words, *"dearly beloved,"* and also the date to the will, yet this addition being wholly immaterial, produces no alteration therein. The Court is therefore of opinion that the will has been well executed and is sufficient to pass both the real and personal estate therein mentioned.

YOUNG, ALSTON & CO. v. WELDON'S REPRESENTATIVES AND DEVISEES.

From Halifax District.

The whole estate of a deceased debtor being liable to the creditor, if owing to the removal of one or more of the legatees from this State, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the court are liable to the creditor for his whole debt, if their legacies amount to so much; and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees.

THIS bill was filed in the Court of Equity for Halifax District against the representatives and devisees of Samuel Weldon, deceased, praying that they might be decreed to pay to complainants the amount of a debt which the said Samuel owed to them at the time of his death. The court having directed an account to be taken by the master, of the (177) principal and interest of the debt due to complainants, and also the value of the several legacies bequeathed to the defendant by the said Samuel in his last will; and the master having made his report, the cause came on to be heard upon the bill, answers, exhibits and master's report, when the court decreed that the complainant recover from the defendants the sum of £380 with interest till paid, and that executions issue against Benjamin Weldon, administrator of Penelope Simmons, for the sum of £126 13 4; against William Weldon for the sum of £42 4 6; against Benjamin Weldon for the sum of £42 4 6; against Penelope Weldon for the sum of £84 8 10; and against John Carter and Martha, his wife, for the sum of £84 8 10; the same being their respective proportions of the said debt, due regard being had to the amount of their several legacies from the personal estate of said testator. And the cause was ordered to be retained for further directions, in case any of the said defendants had become insolvent, or removed themselves and their property out of this State, or any other cause whereby the complainants could not have the effect of their execution against them. It was also ordered that the defendants pay the costs in the same proportion as the debt.

At a subsequent term, it being moved on the part of the complainants, in consideration of the removal from this State of Benjamin Weldon (who was the administrator of Penelope Simmons), and who was also subjected by the above decree to the payment of the several sums therein mentioned, that the

other parties now within the reach of the process of the court should be made liable for their shares, if the property which they had received should amount to so much, it was referred to this Court for judgment thereon.

TAYLOR, J., delivered the opinion of the Court. Nothing appears in this case to show any consent on the part of the complainants to relinquish the claim which they have (178) against the defendants, who are chargeable in respect of the property they have as legatees. The whole fund is liable to the creditor, and if any one of the legatees pay more than his proportion, it becomes a question of contribution between him and the others; but is no answer to the creditor, while anything remains of the testator's property in his possession. It is very proper for the court to adjust these proportions for the convenience of the parties, but if one legatee remove his share out of the reach of the creditor and without his connivance, he has an undoubted right to procure satisfaction from the others. The motion of complainants must therefore be allowed.

Cited: Grigg v. Williams, 51 N. C., 518.

NEWNAN v. NEWNAN.

From Rowan.

An appeal bond cannot be legally executed after the rise of the County Court, nor will the appeal be sustained unless the bond is executed in the County Court. The Superior Court cannot take a bond to sustain an appeal.

THE plaintiff prayed an appeal from the judgment of the County Court of Rowan, but did not execute an appeal bond until after the rise of said court. The transcript of the record was filed with the clerk of the Superior Court, and the defendant's counsel moved to dismiss the appeal, upon the ground that the appeal bond had not been legally executed; and the plaintiff moved for leave to execute an appeal bond in that court. The case was sent to this Court upon the question whether an appeal bond, taken after the rise of the County Court, is good to sustain the appeal; if not, whether the Superior Court can take a bond to sustain it.

LOCKE, J., delivered the opinion of the Court. The act of Assembly regulating appeals from the County to the Superior Court declares, "that all persons dissatisfied with the judgment of the County Court shall be entitled to an appeal to the Superior Court; but before obtaining the same shall enter into bond with two sufficient securities for prosecuting the same (179) with effect." It seems, therefore, that the County Court have no power or authority to grant an appeal until they have received from the appellant a bond and adjudged that the security offered is sufficient. If, therefore, the party fail, during the sitting of the court, to obtain an appeal by executing a bond according to the provisions of the act, he is precluded forever thereafter from obtaining the same. The Court is therefore of opinion that this bond being executed after the rising of the County Court, the appeal intended to be prosecuted thereon cannot be sustained, and that the Superior Court have no authority to take a bond to sustain it. The appeal must therefore be dismissed.

BLACKLEDGE v. SCALES.

From Rowan.

A receives money for B and pays it to C, who says he is authorized by B to receive it. B sues A for the money. C is a competent witness to prove that B authorized him to receive the money of A.

THIS was an action brought to recover money had and received by defendant to the use of the plaintiff. Defendant, being deputy sheriff of Rockingham County, received an execution at the instance of the plaintiff against one Patterson, upon which he received the money claimed by the plaintiff in this action. Defendant alleged that he had paid the money to the plaintiff, etc. And to prove the payment he offered in evidence the receipt of Alexander Tate for the money, saying that Tate had been authorized by the plaintiff to receive it; and the principal question in the case was whether Tate could be examined as a witness to prove that plaintiff had authorized him to receive the money of defendant. No written authority to receive it was given to Tate.

BY THE COURT. We are of opinion that Tate is a competent witness to prove that plaintiff had authorized him to receive

the money of defendant, on the ground that he is equally liable, let the judgment be for or against the plaintiff. Espinasse, 332. For, should the plaintiff recover against (180) Scales, then Scales would recover of Tate; and if plaintiff cannot recover against defendant, then he would be entitled to recover against Tate; so that as between the parties he stands indifferent.

TURRENTINE v. MURPHEY.

From Orange.

A creditor is not liable for the maintenance of his debtor in jail upon a *ca. sa.* unless he discharges the debtor, and the debtor be unable to pay for such maintenance.

THIS was an action brought by the plaintiff as keeper of the public jail of Orange County to recover of defendant the amount of certain prison charges which had accrued by the detention in prison of one Joseph Street, confined at the instance of the defendant upon a writ of *capias ad satisfaciendum.* It was agreed that Street was at the time of his commitment and still continued to be possessed of property more than sufficient to pay for his own maintenance. He was in prison upon the writ aforesaid when this action was brought; and the question submitted to this Court was whether the defendant was liable to the plaintiff for the maintenance of Street in prison.

BY THE COURT. We are not aware of any law by which the defendant in this instance is liable to pay for the maintenance of a prisoner committed on a writ of *capias ad satisfaciendum.* The act of 1773, ch. 4, sec. 9, relied upon for the plaintiff, seems alone to contemplate a case where the party at whose instance the prisoner is confined thinks proper to discharge him, and he should prove unable to pay his fees. But as this case states the prisoner to be fully able to pay his fees, and that he has never been discharged by defendant, the Court can perceive no ground on which the defendant can be made liable to the plaintiff's demand.

Overruled: Veal v. Flake, 32 N. C., 422.

SWEANY v. HUNTER.

From Johnston.

A witness summoned in a suit failed to attend; he was called out, his forfeiture recorded, and judgment *nisi* entered against him. The party at whose instance he was summoned promised that if he would attend the next term and give his testimony, the forfeiture should not be enforced against him. He did attend, but the forfeiture was enforced. He brought this suit to recover damages for breach of the promise. The promise is without consideration, as it was only to induce the plaintiff to do that which it was his duty to do, without reward, except such as is allowed to witnesses for their attendance.

(181) THE plaintiff was summoned as a witness for the defendant in a suit brought by him against one Jesse Mitchell, and failing to attend pursuant to the subpœna served on him, he was at June Term, 1800, of Johnston County Court, called out and judgment *nisi* for the forfeiture, given by the law for his failure to attend, was entered against him. Afterwards it was agreed between the plaintiff and defendant that if plaintiff would attend at next term of the court and give his testimony, the defendant would save him harmless as to the forfeiture aforesaid. The plaintiff did attend at the next term and gave evidence and the case was tried; after which defendant sued out a *scire facias* against plaintiff upon the conditional judgment aforesaid, to which *scire facias* the plaintiff pleaded that he had not been subpœnaed. The jury found against the truth of this plea; the judgment was rendered absolute upon the *scire facias,* execution issued, plaintiff's lands were sold, execution satisfied and the money paid to defendant. This suit was brought to recover damages for the breach of the agreement aforesaid, and it was submitted to the Supreme Court to decide whether there was a sufficient consideration to support the promise made by defendant to save plaintiff harmless as to the forfeiture.

LOCKE, J., delivered the opinion of the Court. To ascertain whether there is a sufficient consideration in this case to support an *assumpsit,* it is first necessary to examine whether the plaintiff was not bound to attend the court by operation of the subpœna and without any additional recompense or reward. The act of 1777, ch. 2, declares "that every witness being summoned to appear in any of the said courts in manner as hereinbefore described, shall appear accordingly, and continue to attend from term to term until discharged by the court or the party at whose

instance such witness shall be summoned; and in default thereof shall forfeit and pay to the person at whose in- (182) stance the subpœna issued the sum of £50, and shall be further liable to the action of such party for the full damages which may be sustained for want of such witness's testimony, who shall recover the same by *scire facias,* with costs." From this section the Court infers that to enforce the attendance of a witness at each and every term during the continuance of the suit, it is only necessary that he should be subpœnaed once; and if he fail and is called out, the forfeiture of £50 does not release the witness from an obligation to attend at the subsequent term. And this inference the Court draws from two considerations: first, because the law declares that he shall continue to attend from term to term until discharged by the court or the party at whose instance he was summoned, and is altogether silent as to the forfeiture operating to release him; it states expressly how long he shall attend under the subpœna and how he is to be released; and, secondly, because the damages which the act gives the remedy to recover against the witness could never be obtained or enforced if, upon the first default made by the witness, calling him out upon his subpœna was to release him from further attendance. Nor until he was examined upon the trial of the cause, few instances would occur in which the plaintiff would be enabled to ascertain what the witness could have proved had he attended, and what proportion of damages he sustained on account of his nonattendance; and if he is to be discharged upon the first forfeiture, the plaintiff would be deprived of this additional remedy. But if the construction given by the Court to the act of Assembly be correct, the remedy is easy and the proof plain. Suppose a witness to be so material that on his testimony alone a particular point in the cause can be supported, and he fails to attend pursuant to the subpœna served on him: he is called out, the plaintiff compelled to suffer a nonsuit by reason of his non- (183) attendance, or to continue the case, or, being nonsuited, prays to have the nonsuit set aside and the cause reinstated, which is granted to him upon payment of all costs up to that time. At the next term the witness attends, the cause is tried, and the plaintiff recovers. Surely, the plaintiff would be entitled to recover these costs by way of damages sustained by him from the absence of the witness. But it is said that the part of the act can still be enforced by taking out a second subpœna. This would expose the plaintiff to more trouble and expense than the law intended to impose upon him; and if the Legislature had intended to expose him to this trouble and ex-

pense, they would have expressed such intention; but they have expressly said the contrary by compelling the witness to attend until discharged under one subpœna. Suppose the mode of suing out other subpœnas upon the default of witnesses was adopted, and in a case where there might be twenty witnesses, each witness fails to attend for two or three terms and is called out at each court, and new subpœnas are issued, the plaintiff finally recovers: would it be just or fair to make the defendant pay for all these subpœnas? or would it be any object to the plaintiff to bring an action on the case against each witness to recover the costs of single subpœna? If not, then this additional expense is to be incurred by the plaintiff, who has obtained his judgment and who, the law intends, should recover all his costs. The Court is therefore of the opinion that this witness was under an obligation to attend the courts without any additional reward, and by virtue of his subpœna; and if so, the promise on which this suit is brought is without consideration, and must be regarded as a *nudum pactum*. It is a rule well settled, that an *assumpsit* will not lie to recover money promised for doing that which it was the party's duty to do without reward. *Stotesbury v. Smith*, 2 Bur., 924. Judgment must be entered for the defendant.

Cited: Fulbright v. McElroy, 32 N. C., 42.

---

(184)

LEDBETTER v. LOFTON, ADMINISTRATOR OF DUNN.

From Rowan.

Affidavits may be read to support the affidavit on which the writ of *certiorari* was granted, as well as to contradict that of the defendant to the writ, and depositions taken in a suit then pending between the same parties may be read upon a motion to dismiss the *certiorari*.

A CERTIORARI was obtained by Ledbetter to repeal letters of administration granted to the defendant Lofton on the estate of Allen Dunn, deceased. The *certiorari* was obtained pending a suit brought by Lofton as administrator of Dunn against Ledbetter, to recover sundry negroes in the possession of Ledbetter, in which suit several depositions had been taken. The *certiorari* was obtained upon the affidavit of Ledbetter, who set forth that the letters of administration had been granted to Lofton

by the County Court of Montgomery, and after stating the facts upon which the application to repeal the letters was founded, he prayed that a writ of *certiorari* might be granted, to be directed to the sheriff of Montgomery, commanding him to go to the justices of the Court of Pleas and Quarter Sessions for Montgomery County and to the clerk of said court and cause them to certify the record of granting of letters of administration of the estates of Allen Dunn, deceased, to Lewis Lofton, to the judges of the Superior Court of Law for the district of Salisbury. Upon the return of this writ of *certiorari* into the Superior Court of Law for Salisbury District, Lofton filed his affidavit contradicting many of the facts contained in the affidavit of Ledbetter and moved that the *certiorari* be dismissed. Upon which the counsel for Ledbetter moved for leave to offer to the court affidavits to support the affidavit of Ledbetter upon which the *certiorari* had been granted, and also to contradict the affidavit of Lofton. A motion was likewise made to read to the court certain depositions taken in the suit aforesaid. And the following questions were ordered to be sent to this Court for decision:

1. Whether affidavits filed at or after the return of the *certiorari* can be read to support the affidavit upon which the *certiorari* was granted.

2. Whether affidavits filed at the same term can be (185) read to contradict the affidavit of Lofton.

3. Whether the depositions taken in the suit wherein Lofton, administrator of Dunn, was plaintiff, and Ledbetter was defendant, previous or after the *certiorari* was granted, can be read in this case.

BY THE COURT. We are of the opinion that affidavits may be read to support that on which the *certiorari* was granted, as well as to contradict that of Lofton; and that the depositions stated in the case may also be read.

NOTE.—This case was subsequently referred to this Court, at July Term, 1809, *post*, 224, upon the question whether proceedings to repeal letters of administration ought not to commence in the court which granted the letters, and the Court held that they ought, and therefore dismissed this *certiorari*.

DEN ON DEMISE OF THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA v. CAMPBELL.

From Orange.

Neither the act of 1800, repealing the laws granting escheated lands to the Trustees of the University, nor bringing a suit by the escheator under the act of 1801, suspends the statute of limitations as to the trustees, whose right was sought to be divested by those acts.

THIS was an ejectment for a house and lot in the town of Hillsborough. Andrew Watson, of North Britain, was seized of the said lot, and he dying without leaving any person in the United States capable of taking from him by descent, the lot escheated and vested in the Trustees of the University under the act of 1791, which granted to the said trustees all the lands within this State which had escheated or should thereafter escheat. The lot in question escheated previous to 1800, in which year the Legislature passed an act declaring "that all acts and clauses of acts which before that time granted power to the Trustees of the University of North Carolina to seize and possess any escheated or confiscated property, real or personal, were thereby repealed and made void; and that all escheated or confiscated property which the said trustees had not legally sold by virtue of said laws should revert to the State and be considered the property of the same as though
(186) the said laws had never been passed." The Legislature at the next session, in 1801, passed an act directing the judges of the Superior Courts to appoint escheators and commissioners of confiscated property, whose duty it should be to sue for and reduce into possession all escheated and confiscated property to the use of the State. Under this act Henry Sheppard was appointed escheator for Hillsborough District, and instituted suit against the defendant for the lot in question. Pending this suit, the case of the Trustees of the University against Foy was decided in this Court, in which this Court decided that the act of 1800 aforesaid was unconstitutional and void, and that the rights granted to the trustees by the act of 1791 remained unimpaired. In consequence of this decision, Sheppard dismissed the suit aforesaid which he had instituted on behalf of the State, and the Trustees of the University brought the present suit. More than seven years had elapsed from the time of the escheat to the commencement of this suit, during which time the defendant and those under whom he claimed had possession of the lot under color of title. And it

was agreed that in this case the statute of limitations barred the right of entry in the lessors of the plaintiff, unless the said statute was suspended in its operation as to them, either by the act of 1800 or by the commencement of the suit aforesaid by Sheppard at the instance of the State under the act of 1801. And it was referred to this Court to decide whether the statute of limitations was suspended as to the lessors of the plaintiff, by both or either of these events.

TAYLOR, J., delivered the opinion of the Court. In deciding this case against the plaintiffs we cannot but feel the extreme rigor and hardship which result from the application of a rule of law which, however we are bound to administer, we have no power to relax. We should seize with avidity any solid ground or principle upon which we could consider the act of limitations to be suspended; because the forbearing to sue has arisen from deference to a legislative act which, until it was (187) submitted to a judicial examination, was believed to be obligatory upon the plaintiffs. But we know of no authority which will warrant us in adding this to the exceptions contained in the act of limitations. Nor do we conceive that a suit being instituted on behalf of the State by the escheator will create a difference; for that claim was opposed to the claim of the trustees and was in consequence of the law by which their title was sought to be divested.

WOODFORK v. BROMFIELD.

From Stokes.

The return of two nihils good service of a *scire facias* against bail.

WOODFORK was bail for one Samuel Robinett in an action brought against him by Bromfield in Stokes County Court. Bromfield obtained judgment and sued out a *capias ad satisfaciendum* against Robinett, which was returned by the sheriff of Stokes *"Not found."* A *scire facias* was then issued against Woodfork, the bail, which was returned *"Not found."* An alias *scire facias* was issued, which was also returned *"Not found."* Whereupon Bromfield signed judgment against Woodfork "according to *scire facias*," and sued out an execution. Woodfork brought a writ of error to reverse this judgment, and the error assigned was "that the *scire facias* upon which the said judg-

ment was rendered was *not made known* to Woodfork, the bail." And it was referred to this Court to decide whether there be error to reverse the judgment.

BY THE COURT. The act of Assembly which gives the *scire facias* against bail says "that no execution shall issue thereon until the same shall be made known to him." What shall be considered a sufficient *making known* is a question of law, and it will be found in 4 Bac. Abr., 422, that the return (188) of *two nihils* is considered as such; and the practice being uniform upon this point, we think it ought not now to be altered; especially as the plaintiff would thereby be without a suitable and just remedy in cases where the bail should abscond, as no attachment would lie until there was a judgment against him; and it has been held that no suit can be brought upon bail bond.

PEACE AND KITTRELL v. PERSON AND GORDON, BAIL OF MORRIS.

From Granville.

Surrender of the principal by his bail at any time before final judgment upon the *scire facias* discharges the bail from the costs of the *scire facias*. A witness summoned by each party to a suit is entitled to compensation from each.

THE plaintiffs recovered a judgment against Morris in Granville County Court, and after the return of a *capias ad satisfaciendum* against him they sued out a *scire facias* against the defendants, who were the bail of Morris, upon which *scire facias* the plaintiffs obtained judgment, from which the defendants appealed to the Superior Court of said county; and the transcript of the record being filed with the clerk of the Superior Court, the defendants brought Morris into court and surrendered him in discharge of themselves. The plaintiffs admitted the surrender, prayed the body of said Morris into custody and judgment against the defendants for the costs on the *scire facias* up to the time of the surrender, which was objected to by the defendants.

In this case each party had summoned the same person as a witness, who moved the court to prove his attendance against each; and two questions were referred to this Court: first, whether the plaintiffs were entitled to judgment against de-

fendants for costs upon the *scire facias* up to the time of the surrender; and, secondly, whether the witness summoned by each party was entitled to compensation from each.

BY THE COURT. The surrender of the principal, being an effectual discharge of the bail, subjects the plaintiffs in the action to the costs. For the act of Assembly provides that the party cast shall pay the costs. Had the sur- (189) render been put in issue and found for the defendant, this must have been the consequence, and the same effect must follow if the plaintiff, knowing that the surrender can be established, surceased his *scire facias*.

A witness summoned for both parties is entitled to compensation from both; his delinquency would expose him to forfeitures at the instance of both; it is but just that his punctuality should benefit him.

THE EXECUTORS OF ALLEN v. WATSON.

A bequeathed negroes and other personal property to his wife during her life; and after her death to be sold and equally divided among his children. After her death, B converts the property to his own use. The executors of A can bring trover for this conversion.

THIS was an action of trover, brought for certain horses, cattle and sheep bequeathed by the plaintiff's testator to his widow, in the words following, to wit: "I give and bequeath unto my beloved wife, Elizabeth Allen, six negroes, to wit, Idy, Fib, Nazora, old Jack, Nimbri and Squire; also, three horses, one by the name of Voltaire, one by the name of Brandy, and one by the name of Ball; also, ten cows and calves, eighteen head of sheep, four feather beds and furniture, and four lots in the town of Smithfield, known and distinguished by the numbers 8, 9, 10 and 11, during her natural life, *and after her decease to be sold and equally divided among my children.*" After the death of Elizabeth Allen, the widow, the defendant converted the personal property, mentioned in the above bequest, to his own use. The defendant at the time of the conversion was guardian to four out of five of the testator's children. It was contended on behalf of the defendant that the executors of Allen, after their assent to the bequest for life, had no property in the articles converted, and could not bring trover to recover

damages for the conversion; and it was referred to this
(190) Court to decide whether the plaintiffs can support this action.

TAYLOR, J., delivered the opinion of the Court. The evident construction of this will is that after the life estate is exhausted, the executors shall sell the property for the benefit of the children. The assent operates only upon the life estate; because, before the remainder can vest in the children, a sale must take place. It is the circumstance by which this case is distinguished from the common cases, where an assent to the first taker vests the property in the remainderman. The executor must be considered as trustee for the purposes of the sale and distribution amongst the children, and therefore have a right to recover. Judgment for the plaintiff.

Cited: Acheson v. McCombs, 38 N. C., 555; *Baines v. Drake,* 50 N. C., 154; *Windley v. Gaylord,* 52 N. C., 57; *McKay v. Guirken,* 102 N. C., 24.

SAWYER ET AL. V. TRUEBLOOD'S EXECUTORS.

A bequeaths personal property to his five daughters, naming them, "to them and their disposal." Three of the daughters die in the lifetime of testator. The shares given to the three who die are to be distributed among the next of kin of testator and do not survive to the other two daughters.

JOSIAH TRUEBLOOD by his will bequeathed one-half of his movable estate to his wife, Elizabeth, during her natural life, and gave *" to his daughters, Ruth, Mary, Sarah, Elizabeth and Anne, all the remaining part of his movable estate, to them and their disposal."* The daughters Mary, Sarah and Anne died in the lifetime of the testator. Ruth and Elizabeth intermarried with the plaintiffs Sawyer and Relf, and claimed of the defendants that part of the residue of the estate bequeathed to the three daughters who died in the lifetime of the testator; and it was referred to this Court to decide whether that part of the residue so bequeathed to the three daughters who died as aforesaid had lapsed and become subject to be distributed among the next of kin, or vested in the complainants as survivors.

TAYLOR, J., delivered the opinion of the Court. There being no words of severance in the devise to the daughters, it would

at common law have been a joint tenancy; but by the act of 1784 it is converted into a tenancy in common. (191) Each of the daughters, then, had a fifth of the residue bequeathed to her in common, and the shares of those who died in the lifetime of the testator must be considered as so much of the testator's property undisposed of by will. As to those, the bequests have become void and cannot be claimed by the survivors.

WEST ET AL. v. COKE, ADMINISTRATOR OF BLAND.

From Caswell.

After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing. Affidavits will not be received by the court to support the allegations of an injunction bill.

COMPLAINANTS filed their bills in the Court of Equity for Caswell County, for the purpose of enjoining a judgment at law recovered against them by the defendant. An injunction was granted and the defendant put in his answer. The cause came on to be heard upon the bill and answer, and defendant's counsel moved to dissolve the injunction; the counsel for the complainants moved to amend the bill and also to read to the court sundry affidavits in support of the facts charged in the bill. The defendant's counsel had no previous notice of this motion to amend and read affidavits; and it was referred to this Court to decide whether, upon the hearing of this bill and answer, the Court will allow complainants to amend the bill or to read affidavits of other persons in support of its allegations.

BY THE COURT. After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing, particularly, if no previous notice of the amendment be given to the defendants. To permit such amendment would introduce improper delays in injunction causes, and other mischiefs which ought to be avoided. Nor will the Court permit the complainant to support his bill by affidavits of other persons. It has been the constant practice of the Court to decide injunction causes upon the bill and answer; and although, in some instances, this practice may produce an injury to a com- (192) plainant, it has been found to be salutary. The defendant has a judgment at law, and if he swears away the equity of complainant's bill, the injunction must be dissolved and the law take its course.

RUTH GIVINS v. EDWARD GIVINS' EXECUTORS AND DEVISEES.

From Salisbury District.

Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife; gives £1,000 to an only daughter, and after giving other pecuniary legacies, he gives the remainder of his estate to his three sisters; the personal estate is exhausted in the payment of debts. The legacy of £1,000 to the daughter is a charge upon the real estate.

THE complainant filed a bill in the Court of Equity for Salisbury District against the executors and devisees of Edward Givins, deceased, to compel the payment of a legacy of £1,000, given to her by the said Edward in his last will. The personal estate had been exhausted in the payment of testator's debts, and the question sent to this Court was whether the legacy claimed by complainant was a charge upon the real estate. The testator, after directing his just debts and funeral expenses to be paid out of his personal estate, gives to his wife £1,000, and charges his real estate with her maintenance; then follows the bequest to complainant: "I give and bequeath to my daughter, Ruth, £1,000." He gives a few other pecuniary legacies, and then gives all the remaining part of his estate to his three sisters. The complainant was testator's only daughter.

A. Henderson for complainant.

TAYLOR, J., delivered the opinion of the Court. The testator directs the fund out of which the wife's maintenance shall be made, but is silent as to the pecuniary legacies. He is also particular in requiring his debts to be paid out of his personal estate; and this furnishes some implication that he did not also mean to render that liable to the payment of the legacies. But when he devises the remainder of his estate to his sisters, etc., the necessary construction is that they shall be entitled to whatever is left after the payment of his debts as well as legacies. It would be unreasonable to give the will such a construction as would give the sisters their residuum and deprive the
(194) daughter, an only one, of her pecuniary legacy; more especially when it cannot be collected from the will that any intention of that sort was entertained by the testator.

BENZIEN ET AL. V. LENOIR ET AL.

From Iredell.

1. Deeds executed in England, for lands in this State, were proved before the lord mayor of the city of London, and the probate thereof certified under the seal of the mayoralty. They were then transmitted to this State; and arrived in 1771, but not registered within twelve months thereafter. They cannot be read in evidence under the act of 1715, ch. 38, as that act requires them to be registered within twelve months *after their arrival.*

2. But the act of 1770, ch. 7, having declared "that all deeds, etc., not already registered, acknowledged or proved shall and may within two years after the passing of this act be acknowledged by the grantor, etc., or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, etc., as if they had been acknowledged or proved and registered agreeably to the directions of any act of Assembly theretofore made," and the deeds *having been registered* within two years from the passing of the act, shall be received in evidence. And a *further probate* of the deeds is not necessary, under this act, to entitle them to registration, they having been legally proved before.

3. A power of attorney executed in 1772, in Ireland, to sell lands in this State, and proved before the mayor of the city of Carrickfergus, in 1774, and the probate certified under the seal of the mayoralty, is not admissible in evidence, as there was no law before 1793 for the probate and registration of such powers of attorney.

4. And this defect is not cured by a *registration* of the power of attorney, under the private act of 1782, ch. 36, sec. 3, which directs "that this power of attorney shall be admitted *to probate and registration* in the county of Wilkes, and be as good and valid as if the confiscation acts had never passed"—for by this act a *future probate* as well as registration were necessary to give validity to the power of attorney.

5. There being no law before 1793 for the probate and registration of powers of attorney to sell lands, a power of attorney proved before a judge of our Superior Courts in 1779, and registered upon his certificate of probate, is not admissible in evidence.

THE bill charged that the complainants were members of the *unitas fratrum* of this State, and instituted this suit on behalf of themselves and all other members of the said *unitas fratrum*. That in 1754 the Earl of Granville (195) granted two tracts of land lying in the county of Wilkes, to Henry Cossart, *in trust* for the *unitas fratrum*. That Henry Cossart died previous to 1776, leaving Christian Frederick Cossart, of the county of Antrim, in the kingdom of Ireland, his heir at law, upon whom the said lands descended. That

Christian F. Cossart was, at the time of the descent, and still continued to be a British subject; that since the descent he had never come over into this State, and that by the declaration of American independence he had become an alien, whereby, or by virtue of the confiscation laws passed in 1777 and at divers times afterwards, the lands held by him in trust as aforesaid, as to the legal title thereof, were supposed to have become vested in the State of North Carolina; but complainants were advised that the said lands having become vested in the State by a voluntary acquisition, in default of any legal proprietor, the equitable interest in trust which the *unitas fratrum* before had therein was in nowise impaired or injured; and that any person obtaining a grant or conveyance of the legal title from the State, for the said lands, either fraudulently, with intent to defeat the trust estate of the *unitas fratrum,* or with notice of the equitable interest which the *unitas fratrum* had in said lands, became seized of the legal estate in trust for the *unitas fratrum.*

That Christian F. Cossart, after the descent to him as aforesaid, to wit, in November, 1772, in order that the said lands might be sold for the use and benefit of the *unitas fratrum,* and the moneys arising therefrom might be applied to their use or as they should direct, executed in due form of law his power of attorney, whereby he empowered Frederick William Marshall to sell and dispose of said lands in his name, and also empowered him to constitute one other attorney or attorneys under him, with power to perform all other matters and
(196) things in relation to the said lands which might be deemed requisite.

That Marshall did not sell the lands, and being called by his affairs into Europe, he, previous to his departure in July, 1774, executed his power of attorney, whereby he appointed John Michael Graff, one of the members of the *unitas fratrum,* to execute all and singular the matters and things to the execution of which he had been appointed by divers persons in Europe therein named or described.

That pursuant to the powers contained, or supposed and intended to be contained, in the said power of attorney, Graff, in July, 1778, as attorney of Christian F. Cossart, the trustee in respect to the said lands, articled to sell and convey the said lands to Hugh Montgomery for the sum of £2,500, proclamation money, of which sum he received £1,000, and thereupon, by a deed duly executed to pass the said lands, supposing Graff to have been legally empowered thereto, he bargained and sold the said lands to said Montgomery in fee simple.

That for securing the residue of the purchase money to be paid to Graff, for the use and benefit of the *unitas fratrum*, Montgomery, by deed duly executed for that purpose, demised to Graff the said lands for and during the term of five hundred years, with a proviso therein inserted that the same should become void on the payment of the principal money with interest, as therein stipulated.

That Graff soon afterwards died, and Trangot Bagge became his administrator in due form of law; who, well knowing that the said term had vested in Graff in trust for the *unitas fratrum*, in November, 1784, assigned the same in due form of law to Frederick W. Marshall, then the agent and trustee of the said *unitas fratrum*, to be possessed by them.

That Marshall had died, having before his death (197) published in writing his last will and testament, bearing date in the month of December, 1801, and thereby devised all his interest and right in and to the said lands to the complainant, Christian Lewis Benzien, and thereof appointed said Benzien, with Jacob Van Vleck and John Gebhard Cunow, executors, which will had been duly proved in Stokes County Court, and the complainant, Benzien, had taken upon himself the burthen of the execution thereof in North Carolina.

That Montgomery, by deed duly executed in 1779, conveyed the said lands to trustees and the survivors or survivor of them; that all the trustees were dead except John Brown, who held the lands in trust for two infant children, until their arrival to age; that Montgomery also made his will, and thereby charged the proceeds of the residue of his real and personal estate with the payment of his debts, and especially with the payment of his debt to the Moravians. That the same persons named as trustees in the deed aforesaid were appointed executors of his will, who proved the same and undertook the execution thereof.

The bill then charged that J. Brown, the surviving executor, delayed the payment of his debt, upon the ground that he, as surviving trustee under the deed aforesaid, could not get possession of the said lands, excepting only a small part thereof. And further charged that William Lenoir and others, having notice of the equitable interest of the *unitas fratrum* in the said lands, and intending fraudulently to defeat that interest, had obtained from the State grants for the said lands, under which they had entered and still kept possession thereof.

The bill then prayed that Lenoir and the other defendants might be decreed to convey to John Brown, the surviving trustee as aforesaid, such right and title as they had acquired to

the lands under their grants, and to surrender up to him the possession of said lands; and that Brown, as surviving executor of Montgomery's will, might be decreed to pay the bal-
(198) ance of the purchase money.

The defendants, in their answer, pray that complainants may be put to the proof of their title, deny notice thereof, and rely upon the statute of limitations.

This cause coming on to be heard, the complainants offered to read in evidence, (1) the grants from Lord Granville to Henry Cossart; (2) the power of attorney from Christian F. Cossart to Frederick W. Marshall; and (3) the power of attorney from Marshall to Graff. This was objected to by the defendants' counsel upon the following grounds: As to the grants from Lord Granville to Cossart, they were executed in England and proved before the lord mayor of the city of London, and the probate certified under the seal of the mayoralty; they were therefore duly proved agreeably to the provisions of the act of 1715, ch. 38. But it did not appear that they had been registered within twelve months after their arrival in this country, as the said act requires. As to the power of attorney from Christian F. Cossart to Marshall, it was proved before the mayor of the city of Carrickfergus in Ireland, and the probate certified under the seal of the mayoralty. Upon this probate it was registered in the register's office for Wilkes County. But there being no public act of Assembly then in force authorizing the registration of powers of attorney, executed in foreign parts, upon such a probate and certificate, it was contended that the private act of 1782, ch. 36, "to vest in Frederick William Marshall, of Salem, all the lands of the *Unitas Fratrum* in this State," had authorized the registration of this power of attorney upon this probate and certificate. As to the power of attorney from Marshall to Graff, it was proved before Samuel Spencer, Esq., one of the judges of the Superior Courts, by one of the subscribing witnesses, in March 1779, and registered upon Judge Spencer's certificate; but it was alleged that there was then no act of Assembly in force authorizing the judges of the Superior Courts to take probate of such powers of
(199) attorney. This case was sent to the Superior Court upon the following questions:

1. Whether the grants and powers of attorney aforesaid were not sufficiently authenticated to be read in evidence.

2. Whether, if the grants be well authenticated, the complainants may not proceed against the defendants, although the powers of attorney be defective in their authentication.

BENZIEN *v.* LENOIR.

BAKER, J., delivered the opinion of the Court. The first question which presents itself for consideration in this case is whether the grants from Lord Granville to Cossart have been properly proved and registered. The act of 1715, ch. 38, directs "that all deeds, etc., made in foreign parts, which shall be acknowledged or proved before the chief magistrate of any city, town or corporation, within the dominions of the King of Great Britain, and registered in the precinct where the land lieth, within one year after the arrival of such deed, shall be good and valid in law, etc." These grants which were made in foreign parts, were proved before the Lord Mayor of London on 4 September, 1770, and arrived in this country about the latter part of that year, or the beginning of 1771, but were not registered until March, 1772, which was more than twelve months after their arrival; so that they were not registered agreeably to the provisions of that act. But the Legislature passed an act in December, 1770, ch. 7, which declares "that all deeds, etc., not already registered, acknowledged or proved, shall and may, within two years after the passing of this act, be acknowledged by the grantor, etc., or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, etc., as if they were acknowledged or proved and registered agreeably to the directions of any act of Assembly heretofore made." And it appears that the grants in question were registered within two years after the passing (200) of this act, that is, in March, 1772; and so far the act was complied with. But it is contended that they were *not proved* at any time afterwards, whereas the act requires that they shall be proved or acknowledged as well as registered within two years. We cannot consider that this was necessary after they had been legally proved before. The act intended to provide for future probate and registration, where either had been omitted to be done in due time. The probate here was in due time, and there could be no reason to require a second probate, where the grantee was not laboring under any inconvenience on that account; the defect being in the registration, and not in the probate. The registration, however, was in Rowan County, when the lands lay in Wilkes; and on that account it was not a compliance with the act. But the Legislature passed an act in 1806, ch. 13, giving a further time of twelve months for the registration of grants under such circumstances. It appears that these grants were afterwards registered in Wilkes County within the twelve months; and we think

that this gives validity to them, and entitles them to be read in evidence as if they had been registered in due time in the first instance.

The second question is whether the power of attorney from Cossart to Marshall has been proved in such a manner as to admit of its being read in evidence. There was no law until lately, that we know of, which allowed of the probate and registration of powers of attorney. The probate, therefore, of this before the Mayor of Carrickfergus, in Ireland, in 1774, and its subsequent registration in Surry County in the same year, being not warranted by law, would not justify the court in receiving it in evidence without further proof. But this defect the complainants attempt to remedy by an act of Assembly passed in 1782, ch. 36, sec. 3, which provides that "this power
(201) of attorney shall be admitted to probate and registration in the county of Wilkes, and be as good and valid in law as if the confiscation acts had never passed," by which we conceive that a future probate as well as registration were contemplated to give validity to it, as the former proof must be considered as if there were none at all, the same not being made under any legal authority. So that one of the requisites of the act of 1782 not being performed, the power of attorney is not proved and registered in the manner required by the act, and cannot be read in evidence.

As to the power of attorney from Marshall to Graff, the only proof of it which appears was before Judge Spencer, in 1779; and that not being made under the authority of any act of Assembly, the power of attorney cannot be read without other proof.

As to the question whether the complainants cannot proceed against the defendants, although the foregoing powers of attorney should not be authenticated by legal proof of their execution, we are of opinion that complainants may proceed, inasmuch as the trust estate (if any there was) vested in the *unitas fratrum* by the deeds from Lord Granville. But as this part of the case can be examined and decided on at the hearing with more correctness, we permit the complainants to proceed, subject to such objections at the hearing as this part of the bill may be exposed to.

(202)

NEIL'S EXECUTOR v. HOSMER'S EXECUTORS.

From Chowan.

1. Act of 1715, ch. 48, sec. 9, barring the claims of creditors against the estates of deceased persons.

2. A demised lands to B, and B covenanted in the indenture of demise to pay $50 annually for the rent. The demise was made in 1790, and B died in 1794, having had possession of the premises until his death. The demise expired in 1803, no rent having been paid. A sued the executor of B upon the covenant of the indenture for the rents; the suit was brought in 1804, and the executor pleaded the act of 1715, ch. 48, in bar. Plea sustained; for the defendants are not sued upon their own possession, but upon the possession of their testator, upon his pernancy of the profits of the demised premises, and not their own, and they must answer as his representatives. The act bars after seven years from the death of the testator, although great part of the rent *did not become due* until more than seven years after his death; no notice of the debt having been given to the executor within the seven years.

THIS was an action of covenant, in which the jury found a special verdict, setting forth that Mary Blount, widow, being seized and possessed of an estate for life in certain lands in Pasquotank County, with Sylvester Hosmer, on 23 December, 1790, executed a certain indenture, whereby the said Mary "demised, leased, and to farm let to the said Sylvester, his executors, administrators and assigns, the said lands with the appurtenances, to have and to hold the said lands with the appurtenances to the said Sylvester, his executors, administrators and assigns, from 1 January then next following, for and during the term of the natural life of the said Mary, yielding and paying the sum of $50 annually, the first payment to be made on 1 January, 1792." By virtue of this indenture, Hosmer entered and took possession of the premises, and continued in possession thereof until his death, in March, 1794. Hosmer made a will and appointed the defendants his executors, who proved the will and undertook the execution thereof. Hosmer (203) left sufficient assets, which came to the hands of his executors, to pay the rents reserved in the said indenture of demise, and all other just debts and demands against his estate. In the beginning of 1797 Mary Blount intermarried with Henry Neil, and lived with him until his death, in October, 1802, when said Henry died, leaving said Mary him surviving. Henry Neil did not at any time during his marriage with said Mary demand or receive any part of the rent of the demised premises;

that the said rent remained unpaid, and with the rents which accrued after his death, remained unpaid at the time of bringing this suit. In 1803 Mary Neil, the widow, made her will, appointed the plaintiff executor thereof, and shortly afterwards died. The writ in this case was sued out on 22 September, 1804, and the defendants pleaded "the general issue, covenants not broken, *plene administravit,* and the act of 1715."

The case was sent to this Court for the opinion of the judges.

Slade for plaintiff.
Browne for defendants.

(206) BY THE COURT. The act of 1715, ch. 48, sec. 9, bars the plaintiff's claim. The principles of this decision being stated at large in the case of *McLellan v. Hill,* decided by this Court at June Term, 1804, it is unnecessary to repeat them here. Let judgment be entered for the defendants.

---

(207)

HARTMAN v. MCALISTER.

From Wilmington District.

A demised a lot in Wilmington to B for five years, and in the indenture of lease covenants that if B, at any time before the expiration of the lease, should be willing to purchase the lot, he would convey it to him upon payment being made to him of $700. Before the lease expired, B elected to purchase the lot, and paid $70 of the purchase money. He failed to pay the balance before the expiration of the lease, and requested further time, which was allowed. He still failed to pay, and A tendered to him the $70, brought an ejectment and recovered judgment. B defended the suit, and failed to tender the balance of the money. He then filed a bill, offering to pay the balance, and prayed that A might be decreed to receive the money, convey the lot, and be enjoined from disturbing his possession. Injunction granted, and decree made according to the prayer of the bill; for, the day of payment not being expressly stipulated, and the contract of purchase in part performed, the court will grant a reasonable time to B to complete the contract; but he must pay the costs, both at law and in equity.

ON 19 March, 1799, McAlister demised part of a lot in the town of Wilmington to Hartman, to hold for the term of five years, at an annual rent of $30, and in the indenture of lease covenanted and agreed with Hartman, "that if he, the said Hartman, or his heirs or assigns should at any time before the

expiration or upon the expiration of the lease be willing to purchase the said piece of land, that he, the said McAlister, his heirs or assigns, should and would, upon the payment of $700 to him or them, make, convey and execute, by proper and firm warranty deeds of conveyance, a right and absolute property in and to the land to the said Hartman, his heirs or assigns, forever." And McAlister further covenanted that if Hartman should not purchase the premises, then, at the expiration of the lease, any houses or buildings that might be erected thereon by Hartman should be valued by two indifferent persons, and the amount of the valuation paid to Hartman or his (208) assigns, etc. Hartman entered under this lease, and erected several houses; he paid the ground rent to McAlister, and in February, 1804, paid him $70 in part of the purchase money for the premises, and took a receipt in the following words: "Wilmington, 2 February, 1804. Received of Jacob Hartman $70, in part payment for a lot bought of me on the southeast corner of Dock and Front streets. Chs. McAlister." The lease expired in December, 1804, and McAlister, supposing that by the agreement aforesaid Hartman was bound to pay the whole of the purchase money before or at the expiration of the lease, applied to Hartman a short time after the lease expired, and insisted upon having the business respecting the lot settled. Hartman requested an indulgence of ten days for the balance of the purchase money. McAlister granted an indulgence of twenty days; at the end of which time he wrote to Hartman that he would extend the time of payment for ten days more, but that if the money was not then paid, he would expect to receive the sum of $120 per year as rent. No answer being returned to this letter, nor any further payment being made or offered by Hartman, McAlister tendered to him the $70 which he had received as before stated, and instituted an action of ejectment against Hartman, and obtained judgment. Whereupon, Hartman filed this bill, praying that he might be permitted to complete his purchase of the premises, offering to pay the balance of the purchase money, and that McAlister might be decreed to convey, and be enjoined from disturbing his possession. McAlister having filed his answer, the case was sent to this Court for the opinion of the judges.

Gaston for complainant. (210)
Duffy and *Williams* for defendant.

BAKER, J., delivered the opinion of the Court. The complainant, by the agreement which he made with the defendant,

was allowed time until the expiration of his lease to determine whether he would purchase the lot in question or not, for the sum of $700; and although it is probable that the parties intended the same should be paid at or before that time, yet, as the words of the agreement do not expressly require it, and as the complainant made a payment of $70 before that time, which the defendant received in part of the purchase money, it appears that complainant manifested his determination to make the purchase, and the defendant confirmed it by his receipt of the money. We therefore think that he should be compelled to convey to the complainant the lot in question, upon his paying to the defendant the balance of the said $700, with the interest thereon; and we direct that the same be paid by the
(211) complainant within forty days after he shall be served with a copy of the decree to this effect; and that upon the payment of the said principal and interest the injunction shall be made perpetual; but on failure to make payment the injunction shall be dissolved. And as the complainant by his neglect to comply with his agreement has driven the defendant into court, we think he should pay all costs, both in law and equity.

HILL v. JONES.

From Franklin.

Complainant obtained an injunction, and died before the hearing of the cause. No administration being had on his estate, and defendant having put in his answer, moved that it be read, and the injunction be dissolved. *Motion overruled.*

HILL filed a bill in the Court of Equity for Franklin County, and obtained an injunction to stay proceedings upon a judgment recovered against him by Jones in Orange Superior Court of Law. Jones put in his answer; but before the hearing of the cause Hill died intestate, and no administration being had on his estate, Jones' counsel moved that his answer be read, and the injunction be dissolved. This motion was sent to this Court for the opinion of the judges.

BY THE COURT. As the complainant is dead and his estate is not yet represented, this cause cannot be heard for the purpose of procuring any decree upon the merits. The motion must be disallowed.

Cited: Collier v. Bank, 21 N. C., 330.

(212)

THE GOVERNOR v. HORTON.

From Rowan.

Debt to recover £100, the penalty imposed by the act of 1794, ch. 2, for importing a negro slave into the State. The writ called upon the defendant to answer "James Turner, Governor, etc,, of a plea that he render to him £100," etc. The declaration stated: "Benjamin Forsythe, who sues in this behalf, as well for his Excellency, James Turner, now Governor of the State, etc., as for himself, complains of William Horton, etc., that he render to James Turner, now Governor, etc., and the said Benjamin, who sues as aforesaid, £100, etc." Variance between writ and declaration pleaded in abatement. Plea sustained.

