NORTH CAROLINA REPORTS

VOLUME 50

This book is an exact photo-reproduction of the volume known as "5 Jones Law" that was published in 1858 and denominated Volume 50 of North Carolina Reports by order of the Supreme Court referred to in Preface, 63 N. C. III-IV (1869), and Memorandum, 108 N. C. 805 (1891).

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1971

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

REPORTS

OF

CASES AT LAW,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

North Carolina,

FROM DECEMBER TERM, 1857 TO AUGUST TERM, 1858, INCLUSIVE.

VOL. V.

BY HAMILTON C. JONES,
REPORTER.

Salisbury, N. C.
PRINTED BY J. J. BRUNER.
1858.

JUDGES OF THE SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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

JUDGES OF THE SUPERIOR COURTS.

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

ATTORNIES GENERAL.

WILLIAM H. BAILEY,
WILLIAM A. JENKINS.

INDEX

TO THE NAMES OF CASES.

VOL. V.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1857.

JAMES WOODHOUSE *v.* S. H. McRAE.

The hirer of a slave permitted him to travel alone from the place at which he was employed to his master's residence, a distance of eighty miles, (both places being within the State, with the Albemarle sound between them,) of which occasion the slave availed himself to escape from the State and was never reclaimed; *Held* that this was not a want of ordinary care in the management of the slave, so as to subject the hirer to the loss.

THIS was an action on the CASE, tried before CALDWELL, J., at the Fall Term, 1857, of Currituck Superior Court.

The plaintiff declared for negligence in the management of a hired slave belonging to the plaintiff, whereby he ran away from out of the State, and was lost to the owner. The owner of the slave lived in Currituck county, and the defendant, the hirer, in the town of Plymouth, in Washington county, some seventy or eighty miles distant, the Albemarle sound lying between the places. The defendant, who had hired the slave for the year 1853, learning that the negro's master was sick, gave him permission, in the month of June, to visit him. The slave did not proceed to Currituck, but was seen, shortly after leaving Plymouth, in the town of Norfolk, in Virginia,

under the control of no one; since then he has not been heard of, and all traces of him are lost.

The Court being of opinion that the plaintiff was not entitled to recover on this state of facts, he submitted to a nonsuit and appealed.

Smith, for the plaintiff.
Heath and *H. A. Gilliam*, for defendant.

BATTLE, J. The right of the plaintiff to recover in the present action is resisted on two grounds: The first is, that the defendant was not guilty of negligence in permitting the slave in question to visit his sick master; and the second is, that the obligation, not to permit the slave to leave the State, was contained in the covenant, and that the action ought to have been brought for a breach of that, and of course, ought to have been an action of covenant.

We are of opinion that the first ground of objection is a valid one, and that being fatal to the action, it is unnecessary to consider the second.

The hirer of a slave is bound to take ordinary care of him; that is, the same care which, under the same circumstances, a person of ordinary prudence would take of the slave if he were the owner; *Heathcock* v. *Pennington*, 11 Ire. Rep. 640; *Couch* v. *Jones*, 4 Jones' Rep. 402. This is the rule by which the hirer is to be governed in keeping the slave from being injured or destroyed, and in the application of it, the slave is to be considered an intelligent being, with a strong instinct of self-preservation, and capable of using the proper means for keeping out of, or escaping from, situations of danger; *Heathcock* v. *Pennington, ubi supra; Herring* v. *Wilmington and Ral. R. R. Co.*, 10 Ire. Rep. 402; *Swigent* v. *Graham*, 7 B. Mon. (Ken.) Rep. 661. No reason can be given why the same rule should not apply to the care which a hirer must take to prevent a slave from running away; and we are sure that the fact is, and therefore the presumption must be, that in the large majority of instances, under ordinary circum-

stances, the slave, an intelligent being, will prefer to remain with his master or hirer, rather than flee from him to another country. Now, if a master were to take his slave seventy-five or a hundred miles from his wife, would he hesitate to permit him to visit her at suitable times? Would he, under ordinary circumstances, think he was running any risk in sending his slave that distance upon any business that required it? We believe that instances of such conduct are not of very uncommon occurrence in this State, and that there is not one case in a hundred in which the slave avails himself of the opportunity of escaping into another State. If, then, an owner of ordinary prudence would feel no hesitation in sending his slave, or permitting him to go, seventy or eighty miles from home, we cannot think the hirer in the present case, where there was no special ground of suspicion, ought to be charged with a want of ordinary care in permitting the slave in question to visit his sick master, even though, in doing so, he had to cross Albemarle sound. It will not do to say that under ordinary circumstances, one who hires a slave near the border of the State, must guard him by day and imprison him or chain him at night, to prevent him from fleeing across the line.

Believing that the action cannot be sustained, we must direct the judgment of nonsuit to be affirmed.

PER CURIAM, Judgment affirmed.

JOHN HALL *v.* MORRISON CRANFORD.

An old field which had been *turned out* without fencing around it, and which had grown up in broom sedge and pine bushes, surrounded by forest land, is "woods," within the meaning of the act, Rev. Code, ch. 16, section 1; and one setting fire to such old field, is liable to the penalty imposed by that act.

Hall *v.* Cranford.

THIS was an action brought, by warrant, for the penalty given by the act of Assembly, Rev. Code, ch. 16, sec. 1, for burning woods, and tried before BAILEY, Judge, at the August Term, 1857, of Montgomery Superior Court.

The evidence was, that the field in which the fire was set, had been cleared and cultivated, but at the time spoken of, was an old field of about four acres, and had been turned out for several years; that it was grown up in grass and pine bushes, some of which were as high as a man's waist, and some as high as his head, and that that there was no fencing about it; that the lands surrounding the old field and contiguous to it were forest land, owned by other persons than either the plaintiff or defendant, and the old field itself was not the property of either of them. There was contradictory evidence as to whether the fire, on this occasion, extended to the forest or woodlands adjoining.

The part of his Honor's charge to which the plaintiff's counsel excepted was, "if the old field only was set on fire, and the fire did not extend beyond it, and did not burn any of the woods outside of it, the plaintiff could not recover."

Verdict for the defendant. Judgment and appeal.

Kelly, for the plaintiff.

No counsel for the defendant in this Court.

BATTLE, J. We dissent from the opinion expressed by his Honor in the Court below, that the "old field grown up in broom-sedge and pine-bushes was not 'woods,'" within the meaning of the Revised Code, ch. 16, sec. 1. According to the testimony of the witnesses, this old field had formerly been cleared, enclosed, and cultivated, but at the time when it was set on fire and burnt, the fences were down, and the land, in the common parlance of the country, said to be *turned out*, and grown up in broom-sedge and pine-bushes, some of which were as tall as a man's waist, and others as high as his head. It was entirely surrounded by forest-land which on every side lay contiguous to it. It is certain that the set-

ting fire to such a parcel of land, without a timely notice to the adjacent proprietors was likely to be attended by all the mischiefs which the statute intended to prevent, and we think it would be a strained construction of the language of the act, to confine it to wood-lands never before cleared, enclosed and cultivated. In the recent case of *Averitt* v. *Murrell*, 4 Jones' Rep. 322, we said that "the term *woods*, as used in the statute, means forest lands in their natural state, and is used in contradistinction to lands cleared and enclosed for cultivation." We therefore held, in that case, that the burning of log-heaps in one's own enclosed field could not be called burning his woods. There may be some ambiguity in the use of the terms "forest lands in their natural state," and it may perhaps be doubted whether they can properly be applied to an old field, once enclosed and cultivated, but now turned out and grown up in grass and bushes. However this may be, it is clear that such old fields are as properly contradistinguished from "lands cleared and enclosed for cultivation," as "forest lands in their natural state," and we cannot perceive any reason why the statute should not embrace the one kind of lands as well as the other. Each is a species of "woods" or "wood-lands," and as the mischief likely to result from burning the one is as great as that of the other, the statute never could have intended to make any difference between them.

Thinking that his Honor erred in holding otherwise, his judgment must be reversed, and a *venire de novo* granted.

PER CURIAM, Judgment reversed.

DAVID J. SOUTHERLAND *v.* JOHN R. WHITAKER *et al.*

A note, made payable to the cashier of a bank, negotiable and payable at that bank and two others in the same town, not founded on any dealing between the payee and makers, endorsed in blank by the payee, without

value, without recourse, shows that it was made to be discounted and has no validity as against the sureties, unless it is thus discounted.

It could not be recovered in the name of the payee, or his endorsee, for the want of a consideration.