THIS was an action of debt to recover the penalty of £100 for bringing a negro slave into this State, contrary to the act of 1794, ch. 2. The act directs the penalty to be recovered in the name of the Governor for the time being, and the writ called upon the defendant to answer "James Turner, Governor, etc., of a plea that he render to him £100, etc." The declaration did not pursue the writ, but stated: "Benjamin Forsythe, who sues in this behalf, as well for his Excellency, James Turner, now Governor of the State of North Carolina, as for himself, complains of William Horton, being in custody, etc., that he render to James Turner, now Governor, and the said Benjamin, who sues as aforesaid, £100, etc." The defendant pleaded this variance between the writ and declaration in abatement, and the case was referred to this Court, upon the question whether the plea should be sustained.

BY THE COURT. It is necessary that the declaration in every case should comport with the writ, for its design is to specify fully and particularly that cause of action which the writ states as the foundation of the plaintiff's claim. So essential a variance as the record presents in this case cannot be permitted without introducing uncertainty and confusion into legal proceedings, and without suffering any diversity, how- (213) ever palpable, to exist between the writ and the count. The defendant is brought into court to answer to one person, and he cannot, when there, be liable to answer two upon the same writ. The plea must therefore be sustained.

THE STATE v. SMITH.

From Wilmington District.

Motion to quash an indictment. In cases of doubt the court will not quash an indictment. It is due to the State, and to the rights of the citizen, in such cases, to have the facts inquired into by a jury, and if the facts charged be affirmed by their verdict, the defendant can have the same advantage of legal points upon a motion in arrest, as upon a motion to quash. Therefore, the court refused to quash an indictment which charged "that the defendant, fraudulently intending to injure A. B., unlawfully and fraudulently procured a certificate of a survey on an entry of lands in the entry-taker's office of Brunswick County to be made by C. D., the surveyor of said county; which certificate set forth that the lands described therein had been surveyed, and that H and G were chain-carriers; when, in fact and in truth, the lands described in the certificate were not surveyed, and when, etc., H and G were not chain-carriers."

THIS case was sent to this Court for the opinion of the judges upon a motion to quash the following indictment:

STATE OF NORTH CAROLINA, } Superior Court of Law,
WILMINGTON DISTRICT. } May Term, 1806.

The jurors for the State, upon their oaths, present, that Benjamin Smith, late of the county of Brunswick, planter, fraudulently intending to deceive one Alfred Moore, on 5 January, 1803, at the county aforesaid, in the district aforesaid, unlawfully and fraudulently did procure a certificate of a survey on an entry of lands in the entry-taker's office of said county, and numbered 86, to be made by John Collier Baker, the surveyor of said county, which said certificate set forth and cer-
(214) tified that the lands described in the same had been surveyed, and that John Smith and George Logan were chain-carriers, when, in fact and in truth, the said lands described in said certificate were not surveyed, and when, in fact and in truth, the said John Smith and George Logan were not chain-carriers; all which the said Benjamin Smith then and there well knew, to the great damage of the said Alfred Moore, the evil example of all others in like cases offending, and against the peace and dignity of the State.

HENRY SEAWELL,
Attorney-General.

It was contended in this case that the indictment is insufficient: (1) because it does not set forth any false token by which

the fraud on Moore was intended to be effected; (2) because it does not set forth how or in what manner Moore *could* be injured; nor (3) how he *was* injured. (217)

TAYLOR, J., delivered the opinion of the Court. We are not prepared to say that the offense charged in the indictment is not the subject of a criminal prosecution, or if it be, that it is stated in the bill with such plain and manifest imperfection as to call for the extraordinary interposition of the Court. In cases of doubt, it is alike due to public justice and the rights of the citizen that the facts shall be inquired into by a jury; and if the charges be affirmed by their verdict, the questions of law, introduced in the present discussion, will be still open to the defendant on a motion to arrest.

Cited: S. v. Heaton, 81 N. C., 545.

NOTE.—The defendant had been, in 1796, Speaker of the State Senate, and after this, in 1810, was elected Governor of the State. The prosecutor was a Justice of the Supreme Court of the United States. The surveyor, John C. Baker, represented the county of Brunswick in both branches of the General Assembly.—W. C.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1809.

---

*JOHN LOUIS TAYLOR, Esquire,

JOHN HALL, Esquire,

FRANCIS LOCKE, Esquire,

SAMUEL LOWRIE, Esquire,

†LEONARD HENDERSON, Esquire,

†JOSHUA G. WRIGHT, Esquire.

HENRY SEAWELL, Esquire, Attorney-General.

EDWARD JONES, Esquire, Solicitor-General.

---

*Judge Taylor was prevented by indisposition from attending the Supreme Court at this term.

†The Honorable Leonard Henderson and Joshua G. Wright, Esquires, were appointed Judges of the Superior Courts of Law and Courts of Equity of this State, by the General Assembly, in December, 1808; the first to supply the vacancy occasioned by the death of the Honorable Spruce Macay; the latter *vice* the Honorable David Stone, who, at the same session of the General Assembly, was elected Governor of this State.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1809.

MAPLES v. MEDLIN ET AL.

From Fayetteville District.

To make the purchaser of a legal title a trustee for the *cestui que trust*, it is not necessary that he should have notice of the *particular cestui que trust;* it is sufficient if he have notice that the person from whom he buys is but a naked trustee. He ought to inquire and search out the *cestui que trust.*

On 4 January, 1792, Marmaduke Maples obtained a grant for the lands in dispute, and on 10 November following he conveyed them to Thomas Maples, the complainant. On 3 March, 1793, the defendant John Ray and one Malcolm MacNeil obtained judgments before a justice of the peace against Marmaduke Maples; but it did not appear that any execution was issued or was levied by virtue of either of these judgments, till 1795. In 1794 Joel Medlin, one of the defendants, purchased the lands in question for £17, and sold it to another of the defendants, John Curry, who, on 10 August, 1794, obtained a deed from Marmaduke and Thomas Maples jointly. Between February and May Courts of Moore County, 1795, executions were issued on the aforesaid justice's judgments, and were levied on the said lands, as the lands of Marmaduke Maples. Upon this, Curry resold to Medlin for a valuable consideration, and received the purchase money, to wit, £40. The executions were returned to May Term, 1795, and orders of sale were granted, under which the lands were sold in August, 1795, when John Ray, one of the defendants, became the purchaser, at the price of thirty shillings. In the fall of 1795 Medlin sold

the lands to Thomas Maples, the complainant, for £35, or thereabouts, and Maples then rented the lands to Medlin for one year; and in the fall of 1796 Medlin paid to the complainant, Maples, the rent for the year. In the fall of 1797, Medlin continuing in possession, refused to pay the rent to complainant, and complainant ordered him to quit the premises. On 13 February, 1797, Curry, to whom Maples had conveyed as aforesaid, made a conveyance of the lands to the defendant John Ray, for the consideration of fifty shillings, informing Ray, previous to the conveyance, that he had resold to Medlin; whereupon this bill was filed by Thomas Maples to compel Ray to convey the lands to him. And the case was sent to this Court for the opinion of the judges. Some additional facts were relied upon in the argument of the cause, which are noticed in the opinion of the Court.

LOCKE, J., delivered the opinion of the Court. From (221) the statement of facts made to this Court, it is evident the legal estate in the lands in dispute passed from Marmaduke Maples to one of the defendants, John Curry, and that the equitable title afterwards vested in the complainant, Thomas Maples, under Medlin's purchase from Curry and complainant's purchase from Medlin, unless it should appear that the first conveyance from Marmaduke to Thomas Maples was made with intent to defraud creditors, and therefore as to them be entirely void. It is true that at the time this deed was executed Marmaduke was indebted to Ray, one of the defendants, and also to one MacNeil, for their attendance as witnesses; and it is equally true that he was also indebted to his brother Thomas £7, which the latter paid for him as prison fees; and it is proved by witnesses present at the time that they understood this conveyance rather in the light of a mortgage than as a conveyance of the absolute estate; in which light we are rather inclined to view this deed, for it is ascertained that Curry paid £10, part of the purchase money, to Marmaduke, and the other £7 to Thomas, when the latter assured Curry he had then no claims on the land. Curry, however, to be sure of his title, took a conveyance from Marmaduke and Thomas both. Hence, it plainly appears that this deed was made upon a valuable consideration, and nothing appears to show that it was made *mala fide*. For, Thomas having paid this money in order to release Marmaduke from jail, had a good right to secure his debt by this mortgage; and although the instrument appears, on the face of it, to convey the abso-

lute estate, yet Thomas seems to have released all further claim to the lands the moment his debt was paid; and however absolute it may appear, yet, if intended as a mortgage, it will be so considered in equity. We are therefore of opinion that this conveyance was not fraudulent, and the defendant Ray seems to have viewed it in the same light. For if fraudulent, he would have had a good title under his purchase at the (222) sheriff's sale; yet he preferred the title which Curry had obtained from Marmaduke and Thomas Maples to a deed from the sheriff. Indeed, he seemed to relinquish all idea of a title under the sheriff's sale when, instead of getting a deed from the sheriff without paying one cent for it, he chose to give $5 for Curry's title, although he is expressly told by Curry that he had sold the land to Medlin, and that he was no more than a trustee for said Medlin.

We are not to consider whether Ray having notice at the time of his purchase from Curry makes him a trustee for complainant, and in equity bound to convey. As to this point, it may be necessary to advert to some of the facts proved in the case. It is admitted by Ray, in his answer, that Curry told him he had sold to Medlin, and had only the naked title at law; but he says that he applied to Medlin, and he consented that Curry should convey; and it is also denied, in the answer, that he had any knowledge that complainant had ever purchased of Medlin, or had any claim to the land. It is denied, in the answer of Medlin, that he ever resold the lands to complainant, and admitted that he consented Curry should convey to Ray. On the part of the complainant the repurchase of this land from Medlin is satisfactorily proven. But it is contended that, although the land was resold by Medlin to the complainant, yet Ray, having no notice of this contract, and having obtained the consent of the only *cestui que trust* within his knowledge, cannot be affected by complainant's equitable title, and therefore not bound to convey. To this we answer that this argument is not founded on the proofs in the cause, because these facts are only stated in the answers of Ray and Medlin, to which there is a replication on the part of the complainant, and consequently the defendant Ray is bound to prove them. But in this proof he has failed. If, however, Ray was not held to this proof, what credit does the answer of Medlin seem entitled to, when he states that he was to give Curry £40 for the land, and which he must have paid; yet he is willing to let Ray (223) have it without having anything repaid to him? His answer is expressly contradicted by several witnesses as to the resale to complainant. This part of the case, then, being

stripped of the evidence arising from the answers of Ray and Medlin, stands thus: Ray, at the time of his purchase from Curry, was expressly told by the latter that he had sold the lands, and was a mere naked trustee; in truth, that he had nothing to sell or transfer, but the mere legal title, which Ray, under this notice, obtained from him. Upon this statement there can be no doubt but that Ray became a trustee for the complainant, and bound to convey to the *cestui que trust* in the same manner Curry would have been bound. But it is said that Ray had no notice of the particular *cestui que trust,* and that general notice is not sufficient. We think it is not necessary that he should have notice of the particular *cestui que trust;* it is sufficient if he have notice that the person from whom he buys is but a mere trustee. For he is then informed that he can buy nothing, that the seller has nothing to part with, and that the moment he obtains the legal estate he becomes a trustee for the *cestui que trust,* be he who he may. It is his business to inquire and search him out. As between the complainant and one of the defendants, this is, then, only the common bill for a specific performance of a contract, upon a consideration actually paid. It is one of the most ordinary subjects of relief, and the defendant Ray being a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person whom he represents would have been bound to do by the decree. 5 Bac., 393; 2 Ves., Jr., 440. Let the decree be entered for the complainant, compelling the defendant Ray to convey the lands, and to pay costs.

Cited: Christmas v. Mitchell, 38 N. C., 545.

(224)

LEDBETTER v. LOFTON, ADMINISTRATOR OF DUNN.

From Rowan.

Proceedings to repeal letters of administration must be commenced in the court in which the letters were granted. The Superior Courts can exercise only appellate jurisdiction in such cases.

LETTERS of administration on the estate of Allen Dunn, deceased, were granted to Lofton by the County Court of Montgomery, and shortly afterwards he instituted an action of detinue in Salisbury Superior Court, against Ledbetter, for certain

negro slaves which were of the estate of the said Allen Dunn. Pending the suit, Ledbetter filed an affidavit stating certain facts, upon which he prayed that the letters of administration granted to Lofton might be repealed, and that for this purpose a writ of *certiorari* might be awarded to have the record of granting administration to Lofton certified to Salisbury Superior Court. A writ of *certiorari* was awarded and the record certified. Sundry affidavits were taken, and the case coming on to be heard, it was moved by defendant's counsel that the *certiorari* be dismissed, on the ground that proceedings to repeal letters of administration ought to be commenced in the County Court which granted them; that the Superior Court could only exercise an appellate jurisdiction in such cases, or, in consequence of its extraordinary and superintending power over inferior courts, award a writ of *certiorari* to revise their judgments, where they had been refused a right to which a party was entitled, or some error or wrong had been committed, and the party affected thereby showed some good reason why he did not bring up the case by appeal; that in the present case Ledbetter had not applied to the County Court to repeal the letters of administration, nor in his affidavit stated any facts to call forth the exercise of the extraordinary powers of the Superior Court in awarding a *certiorari*. The motion to dismiss the *certiorari* was sent to this Court for the opinion of (225) the judges.

BY THE COURT. Proceedings to repeal letters of administration ought to be commenced in the court in which they were granted. This *certiorari* must therefore be dismissed.

BRANTON v. DIXON.

From Fayetteville District.

Complainant having neglected to plead usury to an action at law upon his contract, and having in his bill shown to the court no reason for this neglect, and not having waived the penalty given by the statute for usury, a demurrer to his bill was sustained, and the bill dismissed.

THE bill charged that Branton and Shepperd gave their joint obligation to Dixon, and thereby bound themselves to deliver to Dixon forty barrels of merchantable pork; that, failing to de-

liver the pork by the day mentioned in their obligation, Dixon pressed them for payment, and to procure a forbearance for eight or nine months they agreed to deliver to Dixon twenty additional barrels of merchantable pork, and thereupon their first obligation was surrendered up, and they executed another, binding themselves to deliver to Dixon sixty barrels of merchantable pork. That within the time allowed for the delivery Branton delivered thirty-one barrels of pork; that Dixon afterwards instituted a suit against Branton and Shepperd, in New Bern Superior Court, and recovered a judgment for £282 1 6, and cost of suit, a sum too great, although nothing had been paid on the usurious contract. The bill then prayed for an injunction, and that Dixon might be compelled to come to a true and just account with complainant, etc.

The bill set forth no reason why complainant did not
(226) set up the usurious contract upon the trial at law, nor did complainant, in his bill, waive the penalty given by the act of 1741, ch. 11, for the offense of usury.

The defendant demurred as to so much of the bill as charged him with usury, and answered as to the residue; and for cause of demurrer the defendant showed that complainant ought to have pleaded the usurious contract (if any) to the action of law. The bill, answer and demurrer were sent to this Court for the opinion of the judges.

HALL, J., delivered the opinion of the Court. The bill sets forth that an usurious contract had been entered into between complainant and defendant, on which defendant brought an action at law, and obtained judgment. If the contract were really usurious, and the complainant wished to avail himself of the statute against usury, he ought to have pleaded it to the action at law, or offered to this Court sufficient reasons for not pleading it. Upon this ground, therefore, the demurrer ought to be sustained. But if the complainant had in other respects made out such a case as would entitle him to relief in equity, he has omitted to waive the penalty which the act of 1741, ch. 11, imposed upon defendant, in case the contract should be found to be usurious. Let the demurrer be sustained, and the bill be dismissed with costs.

Cited: Oldham v. Bank, 85 N. C., 247.

(227)

BRAY'S ORPHANS v. BRUMSEY, FORMER GUARDIAN.

From Currituck.

The choosing of a guardian by orphans in court does not necessarily destroy the authority of a former guardian. The court can at any time remove a guardian upon proper cause shown, and in the appointment of a successor have entire discretion.

BRUMSEY was appointed guardian to the plaintiffs by the County Court of Currituck. Some time afterwards the plaintiffs moved the court for leave to choose another guardian, which was granted, and Wallis Bray being chosen by them, he was appointed by the court, and entered into bond with security. Brumsey being dissatisfied with the judgment of the court, appealed; and the case was sent to this court upon the question whether the choice made by the plaintiffs of another guardian superseded the appointment of Brumsey.

BY THE COURT. The choice of a guardian by orphans in court does not necessarily destroy the authority of the first guardian, especially without notice and some evidence of his abusing the trust reposed in him. But the County Court may at any time remove a guardian, on proper cause appearing, and in the choice of a successor have entire discretion.

(228)

MILLER AND ROBERTS v. LUCAS.

From Randolph.

The words in a deed of trust, "to pay, satisfy and detain to themselves the sum of £500, together with all costs which shall arise against them for their being security for A, for several different sums of money, also being common and special bail in several suits," do not extend to securityships entered into subsequent to the execution of the deed; and parol evidence is not admissible to prove that the parties intended the deed to extend to subsequent securityships.

THIS was an action of detinue for certain negro slaves in the possession of defendant, to which the plaintiffs claimed title under a deed of trust, executed to them by William Roberts, on 27 May, 1769, to indemnify them as to sundry debts for

which they were bound as his securities. The principal question in the case arose upon the construction of this deed: whether it extended to future securityships or was confined to securityships existing at the time of its execution. For on 10 September, 1772, William Roberts, with the plaintiffs as his securities, executed a bond to William Cunningham & Co. in the penal sum of £300, Virginia currency, conditioned for the payment of £150, like money, on or before 1 March, 1773. William Cunningham being a British merchant, and the late Revolutionary War coming on shortly after the bond became payable, the debt remained unpaid until 1803, when suit was instituted on the bond against Miller, one of the plaintiffs, in the Circuit Court of the United States for the District of North Carolina, and judgment obtained at December Term, 1803. Miller discharged the judgment, and sought to indemnify himself out of the property conveyed to him and Samuel Roberts, by the deed of trust aforesaid; Lucas, the defendant, being in possession of two negroes, the increase of one of them
(229) named in the deed. This suit was brought to recover possession of them.

The deed set forth, "that William Roberts had bargained, sold, etc., to Haman Miller and Samuel Roberts, their heirs and assigns forever, two slaves, to wit, Peter, etc., together with all the stock of horses, cattle, hogs, household goods, and all other estate whatsoever to the said William Roberts belonging, to have and to hold the said slaves, etc., upon special trust and confidence, and to the uses, intents and purposes following, that is to say, that the said Haman Miller and Samuel Roberts shall, at any time and at all times hereafter, possess and seize themselves of the aforesaid slaves, and other estate before mentioned, and sell and dispose of them for ready money for the best price or prices that can or may be got for the same or any or every part thereof, and out of the money arising from such sale, pay, satisfy and detain to themselves the sum of £500, current money of Virginia, together with all costs that shall hereafter arise against the said Haman Miller and Samuel Roberts on account of their being security for the aforesaid William Roberts for several different sums of money, as also being common bail and special bail in several suits in the County Court and General Court against said William Roberts, until receipts of the money paid; and also to reimburse themselves all reasonable expenses in recording the present deed or making the sale as aforesaid." It was contended on behalf of the defendant, that the debt to Cunningham & Co., being contracted several years subsequent to the execution of this deed, was not embraced by it, and the

payment of this debt by Miller gave him no right to sue for and recover the property conveyed to him and Samuel Roberts by the deed.

The plaintiffs offered in evidence the deposition of Francis Arnold, to prove that it was the intention of the parties, at the time the deed was executed, that it should extend to securityships thereafter to be entered into, and that they (230) had so construed it after its execution.

The case was sent to this Court upon the questions, (1) whether the deed is to be construed to extend to securityships entered into by the plaintiffs in 1772, after the making of said deed; (2) if not, can it be so extended by the deposition of Francis Arnold?

LOWRIE, J., delivered the opinion of the Court. The construction of a deed must be made from the face of it, and no averment or parol evidence can be received to contradict it. When it is proved in a court of justice, it is conclusive on the rights of the parties. Although parol evidence may be admitted to explain latent ambiguities in a deed, and in some special cases has been received to explain ambiguities which were patent, yet such evidence is admissible only in cases of evident necessity. The court will never receive parol evidence to explain away or contradict an explicit agreement in writing. The deed in question does not require the aid of parol evidence to understand it. The words are, "on account of their being security for, etc." The plaintiffs contend that these words may well be construed to extend to cases where they became securities for William Roberts, subsequent to the date of the deed, and that this construction is supported by the words "detain to themselves the sum of £500, Virginia money, together with all costs that shall hereafter arise." The several sums for which the plaintiffs became security were known: as well the bonds on which William Roberts had not been sued, as those on which he had been sued, and in which suits they had become his common and special bail. The whole of those sums being known, a sum certain could be easily fixed on which would be sufficient for their indemnification, and the sum of £500 was agreed on as sufficient for that purpose, but not with respect to the costs that might afterwards accrue. Hence, as to the costs, (231) the words are in the future time, and no specific sum is mentioned or agreed on. The participle "being" is used in expressing that they had become common and special bail in suits in the County and General Courts; and it is not pretended that they are or would be entitled to indemni-

fication for becoming common or special bail for William Roberts subsequent to the execution of the deed. When the deed speaks of the expenses of "recording, etc., and of selling the property," the expressions used prove clearly that the parties were not deficient in language to convey their ideas; that they were capable of using apt and proper words to embrace all the objects which they had in view. The Court is therefore of opinion that the deed cannot be construed to extend to security-ships entered into subsequent to its execution, and that the deposition of Francis Arnold cannot be received to aid its construction.

GRANT, AN ORPHAN, BY HIS GUARDIAN, v. WHITAKER.

From Halifax.

The County Court is not bound to confirm the choice of a guardian made by an infant of fourteen years of age and upwards. Under the act of 1762, ch. 5, the court may exercise a discretion in appointing a guardian, independent of any choice which the infant may make.

WHITAKER was appointed guardian to the plaintiff by the County Court of Halifax; and afterwards the plaintiff, being of the age of seventeen years, came into court and made choice of Thomas Bustin as his guardian. And it was referred to this Court whether an infant of the age of fourteen years and upwards may not choose a guardian; and whether the County Court is bound to confirm such choice, or exercise a dis-
(232) cretion independent of any choice which such infant may make.

HALL, J., delivered the opinion of the Court. It has been already decided in this Court that however much a court may be disposed to accommodate the feelings of an infant of fourteen years of age or upwards, in the appointment of a guardian, they are not bound absolutely by the choice of the infant; and that decision well accords with the true spirit of the act passed in 1762, ch. 5, as well as with the opinion of the Court in *Mills v. McAlister,* 2 N. C., 303. It would be much to be regretted if a court were bound by the choice of an infant in a case of so much importance as that of appointing a guardian. That choice might be brought about by artful, designing persons, whose sole aim would be their own interest. The infant, owing to his tender years and inexperience, could not guard against

these artifices, which a court would be competent both to see and prevent. We are therefore of opinion that the court are not bound to confirm the choice of the infant, but are at liberty to exercise a discretion, independent of any choice which the infant may make.

(233)

HILL, ADMINISTRATOR, ETC., v. MOORE AND WATTERS, EXECUTORS OF CLARKE.

From Wilmington District.

A posthumous child is entitled to a distributive share under the statute of distributions.

JAMES MOORE died intestate in 1783, leaving a sister named Sarah and two brothers named Alfred and Julius Cæsar; he left his wife, Elizabeth, *encient* with a daughter, who was born several months after his death. She was named Mary Paris, and died in September, 1784, without brothers or sisters. Elizabeth, her mother, having obtained administration of her estate, intermarried with William H. Hill, and died in 1788. Administration on her estate was granted to her surviving husband, William H. Hill.

After the death of James Moore, in 1783, but before the birth of Mary Paris, Julius Cæsar Moore died intestate and without issue, possessed of a large personal estate. Sarah, the sister of Julius and Alfred Moore, intermarried with Gen. Thomas Clarke, who died in 1791, having made a will and appointed Henry Watters executor thereof.

In 1785 Alfred Moore and Thomas Clarke, claiming one moiety of the share to which Mary Paris was entitled of her father, James Moore's estate, the said share was divided between Elizabeth, her mother, the administratrix of her estate, and the said Alfred Moore and Thomas Clarke.

The estate of Julius Cæsar Moore was taken possession of by Alfred Moore and Thomas Clarke, and one-sixth part thereof allotted to Elizabeth, administratrix of the estate of Mary Paris Moore.

This bill was brought by William H. Hill, as administrator of the estate of his deceased wife, Elizabeth, against Alfred Moore, and also against Henry Watters, executor of the last will of Thomas Clarke, deceased, praying, first, that the division of the estate of James Moore, deceased, (234)

which had been made in 1785, might be set aside, and the share thereof delivered over to Alfred Moore and Thomas Clarke be decreed to be returned, etc., upon the ground that upon the death of James Moore one-third part of his personal estate belonged to his wife, Elizabeth, and upon the birth of his daughter, Mary Paris, the other two-thirds belonged to her; that upon the death of Mary Paris, her two-thirds vested in her mother, Elizabeth, so that Alfred Moore and Thomas Clarke had no right to any part thereof. Secondly, that an account might be taken of the estate of Julius Cæsar Moore, deceased, and one-third part thereof be decreed to be paid to the complainant, on the ground that although Mary Paris was in *ventre sa mere* at the time of her uncle Julius' death, she was entitled to a distributive share of his estate, which upon her death vested in her mother, Elizabeth.

The defendants demurred to so much of the bill as sought to have an account and division of the estate of Julius Moore, deceased, and answered to the other parts of the bill. The question arising upon the demurrer was, "Whether, Mary Paris Moore being an infant in *ventre sa mere* at the death of Julius Cæsar Moore, she was entitled to a distributive share of his estate." This question was sent to this Court.

Alfred Moore, one of the defendants, in support of the demurrer.

Gaston for plaintiffs.

(251) BY THE COURT. We are of opinion that a posthumous child is entitled under our statutes of distributions to a distributive share; and that Mary Paris Moore was entitled to a share of Julius Moore's estate equally with the brothers and sisters of said Julius who were living at the time of his death and capable of taking.

Cited: Grant v. Bustin, 21 N. C., 78; *Deal v. Sexton,* 144 N. C., 158.

(252)

McCREA v. STARR.

From Tyrrell.

Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest the judgment.

AFTER verdict, the defendant moved to arrest the judgment, for that the warrant was not made returnable within thirty days, Sundays excepted, nor was the time or place of trial mentioned therein.

HALL, J., delivered the opinion of the Court. When there is an appeal from the judgment of a justice of the peace to the County Court, the defendant may plead in any way he thinks proper; he is not bound by any defense which he made before the justice, because there is no correct way of ascertaining what that defense was. But when he enters his pleas in the County Court he is bound by them, because they become matters of record. If, therefore, upon the trial before the justice he defends as to the merits, upon an appeal to the County Court he may plead in abatement. But if in the County Court he plead to the merits, and neglect to plead in abatement such plea as he now tenders in the form of reasons in arrest of judgment, and there is a verdict against him, he ought to be contented; for there is no connection between the merits of his case and such defects in the warrant as he now points out. Had he pleaded such defects in abatement, the court would have judged of them; but he has lost that opportunity by pleading to the merits of his case. Let the reasons in arrest be overruled, and judgment entered for the plaintiff.*

*Other cases were decided at this term to the same effect: In one, a motion to nonsuit the plaintiff, because the *time and place* of trial were not set forth in the warrant, was overruled, because the act does not require them to be set forth in the warrant.

(253)

SAWYER v. HAMILTON.

From Camden.

The General Assembly having authorized the County Courts of Camden and Pasquotank to appoint commissioners to lay out a road, and having authorized John Hamilton to erect tollgates on the said road and exact toll, the commissioners laid out the road across the lands of Enoch Sawyer; and their report being returned to court, was set aside, upon the ground that Sawyer had no notice.

THE General Assembly, in 1805, passed an act authorizing the County Courts of Camden and Pasquotank to appoint commissioners to lay out a road from Elizabeth City, in Pasquotank, to Indian Town, in Camden, on which road John Hamilton was authorized to erect tollgates and exact toll. The commissioners appointed under this act proceeded and laid out the road, and returned their report to Camden County Court. A considerable portion of the road was laid out across the lands of Enoch Sawyer, the commissioners directing this part of the road to be opened to the width of twenty-six feet, and "that Hamilton should have the use and benefit of the timber thereon, necessary and convenient for the making and establishing said road." Upon the return of this report, a motion was made on behalf of Sawyer that it be set aside. It was contended that the act of Assembly under which the commissioners had laid out the road was unconstitutional; that it provided for the establishment of a turnpike road for the exclusive benefit of an individual, without indemnifying those persons across whose lands the road was to be laid out; that it deprived one citizen of his freehold and vested it in another, at the will of the commissioners. It was further contended that the road was laid out without notice to Sawyer, and on that account the report ought to be set aside. Upon the argument of this case in Camden Superior Court, his Honor, *Judge Taylor,* who presided,

(254) was of opinion that the report ought to be set aside, on the ground that the act of Assembly under which the commissioners had laid out the road was unconstitutional and void. The case was sent to this Court for the opinion of the judges.

BY THE COURT. Let the report of the commissioners be set aside, on the ground that Enoch Sawyer, through whose lands the road is laid off, had not notice.

Cited: Jones v. Comrs., 130 N. C., 462.

THE STATE v. KIRBY.

From Stokes.

1. Profane swearing, independent of the disturbance and injury which it may produce to those who hear it, is not indictable; it is cognizable before a justice of the peace, under the act of 1741, ch. 14; but where it is charged as a nuisance, and there is evidence to support the charge, it is indictable. Therefore,

2. A motion to arrest the judgment upon an indictment which charged "That the defendant swore several oaths in the courtyard during the sitting of the court, to the great disturbance and common nuisance of the citizens necessarily attending said court," was overruled.

IT WAS charged in the indictment that the defendant swore several oaths in the courtyard, during the sitting of the court, to the great disturbance and common nuisance of the citizens necessarily attending said court. The defendant submitted, and a motion was made to arrest the judgment, on the ground that the facts thus charged do not constitute an indictable offense.

LOCKE, J., delivered the opinion of the Court. We are of opinion that, although profane swearing, of itself, and independent of the disturbance and injury which it may produce to those who hear it, may not form the subject of an indictment, but is cognizable before a justice of the peace, under the act of 1741, ch. 14, yet, wherever the bill charges the swearing as a nuisance, and there is evidence to satisfy a jury that it has produced this effect, we can discover no reason why (255) the offense should not be indictable. The defendant, then, having submitted to this charge, is to be viewed in the same light as if satisfactory evidence had been adduced to the jury, and they had found him guilty of the nuisance charged in the bill. Reasons in arrest of judgment overruled.

Cited: S. v. Chrisp, 85 N. C., 529; *S. v. Davis,* 126 N. C., 1062.

DAVIS v. LANCASTER, LATE SHERIFF, ETC.

From Halifax.

A sheriff is not *finable* who returns his execution within the time prescribed by law, but fails to return the money made thereon into court or to pay it to the party or his attorney.

THE sheriff returned upon an execution which came into his hands, that it was *satisfied,* but did not return into court nor pay to the party or his attorney the money due thereon. Whereupon the sheriff was *fined nisi.* A *scire facias* issued, which being made known and returned, it was moved that judgment be entered against the sheriff according to *scire facias.* This was objected to, because the law had made no provision for *fining* the sheriff who did not pay the money into court, or to the party or his attorney. The case was referred to this Court, to determine whether, if the sheriff return his execution within the time prescribed by law, but does not return the money into court or pay it to the party or his attorney, he is finable.

HALL, J., delivered the opinion of the Court. The act of 1777, ch. 8, sec. 5, under which the defendant has been fined *nisi,* directs "that every sheriff, by himself or his lawful officer or deputy, shall execute all writs and other process to (256) him legally issued, etc., and make *due return* thereof, under the penalty of forfeiting £50, etc., where such process shall be delivered to him twenty days before the sitting of the court, to be paid to the party grieved, etc." This act, being penal in its operation, is to be construed strictly. Of what is the sheriff directed to make due return? "Of all writs and other process." If he fail to do this, he incurs the penalty. To say that a due return of the process means a transfer of the money into the proper office, as well as a return of the authority under which it was made, would be to give to the act a more liberal construction than we are authorized to give. This opinion is confirmed by the provisions contained in section 10 of the same act, which give a summary remedy against sheriffs who fail to pay into court money which they have made upon executions, where their receipt of the money is evidenced by their returns upon the executions.

It is said, however, that it is of little moment to the plaintiff what the return upon his execution may be, if the money is withheld from him. It is surely some consequence to him to know how his rights stand: whether the money be in the hands

of the sheriff, against whom he may proceed to enforce payment, or still be in the hands of the defendant, against whom he may renew his execution. If, according to our construction of the act, there be a mischief unremedied, it is the business of the Legislature to provide a remedy: our province is to declare the law, not to give it. Our opinion, therefore, is that the *scire facias* has improperly issued, and ought to be set aside.

Cited: Cockerham v. Baker, 52 N. C., 289; *Wyche v. Newsom,* 87 N. C., 144.

(527)

THE STATE v. JONES.

From Franklin.

The statute does not entitle the State to an appeal in a criminal prosecution upon a verdict of acquittal.

THE defendant was indicted in the County Court of FRANKLIN, and acquitted. The solicitor for the State appealed to the Superior Court, and the transcript of the record being filed with the clerk of the Superior Court, it was moved on behalf of the defendant that the appeal be dismissed, on the ground that the State is not entitled to an appeal. The case was sent to this Court for the opinion of the judges.

BY THE COURT. The State, in a criminal prosecution, is not entitled to an appeal under any of the provisions of the act of Assembly regulating appeals; this appeal, therefore, must be dismissed.

Cited: S. v. Phillips, 66 N. C., 646; *S. v. Powell,* 86 N. C., 643; *S. v. Ostwalt,* 118 N. C., 1214; *S. v. Savery,* 126 N. C., 1087, 1091.

(258)

DEN ON DEMISE OF JIGGITTS ET AL. v. MANEY.

From Hertford.

1. As the statutes of devises, 32 and 34 Henry VIII., declare that "a man *having* lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to *all the lands he might have at his death*; for at the time of the devise he *had* not the lands.

2. Yet, if testator had no estate in the lands at the time of the devise, and he devises them for the payment of debts, and afterwards acquires them, a court of chancery will decree a sale of them.

3. Lands acquired subsequent to a devise pass by a new publication of the will.

4. At what time a will shall be considered *as published*, under the act of October, 1784, ch. 10, sec. 5. Under this act there are two classes of cases: (1) Where a will is found among the valuable papers or effects of the deceased; (2) where it has been lodged in the hands of any person for safe-keeping. In each case it is necessary, to support a devise of lands, that the will be in the handwriting of the deceased, and that his name be subscribed thereto, or inserted in some part thereof. The act makes the circumstances of the will being in the handwriting of the deceased, with his name subscribed thereto or inserted in some part thereof, and its being found among his valuable papers, or lodged in the hands of some person for safe-keeping, as equivalent to a publication before witnesses. And the publication shall be referred to *the date* of the will, not to the time of its being found among the valuable papers or effects of the deceased, or of its being lodged in the hands of a person for safe-keeping.

THIS was an action of ejectment for lands in HERTFORD County; and upon the trial the jury found a special verdict, stating that Lewis Meredith, on 4 May, 1798, made a will, and thereby devised his estate, both real and personal, to those under whom the defendant claims; that after the date of said will he purchased the lands in question, and died in October, 1803, seized thereof; that the said will was admitted to probate in Hertford County Court, it being proved by at least three credible witnesses that the same and every part thereof was in the handwriting of Meredith, with his name subscribed thereto in his own handwriting, and that it was found after his (259) death among his valuable papers. The lessors of the plaintiff were the heirs at law of Meredith, and the question arising upon the special verdict was whether the lands purchased *after* the date of the will passed by the will. The question being sent to this Court, was argued by

Cherry for plaintiff
Browne for defendant.

(263) The following opinion was forwarded by TAYLOR, J., and concurred in by the Court:

All the circumstances required by the act of October, 1784, ch. 10, to constitute a valid devise of lands are stated in this case to have attended the execution and probate of Meredith's will. 1. It was in the testator's handwriting, and his name subscribed thereto. 2. It was found after his death among his

valuable papers. 3. It was proved by three credible witnesses. Of the sufficiency of the will no doubt can be raised. The remaining question is, What passed under the will? If the lands sued for passed by the will, the judgment of the (264) Court must be for the defendant; if not, the lessors of the plaintiff, who are the heirs at law, are entitled to recover.

The difference in the rule of law between real and personal property acquired after making the will may probably have been derived from the policy of feuds, according to which no heir was appointed to whom chattels should descend. Upon the death of the owner, they belonged to the ordinary. To appoint an executor, therefore, was to appoint an heir, upon whom the testator's chattels should descend at his death, and who stood exactly in the situation of the testator, and acquired a right to all, as well those which were acquired after making the will as those which were possessed before it. But as to freehold property, the law was different: an heir was already appointed, the course of succession traced out, and immediately upon the acquisition of a feud by the ancestor, an imperfect right belonged to the heir in his own right. Thus it became necessary to insert the word "heirs" in the deed, whenever an inheritance was conveyed. It then vested in the purchaser and his heirs, and could not be disposed of but by some act subsequent to the acquisition of it. For if an estate could be passed by any act prior to the acquisition of it, two incompatible titles would meet together: the title of the heir created by law, the title of the assignee created by the seller. But that of the heir being the most favored title, must prevail. The effect of a disposition of real estate, to take effect after the death of the donor, is to deprive the heir of the succession established by law in his favor; the consequence of disposing of the personal estate is to appoint an heir. The first must therefore operate as a present conveyance by the ancestor, to take place in future against the title of the heir; the latter is to appoint an heir to all the personal property of which the ancestor dies possessed. The will as to personals does not speak until after the testator's death, but as to real property, it refers to the date; be- (265) cause it is considered in the nature of a conveyance by way of appointment. Hence, a man cannot devise lands which he has not at the date of the conveyance. Whatever may have been the origin of this rule, or however artificial the reasoning may seem upon which it is supported, it is too firmly fixed and interwoven in our system of laws to be shaken at this day. In confirmation of the numerous cases to be found in the books, some have been decided in this State, and much property is held

and much litigation prevented by a confidence that the law in this respect is certain and established. Indeed, it would be difficult, if not impossible, to find a single case of sufficient authority to countenance the Court to alter the rule of decision, should they even be strongly called upon to do so by circumstances of peculiar hardship. For in *Bunker v. Cook,* 1 Bro. P. Cas., 199, finally decided in the House of Lords, it was held that lands purchased after the making of the will which devised them to the wife, and expressly referring to all the testator might have a right to at the time of his decease, although purchased with money received by the testator in right of his wife, would not pass by the will. In that case the law was deemed imperative, although the judges when they delivered their judgment declared their belief that the testator intended the lands in question should go to his wife.

Exceptions have been established in particular cases where the testator has an equitable estate in lands and devises them for the payment of debts; and, indeed, there are authorities that go so far as to hold that if lands are devised for the payment of debts, although the testator had no estate whatever at the time of the devise, a court of chancery will decree the sale of them. But it is not necessary to consider the peculiar grounds of these exceptions, since the present case does not fall (266) within any of them. Judgment for the plaintiffs.

Cited: Battle v. Speight, 31 N. C., 290.

LASH ET AL. v. GIBSON.

From Stokes.

A and B, having obtained judgments before a justice of the peace, sued out executions, which were levied upon the lands of the defendant; and the executions so levied were returned into the County Court for orders of sale. The executions were levied on different days, but the orders of sale were made at the same term of the court, and writs of *venditioni exponas* were issued thereon. At the same term, C obtained a judgment in court against the defendant, and sued out a *fieri facias,* which was levied upon the same lands; and the sheriff sold the lands under all these executions, and paid the money into court; and it being insufficient to discharge all the executions, application was made to the court for an order of distribution. The execution from the justice which was *first levied* is to be first satisfied, and the money is to be distributed according to the priority of the levy of the executions.

LASH *v.* GIBSON.

LASH and others recovered judgments against John Moore, before a justice of the peace, and sued out their executions, which were levied on a tract of land belonging to Moore, no personal property being found. The executions so levied were returned to December Term, 1807, of Stokes County Court. The levies were made at different times, one on 30 November, another on 2 December, 1807, etc.

Gibson sued out a writ against Moore, on 29 August, 1807, returnable to September term following, when judgment by default was taken, and at December term following final judgment was obtained; and at the same term orders of sale were granted upon each of the aforesaid levies.

Writs of *venditioni exponas* were issued upon each of the orders of sale, commanding the sheriff of Stokes to expose to sale the land levied upon by the executions aforesaid, issued by a justice of the peace. A writ of *fieri facias* (267) was issued upon Gibson's judgment, which was levied by the sheriff upon the land aforesaid before the writs of *venditioni exponas* came to his hands. The sale of the land was advertised and made, both under the writ of *fieri facias* and the writs of *venditioni exponas*. The money arising from the sale was paid into the office, and it being insufficient to discharge all the executions, a question arose among the creditors how the money was to be distributed. Whether each was to receive a ratable proportion, or whether the executions were to be satisfied according to the priority of levy. And, lastly, whether Gibson, being a judgment creditor in court, and having obtained judgment by default at September term, was not entitled to a preference.

LOWRIE, J., delivered the opinion of the Court. We are not surprised that a case should arise circumstanced like the present; but it is not difficult to discover the principles by which it ought to be governed. In every country enjoying a jurisprudence like ours, collisions of interest like the present will often happen. It is an invariable rule, founded upon the principles of morality, that every man ought to enjoy all the fruits of an honest and laudable vigilance; upon this principle the maxim is bottomed, that the law favors the vigilant and not the supine. We are therefore of opinion that the money collected by the sheriff on the executions returned in this case ought to be distributed according to the priority of the levy of the executions. And even admitting that the judgment of Gibson in the County Court, which is a court of record, bound the land, the orders of sale are equally judgments of the same court; and although

Gibson may have obtained his judgment earlier in the term than the orders of sale were granted, this will not vary the case, for the whole term is but one day in contemplation of law.

Each execution has a lien upon the land from the time
(268) of the levy, and the orders of sale had relation back to the times the levies were actually made; for the sheriff was not bound, in order to make a sale, to *levy* the writs of *venditioni exponas*. By these writs he was to expose to sale the land already levied on, and thus complete the act commenced by the levy. The judgment of the Court, therefore, is that the executions first levied be first satisfied.

DEN ON DEMISE OF CLEVELAND v. GRIME.

From Ashe.

Motion to file a new declaration in ejectment, the original being lost out of the office, and defendant served with notice to produce a copy, disallowed.

A MOTION was made on behalf of plaintiff for leave to file a new declaration according to the courses of his deed, it appearing that the declaration which had been originally filed was lost out of the office, and that a notice had been served on the defendant to produce the copy of the declaration, which had been delivered to him at the commencement of the suit, and it was referred to this Court to decide whether the motion should be allowed.

BY THE COURT. Let the motion be disallowed.

---

(269)

THE STATE v. HERNDON AND BLEDSOE.

From Wake.

A witness for the State who is called out upon his recognizance, and has judgment *nisi* for the forfeiture entered against him, may apply to the court for a remission of the forfeiture before a *scire facias* issues against him.

STATE *v.* GROFF.

The defendants were bound in recognizance to give evidence in behalf of the State against George Evans, upon an indictment in Wake County Court, and, being called, failed to appear, whereby they incurred the forfeiture of £20 each, and judgment *nisi* was entered against them. During the same term at which they were so called out they came before the court personally, and made application for a remission of said forfeiture. This application was opposed, on the ground that there was no process before the court authorizing them to take cognizance of this application, and that before the court would hear the excuse of defendants for their failure to attend, they must be brought in to answer upon a *scire facias*. The case was referred to this Court.

BY THE COURT. We think it is discretionary with the court to hear the excuse of the witness at the first term, and that it is proper to do so, unless it be shown that the State would receive some injury thereby; and, in that case, the excuse ought not to be heard until the succeeding term.

(270)

THE STATE v. GROFF.

From Anson.

An accessory is not liable to be tried as for a misdemeanor, where the principal is amenable to justice. The act of 1797, ch. 19, does not infringe this rule. That act only extends to cases "where the principal escapes and eludes the process of law."

THE defendant was indicted for receiving stolen goods, knowing them to be stolen. The principal, a negro slave, had not been indicted; he resided in the county of Anson, and was amenable to the law. It was urged that the defendant, being an accessory, could not be tried until the principal was tried and convicted. The case being sent to this Court, was argued by

A. Henderson for defendant. (271)

BY THE COURT. We are clearly of opinion that as the principal lives in the county of Anson, and is amenable to the law, he ought to be convicted before the accessory is put upon his trial.

Cited: S. v. Ives, 35 N. C., 339; *S. v. Tyler,* 85 N. C., 572.

(272)

DEN ON DEMISE OF BICKERSTAFF v. DELLINGER.

From Lincoln.

The plaintiff in error, upon a reversal of the judgment, is not entitled to restitution for lands sold under an execution issued upon the judgment, but to the money arising from the sale.

THIS was an action of ejectment for lands in Lincoln, of which Bickerstaff, the lessor of the plaintiff, was seized on 17 February, 1787, when Henry Dellinger having obtained a judgment against Bickerstaff, in Lincoln County Court, and sued out his execution, the lands were levied on and sold by the sheriff, and said Dellinger, the plaintiff in execution, became the purchaser; whereupon the sheriff executed to him a deed for the lands, bearing date the said 17 February, 1787. Henry Dellinger conveyed the lands to Jacob Dellinger, the defendant, in March, 1796.