Such a note is distinguishable from a note or bill founded upon a real transaction and evidencing real indebtedness; for in that case, though made negotiable at a bank and not discounted, such a note is valid.

Action of ASSUMPSIT, tried before ELLIS, J., at the last Fall Term of Duplin Superior Court.

The plaintiff declared on the following promissory note:

"Wilmington, N. C., December 24, 1854.

"$775.—Ninety days after date, we, John Whitaker, as principal, and John B. Quince and S. W. Dunham, sureties, promise to pay to William Reston, cashier, or order, seven hundred and seventy-five dollars, value received, negotiable and payable at the bank of Cape Fear, the Wilmington branch of the bank of the State of North Carolina, or at the Commercial Bank of Wilmington."

The plaintiff introduced Mr. Hall, who testified that he saw this note in the hands of the plaintiff before the name of Reston, the payee, was inserted in it; nor did it then have any endorsement; that he saw the plaintiff fill up the blank with Mr. Reston's name; the note was left with him, and he procured Mr. Reston to endorse it in blank "without recourse." Nothing was paid him for it.

Mr. Kelly was called by the defendants, who stated that he paid nothing to Reston for his endorsement, and that he, Kelly, endorsed it to the plaintiff without consideration to him, and he did this merely to enable the plaintiff to sue in Duplin county.

Mr. Wright, for the defendants, testified that he was an officer in the bank where Mr. Reston was cashier; that this note was placed there for collection; that it was not collected, but given back to the plaintiff, not having been discounted at the bank.

Mr. Reston testified, that he was applied to by Mr. Hall as the attorney or agent of the plaintiff to endorse the note in

question, which was then past due. He further states, that the said note was never delivered to him, or accepted by him, under any contract or agreement made by the payers, or either of them, or with any other person; that he had no title to it, nor interest in it, and never saw it till it was presented to him for his endorsement.

The Court charged the jury that, taking the testimony of all the witnesses to be true, the plaintiff could not recover; that it appeared that no contract had been made with Reston by the defendants, and no consideration moving from him to them, and nothing paid by Kelly or plaintiff for the endorsement; there was no presumption of law that the plaintiff paid value for the note before it was endorsed to him, and no evidence was offered that he had paid value.

Plaintiff excepted.

Verdict for the defendants. Judgment and appeal.

London, for the plaintiff, cited Byles on Bills 88, (margin) Chitty on Bills 79; Ibid 177; *Powell* v. *Walters*, 17 Johns. N. Y. Rep. 179; *Horah* v. *Long*, 4 Dev. and Bat. Rep. 634; *Robinson* v. *Reynolds*, Eng. Com. L. Rep. vol. 42, p. 634.

W. A. Wright, for the defendants.

PEARSON, J. This case is not distinguishable from *Dewey* v. *Cochran*, 4 Jones' Rep. 184. The principle settled by that case is, where a note shows on its face that it was made for the purpose of being discounted at a particular bank, it does not become a note, and has no validity so far as the sureties are concerned, unless it be so discounted, and consequently it cannot be thrown into the market and traded off to a private individual. The principle rests on the ground, that from the known rules and practice of the bank, one may be willing to become bound as surety to a note negotiable and payable at that bank, who would not be willing to incur the responsibility of a surety to a note which was to be thrown into market, and might pass into the hands of an individual who was unknown, and remain there for years, during which

time the surety might be uninformed as to whether it had ever been negotiated, and if so, who held it; or whether the principal had made any arrangement in regard to it. Our case illustrates the soundness of the principle. The note is not heard of until six months after it was written, and three months after its maturity. It is then found in the hands of the plaintiff. What he paid for it, or how he obtained it, no one knows. Then follows the filling up and the endorsements for the purpose of collecting it out of the sureties who had been kept uninformed of the disposition which had been made of it; but who knew that it had not been discounted at bank according to the original purpose for which it was made, and who were justified in coming to the conclusion that it had been destroyed or thrown aside as waste paper, and therefore did not feel called on to require of the principal any security for their protection, as it is reasonable to suppose they would have done, had it been discounted, and its dishonor at maturity become known; because, by the rules of the bank it must be then paid, or renewed; whereas, according to the habits of our people, a note may be overdue for years without its being considered dishonored, except so far as its negotiability may be affected by the law merchant.

The fact that this note is negotiable and payable at one of three banks in Wilmington, does not vary the principle. There is a marked difference between a note negotiable and payable *at bank* generally, and at one of three particular banks; for when it is discounted, the identity of the bank is fixed. The *play* in respect to the three banks is attributable to the circumstance, that as the rules and practice are the same, it was a matter of indifference to the sureties, and they were willing to consult the convenience of the principal, in reference to which one of these three particular banks he might select, or be able to meet with accommodation.

It was said on the argument, "property is frequently sold on time, the purchasers to give notes with sureties, negotiable and payable at bank; this is done to meet the requirement of the bank charters, and to enable the seller to realise

the money before the notes mature. Can it be that if the bank refuses to discount the note, he has no remedy against the sureties?"

There is an obvious distinction between that case and ours. There, the note is made payable to the seller; the intent that it is to become a note and have validity from the time it is written, and its being made afterwards negotiable and payable at bank is a collateral circumstance, introduced for the accommodation of the seller, and not intended to affect the validity of the note. Here, the intention is, that the paper shall not be a note, or have validity, unless it is discounted; in other words, in our case it is made a condition precedent to the existence of the note, and is not a mere collateral circumstance.

His Honor puts his decision upon a second ground, that there was no proof of a consideration. We concur with him upon this point also. As a general rule, a consideration is implied in reference to instruments of this sort; but where circumstances of suspicion are thrown upon a note, that the name of the payee is not inserted, and his endorsement is not made until it is six months over-due, and is then made without consideration and without recourse, and the holder gives no account of the manner in which he came by it, there must be proof of a consideration.

PER CURIAM, Judgment affirmed.

STATE v. ISRAEL PERRY.

If one person by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow.

INDICTMENT for an AFFRAY, tried before CALDWELL, J., at the last Fall Term, of Currituck Superior Court.

The facts are, that the defendant and one Whitehall met near the court-house of Currituck county; the defendant asked Whitehall to walk aside with him, saying that he wished to have a friendly talk with him; Whitehall did so, whereupon the defendant immediately commenced abusing the other in a violent manner, accusing him of stealing cattle and mismarking hogs, and said that he knew enough against his wife and daughter to sink them into hell. Whitehall thereupon pulled off his coat, saying as he did so, that he could stand every thing but a charge against his family. He then struck the defendant a blow, when the bystanders interfered so that no blow was struck by the defendant Perry, and no further conflict took place.

The charge of the Court, as to the defendant Perry was, that if his abusive language towards his adversary, as proved by the witnesses, was calculated and intended to bring on a fight, he was guilty, though he did not strike a blow and had been knocked down.

The defendant's counsel excepted to the charge of his Honor.

Verdict for the State. Judgment and appeal.

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

BATTLE, J. An affray is defined to be the fighting of two or more persons in a public place to the terror of the citizens; *State* v. *Allen*, 4 Hawks' Rep. 356; *State* v. *Woody*, 2 Jones' Rep. 335. From this definition, it seems to us to be plain, that if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow. He is undoubtedly the immediate cause of the breach of the peace, and is morally the more guilty of the two; and we are not aware of any principle which prevents the law from regarding him as a criminal. The only argument urged in his favor is, that the use of words alone, however insulting to his adversary, is not a misdemeanor, and

that being innocent up to the time when he is stricken, he cannot be made guilty by the sole act of such adversary. The argument is plausible, but will not bear the test of strict examination. If one man by words, or signs, instigates another to strike a third, he is clearly guilty of an assault and battery the moment the blow is stricken, though no offence is committed until that is done. That case is like the present in principle, and we cannot distinguish the one from the other. An affray is denounced by the law as a misdemeanor, because it is a breach of the peace; and, surely, he who intends to provoke it, and does provoke it, ought not to escape the necessary consequence of his guilty intention. The charge of his Honor in the Court below was correct, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

STATE *v.* WILLIAM CHAVERS.

It was held not to be error in a Judge to instruct the jury that, according to the 79 sec. of 107 chap. of the Rev. Code, a person must have in his veins less than one-sixteenth part of negro blood, before he will cease to be a free negro, no matter how far back you had to go to find a pure negro ancestor.