In September, 1798, Bickerstaff brought a writ of error to reverse the judgment which Henry Dellinger had recovered, and upon which the lands had been sold. At September Term, 1801, of Morgan Superior Court, the judgment was reversed, and the plaintiff in error was ordered to be restored to all things by him lost by means of that judgment. This ejectment was brought in 1807, and the case was sent to this Court upon the question, "Whether the reversal of the judgment divested the title which the sheriff's deed had conveyed, and entitled Bickerstaff to be restored to the lands."

The following opinion, forwarded by TAYLOR, J., was concurred in by the Court:

This ejectment is instituted upon the ground that the lessor of the plaintiff is entitled to a restitution of the land upon a reversal of the judgment under the authority of which it was sold, because Henry Dellinger, the plaintiff in the original action, and the defendant in error, became the purchaser. It (273) must be conceded that the general rule of law is that upon the reversal of a judgment the plaintiff in error is entitled only to the money raised by the sale. If it were otherwise, few persons would be willing to take upon themselves the risk of buying property at a sheriff's sale, of which they might afterwards be deprived in consequence of some error in the judgment, to the examination of which they would not be parties and on which they could claim no right of being heard. If a different rule apply to the case where the plaintiff himself becomes the purchaser, it must be supported by some authority,

and we cannot perceive, in any of the cases relating to this point, that conclusive force which ought to establish so important an exception to a fixed principle of law. In this State lands are liable to be sold upon the *fieri facias* in like manner with chattels. As the plaintiff in the original judgment might, under a *fieri facias,* become the purchaser of goods, he may now become the purchaser of lands, and if the plaintiff in error is entitled to a restitution of lands upon the reversal of the judgment, because the defendant became the purchaser, he must be equally entitled to the restitution of goods for the same reason. It is also a necessary consequence of this doctrine that the plaintiff in the original action, purchasing the goods, cannot sell them so as to convey a valid title against a subsequent reversal of the judgment, but they must still remain liable to the right of restitution, by reason of the original vice impressed upon them in being bought by a person who had a legal right to purchase, and from a person commanded by law to sell and having a right to sell to the plaintiff.

If such were the law in England, it is probable some cases might be found where suits have been instituted against subsequent purchasers of chattel property, or even against the plaintiff in the original judgment, in behalf of the plaintiff in error claiming restitution after a reversal. No such (274) cases are recollected. As to the point of restitution, the first case that occurs, and I believe strongest in favor of the plaintiff, is to be found in Cro. Jac., 246. It was there held that the sale and delivery of a lease to the party himself upon an *elegit* was void, and that upon a reversal the plaintiff in error was entitled to restitution. The Court took this strong difference between an *elegit* and a *fieri facias,* that in the former the sale and delivery is not in pursuance of the writ, but the writ of *fieri facias* gives the authority to the sheriff to sell. They do not go so far as to say that a sale by *fieri facias* to the party himself shall deprive the plaintiff in error of restitution, nor do they intimate that he is entitled to restitution because the sale was made to his adversary, but because he does not come *duly thereto by act of law.* Here the lease was delivered to the party that recovered, by way of extent, without any sale, and therefore the owner shall be restored; so, if upon an *elegit* personal goods are delivered to the party by a reasonable price and extent, upon the reversal of the judgment he shall be restored to the goods themselves.

This case appears to have been decided upon reasons exclusively applicable to the writ of *elegit,* between which and the *fieri facias* there is a difference so manifest as to require a

different construction of the law regarding restitution. For, (1) By an *elegit* the defendant's goods and chattels are not sold, but only appraised; whereas, by a *fieri facias* they are sold without any previous appraisement by a jury. (2) By an *elegit* they are delivered to the plaintiff at a reasonable price and extent; whereas, in a *fieri facias* they cannot be delivered to the plaintiff in satisfaction of his debt, but must be sold. (3) By the first, a moiety of the defendant's lands are delivered to the plaintiff till his debt be levied out of the rents and profits; but by the latter they are absolutely sold to the best bidder, whether he be the plaintiff or a stranger. The well-known effect of a seizure of property under a *fieri facias* is to divest the (275) title by the authority of law; but under the *elegit* nothing is finally settled until the inquisition is returned and filed, before which the court may examine it, and upon the detection of irregularity, may award a new writ.

When a judgment is reversed, the defendant is to be restored to what he lost by the writ as it was awarded. In a *fieri facias* he loses the money, because the sheriff is commanded to make the money out of the defendant's goods and chattels, lands and tenements; and to that, therefore, he is properly restored. But in an *elegit* the goods themselves are delivered over to the plaintiff, and upon a reversal the defendant must be restored to them. We are therefore of opinion that the plaintiff in error is not entitled to restitution, even against the plaintiff in the original judgment, where the sale has taken place under a *fieri facias* and without fraud.

WARDEN & SONS v. NIELSON.

From Burke.

In a suit upon a penal bond the plaintiff is not entitled to recover beyond the penalty.

THIS was an action of debt, brought upon a penal bond given by the defendant to the plaintiffs, merchants in Philadelphia, on 6 November, 1774, payable 1 February, 1775. The defendant removed from Pennsylvania, and settled in this State. On 15 May, 1794, the defendant wrote to the plaintiffs, acknowledging the debt, and praying further time for payment. On 26 December, 1805, he wrote to the same effect, and on 4 November, 1806, he wrote to the agent of the plaintiffs, expressing

a hope that they would take the amount of the penalty of the bond, divided into three annual payments. De- (276) fendant failing to make payment, this suit was commenced on the bond, the condition of which was in the following words:

"The condition of the above obligation is such that if the above bounden William Nielson shall well and truly pay to the said Jeremiah Warden & Sons the just sum of $782.21, with lawful interest until paid, then the above obligation to be void; otherwise, to remain in full force and virtue."

The jury, under the direction of the court, gave a verdict for the penalty of the bond, to wit, $1,564.42, and $750.95 for interest, by way of damages, subject to the opinion of the court whether the plaintiffs were entitled to recover beyond the penalty of the bond.

WRIGHT, J. Whether, in an action of debt on a penal bond, the plaintiff can recover a greater sum than the penalty seems to have been a question for a long time unsettled in the English courts; but from an examination of the cases (277) cited upon the argument of this case it will appear always to have been the better opinion that no such recovery could be had, at least, in a court of law, until the decision reported in 2 Term, 388, made by *Justice Buller,* in conformity with the opinion expressed in his Law of Nisi Prius, 178. This decision, however, was afterwards overruled by *Lord Kenyon,* 6 Term, 303. And in *McClure v. Knight,* 1 East, 426, the law seems to have been considered by the counsel and the Court as settled, for the only question made in the argument was whether, on a judgment rendered in Ireland on a penal bond, the plaintiff in a suit brought in England on such judgment was entitled to recover beyond the penalty, which was properly decided in the affirmative, on the ground that the nature of the demand was altered by the judgment, and that it was competent for the jury to allow interest on what was there ascertained to be due. The other cases cited by the plaintiff are *Bunbury,* 23, and 2 *Dallas,* 252.

The first is a chancery decision, and is reported by the reporter in a line and a half, in which he states "that interest was decreed to be paid on a bond, although it exceeded the penalty." But none of the cases to which he refers support the principle of the decree, and some of them are entirely opposed to it. The first from Hardress, 136, was a bill to be relieved against an extent on a judgment in debt for a penalty of £1,500,

after satisfaction of the penalty by perception of the profits according to actual receipts, but not according to the extended value. The court would not give the complainant relief without paying costs and damages, for it appeared there had been a default in him in not permitting the defendant quietly to receive the profits upon a former extent, whereby he was put to great charges, and the court declared the plaintiff should either have all law or all equity. 1 Ch. Ca., 271, was
(278) the case of a jointress who had paid a mortgage, and she was permitted to hold over until repaid with interest. The other cases, 2 Ch. Ca., 226, and 2 Ver., 509, are in direct opposition to the principle which they were cited by *Bunbury* to support; to which may be added the cases reported in 1 Atk., 75; 3 Bro., 489, 496; 1 Ver., 349, referred to by defendant's counsel. The other case cited by the plaintiff's counsel from 2 Dallas, 252, would at first view seem to conflict with the English decision; but it is believed a distinction may be drawn between that case and those decisions. That was a suit on a penal bond conditioned for the performance of a collateral act, on a stated day, to wit, the procuring of a patent within six months for a tract of land which the defendant had sold to the plaintiff. The judges, in delivering their opinion, considered the penalty as a debt due to the plaintiff on the day when the collateral act was to have been performed, and that upon that ground he was entitled to retain a verdict for interest beyond the penalty which the jury gave for the detention of the debt. From a review, therefore, of the cases on the subject, it may be considered as a settled point, that, except in some particular cases, where a collateral act is to discharge a penalty which is inserted in a bond as a debt which is to become due on the failure of performing that act on the day stipulated, or in cases in equity framed upon some specific ground of relief, the penalty of the bond is all that can be recovered, either at law or in equity. As to the question made by the plaintiff's counsel, whether there is any difference between common conditions to penal bonds and the one sued on, which binds the obligor to the amount of the condition with interest till paid, this is nothing more than a condition in law, which would arise without its being stated in the bond, and was inserted either from an ignorance of the law or from an excess of caution; but it cannot be considered as intended to increase the obligation of the
(279) defendant. It is therefore the opinion of the Court that the plaintiff should enter a *remittitur* for the amount assessed for interest by way of damages.

RAYNOR v. DOWDY AND BENTHALL.

From Bertie.

The County Court may grant to a man the privilege of erecting and keeping a ferry, although he does not own the lands on either side of the river or creek over which the ferry is established.

THE County Court of Hertford granted to Raynor, the plaintiff, the privilege of erecting and keeping a ferry on Wicacon Creek. The defendants brought an ejectment against Raynor for the land whereon the ferry was erected, recovered a judgment, and the Sheriff of Hertford County put Benthall in the possession of the land, but refused to put him in possession of the ferry. Benthall demanded possession of the ferry, which being refused, he armed himself with pistols and took possession of the ferry. At the time the County Court of Hertford granted to Raynor the privilege of erecting and keeping this ferry, he did not own the land on either side of the creek. The jury found a verdict for the plaintiff, and assessed damages for the trespass, subject to the opinion of the court upon this question, "Whether the County Court of Hertford had a right to grant to Raynor the privilege of erecting and keeping this ferry, when he did not own the lands on either side of the creek." The case being sent to this Court, was argued by

Cherry for plaintiff. (280)

BY THE COURT. We are of opinion that the County Court of Hertford had a right to grant to the plaintiff the privilege of erecting and keeping a ferry, although he did not own the land on either side of the creek. Let judgment be entered for the plaintiff.

Cited: Pipkin v. Wynn, 13 N. C., 402.

(281)

JONES v. SYKES.

From Cabarrus.

Appellant bound to give two securities, and one only being given, appeal dismissed.

THE plaintiff prayed an appeal from the judgment of the County Court of Cabarrus, and executed an appeal bond with one security only. At October Term, 1808, the Cabarrus Superior Court, defendant's counsel moved to dismiss the appeal, on the ground that the act of Assembly regulating appeals required the appellant to enter into bond with two securities; and the case was sent to this Court upon the motion to dismiss the appeal.

BY THE COURT. The motion must be allowed. Entering into bond with two securities is a condition to be performed before the party dissatisfied with the judgment of the County Court can obtain an appeal. Let the appeal be dismissed.

STATE v. SUTTON ET AL.

From Bertie.

The caption of an indictment must describe the court before which it is found, that it may appear the court can exercise jurisdiction over the offense charged.

THE defendants being convicted upon an indictment for a riot, their counsel moved in arrest of judgment "that in the caption of the indictment upon which the defendants had been found guilty there was no description of the court before which the indictment was found." The caption of the indictment was in the following words and figures:

(282) STATE OF NORTH CAROLINA, Bertie County. } *April Term, 1803.*

Cherry for defendants cited 2 Hawk., 359, sec. 119, to prove that the caption of an indictment must show that the court had or could exercise jurisdiction over the offense indicted. He said there was no such term of the Superior or County Courts

of Bertie as *April term,* known, distinguished or described by any public law; for if so, the court would be bound officially to take notice of it. April term was a judicial term unknown to the laws of North Carolina, so far as it affected the county of Bertie; the session of Bertie County Court was not holden in that month; and as to the Superior Courts of the State, their terms were fixed by the act of 1806, commencing on the first Mondays of March and September, and ending as the circuits progressed, on the sixth Mondays after the fourth Mondays of the said month.

BY THE COURT. The caption of the indictment ought to describe the court before which it is found, that it may appear the court can exercise jurisdiction over the offense charged. It is not stated in the caption to this indictment whether it was found in the County or Superior Court. And although it may be true that the term of the Superior Court happened in April, yet "April term" is not distinguished as a judicial term of that court in any act of Assembly. Judgment arrested.

Overruled: S. v. Brickell, 8 N. C., 354.

(283)

GARDNER v. CLARK.

From Chowan.

Debt lies by the payee against the maker of a promissory note expressed to be given for "value received."

THIS was an action of debt, brought upon a promissory note in the words and figures following, to wit:

Five days after date I promise to pay to Henry Gardner, or order, $107.75, value received. Edenton, 31 July, 1805.

WM. CLARK.

The case was referred to this Court, upon the question, "Whether an action of debt can be maintained on this note."

LOWRIE, J. Debt is an action founded on an express contract for a sum certain. A writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold, or by contract, or upon a loan made by the creditor to the debtor. Fitz. N. B., 273. If a tailor agree

to have a certain price for making a suit of clothes, debt will lie. Woods Inst., 544. A man owes another a sum of money, who hath his note under hand without seal; debt will lie. This position is laid down by Morgan and Ruffhead in their Law Dictionary, title, Debt. Debt lies on a promise to a physician, surgeon, etc., if he make a cure. 3 Com. Dig., 365. These authorities prove that debt will lie on a simple contract. It has been said and so adjudged that before the statute of 3 and 4 Anne, no action would lie upon a note, as a note. Salk., 129. And that *indebitatus assumpsit* would not lie on a bill of exchange. Stra., 680. The same doctrine was held in *Hodges v. Stuart,* 1 Salk., 125. And it was there said by *Holt, Chief Justice,* that *indebitatus assumpsit* would not lie on a bill of exchange for want of a consideration; for it is but evi-
(284) dence of a promise to pay, which, taken alone, is a *nudum pactum,* and therefore the party must either bring a special action on the custom of merchants, or else a general *indebitatus assumpsit* against the drawer for money received to his use.

But *Lord Mansfield* declared that all the cases upon this subject decided in King William's time went upon mistaken principles; and the truth of this observation will be admitted, if we take the trouble of examining the course of decisions upon the subject. In 1783, upon a writ of error from Ireland, in the case of *Otway v. Ramsay,* Strange, 1090, after two solemn arguments, and a third one ordered, the Court strongly inclined to the opinion that debt would not lie in Ireland or a judgment in the King's Bench in England. The plaintiff, however, declined a third argument, and the judgment was affirmed, without the opinion of the Court being given. But forty years afterwards, in *Walker v. Witter,* Doug., 1, 2, it was adjudged that debt would lie on a foreign judgment. In the case of *Hodges v. Stuart,* Salk., 125, in the time of William III., it was held that bills and notes, payable to bearer, or to A. B. and bearer, were not negotiable or assignable, so as to enable the indorsee to maintain an action against the drawer; but in the time of Geo. III., in the case of *Grant v. Vaughan, Lord Mansfield* said: "There has since been no doubt but that actions may be brought by the bearer of such promissory note against the drawer." Lovelace on Bills, 108.

There is an anonymous case reported by Hardress, 485, that seems to unfold the principles upon which this case must be decided. The effect of that case is very accurately expressed in Com. Dig., Debt B. *Lord Chief Baron Comyn,* after saying that debt lies on every express contract to pay a sum certain

(A. 8), and also lies though there be only an implied contract (A. 9), thus states the principle of these cases: "So debt lies not upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but (285) does not raise a duty," and cites Hardress, 485. The case in Hardress was debt against the acceptor of a bill of exchange, and the Court there said: "The acceptance does not create a duty, no more than a promise made by a stranger to pay the debt of another if the creditor will forbear his debt." In *Hard's case,* 1 Salk., 23, it is also said that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange, for his acceptance is but a collateral engagement; but that it will lie against the drawer, for he is really a debtor by the receipt of the money. So, in *Hodges v. Stuart,* before quoted for another purpose, the Court said that debt would lie against the drawer of a bill of exchange for *value received,* and the reason given is, "that it is for the apparent consideration." As debt will lie where *indebitatus assumpsit* will, and as the statute of Anne puts notes on the same footing with bills of exchange, it would seem clearly to follow that an action of debt may be maintained by the payee of a promissory note against the drawer.

HALL, J. *Bishop v. Young,* 2 Bos. and Pul., 78, seems to decide the present case. The question there was, "Whether debt would lie by the payee against the maker of a promissory note, expressed to be for value received." It was decided in the affirmative; and for the reason there given, I think the present action can be supported, and that judgment should be entered for the plaintiff.

TAYLOR, J. In Hardress, 485, it was held that an action of debt will not lie against the acceptor of a bill of exchange; but the reasons given for that determination tend strongly to demonstrate that an action of debt will lie by the payee against the maker of a promissory note. It was said in that case that the acceptance does not create a duty any more (286) than a promise made by a stranger to pay the debt of a third person, if the creditor will forbear his debt; and he that drew the bill continues debtor, notwithstanding the acceptance makes acceptor liable to pay it. But the making of a promissory note does manifestly create a duty, if a consideration be expressed, and raises an original obligation in the maker, for which an action of debt is a proper remedy, according to the general description of that action to be found in all the elementary writers. 3 Bl. Com., 155, says an action of debt

will lie whenever a sum of money is due by certain and express agreement, where the quantity is fixed and certain and does not depend on any subsequent valuation to settle. Comyn says debt lies upon every express contract to pay a sum of money. Dig., tit. Debt. And in 3 Woodeson, 95, it is laid down that the action of debt may be brought whenever a determinate sum is claimed as due, whether the contract on which it arises is special or simple.

The action of debt on simple contract has grown much into disuse, in consequence of the defendant being permitted to wage his law, and of the necessity imposed upon the plaintiff of proving his whole debt or being precluded from recovering any part. This latter rule has been much relaxed in modern times, as appears from 2 Bl., 1221; Doug., 6; 2 Term, 129; 1 H. Bl., 149; and it is not now understood to be necessary that the plaintiff should recover the exact sum demanded. From this disuse of the action, a belief seems to have prevailed that it could not be sustained; and *assumpsit* has been the usual remedy on promissory notes. But no decision is recollected to have been made in this State against the action of debt in such cases, and there is a great modern authority in favor of it in precisely such a case as that before the Court. 2 H. Bl., 78. Judgment for the plaintiff.

---

(287)

STATE v. WHITSENHUNT.

From Lincoln.

Solicitor for the State entitled to a fee in case of a *scire facias* against a delinquent juror, in all cases where costs are given against such juror.

THE question in this case was whether the solicitor for the State was entitled to a fee in the case of a *scire facias* against a delinquent juror.

BY THE COURT. The solicitor for the State is entitled to a fee on a *scire facias* against a delinquent juror, in all cases where costs are given against such juror. Where the juror is discharged without costs, the solicitor is not entitled to a fee.

Cited: S. v. King, 143 N. C., 682.

HOWE v. O'MALLY.

From Chowan.

A conveyed to B a tract of land, containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the defendant should pay the plaintiff $10 per acre for the excess; if it fell short, plaintiff to refund to defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other.

The plaintiff, by a deed of bargain and sale, conveyed to the defendant, in 1790, 145 acres of land, part of a tract of 366 acres purchased from Clement Hall. In 1792 the plaintiff, by another deed, conveyed to the defendant a part of the same tract of land, purporting to contain 221 acres, "be the same more or less." Each tract was described by particular metes and bounds, and both together made up (288) the whole tract purchased from Clement Hall, by the plaintiff, for which the defendant fully paid and satisfied the plaintiff.

Some time afterwards, to wit, in 1806, in a conversation between the parties, it was mutually agreed to have the tract of 221 acres last sold surveyed, and if it were found to contain more than 221 acres (the number of acres called for by the deed) the defendant should pay to the plaintiff $10 per acre for the excess; and if, on the other hand, it should fall short of that number of acres, the plaintiff should refund to the defendant at the same rate per acre. In October, 1806, a survey was accordingly made, and the tract was found to contain 308 acres, including swamp on two of the lines, 87 acres more than the deed called for. This action was brought to recover the sum of $870, with interest, etc.

For the defendant it was contended, first, that unless from the presumption that the agreement proved subsisted between the parties at the time of the execution of the conveyance in 1802, there was no consideration to support it, and that such presumption would be not only violent, but against the solemn deed of the parties. That the evidence was improper and ought not to have been received, inasmuch as it goes to establish a parol agreement in express contradiction of the solemn deed of the parties; for if any meaning is to be given to the words, "be the same more or less," in the deed of 1802, the plaintiff had at that time sold and absolutely conveyed all the lands which he held under his conveyance from Hall, and that therefore there was nothing for the agreement to operate upon.

For the plaintiff it was urged that there was no neces-
(289) sity for resorting to the presumption that the agreement proved subsisted between the parties at the time of the execution of the conveyance in 1802, or go in search of a consideration to support it, inasmuch as the promises were mutual and each a consideration for the other. That the number of acres in the tract was quite uncertain, and, for aught that the plaintiff knew, might have been less than the number expressed in the deed. His promise, therefore, to pay the defendant in that event $10 for every acre so falling short was a good consideration to support the promise of the defendant, to enforce which the action was brought. This agreement is not in contradiction of the deed, but perfectly consistent with it; it was quite a distinct transaction and not intended to control, explain or vary the deed in any respect, but stood entirely on its own bottom.

BY THE COURT. Here are mutual promises; one is made the consideration of the other, and we are of opinion that the plaintiff's promise to refund in the event of a deficiency in the number of acres is a good consideration to support the defendant's promise to pay, should there be more acres than called for by his deed. Judgment for the plaintiff.

(290)

TINDALL'S EXECUTORS v. MOUNGER ET AL.

From Rowan.

A gives his bond to make title to a tract of land to B, and dies intestate, leaving three sons, his heirs at law, one of age, the other two infants. B dies; the administrators of A recover of the executor of B a judgment for the balance of the purchase money for the land. The executors and devisees of B file a bill, praying for a specific execution of the contract, as against A's heirs at law, and an injunction as against A's administrators, on the ground that part of the land was claimed by an elder title. The heirs, in their answer, declare their readiness to make title, and the administrators admit assets. Injunction dissolved, upon defendants giving security to make title agreeably to the prayer of the bill; and costs ordered to be paid by A's administrators, out of the assets of their intestate.

HENRY MOUNGER, by his bond dated 1 January, 1784, bound himself, his heirs, executors and administrators, in a penalty,

conditioned to make to James Tindall, his heirs and assigns, a good and clear right and title in fee simple to three tracts of land as soon as rights could be obtained. The land had been entered by Mounger, and the grants afterwards issued and came to the hands of Tindall. In February, 1795, Mounger died intestate, leaving three sons, Edwin of full age, Thomas and Henry infants. Thomas afterwards arrived to full age. In May, 1795, Tindall died. Afterwards the administrators of Mounger recovered a judgment upon a bond given by Tindall for the balance of the purchase money of the land; and thereupon, in February, 1797, a bill was filed by the executors and devisees of Tindall, against Mounger's heirs aforesaid, and also against David Cowan, a person who claimed two of the tracts sold as above, by an elder title, to carry into specific execution the contract of sale appearing in the bond aforesaid; and for an injunction against the judgment at law, on account of a claim of Cowan. The defendants put in their answers, and admitted the bond for title, and Thomas and Edwin, who were now of age, said they were ready to make titles; the infant Henry submitted to act as the court should direct. (291) The administrators admitted the estate of their intestate, Henry Mounger, deceased, was solvent. On these answers, the court, at September Term, 1799, ordered the injunction to be dissolved, on bond and security to amount of the judgment being given to make title agreeably to the prayer of the bill. The case coming on to be heard on the bill and answers, it was referred to this Court to decide which of the parties to this suit should pay the costs.

BY THE COURT. We are of opinion that the costs should be paid by Mounger's administrators, out of the assets of their intestate.

SEARS ET AL. v. WEST.

From Craven.

A billiard table erected and used merely for the purpose of amusement is liable to the tax imposed on "billiard tables," in the same way as if used for the purpose of gaming.

THIS was an action of trespass, to recover damages from the defendant for having taken out of the possession of the plaintiffs a billiard table. The plaintiffs were the owners of the

table, which previous to 1 April, 1807, they caused to be erected in the town of New Bern at their own expense; not for any purpose of emolument, or to be employed as a gaming table, but for their private and individual amusement. They had constantly kept up the table since its erection for the purpose which originally induced them to have it built. The defendant, being Sheriff of Craven County, levied on the table for the tax which he conceived was due therefor to the State for the year
(292) 1807. If the tax be due thereon, and the levy therefore legal, it was agreed that judgment should be entered for the defendant; if otherwise, for the plaintiffs, and damages to be assessed to sixpence.

Gaston for plaintiffs.

BY THE COURT. The object of the act of 1798, ch. 19, was to suppress excessive gaming, and also to remove the temptations to "idleness and dissipation," as these contributed to the main vice. The act therefore forbids the use of "gaming tables," generally, with a proviso that it should not extend to billiard tables until 1 April, ensuing. The act of 1804, ch. 31, tolerates the use of billiard tables, but imposes a tax upon that
(293) use. By that act every man who *"erects and keeps"* a billiard table is made liable to the tax. The Legislature seems to have considered the use of the billiard table as conducive to idleness and dissipation, as well as a means by which excessive gaming was promoted. We are therefore of opinion that judgment should be entered for the defendant.

JOHNSTON, ASSIGNEE, ETC., v. KNIGHT.

From Richmond.

A and B gave their joint bond to C, and D became the subscribing witness. C assigned the bond to D, who brought suit on the bond, against A. He pleaded the general issue, and upon the trial the handwriting of D and also of A was proved. It was also proved that on the day on which the bond bore date, A had purchased goods of C to the precise amount of the bond. This is not legal proof of the execution of the bond; and the jury having found a verdict for the plaintiff, the verdict was set aside and a nonsuit entered, upon the ground that the testimony was improperly received, and also upon the ground that the production of the subscribing witness to a bond is never dispensed with,

except from necessity, as where he is dead, has removed, or become interested by operation of law. Here the subscribing witness has become the assignee of the bond, and the plaintiff in the cause.

MOSES KNIGHT and Richard Knight executed their joint bond to John Hardwick, executor of the last will of Richard Edgeworth, deceased, and William Johnston, the plaintiff in this cause, became the subscribing witness to the said bond. Hardwick afterwards assigned the bond to Johnston, and Johnston brought an action of debt against Moses Knight, one of the obligors. The defendant pleaded the general issue. Upon the trial of the cause the handwriting of Johnston, and also of Moses Knight, was proved. It also appeared in evi-
dence, from the account of sales of Richard Edgeworth's (294) estate, returned into the proper office by his executor, John Hardwick, that Moses Knight purchased at the sale of Richard Edgeworth's estate goods to the precise amount of the bond, and that the sale was made on the day on which the bond purported to be executed. The assignment of the bond to Johnston was also proved. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the question, "Whether the execution of the bond was legally proved."

HENDERSON, J., delivered the opinion of the Court. It is one of the primary rules of evidence that the best which the nature of the case admits of, and which is in the party's power or possession, shall be produced. The offer of lesser evidence whilst the greater is in the power or possession of the person offering it affords a presumption that the greater evidence, if produced, would operate against him. The testimony of the subscribing witness to a written contract is the best evidence of its execution, of the terms, conditions and consideration on which it was made. He is selected by the parties to bear evidence of their contract in case a dispute should arise. His production has been dispensed with in cases of necessity only, as where he is dead, removed beyond the process of the court, become infamous, or interested by operation of law. The necessity in the present case arises entirely from the act of the person (or at least with his concurrence) who offers the lesser evidence, which certainly cannot and should not form an exception to the general rule. We are therefore of opinion that the evidence received upon the trial was improperly received, that the execution of the bond was not legally proved, that the verdict should be set aside, and a nonsuit entered.

Cited: Overman v. Coble, 35 N. C., 5.

(295)

PARKER'S EXECUTOR v. PARKER'S ADMINISTRATOR.

From Halifax.

A suit pending in chancery is "by consent of parties" referred to five persons, whose report is to be binding between the parties. The referees make a report, and exceptions are filed to it, charging errors and mistakes in liquidating the accounts. The suit then abates by the death of the complainant. An action on the case was brought to recover the sum reported by the referees to be due. The record of this suit and the proceedings therein are not evidence of the debt. The reference being matter of record, the award is not binding until confirmed by the court.

IN 1799 Airland Parker filed his bill in chancery in Sussex County Court, in Virginia, against Richard Parker, executor of the last will of Frederick Parker, deceased, praying for a discovery and an account, etc. To this bill Richard Parker put in his answer, and at September Term, 1801, the following entry was made in the cause: "By consent of parties, this cause is referred to William Hines, Robert Goodwyn, Benjamin Tate, John Chappell and James C. Baily, or any three, whose report to be binding between the parties." At March Term, 1802, the referees made their report, and therein stated that they found the complainant Airland Parker was indebted to the defendant Richard Parker, executor, etc., in the sum of £135 18s. 9d., Virginia currency, which sum, except £28 thereof, they were of opinion should bear interest from 6 October, 1795, till payment should be made. The cause was continued at complainant's costs, and at June term following, the complainant filed several exceptions to the report of the referees, charging them with errors and mistakes in liquidating and settling the accounts of Richard Parker, executor, as aforesaid. The cause was then continued, and at each successive term was continued without any further proceedings being had therein, until June Term, 1803, when it abated by the death of the complainant.

(296) This was an action on the case brought on the above award. The only evidence offered by the plaintiff was a copy of the record from the Court of Chancery for Sussex County in Virginia, setting forth the proceedings in that court, as above stated. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the question, whether the action would lie upon the award. The case being sent to this Court,

HALL, J., observed that, although he entertained much doubt upon the question, he inclined to the opinion that judgment

should be entered for the plaintiff; that if the reference in this case had been made as references generally are made, to clerks and masters, or if it had been the understanding of the parties, and the practice of the court in which this reference was made, that reports made by referees appointed as in this case should be subject to the exceptions of either party, as reports made by clerks and masters are, it was clear that judgment should be entered for the defendant. We can, however, only judge from the record itself. It is therein stated that, "by consent of parties, the case was referred to William Hines and others, whose report was to be binding between the parties." It seemed very much to resemble common cases of submissions and awards; the defendant was not precluded on the trial from availing himself of any valid objection against the report or award that was in his power to be made, and which it would be proper to make to awards in ordinary cases; but he seemed to have waived this privilege, and to rest his defense on the ground that it was only an interlocutory decree, and not such a submission and award as would support this action. But by

LOCKE, LOWRIE, HENDERSON and WRIGHT, JJ. The order of reference appears to us to have been made by the court; the report or award is therefore no evidence of a debt, or obligatory upon the parties, until confirmed by the court. Judgment for the defendant.

---

(297)

ARRINGTON v. CULPEPPER.

A and B signed a written contract respecting a horse race, agreeably to the act of of 1800, ch. 21. B and C made a by-bet, and reduced it to writing, and therein B agrees, "if A should win the race which he had made with him that day, he agrees to pay C $1,000." A won the race, and the stakeholder was directed by B to deliver his bond for the $1,000 to C, and the bond was delivered. C sued B, and B pleaded that the bond was delivered as an *escrow: Ruled,*

(1) That the written contract of by-bet between B and C, not referring to the written contract between A and B, as to the race, there was not between B and C such a contract in writing as section 2 of the act of 1800, ch. 21, requires.

(2) That parol evidence could not be admitted to prove that the race referred to in the written contract of by-bet was the race mentioned in the written contract between A and B.

(3) That the delivery of the bond to C by the stakeholder, by the direction of B, did not preclude B from claiming the benefit of the act of 1800, and requiring C to prove everything required by that act to make the bond obligatory.

THIS was an action of debt, to recover a by-bet on a horse race. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case: The defendant, Mathew Culpepper, and one Francis Ward, on 30 November, 1805, made a horse race, and on the same day entered into the following articles:

Articles of a race made this 30 November, 1805, between Mathew Culpepper and Francis Ward, as follows, to wit: They are to run at Douther's paths, on the Monday before next Christmas, for $200, for which they have staked their notes. Culpepper is to run a two-year-old filly of his, called Dolly Washington, being a sorrel which he had of Abner Foster. Ward is to run a sorrel colt of his, called Golden Rod, which was got by Don Galo, and raised by Mr. William Avent, of the same age, both being considered two years old last spring. They are to run one-quarter of a mile; to start at the end towards the old house, and to run out towards the road. The lowest nag is to carry 136 pounds; the other is to carry 14 pounds for the first inch, and 7 for every other inch over, or in proper-
(298) tion for parts, etc. They both agree that either two of the judges, on the day of the race, shall measure the ground, and whatever they say is a quarter of a mile shall be binding on both parties. They also both agree that the race shall be what is called "a play or pay" race. In evidence of which agreement they have both set their hands and seals, the date above mentioned.

MATHEW CULPEPPER. (SEAL.)
FRANCIS WARD. (SEAL.)

Witness: ABNER H. HINES.

On the same day the defendant signed and sealed the obligation declared on, which was in the following words and figures, to wit:

If Francis Ward wins the race that he and myself made this day, I promise to pay to Peter Arrington the just sum of $1,000, on or before 25 December next, as witness my hand and seal, this 30 November, 1805.

MATHEW CULPEPPER. (SEAL.)

Teste: ABNER H. HINES.

This obligation was delivered to a third person, as a stakeholder, to be delivered over to the plaintiff in case he won the bet. The race between Ward and defendant was run agreeably to the articles, and Ward declared to be the winner. Afterwards, and on the same day, the stakeholder was directed by the defendant to deliver over the obligation to the plaintiff, saying, "he would have won the race if his rider had rode agreeably to his directions," and the stakeholder delivered the bond accordingly.

It was submitted to the Court, (1) Whether the plaintiff, on the production of the articles aforesaid, and proof of their execution, should not be permitted to read the same in evidence, as proof of the terms of the race bet upon by plaintiff and defendant. (2) Was it essential to the plaintiff's right to recover that he should prove anything relative to the articles, the running and winning of the said race, after the delivery by the stakeholder to the plaintiff, by the direction of the defendant? (3) Whether, if further proof was necessary on the part of the plaintiff, he should be permitted to show by *parol* evidence that the articles before set forth were the articles of (299) the race referred to by the writing obligatory declared on.

The case was sent to this Court for the opinion of the judges.

LOCKE and HENDERSON, JJ., were of opinion that the plaintiff was entitled to judgment. But by

HALL, LOWRIE and WRIGHT, JJ. The act of 1800, ch. 21, declares, in the first section, "that from and after the passing of this act no money shall be recovered at law by means of any bet or wager on a horse race, except a written obligation is produced on the trial, containing the sum so betted or laid on such horse race, signed, sealed and attested by at least one witness." This part of the act has been complied with by the plaintiff, by the production of the written obligation upon the trial, a copy of which makes a part of the present case. The second section declares, "that all horse-racing contracts shall be reduced to writing and signed by the parties thereto at the time they are made; otherwise, they shall be void; and all subcontracts or by-bets on the same shall also be reduced to writing and signed by the parties to such by-bets, or the same shall be void; and on all trials at law, where it may be necessary to give such contracts in evidence, no parol testimony shall be admitted to alter or explain such contracts." The first and third questions may be considered together. There would be no difficulty in the case if the obligation declared on recited the

terms of the race made between the defendant and Ward, or referred with sufficient certainty to the articles entered into by them, in which articles those terms are contained. In that case the articles referred to would become connected with the obligation on which the suit is brought, and would be viewed in the same light as if they had been signed by the plaintiff
(300) and defendant. The contract between the parties, as well as the sum bet, would be evidenced by a writing signed by the parties. But the obligation merely refers to a "race made," without saying whether the terms of such race were reduced to writing, or existed in the memory of witnesses. In the latter case the plaintiff clearly could not recover. But suppose it to be otherwise (as probably the fact was), and the plaintiff should be permitted to give such articles in evidence: the defendant would be permitted to show that he and Ward made another race on the day referred to or mentioned in the obligation declared on; it would then be a matter of controversy between the parties, to which race the obligation referred, and that controversy could only be settled by the introduction of parol testimony. The Legislature did not intend that horse-racing contracts should in any respect depend upon testimony of that kind, further than to prove the execution of the writings in which they were contained; nor would such testimony in the present case be necessary, if the obligation sued on had either recited the terms of the race or referred with sufficient certainty to any instrument or writing in which they were contained. The act is express that all such subcontracts or by-nets shall be reduced to writing and signed by the parties, or the same shall be void. That has not been done in the present case. The writing signed by Ward and Culpepper has not been signed by Arrington and Culpepper. It is true that this is not strictly required, but it ought to be referred to by the obligation sued on with so much certainty as to preclude the necessity of producing parol testimony to connect them. This case must be viewed as if the articles had not been signed by Ward and Culpepper, but by Ward and some other person; because, although the defendant and Ward signed them, yet on the same day they might have made another race, and signed other articles, in which case it would be uncertain to which race the plaintiff and defendant referred. As the plaintiff has been fortunate
(301) in this race, he is willing to admit that those were the articles, and thinks the defendant should be compelled to do the same because he signed them. But the plaintiff would not deem this reasoning very applicable if he had lost the race and were defendant in this suit.

As to the second question, it is in substance this, whether the plaintiff is in any better situation in consequence of the defendant having directed the stakeholder to deliver the obligation to him, after losing the race, than he would be in, provided he had proved by witnesses that he won the race, and that in consequence thereof the stakeholder had delivered the obligation to him. If such direction by the defendant was to have the effect of making the obligation which had been delivered as an *escrow* stand as one delivered by the defendant to the plaintiff, and not to be considered as having been delivered as an *escrow* at all, it would be all-important to the plaintiff. But that cannot be done. The defendant did not himself deliver the bond to the plaintiff (but if he had, it would not alter the case); he only directed the stakeholder to do it. The effect, then, can be no other than if proof tantamount thereto had been adduced. The defendant's confessions out of court place things precisely where they would be if the facts confessed had been proved in court. They amount to this, that he lost the race with Ward; that that was the race referred to in his obligation; but that the contract which he made with the plaintiff was defective in point of law, of which defect he claimed the benefit. We are therefore of opinion that the contract has not been entered into agreeably to the directions of the act of Assembly, and that judgment should be entered for the defendant.

---

(302)

MOORE v. EAGLES.

From New Hanover.

A and B, being tenants in common of a tract of land situate in an island in the Cape Fear River, agree by deed, "that as to those lands on the said island which lie below the causeway or great road through the island, A's two-thirds shall be taken all together, and shall be at the lower end of the said island, and be bounded by the Northwest River on the one side and by the Northeast River and Great Creek on the other; and B's one-third shall be taken off of the remainder, lying above the said A's and below the said causeway; and as to all that part of the island belonging to them, lying above the said causeway, A's two-thirds shall be taken next the thoroughfare and Northeast River, and the said B's one-third shall be taken next the causeway." This agreement is sufficiently certain for each tenant to know his share, and dissolves the tenancy in common.

THIS was a petition filed in the County Court of BRUNSWICK, for partition of certain lands lying in Eagles' Island, in the

river Cape Fear. The petition stated that Joseph Eagles, late of the county of Brunswick, who departed this life in 1791, was at the time of his death seized and possessed in fee simple of a certain estate and tract of land, situate, lying and being in Eagles' Island aforesaid; that he died intestate and the land aforesaid, by the then laws of descent in this State, descended upon his issue male, in equal portions as tenants in common; and that the said Joseph left issue, male, two sons, Richard and Joseph. That in 1806, the said Richard and Joseph being still tenants in common of the land aforesaid, the petitioner, Maurice Moore, purchased out all the said Richard's right, title, interest, claim or demand whatever in said land, who, by deed bearing date in the same year, conveyed the same to the petitioner, who thereby became a tenant in common with the said Joseph. And to the end that a severance might be made of the said tenancy in common in the land afore-
(303) said, between the said Joseph and the petitioner, and that each might know and have his part distinct and separate from the other, the petitioner prayed the court to appoint commissioners to lay off and divide the said land between him and the said Joseph.

To this petition the defendant (who was an infant), by his guardian, put in a plea, setting forth that Richard Eagles, the elder, was seized and possessed of certain lands, situate in Eagles' Island aforesaid, and by his last will and testament, dated 23 March, 1769, and which had been duly proved, devised two-thirds of his lands upon said island to his son Joseph Eagles, in the petition mentioned, in fee, and the other third to his daughter, Susannah Elizabeth Eagles, in fee; that the said Susannah Elizabeth intermarried with Alfred Moore, esquire; and they by deed bearing date the .... day of .... in the year .... conveyed the third part of said lands, devised to the said Susannah Elizabeth as aforesaid, to Maurice Moore, esquire, who by deed reconveyed the same lands to the said Alfred Moore; that Joseph Eagles, named in the petition, departed this life as set forth in the petition, and that his share in the said lands, to wit, two-thirds part thereof, descended to his sons Richard and the defendant Joseph. Admitting that the petitioner purchased of Richard, as set forth in the petition, the defendant stated that he was advised the lands aforesaid devised to the said Joseph Eagles and Susannah Elizabeth Eagles were held by and belong to the said Alfred Moore, Maurice Moore and the defendant, as tenants in common, and that no division of said lands could take place according to the laws of this State, by virtue of any petition filed for that purpose, un-

less the said Alfred Moore was made a party to the petition; that no severance of said tenancy in common or partition of said lands had been made among or between the parties claiming said lands or shares therein, under the last will and testament of the said Richard Eagles, the elder; and that the said lands then remained to be divided between the said Alfred Moore, Maurice Moore and the defendant, as ten- (304) ants in common. That Alfred Moore was not named in the petition either as a petitioner or defendant, nor was any division of said lands sought, as related to the interest of said Alfred Moore therein; and defendant demanded the judgment of the court whether he should be compelled to make any other or further answer to the petition until the said Alfred Moore should become a party to the petition.

To this plea of the defendant, the petitioner filed a replication, stating that his petition was sufficient in law to be answered unto by the defendant, without the said Alfred Moore being made a party to the same; because he averred that long before he filed his petition, to wit, on 28 January, 1788, Joseph Eagles, father of the defendant, then being proprietor of two-thirds, and the said Alfred Moore of one-third, as tenants in common of the said lands, did, by a deed indented and bearing date the day and year aforesaid, make partition of the said lands, and did thereby dissolve the said tenancy in common, as by the said deed would more fully appear.

The deed referred to in the replication was in the following words, to wit:

Whereas Richard Eagles, formerly of Brunswick County, gentleman, in and by his last will and testament, devised his lands on the green island opposite Wilmington, commonly called Eagles' Island, to be divided between his son, Joseph Eagles, party to these presents, and Susannah Eagles (now Susannah Moore), his daughter, in the proportion of two-thirds to his said son Joseph Eagles and one-third to his daughter Susannah; and whereas the division hath never been made: This indenture therefore witnesseth, that the said Joseph, on the one part, and Alfred Moore, husband of the said Susannah, on the other part, have agreed, and by these presents do agree, that the lands shall be divided in the following manner, that is to say, that as to all those lands on the said island which belonged to the said Richard Eagles at his death, and which lie below the causeway or great road through the said island, the said Joseph's two-thirds shall be taken all together, and shall begin at the lower end of the said island, and be bounded by the Northwest

(305) River on the one side and by the Northeast River and Great Creek on the other; and the said Susannah's third shall be taken off of the remainder, lying above the said Joseph's and below the said causeway; and as to all that part of the said island belonging to them as aforesaid, and lying above the said causeway, the said Joseph's two-thirds shall be taken next the thoroughfare and Northeast River, and the said Susannah's part, or the other third, shall be taken next the causeway. If any lots immediately opposite to Wilmington shall be found still belonging to them, they shall hereafter be divided as they may agree.

A. MOORE. [SEAL.]
JO. EAGLES. [SEAL.]

Signed, sealed and delivered, this 28 January, 1788, in the presence of
JOHN SWANN,
JAMES READ.

To this replication the defendant demurred, and the plaintiff having joined in demurrer, the case was sent to this Court for the opinion of the judges.