An indictment charging the defendant, as a "free person of color," with carrying arms, cannot be sustained; for the act (66 sec. 107 ch. Rev. Code,) is confined to "free negroes."

INDICTMENT, tried before PERSON, J., at the Spring Term, 1857, of Brunswick Superior Court.

The defendant was charged, as a free person of color, with carrying a shot-gun. It was proved that the defendant carried a shot-gun as charged in the indictment.

A witness proved that the defendant's father was a man of dark color and had kinky hair; that he was a shade darker than the defendant himself, and his hair was about as much kinked.

A *Mr. Green* proved that he and the defendant, with others, came to this court upon a steam-boat from Wilmington, and that the price of a passage for white persons was one dollar; that while on the way, the defendant handed him one dollar, and requested him to pay the fare of himself and his brother with that sum, saying he understood that the fare of white persons was one dollar and colored persons half price, and that he and his brother were colored persons, and that the witness accordingly paid the fare of both of them with one dollar.

The defendant's counsel insisted, in his argument, that his client was a white man, and called upon the jury to inspect him and judge for themselves.

The Court charged the jury "that every person who had one-sixteenth of negro blood in his veins, was a free negro. That the descendants of negro ancestors became free white persons, not by being removed in generation only, but by that, coupled with purification of blood, for if it was not so, then persons of half negro blood might, and would, become free white persons by law." "Take," said his Honor, "two families, the father of one family a white person and the mother a negro, and the father of the other family a negro and the mother a white woman; the members of these families are of the half blood, and in the first generation from a negro, let them intermarry, and their descendants intermarry, until by generation, they are removed beyond the fourth generation from the pure negro ancestors, the father of the one, and the mother of the other, from whom they are descended, are they any the less free negroes in the fifth than they were in the first generation from their negro ancestors? They still have half negro blood in their veins, and that is all they had in the first generation. In the fourth generation they were unquestionably free negroes, but they certainly had no more negro blood than their children."

"Can it be then," continued his Honor, "that a remove by one generation has the effect, in law, of turning a half negro into a free white man in spite of the color of his skin or the

kinking of his hair? It seems to me both unreasonable and absurd, and therefore I cannot put such a construction upon the 79th section of the 107th chapter of the Act of Assembly, (Revised Code) declaring who shall be deemed free negroes. My construction of the statute is, that no person in the fifth generation from a negro ancestor becomes a free white person, unless one ancestor in each generation was a white person; that is to say, unless there shall be such a purification of negro blood by the admixture of white blood as will reduce the quantity below the one-sixteenth part; and unless there is such purification it makes no difference how many generations you should have to go back to find a pure negro ancestor; even though it should be a hundred, still the person is a free negro."

His Honor, therefore, instructed the jury, "if from inspection of the defendant, the evidence as to the color of his father, and his own declarations made upon the steam-boat, taken all together, they should find that he had as much as one-sixteenth of negro blood in him, he was a free negro, and they should so find."

The defendant's counsel excepted to the charge.

The verdict was against the defendant. Judgment and appeal.

Attorney General, for the State.
Shepherd and *Baker*, for the defendant.

BATTLE, J. The defendant was indicted as a "free person of color," for carrying about his person a shot-gun, contrary to 66th section of the 107th chapter of the Revised Code. The 79th section of the same chapter declares, "That all free persons descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood." The defendant was convicted and moved for a new trial upon two grounds: *First.* Because there was no evidence that he was a free negro. *Secondly.* Because the Judge erred in his instructions to the jury upon

the meaning of the statute which prescribes who shall be considered such a person.

The counsel for the defendant insists upon both grounds in his argument before us, but relies mainly on the last.

1st. We think there was testimony sufficient to be left to the jury, tending to prove that the defendant was a free negro. The evidence introduced to show the color of his father —the kind of hair which he and his father both had, was competent, and that, together with his confessions, and his own color, which his own counsel called upon the jury to inspect, was sufficient for the consideration of the jury upon the question submitted to them. Upon its weight and its sufficiency to establish the fact of his being a free negro, it was for them alone to decide.

2d. The main objection to the charge of the Judge is that he, instead of following the rule laid down by the 79th section of the statute, to determine who should be regarded as a free negro within the meaning of the 66th section, misled the jury by making the quantity of the negro blood the test by which to ascertain the fact. Taking the charge altogether, we think that it is not obnoxious to censure, and that it lays down the rule correctly according to the statute. By that, as we understand it, no person can cease to be a free negro, unless he has reached the fifth generation from his African ancestor, with a white father or mother in each of the first, second, or third and fourth generations. In that case a simple arithmetical calculation will show that he will not have a sixteenth part of African blood in his veins.

That part of his charge which speaks of the marriage of persons belonging to two families, both of which have a mixture of white and negro blood, was intended solely to guard the jury against being misled by any other rule than that to which we have already adverted, to wit, that there must be a white father or mother in each generation from the African ancestor down to the fifth, to exclude the descendant from the operation of the statute. With a view to that rule, the Judge was right, for it is a mathematical truth, in saying that the

person in the fourth generation *would necessarily* have a sixteenth part of negro blood in him.

The motion for a new trial being denied him, the defendant, through his counsel, moves here in arrest of the judgment, because he is charged, in the indictment, as "a free person of color," whereas the section of the act, under which he is indicted, makes it penal for any "free negro" to carry arms about his person. The counsel contends that, although the terms "free negro" and "free person of color" are often used in the 107th chapter of the Revised Code, as synonymous, yet it is not always the case, and that therefore the indictment, upon the section in question, cannot be sustained in substituting the latter description of the person for the former.

There can be no doubt that the two terms are sometimes used in the act to which the counsel refers, as synonymous; as, for instance in the 11th and 13th sections, which prohibit free negroes from working in certain swamps without a certificate; and we also think, with the counsel, that there is at least one instance, (and one is sufficient for his purpose,) in which the terms cannot be so regarded. The 44th section declares that "any slave or free negro, or free person of color convicted by due course of law, of an assault with intent to commit a rape upon the body of a white female, shall suffer death." Here, three classes of persons seem to be included, to wit, slaves, free negroes, and free persons of color. The last section of the act to which we referred in giving our opinion upon the motion for a new trial, defines who shall be deemed free negroes and persons of mixed blood, but does not declare who shall be embraced under the term "free persons of color." The amendment to the constitution of the State, Art. 1, sec. 3, ch. 3, to which the counsel for the State has referred us, does not remove the difficulty, because the terms there used are "free negro, free mulatto, or free person of mixed blood," with a similar definition to that given in the section of the act above specified. Free persons of color may be, then, for all we can see, persons colored by Indian blood, or persons descended from negro ancestors beyond the fourth

degree. The indictment then, in the present case, may embrace a person who is not a free negro within the meaning of the act, and for that reason, it cannot be sustained.

PER CURIAM, Judgment arrested.

BRANCH & THOMAS *v.* DANIEL MORRISON, *Adm'r., et al.*

Turpentine run into boxes (cut into the trees) is personal property.

One who is possessed of land, though he has no title to it, is the *true owner* of turpentine produced by his labor and cultivation and run into boxes, and he can maintain trover for taking it from them.

THIS was an action of TROVER, tried before his Honor, Judge BAILEY, at the last Fall Term of Harnett Superior Court.

The plaintiffs declared for the conversion of a quantity of turpentine taken out of his boxes, cut into trees. They proved that in December, 1853, they leased from Neil McKay a large tract of land, in which he, McKay, had cut boxes, and which he had worked in the year 1853; that they cut other boxes, and that in 1854, after these boxes had filled up and were ready for sapping, Alexander Morrison, the in testate of one of the defendants, and the other defendant, Ray, went upon the land and dipped the turpentine from the boxes and carried it off, amounting to about forty barrels.

The defendants then offered a grant from the State, dated January, 1854, to Alexander Morrison, and that this grant embraced the territory upon which were the trees from which the turpentine in question was made, and claimed to have entered and taken the commodity in question under this grant.

The plaintiffs then produced in evidence a grant from the State to John Gray Blount for the land in question, dated in 1795, and exhibited several mesne conveyances for the same, but none of them connected the plaintiffs with Blount, at the date of the lease from Mr. McKay, or at the date of the writ.

The plaintiffs then offered evidence to locate the Blount grant, but his Honor holding that the plaintiffs had shown title out of themselves, and that they could not recover, they took a nonsuit and appealed.

Neil McKay and *Moore*, for plaintiffs.
Shepherd and *Winslow*, for defendants.