Jocelyn in support of the demurrer.
(308) *A. Moore contra.*

LOCKE, J. I regret very much, on this question, I should differ in opinion from my brethren, who have overruled this demurrer. But as it is my duty to be guided by the best judgment I can form on this subject, and not by the opinion of others, I shall briefly state the grounds on which my opinion is formed. The deed set forth in the replication of the petitioner does not state either the beginning, the courses, or the lines of Moore's one-third, but only on what part of the island it shall be laid off. It does not state whether his share shall consist of one-third in quantity or of one-third in value; it declares that one-third (meaning certainly whatever share was devised to Mrs. Moore) should be laid off in a certain part of the island. I have always understood a tenant in severalty to be one whose estate is severed and separated from that of all others, and who completely knoweth his own land. I would then ask, can any man, from this deed, know precisely Moore's one-third? But it is said, "That is certain which can be made so," and that as this deed says Moore's share shall be taken off adjoining the causeway, any surveyor can ascertain where the share will be, and that to effect a partition it is not necessary to

have a survey and marked lines. To this I answer, that unless the deed of partition should state some point at which the beginning shall be, some courses to be run by a surveyor, or some natural boundary, which can with certainty be ascertained, the partition cannot be so made as to leave an estate in severalty to one of two tenants in common. I am not able, from the description of this deed, to say that any such certainty is contained therein, or that by any possibility it can be made certain. For I think one-third of this tract can be laid off so as to answer the description of this deed, in as many different (309) ways as the fancy of twenty surveyors might suggest. If surveyed by one to-day, from the face of the deed, he would give land to Mr. Moore which another on to-morrow would take from him, and thus the land would be Moore's or Eagles', according to chance, or the caprice of a surveyor. It has been further said that the land just below the causeway is certainly Moore's, and if he can place his foot on a single spot, and say it is his, that is evidence of a partition. I admit that it is as to that spot, but not as to the whole third; and if Moore be a tenant in common of a single acre, although as to the rest he may be a tenant in severalty, yet this demurrer ought to be sustained, and Moore made a party. It is further urged that if this demurrer be sustained, and commissioners be appointed under our act of Assembly to make partition, this deed will not restrain them from laying off Moore's third where they please, and that the Court cannot impose terms which the commissioners are bound to pursue. I admit that if such an order should be made by the Court, and commissioners appointed under it, such a consequence might ensue. But I think no such order can or ought to be made. I am far from viewing this deed as a mere nullity; I consider it as a covenant binding Eagles and his heirs, and all claiming under him, to divide according to the spirit of this instrument, and that this is a case where the common-law remedy cannot be used; that when Moore is made a party he has nothing to do but to plead this deed in order to oust the law court of its jurisdiction and compel the petitioner to resort to a court of equity, which will decree partition to be made according to the deed. For the act of Assembly affords a remedy only where there is neither a partition nor a covenant to divide in any particular manner, leaving the commissioners with full powers to divide equally between the parties, and to ascertain the difference in value of the respective shares. The remedy therefore (310) given by the statute, only extending to cases where no partition has been made, nor any agreement binding the parties to

divide in a particular way, seems to me not to embrace this case, but to leave the parties to such remedy as was in force before the passing of the act. For these reasons I am of opinion that the demurrer ought to be sustained. But,

By HALL, LOWRIE, WRIGHT, JJ. Let the demurrer be overruled.

---

(311)

DEN ON DEMISE OF MARTIN v. LUCEY.

From Anson.

1. It is not incumbent on a purchaser of lands sold for taxes acknowledged to be due to show, on the trial of an ejectment brought against him by the person who was bound and who failed to pay the taxes, anything more by way of defense than the sheriff's deed for the lands so sold.
2. If such purchaser be plaintiff in the ejectment, he must also show that the title to the lands is out of the State.
3. The title being out of the State, the taxes are *a lien* upon the lands, into whosesoever hands they may pass; and it behooves the present holder of the lands to see that the taxes have been paid; for
4. If the sheriff, in his advertisement of sale for the taxes, mistake the name of the owner of the lands, or their local situation, the purchaser at such sale shall hold the lands.
5. The acts which make it the duty of the sheriff to advertise the sale in some newspaper printed in the State, and at three public places in the county, and set forth the names of the owners of the lands, the water courses on which the lands are situate, etc., are merely directory to the sheriff in the discharge of his duty. His neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the sheriff.
6. The sheriff's authority to sell rests upon the fact *that the taxes have not been paid.* If, therefore, it appear that the taxes have been paid, the purchaser at the sheriff's sale gets nothing by his purchase.

THE lessor of the plaintiff claimed the lands described in the declaration of ejectment under a grant from the State. The defendant alleged that the lands had been sold by the sheriff of Anson for the taxes due thereon, and that he had become the purchaser. He produced a deed executed to him by the sheriff for the lands, and was ready to prove a regular advertisement of

the sale, published in the public papers, but could prove no other advertisement. The sale was made before 1798. The case was sent to this Court upon the question, whether the defendant was bound to show any other evidence of title than the sheriff's deed, it appearing by the plaintiff's own showing (312) that the title was out of the State.

Duffy for plaintiff.
McBryde for defendant.

WRIGHT, J., delivered the opinion of the Court. The question which is presented to the consideration of the (316) Court by this case is, whether it is incumbent on a purchaser of land for taxes, acknowledged to have been due at the time of sale, to show on the trial of an action of ejectment brought against him by the person who was bound and had failed to make payment of such taxes, anything more than the sheriff's conveyance for the land so sold. The determination of this question must depend upon a proper construction of the several acts of Assembly authorizing the sale of land for taxes, and the principles which have influenced decisions in analogous cases. The first act which made lands liable to be sold for the payment of taxes was passed in 1792, ch. 2. Section 5 of this act, after authorizing the sheriff to distrain the land of any person failing to make payment of their public taxes, to sell the same and make a conveyance to the purchaser, declares, "that such conveyance shall be good and valid in law, the land so sold being first advertised for such length of time as is required in cases of execution." And section 6 of the same act declares, "that if any person liable for the payment of any taxes on land shall, before they are paid, sell the same and remove out of the county where the land is situated, the person purchasing the land shall be subject to the payment of the taxes due thereon, and shall be proceeded against as if he had originally given in the same." From these sections it may be fairly deduced that the Legislature intended that a failure on the part of any person bound for the payment of the taxes due on any lands should operate as a lien on such lands, and that the sale which should be made by the sheriff in consequence of such failure should convey to the purchaser a good title to the lands against the delinquent and all persons claiming under him, notwithstanding the sheriff should fail in making the advertisements required to be made or in the performance of any duty enjoined on him by the act. But it is said that the act of 1796, ch. 1, sec. 5, under which the sale was made in (317)

the present case, contains express negative words, "that it shall not be lawful for any of the sheriffs in this State, either by themselves or deputies, to sell lands for their taxes until the same hath been first advertised for sale in the *North Carolina Journal,* the *State Gazette,* or the *Fayetteville Minerva,* for the space of one month, and also in the county in which they are situated, in manner as heretofore required by law; which advertisements shall mention the situation of the lands, the streams near which they lie, the estimated quantity, the names of the tenants, the reputed owners, etc."; and that these words are equivalent to saying that a sale otherwise made is not a legal sale, and consequently a conveyance under such sale cannot transfer any title to the purchaser. It is believed that this act was intended to impose additional duties on the sheriffs, and that the provisions of this as well as the other act are merely directory to them of their duty; and that although a failure in the performance of any part of it might subject them to an action, in which they would be compelled to indemnify the owner of any land which might be irregularly sold, to the extent of the injury received by such sale, yet that it ought not to destroy the title of the purchaser, who has a right to presume that a public officer known to possess the power to sell has taken every previous step required of him by the law under which he sells. This construction appears to be in conformity with the decisions in cases of sales made of land by sheriffs under writs of execution, which are analogous in principle to the cases of sales for the payment of taxes. The act under which the sheriff's authority to sell is derived in cases of execution contains negative words. Section 29 of the act of 1777, ch. 2, after directing in what cases and in what manner executions shall be issued against lands and tenements, declares, "that where any sheriff shall have levied process upon any lands and tenements in manner aforesaid, and judgment shall have been there-
(318) upon had, he shall not proceed to sell the same until in the most public place in his bailiwick he shall, forty days at least before the day of sale, have advertised the same." These words are of equal import to those contained in the act of 1796, inasmuch as they declare that the sheriff shall not sell without first advertising. Yet in the cases of sales of land under executions the purchasers have never been considered as bound to support their titles by proof, either of the advertisement of the sheriff or that the defendants in execution had no goods and chattels on which a levy could be made; but are only bound to prove by the judgment and execution the authority of the sheriff to sell. The same principle that would require proof

of the advertisement would require proof that it was made in the manner prescribed by the act, that is, in some one of the papers mentioned in the act, in which shall be stated all the circumstances enumerated. This would so embarrass sales of this kind, and throw so many difficulties in the way of persons willing to bid a fair price for the land, that they would not be willing to purchase. For it would not only be necessary to prove these facts on any particular occasion, but they must preserve the evidences of them, with their titles, to be used at any distant period, whenever these titles might be made the subject of controversy. The consequences would be that not only the difficulty of collecting the public revenue would be increased, but the lands would become a subject of speculation, merely, to those who would, by purchasing at very reduced prices, be willing to encounter the inconveniences and risks of purchasing under these embarrassing circumstances. Let judgment be entered for the defendant.

Cited: Stanly v. Smith, 4 N. C., 124; *Love v. Wilbourne,* 27 N. C., 346.

(319)

WILKIE AND WIFE v. WEST.

From Hillsboro.

Under the act of 1741, ch. 14, sec. 10, a *married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage; and the man so accused shall be adjudged the reputed father, and stand charged with the maintenance of such child, as the County Court shall direct.

CATHERINE JONES was delivered of two base-begotten children, and several years afterwards she intermarried with Wilkie. Soon after her intermarriage she upon oath charged West with being the father of said children. West was arrested and bound over to the County Court, and application was made to the court for an allowance for the maintenance of the children. The court made an order for an allowance, from which West appealed to the Superior Court; and the case was sent to this Court upon the question, Whether under the act of 1741, ch. 14, sec. 10, relating to bastardy, a *married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage, so that the man so accused shall

be adjudged the reputed father of such child, and stand charged with the maintenance of the same, as the County Court shall order.

BY THE COURT. It is true that Laws 1741, ch. 14, regulating the proceedings in cases of bastardy, speaks of *single* women only. It authorizes any two justices of the peace, "upon their own knowledge, or information made to them, that any single woman within their county is big with child, or delivered of a child or children, to cause such woman to be brought before them, and examine her upon oath concerning the father; and if she shall refuse to declare the father, she shall pay the fines imposed by this act, and give sufficient security to keep such child or children from being chargeable to the parish,
(320) etc.; but in case such woman shall, upon oath, before the said justices, accuse any man of being the father of a bastard child or children begotten of her body, such person so accused shall be adjudged the reputed father of such child or children, and stand charged with the maintenance of the same, as the County Court shall order, etc." This act intended to provide for the maintenance of base-born children, and to keep the counties in which they shall be born indemnified against their maintenance, by compelling the reputed fathers to give bonds with security for this purpose. This being the general intent of the act, the Court will give to it such construction as will effectuate this intent, which can only be done by admitting the mothers of base-born children, whether they be single or married, to accuse, upon oath, the men who are the fathers of such children, in order that process may issue and the men so accused may be compelled to give bonds with sufficient security for the maintenance of the children. The order of the County Court must therefore be confirmed.

---

(321)

VICK ET AL. V. FLOWERS.

From Chatham.

1. Pending an execution against A, he conveys his property to B by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A and B that when the execution shall be satisfied B shall reconvey the property to A. Equity will not enforce this agreement.

2. No person is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention or for a fraudulent purpose.

3. Fraudulent conveyances are binding upon the party making them.

4. In applying the maxim, "that he who does iniquity shall not have equity," to particular cases, it is not necessary that it should appear that the iniquity was done to the person against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up.

THE bill charged that one Giles Vick intermarried with Delilah Flowers, daughter of Jacob Flowers, the defendant, in 1788; that shortly after the marriage Flowers gave to Vick two negro slaves, named Jury and Patience; that in 1794 Vick became indebted to Wilkinson in the sum of £515 7s., for which sum he gave his bond, with one John Oldham his security; which bond being assigned to one Benjamin Williamson, suit was instituted thereon in Halifax Superior Court of Law against Vick and Oldham. Several payments were made by Vick, but still a considerable balance remained due on the judgment; and pending the execution against the property of Vick and Oldham, Vick conveyed the said negro slaves, with the increase of Patience, to Flowers. The conveyance purported to be absolute and for a valuable consideration, but the bill charged that it was made upon a secret trust between Vick and Flowers, that as soon as Vick's estate should be relieved from the aforesaid debt to Williamson, by having the same duly discharged, Flowers should reconvey the negroes to Vick, and that the conveyance was not made upon a valuable consideration, or, if so, that the sum paid was merely nominal, and that it was expressly (322) agreed between Vick and Flowers, at the time of the conveyance, that whenever the debt to Williamson should be paid, Flowers should reconvey the negroes. The conveyance was made in 1796, and Vick died in 1797. A short time after the conveyance Flowers took possession of the negroes, and Oldham having discharged the balance due on Williamson's judgment, sued Flowers as executor *de son tort* of Vick, and recovered a judgment for the amount which he had paid as Vick's security. Flowers sold some of the negroes to discharge the judgment which Oldham recovered, which judgment being satisfied, this bill was brought against Flowers, to compel him to execute the secret trust aforesaid, and reconvey the residue of the negroes, charging that, the debt to Williamson being satis-

fied out of Vick's property, Flowers was bound in equity and good conscience to reconvey so many of the negroes as remained in his hands.

To this bill the defendant demurred, and for cause of demurrer alleged that the bill did not contain any matter of equity, whereon the court could grant any decree or give the complainant any relief or assistance as against the defendant. And the questions arising upon this demurrer were sent to this Court for the opinion of the judges.

This case being similar, in many of its circumstances, to the case of *Jackson v. Marshall, post,* 323, and both cases depending in part upon the same principles, the facts of the latter case are here stated.

Cited: Dobson v. Erwin, 18 N. C., 575; *York v. Merritt,* 80 N. C., 290; *Pittman v. Pittman,* 107 N. C., 162; *Bank v. Adrian,* 116 N. C., 543.

---

(323)

JACKSON v. MARSHALL'S ADMINISTRATOR AND DEVISEE.

Pending a suit against A as security of B, A, to defeat any recovery that might be made against him in said suit, conveys his property to C, by an absolute deed, purporting to be for a valuable consideration. And it was agreed between A and C, that C should reconvey the property to A whenever he should be requested. It appeared upon the trial of the suit against A that the debt claimed of him had been paid by B, for whom he was security, and judgment was rendered in favor of A, upon which he filed a bill to compel C to reconvey the property according to his agreement. Equity will not enforce this agreement, on account of its moral turpitude.

THE bill charged that Jackson, in order to the more convenient settlement of his estate at a future day, so as to answer the exigencies of his family, concluded to raise a trust in fee on his estate, and to make such divisions and provisions out of the same as a trust is capable of according to the rules of equity, and which an estate at common law is not. That to this end, he applied to one Benjamin Marshall, late of Halifax County, now deceased, and made known to him his designs, and requested him to permit complainant to make him a trustee for the said purposes; that Marshall consented thereto, and promised that he would, from time to time, make such conveyances as complainant should direct, and reconvey the property to complainant if ever requested to do so. That in pursuance of

this agreement, complainant, in May, 1801, by deed duly executed, conveyed to Marshall two tracts of land lying in Halifax County, and by another deed executed about the same time he conveyed to Marshall all his stock of cattle, horses, hogs, and all his other property, including negroes Hercules and Lydia. The bill charged that the conveyances were upon trust, for the benefit of the complainant, and that the said trust was declared by Marshall at and after the execution of the conveyances; that all the said property was by express agreement to be at complainant's disposal, and he was to take the profits (324) and proceeds thereof, and Marshall was to convey the same at any time, as complainant should direct; that although a consideration was expressed in the conveyances, none was ever paid by Marshall for the property. That Marshall had since died, having duly executed his last will, and therein devised the lands aforesaid to his son, Howell Marshall, and the other property he directed in his will to be sold and the proceeds divided amongst his other children; that Jeremiah Marshall had caused the will to be proved, and administration with the will annexed to be granted to him; that he and the said Howell Marshall denied the trusts aforesaid, and pretended that the conveyances aforesaid were intended by the parties to be absolute and subject to no secret trust. The bill prayed that they might be compelled to answer, and be decreed to reconvey the lands and other property to complainant.

To this bill Jeremiah Marshall, the administrator, put in his answer, and therein alleged that he had no personal knowledge of the transactions charged in the bill, but believed, from every information which he had been able to acquire, that the conveyances were intended by the parties to be absolute; that a considerable part of the purchase money had been paid by Benjamin Marshall, previous to his death, and that complainant held his bonds for the balance.

This cause coming on to be heard in the Court of Equity for Halifax District, sundry issues were submitted to a jury, who found that the conveyances mentioned in the bill were upon trusts, and not intended to be absolute; that they were made to defeat any recovery that might be made in a suit then pending in Halifax Superior Court against complainant, as security for one Cofield, in which suit the plaintiff failed to recover, it appearing that the debt was paid by Cofield before the institution of said suit. The jury also found that complainant, at the time of executing the said conveyances, was (325) indebted to one Burt, and also one Hilliard, to a small amount, but that those debts bore a small proportion to the

value of his estate, and that creditors were not intended to be defrauded by said conveyances or hindered or delayed thereby of the recovery of their debts.

The bill, answer and findings of the jury were sent to this Court for the opinion of the judges. This, with the preceding case of *Vick v. Flowers,* was argued by

Cameron and *Williams* (Chatham) for complainants.
Browne and *Norwood* for defendants.

(328) WRIGHT, J., delivered the following opinion as the opinion of the Court in both of the preceding cases:

It is rather a singular circumstance that claims such as the present bills set up are made at this day, and attempted to be enforced without the authority of a single adjudged case (329) to support them. That conveyances like those set forth, made under similar agreements, have before occurred, there can be little doubt; and it is equally certain that if these agreements had ever been considered as entitled to the assistance of a court of equity the diligence and industry of the complainant's counsel would have discovered the cases in which application to enforce them had been sustained, and relief granted. The silence of the books on the subject would seem of itself to afford strong presumptive evidence that the complainants are not entitled to the relief which they seek. But although such presumption exists, yet if they could have shown that under the influence of any of those principles which direct the decisions of our courts of equity they were entitled to relief, the Court would feel bound to grant it, notwithstanding it might seem to militate against the policy of the statutes which have been from time to time made for the protection and security of creditors. It is believed that so far from granting relief to the complainant, not only the statute against fraudulent conveyances, but every principle and rule which has been adopted and matured in courts of equity for the purpose of suppressing fraud and of inculcating a course of fair and honest dealing among men, directly forbid it. The complainant's counsel rested their arguments much on the nature of trusts in the civil law, from which they have been taken and adopted into our jurisprudence by the courts of equity; and cases were cited to show that by that law they were enforced, although they had originated in fraud on the part of the *cestui que trust.* To this it is a sufficient answer to say that although the courts of equity may have derived their idea of a trust from the civil law, yet that that law has no binding force or author-

itative influence on these courts, which are guided altogether by a set of rules and principles peculiarly their own, that have grown out of the condition and positive institutions of the country where they have been established. The complainant's claim will derive very little weight from the (330) consideration that it would have been enforced by a Roman prætor, if it be opposed by any of these rules or principles. Some reading is also cited from Saunders on Uses, and Reeves' History of the English Law, to show that trusts originated in covin, and that on their first introduction they were applied to what might be deemed fraudulent purposes, that is, to avoid the statutes of mortmain. But it is to be observed that the clerical chancellors who presided in the courts of equity at that time did not consider these conveyances as dishonest or against conscience, and rather leaned in favor of them, and enforced the secret trusts which arose out of them, and which produced a variety of acts of Parliament that were deemed necessary to prevent the fraudulent purposes to which they were applied: among others, 13 and 27 Elizabeth; of the former, our act of 1715 is nearly a copy. The complainant's counsel, however, contend that, although the statute makes the conveyances to which it alludes void, yet that it does not give validity to anything, and hence an inference is drawn that when a debt is discharged, to delay the payment of which a conveyance or secret trust is made, the conveyance ceases to be binding, and the debtor becomes entitled to a reconveyance. But this argument is certainly unsound, for, although the statute does not validate anything in express terms, it does by a very strong implication. It declares, "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels," etc., made for the purposes or with the intent stated in the preamble, shall henceforward be deemed and taken "only as against that person or persons, his or their heirs, executors, administrators and assigns, and every of them, whose actions, suits, debts, accompts, damages, penalties and forfeitures shall release by such covinous or fraudulent devices and practices, as is aforesaid, or shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of no effect; (331) any pretense, color, feigned consideration, expressing of use, or any matter or thing to the contrary notwithstanding." As to the parties themselves, therefore, it must mean that it shall be taken to be good; for that which would otherwise be good, and is declared void only as to a certain intent, remains good to all other intents; and that such has been the construc-

tion which the statute has heretofore received may be gathered not only from the opinion of elementary writers on the subject, but from adjudged cases in the English courts, and in our own. 2 Bac. Abr., 605; Fonblanque on Equity, 139; Roberts on Fraudulent Conveyances, 643; Cro. Jac., 270; 1 Ch. Ca., 59; *Brady v. Ellison,* 3 N. C., 348. In the case cited from Cro. Jac. the alienee was permitted to recover at law from the executors of the debtor, the property conveyed, on the ground that although the conveyance was void as to creditors (it being made to defraud them of their debts) yet that it was good as against the person making it and his representatives. But, supposing no adjudged case or elementary opinion could be found in support of such a construction, yet the object and spirit of the law would seem evidently to require it. The design and intention of the act was the protection and security of creditors; this can only be effected by destroying all confidence between the parties to secret agreements, by multiplying the difficulties which fraudulent debtors would have to encounter in attempting to defeat their claims, and denouncing every species of forfeiture and risk against such attempts which can be raised up against them in a court of equity. The act of Assembly, therefore, would seem a complete answer to the claims of the complainants. But, independent of the act, the claims are in direct opposition to some of the most fundamental maxims which direct and influence the conscience of a chancellor. *He who hath done iniquity shall not have equity; he who requires the aid of a court of equity must disclose* (332) *a fair and honest transaction,* are maxims which have never been departed from, and are in direct hostility to the claims of the complainants. It is true that Francis, in his exposition of the first maxim, says that the iniquity must be done to the defendant himself, and this exposition was much relied on by the complainants' counsel. But this exposition is certainly incorrect, nor does the case cited by Francis for the purpose prove it. He cites a case where a person, during the great rebellion, who, in order to avoid a sequestration by the usurper, had sworn, in an answer in chancery, that he had been satisfied for a debt, was permitted to recover by a chancellor sitting after the restoration; and who, no doubt, held that the opposition to the claim was more unconscientious than the means taken to avoid the sequestration. The true exposition of the maxim is to be found in 1 Fonbl., ch. 4, sec. 13, where, after stating it, he says: "But this must be understood where such person is plaintiff," etc. And the following adjudged cases illustrate it: 2 Vern., 602; 1 Ch. Ca., 202; 1 Vern., 475; 2 Ves.,

156. *Gale v. Lendo,* 1 Vern., 475, was a case where the party against whom relief was sought was in no wise to be injuriously affected by the transaction, inasmuch as she had received the money for the bond which she had given to her brother on her marriage. The obligor, however, was not permitted to recover, because he had taken it with a fraudulent intention to operate against her husband, who had died; and although he was not affected by it, nor could his estate be made liable for it, yet as it was given originally for a fraudulent purpose, it was void as against all persons. This case is also an answer to the argument of the counsel, which went to show that although a fraud was contemplated, yet none was effected, and that therefore no forfeiture should attach against complainants. The fraud consists, not in the actual injury sustained by the person intended to be injured, but in the act itself, and the turpitude of the motive which influenced the party to its commission; and that which was once a fraud always remains a fraud. 1 (333) Vern., 475.

It would therefore seem, from this view of the cases, that so far from complainants being entitled to relief upon any ground of equity, they are opposed not only by the statute against fraudulent conveyances, but also by the maxim, that he who hath done iniquity shall not have equity; and by the principle, that no plaintiff is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention and for a fraudulent purpose. This renders it unnecessary to consider the other part of the cases, that is, whether parol proof should be admitted to prove the private agreement; for if this agreement had been reduced to writing with all possible solemnity it would not have received the aid of a court of equity for a specific performance. The bills must therefore be dismissed.

Cited: Vick v. Flowers, ante, 322; *York v. Merritt,* 80 N. C., 290; *Pittman v. Pittman,* 107 N. C., 162; *Bank v. Adrian,* 116 N. C., 543.

ALLISON v. GREGORY & SONS AND KIRKLAND.

From Hillsboro.

An equity of redemption cannot be sold by virtue of an execution at law.

ALLISON being indebted to Gregory & Sons, of Charleston, mortgaged to them a house and lot in the town of Hillsborough, to secure the payment of the debt; and being also indebted to one Armstead, he was sued by Armstead in Edenton Superior Court, and judgment was obtained against him; upon which judgment an execution was issued, directed to the Sheriff of Orange County, who levied it upon the aforesaid house and lot, and at the sale Kirkland became the purchaser. Some time after the purchase Kirkland filed a bill against Gregory & Sons,
(334) for the purpose of redeeming the house and lot as to them, and against Pratt and Taylor, who had purchased from Allison other parts of the property mortgaged to Gregory & Sons, for the purpose of compelling them to pay their proportional parts of the money due on the mortgage. Gregory & Sons filed a bill to foreclose the equity of redemption, and Allison filed a bill against Gregory & Sons and Kirkland, to redeem the house and lot. To Allison's bill Kirkland demurred, and the question arising upon the demurrer was, Whether Allison's equity of redemption in the house and lot was liable to be sold under an execution at law.

BY THE COURT. An equity of redemption cannot be sold by virtue of an execution at law. Allison is therefore entitled to redeem, but Kirkland should stand in the place of Armstead, whose debt he satisfied, and is entitled to have his money, with interest thereon, refunded by Allison, he being accountable to Allison for the rents and profits of the house and lot during the time that he has had them in possession.

The General Assembly in 1812 passed an act subjecting an equity of redemption to sale under an execution at law.

SHAW ET AL. v. SHAW ET AL.

From Fayetteville.

A legacy or distributive share cannot be recovered, without setting up a legal representative of the deceased, on whose estate a claim for the one or the other is made.

THIS was a bill of reviver, and the original bill which it was the object of the present bill to revive was brought to recover a legacy bequeathed by the last will and testament of Dushee Shaw, the elder, of which Duncan Shaw, Niel Shaw, and one Buie were appointed executors. But from the statement made by the complainants' bill, it appeared that the (335) present defendants were neither the legal representatives of the said Dushee Shaw, the elder, nor were they expressly charged in the bill with having taken into their possession any of the assets of the said Dushee; but some of them, to wit, Lucy, John and Niel Shaw, were called upon as executors of Daniel Shaw and Niel Monroe, as executors *de son tort* of Catharine Shaw, who were stated to have been the administrators of Duncan Shaw, the acting, but not the surviving, executor of Dushee, the testator. To the right of the complainants to have their bill revived against the defendants, upon this statement, the defendants demurred, and assigned two grounds of demurrer. First, that the complainants had shown no title or right to revive against them or to call them to an account as the representatives of Daniel Shaw and Catharine Shaw. Secondly, that they had not shown such right or interest in defendants respecting the subject-matter of the bill as would make them liable to complainants, or would sanction a decree against them.

WRIGHT, J. We are of opinion that the demurrer is sustainable upon both grounds. For, as to the first, as Daniel Shaw and Catharine Shaw were only the administrators of Duncan Shaw, the executor of Dushee Shaw, out of whose estate the legacy is claimed, the defendants, even if a legacy could be recovered from any but a legal representative of the testator, were not bound to the discovery or relief sought from them, inasmuch as Daniel Shaw and Catharine Shaw, whom they represent, are not charged with having taken into their possession any part of the fund out of which the legacy was payable. As to the second, the defendants are not themselves charged as the representatives of the testator, Dushee Shaw, the elder; and even supposing them to have been charged with hav- (336)

ing possession of assets subject to the payment of the legacy, yet it has already been decided by this Court that a legacy or distributive share cannot be recovered without setting up a legal representative of the deceased, on whose estate a claim either for the one or the other is made. Let the demurrer be allowed.

Cited: Martin v. McBryde, 38 N. C., 533.

EX PARTE MASON.

Under the act of Congress regulating the enlistment of soldiers in the Army of the United States, where the father is dead and the son is without a guardian or master, "the consent in writing" of the mother, if she be alive, is necessary to make valid the enlistment of the son, if he be a minor—and such minor, enlisted without such consent, was discharged upon a writ of *habeas corpus.*

EDWARD MASON, a minor under the age of twenty-one years, enlisted as soldier in the Army of the United States, without the consent of his mother, his only surviving parent. He had no guardian, nor was he bound apprentice to any master. He was brought upon a writ of *habeas corpus* before his Honor, *Judge Taylor,* who was of opinion that his enlistment was illegal, and that he ought to be discharged; but, understanding that this opinion differed from that of one of his brethren of the bench, he ordered the case to be sent to this Court.

BY THE COURT. The act of Congress under which this application for the discharge of Mason is made declares, "That no person under the age of twenty-one years shall be enlisted by any officer without the consent, in writing, of his parent, guardian or master, first had and obtained, if any he have." There is no rule of construction under which the term *parent* used in this act can be considered as extending to the father and not to the mother. It is not material to inquire how the (337) mother stood at common law towards the son during his nonage, or to point out the difference which the principles of the feudal institutions set up between the rights and duties of the father, and those of the mother, towards the eldest son, and, indeed, towards all the children. This difference grew up at a time when the education of the son was purely military,

and the mother was not only incompetent, but considered unworthy of attending to it. Since civilization has been introduced, the authority of the mother over her children has been gradually extended, and she has taken an active part in their education. Congress, no doubt, thought that where the father was dead, and the children without guardians or masters, they should be subject to the control of the mother, when, during their minority, attempts should be made to enlist the males in the Army of the United States. We are therefore of opinion that in this case the mother is the *"parent"* whose consent in writing was required, and her son being enlisted without such consent, that he must be discharged.

Cited: In re Bryan, 60 N. C., 19, 32.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1810.

JOHN LOUIS TAYLOR, Esquire,

JOHN HALL, Esquire,

FRANCIS LOCKE, Esquire,

SAMUEL LOWRIE, Esquire,

LEONARD HENDERSON, Esquire,

JOSHUA G. WRIGHT, Esquire.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1810.

DUDLEY v. CARMOLT.

1. After verdict, the court will not arrest the judgment because the writ is *tested* by the clerk and signed by the deputy clerk. The stat. 5 George I., ch. 13, is in force, and cures defects in the writ, by verdict.
2. Section 25 of the Constitution intended merely to prescribe an uniform mode of issuing writs.

This case was sent up from the Superior Court of Law for the District of Wilmington, to June Term of this Court, 1806, upon reasons filed in arrest of judgment. Dudley sued out the following writ against Carmolt:

STATE OF NORTH CAROLINA,

To the Sheriff of Onslow County—GREETING:

You are hereby commanded to take the body of Robert Carmolt, if to be found in your county, and him safely keep, so that you have him before the justices of our County Court of Pleas and Quarter Sessions, to be held for your county at the courthouse in Onslow County on the second Monday of October next, then and there to answer to Christopher Dudley of a plea of trespass on the case, etc.; damage £500. Herein fail not, and have you then and there this writ. Witness, Robert W. Snead, clerk of our said court at Onslow County, 8 July, (340) 1799, and the 24th year of our independence.

W. N. SNEAD, D. C. C. C.

The defendant appeared and pleaded in chief to the action, and upon the trial there was a verdict for the plaintiff. The defendant by his counsel moved that the judgment be arrested, and assigned the following reasons:

1. That the *capias ad respondendum* upon which the defendant was arrested and required to answer to the complaint of the said Christopher in this suit was not signed by the clerk of the court from which said writ issued, to wit, the clerk of the Court of Pleas and Quarter Sessions for the county of Onslow, as appears by the record in said suit.

2. That the said writ, as appears from said record, was signed by W. N. Snead, D. C. C., when from the said writ it appears that Robert W. Snead was, at the time the said writ issued, clerk of the said court for the county of Onslow, from which the writ issued.

3. That the said writ, as appears in said record, was tested in the name of Robert W. Snead, clerk of the said court, and signed by W. N. Snead, D. C. C.

JOCELYN,
GASTON,
For Defendant.

This case was argued by Jocelyn for the defendant several terms ago; the court took time to advise, and at this term gave judgment for the plaintiff.

LOCKE, J. The defect in the writ would have been fatal if advantage had been taken thereof by plea in abatement; but as the defendant has pleaded in chief, it would seem to amount to a waiver of that advantage, and be equivalent to an acknowledgment on his part that he has been brought into court by a proper process. 1 Stra., 155; Salk., 59. However, upon this point, the Court gives no opinion, believing that the case (341) can be decided on a ground liable to less exception or doubt. The stat. 5 George I., ch. 13, was passed (as the preamble states) for the purpose of preventing writs of error and reasons in arrest of judgment after verdict, and expressly declares "that where any verdict hath been or shall be given in any action, suit, bill, plaint or demand, the judgment therefor shall not be stayed or reversed for any defect or fault either in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings." Such error, therefore, was cured by the verdict, or at least could not be taken advantage of after verdict. This statute, the most broad and extensive of any

passed on the subject, seems completely to cure the defect contained in this writ. Great doubt, however, was entertained by the Court, and much time was spent in ascertaining whether this statute was in force in this State; but in examining the several acts of Assembly the Court have found an act passed at New Bern, on 3 November, 1768, entitled "An act for dividing the Province into six equal districts." Iredell's Revisal, 239. The body of this act is not recited in this revisal of the laws; but upon looking into the act we find that, among other things, it enacts "that all the statutes of jeofails and amendment, which now are in force in England, are hereby declared to extend to and be in force in this colony, and shall be duly observed by all judges and justices of the several courts of record within the same, according to the true intent and meaning of said statute." In 1777, ch. 2, the Legislature further declared "that all the statutes of England and Great Britain for the amendment of the law, commonly called statutes of jeofails, and which were heretofore enforced in this territory by any act or acts of the General Assembly under the late government, are hereby declared to have continued and to be now in full force in this State, and shall be duly observed by all judges and (342) justices of the several courts of record within the same, according to the true intent and meaning of the said statutes, unless where the same are or may be altered by this or any other act." Hence, it evidently appears that the stat. 5 George I. is in full force and ought to be observed by judges and justices of our courts.

But it is contended for the defendant that section 26 of the Constitution supersedes the statute of 5 George I. as to the point now under consideration. That section declares that "all writs shall run in the name of the State of North Carolina, and bear teste and be signed by the clerks of the respective courts." The Court think that the Constitution merely intended to prescribe one uniform mode of issuing writs, and can have no greater effect or binding force than a constitutional act of the Legislature. Suppose, then, that an act of Assembly had prescribed that all writs should be signed and bear teste by the clerks of the respective courts: would not the statute above recited cure such defect after verdict? It surely would. In such a case we would be led to inquire how ought this defect to be taken advantage of? Certainly, in the same way in which, in England, advantage would be taken of a writ that varied from the prescribed form, and that is by plea before verdict; for as there the statute of 5 George I. would cure error in the

writ after verdict, so here, the same statute being in force, will cure the like error. Let the reasons in arrest be overruled, and judgment be entered for the plaintiff.

Cited: Sheppard v. Lane, 13 N. C., 156; *Glisson v. Herring, ib.,* 161; *Worthington v. Arnold, ib.,* 364; *West v. Ratledge,* 15 N. C., 38.

RICKETS v. DICKENS & WAIT.

From Hillsboro Superior Court of Law.

1. In a deed of bargain and sale, the words "grant, bargain, sell, etc.," do not imply a warranty of title, nor do the words of a deed describing the length of lines and boundaries, etc., and concluding with the words "containing so many acres," import a warranty of quantity.

2. The action of covenant will lie upon the words of a deed "will warrant and defend the premises to A. B. and his heirs forever." And this from necessity, as otherwise a vendee would be without a remedy in many cases; for the writ of *warrantia chartæ* is not in use in this State, nor are real actions in which voucher is used.

3. Plea, "that the plaintiff before the commencement of the action, had sold and conveyed to another in fee the lands mentioned in the deed," overruled, and demurrer to said plea sustained.

(343) THIS was an action of covenant, and the declaration contained two counts. In the first, the plaintiff declared on a deed of bargain and sale made by defendants to him, wherein, after acknowledging the receipt of $250, the consideration therein mentioned, they proceed thus: "have granted, bargained and sold, aliened, released and confirmed, and by these presents do grant, bargain and sell, alien, release and confirm, unto the said Anthony Rickets, his heirs and assigns forever, a tract of land, etc., beginning at Harris' corner white oak, etc., *containing two hundred and fifty acres,* etc., to have and to hold the said land and premises, and every part thereof, unto the said Anthony Rickets, etc." The breach of this contract assigned was that the lines which bounded the tract of land were not as long as represented by the deed, and that the boundaries mentioned in the deed contained only 244¾ acres, and not 250.

In the second count the plaintiff declared on another deed of bargain and sale made between the same parties, in which the defendants, after acknowledging the receipt of $183, the con-

sideration therein mentioned, proceeded thus: "have granted, bargained and sold, and by these presents do give, grant, bargain and sell, alien, enfeoff, release and confirm unto (344) the said Anthony Rickets, his heirs and assigns forever, a certain tract or parcel of land, beginning, etc., containing 183 acres, be the same more or less, etc., to have and to hold, etc.; and the said Robert Dickens and William Wait, and their heirs and every of them, all and every other person or persons, and their heirs, anything having or claiming in the premises above mentioned, or any part thereof, by, from or under them, or any other person or persons, shall and will warrant and defend the said premises, with the appurtenances thereunto belonging, to the said Anthony Rickets and his heirs forever, by these presents." The breach of this covenant assigned in the declaration was that the defendants, Dickens and Wait, were not, at the time of executing the deed, seized of 23 acres of the land included within the boundaries set forth in the deed, and that one Ann Horton was seized in fee of the said 23 acres at the time the said deed was executed, and was thereof possessed, and was so seized and possessed long before that time and ever since.

The defendants, among other pleas, pleaded, "That the plaintiff, before the commencement of this suit, had sold and conveyed in fee simple the lands mentioned in the said deed, to R. B." To this plea the plaintiff demurred, and the defendants joined in demurrer.

The jury found for the plaintiff upon both counts in the declaration, and assessed damages, and the case was sent to the Supreme Court upon the following points: 1. Ought the demurrer to be sustained? 2. Is the plaintiff entitled to judgment on the first count? 3. Will an action of covenant lie upon the warranty contained in the deed mentioned in the second count?

TAYLOR, J. So large a proportion of the contracts of the people of this State arises from the commerce in lands that it is of great consequence to render all those rules which relate to contracts and warranties explicit and intelligible; (345) hence, confidence and security will be promoted, litigation suppressed, and a greater degree of precision introduced into deeds than it is now customary to employ. The necessity of this will be manifest from a very slight attention to the principles which relate to the subject. We are in this case called upon to decide whether an action of covenant will lie upon the deficiency of 5¼ acres stated in the first count of the declaration. The deed is a bargain and sale, and contains no warranty, nor covenant to warrant; it must therefore be considered

to have been the intention of the bargainor, and to have been so understood by the bargainee, that no warrant accompany the sale. However equitable it may appear, on principle, that compensation should be made by the seller upon a deficient quantity (and the civil law adopts that idea), yet, according to the established theory of the common law, no action can be sustained where the sale is free from the imputation of fraud. "The word *warrantizo,*" says Littleton, 735, "maketh the warranty, and is the cause of warranty, and no other word in our laws." If the seller in any case should conceal from the buyer a fact or instrument which would disclose a defect in the title, or neglect to inform him of an encumbrance to which it is subject, these and other similar cases of fraud may be remedied by an action on the case, in the nature of an action of deceit; and in such cases the action may be maintained, not only where there is no warranty, but where the warranty does not reach the particular defect. Coke Litt. in Notes. Cases of fraud form an exception to many of the rules of common law, a strongly marked feature of which is to prevent the contrivers of dishonest attempts from being benefited by them, and to break down every barrier behind which covin seeks to intrench itself. The next inquiry is, Whether the deed contains any words from which a warranty can be implied. And here it might be suffi-
(346) cient to say that the deed is of that class which derive their principal efficacy from the statute of uses; that it was seldom resorted to before the statute, and that it is only in the common-law conveyances of feoffment, confirmation, release, etc., that particular words imply a warranty. It may, however, be a more satisfactory ground of decision to consider this case as if the action was brought upon a common-law conveyance. We will therefore examine the doctrine upon this subject as it is laid down by the most approved writers. The statute *"De Bigamis"* is laid down by Lord Coke, ch. 6, to be declaratory of the common law in relation to this point. According to this statute, "in deeds wherein is contained *'dedi* and *concessi,'* without homage or without a clause of warranty, and to be holden of the givers and their heirs by certain services, it is agreed that the givers and their heirs shall be bound to warranty; and where is contained *'dedi'* and *'concessi,'* etc., to be holden of the chief lord of the fee, and not of the feoffors and their heirs, reserving no services, without homage or without the aforesaid clauses, their heirs shall not be bound to warranty, notwithstanding the feoffor, during his own life, by force of his own gift, shall be bound to warranty." Thus it appears by this statute that the word *"dedi"* bound the feoffor and his heirs to

warranty, and the reason of it, according to Lord Coke, was, "That when *'dedi'* is accompanied with a perdurable tenure of the feoffor and his heirs, then *'dedi'* importeth a perdurable warranty, from the feoffor and his heirs to the feoffee and his heirs." 2 Inst., 275.

The statute of *quia emptores* afterwards abolished subinfeudations, and consequently with them the warranty, so far as it respected the heirs of the feoffor; because, as this was a consequence of tenure, it could not subsist without it. Thenceforward the implied warranty only bound the donor during his own life, and except in the case of *homage auncestrel,* the heirs could not be bound without an express war- (347) ranty. But there is no other word besides *"give"* which implies a warranty in the conveyance of fee-simple estates (Coke Lit., 385), consequently, neither the nature of the deed itself in the present case nor the words contained in it will permit us to imply a warranty. On the first count, therefore, the defendant is entitled to judgment.

By the warranty, which is the foundation of the second count, it must be admitted that an obligation is created which in England is enforced by a writ of *warrantia chartæ* or by *voucher.* The first has never been used in this State; the second is permitted only in real actions, which has never been resorted to here. Unless, then, an action of covenant is sustained, the party who has an acknowledged legal right is without remedy. The reason why an action of covenant lies not in England on a warranty is that the party has a higher and better remedy, which the law always compels a person to use. But even there, if that remedy cannot be afforded him, the law permits him to bring covenant: as if a term for years only be recovered out of an inheritance which has been warranted to him, as in this case, he could not vouch, for that is permitted only in real actions; nor could he bring a *warrantia chartæ,* for that is where some person demands or claims the fee of him. Of necessity, it gives a lesser remedy. This doctrine is exemplified in *Pencombe v. Rudge,* Yelverton, 139. We therefore think that the action of covenant will lie upon the warranty contained in the second count in the declaration.

With respect to the plea relied upon, and which forms a part of the case, the Court are not aware of any principle upon which it can be sustained. Had the suit been brought in the name of the plaintiff's vendee, there might have been some ground for an objection; for as the breach was coeval with the covenant, the right to sue was a chose in action, the propriety of assigning which is at least questionable. But it is evident that as the

defendants were not seized of the twenty-three acres when
(348) they sold, nothing passed to the plaintiff by the deed, and he could convey nothing to R. B. Consequently, with respect to the quantity in dispute, the plea fails in point of fact. We think the plea should be overruled and the demurrer sustained. Let judgment be entered for the plaintiff.

HALL, J., *contra.* I agree with my brethren as to the first and third points made in this case, but disagree with them as to the second. My reasons for this disagreement are given at large in the next case of *Powell v. Lyles, post,* 349.

Cited: Powell v. Lyles, post, 349; *Grist v. Hodge,* 14 N. C., 201; *Huntley v. Waddell,* 34 N. C., 38; *Southerland v. Stout,* 68 N. C., 449; *Smith v. Ingram,* 130 N. C., 103.

POWELL v. LYLES.

From Wake.

1. In a deed of bargain and sale the words "give, grant, bargain and sell" do not imply a warranty.

2. The clause of a deed describing the length of lines and the boundaries of a tract of land, and concluding with the words, "containing so many acres," does not amount to a covenant of quantity; and no action lies if the quantity be less than that mentioned, as the word "containing" does not import or constitute a covenant.

THIS was an action of covenant brought on the following deed, to wit:

This indenture, made this 21 January, 1807, between Samuel Lyles, of the county of Wake and State of North Carolina, of the one part, and Caswell Powell, of the county and State aforesaid, of the other part, witnesseth, that the said Samuel Lyles, for and in consideration of the sum of £500, lawful money, to him in hand paid by the said Caswell Powell, the receipt whereof he, the said Samuel Lyles, doth hereby acknowledge, and himself fully paid, hath given, granted, bargained, sold and conveyed unto the said Caswell Powell, his heirs and assigns
(349) forever, a certain tract or parcel of land lying and being in the county and State aforesaid, on the south side of Neuse River, *containing 340 acres,* beginning at a hick-

ory, Abbot's corner, thence south 300 poles to a hickory in Bohannoh's line; thence west 129 poles with the said line to a pine, Jacob Riches' corner; thence north 300 poles to a pine in Abbot's line; thence with the said line to the first station: To have and to hold the said lands, with all the privileges and benefits thereunto belonging, to him, the said Caswell Powell, his heirs and assigns forever, against the lawful claim or claims of any person or persons whatsoever; and I, the said Samuel Lyles, for myself and my heirs, do further agree that I will make or assign any deed or writing of conveyance, when thereunto required by the said Caswell Powell, his heirs or assigns, that shall be judged necessary to authenticate the same. In witness whereof, I have hereunto set my hand and seal the year first above written.

SAMUEL LYLES. [SEAL.]

Signed, sealed and delivered
in the presence of
JAMES FORT,
POLLY FORT,
CHARLOTTE EMBRY.

Some time after the conveyance an accurate survey of the land mentioned in the said deed was made, and the boundaries were found to be correct, but the quantity of land was deficient by 17¼ acres. The question submitted to the Supreme Court was whether an action of covenant would lie on this deed to recover damages for such deficiency.

TAYLOR, J. This case does not essentially differ from that of *Rickets v. Dickens, ante,* 343. In both cases the actions are brought upon deeds of bargain and sale. The one now declared on contains no covenant of warranty, and thus far corresponds with the deed set forth in the first count of the declaration in the other case; but the word *"give"* is contained in the deed in the present case, which, according to the principles stated in *Rickets v. Dickens, ante,* 343, would imply a warranty, if inserted in a deed of feoffment, etc.; but in other forms of alienation gradually introduced since the statute of *quia emptores,* no warranty whatsoever is implied, they bearing no sort of analogy to the original feudal donation. (350) Lord Coke, in illustrating the statute *de bigamis,* more particularly explains the several conveyances at common law in which that word implies a warranty. "The letter of this act," says he, in 2 Inst., 275, "extends but to the feoffor upon a feoffment made; but if *'dedi'* doth inure by way of release or confirmation, it importeth a warranty during the life of him

who makes the deed: so it is, if a reversion expectant upon an estate for years, life, or in tail be granted by this word *'dedi,'* and attornment had; here *'dedi'* doth import a warranty, though the estate passeth not by way of feoffment." *Vide,* also, 2 Bl. Com., 210. The deed in this case being a bargain and sale, no implied warranty ariseth by force of any words; and though it would be difficult to assign any satisfactory reason why the distinction should be preserved at the present day, when deeds vary from each other only by a slight verbal difference, and when equal validity is conferred upon all by the ceremony of registration, yet the Court has no power to remove ancient landmarks: they must administer the law as it is written, and leave the Legislature to alter what may be deemed inconvenient. There is a covenant in this deed for further assurance, which probably was designed by the parties to compel a future execution of a conveyance containing the necessary warranty. If that be the case, the plaintiff cannot be remediless, although, in the present suit, there must be judgment against him.

HALL, J., *contra.* Espinasse, in his treatise upon the Action of Covenant, p. 267, says "there is no need of the word covenant, nor of any particular form of words to constitute a covenant in *deed;* for anything under the hand and seal of the parties importing an agreement shall support this action as amounting to a covenant. As in the case of a lease for lands, in which are the words 'yielding and paying' so much (351) rent; this is a covenant, and this action lies for the non-payment, for it is an agreement for the payment of rent, which amounts to a covenant," and he cites 1 Roll. Abr., 518, 519. Sheppard Touchstone, 87, speaking of deeds, says, "that the construction should be made upon the entire deed, and that *one* part of it doth help to expound *another,* and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together, and there be no discordance therein." *Vide,* also, Plow., 160. And many other authorities might be referred to which support the same principles. It must, then, be admitted that every sentence in the deed which is now the subject of controversy shall have some meaning attached to it, and the true question is, Do the words and sentences of the deed import an agreement on the part of the bargainor that there are *three hundred* and *forty acres* in the tract of land which he conveyed by this deed? Lands may be described in a deed of conveyance by *course* and *distance* directed by marked lines and corners, or by *known* and *visible* boundaries only, without mentioning course and distance. As to the

first mode, a mathematician would tell you that there was sufficient certainty in it without making any actual survey. But when he should be told that, although a deed called for courses and distances, yet if the distances were longer or shorter, or courses different from those called for in the deed, he must be bound by them, he would probably think it safer to make an actual survey.

It is unnecessary to cite authorities to prove that course and distance must be controlled by real lines and corners. This rule has been long established by the Legislature, and enforced by judicial decisions. Where the lands are described by known and visible boundaries, without course or distance, there is generally a greater necessity for a survey. In the case now before us three of the lines are said to run certain courses and distances to certain corners. The fourth runs from a pine in Abbot's line with the said line to the first station. Those distances may be found to be shorter *in fact* than those (352) called for in the deed. The fourth line, instead of being straight, may form a semicircle, because Abbot's line, with which it runs, may be of that form. Who must be supposed to be best acquainted with these lines and the quantity of acres contained within them, the purchaser or the seller? I apprehend the *seller;* and the parties to the deed for the land in question seem to have thought so too, for, in the deed by which he passes his title, and which evidences the contract of sale, he not only sells the land within the boundaries therein set forth, but sells it as *"containing"* 343 acres. But it is said that this latter member of the sentence is only descriptive of the land, and nothing more. To this I answer, if it be descriptive only, it must be as to quantity, and nothing else. If, then, the seller has by his deed described the land as *"containing"* so many acres, when in fact it does not; if he must be supposed to have been best acquainted with the quantity; if "every word should have effect in a deed (if it may be) and none be rejected," I think the conclusion must be that the defendant is liable for a deficiency.

It is asked, however, if upon a survey it should have been found that the tract of land contained more than 343 acres, what would have been the consequence? Could the defendant claim compensation beyond the stipulated price? It is evident that he could not; and for the reasons before given, namely, that he has sold all the lands within certain boundaries, and let the quantity be what it may, he can claim no more than what he has agreed to take for *all the lands within such boundaries.* Nor could the plaintiff set up a claim in the present case, had

the defendant omitted to stipulate, in addition, that there were within those boundaries 343 acres. If the words "containing 343 acres" do not amount to such a stipulation, it appears to me that they can mean nothing, for all the lands contained (353) within the boundaries set forth would have passed without these words; and where persons sell lands and use these words merely as descriptive of the land, without intending to create a covenant as to quantity, they add the words *"more or less," "by estimation,"* or some other words which show their intention to be not to bind themselves as to quantity. To use the words of *President Pendleton,* in *Joliffe v. Hite,* 1 Call., 301, "a man wishes to sell his land, and another willing to purchase inquires what is the quantity. The vendor answers, I hold it for so many acres, but I mean to sell the tract as it is, *more or less,* and such is my price." He adds, "This is perfectly understood by planters and farmers of the lowest order." I cannot but think that the principles to be extracted from this case in Call. support the construction which I contend for in the present case. And although I fear that my opinion may be erroneous, since my brethren of the bench do not acquiesce in it, I feel bound to declare it to be my opinion that, in this case, judgment should be entered for the plaintiff.

Cited: Rickets v. Dickens, ante, 348; *Huntley v. Waddell,* 34 N. C., 33.

ROBERTS, INDORSEE OF ELI MOORE, v. JOSEPH JONES.

From Hertford.

1. Debts which can be set-off must be such as are due in the same right: therefore,
2. Where A gave his note to *B, administrator of the estate of C,* and B assigned the note to D, who sued A, A was not permitted to set-off a note given by B to E and by him assigned to A, nor a note given by B to him.

THIS was an action of debt, brought upon a note given by the defendant, Joseph Jones, and one Lazarus Carter, for the sum of £18 10s. and made payable to "Eli Moore, adminis- (354) trator of the estate of John Anderson, deceased," dated 15 November, 1797, and indorsed in blank with the name "Eli Moore." The defendant pleaded a set-off, and offered in evidence two notes: one given by the said Eli Moore to Matthias Jones, "or his order," for the sum of $40, dated 11 January,

first mode, a mathematician would tell you that there was sufficient certainty in it without making any actual survey. But when he should be told that, although a deed called for courses and distances, yet if the distances were longer or shorter, or courses different from those called for in the deed, he must be bound by them, he would probably think it safer to make an actual survey.

It is unnecessary to cite authorities to prove that course and distance must be controlled by real lines and corners. This rule has been long established by the Legislature, and enforced by judicial decisions. Where the lands are described by known and visible boundaries, without course or distance, there is generally a greater necessity for a survey. In the case now before us three of the lines are said to run certain courses and distances to certain corners. The fourth runs from a pine in Abbot's line with the said line to the first station. Those distances may be found to be shorter *in fact* than those (352) called for in the deed. The fourth line, instead of being straight, may form a semicircle, because Abbot's line, with which it runs, may be of that form. Who must be supposed to be best acquainted with these lines and the quantity of acres contained within them, the purchaser or the seller? I apprehend the *seller;* and the parties to the deed for the land in question seem to have thought so too, for, in the deed by which he passes his title, and which evidences the contract of sale, he not only sells the land within the boundaries therein set forth, but sells it as *"containing"* 343 acres. But it is said that this latter member of the sentence is only descriptive of the land, and nothing more. To this I answer, if it be descriptive only, it must be as to quantity, and nothing else. If, then, the seller has by his deed described the land as *"containing"* so many acres, when in fact it does not; if he must be supposed to have been best acquainted with the quantity; if "every word should have effect in a deed (if it may be) and none be rejected," I think the conclusion must be that the defendant is liable for a deficiency.

It is asked, however, if upon a survey it should have been found that the tract of land contained more than 343 acres, what would have been the consequence? Could the defendant claim compensation beyond the stipulated price? It is evident that he could not; and for the reasons before given, namely, that he has sold all the lands within certain boundaries, and let the quantity be what it may, he can claim no more than what he has agreed to take for *all the lands within such boundaries.* Nor could the plaintiff set up a claim in the present case, had

By the words "mutual debts subsisting between the testator or intestate and either party," the Court understands that if an executor or administrator were to bring an action in right of his testator or intestate, a debt due and owing from said executor or administrator in his own right to the defendant could not be set-off; otherwise, the executor would be compelled to pay his own debts with the money of his testator, and thus commit a *devastavit*. If, then, Eli Moore himself had brought this suit in his character of administrator of Anderson's estate, and the defendant could not have set-off the note for $30, upon the ground "that the debts were not due and owing in the same right," it necessarily follows that the note for $40 could not be allowed as a set-off; and if neither could be allowed as
(356) a set-off against Eli Moore, upon the ground before stated, it follows that neither can be allowed as a set-off against his indorsee. Judgment for the plaintiff.

ALSTON AND WIFE ET AL. v. BRANCH AND ARRINGTON.

From Halifax.

1. A devised all his cash on hand, certificates, stock in trade, etc., also all his estate real, personal or mixed, not before devised, "to his three illegitimate daughters, B, C, and D, between them and the heirs of their bodies forever; *but if either of the said children should die before they arrive at the age of eighteen years, or marries, then the estate of the one deceased to be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die before they arrive at the age of eighteen years or marries, then the portion of the two deceased shall descend to the surviving one and the heirs of her body forever; but if all the said daughters should die before they arrive at the age of eighteen years, or marry, and have issue thereby*, then all the cash, certificates, etc., and other property aforesaid to be equally divided between E, F, G, etc."

2. D, one of the daughters, intermarried with J. S., and died *after* attaining the age of eighteen years, but without issue.

3. D's estate became absolute upon her arriving at the age of eighteen years, and upon her death, without issue, did not vest in her surviving sisters.

4. Cross-remainders between the daughters are not to be raised by implication in this case. And the Court will construe the word *or* as *and* to effectuate the intention of the testator; his intention being, that if either of the daughters should die under the age of eighteen years, unmarried, and without issue, that her

estate should go over to her surviving sisters; but if either of them should attain the age of eighteen years, or should marry and have issue, that her estate, before contingent, should become absolute upon the happening of any one of these events.

MICAJAH THOMAS, late of Nash County, deceased, by his last will and testament devised and bequeathed to his three illegitimate daughters, Mourning, Margaret and Temperance Jackson, certain negro slaves, all his cash on hand, certificates, stock in trade, debts due by bond or otherwise, and (357) all and everything else of his estate, real, personal or mixed, not devised or bequeathed to others, and directed the said estate to be equally divided between them when they should arrive at the age of eighteen years, or marry; "between them and the heirs of their bodies forever; but if either of the said children, Mourning, Margaret and Temperance, should die before they arrive at the age of eighteen years, *or marries,* then and in that case my will and desire is that the estate of the one deceased should be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die before they arrive at the age of eighteen years *or marries,* then it is my will that the portion of the two deceased shall descend to the surviving one and the heirs of her body forever; but if *all* my daughters, Mourning, Margaret and Temperance, should die before they arrive at the age of eighteen years, *or marries and has issue* thereby, then the said negroes, with their increase, money, certificates, stock in trade, and all other property which they are entitled to by this will, shall go to and be equally divided between Bennet Boddie, George Boddie, Temperance and Mary Perry, daughters of Nathan Boddie, and my two nieces, Rhody Ricks and Mourning Arrington, to them and their heirs forever."

Mourning, one of the daughters, intermarried with James Branch, and died, after attaining the age of eighteen years, and after having a still-born child. She had no issue born alive. Margaret intermarried with John Alston, and Temperance with James Alston, and the said Alstons and wives filed their bill against James Branch, who survived his wife Mourning, for an account of so much of the estate of the testator, Micajah Thomas, as had been allotted to the said Mourning shortly after her marriage, and as had come to the hands of said Branch; and also against William Arrington, who had been guardian to the said Mourning, to restrain him (358) from paying over to Branch such moneys, belonging to the estate of the said Mourning, as were then in his hands; and the bill prayed that Branch might be decreed to deliver up to

complainants the negroes and other estates, and pay over to them such moneys as were in his hands belonging to the estate of the said Mourning.

To this bill the defendants demurred, and it was submitted to the Supreme Court, Whether the estate vested absolutely in Mourning when she attained eighteen or when she married, or whether it ceased and determined by her death without issue after marriage.

Haywood for complainants.
(378) *Browne* for defendants.

TAYLOR, J. The testator's intention appears to have been that as his daughters attained the age of eighteen years or married, their shares of his estate, which, before those events happened, were contingent, should become absolute. A literal construction of the will would not effectuate this intention; for then, a dying under eighteen years of age, although the daughter was married, or a dying without marriage, although she had attained the age of eighteen years, would give her share over to the survivors. If the word *or* is construed copulatively, then the survivors can claim the shares of the deceased only upon the event of her having died unmarried and under eighteen. But Mourning having reached the age of eighteen, and having also married, there is not the least right in the complainants. To show that the will ought to be thus construed, the cases cited in *Dickenson v. Jordan, post,* 380; clearly prove. Another clause of the will provides that in the event of the death of his daughters under the age of eighteen years,
(379) or marriage and having issue thereby, the estate shall go over to some other persons therein named. It is certainly a sound rule of construction, that every part of a will shall be taken into view, in order to ascertain the design of the maker; and this clause seems to show more clearly that the intention of the testator would not be accomplished by adopting the construction contended for by the complainants; for, then, the claim of the issue of a daughter dying under eighteen might have been defeated, which cannot be thought to have been wished or contemplated by the testator, who has called distant relations into the sphere of his bounty only upon a total failure of all those circumstances upon the happening of which he meant the shares of his daughters respectively to rest so as to become absolute.

In borrowing light from the clause of the will, we must keep in mind this important fact, that the same construction which

would entitle the complainants to their deceased sister's share of the estate must be equally operative to transfer their own shares to the ulterior legatees. The Court cannot now decree in favor of the complainants on the ground of Mourning having died without issue, and hereafter refuse to sustain a bill in favor of the rest of the legatees, in the event of the complainants dying without issue. Moreover, if the complainants had died under the age of eighteen years, leaving issue, the same construction must have taken the estate from that issue and given it to these distant relations, if they are relations at all; for it does not appear that more than two of them are connected with the testator. Upon the whole, the Court are of opinion that the occurrence of either event, to wit, attaining the age of eighteen years, marriage and having issue thereby, was sufficient to vest the shares absolutely in the daughters; and that, consequently, nothing short of the failure of all these events would vest the share of a deceased daughter in the survivors, or in the residuary legatees upon the death of the daughters. Let the demurrer be sustained.

(380)

DEN ON DEMISE OF DICKENSON ET AL. V. JORDAN AND BLOUNT.

A devises to his grandson B a tract of land, "and in case B died before he arrived at lawful age, or leaving no issue, then to his grandson C." B arrived at full age, but died without issue. B took a contingent fee under this devise, which became absolute upon the arrival of B to full age; and the Court will construe the word *or* as *and*, to effectuate the intention of the testator, it being his intention that the estate should become absolute in B upon B's having issue or arriving at full age.

EJECTMENT for lands in the county of Pitt. Special verdict. The facts disclosed in the special verdict were, that William Spier, late of Pitt County, being seized in fee of the lands described in the plaintiff's declaration, made and published his last will, duly executed to pass lands, and bearing date 10 November, 1780; he therein devised the said land "to his grandson, William S. Stewart, and his heirs or assigns forever," and by a codicil to his will, duly executed to pass lands, bearing date 5 June, 1781, further devised, "that in case his grandson, William S. Stewart, died before he arrived at lawful age, or leaving no issue, then he gave the lands devised to William S. Stewart to his grandson, John Spier, his heirs or assigns for-

ever." That the said William Spier afterwards died, without having revoked or altered said will, and upon his death the said William Spier Stewart, by virtue of said devise, entered into the premises, and was thereof seized; that the said William S. Stewart arrived at full age, but died without issue in 1799, leaving the said John Spier him surviving, and having previously published in writing his last will, duly executed to pass lands, and therein devised his interest and estate in the premises to his brother, James Stewart, who afterwards died intestate, leaving the lessors of the plaintiff his heirs at law. The jury prayed the advice of the court in the premises, and if the court should be of opinion that the lands, by virtue of
(381) the limitation aforesaid, passed to the said John Spier upon the death of William Spier Stewart without issue, but after his attaining his full age, they found for the defendant; otherwise, for the plaintiff. The case was sent to this Court from the Superior Court of Law for Pitt County.

Gaston for plaintiff.

TAYLOR, J. By the will of William Spier an absolute fee simple is given to his grandson, William S. Stewart; by the codicil this is converted into a contingent fee, which is
(382) to pass to the testator's other grandson, John Spier, in the event of the first devisee's dying under age *or* without leaving issue. According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated, when it does not contravene the rules of law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate, if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty; yet such would be the effect of a literal interpretation of his will. His intention seems to have been that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age; or, in other words, that both contingencies, to wit, his dying under age, and without leaving issue, should happen before the estate vested in John Spier. To give effect to this intention, it is necessary to construe the disjunctive *or* copulatively; and there are various, clear and direct authorities which place the power of the Court to do this beyond all doubt. Only a few of those cases need be cited.

Soulle v. Gerard, 1 Cro., 525, was a devise to one of four sons, and his heirs forever, and if he died within age, *or* without issue, to his three other sons jointly. The devisee had issue a daughter, and died within age, and it was adjudged that he took an estate tail. In *Wright v. Kemp,* 3 Term, 470, *Lord Kenyon* thus expresses himself: "There is no doubt of the intention of the parties, and where sense requires it there are many cases to show that we may construe the word *or* into *and,* and *and* into *or* (2 Stra., 1175; 3 Atk., 390) in order to effectuate the intention of the parties. Hence, therefore, in order to give effect to the intention of the surrenderer, we must say that when he used the word *or* he meant *and;* and there is no case where any difference has been made between a will and a deed, where the court are considering how the intention of the (383) parties can be effected."

A, being seized of lands holden upon leases for lives, devised to B, his brother, all his real and freehold estates, subject to an annuity to his mother for her life; but in case B should die before he attained the age of twenty-one years, *or* without issue living at his death, to his mother forever. A died, B attained the age of twenty-one years, and then died without issue. It was held that the word *or,* in the devise over, must be construed as *and,* and that the mother took nothing upon the death of B. 5 Bosan. and Pul., 37.

In examining the many cases upon this subject, the point will be found to be completely settled. It is therefore unnecessary to multiply authorities; it is clear upon principle and precedent, and we have no hesitation in saying that judgment ought to be rendered for the plaintiff.

Cited: Turner v. Whitted, 9 N. C., 619.

FREDERICK WHITEHURST ET AL. v. EXECUTORS OF ENOCH PRITCHARD, DECEASED.

A devised all the residue of his estate to be "*equally divided between B, C, D, E's heirs and F.*" The distribution is to be made *per capita,* and each of E's children take an equal share with B and the other legatees.

THIS was a petition brought in Camden County Court by Frederick Whitehurst and others, children of Elizabeth White-

hurst, deceased, against Jeremiah Bright and Timothy Cartwright, executors of the last will of Enoch Pritchard, deceased, for a legacy, which the petitioners claimed under said will.

The testator, after devising his tract of land whereon he
(384) lived, to his wife, and bequeathing one negro slave to his wife and another to Jeremiah Pritchard, devised "all the remaining part of his estate, within doors and without, to be equally divided between Hugh Pritchard, Benjamin Pritchard, Lydia Taylor, Elizabeth Whitehurst's heirs, and Jeremiah Bright, to them and their heirs forever." The petitioners contended that the residuary part of the estate was to be distributed *per capita,* and each of them entitled to a twelfth part thereof. The executors insisted that the residuary part of the estate was to be distributed *per stirpes,* and that the petitioners were jointly entitled to one-fifth thereof. The County Court were of opinion that the residuary part of the estate should be divided into five equal parts, and that the petitioners were entitled to one of these parts, to be equally divided among them. A decree was entered accordingly, from which the petitioners appealed to the Superior Court; and the case coming on to be heard before his Honor, *Judge Taylor,* he gave judgment for the petitioners; but, at the request of the defendants' counsel, ordered the case to be sent to this Court for the opinion of all the judges thereon.

TAYLOR, J. There are no expressions in the will from which an inference can be drawn that the testator intended the division should be *per stirpes;* on the contrary, he uses the word *"equally,"* which plainly excludes such a construction. *Thomas v. Hole,* Cases Temp. Tal., 251. But independently of this, there are some cases which bear directly in point on the general principle, and which cannot be distinguished from the case at bar. A devised his freehold estates to trustees in trust, to sell and divide the money *equally* between R. S., J. S. and the children of M. P. M. P. had three children living at A's death, and the question was, Whether the children should take *per stirpes,*

in which case the money would be divisible into three
(385) parts, to one of which the children would be entitled; or whether they should take *per capita,* in which event the fund would be divided into five parts, and each of the children be entitled to a share in its own right. The chancellor decreed that the distribution was to be made *per capita. Butler v. Stratton,* 3 Bro. Ch. Cases, 367. In the case cited the word "children" is used, in which respect alone it differs from the case before us; but that is a mere verbal difference, which makes

none in principle or the rule of adjudication. For the word "heirs" has been considered synonymous with "children," where there are any competent to take as such (*Loveday v. Hopkins,* Amb., 273); and when applied by testament to personal property, must be understood to mean "next of kin," as they are the only persons designated by law to succeed to that kind of estate. 5 Ves. Jr., 399. The other authorities which relate to the principal point are, *Blackler v. Webb,* 2 P. Wms., 383; *Weld v. Bradbury,* 2 Vern., 705; *Northey v. Strange,* 1 P. Wms., 340; *Wicker v. Mitford,* Harg. Law Tracts, 513. An idea was adopted in the argument of this cause, that the statute of distributions must be resorted to in order to fix the construction of the will; but there is no authority for such a position. It is true that the statute of distributions does, in many cases, furnish the rule as to the object of the bequest, whereby we are enabled to ascertain who shall take under the designation used in the testament; but the proportion in which they shall take must necessarily be established from a just construction of the will. We are of opinion that the distribution must be made *per capita,* and, consequently, that each of the petitioners must share equally with the other legatees.

LOWRIE, J., *contra.* Obliged, as I am, to differ in opinion from my brethren, it affords me great consolation that, if I should be wrong, my opinion in this case will not (386) change the law nor alter the decision of the courts. The rule of law, in all cases of this kind, is founded in good sense; it is that all wills must have an interpretation as near to the mind and intent of the testator as may be. *"Quod ultima voluntas testatoris per implenda est, secundum veram intentionem."* Such construction shall be made of the words of the testator as will satisfy the intention when consistent with the rules of law, and they shall be placed in such order that the intention may be fulfilled. So anxious are courts of justice to arrive at the intention of testators in all cases, that they have sometimes, in cases of ambiguity, traveled out of the will in search of facts, from the knowledge of which they might the better be enabled to arrive at the intention of the maker. No case can be found in which the intention of the testator has not governed the decision of the Court, where that intention could be discovered, and the decision, in conformity thereto, could be made without contravening any known rule of law.

In the case before us the testator gives the residue of his estate "to be equally divided between Hugh Pritchard, Benjamin Pritchard, Lydia Taylor, Elizabeth Whitehurst's heirs,

and Jeremiah Bright." I am here obliged to understand the testator as speaking of the heirs of Elizabeth Whitehurst, as representing her in his mind and in justice entitled only to such part of the residue of his estate as Elizabeth, had she been living, would have been entitled to; that is, to as much as was devised to Hugh Pritchard, or any other of the legatees. Had he not intended them to stand in the place of their mother, he certainly would have named them individually, as he did the other legatees. Had Elizabeth Whitehurst been living, he would, in all probability, have devised to her as much, and no more, than he gave to Lydia Taylor.

As far as I have been able to understand the reasons (387) upon which the decision of the Court in this case has gone, they are grounded upon *Blackler v. Webb,* 2 P. Wms., 383, and *Thomas v. Hole,* Cas. Temp. Talb., 251. In *Blackler v. Webb* the devise was "of the surplus of the testator's personal estate, equally, to his son James, to his son Peter's children, to his daughter Traverse, and to his daughter Webb's children, and his daughter Man. In this case the Lord Chancellor at first inclined to the opinion that the grandchildren should take *per stirpes* only; and the reason why he did not finally so decide is given in his own words: "That the grandchildren could not take according to the statute, or in allusion thereto, forasmuch as the testator's daughter *Webb* was living, and so her children could not represent her." The Lord Chancellor indeed added that to decree the grandchildren should take *per stirpes* would be going too much out of the words of the will, and where, too, the meaning of the testator might be according to the words. It also appeared in this case that the husband of Mrs. Webb was very poor, and had been twice a bankrupt; that from the words of the will it appeared the testator did not intend Mrs. Webb to have the benefit of the devise, and it might be reasonably supposed the testator intended a provision for his grandchildren, such as their parents were unable to make for them. But in this case the Lord Chancellor was governed by the intention of the testator, as far as the same was consistent with the rules of law and could be collected from the words of the will and all the circumstances of the parties concerned. In the case before the Court neither of the circumstances that finally governed the decision of the Lord Chancellor exist. The father here does not appear to have been in indigent circumstances and unable to provide for his children, and the mother was dead, so that they could represent her, and could well take in allusion to the statute of distributions.

The case of *Thomas v. Hole* was a devise of £500 "to the relations of Elizabeth Hole, to be divided equally (388) between them." Mrs. Hole, at the death of the testator, had two brothers living, and several nephews and nieces by other brothers. It was determined, first, that no relations but such as would be entitled under the statute of distributions could take under the devise; and, secondly, that on account of the words, "equally to be divided between them," they should take *per capita*. I am unable to see any bearing that this case can have upon the one before the Court. The word "relations" is so general in its meaning that nothing certain respecting the testator's intention as to what relations should take could be inferred merely from the words of the will. In such cases the statute of distributions is the best guide, and the Court adopted it to ascertain who should take under the word *"relations."* It having been ascertained who were such relations as were entitled to take under the devise, the word "equally" governed the Court in decreeing that they should take *per capita*. In making such decision the Court arrived at the most probable intention of the testator, he having used an expression which proved that each relation of Elizabeth Hole answering the legal description contained in the devise was equally an object of his bounty. All the persons whom the testator intended to take under this devise were described or designated by the word "relations"; the distribution was to be "equal": as soon, therefore, as the devisees were ascertained, by the rule adopted by the court, the mode of distribution was certain and imperious.

The words "heirs of Elizabeth Whitehurst" are here used as *"descriptio personæ,"* and who the testator most evidently meant should take collectively; and the devise ought to take effect in that sense. There are no words in the will informing us that the word "heirs" is used in any other than a descriptive and collective sense, and in that sense it must be taken. The whole of the heirs of Elizabeth Whitehurst, agreeably to any fair grammatical construction of the words, constitute (389) but one devisee in relation to the words, "equally divided," and as such are entitled to take one-fifth part of the residue devised, and no more. I am therefore of opinion that the judgment of the County Court was correct, and ought to be Affirmed.

Cited: Stowe v. Ward, 10 N. C., 606; *Ricks v. Williams,* 16 N. C., 11.

FREDERICK FONVILLE v. SOLOMON CASEY.

From Craven.

An agreement made for a valuable consideration, to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt when produced, and the plaintiff may maintain trover for the colt.

THIS was an action of trover, and the case was sent to this Court upon the question, Whether an agreement made for a valuable consideration, to deliver to the plaintiff the first female colt which a certain mare owned by the defendant should have, did, upon the foaling of such colt, vest in the plaintiff a property to maintain this action.

TAYLOR, J. There are two questions to be decided in this case: first, whether chattels can be sold so as to vest in the buyer, without delivery; and, secondly, whether a sale is good of a thing not *in esse* at the time when the contract is entered into.

The right of a thing may be completely transferred by the agreement of the owner made upon a proper consideration, as is manifest from various cases stated in the books. From the time the sale is completed the seller is indebted to the buyer for a thing in kind, and is bound to deliver the specific thing sold; but delivery, though necessary to the enjoyment, (390) is not essential to the completion of the right. If a horse be sold and die in the stable of the vendor between the sale and the delivery, the vendor may have an action for the price, the horse being the property of the buyer from the time of the sale. So, if the horse live, and the seller refuse to deliver him, the buyer tendering the price may take the horse or bring an action for him. Noy's Maxims, ch. 42. In 1 Strange, 167, it is stated, "that property may by our law be changed without delivery, as a horse sold in a stable; though it is otherwise in the civil law."

The learning relative to the second question is briefly noticed 3 Reeves' Hist. English Law, 372. According to that writer, the law allowed, in the time of Edward IV., contracts to include things not *in esse;* and he cites from the Year-Book a case where a man was permitted to make a contract for the sale of all profits or tithes to come off his land the next three or four years. In the further progress of the principle, a distinction was established between contracts executed and executory; and it was laid down as clear law that a man could not, by an exe-

cuted contract, grant anything of which he was not at the time of the contract actual or potential owner; and every such contract, without such an interest, was held absolutely void. Plow., 432. Thus, if a man should grant all the wood that he should buy thereafter, the grant was void, because he could not make another possessor of a thing of which he was not himself proprietor, either actually or potentially. Hob., 132. For the same reason it is a good plea for a lessee, "that the lessor had nothing in the lands at the time of the lease." Co. Lit., 41, b. Many other cases are brought together to illustrate the distinction, by Powell in his Treatise on Contracts, who (after stating the case of a writ of annuity granted by a prebend after collation, admission and institution, but before induction, which grant is held to be void, though confirmed by the ordinary) proceeds thus in summing up the doctrine: "But we must distinguish the last-mentioned case from those cases in (391) which, although it be uncertain whether the thing granted will ever exist, and it consequently cannot be *actually* in the grantor or certain, yet it is in him *potentially*, as being a thing accessory to something which he *actually* has in him; for such potential property may be the subject of a contract executed, as a grant, or the like. Thus a person may grant all the tithes that he shall have in such a year, yet perhaps he shall have none; for the right to the advowson is in him, and out of that advowson they arise. So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then *in esse*. Upon the same principle, the lord of a manor may part with the profits of his court for a time to come." It is also laid down in Hobart, 132, that the grant of all the tithe wool of such a year is good in its creation, though it may happen that there be no tithe wool in that year. But the grant of the wool which shall grow upon such sheep as the grantor shall afterwards purchase is void.

The principles here laid down and the cases cited in support of them appear fully to warrant the judgment of the court in favor of the plaintiff, who, owning the mare at the time of the contract, had a potential interest in the colts which she might afterwards produce, and might therefore sell them by an executed contract.

LOWRIE, J., *contra.*

(392)

EXECUTORS OF ROBERT ADAM v. THOMAS J. ROBESON.

From Duplin.

In an inquisition of forcible detainer, the proceeding being of a civil nature, the Court will grant a new trial if the jury find contrary to evidence.

THIS cause was brought up to the Superior Court of Law for Cumberland County by a writ of *recordari,* directed to two of the justices of said county, commanding them to certify the proceedings had before them relative to an inquisition of forcible detainer. The cause was removed for trial to the county of Duplin, and at September Term, 1807, a trial was had upon the testimony produced by the parties, when the jury found that the defendant was not guilty of the forcible detainer complained of by the plaintiffs. A rule for a new trial was obtained by the plaintiffs upon the ground that the verdict was contrary to evidence. It was insisted for the defendant, that the rule ought not to be made absolute, although the verdict might be contrary to evidence, because the proceedings in this case were in the nature of criminal proceedings, and the law did not allow the granting of a new trial. The case was sent to this Court upon the rule for a new trial, and all the evidence offered upon the trial in the court below was certified to this Court.

Gaston for plaintiffs.
Williams, of Chatham, for defendant.

HALL, J. After an attentive examination of the evidence offered upon the trial in this case, we are of opinion that the verdict was not contrary to evidence; and, therefore, that the rule for a new trial ought to be discharged. This opinion would render it unnecessary to say anything upon the second point submitted in this case, were there any doubt in the mind of the Court. But as the point has come up, we are willing
(393) to express our opinion, that we do not feel bound by any rule of law to forbid a new trial in a case like the present, did those circumstances exist for which new trials are commonly granted. It is not so much the form of the proceeding as the real subject-matter of it which should be attended to. In *Norris v. Tyler,* Cow., 37, which was an action for a malicious prosecution, and in which there was a verdict for the defendant, the Court, on a motion for a new trial, said, "the defendant had been sufficiently tried once, where the suit was of a criminal nature," and rejected the motion.

It has been decided that new trials ought not to be granted in penal actions. 1 Wills., 17; 3 *id.*, 59. Since that time, however, they have been granted in such actions, for particular reasons, as on account of a mistake or misdirection of the judge. 4 Term, 753; 5 *id.*, 19. In *King v. Frances,* 2 Term, 484, which was a *quo warranto* information, the Court granted a new trial, saying, "that *that* of late years had been considered in the nature of a civil proceeding." Yet 4 Bl. Com., 312, tells us "that it is properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him of his office," but adds that "it is considered at present as merely a civil proceeding." The proceeding in the principal case for a forcible detainer had for its object a restoration of the party to the possession of the premises, in case of *force* found, or, in case of force not found, to leave the possession where it was. 3 Bl. Com., 179, says, "a forcible entry and detainer is an injury of both a civil and criminal nature." The case before us is of the first kind. The defendant, if guilty, may be indicted and fined, in which the offense would be considered a criminal one, and a new trial refused. If the finding of force, by the jury of view before the magistrates, was to be followed not only by a restitution of the possession, but (394) also by fine and imprisonment, a new trial ought not to be granted; but as that finding is only to affect the civil rights of the parties, no good reason seems to exist to forbid the court to grant a new trial.

JAMES MILLER v. LEWIS HUNTER ET AL.

From Lincoln.

Previous to the act of 1809, ch. 8, a debtor imprisoned for debt was entitled to the benefit of the act for the relief of insolvent debtors by remaining within the prison bounds (bond having been given for the keeping thereof) for the space of twenty days.

THIS was a motion for judgment upon a penal bond given by the defendants, conditioned to be void if a debtor who had been arrested upon a *capias ad satisfaciendum* should keep within the prison bounds. The debtor, after giving due notice to the creditor at whose instance he had been arrested, took the oath of insolvency and went at large; and this having occurred

previous to the passage of the act of 1809, ch. 8,* it was submitted to this Court, Whether the debtor was entitled to the benefit of the act for the relief of insolvent debtors by remaining for the space of twenty days within the prison bounds.

TAYLOR, J. The act of 1773, ch. 4, declares that "if any person or persons now are or hereafter shall be taken or charged on *mesne* process or execution for any debt, and shall have remained in *close* prison by the space of twenty days, it (395) shall and may be lawful for two justices of the peace," etc., upon the debtor's complying with the several requisites of the act, to discharge him. The act of 1741, ch. 2, declares, "that for the preservation of the health of all such persons as shall at any time thereafter be committed to the county prisons, the court shall have power to mark out such a parcel of land as they shall think fit, not exceeding six acres, adjoining to the prison, etc., and every prisoner not committed for treason or felony, giving good security to the sheriff of the county to keep within the said rules shall have liberty to walk therein, out of the prison, for the preservation of his or their health. And every prisoner giving such security as aforesaid, and keeping continually within the said rules, shall be and is hereby adjudged and declared to be in law a true prisoner." In a subsequent clause the same act points out the mode of recovery against the securities, if the principal should escape or violate the rules. As the act of 1741 extends the benefits of the bounds to all prisoners (except those confined for treason and felony), upon their giving security, and declares that all those who continually keep within the bounds shall be adjudged to be true prisoners, a majority of the Court are of opinion that the words "a true prisoner" are synonymous with the words "a close prisoner," and that therefore a debtor, having given security as the act directs, and remaining for the space of twenty days within the bounds, is entitled to the benefit of the insolvent debtor's act.

LOCKE, J., *contra*. Having given to the acts of 1741, ch. 8, and 1773, ch. 4, an attentive consideration, I am compelled to give them a construction different from that which a majority of the Court thinks to be correct. The act of 1741 must be supposed to have been well understood by the Legislature which passed the act of 1773; and if the Legislature intended the

*This act declares that any person who thereafter should be imprisoned for debt should not be permitted to take the oath of insolvent debtors, unless he should continue within the walls of the prison for the space of twenty days.

benefit of the act of 1773 to persons remaining in the prison bounds for twenty days, they would have used (396) some words to explain that meaning more clearly; as, that a person remaining in the prison bounds for the space of twenty days should have the benefit of the act; or, that a person being a *true* prisoner for twenty days should be entitled to its benefit. But to me it appears that the Legislature never intended the benefit of the act of 1773 to be extended to any debtor, unless he remained within the walls of the prison for twenty days; and this opinion is confirmed, not only by the expressions used in the two acts aforesaid, but by a consideration of the objects which the Legislature had in view in passing them. In 1741 no provision was made for releasing a debtor from prison until he paid the debt for which he was confined. It was therefore to be presumed that such prisoners would be numerous and the period of their confinement long; and that, too, in jails which were small and filthy. In such a situation the health of prisoners was likely to be impaired from want of exercise and wholesome air. From a spirit of humanity, therefore, the Legislature granted to such prisoners the liberty of the bounds, upon their giving security, in order that if they should abuse this privilege the creditors might have their debts secured; but if they used this privilege in the way directed by the Legislature, for the preservation of their health, and by keeping continually within the bounds, they should be considered *true prisoners;* that is, the creditors should not have an action against the sheriff for an escape, they being in contemplation of law prisoners, and having broken none of the covenants of the bond given for keeping within the bounds. The act seems to intend nothing more upon this point than to protect the sheriff from an action for an escape, to which he would have been exposed but for the provisions of the act.

What, then, was the object of the Legislature in passing the act of 1773? To adopt some mode by which an (397) honest but an unfortunate debtor should be discharged from prison, although he might be unable to pay his debt; and that was by imposing on him not only an oath that he was unable to pay, but also an imprisonment for twenty days, in order that this punishment might induce him to make a fair disclosure of his circumstances, and compel him to pay as far as his property might extend, and to release him from further punishment thereafter. The Legislature, well knowing that a debtor having the benefit of the bounds, was in law a *true prisoner,* carefully omitted, in the act of 1773, this expression, and adopted the expression, *"close prison,"* in contradistinction to

the words, *"a true prisoner,"* a term so clearly indicating the intention of the Legislature as to remove all doubt from my mind. I am therefore of opinion that judgment should be entered for the plaintiff.

(398)

JAMES CHILD, ASSIGNEE, ETC., v. JOHN DEVEREUX.

From Orange.

1. A debtor who is ready to pay his debt when it becomes due is excused from paying interest thereon if the creditor conceals his place of residence and the debtor knows not where to apply to make payment.

2. A gave his note to B, who, before it became due, was arrested and confined in jail; immediately after his confinement in Hillsborough jail he published a notice to his debtors, "that their notes were negotiated to persons living out of the State; but if any wished to make payment, by writing to him at Hillsborough, he would cause their notes to be placed in the hands of a person in New Bern, at a certain time; but if payment were not then made, the notes would be returned." The note of A was not due at the time appointed for B's debtors to make payment in New Bern, and before it became due, B was discharged from jail, and left the State secretly. His place of residence was unknown, and in writing to his friends he would often not date his letters from any particular place. A made inquiry for him, alleging that B held his note, which he wished to discharge; he had funds ready to pay the note, but could not ascertain where it was. Several years after the note became due, B assigned it to C, who gave notice of the assignment to A. A tendered to C the principal debt. C refused to accept it, unless he would also pay the interest. C sued A, who pleaded a "tender and refusal," and the Court were of opinion that the tender was good, and that A was not bound to pay interest upon his note.

THIS was an action on the case, brought on three several promissory notes made payable to Wilson Blount, and signed by the defendant as security for John Haslin. Each note was for the sum of $2,000, and was dated 25 February, 1799. The first was made payable on 25 February, 1803; the second on 25 February, 1804; and the third on 25 February, 1805. The defendant pleaded a tender and refusal, and the only question in the case was, Whether the plaintiff was entitled to recover interest upon the money. It appeared in evidence that in De-
(399) cember, 1801, Wilson Blount, the payee of the notes, was arrested upon a *capias ad satisfaciendum,* and confined in prison at Hillsborough, in Orange County, and that he re-

mained there, either in close jail or within the prison bounds, until 29 December, 1803, when he left Hillsborough, and expressed a wish to a friend to travel into Virginia by the most secret routes, of which he got directions. His imprisonment was a matter of great notoriety, but during the continuance of it he was seen by few persons. On 16 January, 1802, he published in *The New Bern Gazette* a notice dated at Hillsborough on 21 December, 1801, to the following effect, "That the notes of all persons who stood indebted to him were negotiated to persons living out of the State; but to accommodate those who wished to make payment of their debts, he informed them that if they would write to him at Hillsborough to that effect, he would cause their notes to be presented for payment at New Bern, in April then next ensuing; but after that time their notes would be returned." The notes on which this suit was brought were not assigned at the date of this advertisement, nor for some time after they became due. On 8 June, 1805, John C. Vandenhewel, of New York, received two sets of bills of exchange, drawn by Catharine H. Haslin, the executrix of the last will of John Haslin (who had died some time before), in favor of himself, on merchants in London, for £450 sterling each, payable sixty days after sight, which bills were duly accepted and paid. These bills were drawn for the express purpose of paying two of the notes in question, and Mr. Vandenhewel retained the money for this purpose until 23 February, 1808, when it was drawn out of his hands by the defendant. In October, 1805, and at other times afterwards the defendant expressed to Mr. Vandenhewel great anxiety to learn where the notes were, that he might pay them; and in 1804 and 1805 the same anxiety was expressed to Mr. Vandenhewel by Catharine H. Haslin, the executrix. In 1804 the defendant inquired of Frederick Blount, a relative of Wilson Blount, (400) if he knew where Wilson Blount was, and was told that he did not know with certainty, but he had understood that he was in Virginia. Defendant told him that Wilson Blount had his notes, which he wished to discharge, and that the money was lodged in New York for that purpose. On 18 December, 1807, a tender of the principal of said notes was made in New Bern to Mr. Durkin, the then assignee, when the defendant told Mr. Durkin he would not pay the interest, as the money had been ready ever since the notes became due, but he could not ascertain in whose possession they were, Wilson Blount being absent and keeping his place of residence concealed. It also appeared in evidence that after Wilson Blount went to Virginia, he wrote letters to Mr. Hogg, of this State, one of which letters

was dated at Suffolk, and others at no particular place, he appearing desirous of concealing his place of residence; and before he left Hillsborough he told Mr. Hogg there was a large debt for which a writ had been sued out against him, but he had eluded the vigilance of the officer until the writ became returnable; and before an *alias* writ could be sued out he would be out of the State. It was also proved that the defendant had always been able to meet his engagements, and was noted for his punctuality in discharging them.

The jury having found the whole interest against the defendant, a rule for a new trial was obtained, and the case was sent to this Court for the opinion of the judges upon the question, Whether the defendant ought to pay interest; and if so, to what amount?

BY THE COURT. We are of opinion that the defendant ought not to be compelled to pay interest on his bonds, and that the rule for a new trial should be made absolute.

Cited: Peebles v. Gee, 12 N. C., 344.

---

(401)

DEN ON DEMISE OF JAMES TYRRELL v. PETER MOONEY.

From Rutherford.

1. Evidence to prove that the person under whom the defendant claimed was entry-taker at the time he made his entry, and that he did not make his entry in the manner directed by the act of 1777, ch. 1 (which declares the entry void unless made as the act directs), is inadmissible upon the trial of an action of ejectment.
2. Although if the case were "*res integra*," the Court might give a different opinion, the construction which was early given to the act of 1777, ch. 1, not to vacate grants by parol evidence in actions of ejectment, ought not now to be departed from.
3. In many cases, although a statute declares an act *void*, the courts will construe it to mean that the act is only voidable.
4. It is of more consequence that the rules of property should be fixed and notorious than that they should conform to the principles of justice.

UPON the trial of this ejectment, evidence was offered on behalf of the lessor of the plaintiff to prove that the person under whom the defendant claimed was entry-taker of the

county of Rutherford at the time the entry was made upon which the grant issued, under which the defendant claimed title to the lands in question; and that in making his entry he did not comply with the provisions of the act of 1777, ch. 1, which act in section 9 declares, "That if any entry-taker shall be desirous to make any entry of lands in his own name, such entry shall be made in its proper place before a justice of the peace of the county, not being a surveyor or assistant, which entry the justices shall return to the County Court at their next sitting, and the County Court shall insert such entry; and every entry made by or for such entry-taker in any other manner than is therein directed shall be illegal and void, and any other person may enter, survey and obtain a grant for the same lands." This evidence was rejected by the court, and a verdict was rendered for the plaintiff. A rule for a new trial was obtained, and the case was sent to this Court upon the question, Whether, upon the trial of an ejectment, the evidence offered should be received. (402)

LOCKE, J. The many cases occurring in our courts under the act of 1777, ch. 1, compelled the judges at an early period to adopt a construction which excludes the evidence offered in this case. In *Reynolds v. Flinn,* 2 N. C., 106, the Court said: "Here the plaintiff has a State grant, and it would be of the most dangerous consequence to avoid it by parol testimony. It is true that the act of 1777, ch. 1, sec. 9, declares, 'that every right, title, claim, etc., obtained in fraud, elusion, or evasion of the directions of that act shall be deemed void'; but the meaning is that it shall be void as to the State, who may proceed to avoid it by *scire facias;* not that it shall be avoided upon evidence in ejectment by an individual citizen." In *Seekright v. Bogan,* 2 N. C., 177, it was insisted for the defendant that he was entitled to the land, because he made the first entry; but the Court said the rule was, that the first grant gave the best title, not the first entry. The same doctrine was held by the Court in *Andrews v. Mulford,* 2 N. C., 311, 318. Many other cases might be adduced to show that the construction of this act of Assembly has uniformly excluded evidence of this kind in an action of ejectment, and compelled persons who have been injured by fraudulent grants to resort to a court of equity for relief. Many cases might also be adduced to show that where a statute declares an act void, the construction has been that it is only voidable: as *Smith v. Warren,* Roll., 159, where the Court held that, although the statute of additions directs that

if any person be outlawed without addition the outlawry shall be void and of none effect, yet it shall not be void without writ of error. The construction of the act of 1777 has been so long fixed that the Court cannot think at this day of altering it; although if this case was entirely new, and brought be-
(403) fore the Court now for the first time for a decision, a different construction might possibly be given to the act. Rules of property which have become known and fixed, and which have been long acted under, should never be broken in upon but for reasons of the most urgent necessity, and then only by the Legislature. In many instances it is of much more consequence that the rule should be certain and notorious than that it should be conformable to strict notions of justice, especially in a case like the present; for the observance of this rule does not deprive the plaintiff of all remedy; it only compels him to seek it in a court of equity, or institute proceedings under the act of 1798, ch. 7, to vacate the grant, which has been obtained in fraud, elusion or evasion of the act of 1777. The practice of the courts in refusing evidence in an action of ejectment to vacate a grant was well known to the Legislature of 1798, and the passing of the act of 1798, ch. 7, and therein giving a remedy at common law, must be considered as a legislative sanction of this practice. This act, instead of directing grants improperly obtained to be vacated by parol evidence in an action of ejectment, has pointed out a much more safe and effectual method of vacating grants, by declaring that "when any person or persons, claiming title to lands in any of the counties of this State, under a grant or patent from the King of Great Britain, any of the lords proprietors of North Carolina, or from the State of North Carolina, shall consider himself or themselves aggrieved by any grant or patent issued or made since 4 July, 1776, to any other person against law, or obtained by false suggestions, surprise or fraud, such person so aggrieved may file his petition in the Superior Court of Law for the district in which such land may lie, together with an authenticated copy of said grant or patent, which petition shall briefly state the grounds whereon such patent should be repealed and vacated; and thereupon a writ of *scire facias* shall issue to the grantee, patentee or person claiming under
(404) such grant or patent, requiring him to show cause why such grant or patent should not be repealed and vacated." And the act authorizes the court to give judgment that such grant or patent be repealed, vacated and made void.

It has been contended that there has been a departure from the rule early established in the cases of *University v. Sawyer,*

1 N. C., 159, and *Strother v. Cathey, ante,* 162. There is certainly a wide difference between those cases and that now under consideration. In the first, the grant was declared void, not upon the ground that the entry was irregular and that some of the requisitions of the act of 1777 had been omitted; but because that act only authorized the entry-taker to receive entries for *vacant* and unappropriated land; that the Secretary and Governor had only power to issue grants for land of that description; and as the land for which the defendant had obtained a grant had been entered and granted before the entry of the defendant Sawyer was made, his grant was deemed to be *ipso facto* void. So in the case of *Strother v. Cathey,* at the time the land claimed by the defendant was entered, the State had no title to it; it had been previously granted to the Cherokee Indians, and was the property of that tribe solely and exclusively; and every entry-taker was forbidden to receive entries for it. The grant to the defendant was therefore declared void; the State had no title or interest in the land. But the present case is quite different: the land was the property of the State; it was vacant and unappropriated; the officers of State were clothed with power to issue the grant to the defendant, and the only defect complained of is the mode of obtaining the grant. This defect must be remedied, and the injury thereby produced redressed by an application to a court of equity, or by a petition filed in a court of law, under the act of 1798. The evi-
dence was properly rejected, and the rule for a new trial (405) must be discharged.*

*NOTE BY REPORTER.—The principle settled in *University v. Sawyer,* 1 N. C., 159, was this, that grants of escheated or confiscated lands by officers appointed to convey *vacant* lands are void. That case was decided in Edenton Superior Court, at April Term, 1799. The land had been originally granted to a person who left the State before 1771, since which time he had not been heard of. In 1780 part of the same tract of land was granted to another person, whose title had come to the defendant, and in 1788 another part of the same tract was granted to another person, whose title had likewise come to the defendant. It was argued for the defendant that the State, at the time of these respective grants, was entitled to the lands, either by escheat or confiscation; and, having granted them to persons under whom the defendant claims, could not afterwards make a valid grant of the same lands to the trustees of the University. But supposing the grants under which the defendant claimed to be voidable, as having issued by a mistake occasioned by the misrepresentation of the grantees, yet they could not be avoided on a trial in ejectment.

BY THE COURT. The officers authorized by the Government to sell and convey *vacant* lands, which had never been appropriated by any grant, have sold and conveyed lands which have been thus

appropriated; to this their power did not extend, and consequently all such sales and grants are void. The Court will not, on the trial of an ejectment, declare that grants thus circumstanced shall be recalled and canceled; but they are bound, by the positive terms of the act of 1777, ch. 1, sec. 9, to declare that they transfer no title.

(406)

JOHN LEAREY'S EXECUTORS v. LITTLEJOHN & BOND.

From Chowan.

In *assumpsit* for goods sold and delivered by plaintiff's testator, a specific legatee, not entitled to any share of the residuum, is a competent witness to prove the delivery of the goods, unless there be a *reasonable* probability that his specific legacy must be resorted to for the payment of debts; for without this reasonable probability, his interest is too remote to go to his competency.

ASSUMPSIT for goods sold and delivered to defendants by plaintiff's testator. Plea, the general issue. The plaintiff offered as a witness to prove the delivery of the articles, one Charles Learey, the son of the plaintiff's testator and a specific legatee under the will of his father, but not entitled to any share of the residuum of the estate. This witness was objected to by the defendants' counsel as incompetent on the ground of interest. The court held the objection to go only to the credit of the witness, and admitted him. The jury found for the plaintiff, on the testimony of the witness; and a rule for a new trial being obtained, on the ground that improper testimony had been received, the same was sent to this Court. The judges here were divided in their opinion: *Taylor, Locke, Lowrie* and *Wright* being of opinion that the specific legatee was properly admitted as a witness; *Hall* and *Henderson, contra.*

BY THE COURT. It is true, the debts of the testator (unless otherwise ordered by the will) are to be charged, in the first place, upon the residuum of the estate, and that must be exhausted before the legacies can be taken to pay debts. It is also true that the recovery in this case will go to increase the residuum, and *pro tanto* diminish the risk of the specific legatees. But the case does not set forth that it is even probable that the residuum without this recovery would be insuf-
(407) ficient to pay the debts. A remote interest goes to the credit, and not to the competency of the witness, and under the circumstances as stated in this case the interest of the

witness must be considered as very remote, if barely possible. It may be difficult, perhaps impossible, to fix the precise degree of risk which shall exclude a specific legatee having no interest in the residuum, nor pecuniary legacies, nor is it necessary to attempt it in this case. It is sufficient here to say no such interest appears in the witness offered as ought to exclude him.

The following rules are laid down on this subject, and generally acquiesced in. The application of them to particular cases is sometimes attended with difficulty. The interest which disqualifies a witness is, when there is a certain benefit or disadvantage to him attending the decision of the suit one way. Gilb., 225. Where a question arises on which a doubt may be raised, it ought to be restrained to the credit rather than to the competency of the witness. Hard., 360. The possibility that a witness may be liable to an action in a certain event does not destroy his competency. 11 Rep., 163. The interest which excludes must be certain, not contingent. Salk., 283. In a recent case (2 East, 559) it was decided that an occupier, whose name was purposely omitted in the rate, was a competent witness, although it was contended that he was actually interested, for that he might be put on the next rate while the same burthen subsisted. The Court said it was perfectly contingent whether the witness would be interested or not; he might die or part with his property before the making of the next rate, and he could not be rejected on the mere ground of an expectant interest. So in the principal case there may be ample funds, without the aid of this recovery, to discharge all the debts; in which event the witness does not testify to advance his own interest, but that of the residuary legatee. He is also liable to the common risk of a specific legatee arising from the destruction of the property. Without presuming that the estate is (408) solvent or otherwise, as interest is set up against the competency of the witness, that interest ought to be made out, and the condition of the fund ought so to be exhibited to the court that it may be perceived that a verdict for the plaintiff would produce a positive benefit to the witness. His interest can only arise upon some future event, which may or may not happen, and cannot therefore destroy his competency. Rule discharged.

WILLIAM McGIMPSE v. ABNER NASH VAIL.

From Chowan.

1. A sued B in the County Court, and recovered a judgment, from which B appealed to the Superior Court, and gave bond, with C and D his securities, for the appeal. In the Superior Court A was nonsuited, and at the same term the nonsuit was set aside by consent of B, who at the next term confessed judgment; and at the same term judgment was entered up against the securities for the appeal. Execution issued, and the securities moved to set aside the execution as to them, because B had set aside the nonsuit without their consent. Motion disallowed.

2. The securities have no control over the proceedings between the plaintiff and defendant, and are bound by all the rightful acts of the defendant in the course of those proceedings.

THIS was a motion to set aside an execution. The plaintiff brought an action of debt against the defendant in Chowan County Court, and obtained judgment, from which the defendant appealed to the Superior Court, and entered into bond with two securities for prosecuting his appeal and performing the judgment of the Superior Court. At March Term, 1808, of the Superior Court the plaintiff was nonsuited. The plaintiff's counsel being about to move to have the nonsuit set aside and a new trial granted, on affidavits which were shown to the defendant, the defendant proposed to set the nonsuit aside, on condition that each party should pay his own costs up to
(409) that term. This was assented to by the plaintiff's counsel, and the nonsuit was set aside. At the succeeding term judgment was confessed by the defendant, and, on motion, judgment was entered up against the securities for the appeal. On this judgment execution issued, and at the next term the securities moved to have the execution set aside as to them, contending that they were discharged by the nonsuit, and that it was not competent for the defendant to set aside the nonsuit without their consent, so as to bind them *de novo*.

TAYLOR, J. It would be a manifest violation of the acts relative to appeals if securities were discharged by a nonsuit, which was not the ultimate judgment of the court, or which the parties in a spirit of accommodation, or from a sense of justice, mutually agreed to set aside.

The nature of the engagement entered into by the securities to an appeal bond is to perform the judgment of the Superior Court, the meaning of which is its final determination or sentence upon the suit. Until that is rendered the court maintains

jurisdiction over the cause, and may make such orders as justice requires and the legal course of judicial proceedings sanctions. With equal force it might be contended that a verdict in favor of the defendant operated a discharge to the securities, although a new trial should be granted, as that a nonsuit erroneously awarded by the court should produce the same effect, although it were afterwards set aside on a more attentive consideration of the subject. Let the motion be disallowed.

---

(410)

GEORGE HAUSER AND ANDREW BOWMAN v. JOEL MANN AND JOHN BLACK.

From Stokes.

IN EQUITY.

A and B, citizens of Virginia, sold a stud-horse to C and D, citizens of this State, and made a false and fraudulent representation of his pedigree. C and D being sued on their bond for the purchase money, and judgment being recovered, filed their bill charging the fraud, and praying for an injunction. The injunction was granted, and A and B demurred to the bill, and for cause showed that it appeared from complainants' own showing, they had relief at law. Demurrer overruled upon two grounds: (1) That A and B reside in another State, and that C and D ought not to be sent beyond the jurisdiction of our own courts to seek relief. (2) That it being a case of fraud, a court of equity will take cognizance of it, and at once save complainants from an iniquitous recovery at law.

THE bill charged that in February, 1805, Joel Mann, of the State of Virginia, came into this State, having in his possession a stud-horse, which he said belonged to John Black, of Virginia, and that Black had authorized him to sell the horse. He declared to the complainants that this horse was a colt of the imported horse *Shark,* and that his dam was begotten by a noted horse called *Bell-Air.* Under these representations, the complainants purchased the horse at the price of $525, of which they paid down $125 and gave their bond for the balance, which bond Mann immediately and before it became due assigned to Black without responsibility.

The bill then charged that after the purchase of the horse the complainants discovered that the representations made to them by Mann, of the pedigree of the horse, were false; that he was a horse of ordinary blood, and not worth more than

$200; that Mann was the son-in-law of Black, and they
(411) had combined together to cheat some innocent purchaser in the sale of the horse; that Black had instituted suit against them on their bond, and recovered a judgment; that he and Mann both resided in another State, and had no property here to which complainants could resort for compensation for the fraud practiced on them. The bill prayed for an injunction against the judgment, except as to $75, which, with the $125 before paid, complainants alleged to be the full value of the horse.

An injunction was awarded according to the prayer of the bill, and at the next term of the court the defendants demurred, and for cause showed that it appeared by complainants' own showing that they had relief at law. The complainants having joined in demurrer, the case was sent to this Court.

LOWRIE, J. The demurrer admits the allegations of the bill to be true. If the defendants have been guilty of the fraud charged in the bill, the complainants are entitled not only to the relief which they ask, but to have the contract set aside. It is said complainants have relief at law. It is true, they have; but where must they go to seek it? Will this Court refuse them relief because they may go into another State and recover damages in an action at law? Mann came into this State to commit the fraud; Black was his confederate. Here the fraud was committed, and here it ought to be redressed. This Court is of opinion that the demurrer ought to be overruled, upon either of two grounds: (1) That the defendants reside in another State, and that complainants ought not to be sent beyond the jurisdiction of our own courts to seek redress. (2) That this being a case of fraud, a court of equity will take cognizance of it, and at once save the complainants from an iniquitous recovery at law. Let the demurrer be overruled.

Cited: Henry v. Elliott, 51 N. C., 177.

(412)

ROBERT TEAR v. JOHN D. WHITE'S ADMINISTRATOR.

From Bertie.

Judgment *quando assets acciderint* was rendered against an administrator for £1,835 4*s.* 2*d.*, to be discharged on the payment of £917 4*s.* 1*d.* Plaintiff sued out a *scire facias* suggesting assets and reciting a judgment for £917 12*s.* 1*d.*, but not reciting it as a judgment *quando*, etc. *Nul tiel record* and *no assets* were pleaded to the *sci. fa.:* The court sustained the plea of *nul tiel record*, and gave judgment for the defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs.

THIS was a *scire facias* suggesting assets. Pleas, *nul tiel record, no assets.* The *scire facias* was returned to Bertie County Court, at November Term, 1807, and recited a judgment for "£917 12s. 1d., with interest thereon from 20 October, 1805, until paid, for debt." The record offered in evidence was of a judgment for "£1,835 4s. 2d., to be discharged on payment of £917 4s. 1d., with interest, etc., *when assets,* etc." The plaintiff had a verdict upon the plea of "no assets," and judgment was given for him upon the plea of *"nul tiel record."* The defendant appealed to the Superior Court, and at October Term, 1809, the jury were charged with the trial of the issue of fact, and by the consent of parties a juror was withdrawn and the case continued. At the next term the plea of *"nul tiel record"* being submitted to the court, the variance between the judgment recited in the *scire facias* and that set forth in the record offered in evidence was insisted on; and the court adjudged that there was no such record as that recited in the *sci. fa.* Because, (1) The *sci. fa.* recited a judgment for £917 12s. 1d.; the record produced was for a judgment of £1,835 4s. 2d. (2) The *sci. fa.* recited an absolute judgment; the record produced was of a judgment *when assets.*

The plaintiff moved for and obtained a rule upon the defendant to show cause why the judgment upon the (413) plea of *"nul tiel record"* should not be set aside and he have leave to amend his writ of *scire facias.* The rule was sent to this Court.

BY THE COURT. The rule may be made absolute upon payment of costs.

DEN ON DEMISE OF EVANS v. THOMAS SATTERFIELD.

From Chowan.

A devise is color of title, and seven years' possession under it bars the right of entry.

THE question in this case was, Whether a devise be such color of title that seven years' possession under it bars the right of entry. The facts were that Thomas Haskins being seized of the lands, in 1762, devised them to his wife, Mary Haskins, for life, remainder to his son William in fee. William died without issue, and the estate in remainder descended to his nephew, Thomas Haskins, who also died without issue, and the estate descended to *his* nephew, Thomas Haskins, who in 1782 conveyed to John Coffield, Jr., and he, in 1787, conveyed to John Coffield, Sr. He devised the land to his son Jeremiah, *then of full age,* who died in 1797, intestate, leaving a son named John and two daughters, Nancy and Betsey. Nancy died at eleven years of age; Betsey intermarried with Evans, the lessor of the plaintiff, and was under age when this suit was brought, as was also her brother John.

Mary Haskins, the devisee for life, died in 1792, having devised the lands to her son John Haskins in fee. John Haskins died in 1793, having devised the lands to his daugh-
(414) ter Anne, since intermarried with Thomas Satterfield, the defendant, who had been in possession of the lands from 1793 to the bringing of this suit in 1808.

BY THE COURT. The defendant has been in possession, claiming under the devise to his wife, fifteen years before the commencement of this suit. When his possession commenced, Jeremiah Coffield was of full age, and labored under no disability, so that the only question in the case is, Whether the devise to the defendant's wife be such color of title that seven years' possession under it bars the right of entry. The Court are of opinion that the devise is good color of title, and that judgment be given for the defendant.

DEN ON DEMISE OF PENELOPE CLINTON ET AL. V. ENOCH HERRING.

From Sampson.

1. A *constructive* possession of lands under color of title for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the State.
2. Nor will the *actual* possession for twenty-one years, of different parts of the lands covered by the color of title, by purchasers from him to whom the color of title was made, avail him as to the parts of the lands not sold and actually possessed; for they are distinct tracts, held by different persons in different rights.

THE principal question in this case was, Whether, under Laws 1791, ch. 15, a *constructive* possession of lands for twenty-one years, under known and visible boundaries, bars the right of entry under the State. Upon the trial of the ejectment the lessors of the plaintiff gave in evidence a deed bearing date 3 November, 1761, executed by Felix Kennon, Sheriff of Sampson County. This deed recited a judgment recovered by John Sampson against one Vaughan, and an execution that issued on the judgment, which was levied on the land, (415) and that John Sampson became the purchaser. The record of the judgment and execution was not produced. In 1783 John Sampson devised the lands to Richard Clinton, who died intestate in 1794, leaving Thomas, Richard, Owen and William, his sons and heirs at law. Thomas conveyed to Penelope Clinton his undivided share, and she, with the said Richard, Owen and William, were the lessors of the plaintiff.

The defendant claimed title under a grant from the State, which issued in 1800, about two years before the commencement of this suit. The fact that the lands were ascertained and identified under known and visible lines or boundaries was admitted, for the purpose of getting the opinion of the court upon the main questions in the case, which were:

1. Whether a *constructive* possession of the lands for more than twenty-one years, under the sheriff's deed aforesaid, will, under the act of 1791, ch. 15, bar the entry of any person under the State; it being admitted that as to so much of the lands covered by the said deed as is claimed in this suit the lessors of the plaintiff and those under whom they claim have not had twenty-one years' *actual* possession.

2. Whether, if a *constructive* possession be not sufficient to bar the right of entry, the *actual* possession for twenty-one years of divers different parts of the lands covered by the sheriff's

deed, by purchasers from Sampson, shall avail him and those claiming under him, as to the parts not sold and actually possessed.

Upon the trial of this case in the Superior Court the jury found a verdict for the defendant under the charge of the court, and a rule for a new trial being obtained, the same was sent to this Court.

HALL, J. Laws 1791, chapter 15, declares, "That (416) where any person or persons, or the person or persons under whom he, she or they claim, shall have been or shall continue to be in possession of any lands, tenements or hereditaments whatsoever, under titles derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by indorsement of patents, or other colorable title, for the space of twenty-one years, all such possessions of lands, tenements or hereditaments under such title shall be and they are hereby ratified, confirmed and declared to be a legal and good bar against the entry of any person or persons under the right or claim of the State, to all intents and purposes whatsoever, any former act, law or usage to the contrary in anywise notwithstanding: *Provided, nevertheless,* that the possession so set up shall have been ascertained and identified under known and visible boundaries or lines." Before this act, no possession, however long and however well ascertained and identified under known and visible lines or boundaries, could have ripened into a title against the State. Where the title was out of the State, and in an individual, the act of 1715 had declared that an adverse possession for seven years should bar the right of entry under such title. The obvious policy of the act of 1791 was to favor persons who took *actual* possession of lands under known and visible boundaries, and remained in such possession for twenty-one years. It certainly could not have been the intention of the Legislature to confirm the titles of those who claimed lands under some one or other of the titles mentioned in the act, and who had been only *constructively,* not *actually,* possessed of the lands for twenty-one years.

As to the second question made in this case, it is to be observed that when Sampson sold a part of the lands covered by the sheriff's deed to him, and the purchaser took actual possession of such part, that possession extended to the limits (417) of the lands so purchased, and no further. The purchaser had no more right to the possession of the residue of the lands (the title to which still remained in Sampson)

than Sampson had to the possession of the land he had sold. They were two distinct tracts, held by different persons, in different rights. It is not like the case of one person holding possession on behalf of and under the title of another. If the person had not purchased, but taken possession of a part of the tract in the name of the whole, for and on behalf of Sampson, and by his permission, that would have been Sampson's possession. The rule for a new trial must be discharged.

ISAAC WILLIAMS v. HENRY BRANSON.

From Moore.

1. Freighters for hire upon navigable rivers are to be considered as common carriers, and subject to their liabilities.

2. The words of a bill of lading, "dangers of the river only excepted," signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment.

THIS was an action on the case, to recover damages of the defendant for the loss of a hogshead of sugar. The case was, that the defendant was the owner of a boat that carried freight on the Cape Fear River, between Fayetteville and Wilmington. His skipper contracted with the plaintiff's agent at Wilmington to carry from that place to the town of Fayetteville, certain articles, for which he gave a receipt in the following words, to wit:

WILMINGTON, 11 December, 1806. (418)

Received of Mr. Henry Williams, in good order and well conditioned, the following articles, viz.:

1 Hogshead of Rum,
5 do. of Brown Sugar, etc.,

which said articles, I promise to deliver to Messrs. Nesbit & Campbell at Fayetteville, the dangers of the river only excepted, their paying freight for the same. HUGH MCCALL.

One of the hogsheads of sugar mentioned in the receipt being larger than common, could not be stowed away in the hold of the boat, but was placed behind on the hatches, a place where

sugar was sometimes, but not usually carried, except large hogsheads. There was at the time a considerable freshet in the river. About ten miles above Wilmington a large cypress tree stood on the bank, leaning over the water; and at this place there was a bend in the river. In passing this tree, the stream being rapid, the stern of the boat was driven in towards the bank, and passed under the tree, which forced the hogshead overboard, together with the skipper, who was trying to save it.

It appeared in evidence upon the trial of the cause that the skipper, after having deposited the other articles in his boat, did not wish to take on board this hogshead of sugar on account of its size, and he informed the plaintiff's agent that if the hogshead were taken it must be placed on the hatches; and the hogshead was placed there with his knowledge, he saying if the skipper would not take it he should take nothing.

It further appeared in evidence that at the time the hogshead was forced overboard the boat was in the common way, and that this was the only way along which boats could be got up the river in times of high water. That boats are got up the river by hooking and gigging; and that whilst the hands were engaged in the bow of the boat in hooking to the trees and limbs which stood on the bank or stretched over the water, the rapidity of the current drove the stern of the boat under the tree, which forced the hogshead overboard. The cypress tree
(419) was a noted one, and well known to the skipper and crew of the boat; there appeared to be no neglect in the skipper and crew, unless the circumstances as stated constitute neglect in contemplation of law.

The jury found a verdict for the defendant, and a rule for a new trial being obtained upon the ground that the verdict was contrary to evidence, the same was sent to this Court.

TAYLOR, J. If the loss of the property were occasioned by such an accident as came fairly within the scope of the exception contained in the bill of lading, or receipt, the defendant ought not to be responsible; otherwise, he must be, upon every principle applicable to the duty of common carriers.

The words of that paper are, "dangers of the river only excepted," and signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment.

Nor, indeed, is every loss proceeding from a natural cause to be considered as happening by a peril of the sea; for if a ship perish in consequence of striking against a rock or shallow, the

circumstances under which the event takes place must be considered, in order to decide whether it happened by a peril of the sea or by the fault of the master. If the situation of the rock or shallow be generally known, and the ship not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master (Abbot, 169); or if the shallow were occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God or the perils of the sea. *Id.*

Apply this principle to the case before us, and consider whether the circumstances under which the loss happened do not announce a degree of carelessness or temerity in the skipper that ought to render the defendant responsible (420) to the plaintiff.

The force of the current in the time of a freshet, and the increased danger thence arising from the cypress tree, were well known to the skipper. He should not have adventured to pass the bend at such a time, without employing adequate precautions to obviate the danger, if, indeed, any precaution could have been sufficient. But in prosecuting that part of the voyage at such an unseasonable time, he took the risk upon himself. The state of the river, it is true, was equally known to the plaintiff, but he neither knew the consequent hazard connected with this part of it, nor does it appear that he urged the departure of the skipper in the face of such danger.

Here, then, was no tempest—no irresistible impulse of natural causes, but a fixed and well-known danger, which every man accustomed to the navigation would calculate upon meeting, if he proceeded on the voyage at such a time, with only the usual number of hands; and even these, it appears, were all employed at the bow of the boat, whilst none were left in the stern to counteract the tendency of the current to force that part under the tree. Thus, in *Amis v. Stephens,* 1 Stra., 128, where the plaintiff put goods on board the defendants' hoy, which sunk in consequence of a sudden gust of wind, as she came through a bridge, the Court held the defendant not liable, as the accident was occasioned by the act of God; but they said, if the defendant had ventured to shoot the bridge at a time when the general bent of the weather was tempestuous, he would have been liable. The rule for a new trial must be made absolute.

(421)

PATRICK BROWN v. EPHRAIM FRAZIER AND BARNETT PULLIAM.

From Hertford.

1. An action cannot be maintained upon a bond given by a person arrested upon a *capias ad satisfaciendum*, to keep within the limits of the rules of the prison.

2. Laws 1759, ch. 14, give to such bond *the force of a judgment*, and authorize the creditor to have execution thereon, upon motion in court.

THE plaintiff having recovered a judgment against Frazier, sued out a *capias ad satisfaciendum*, upon which Frazier was arrested, and he entered into bond, with Barnett Pulliam his security, for keeping within the rules of the prison. The bond was taken by the sheriff, and by him assigned to the plaintiff in the manner prescribed by the act of 1741, ch. 18, and 1759, ch. 14. The defendant Frazier having gone without the rules of the prison, the plaintiff brought an action on the bond, given by him and Pulliam for his keeping within the rules; and the question in the case was, Whether the action could be sustained.

BY THE COURT. Laws 1759, ch. 14, declare, "That bonds given in pursuance of the act of 1741, ch. 18, by any person committed on a *capias ad satisfaciendum*, shall, by the sheriff taking the same, be assigned to the party at whose instance such person was committed to jail, and shall be returned to the office of the clerk of the court from whence such execution issued, there to be safely kept, *and shall have the force of a judgment;* and if any person who shall obtain the rules of any prison, upon giving bond and security as aforesaid, shall escape out of the same before he shall have paid the debt, or damages and costs, according to the condition of such bond, it shall be lawful, and full power and authority are hereby given to the court where such bond is lodged, upon motion of the
(422) party for whom such execution issued, *to award execution* against such person and his securities for the debt, or damages and costs, with interest," etc. This act gives to the bond *the force of a judgment*, and authorizes the party to have execution sued out thereon, upon mere motion. Here the plaintiff has brought an action on the bond as a common deed. He

cannot elect to treat it as such; he cannot divest it of the attributes given to it by the act. He must consider it as clothed with the force of a judgment, and take the remedy thereon which the act prescribes. Judgment for the defendants.

Cited: Whitley v. Gaylord, 48 N. C., 287; *S. v. Pearson,* 100 N. C., 417.

JESSE CARTWRIGHT v. JESSE GODFREY ET AL.

From Camden.

Upon the trial of issues of fact in a suit in equity, a motion to read in evidence in his behalf defendant's answer, which had been replied to and its allegations disproved by more than one witness, was disallowed.

COMPLAINANT filed a bill in equity, to which defendant put in his answer, which was replied to, and depositions were taken. The allegations of the answer were contradicted by more than one witness; and upon the trial of the issues of fact in the cause it was moved on behalf of the defendant that his answer be read in evidence in his behalf. The motion was overruled, and the jury found for the complainant upon the issues submitted to them. Defendant obtained a rule for a new trial upon the issues, on the ground that his answer ought to have been admitted as evidence. The rule was sent to this Court.

BY THE COURT. The court below did right in refusing to admit the defendant's answer to be read in evidence. Let the rule be discharged.

(423)

WILLIAM AND P. M. SLOCUMB v. NEWBY & PLEAS.

From Perquimans.

It is no objection to the competency of a witness, that he is counsel for the plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money.

THIS was a question as to the admissibility of a witness. The plaintiffs claimed a debt in this case, and their counsel offered

himself as a witness. He was examined on his *voire dire,* and declared that he was not otherwise interested than as counsel; that there was no special agreement between the plaintiffs and himself; but if the debt were recovered, he should charge a commission for receiving and remitting the money. He was admitted as a witness, and a verdict being given for the plaintiffs, a rule for a new trial was obtained by the defendants, on the ground that improper testimony had been received. The rule was sent to this Court.

BY THE COURT. The objection to the witness goes to his credibility, and not to his competency. The rule discharged.

Cited: White v. Beaman, 96 N. C., 287; *Grant v. Hughes, ib.,* 188.

(424)

CARLTON v. BLOODWORTH.

From Duplin.

In an action of trover for a negro slave, the plaintiff offered in evidence a certified copy from the registry, of the bill of sale for the slave, he first making an affidavit that the bill of sale was not in his possession or power; that he had delivered it to the register to be registered, and on application for it afterwards was told by the register that it was lost. There was a subscribing witness to the bill of sale, who resided in the State, and he was not produced as a witness: *Held,* that the copy cannot be received in evidence: (1) on account of the insufficiency of the proof as to the loss of the original; (2) because the act of 1792, ch. 6, requires that in all trials where the title of a slave is evidenced by a written transfer, the execution of such writing shall be proved by the subscribing witness, if alive and within the State; and there cannot be less reason for requiring the subscribing witness where a copy is offered in evidence than where the original is offered.

THIS was an action of trover for a negro slave. The plaintiff offered in evidence a certified copy from the registry of a bill of sale for the slave, upon an affidavit by him made that the original was not in his possession or power; that he had delivered it to the register to be registered, and had afterwards applied for it, and it could not be found. It appeared from the copy that there was a subscribing witness to the original, and it was admitted that he resided in the State. The admission of this copy in evidence was objected to upon

two grounds: (1) the insufficiency of the proof as to the loss of the original; (2) that the subscribing witness ought to be in court, to be examined touching the execution of the original. The court permitted the plaintiff to proceed, and reserved the points made as to the admissibility of the copy in evidence; which, upon a verdict being found for the plaintiff, were sent to this Court.

BY THE COURT. Each of the objections made to the admission of the copy in evidence is good. It appears by the affidavit of the plaintiff that the original was lost after he delivered it to the register; and if it be competent for the (425) plaintiff to prove that he delivered it to the register, it surely is not also competent for him to prove that the register lost it. The fact of loss, according to the plaintiff's own showing, could be proved by the register, and that fact must be proved before the copy shall be read.

As to the second objection, it is declared by the act of 1792, ch. 6, "that in all trials at law, where a written transfer or conveyance of a slave or slaves shall be introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution of such writing; but if such witness shall be dead, or removed out of the State, then the probate and registration of such writing may be given in evidence." There cannot be less reason for requiring the subscribing witness where a copy is offered in evidence than where the original is offered. Judgment that the verdict be set aside and a nonsuit entered.

---

(426)

DANIEL SMITH v. OBED WILLIAMS.

From Onslow.

1. A having sold a slave to B, and given to B a written instrument, setting forth "that for the consideration of $300 he had sold the slave to B, and that he would warrant and defend the slave against the claims of all persons," but setting forth nothing as to the soundness of the slave; B shall not be permitted to set up a parol warranty of soundness, and recover on it against A.

2. This would be to add by *parol* to a written contract.

3. The parties, by making a written memorial of their transaction, implicitly agree that in the event of any future misunderstanding, that writing shall be referred to as the proof of their act

and intention; that such obligations as arise from it by just construction or legal intendment shall be valid and compulsory on them, but that they do not subject themselves to any stipulation not set forth in the writing. For if they meant to be bound by any such, they might have added them to the writing, and thus have given to them a clearness, a force, and a direction which they could not have by being trusted to the memory of a witness.

4. Where anything forming part of the contract is left out of the writing by fraud or accident, or anything forming no part of the contract is inserted by fraud, parol evidence may be received to prove these facts.

5. But where nothing is omitted or inserted in the writing, through fraud, accident or mistake, parol evidence shall not be received to show that the agreement of the parties was otherwise than the writing sets forth.

THIS was an action on the case for a breach of warranty in the sale of a negro. The declaration stated, "that the defendant warranted the negro to be sound and healthy as far as he knew; that the negro was unsound and unhealthy, being afflicted with a rupture, and that the defendant well knew he was so afflicted at the time of the warranty and sale." The jury found a verdict for the plaintiff, subject to the opinion of the court on a point of law reserved in the course of the trial, viz., Whether the plaintiff could be permitted to prove such a warranty, when at the delivery of the negro upon the sale he received from the defendant a written instrument, but (427) not under seal, in the following words:

Know all men by these presents, that I, Obed Williams, of the county of Onslow and State of North Carolina, have bargained and sold unto David Smith, of the aforesaid county and State, one negro fellow, named George, about thirty years of age, for and in consideration of $300. I do warrant and defend the said negro against the lawful claim or claims of any person or persons whomsoever, unto him, the said Smith, his heirs and assigns forever. Given under my hand this 29 January, 1802.

OBED WILLIAMS.

Teste: GEORGE ROAN.

This instrument had been proved in Onslow County Court, and registered. The point reserved was sent to this Court.

TAYLOR, J. The contract between the parties is stated at length in the special case, and appears to be both formally and substantially a bill of sale in all respects, except as to the want

of a seal. This omission, however, is so important in the legal estimation of the paper that it cannot be classed amongst specialties, but must remain a simple contract, on which no additional validity can be conferred by the subsequent registration. For I do not apprehend that any legal effect can be given to a paper by recording it, if that ceremony were not required by law.

It might not, however, be an useless inquiry to consider whether a paper containing nearly all the component parts of a specialty or deed does not advance some greater claims to be respected in the scale of evidence than such proofs of a contract as rest upon the memory of witnesses.

The solemnity of sealed instruments has been, from the earliest periods of the law, highly regarded, because the forms and ceremonies which accompany them bespeak deliberation in the parties, and afford a safe ground for courts and juries to ascertain and settle contested rights. This de- (428) liberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus in Plowd., 308, B.: "It is said that deeds are received as a *lien final* to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed; for, first, the deed is prepared and drawn; then the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears that the law gives to deeds a respect and importance which it denies to any other contracts; not an empty and unmeaning respect, but such as properly arises from the existence of all those circumstances which are calculated to fix and make authentic the contracts of men.

A contract cannot be a deed if either it is not prepared and drawn, if the seal be not affixed, or if it be not delivered; but, still, if the deliberation is inferred from all these circumstances, it is fair reasoning to presume some degree of deliberation from any one or two of them, and to give to the paper, when it is introduced as evidence of the parties' transaction, precisely such credence as belongs to it from its partaking more or less of the nature of a deed.

To give this rule a practical application to the case before us, the conclusion would be that as the paper is without a seal, it cannot be a deed, and is therefore not decisive evidence as that instrument is; it is not a *final lien;* but as it possesses some of the essentials of a deed, viz., a formal draft and delivery, so far it shall be regarded as evidence of no slight nature of the fact it is introduced to establish.

The writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and notwithstanding the splendid eloquence of Cicero to the contrary, in his declamation for the poet Archias, the sages
(429) of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact and leaves in the mind uncertain opinions, imperfect notions and vague surmises.

It is, however, contended by the plaintiffs that contracts by our law are distinguished by specialty and by parol; that there is no third kind, and that whatever is not a specialty, though it be in writing, is by parol. To establish this position, a case is cited from 7 Term, 350, by which it is certainly proved. But the position being established, whether it will authorize the inference that parol evidence is admissible to vary and extend written evidence will best appear from an examination of the case, and from some attention to the question which called for the solution of the Court.

In the case cited the declaration states that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against her generally. From this statement it is manifest that the promise could not be extended beyond the consideration which was in another right as administratrix, and made to bind the defendant personally. But in order to avoid this objection it was contended that the promise being reduced to writing the necessity of a consideration was dispensed with, and that the fact of its having been made in writing might well be presumed after verdict, if necessary to support the verdict, which latter position was conceded by the Court.

It is, then, perfectly evident that the only question in the case was whether *nudum pactum* could be alleged against a contract in writing, but without seal. That it could not had been a notion entertained by several eminent men, and amongst the rest by the learned commentator, who observes that "every bond, from the solemnity of the instrument, and every note,
(430) from the subscription of the drawer, carries with it internal evidence of a good consideration." This doctrine, however, is inaccurate as applied to notes, when a suit is brought by the payee, and is only correct as between the indorsee and drawer. To demonstrate the propriety of the objection it became necessary for the Court, in *Ram v. Hughes,* to

enter into a definition and classification of contracts into those by specialty and those by parol, to which latter division every contract belongs that is not sealed, though it may be written. Every written unsealed contract is, therefore, in the strict language of legal precision, a parol contract, and, like all others, must be supported by a consideration.

But let it be considered what the Court would have said if the case, instead of requiring them to give a precise and comprehensive definition of contracts, had called upon them for a description of the evidence by which contracts may be supported. They would, I apprehend, have said (because the law says so) the evidence which may be adduced in proof of a contract is threefold: (1) matter of record; (2) specialty; (3) unsealed written evidence, or oral testimony. It is therefore necessary to distinguish between a contract and the evidence of a contract, for though they may be, and are, in many cases, identified, yet in legal language a parol contract may be proved by written evidence. This is the case now before us, and this brings me to the question it presents, which I understand to be, whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing. The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed that in the event of any future misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligations as arose from the paper, by (431) just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing, and thus have given them a clearness, a force and a direction which they could not have by being trusted to the memory of a witness. For this end the paper is signed, is witnessed, and is mistakenly recorded. But the plaintiff says, besides the warranty of title contained in the writing, the defendant made me another warranty as to the quality, which I can prove by a witness present at the time; and though he has complied with the warranty which was committed to writing, yet he has broken the one which was orally made, whence I am injured and seek compensation.

We are then to decide whether the law deems such proof admissible.

By the common law of England there were but few contracts necessary to be made in writing. Property lying in grant, as

rights and future interests, and that sort of real property to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until stat. 32 Henry VIII., which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. II., commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English courts, with respect to the admission of verbal testimony to add to or alter written instruments, in cases coming within the provisions of that statute. That law being posterior to the date of the charter under which this State was settled, has (432) never had operation here; so that the common law remained unaltered until 1715, when a partial enactment was made of the provisions of the English statute.

The law must therefore be sought for in cases arising before the statute of frauds, and expositions upon that statute are no otherwise authoritative than as they affirm or recognize the ancient law. But I believe there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.

In Plowden, 345, *Lord Dyer* remarks: "Men's deeds and wills, by which they settle their estates, are the laws which private men are allowed to make, and they are not to be altered, even by the King, in his courts of law or conscience."

In *Rutland's case,* 5 Coke, the Court resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain testimony of slippery memory, and should be perilous to purchasers, farmers, etc.

The case of *Meres v. Ansel,* in 3 Wilson, 275, is directly in point upon the general principle, to show that parol evidence shall not be admitted to contradict, disannul or substantially vary a written agreement.

In 2 Atkins, 384, *Lord Hardwicke* says: "It is not only contrary to the statute, but to common law, to add anything to a written agreement by parol evidence."

All written contracts, says *Justice Ashurst,* whether *by deed or not,* are intended to be standing evidence against the parties entering into them. 4 Term, 331.

1 Ves., Jr., 241, parol evidence to prove an agreement made upon the purchase of an annuity that it was redeemable, was rejected.

In a very recent case, in 7 Ves., 211, we are furnished (433) with the opinion of the present master of the rolls, *Sir William Grant,* than whom no judge ever ranked higher in the estimation of his contemporaries for profound and accurate knowledge in legal science and a proper and discriminating application of well-grounded principles to the cases which arise in judgment before him. His observations are: "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply."

To these authorities I will add a decision of the Circuit Court of Pennsylvania, because it appears to be in principle the very case under consideration.

An action on the case was brought by the assignee of a bond against the assignor, upon a written assignment in general terms. The plaintiffs offered oral evidence to show that the defendant had expressly guaranteed the payment of the bond. *Chase, J.* "You may explain, but you cannot alter a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt upon the face of the instrument. But the proposition now is a plain case of alteration, that is, an offer to prove by witnesses that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has been so adjudged in the Supreme Court, in *Clark v. Russel,* 3 Dal., 415. I grant that chancery will not confine itself to the strict rule, in cases of fraud and of trust; but we are sitting as judges at common law, and I can perceive no reason to depart from it."

I suppose the above authorities are amply sufficient to establish the proposition for which they are cited, and (434) therefore I forbear to make any other references for that purpose. The exceptions to the general rule may be comprised under the heads of fraud, surprise, mistake, in cases of resulting trust, to rebut an equity or to explain latent ambiguities; and there may also be some other cases which cannot be properly ranged under the titles specified. But as the case

stated is, in my opinion, directly opposed by the general rule, so far as it seeks to establish the proof of warranty as to quality, by parol, and presents no fact to bring it within any of the exceptions, it would be needless to multiply authorities with respect to them.

As to the exception on the ground of fraud, I conceive that only occurs where something intended to have been inserted in the contract is omitted through the misrepresentation or unfair practice of one of the parties. In such case the omission may be supplied by parol evidence. But there is no allegation here that the additional warranty was intended or understood by either party to have been inserted in the agreement.

It is also necessary to attend to the nature of the remedy adopted by the plaintiffs in this case, which is founded on the warranty, and is in *assumpsit*. The questions arising upon the general issue are, whether the warranty was made, and whether it was true at the time of making. For, if the warranty were made and not complied with, it is wholly immaterial whether the defect was known to the seller or not—a principle that seems to extend to every case where the plaintiff proceeds on the warranty. But in an action of deceit, the *scienter* or fraud is a material part of the declaration, and must be brought home to the defendant to authorize a recovery against him, and in such case it seems from the authorities that proofs of the fraudulent conduct of the defendant may be drawn from sources *dehors* the written contract. It cannot be contended

(435) that inserting the *scienter* in a declaration on the warranty will convert it into an action of deceit founded on *tort*. In the latter action the knowledge of the defendant, or something equivalent to it by which the fraud is charged, is a substantive allegation, and must be proved; in the former, it is merely surplusage, and may be rejected.

Cited: Streator v. Jones, post, 451; *Dickenson v. Dickenson,* 6 N. C., 280; *Pender v. Forbes,* 18 N. C., 251; *Bonham v. Craig,* 80 N. C., 229; *Cobb v. Clegg,* 137 N. C., 158.

STATE v. JAMES ENGLISH.

From Burke.

The prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it.

THE question submitted to the Court in this case was, Whether the prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it.

TAYLOR, J. It is necessary in many cases, to prevent a failure of justice, that a prosecutor should be indorsed on a bill, where no individual is willing to become one. The Governor represents the supreme executive power of the State, and, according to the theory of our Constitution, is bound to attend to the due enforcement and execution of the laws. For this particular object he represents the sovereignty of the people in its highest and ultimate capacity; and, although he cannot personally direct, may tacitly influence the subordinate officers in their details of duty more immediately within their control. A discretion resides in the prosecuting officer to indorse on a bill as prosecutor whomsoever he may think fit; subject, however, to the interference of the court in cases where the exercise of such a power may operate injuriously to an individual. The practice of indorsing the Governor is to be preferred, since it cannot, in any instance, produce inconvenience (436) to an individual, and may tend to the due execution of the laws by the punishment of offenders, where otherwise no individual would step forward to prosecute. The Court, however, go on the presumption that the discretion will, in every case, be exercised with a view to the public advantage; and thus guarded, it ought to be sanctioned.

HENRY WARREN v. ALSEY HIGH.

From Wake.

The probate of a will attested by only *one* witness being caveated in the County Court, an issue of *devisavit vel non* was made up under the direction of the court; and the jury found that "the deceased did, in the said will, devise *both real and* personal property." The caveator appealed, and in the Superior Court the jury found that "the paper-writing offered as the will did devise as to personals, but not as to real estate." The executor offering the will for probate shall pay the costs, it being his folly to insist in the County Court that the will, being attested by only *one* witness, could pass the real estate.

A PAPER-WRITING, purporting to be the last will of William Martin, deceased, was offered for probate in Wake County Court, and a caveat was entered to the probate thereof. An issue of *devisavit vel non* was made up under the direction of the court. The paper-writing was attested by only *one* witness, and the jury returned for their verdict, "that the deceased did devise both real and personal property, in the paper-writing offered in evidence as the last will and testament of the said William Martin." The defendant, the caveator, appealed to the Superior Court, in which court, the issue being submitted to a jury, they found, "that the paper-writing purporting to be the last will and testament of William Martin, deceased, doth devise as to personals, but not as to real estate." A
(437) question was then made who should pay the costs. Which question being sent to this Court,

HALL, J., delivered the opinion of the Court: It appears that the only real question here decided was as to the real property, under the issue of *devisavit vel non*. In the County Court a verdict was found for the plaintiff, although there was only one subscribing witness to the will. The defendant very properly appealed, and a verdict was found in favor of him in the Superior Court. As our law requires at least two subscribing witnesses to a will of land, and as it was supposed by those who had an agency in deciding this question in the County Court, that that requisite might be dispensed with, the defendant was necessarily driven to his appeal; and of course, the plaintiff ought to pay the costs.

HENRY WILLIAMS, CHAIRMAN, ETC., v. JOHN HICKS.

From Warren.

The distributees of an intestate's estate may bring suit for their distributive shares against the securities of an administrator upon the administration bond, without any previous proceeding against the administrator, although he has made no settlement of his administration with the court, nor filed an account current.

JOHN WITHERSTON having died intestate, letters of administration were granted to Nancy Witherston, who entered into bond, with John Hicks her security, for the faithful administration of the estate of her intestate. She returned to the County Court an account of sales of the estate, and then removed out of this State to parts unknown, having made no settlement with the court, nor returned an account current of her administration. The estate left two children, (438) Rebeccah and Gabriel; and for the purpose of recovering their distributive shares of his estate, they brought an action of debt against John Hicks for the nonperformance of the conditions contained in the bond given by the administratrix, to which he was security, and upon the trial gave in evidence the account of sales aforesaid, for the purpose of showing the amount of the estate. A verdict was given for the plaintiff, subject to the opinion of the court upon the question, Whether this suit could be maintained before some proceedings were had against the administratrix, whereby it could be ascertained what was the surplus remaining in her hands for distribution.

BY THE COURT. We are of opinion the suit can be maintained on the bond against the security, although the administratrix has not settled her accounts, nor any proceedings been had against her to ascertain the surplus in her hands for distribution. Judgment for the plaintiff.

Cited: Smith v. Fagan, 13 N. C., 301; *Governor v. Carter,* 25 N. C., 340; *S. v. McKay,* 28 N. C., 401; *Strickland v. Murphy,* 52 N. C., 244.

HENRY VERVELL v. JOHN TREXLER.

From Rowan.

The plaintiff in a writ of *certiorari* is entitled to file affidavits, after those of the defendant have been filed, either to confirm those upon which the writ was obtained or to disprove those filed by the defendant; and he is entitled to a continuance of the cause to procure such affidavits, if he make it appear to the satisfaction of the court that he cannot procure them at the term at which the defendant's affidavits are filed.

UPON the affidavit of Henry Vervell, a writ of *certiorari* was granted, directed to the clerk of the Court of Pleas and Quarter Sessions for Rowan County, commanding him to certify
(439) the record of certain proceedings had in a cause depending in the said court, wherein John Trexler was plaintiff and the said Vervell was defendant. This writ was returnable to April Term, 1810, of the Superior Court of Law for Rowan County; at which time Trexler, the defendant to the writ, filed his affidavit in opposition to the affidavit of Vervell and in avoidance thereof. Vervell prayed time of the court until the next term to file affidavits in confirmation of the first affidavit by him made to procure the writ of *certiorari* and to disprove certain facts set forth in Trexler's affidavit, and for this purpose he moved for a continuance of the cause upon affidavit. A question was made, Whether the plaintiff in *certiorari*, after the defendant has filed his affidavits, is entitled to take and file other affidavits, either in confirmation of that upon which the writ was granted or in opposition to those filed by the defendant; and also entitled to a continuance of the cause for the purpose of procuring such affidavits, where it appears to the court upon affidavit that he had not the opportunity of taking them at the term at which the defendant's affidavits were filed. The question was sent to this Court.

BY THE COURT. The plaintiff in the writ of *certiorari* is entitled to file affidavits, after those of the defendant have been filed, either to confirm those upon which the writ was obtained or to disprove those filed by the defendant; and he is entitled to a continuance of the cause to procure such affidavits, if he make it appear to the satisfaction of the court that he cannot procure them at the term at which the defendant's affidavits are filed.

(440)

WILLIAM MUIR'S EXECUTORS v. JOHN STUART'S REPRESENTATIVES.

From Halifax.

IN EQUITY.

A court of equity has the power to appoint the clerk and master of the court guardian to infant defendants, to appear and answer for them, and can exercise this power without the consent of the clerk and master.

THE death of Thomas Stuart, who had been appointed guardian to the defendants in this case, being suggested, a motion was made by complainant's counsel that the clerk and master of the court be appointed guardian to the infants, to appear and answer for them. The master refused to accept the appointment, and it was submitted to this Court to decide whether the court could make such appointment without the consent of the master.

BY THE COURT. This power has been exercised by the Court of Chancery in England (Nels. Ch., 44; 2 Ch. Ca., 163), and no objection can be urged to the exercise of the power by our courts of equity. Much good may result to infants by a proper exercise of it, and no injury can result to the clerk and master. Let the appointment be made.

(441)

JOHN HAMILTON v. ALLEN JONES' EXECUTOR.

From Halifax.

1. An order entered of record for a *scire facias* to issue to make the representative of a deceased defendant a party to a suit, will prevent an abatement of the suit.
2. The order being made, it is the business of the clerk to issue the *scire facias*, and if he fail to do it, the plaintiff shall not be prejudiced by his neglect.

THE question in this case was, Whether an order entered of record for a *scire facias* to issue to make the representative of a deceased defendant a party to the suit will prevent an abatement. The facts were that the death of Lunsford Long, the defendant, was suggested at the first term after his

death, and application was made to the court at the same term for a *scire facias* to his representative to make him a party. This application was entered of record, and an order made for the *scire facias* to issue; but the *scire facias* was not issued for two terms, and his representative, when called in, pleaded in abatement that no *scire facias* had issued until two terms had elapsed after the death of Lunsford Long. The plea was sent to this Court.

HALL, J. We are of opinion that the suit has not abated. The act of 1786, ch. 14, sec. 1, declares "that it shall and may be lawful for executors, etc., to carry on every suit or action in court after the death of either plaintiff or defendant; and may be proceeded on by application, in the same manner as appeals are carried on under Laws 1785, ch. 2, sec. 2," which latter act declares, "that no appeal shall be abated by the death of either plaintiff or defendant, but may be proceeded on by application of the heirs, executors, etc., of either party."
(442) If an application is to be made, to whom can it be made except to the court? In this case it was made to the court, and within the time required by the law. That being done, it was the business of the clerk to issue process against the executors of the deceased defendant, to bring them into court and make them defendants to the suit. He has failed to do so. This was not the plaintiff's fault; he has done all that he could, and ought not to be injured. It is no answer to this to say that the executors of the deceased defendant should be made defendants to the suit, within the time limited by law, by actually serving process on them. This would prove too much, because it will be admitted that if process had issued and had not been served by the sheriff, it might issue a second time. Nor does this case resemble one where a party may take out process at pleasure, without making application to the court. In that case the party must see that the process is delivered to the sheriff. In this case, an order having been entered on the record that process should issue, the clerk should have obeyed it without any special application for that purpose. Plea overruled.

Cited: Love v. Scott, 26 N. C., 80.

(443)

STATE v. JOHN PATTERSON ET AL.

From Cabarrus.

1. The Superior Court of one county has no jurisdiction of criminal offenses committed in another county, although both of the counties belonged to the *same judicial district* before Laws 1806, ch. 2.

2. Although the *district* Superior Court had jurisdiction of offenses committed in each of the counties composing the district, and the act of 1806, ch. 2, declares that the Superior Courts of the counties established by that act shall have "the same jurisdiction which the district Superior Courts had before the passing of that act," yet the object of the Legislature in passing the act of 1806, being to make the administration of justice more convenient to the people, the words, "the same jurisdiction," relate to the *extent or jurisdiction as to subject-matters*, and mean, when applied to criminal offenses, that a county Superior Court shall have the same jurisdiction of them, if committed within the limits of the county, that the district Superior Court had, if committed within the limits of the district.

THIS was an indictment for a riot; and the riot was charged to have been committed in the county of Mecklenburg. The defendants pleaded to the jurisdiction of the court, the bill having been found in the Superior Court of Cabarrus. The prosecuting officer for the State demurred to the plea, and the defendants having joined in the demurrer, the case was sent to this Court.

LOCKE, J. Laws 1806, ch. 2, declare, "that the State shall be divided into six judicial circuits; that a Superior Court shall be held at the courthouse in each county in the State, twice in every year, which courts shall have the same jurisdiction that the present Superior Courts of Law and Courts of Equity now have and exercise." To ascertain the jurisdiction given by this act we must examine the jurisdiction given by the preceding acts to the Superior Courts as they existed in 1806. Laws 1777, ch. 2, declare "that this State shall be and is hereby divided into districts, that is to say, the districts (444) of *Wilmington, New Bern, Edenton, Halifax, Hillsboro, Salisbury, Morgan* and *Fayetteville,* in each of which a court for the trial of causes, civil and criminal, shall be established, by the name of the Superior Court of Law in the district where the same shall be held, which shall have jurisdiction, etc., of all pleas of the State and criminal matters, of what nature, degree or denomination soever, except that all indictments

for assaults, batteries and petty larcenies and actions for slander shall originate in the County Court," etc. This act gives to the district Superior Court jurisdiction over all criminal offenses committed within each of said districts. The counties of *Iredell, Stokes, Rockingham, Guilford, Montgomery, Cabarrus, Mecklenburg* and *Rowan* composed the district of *Salisbury;* and any criminal offense committed in any one of these counties was to be tried in the district of Salisbury; and if the Superior Court, by the act of 1806, has precisely the same jurisdiction which before the act the district of Salisbury had, it would follow that the offense charged in this case to have been committed in the county of Mecklenburg would be cognizable in the Superior Court of Cabarrus; and the words of the act of 1806 are comprehensive enough to receive such a construction. But we cannot believe that the Legislature intended that the words should receive such a construction; for it would be at variance with the object which they professed to have in view in passing the act, to wit, the convenience of suitors. The only evil of the district system complained of was the distance which suitors and witnesses had to travel to the seat of justice; and to remove this evil the Legislature declared that the people should have their business transacted in their own counties, where it would be convenient and easy for parties to attend. But if we give to the act the construction contended for, this object will be entirely defeated; for, instead of bringing a criminal from the county of Rockingham to Salisbury for
(445) trial, he might be taken to Mecklenburg, or any other remote county which belonged to the district of Salisbury, and the act which the Legislature passed for the convenience of the citizens would be found inconvenient and oppressive. The Legislature intended to give to the several county Superior Courts jurisdiction over the same offenses and civil matters which the district Superior Courts had in 1806, limiting the territory within which that jurisdiction was to be exercised to the county in which the court was held. In all indictments it must appear that the offense charged was committed within the territorial jurisdiction of the court. It appears from the indictment in this case that the riot charged was committed in Mecklenburg; the Superior Court of Cabarrus cannot take jurisdiction of it. The demurrer must be overruled, and the plea sustained.

Cited: S. v. Lewis, 142 N. C., 635.

WILLIAM ELLIS v. GEORGE GEE, LATE SHERIFF OF CHATHAM.

From Chatham.

A paper-writing upon which a constable arrests a debtor and imprisons him, not running in the name of the State, nor being directed to any ministerial officer, nor purporting to be signed by a justice of the peace, cannot be deemed a judicial process; and the sheriff is not guilty of an escape in permitting the debtor thus imprisoned to go at large.

THIS was an action on the case for an escape. The facts were that Archibald Briant, being arrested by one of the constables of Chatham County upon a process purporting to be a *capias ad satisfaciendum,* was committed to the jail of said county, and George Gee being the sheriff of said county, permitted him to go at large. Upon the trial of the case the plaintiff's counsel offered in evidence a warrant sued out at the instance of the plaintiff against Archibald Briant, (446) and a judgment entered thereon for the sum of $25. He also offered in evidence the process, purporting to be a *capias ad satisfaciendum,* upon which Briant had been arrested and committed to jail. It was in the following words:

You are hereby commanded to execute the body of Archibald Briant, and proceed against him as the law directs, where no goods and chattels are found, to raise the sum of $25, with interest. 26 July, 1808. WM. RAGLAND.

The defense set up by the defendant's counsel was that Briant *had not been in prison on execution.* He admitted that a constable had arrested him and put him into prison, and that the defendant had permitted him to go at large; but he insisted that the paper-writing offered in evidence upon which Briant had been arrested and imprisoned had neither the form nor substance of a *capias ad satisfaciendum,* nor could it be deemed a judicial process to any intent: it did not run in the name of the State, was not directed to any ministerial officer, did not recite nor refer to any judgment which had been recovered, nor did it purport to be issued by a justice of the peace; that therefore, the arrest and imprisonment of Briant had been illegal, and the defendant was not guilty of an escape in permitting him to go at large. And of this opinion was the court, and the plaintiff was nonsuited. A rule to set aside the nonsuit and grant a new trial being obtained, on the ground that the opinion of the court was incorrect, the same was sent to this Court.

BY THE COURT. Let the rule be discharged.

(447)

ALFRED McCAY ET AL. v. WILLIAM McCAY, AN INFANT, ETC.

From Rowan.

A had a child born after he had made and published his will, and in his last sickness inquired of the physician who attended him, and who was one of the witnesses to the will, "whether he thought him dangerous, and begged for a candid answer, for that his youngest child was unprovided for, and he wished to make some provision for the child." The physician answered, "that he thought him better, and expressed a wish that he would postpone such a business to some future period." A died, and it was held that the birth of the child after the making of the will, together with the declarations of A to his physician, of the wish to make a provision for the child, did not amount to a revocation of the will.

THIS was an issue of *devisavit vel non,* made up under the direction of the court, upon a paper-writing offered for probate as the last will of the late Judge McCay. The facts are set forth in the following special verdict:

"The jury find that Spruce McCay, Esquire, did, on 23 February, 1803, duly make and publish his last will and testament in the words and figures following, that is to say, etc. And the jury further find that the same was executed in the presence of two credible witnesses, no one of whom was or is interested in the devise of the said lands, and attested by them; and that the testator was, at the time of making and publishing said will, of sound mind, memory and understanding. And they further find that after the making and publishing of the said will, to wit, in April, 1804, the said testator had a child born of his wife, Elizabeth, named William, who is the defendant and caveator against the will. And they further find that afterwards, viz., in the fall of the said year 1804, the said Spruce McCay was sick, and attended by Dr. William Moore, one of the witnesses to the said will, and that he, in a conversation then had with the said Dr. Moore, asked the said doctor if he thought him dangerous, and begged the said doctor to be candid in his answer, for that his youngest child, meaning the said William, was unprovided for, and he wished to make some provision for the said child. Upon which the said Dr. Moore said, he thought him better, and would prefer his postponing such a business to some future period. And they further find that the said testator, at the time of such conversation, intended to make
(448) some provision for his youngest child William. And they further find that the said testator was much pleased with the said William, called him a fine boy, and was as fond

of him as of any other of his children. And they further find that the said testator, afterwards, to wit, on 25 February, 1808, died without altering or revoking his said will, unless what is stated as aforesaid alters or revokes the same. If, therefore, the court should be of opinion that the birth of said child, attended with the circumstances aforesaid, is a sufficient revocation of the said will, then they find that the paper-writing now produced is not the last will and testament of the said Spruce McCay, deceased, and that he did not devise. But if the court should be of a contrary opinion, then they find that the same paper-writing is the last will and testament of the said Spruce McCay, and that he did devise."

The foregoing special verdict was sent to this Court for the opinion of the judges.

BY THE COURT. We are of opinion that the birth of the child, together with the other circumstances set forth in the special verdict, do not in law amount to a revocation of the will.*

---

(449)

JOHN STREATOR v. NATHANIEL JONES.

From Wake.

IN EQUITY.

Bill to redeem. Complainant charged that he borrowed $800 of defendant, and to secure the repayment thereof had executed to defendant an absolute deed for certain lands; that it was agreed between him and the defendant that he might redeem the lands, and that defendant, upon receiving his money, with interest, should reconvey them; but it was agreed that this part of their contract should not be put in writing, and that, *as to it*, complainant should *trust to the defendant's word.*" Defendant, in his answer, denied the parol agreement charged in the bill, and set up an absolute purchase of the lands: *Held*, that parol evidence cannot be received to prove the agreement charged in the bill, for such evidence would contradict the deed of complainant.

COMPLAINANT charged in the bill that in 1799 the defendant, Nathaniel Jones, advanced to him on loan the sum of $800, and

*This case was tried upon the issue, and the special verdict found at October Term, 1808, of Rowan Superior Court. The case attracted the attention of the General Assembly to the subject, and at their session in November, 1808, they passed an act "to provide for children born after the making of their parent's will."

that for securing the repayment thereof, with 25 per cent interest, on or before the expiration of that year, he executed to the defendant an absolute deed for divers tracts of land. That it was agreed at the time the deed was executed that the lands should be redeemable on complainant's paying the money borrowed, and 25 per cent interest thereon; that complainant expressed a wish that a paper-writing, setting forth that the lands were redeemable, should be annexed to the deed; but defendant objected, and said, "Here, take the money you want, and trust to my word"; and that, trusting to the word of the defendant, he executed the deed. The complainant then charged that he had continued in possession of the lands until 1801, when he was evicted. The bill prayed that complainant might be permitted to have an account taken under the direction of the court, of the principal money advanced to him by defendant, and the interest which had accrued thereon; that the
(450) court would decree that upon the sum thus ascertained being paid to the defendant, he should reconvey to the complainant the said lands. The complainant offered to release the penalty given by the statute against usury, etc.

To this bill the defendant filed his answer, and set up an absolute purchase of the lands. He denied that any agreement was made that the lands should be redeemable, and admitting the fact that complainant retained possession until 1801, alleged that complainant continued in possession as his tenant, and had agreed to pay a certain rent annually for the said lands, so long as he remained in possession thereof.

The case was sent to this Court upon the question, Whether complainant could be permitted to prove the parol agreement charged in the bill to have been entered into between him and defendant at the time the deed was executed, to wit, that he might redeem the land upon paying the money advanced to him, and the interest.

BY THE COURT. The bill does not charge any circumstances of fraud, mistake or accident, nor does it charge that complainant was a needy man, and that defendant, knowing his necessitous circumstances, took advantage thereof, and thereby procured an absolute deed, when only a mortgage was intended. The bill states a case of two men, equally free and competent to contract, having made an agreement as to the conveyance of a tract of land, part of which agreement they reduced to writing and part thereof by mutual consent still rested in parol; and this latter part is in direct contradiction to the former. That part of the agreement which is in writing sets forth an

absolute and unconditional sale of the lands; that part which by mutual consent was not reduced to writing sets forth that the sale was not absolute, but conditional, and that complainant was entitled to have the lands reconveyed to him upon his performing the condition. In other words, the com- (451) plainant asks to be permitted to contradict by parol evidence his written contract with the defendant, and assigns no other reason for this request than that he and the defendant had voluntarily agreed that the writing should not set forth their contract truly. It would be too palpable a violation of the rules of evidence to permit the complainant to set up a parol agreement contradictory of the written one. He agreed "to trust to the defendant's word"; upon that he must still place his trust. This Court can give him no relief. The rules of evidence applicable to this case are discussed at large in *Smith v. Williams, ante,* 426.

Cited: Dickenson v. Dickenson, 6 N. C., 290; *Sowell v. Barrett,* 45 N. C., 54; *Bonham v. Craig,* 80 N. C., 227, 8, 9; *Egerton v. Jones,* 102 N. C., 283; *Norris v. McLain,* 104 N. C., 160; *Sprague v. Bond,* 115 N. C., 533.

Doubted: Streator v. Jones, 10 N. C., 433.

---

(452)

STATE v. JOHN OWEN.

From Wake.

1. In an indictment for murder, where the death is occasioned by a wound, bruise, or other assault, *the stroke* must be *expressly laid.* But an indictment, charging "that A. B., with a certain stick, etc., in and upon the head and face of C. D., then and there feloniously, etc., did strike and beat, *giving* to the said C. D. *then and there* with the stick aforesaid, in and upon the head and face of the said C. D., several *mortal wounds,* of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle *giving* and the words *then and there* connect this allegation with the mortal wounds in the second clause.

2. In an indictment charging "that A, feloniously and of his malice aforethought, assaulted B, and with a sword, etc., *then and there* struck him, etc.," the first allegation, of *feloniously and of his malice aforethought,* applied to the assault, runs also to the stroke to which it is essential.

3. Where in an indictment for murder the death is charged to be occasioned by *a wound*, a description of the wound must be set forth in the indictment—its length, breadth, depth, etc., where they are capable of description; and the omission of such description is fatal to the indictment.

4. Where the death is charged to be occasioned by *a bruise*, a description of its dimensions, etc., is not necessary.

THE defendant being found guilty of the offense charged in the following bill of indictment, it was submitted to this Court whether sentence of death could be pronounced against him on the said bill.

STATE OF NORTH CAROLINA, } *Superior Court of Law,*
WAKE COUNTY. } *October Term, 1809.*

The jurors for the State upon their oaths present, that John Owen, late of the county and State aforesaid, cabinet-maker, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on the night of 21 April, 1809, with force and arms, at the city of Raleigh, in the county of Wake aforesaid, in and upon one Patrick Conway, in the peace of God and the State then and there being, feloniously, willfully, and of his malice aforethought did made an assault; and that he, the said John Owen, with a certain stick, of no value, which he, the said John Owen, in both his hands then and there had and held, the said Patrick Conway, in and
(453) upon the head and face of him, the said Patrick Conway, then and there feloniously, willfully, and of his malice aforethought, did strike and beat, giving to the said Patrick Conway, *then and there,* with the pine stick aforesaid, in and upon the head and face of him, the said Patrick Conway, several *mortal wounds,* of which said several mortal wounds the said Patrick Conway then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said John Owen the said Patrick Conway, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

OLIVER FITTS, *Attorney-General.*

Seawell, for the prisoner, took two exceptions to the indictment: 1. That in that part which states the mortal wounds, the stroke is only laid by implication. 2. That the indictment does not set forth *the length and depth* of the mortal wounds.

Potter, for the *Attorney-General,* for the State.

The judges were unanimous in opinion that the first ex- (457)
ception taken to the indictment could not be supported.

TAYLOR, J., delivered the opinion of the Court. In endeavoring to form a correct opinion on the points argued in this case, it is the design not less than the duty of the Court to conform to the principles of law as they are laid down in works of authority. We disclaim all right of giving to them a rigorous construction to aid the prisoner's acquittal or of relaxing their true meaning to effect his condemnation. Like every other citizen in his situation, he is entitled to the full benefit of the constitutional provisions devised to promote the security of all; and though the most atrocious criminality may have
been proved to the satisfaction of the jury, yet legal (458)
condemnation ought never to be separated from legal
proofs. And we cannot too strongly impress it on our minds that want of the requisite precision and certainty which may, at one time, postpone or ward off the punishment of guilt, may, at another, present itself as the last hope and only asylum of persecuted innocence. It must, however, be confessed that there is, in the ancient reasoning on this branch of the law, a degree of metaphysical and frivolous subtilty strongly characteristic of the age in which it was introduced, when at the revival of letters the first efforts of learning were laborious and rude, and scarcely a ray of common sense penetrated the clouds of pedantry. Were a system now to be established, it is probable that much of the jargon of the law would be exploded, and that no objection would prevail against an indictment, or any other instrument, which conveyed to the mind, in an intelligible form, its intended impression. But we must follow in the footsteps of those who have preceded us until the Legislature think fit to interfere; though we have no wish to extend the particularity further. On this subject the sentiments of an eminent judge have been properly read by the counsel for the State; since, although he was conspicuous for his tenderness to criminals, as well as for every manly and Christian virtue, yet he condemned this nicety as a reproach to the laws. We would also refer to the opinion of another illustrious man delivered a century afterwards, a man who had devoted a long life to the cultivation of the science he so ably dispensed.

The first exception taken to this indictment is that in that part of it which states the mortal wound the stroke is only laid by implication.

The rule laid down by the writers is that where the death is occasioned by a wound, bruise or other assault, the stroke should

be expressly laid. In every case, however, where the objection has been heretofore taken, there is an omission of the express charge of the stroke in that part of the indictment wherein it is charged in this. In *Long's case,* 5 Co., the word *"dis-*
(459) *charged"* is used. There seems to be no case where a repetition of the stroke is required after the participle *giving,* if it has been directly charged in the preceding clause.

A critical examination of *Long's case,* supposing it to be of good authority, which is by no means certain, will show that instead of supporting, its tendency is to repel the exception in this case. The material words of the indictment, necessary to be taken into view, in *Long's case,* were "that the aforesaid H. D. a certain pistol, etc., loaded with powder and a leaden bullet, etc., in and upon the said H. Long discharged, giving to the said H. Long then and there with the leaden bullet aforesaid, so as aforesaid sent forth from the said pistol by the said H. D., one mortal wound, etc." The court in giving judgment, divided the objection into two parts: (1) the clause before the words "giving him"; (2) the clause containing these words; and they resolved that the first clause was not sufficient of itself; for although H. D. discharged the pistol upon him, it may be that he was not struck by it. Then the second clause cannot make it good, for the clause of "giving," etc., depends on the said first clause, and describes the wound only to show it to be mortal, which ought to appear by the first sentence to be given; because in that case the participle determines the verb. But here it did not appear by the first clause that a stroke was given, and then "giving," etc., cannot supply it, for that is a participle depending upon the verb precedent, and the verb precedent is "discharged," and "discharged" may be without a stroke. Although the grammar and logic of that case are refined, yet the Court do not in their reasoning intimate the necessity of inserting *after* the participle "giving," the manner, the *quo modo* of the wound. Their opinion is that if there had been a direct allegation of a stroke in the first clause, the
(460) participle "giving" would have connected it with the second clause and made the indictment good. But the decision was not approved of in after times; for *Lord Holt* said that by his consent they would not be so nice again, and that there was not a case in the law like that; and its authority is admitted to be considerably shaken in a recent case.

To sustain this exception would be to establish a precedent more exceptionable than that in *Long's case;* and instead of promoting perspicuity and simplicity of language in indictments, would seem only to introduce tedious and perplexing

tautology. Yet this is not required, even in the statement of those terms of art so peculiarly appropriated to the description of particular offenses that they cannot be supplied by any circumlocution. For where the indictment charged that A feloniously and of his malice aforethought assaulted B, and with a sword, etc., *then and there* struck him, etc., the first allegation of *feloniously and of his malice aforethought* applied to the assault, ran also to the stroke to which it is essential. An indictment against Mary Nicholson for poisoning Elizabeth Atkinson stated that the prisoner did *willfully, feloniously and of her malice aforethought.* mix poison, viz., white arsenic with flour and milk, with the intent that the same should be afterwards taken and eaten by the deceased, *and* the said flour and milk so mixed with the poison as aforesaid, *then and there delivered to the deceased,* etc. This was holden sufficient by all the judges, without adding the words "feloniously and of her malice aforethought" to the allegation of delivering the poison. For they considered that these words ran by the word *"and"* and the words *"then and there."* But if the sentence had not been so connected, a different construction would have prevailed.

The indictment before us contains a direct allegation of a stroke, accompanied with the necessary terms of art, and all the sentences are connected together by the words *and* and *then and there;* so that in all these respects it bears the strict form of carrying forward from one sentence to another (461) the criminal charge. Further repetition might have obscured, but could not have illustrated the charge, nor could it have brought the indictment nearer to the most approved precedents. On this point, therefore, the Court are unanimously of opinion against the prisoner.

As to the second exception, the judges were divided in opinion: *Hall, Lowrie* and *Henderson* being of opinion that the exception was fatal to the indictment, and that sentence of death could not be pronounced against the prisoner upon the indictment in consequence thereof; *Taylor* and *Locke* being of a contrary opinion.

HENDERSON, J., observed, that if the Court were now about to decide on the propriety of requiring the dimensions of any wound charged in an indictment to be mortal, to be set out, he should be clearly of opinion that it was unnecessary. But as immemorial custom, and all the authorities have determined, though not for reasons satisfactory to his mind, that wherever a death is stated to be occasioned by a *wound,* that the length,

breadth and depth of the wound should be described, where they are capable of description; and as the word *wounds* is used in this indictment, the dimensions of those wounds ought to have been stated. The judge observed that a precedent had been produced from West's Symbolcography, which did not seem to make this necessary; but this was not an authority: it was a mere precedent, upon which no judgment had passed, and the omission might have been by mistake. On examining all the books, he could find no authority where a death is charged in an indictment to be produced by a wound, that the dimensions of the wound are omitted. It is not for the Court to determine why this description is required; it is enough for them
(462) to know that the law does require it; and believing both from authority and precedent that this was the law, he felt it to be his duty so to pronounce it.

LOWRIE, J., had but little doubt, if this indictment were submitted to the opinion of men unlearned in the law, it would be their unanimous opinion that the description of the manner in which the deceased came to his death was sufficiently set forth. But if the law has said otherwise, though the Court may not see the reason upon which the law is founded, they must be bound by it. It appears from the books that wounds capable of description must be described, that the Court may judge whether it be probable that death might have been produced by them. It appears probable that in this case Conway might have come to his death by the strokes stated to have been given; but the dimensions of the wounds being required, they cannot be dispensed with. The authorities to this point stand uncontradicted, except by West in his precedents, which, for the reasons stated by his brother *Henderson,* ought not to set aside the others. All the exceptions to this rule are cases where the wound cannot be described, such as where a limb is cut off or the body run through. He thought the exception was fatal to the indictment.

HALL, J., said it was unnecessary for him to add much to what had been said by his brethren, *Henderson* and *Lowrie.* But it might be asked what the common law of England was when it was adopted by this country, for such as it was, it must be observed. It had been very properly remarked that if the Court were not met to determine in what manner indictments of this kind should be formed, this strictness would not be required. Any one proposing that wounds should be described as laid down in the books would be considered as evincing but lit-

tle knowledge of legislation. The reason given by writers for observing this particularity is that the Court may (463) see that the wound is such as might produce death. The causes of death appeared to be laid with sufficient certainty in this indictment; but as we find from all the authorities, from Coke to East, that whenever death is stated to be produced by a wound, the dimensions of the wound must be given, it cannot now be dispensed with. It appears from West that the law was not formerly so; but this was the law when the common law of England was introduced here. All modern writers agree that the dimensions of the wound must be stated—not for any good reason, he admitted, but it was not for the Court to legislate, but to decide, as they had sworn to do, according to the law. The exceptions stated in the books prove the rule. When bruises or blows are stated, no dimensions are necessary; but where a wound is laid, it has been an invariable custom to state its dimensions.

TAYLOR, J., said he was sorry that it was not in his power to concur in the opinion delivered by his brethren. He, however, could place but little confidence in his own opinion, since it was different to-day from what it was yesterday. He then thought the indictment could not be sustained; but upon a more careful examination of authorities he now thought otherwise. He had looked in West's Book of Precedents, and though, as has been stated, precedents only show the opinions of the writers, yet all precedents which are brought into argument are of the same authority. Their weight depends much upon the age in which they were written and the character of the writers. Such as they are, they had induced him to change his opinion. (He here read from West the indictment produced by the prisoner's counsel.) Looking further into the book, he found a precedent where a person is charged with striking with a club; he is stated to have struck, wounded and maltreated the deceased, who languished and died, but there is no description of the wound. He found another precedent where a person is charged (464) with striking, wounding and maltreating the deceased, without describing the wound. From these precedents it appeared that the writer did not consider it necessary, when a wound was inflicted with a club or a stick, that it should be particularly described. These precedents had induced him to look into the English common law, by which his opinion was confirmed.

He said he had read what East says on the subject, where he states that in all cases of doubt a statement which shows that

death might ensue is sufficient; and had asked himself whether the wound given to Conway is so described in the indictment as probably to occasion death. The answer was in the affirmative.

This indictment, he observed, is in the same words with the precedents in West, except as to the word "maltreated," which is found in the latter, and which is of no consequence.

Finally, he said, he came to this conclusion that wherever the death was occasioned by a cut with a sword, dagger, or other edged instrument, it is necessary to state the dimensions of the wound; but when the death is occasioned by a club, cudgel or stick, it is sufficient to state the wound without the dimensions. He, therefore, was of opinion that the exception to the indictment could not be sustained.

LOCKE, J., agreed entirely with the opinion delivered by his brother *Taylor,* for the same reasons, and from the same authorities quoted by him, and which he deemed it unnecessary to repeat.

The indictment being adjudged insufficient by a majority of the Court, the prisoner was remanded to jail to answer the same charge upon another bill of indictment to be preferred against him.

Cited: S. v. Moses, 13 N. C., 463; *S. v. Gallimon,* 24 N. C., 376; *S. v. Smith,* 61 N. C., 341.

---

(465)

THE GOVERNOR v. HENRY B. HOWARD.

From New Hanover.

1. The repeal of an act of Assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary.

2. A sues B for the forfeiture of £100, given by the act of 1794, for buying a slave, knowing him to have been imported, contrary to that act. Pending the suit this act is repealed, and the repeal is pleaded in bar. The plaintiff demurs to the plea. The demurrer overruled, and the plea allowed.

THIS was an action of debt, to recover the sum of £100, as a forfeiture for having bought a slave, knowing the same to have been imported into this State, contrary to the act of 1794, ch. 2.

Pending the suit, and after issue had been joined therein, the act of 1794, ch. 2, was repealed, and at the next term of the court after this repealing act was passed, the defendant pleaded it in bar, by way of a plea since the last continuance. To this plea the plaintiff demurred; and the defendant having joined in demurrer, the case was sent to this Court upon the question, Whether the demurrer should be sustained, or should be disallowed and the plea sustained.

HALL, J. It is laid down in Cro. Eliz., 138, that the Attorney-General cannot enter a *nolle prosequi* to an action *qui tam,* except for the King's part of the penalty; nor can the King, after action commenced, release any but his own part of the penalty. 2 Bl. Com., 436; 11 Co., 65. But it is in the power of Parliament to release the informer's interest. 2 Bl. Com., 436. If so, they surely have the power of taking away the informer's right of action, by repealing the act which gave birth to it. It is said (Wm. Bl., 451) "that no proceeding can be had or pursued under a repealed act of Parliament, (466) though begun before the repeal, unless by special exception." And by Hale P. C., 291, "that when an offense is made treason or felony by an act of Parliament, and then that act is repealed, the offense committed before such repeal and the proceedings thereupon are discharged by such repeal." From these authorities and others which might be referred to, as well as from the circumstances that the suit in the present instant must be brought in the name of the Governor alone (the act having directed the forfeiture to be sued for in his name), although after a recovery, one moiety thereof is to go to the informer or the person who brought the suit. The demurrer must be overruled and the plea allowed.

Cited: Hulin v. Biles, 4 N. C., 626; *S. v. Cress,* 49 N. C., 422; *S. v. Williams,* 97 N. C., 456.

JAMES DUNCAN AND WIFE v. THE ADMINISTRATOR OF PARISH SELF, DECEASED.

From Chatham.

A gift of a chattel to a person, with a reservation to the donor of a life estate therein, is good, and vests a property in the donee in the event of his surviving the donor.

DUNCAN *v.* SELF.

Parish Self made a gift by parol of a negro girl slave to his daughter Elizabeth, reserving to himself the said negro during his life. He kept the said negro in his possession until his death, and his daughter survived him. She having intermarried with James Duncan, this action of detinue was brought by them against the administrators of the estate of Parish Self, to recover the said negro girl. The defendants insisted that no title vested in Elizabeth, the daughter, by the gift; that the reservation of the property to the donor during his life was in fact a reservation of the entire interest in the negro, and nothing was left for the daughter, inasmuch as the law will not allow a remainder to be created in a chattel after a life estate, except it be done by executory devise or by deed of trust.

(467) The case was sent to this Court upon the question, Whether the gift vested such an interest in Elizabeth, the daughter, as enables her husband and herself to recover the negro.

BY THE COURT. We are of opinion that the daughter, Elizabeth, having survived her father, the donor, the property in the negro girl vested absolutely in her at his death, and that the plaintiffs are entitled to judgment.*

Cited: Sutton v. Hollowell, 13 N. C., 186.

*The decision in this case has been thought to militate against the rule of the common law which forbids the creation of future interests in a chattel after a life estate therein, except by executory devise, or by way of trust. It is to be regretted that the Court did not assign at length the reasons upon which their decision was founded; but it will be seen from a consideration of the principles upon which it is probable their decision was made, that it does in nowise impugn the rule of the common law. *Tims v. Potter,* 1 N. C., 12; 2 N. C., 234, is the leading case in our courts upon this subject. Glover gave a negro girl to his daughter, reserving to himself a life estate in the said negro. The daughter survived the father, and after his death brought an action of detinue to recover the negro and her increase. The principal question upon the trial was, Whether the plaintiff was entitled to the children of the negro girl, born during the life of Glover, the donor. The validity of the gift to the daughter was not questioned. Various other cases have occurred since that time, similar to the one of *Tims v. Potter,* and the courts have considered the gift as vesting an estate in the donee; and the courts have probably proceeded upon one or the other of the following grounds: 1. That where one person gives a chattel to another, reserving therein a life estate, the law deems the gift a present one, in case the donee survive the donor, and to take effect in possession in that event; but that the interest of the donee during the life of the donor is a *mere possibility,* which is not transmissible to the representatives of the donee; and that if the donor survive the donee, the interest in the

chattel remains entire with him, and goes to his representatives. And this possibility differs from a contingency; the first having no actual existence till a certain event happens, the second having an actual existence, which may or may not take effect. Upon this principle, if Parish Self had survived his daughter, the negro girl would have belonged to him in absolute property, as before the gift, and would have gone to his administrators after his death, his daughter having nothing during his life but a mere possibility; but in the event of her surviving her father, the gift took effect in possession. The interest and estate in the negro were not out of the father by the gift; he parted only with a possibility of interest, which was to take effect or not, as the event should happen of the daughter surviving him or not.

The case of *Roberts v. Polgrean*, 1 Hen. Black., 536, illustrates the above principle, and shows that the cases of *Tims v. Potter* and *Duncan v. Self* do not militate against the rule of the common law which forbids the creation of future interests in a chattel after a life estate therein, except by executory devise or by deed of trust. In that case the limitation of a term was, "to Mary Rawles, *during her natural life*, with remainder to her son William Rawles, and his issue lawfully begotten; and in default of issue of said William Rawles, then to Elizabeth Polgrean (the defendant), daughter of the said Mary Rawles, *during her natural life*, with remainder over." Mary Rawles conveyed the premises during the remainder of the term to her son William Rawles, his executors, administrators, etc. William Rawles then by deed of indenture conveyed the premises to "Margary Coles and her heirs, *immediately after the death of him, the said William*, to hold the same to her heirs forever." William Rawles *survived* Margary Cole, and died *intestate* and *without issue*, and administration on his estate was granted to Elizabeth Polgrean (the defendant). Margary Cole died intestate, and administration on her estate was granted to her daughter, Mary Roberts. The suit was brought by Mary Roberts, as administratrix of the estate of Margary Cole, to recover the possession of the leasehold premises, claiming under the deed made by William Rawles to Margary Cole; and two points were decided by the Court:

(1) That the deed from William Rawles to Margary Cole must be construed to be a present gift to the wife, in case she survived her husband, to take effect in possession on that event; and that William Rawles, the donor, having survived Margary Cole, the donee, the whole interest in the term survived, or rather remained in him.

(2) That this interest vested, upon William Rawles' death, *in his representative*. Elizabeth Polgrean was the person to whom the term was limited originally in default of issue of William Rawles; yet the Court said she could claim nothing under this limitation, but held the term in her character of administratrix of William Rawles' estate.

This case shows that in all such cases as *Tims v. Potter* and *Duncan v. Self* the donor remains possessed of his former absolute estate in the chattel; that his estate therein is not abridged, by the gift, from an absolute interest to an interest for life; that the donee takes by the gift neither a vested nor contingent remainder, but a mere possibility, which may take effect or not, as the donee happen to survive or not survive the donor.

This case seems also to recognize the rule that by deed (not of trust) a chattel cannot be limited over after an estate for life, and

that the estate for life absorbs the entire interest in the chattel. It would seem that it was upon the operation of this rule Elizabeth Polgrean, the defendant, was adjudged to hold the term in her character of administratrix of William Rawles' estate, and not in her own right under the ulterior limitation contained in the first deed. For, by the first deed, the term was limited "to Mary Rawles *during her natural life*," and then over to William Rawles, and his issue lawfully begotten, and, in default of issue of said William Rawles, to Elizabeth Polgrean during her natural life. As William Rawles died without issue, the term would have belonged to Elizabeth Polgrean under this limitation had not Mary Rawles, *the donee for life*, taken the absolute interest; for the limitation over is not too remote, it being to take effect within the compass of a life in being, it being "to Elizabeth Polgrean during her natural life," and is the same as the *Duke of Norfolk's case*. The Court held that Elizabeth Polgrean could claim nothing under this limitation. Mary Rawles, the donee for life, conveyed her interest in the term to her son William Rawles, and under this conveyance he became possessed of the entire interest, and Elizabeth Polgrean having administered on his estate, she was adjudged to hold the term as his administratrix.

3. The courts may have proceeded upon the ground that the reservation for life was inconsistent with the gift, and therefore void. This was the view taken by this Court of such a reservation, in the case of *Vass v. Hicks*, 7 N. C., 493.—REPORTER.

---

(468)

RICHARD RUSSELL v. PRESLEY HINTON.

From Warren.

1. A person summoned as a garnishee may avail himself of any defense which he could make, were he sued by his creditor.

2. A, summoned as a garnishee in a suit between B and C, declared that he had given his bond to C for £870; that the debt really due at the time was only £801 15*s.*; that the bond was given upon an usurious consideration, and therefore void. B urged A to make some contract with C for taking up this bond, assuring him that he might have confidence in C's integrity, and that if he would make such contract C would certainly pay to him (B) the debt which he owed to him; and A believed from B's representations that if he made this contract he would not be called upon by B as a garnishee. A agreed by a day certain to take up his bond and make payment to C, upon his deducting 12½ per cent from the amount thereof. After this contract was made, but before the day of payment agreed on, B sued out an attachment against C, and A was summoned as garnishee. Notwithstanding this summons, A complied with his contract with C and paid the money on the day. On this garnishment no judgment of condemnation will be entered, and the garnishee shall be discharged.

RICHARD RUSSELL sued out an original attachment against Edward P. Davis, then residing in the State of Virginia, and

Presley Hinton was summoned as a garnishee, to declare whether he owed said Davis, and if so, to what amount. (469) Hinton appeared, and in his garnishment stated that some time in 1804 he purchased from Davis a tract of land, paid down part of the purchase money, and gave six separate bonds to secure the balance; three of which bonds he had discharged, and as to the other three, he not finding it convenient to pay them as they became due, had entered into a contract with Davis to allow him more than 6 per centum per year upon the money, provided Davis would prolong the time of payment; and the three bonds amounting to £801 15s. 0d., currency of Virginia, had been surrendered to him, and he had given a new bond to Davis for the sum of £870, like money, and a longer time for payment had been given. He declared this last bond was given upon an usurious consideration. He further stated that some time after this new bond was given, (470) Davis came into this State, and that Davis, Russell and himself had frequent conversations upon the subject of the debt due by Davis to Russell, and also of the debt due by himself to Davis; that Russell urged him to make some other contract with Davis whereby the bond to Davis might be taken in, or, as Russell expressed it, purchased in; alleging that he, Russell, had full confidence that in that event Davis would discharge the debt due to him. That in consequence of Russell's persuasions and solicitations he made a contract with Davis for the taking in of said bond, believing from Russell's representations that he would discharge him from any garnishment in relation to the said bond. That shortly after he had made his contract with Davis as aforesaid, Russell sued out this attachment and had him summoned as a garnishee; that, notwithstanding this summons, he had fulfilled his contract with Davis, and (471) had paid to him £500. Being asked what were the terms of the last contract between himself and Davis, he answered that he proposed to Davis to take up the bond by a day certain, if Davis would discount 12½ per cent thereon, and pay him part in cash, part in tobacco, and assign to him bonds on demand for the balance; that Davis acceded to this proposition, and the day of payment happening after he had been summoned as a garnishee in this case, he had, notwithstanding the summons, complied with his agreement and made the payment. Upon this statement of facts, it was submitted to this Court to decide whether the plaintiff was entitled to judgment of condemnation against the garnishee.

LOCKE, J. The garnishee has stated at full length the nature

of the debt, and the amount thereof, due to Davis at the time he was summoned at the instance of the present plaintiff, and the last contract made with Davis, under which he has paid the £500 which the plaintiff prays may be condemned for his use. He submits to this Court how far he is liable to the plaintiff's demands. To determine the extent of this liability it may be necessary to consider it on the ground of the debt due to Davis at the time he was first summoned; and, secondly, on the ground of his second contract, by virtue of which the first debt was extinguished or surrendered to the defendant. As to the first, it is a general principle that a garnishee, when summoned by the plaintiff in attachment, is entitled to make every defense against such plaintiff that he would be entitled to make against the original contracting party, had he brought suit. For it is rather a case between them than between plaintiff and garnishee, inasmuch as the plaintiff's right to recover must depend
(472) on some existing debt between garnishee and his creditors. If, then, Davis had brought an action of debt upon the bond for £870, and Hinton had pleaded the statute of usury (as he has virtually done here), and the evidence showed to the jury that Davis had reserved to himself eight or ten pounds for the forbearance of every hundred pounds attempted to be secured by the bond, the jury must have found that the bond was given on an usurious consideration, and therefore void; and if void as between Davis and defendant, will be equally so between defendant and Russell. On that part of the garnishment, therefore, no doubt can be entertained.

But it is alleged that as defendant, by virtue of a second contract, and after he was summoned as a garnishee in this case, has paid over to Davis £500, he is liable to the plaintiff for that amount. This part of the case seems to indicate more than usual skill on the part of the plaintiff to circumvent and ensnare an honest, unsuspecting man. At whose instance was this second contract made? Did it not proceed from the intimations of the plaintiff himself? He recommended this measure to the defendant, at the same time assuring him that he had full confidence in the integrity of Davis, and if this contract was made by defendant, he felt certain that the debt which Davis owed him would be paid. He did not say, in express terms, that defendant should be discharged from his garnishment; but his mentioning, that if defendant made the contract he had full confidence that Davis, in that event, would pay his debt, that owing to these solicitations of the plaintiff, the contract was made, and in full confidence that Russell would look to Davis for his debt, and discharge defendant, seem to be tan-

tamount to an express discharge. For, if defendant was or could be liable, there was no necessity to place any confidence in Davis, because the plaintiff had the law on his side to compel a payment from defendant, let Davis act in any (473) way he pleased. But the case has impressed a belief upon the minds of a majority of the Court that plaintiff, knowing the bond to be usurious, and therefore his remedy gone against the garnishee, induced the defendant to change the nature of his debt to Davis, under a belief which he artfully enforced, that if defendant did so, he should not be called upon as a garnishee; and having induced defendant to make a positive contract with Davis, a contract which, he well knew, defendant would feel himself bound in honor to comply with, he would lay hold of that circumstance to compel a second payment by defendant, by calling upon him as garnishee, after he had promised to Davis the payment of the money in such way that plaintiff well knew as an honorable man he could not decline the payment. If, then, the plaintiff has made such declarations of his reliance upon the integrity of Davis as to induce defendant to pay such sum as was really and honestly due to Davis, but of which Davis had no legal means of compelling payment, he cannot afterwards have any claim on defendant. If he should be made liable, he would be compelled to pay this debt twice, when, without the advice and influence of the plaintiff, he was not liable to pay any part of it. The statute of usury shielded him effectually. The defendant cannot recover back the money which he paid to Davis, supposing it to have been paid upon an illegal consideration. 3 Term, 266; Doug., 468. We are therefore of opinion that no judgment of condemnation ought to be rendered against the garnishee, and that he ought to be discharged.

HALL, J., *contra.* I think now, as I did in the case of *Gee v. Warwick,* 3 N. C., 354, that a garnishee has a right to avail himself of any legal defense which he might have in his power, were he sued in an action at law by his creditor. If, in the present case, the debt due by the defendant to Davis was contracted upon an usurious consideration, it would fur- (474) nish a good plea to the defendant in an action brought by Davis to recover it. The rights of the debtor are not impaired by the absconding of the creditor; but to answer the purposes of justice the rights of the creditor so absconding are, by our act of Assembly, transferred to others to whom he is a debtor. In such case the garnishee is under the same moral as well as legal obligation to pay any debt to the plaintiff, the creditor of his creditor, that he felt himself bound by to pay it

to his creditor before he absconded. The plaintiff's claim, in this case, is as strong upon the defendant as if Davis had assigned the bond in question to him. Although the garnishee may have a good defense against a recovery upon the bond, founded upon the act of Assembly made to prevent usurious contracts, he ought not, after having voluntarily relinquished it as to Davis, to be permitted to shelter himself under it as to Russell. He was under no tie, legal or moral, to pay a cent to Davis; but, except as to this defense, he was under both to pay it to Russell. If he was disposed not to retain another man's money unconscientiously, he should have well considered whose money it was. His conduct to Davis proves very clearly that he did not intend to avail himself of that defense, but to pay what was really due. But he paid it to a person who was not entitled to receive it, either on equitable or legal principles. The plaintiff ought not thereby to be injured. In short, I think that as the garnishee has relinquished the only defense he had at law (which is fully evinced by his second contract with Davis), he stands, as to the present plaintiff, as if such defense never had been in his power; and that having paid the money to Davis, he paid it in his own wrong, and of course should be compelled to pay it again to the plaintiff, whose moral right to receive it cannot be questioned, and whose legal claim to it the defendant should not be permitted to dispute, after having renounced the benefit of the only plea which, from his garnishment, he could with any success have relied upon.

(475)

JAMES EXUM v. HYDER A. DAVIE AND WIFE AND HARWOOD JONES.

From Northampton.

1. A devised his manor plantation to his son B, in trust, to apply and pay over the rents and profits to another son, C, during his life, and after the death of C he devised the plantation to B in fee simple. In 1790 B conveyed the plantation to C in fee, with a proviso, "that if C should die without a child or children, the plantation should revert to B and his heirs." B died in 1794, intestate, leaving two children, D, a son, and E, a daughter. At the time of his death, D, his son, was heir at law. In 1795 the Legislature declared that sisters should be admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common. In 1798 C died without leaving any child: and a question arose, Whether D, who was the heir of his father at the time of the descent, or D and E, who were the heirs at

law at the time the reversionary interest of the father fell into possession, were entitled to the rents and profits of the plantation.

2. *Held*, that E was entitled equally with D; for whoever claims a fee simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate must make himself heir to such purchaser at the time when such remainder or reversion falls into possession.

3. And the pleadings in a writ of formedon in remainder or reverter show that he who is heir at the time of the contingency happening and the lands falling into possession, is to take, and not he that is heir at the death of the first purchaser or donor. For in formedon in descender, the Court stating the gift to the first donee, expressly avers a descent from him to A, his son and heir, then to B, his son and heir, and then to the demandant, his son and heir. But in formedon in remainder and reverter, the Court only avers the happening of the contingency on which the lands were to go over or revert, and that on its happening the lands ought to go over or revert to the demandant, who now claims as cousin and heir of the first purchaser or donor.

4. The interest of the first purchaser of a remainder in fee, or the donor of a reverter in fee, is to him *and* his heirs forever; and on his death, whatever interest vests in his heir, is to him and *his heirs* forever. This interest, although vesting in (476) the heir of the first purchaser or donor and his heirs, is subject to be divested out of *his heirs* by any subsequent event which makes them not heirs to the first purchaser or donor *at the time when the reversion falls in*. As the law of descents has not been changed in England, the books show no case decided there in which the estate has by any subsequent event been divested out of *the heir* of the first purchaser or donor in whom it has once vested; and, therefore, if the remainder or reversion once vested in him, he continued *to be heir* to the first purchaser or donor, at the falling in of the reversion, if he so long lived; but such heir does not take an interest to himself and another to his heirs; and as the interest which he takes *to his heirs* is liable to be divested by subsequent events, making *his heirs* not heirs to the first purchaser or donor at the time when the remainder or reversion falls into possession, so *his* interest may be divested by a public and general law, making *him* not heir to the first purchaser or donor at the time when the remainder or reversion falls in.

5. Here the reversionary interest fell in in 1798, at which time the act of 1795 had made D not the sole heir to the donor, and had declared that D *and* E should *then* be considered heirs to him. And it is a common case in law for lands to vest in one *sub modo* only, so as to be divested by a subsequent event, and vested in another. It occurs, (1) *Ex institutione legis* in every instance where on the death of a tenant in fee or in tail his lands descend to his daughter, uncle, etc., and afterwards a son is born, who shall enter upon the daughter, etc., and divest the estate which she took by descent. (2) *Ex provisione hominis*, as where lands are settled or devised to the use of the husband and wife for life, remainder to such one or more of their children as they

shall appoint; and in default of such appointment, to all their children as tenants in common. There, on the birth of one child, the remainder vests solely in it; but on the birth of the second, and so on *toties quoties;* and if the father and mother make an appointment, then the whole remainder is divested out of the children as tenants in common, and vested according to the appointment.

6. So if, on the death of B, an interest vested in his son D, one moiety of the interest was divested by the act of 1795, and D and E became entitled each to a moiety of the lands, and, of course, to a moiety of the profits.

HARWOOD JONES devised his "manor plantation, and all the land adjoining the same, to his son John Jones, in trust, to apply and pay over annually the rents and profits of the same to the use of another son, Harwood Jones, for and during his natural life; and after the death of the said Harwood (477) (the son) to John in fee simple." In 1790, and shortly after the death of Harwood Jones, the devisor, John Jones conveyed the said manor plantation to his brother Harwood Jones, in fee, with a proviso, "that if the said Harwood Jones should die without child or children, the said manor plantation should revert to the said John Jones and his heirs." Harwood Jones died in 1798, without leaving any child or children, or the issue of such; and John Jones died in 1794, intestate, leaving two children, Harwood and Elizabeth, since intermarried with Hyder A. Davie. James Exum was appointed guardian to the said Harwood and Elizabeth, and received the rents and profits of the said manor plantation; and not being able to determine who was entitled to the said rents and profits —whether they belonged exclusively to Harwood, or were to be divided between him and his sister Elizabeth; and as Mr. Davie, in right of his wife, Elizabeth, claimed the moiety of the rents and profits, he filed this bill in the Court of Equity for Northampton County, against Harwood Jones and Hyder A. Davie and Elizabeth, his wife, to compel them to interplead, settle and adjust their rights and demands between themselves, so that he might be enabled to pay the said rents and profits with safety to himself. He appended to his bill the usual affidavit that he did not file the bill in collusion with either of the defendants, but from a desire to avoid being doubly vexed concerning the matters contained therein.

The defendants put in their answers, Harwood Jones insisting that the whole rents and profits belonged to him, and Hyder A. Davie and wife insisting that one moiety thereof belonged to them. The case was sent to this Court upon the bill and answers, for the opinion of the judges.

Fitts for Harwood Jones. (478)
Browne for Hyder A. Davie and wife.

Browne for Davie and wife: The first questions which present themselves in this case are, (1) whether the heirs of John Jones are entitled to the lands, the profits of which are now in controversy, and (2) if they be entitled, who are his heirs?

By the will of Harwood Jones the elder, his son Harwood Jones was tenant for life, with a clear remainder to his other son, John Jones. But John Jones, by deed of bargain and sale, conveyed the said lands to his brother Harwood in fee, *"Provided, nevertheless,* and upon this express condition, that if the said Harwood Jones should depart this life without a legitimate child or children, then in that case the said lands, etc., are to revert to and become the property of the said John Jones, his heirs and assigns, forever, in as full and ample a manner, to all intents and purposes, as if this present indenture had never been made." If this had been a feoffment or other common-law conveyance, the feoffee would have taken a fee simple on condition. Co. Lit., 203, a; 204, 331, 371, 372. And on his dying without child or children, the feoffor might have entered and been seized of his former estate. Co. Lit., 325, 202, a.

A condition may either confirm or defeat a fee simple. Co. Lit., 207, a.

But this conveyance was a bargain and sale to operate by the statute of uses (2 Bl. Com., 338); and on such conveyance a fee may be limited on a fee, provided the contingency on which it is so limited is not too remote. The *Duke of Norfolk's case* arose on a deed, and was a springing trust after an estate tail in a term. An estate tail in a term gives the whole interest therein, because it cannot be docked by fine or recovery, and so tends evidently to perpetuity. Fearne's Essay on Remainders, etc., 5, 349, 414. A common recovery suffered by tenant in tail barred all remainders and reversions on account of the supposed recompense. 2 Bl. Com., 360. But conditions, (479) conditional limitations, shifting uses and trusts, resulting uses and trusts, etc., which were only to have operation after the termination of a fee simple, being of no value in the eye of the law, no recompense was awarded them, and therefore they were not bound on that ground; but on the absurd notion that the recoverer was in possession of the estate tail, which, in contemplation of law, will ever continue to subsist. 2 Bl. Com., 360; Fearne's Essay, 67, 72 (Powell's edition). But a recovery by tenant in fee simple did not bar them; for he, having the whole estate, would be entitled to the whole recompense, and

there being no previous estate tail, there was no room for the notion of its continuing to subsist. This is the foundation of the rule limiting them to take effect within a life in being and twenty-one years after.

In the case before the Court the bargainee was tenant in fee simple, and no recovery has or could have been suffered. It is therefore submitted that the heirs of John Jones are clearly entitled to the lands, the profits of which are in dispute in this case.

The second question is, Who are the heirs of John Jones entitled to these lands? At the death of John Jones, his son was his sole heir; but at the death of Harwood Jones, the bargainee, in 1798, when the reversionary interest of the said John fell into possession, his son and his daughter were equally entitled;* and the question is, whether the son, who was heir at the death of his father John, or the son and daughter, who were the heirs at law at the death of Harwood, the bargainee, and the falling into possession of the reversionary interest, are to take.

(480) Whoever claims a fee simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate must make himself heir to such purchaser at the time when such remainder or reversion falls into possession (Co. Lit., 116, 7, 146, 15 a; 3 Co., 42; Fearne, 449, 534; 2 Will., 29); and although the particular reason given in the case in *Willson,* against the plaintiff, was that she was not of the blood of the first purchaser, yet that would not govern the case from Lord Coke, as the father and the sister of the whole blood were of the blood of the first purchaser. It must therefore be the general one assigned by Fearne, "that she was not heir at the time of the contingency happening and the estate falling into possession."

In formedon in descender, the Court stating the gift to the first donee, expressly avers a descent from him to A, his son and heir, then to B, his son and heir, and then to the defendant, his son and heir. Co. Ent., 317, 320, etc. But in formedon in the remainder and reverter the Court only avers the happening of the contingency on which the lands were to go over or revert; and that on its happening the lands ought to go over or revert to the defendant, who now claims as cousin and heir of the first purchaser or donor; and only under a *scilicet* shows how he is cousin and heir. Rast. Ent., 375-6; Cok. Ent.,

*By the act of 1795, sisters were admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common. —REPORTER.

329, 338, 340. What is laid under a *videlicet* is mere form, not traversable by the defendant; nor is the plaintiff obliged to prove it, but may support his general allegation of being cousin and heir by proof of any other facts. Hob., 105-6. As the accuracy and scrupulous precision of ancient pleading, and the necessity that a party was under of averring everything material to his claim, are well known, and as the demandant in remainder or reversion only averred that at the time the contingency happened and the lands were to come into possession, he was heir to the first purchaser or donor, these precedents appear to be strong evidence that he who was heir at the time of the contingency happening and the lands (481) falling into possession, was to take, and not he that was heir at the death of the first purchaser or donor, or those claiming under him. The same doctrine is strongly laid down by *Brampton, C. J.*, and *Berkley, J.*, in Cro. Car., 411, and agreed to by *Jones* and *Croke, JJ.*, although they differed from the others in the determination of that case upon the custom. But Croke reports himself and Jones as having said: "If lands vest in an heir by reason of a contingency, although another heir more near comes *in esse*, it shall never be divested; and he who will after claim ought to claim from him in whom the estate vested." The two cases which they cite in support of this doctrine are both stated in Co. 65, a, and show that by the term *"vest"* they meant vesting in possession on the happening of the contingency. Indeed, they could mean nothing else, for an interest, while it depends on a contingency, is not a *vested* interest, and is therefore called contingent. So that this doctrine has no bearing on the case now before the Court. Both cases are, however, well explained, and the *dictum* itself shown not to be law, in 1 Co., 69 a; Cro. Car., 87; Hob., 3; 3 Co., 61, b.

The interest of the first purchaser of a remainder in fee, or the donor of a reverter in fee, is to him and his heirs forever; and on his death, whatever interest vests in his heir is to him and his heirs forever. But the cases already cited show that this interest, although vesting in the heir of the first purchaser or donor and his heirs, is subject to be divested by any subsequent event which makes them not heirs to the first purchaser or donor *at the time when the reversion falls in*. It is true that none of these cases show that the estate may, by a subsequent event, be divested out of an heir of the first purchaser or donor, in whom it has once vested; but only that it shall not descend from such heir to his heirs, which must be owing to the law of descent's never having been changed in England since we have any reports of cases decided there; and, therefore, if the

(482) remainder or reversion once vested in a person as heir of the first purchaser or donor, he continued to be heir to the first purchaser or donor at the falling in of the reversion, if he so long lived; but such heir does not take an interest to himself and another to his heirs; and if the interest which he takes to his *heirs* is liable to be divested, and has been divested by subsequent events, making *his* heirs not heirs to the first purchaser or donor at the time when the reversion or remainder fell into possession, why should not *his* interest be liable to be divested and actually be divested by a subsequent event (the passing of a public and general law) making *him* not heir to the donor or first purchaser at the time when the reversion or remainder fell into possession?

It is impossible to ascertain when this rule of law was first established; but it was probably after that which, in opposition to the principles of both natural and feudal law, excluded the children of different venters from inheriting from one another the lands of their common ancestor; and one beneficial consequence, if not a cause of it, is the avoiding of some extreme hardships under the latter rule: *ex gratia,* if John Jones had had two sons by different venters, and no other relations whatever, and died, then the son by the first venter had died, and then Harwood Jones, the bargainee, had died, living the son by the second venter, by this rule the son by the second venter would inherit; whereas, if the reversion had vested in the son by the first venter, that then must have continued in him and his heirs, and could not be divested by any subsequent event making him or his heirs not heirs to the first donor at the time of the reversion falling in, the son by the second venter could not, at common law, inherit, but the lands would escheat. In *Cunningham v. Moody* (1 Ves., 174) *Lord Hardwicke* says, in a similar case: "The Court never is sorry to see this happen between brothers and sisters of the half blood by the (483) same father; it both answers the intention and rule of nature." It is also in strict conformity to the great principles of inheritance: it admits all the blood of the first purchaser, and none but the blood of the first purchaser.

It is common sense in law for lands to vest in one *sub modo* only, so as to be divested by a subsequent event and vested in another. It occurs *ex institutione legis* in every instance where, on the death of a tenant in fee or in tail, his lands descend to his daughter, brother, uncle, etc., and afterwards a son is born or other nearer heir; the after-born issue shall enter upon the sister, brother, uncle, etc., and divest the estate which he or she took by descent. Co. Lit., 11, b; Com. Dig. Descent, ch. 2,

et multis aliis. So it occurs often *ex provisione hominis,* as where lands are settled or devised to the use of the husband and wife for life, remainder to such one or more of their children as they shall appoint; and in default of such appointment, to all their children as tenants in common: there, on the birth of one child, the remainder vests solely in it; but on the birth of a second child, one moiety of the remainder is divested out of the first child and vested in the second, and so on *toties quoties;* and if the father and mother make an appointment, then the whole remainder is divested out of the children as tenants in common, and vested according to the appointment. *Cunningham v. Moody,* 1 Ves., 174; 4 Term, 30. Thus, if on the death of John Jones an interest vested in his son Harwood, one moiety of that interest was liable to be divested, and was actually divested by the act of Assembly of 1795, and each of the defendants is entitled to a moiety of the lands, and of course to a moiety of the profits.

But it is contended that on the death of John Jones no interest whatever descended to or vested in his son Harwood. Wherever the vesting of an estate, either in interest or in possession, depends on a contingency which, by possibility, may never happen, it is called a *possibility;* and the old authorities did not perhaps distinguish between them. (484) But the law for a number of years past has distinguished and made a wide difference between them. The first, where the vesting in interest depends on a contingency which, by possibility, may never happen, is called a bare or naked possibility, and has no existence until the event happens. It is a mere hope or expectation, such as an heir apparent has during the life of his father, and of course cannot be disposed of. The second, where the vesting *in possession only* depends on a contingency which, by possibility, may never happen, is called a possibility, coupled with an interest; or there is a present existence in interest, although the taking effect in possession depends on a future event (1 H. Bl., 537); and it has been decided by degrees that these last are descendible, releasable, assignable and devisable. 3 Term, 93, 95. It is admitted that John Jones, the donor, had a possibility coupled with an interest: it was descendible to his heirs, and he might have disposed of it from his heirs, either by release, assignment or devise. But on his death his son took no such interest. It was not descendible from him to his heirs. If he had died in the lifetime of his uncle, his father's heirs and not his would have been entitled at the death of his uncle, as has been shown already. He could not devise it (3 Lev., 427), nor could he assign it; for devisable

and assignable are convertible terms, a devise being only an assignment in contemplation of death. The son of John had not, therefore, during the life of his uncle, a possibility coupled with an interest; but only a bare, naked possibility, a mere hope or expectation that he would be heir to his father at the death of his uncle. The Legislature have disappointed this expectation by the act of 1795, declaring his sister should inherit equally with himself; so that these lands and the profits thereof must be equally divided between them.

(485) No inconvenience, even at the common law, could have resulted from considering such possibility as in abeyance or suspension, on the death of the donor or first purchaser. The uncle was tenant in fee simple, constituted a complete feudal tenant, was dispunishable of waste, could pray in aid of no remainderman or reversioner, could even bring or defend a writ of right; and the power of alienation could only be restrained during the period which lapsed between the death of John Jones and his brother Harwood Jones.

BY THE COURT. For the reasons given by the counsel in the argument of this case on behalf of Davie and wife, we are of opinion that they are entitled to a moiety of the rents and profits received by the guardian. Judgment accordingly.

Cited: Gentry v. Wagstaff, 14 N. C., 278; *Lawrence v. Pitt,* 46 N. C., 348.

THE WARDENS OF THE POOR OF GRANVILLE COUNTY v. WILLIAM M. SNEED.

From Granville.

The act of 1808, ch. 12, sec. 3, declares the appointment of deputy clerk of the County Court to be incompatible with the office of a justice of the peace; and further declares "that if, after the passing of the act, any person holding the office of justice of the peace shall *accept* the appointment of deputy clerk, his office as a justice of the peace shall be vacated; and if, being deputy clerk, *he accept* the office of justice of the peace, his appointment as deputy clerk shall be vacated; and if any person shall presume to act in any of the said offices contrary to the true intent and meaning of the act, he shall forfeit and pay the sum of fifty pounds." This act does not extend to the case of a man who was both deputy clerk and justice of the peace *before* the passing of the act, and who subsequently continued to act as a justice of the peace without resigning his appointment as deputy clerk.

WARDENS *v.* SNEED.

THIS was an action of debt, brought to recover the penalty of £50, imposed by the act of 1808, ch. 12, sec. 3, which declares that "the following appointments are declared (486) to be incompatible with the office of a justice of the peace, that is to say, clerk of the Court of Pleas and Quarter Sessions, deputy clerk thereof, deputy sheriff, constable and county trustee; and any person who now holds or may hereafter accept the office of justice of the peace, and who shall accept of any of those appointments in the same county, shall thereby vacate his said office; and any person holding either of these appointments, who shall accept the office of justice of the peace in the same county, shall thereby vacate his said appointment; and every person who shall presume to act in any of these offices, contrary to the true intent and meaning of this act, shall forfeit and pay the sum of £50, to be recovered in any court having cognizance thereof, in the name of the wardens of the poor for such county, and to be applied by them to the use of the poor." The defendant had been duly appointed and commissioned as a justice of the peace for Granville County, and had taken the oaths prescribed by law for his qualification before the passing of this act. He had also been duly appointed, and had qualified as deputy clerk of the Court of Pleas and Quarter Sessions for Granville County before the passing of this act; and he continued to act as a justice of the peace in the said county after the act went into operation, without having resigned his appointment as deputy clerk of said court. It was submitted to the Supreme Court to decide whether the plaintiffs were entitled to recover.

BY THE COURT. This being a penal act, is to be construed strictly. The case of the defendant is not within the letter of the act. The offense charged against the defendant, for which the forfeiture is sought to be recovered, is "acting as a justice of the peace after the act went into operation, without resigning his appointment as deputy clerk of the County Court." If, subsequently to the passing of the act, *he had accepted* the appointment of deputy clerk, his office of (487) justice of the peace would have been thereby vacated; if, being deputy clerk, he had *subsequently* to the passing of the act *accepted* the office of justice of the peace, his appointment as deputy clerk would thereby have been vacated. This must be construed to be the *true intent and meaning* of the act; and the act declares that if any person shall presume to act *in any of the said offices,* contrary to the *true intent and meaning* of the act, he shall forfeit £50. The defendant's case does not

come within either branch of the act. He did not, after the passing thereof, either *accept* the *appointment of deputy clerk* or *the office of justice of the peace.* He held both before that act passed. Let judgment be entered for the defendant.

---

(488)

JAMES CRITCHER v. SAMUEL WALKER.

From Granville.

1. Circumstances which incline the Court to construe a transaction to be a *conditional sale*, and not a mortgage—among others: (1) The money advanced being equal, or nearly so, to the value of the goods conveyed; (2) a stipulation in the contract of the parties, that he who advances the money and receives the goods shall hold the goods subject to the claim of him from whom he receives them, until a particular day, and subject to his loss if they be destroyed by that day; but to hold them free from such claim after the day, and subject to his own loss if they be destroyed or perish after the day.

2. Critcher being in want of money, applied to Walker, who advanced to him £70, and he thereupon placed in Walker's possession a negro girl, to work for the interest of the money to a particular day, up to which day Critcher was at liberty to pay the money and take the negro back; and if the negro died before that day, Critcher was to bear the loss; if after the day, and the money was not paid by the day, Walker was to bear the loss. £70 was the value of the negro girl at the time Walker received her into possession. Twelve years afterwards, when the negro girl had grown up and had several children, Critcher tendered the money and demanded the negroes. Walker refused to deliver them, and Critcher filed his bill, praying to be permitted to redeem the negroes, treating the transaction between him and Walker as a mortgage. Bill dismissed; for as £70 was the value of the negro girl, and Walker was to bear the loss if she died after a particular day, the Court will construe the contract to be a *conditional sale*, and not a mortgage.

3. In mortgages the want of a covenant for the repayment of the mortgage money is no bar to a redemption, nor in such case is the mortgagee without remedy, although the goods be destroyed, or not of value sufficient to pay the debt. In equity he may recover the money from the mortgagor, for every mortgage implies a loan, and every loan a debt.

THE bill charged that complainant, being in want of money, applied to the defendant, in 1785, to loan to him the sum of £70, Virginia currency, and that the defendant agreed to loan the money, provided complainant would place in his posses-

sion a negro woman named Mag. as a security for the money, and to work for the interest thereof; that complainant thereupon received the money, and delivered the negro woman to defendant, and at the same time executed a bond to the (489) defendant for the money, and defendant had the bond still in his possession. The bill then charged that the negro woman had had five children since she was delivered to the defendant; that complainant had in 1797 tendered to defendant the sum of £70, Virginia currency, and requested defendant to surrender to him Mag. and her increase; that defendant refused to accept the money or surrender up the negroes. The bill prayed that complainant might be permitted to redeem, etc.

The defendant in his answer admitted that he had advanced £70, Virginia currency, to the complainant, but averred that he took complainant's bond for the repayment thereof on 25 December, 1785; and that he took the negro woman Mag. into his possession on the following terms, viz., that she was to remain in his possession until the said 25 December, at which time complainant was to be at liberty to take her back, upon paying the money advanced, without interest; but if complainant failed to pay the money by or on that day, she was to become the absolute property of the defendant. That the bond was given to secure the debt in the event of the negro's death before 25 December; that it was agreed, if she died before that day, the loss should fall on the complainant. If she died afterwards, the loss should fall on the defendant. The defendant also relied upon the length of time, and insisted that in analogy to the statute of limitations, the court ought to refuse any aid to the complainant.

The answer being replied to, sundry issues were made up under the direction of the court, and submitted to a jury, who found, (1) That defendant had kept possession of the bond for £70, Virginia currency, from the time it was given, and had not offered to return it to the complainant: (2) that £70, Virginia currency, was the value of the negro girl Mag. at the time she was delivered to defendant in 1785; (490) (3) that she was to remain in possession of defendant, subject to the claim of the complainant, until 25 December, in that year, and up to that day complainant was to pay no interest upon the money advanced to him by defendant, but the negro's work should be for the interest; (4) that complainant was to bear the loss if the negro died before 25 December, and the defendant was to bear the loss if she died after that day; (5) that complainant had not paid the money due on his bond, nor applied to the defendant to have it surrendered up to him.

The case was sent to this Court upon the bill, answer, replication to the answer, and findings of the jury.

HALL, J. The allegations of the complainant's bill exhibit, in almost all respects, the features of a mortgage; the answer of the defendant, those of a conditional sale. But as neither are evidence, except against the party from whom they come, we must have recourse to the facts as found by the jury. It is of importance to keep in view that one of these facts is that £70, Virginia currency, was the value of the negro at the time she went into the possession of the defendant—a circumstance which does not happen in mortgages, but is often found in conditional sales. A circumstance in which the transaction resembles a mortgage is this, that if the negro died before 25 December, 1785, the complainant was to bear the loss; on which account he gave his bond for the money. The defendant, in his answer, states that the bond was given to secure the debt if the negro died before that day. Although the jury do not find expressly that the bond was given for that and no other purpose, yet they find that which is tantamount to it, for they find that the defendant was to bear the loss in case the negro died after 25 December, 1785; which finding seems to distinguish the case from a mortgage, for if the negro had died after that day, and suit had been brought upon the (491) bond for the money, a court of equity would have enjoined the proceedings, if this fact had been made to appear; the consequence of which would have been that the defendant must have borne the loss. This is not like the case of a mortgage reported in 2 Atk., 496 (and the same principle is to be found in many other cases), "that in mortgages the want of a covenant for the repayment of the mortgage money is no bar to a redemption." For although there is no bond or covenant for the payment of the mortgage money, yet the mortgagee is not without remedy. See *King v. King,* 3 P. Wms., 388, and *Lord Hardwicke's* decree thereon, cited by *Lord Talbot,* which was the case of a ship mortgaged and then taken at sea, and there was no covenant for the payment of the money. Although the ship could not be said properly to be in the nature of a pawn, since the mortgagor had gone in her to sea, yet the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. For it is said in these cases that every mortgage implies a loan, and every loan a debt. 1 P. Wms., 271, 291. So in case the mortgagor be evicted, or the property mortgaged be not of value sufficient

to pay the debt, as agreed by the counsel in *Howell v. Price, id.*, the mortgagee might in equity recover the money against the mortgagor. But in this case, if the negro woman died, it was the loss of the defendant; and with respect to him it cannot be said, as in case of mortgages, that there is a debt due. As the negro has lived and become valuable by her increase, the defendant is entitled to the benefit arising therefrom. Agreeably to the complainant's view of the case, the defendant might lose, but could not gain. As defendant has run the risk of a total loss, he shall have the gain that has been made. As to the length of time, it is only necessary to remark that under the particular circumstances of this case it strongly fortifies the defendant's situation. Let the bill be dismissed.

---

(492)

CORNELIUS WINGATE v. THE EXECUTORS OF GIBSON ET AL.

From Fayetteville.

A, having recovered a judgment against B, sued out a *fi. fa.*, and before the return of it he died. *After* his death, he having no representative, another *fi. fa.* was sued out in his name. This *fi. fa.* set aside as having issued erroneously.

AT April Term, 1805, of Fayetteville Superior Court, Cornelius Wingate recovered a judgment for £1,000 against John McAlister and the executors of William Gibson. A *fieri facias* was sued out, returnable to October Term, 1805, and defendants, having filed a bill in equity for that purpose, obtained an injunction as to $700 of the judgment. Another *fieri facias* was issued from October Term, 1806, returnable to April Term, 1807, upon which nothing was done. At April Term, 1807, there was a suit pending in the same court at the instance of the executors of William Gibson v. Cornelius Wingate, and at that term the death of Wingate was suggested in that suit. At October Term, 1807, another *fieri facias* was sued out upon the judgment aforesaid, in the name of Cornelius Wingate, returnable to April Term, 1808; and at this term a motion was made to set this *fi. fa.* aside for having issued irregularly, the sheriff having done nothing upon either of the *fi. fa's* issued in the lifetime of Wingate; he having died,

and his death being suggested of record before the issuing of the last *fi. fa.* and he having no representative before the court. The motion was sent to this Court.

BY THE COURT. Let this motion be allowed, and the *fi. fa.* be set aside.

Cited: Aycock v. Harrison, 65 N. C., 9.

---

(493)

DEN ON DEMISE OF JOHN WILSAY AND WIFE v. MALACHI SAWYER AND WIFE.

From Camden.

A, being seized of lands, dies intestate in 1802, leaving a brother and sister, also a widow and two children; each of the children dies intestate and without issue. The lands do not go to the mother, but to the uncle and aunt of the father.

THIS was a question of descent. John Watkins being seized of the land, died intestate in 1802, leaving a widow and two children, John and Mary. Mary died intestate and without issue, and shortly afterwards John died intestate and without issue, leaving his mother (wife of the defendant Sawyer) him surviving. John Watkins the elder left a brother named Miles, and a sister named Anne, who is the wife of John Wilsay, the lessor of the plaintiff. Miles conveyed to Wilsay, and Sawyer and wife having gotten possession of the lands, Wilsay brought this ejectment. The question was, Whether upon the death of John Watkins the younger, intestate and without issue, the lands descended to his uncle and aunt, the brother and sister of his father, or to his mother.

BY THE COURT. John Watkins the younger took the lands by descent from his father. In such case the mother is not entitled to the lands upon his death, either under section 7 of the act of 1784, ch. 22, or section 2 of the act of 1787, ch. 19. The lessors of the plaintiff are entitled to the land. Let judgment be entered accordingly.

(494)

DEN ON DEMISE OF LINDSEY AND WIFE v. JOHN BURFOOT.

From Camden.

1. Testator devised his lands "to be divided between his daughters, Amey and Jaca; and if either of them died before they came of age *or* married, the share of the one so dying to vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had a brother, who died in her lifetime, leaving children, who were her heirs at law under the act of 1784, ch. 22, sec. 3. The lands devised to Jaca vested absolutely in her upon her marriage, and upon her death descended to her heirs at law.

2. The Court will not construe the word *or* copulatively, so as to render the happening of both events, viz., Jaca's marriage and her death under age, to be necessary to the absolute vesting of the estate in her, unless it be necessary to carry into effect the intent of the testator; and where no intent appears rendering such a construction necessary, the word *or* shall be construed disjunctively.

THE question in this case arose upon the will of Robert Burfoot, who, being seized of the lands mentioned in the declaration, devised them with certain personal estates "to be divided between his daughters, Amey and Jaca; and if either of them died *before they became of age or married,* the share of the one so dying should vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had one brother, who died in her lifetime, leaving children, and these children were her heirs at law under the act of 1784, ch. 22, sec. 3. Her sister Amey married Lindsey, the lessor of the plaintiff. And the question was, Whether Amey was entitled to the lands under the limitations of the will, or whether they descended to the heirs at law of Jaca, under whom the defendant claimed.

BY THE COURT. It is contended for the lessors of the plaintiff that both events, to wit, the marriage of Jaca and her death under age, must happen before the lands vested absolutely in her and defeated the limitation to Amey; and that the word *or* ought to be construed copulatively as *and*. If it were necessary to resort to this construction to carry into effect (495) the general intent of the testator, the Court would do it; but there is no good reason in this case for giving to the word *or* any other than its ordinary meaning; there is nothing from which the Court can infer that the testator did not intend that

the estate should vest absolutely in Jaca, upon the happening of either event; and one of them having happened, we are of opinion the lands vested absolutely in her, and descended to her heirs at law. Judgment for the defendant.

Cited: Turner v. Whitted, 9 N. C., 619.

ANDREW GIBSON v. JESSE LYNCH.

From Guilford.

1. A having recovered a judgment against B in the County Court, B prayed an appeal to the Superior Court, which was granted, upon his entering into bond with *one* security only. On motion of A, in the Superior Court, the appeal was dismissed.

2. The act of 1777, ch. 2, declares that "before either plaintiff or defendant shall obtain an appeal to the Superior Court, he shall enter into bond with *two* sufficient securities." Giving bond with *two* sufficient securities is a condition precedent, which must be complied with before the County Court have the power to grant an appeal.

3. The motion to dismiss may be made at any time. Therefore, B, having filed with the clerk of the Superior Court a transcript of the record, at April Term, 1807, and the case remained on the docket until April Term, 1810, during which time sundry orders were made in it, a motion to dismiss was allowed.

THIS was a motion to dismiss an appeal, upon the ground that the appeal bond had been signed by one security only. Judgment was rendered in the County Court at February Term, 1807, and a transcript of the record having been filed with the clerk of the Superior Court, sundry orders were made in that court, and the case remained on the docket until April
(496) Term, 1810, when a motion was made to dismiss the appeal. The motion was sent to this Court.

LOCKE, J. It has already been decided by this Court that an appeal cannot be sustained where the appellant has failed to give two securities. This question is again brought forward, either for the purpose of having that decision revised or under a belief that this case is attended with some peculiar circumstances which did not attend the case heretofore decided. The only peculiar circumstance attending this case is that the case was permitted to remain upon the docket of the Superior Court

from April Term, 1807, to April Term, 1810, during which time sundry orders were made in it, before any motion was made to dismiss. But this circumstance cannot sustain the appeal. The act of 1777, ch. 2, declares "that if any person or persons, either plaintiff or defendant, shall be dissatisfied with the judgment, sentence or decree of the County Court, he may pray an appeal to the Superior Court of Law; but before obtaining the same, shall enter into bond with *two sufficient securities* for prosecuting the same with effect, and for performing the judgment, sentence and decree which the Superior Court shall pass thereon." The mode of having a cause revived in the Superior Court, by way of appeal, is given by the act of Assembly, and not by the common law; and the Legislature who gave the right of having a cause tried *de novo* in the Superior Court upon an appeal have prescribed the terms upon which this right might be had. If they had not prescribed the terms, they would have given to the Superior Courts the power of modeling the practice according to the principles of justice and the convenience of parties. But they have, in clear and unequivocal language, declared that before either plaintiff or defendant shall have this right he shall enter into bond with two sufficient securities. What, then, is the power given to (497) the County Court in granting appeals? Simply to decide whether the two securities offered be good and sufficient, not whether the party praying the appeal shall be entitled to it on his giving one sufficient security. The object of the act was to secure the appellee in any judgment he might obtain in the Superior Court; and although it is said this object will be attained equally as well where one sufficient security is given, the Legislature thought there would be more certainty in having this object attained by having two sufficient securities given, than one. They presumed that the party prevailing in the County Court had justice on his side, and if the other party were dissatisfied he should not appeal until he secured his adversary in such judgment as he might recover in the Superior Court. They have pointed out how that security shall be given, and have made the giving of it a condition precedent to obtaining the appeal. Until this condition be complied with the County Court have no power to grant an appeal.

It is said the County Court having granted an appeal in this case, and being a court of competent jurisdiction, this Court will presume that it has acted rightly. The answer to this is that the act of Assembly makes the appeal bond a part of the record to be certified to the Superior Court, and although the presumption is that the County Court has acted rightly, yet

this presumption lasts only until the contrary appears; and that appears from the record certified to the Superior Court. And as it is as much the fault of one party as of the other to permit the case to remain so long on the docket of the Superior Court, a motion to dismiss, for the reasons offered in this case, is always in order. The act of Assembly is imperative, and the motion to dismiss the appeal must be allowed. Appeal dismissed.

Cited: S. v. Mitchell, 19 N. C., 238.

(498)

BARTLETT TYLER v. THE ADMINISTRATOR OF THOMAS PERSON, DECEASED.

From Warren.

Under the act of 1787, ch. 19, the courts have the power to make rules for the plaintiff to give further security from time to time, for the costs; and in case of a failure to comply with these rules, to dismiss his suit. And the court seemed to have had this power before that act passed.

THIS was a motion that the plaintiff be laid under a rule to give other and further security for the prosecution of the suit, or that the suit be dismissed. The plaintiff had given bond with security for the prosecution of the suit, at the time the writ was sued out, agreeably to the directions of the act of 1787, ch. 19; but the security had removed out of the State since that time. The motion was opposed upon the grounds that the plaintiff having given security when he sued out his writ, had done all that the act of Assembly required of him, and that the court could not order the suit to be dismissed except for some defect or irregularity in the proceedings. The motion was sent to this Court.

HALL, J. We find that in many instances in the English courts the judges have directed that security should be given for costs: as in the case of an ejectment brought on the demise of an infant, in the case of the death of the lessor of the plaintiff in that action, or where the lessor resided without the kingdom; so, also, where an action for the mesne profits was brought in the name of the nominal plaintiff, who had recovered in an action of ejectment. Sayer's Law of Costs, 152. The courts have done this without the aid of any statute passed for that

purpose. It is true that in other cases they have refused to make such orders, as where the plaintiff, a merchant, resided at Dunkirk (1 Wills., 266), also where the plaintiff (499) was a Swede. Strange, 1206. But what is the reason assigned? "That such a rule would affect trade, in shutting up our courts from foreigners, who could not, perhaps, find security in a foreign country." That the courts have the power to require such security has not been doubted; policy has sometimes forbidden the exercise of it.

The act of 1787, ch. 19, recites in its preamble that "Whereas transient persons and others having no property, real or personal, in this State, obtain writs and enter into litigious lawsuits, where they have no allegations sufficient to support a suit or property to disburse the charges thereof in case of failure, much to the injury of the good citizens thereof, for remedy," etc. The enacting clause then directs, "That every clerk, before issuing any writ or other leading process, shall take sufficient security of the person so applying, conditioned that he will prosecute such suit, or in case of failure, pay to the defendant all costs," etc. Our Legislature and the English courts have not been influenced by the same policy. Our Legislature have decided the question, and not left it to the courts to decide. Independently, therefore, of any right which the courts of this State might exercise in directing security to be given for the costs under particular circumstances, in case an act had not been passed upon the subject, the true spirit and meaning of the act is, not only that security be given, but if the security remove or become insolvent, further security may be required. Let the motion be allowed.

Cited: Jones v. Cox, 46 N. C., 375.

---

(500)

JAMES OATS, TRUSTEE OF THE COUNTY OF SAMPSON, v. JESSE DARDEN, LATE SHERIFF OF SAID COUNTY.

From Sampson.

1. The summary remedy against delinquent sheriffs, given by Laws 1808, ch. 21, applies as well to cases where the delinquent is out of office as where he is not; and also applies to arrearages due by the delinquent previous to the passing of the act.

2. The act is a beneficial one, and is to be liberally construed.

OATS *v.* DARDEN.

THIS was a motion made under Laws 1808, ch. 21, for judgment against the defendant for arrearages due from him as sheriff for 1807 and 1808. Two questions were made: (1) Whether the summary remedy given by that act applied to arrearages due before the passing of the act, and (2) whether this remedy could be enforced against a man whose sheriffalty had expired.

HALL, J. The policy of the Legislature in giving a summary remedy against sheriffs is obvious. They considered that there was no necessity of going through all the forms of an ordinary suit against a man who had in his hands public money. Where an individual sues another, delay is frequently necessary to prepare for trial; but this is not the case with two persons, one acting as county trustee, the other as sheriff. As to the objection in this case, that the defendant is out of office, there is no good reason to support it. The question is not whether the defendant now be sheriff, but was he sheriff at the time the moneys now claimed of him came into his hands? He is in no worse situation, nor is the county trustee in any better, by his being out of office. This is not like the cases where remedies are given in a summary way by courts against their officers as such. There they proceed against them as *their* officers, forming part of the court, but moving in an inferior sphere. On this account it is that the judges, who have (501) the control over them, compel them in a summary way to do their duty. This is a power inherent in all courts. But the moment a man ceases to be an officer of a court he falls into the common mass of citizens, and is no longer amenable to it as an officer. The present defendant is not called upon by such a power. The law of the land has pointed out the mode of proceeding now in question, against him, as well as against all public delinquents. It is a matter of no consequence whether he be out of office or not.

As to the other objection, that the act which authorizes this proceeding passed in 1808, and that the defendant cannot be proceeded against under it for public moneys which came into his hands previous thereto, and that the remedy which the county trustee then had must be resorted to: it may be answered, that when an act of Assembly takes away from a citizen a vested right, its constitutionality may be inquired into; but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly, in that respect, runs in a constitutional channel. Laws 1808, ch. 21, declares, "that the county trustees shall annually call upon the sheriffs of

their respective counties for the payment of all moneys that may be in their hands due to the trustee, etc.; and if any sheriff shall fail to account, then, etc., to move for judgment against such sheriff, etc., ten days' notice being previously given, etc." This act does not alter the rights of the sheriff; it only alters the mode of proceeding against him. Surely, the Legislature have the right to do this. But it is said the act of 1808 created new penalties. If it did, the answer is, they are not sought to be enforced in this case. But, in truth, no new penalties are created; the act of 1795, which the act of 1808 was intended to amend, pronounced the same penalties against delinquent sheriffs. These acts are beneficial, and should be liberally construed. The motion for judgment against the defendant must be allowed.

Cited: Bank v. Davenport, 19 N. C., 48; *Hill v. Kesler,* 63 N. C., 446.; *Worth v. Cox,* 89 N. C., 48.

(502)

SAMUEL WELLBORN v. NATHANIEL GORDON'S ADMINISTRATOR, ETC.

From Wilkes.

Wherever an administrator establishes the plea of "fully administered," he is entitled to judgment of execution for his costs immediately against the plaintiff.

IN this case the plaintiff established his claim against the estate of the intestate, and obtained a verdict for the same; but the defendant supported the plea of *"plene administravit,"* upon which the counsel for the defendant moved for judgment of execution against the plaintiff for his costs. And three questions were made: (1) Whether the defendant was entitled to costs; (2) if so, who was to pay them, the plaintiff or the heirs at law of the intestate? (3) was he to wait for his costs until final judgment against the heirs at law upon a *scire facias* to be sued out against them by the plaintiff to subject the real estate descended to the payment of his debt, or was he entitled to an execution immediately against the plaintiff for his costs?

BY THE COURT. The administrator having established the plea of *"plene administravit,"* is entitled to judgment for his costs. There is no person in the court against whom he can

pray for judgment, but the plaintiff. He and the plaintiff are the parties litigant upon the record. If the plaintiff should proceed by *scire facias* against the heirs at law to subject the real estate to the payment of his debt, the administrator will be no party to that proceeding, unless the heirs should wish to have a collateral issue made up between themselves and the defendant, to try whether the defendant has fully administered. If the finding of the jury upon such collateral issue should be in favor of the defendant, he could have judgment against the heirs only for the costs of such collateral issue. If the plaintiff failed to sue out a *scire facias,* the heirs (503) would not be before the court, and no judgment could be prayed against them. And in all cases where there was no real estate in the hands of the heirs, the administrator would lose his costs if he could not look to the creditor for them. Wherever the administrator establishes the plea of "fully administered," he is entitled to judgment and execution for his costs against the plaintiff immediately. Let the motion be allowed.

Cited: Battle v. Rorke, 12 N. C., 232; *Terry v. Vest,* 33 N. C., 67; *Lewis v. Johnston,* 67 N. C., 39; *s. c.,* 69 N. C., 394.

INDEX.