PEARSON, J. Turpentine in boxes, in a state to be dipped up, is personal property. It no longer forms a part of the tree, but has been separated by a process of labor and cultivation. If, like the sap of the sugar-maple, its flow were directed into vessels on the ground near the tree, no one would doubt its being severed from the realty. This is the same in effect with turpentine, although its flow is directed into boxes cut in the tree itself. When it ceases to be a part of the tree, it becomes personal property. *State* v. *Moore*, 11 Ire. Rep. 70.

It was then insisted, that although the turpentine was personal property, in the possession of the plaintiff at the time of the conversion, yet he could not maintain trover, for the right of property was not in him, and the true owner was known, to wit, the heirs of Blount, who had title to the land.

It is settled by *Barwick* v. *Barwick*, 11 Ire. Rep. 80, that trover will not lie upon a mere possession, where the true owner is known. The plaintiffs' counsel commented upon this case, but we are satisfied that it rests upon correct principles, and it is approved in *Craig* v. *Miller*, 12 Ire. Rep. 375, which case is distinguished and put on the ground taken in *Armory* v. *Delamire*, 1 Strange's Rep. 505, that the true owner was not known. In our case, however, suppose the land belongs to Blount's heirs, that does not give them a right to the turpentine which had been severed from the realty by the plaintiffs, while they were in possession of the land; on the contrary, the turpentine, when, by the labor and cultivation of the plaintiffs, it was made personal property, became the property of the plaintiffs. So they are the *true owners*. The heirs of Blount, if they ever regain possession of the land,

may have an action of trespass *quare clausum fregit*, "for treading down grass," against the plaintiffs, but they will have no right of action to recover this particular turpentine, either against them, or the defendants, for they never had a right of property in it, and cannot acquire either a right of possession, or of property in respect to it, by the *jus post liminii; Brothers* v. *Hurdle*, 10 Ire. Rep. 490. It is there held that the owner of land cannot maintain trover for corn, fodder, &c., that had been raised on the land and severed while the defendant was in possession. The court say, "the amount of it would be, when one who has been evicted regains possession, he may maintain trover against every one who has bought a bushel of corn or a load of wood from the trespasser, at any time while he was in possession! This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one whose title admitted of question."

The defendants' counsel took a distinction between things which are of annual cultivation, e. g. corn, and such as are of the natural growth of the earth, e. g. trees. The distinction makes a difference to this extent: the former is personal property for some purposes *before* severance, the latter is not; but *after* severance both species become personalty, and the same principle is applicable.

The defendant's counsel then insisted, that although he could not be sued in trover by Blount's heirs, yet he would be exposed to their action of trespass *quare clausum*, in which the value of this turpentine would be incidentally involved, and he could not protect himself, by the plaintiffs' recovery, from being charged a second time in respect thereof, and, therefore, he contended, the case fell within the principle of *Barwick* v. *Barwick*, supra.

The principle cannot be extended that far. The action of trover, founded upon the plaintiffs' possession, can only be defeated when the true owner is known, so that the defendant, by satisfying the judgment, would not become the owner of the chattel by a judicial transfer, but would be exposed to

a second action in respect to the chattel itself. A mere possibility that the owner may afterwards be discovered, will not defeat the action; *Armory* v. *Delamire*, supra; *Craig* v. *Miller*, supra.

In our case, the plaintiffs are the owners of the chattel. The defendants, by satisfying the judgment, will acquire a perfect title to it, and the possibility that Blount's heirs may sue them for trespass to the land, cannot defeat the action, for, in fact, the value of this turpentine would not even incidentally be chargeable to them, it having been severed and become the personal property of the plaintiffs before the defendants trespassed upon the land. So that the value of the turpentine could only be taken into the amount of damages in the action of trespass against the plaintiffs, which Blount's heirs may bring against them. There is error.

PER CURIAM, Nonsuit set aside, and a *venire de novo*.

PETER A. McEACHIN *et al.* *v.* JAMES Q. McRAE.

(Question of intention arising from the peculiar phraseology of a will.)

In the construction of doubtful language in a will, that interpretation which gives a consistent meaning to all the terms employed in the instrument, will be preferred to one which works an inconsistency and leaves part of the language unemployed or unmeaning; especially where the proposed construction is strictly according to the rules of grammar.

ACTION of TROVER for the conversion of slaves; submitted, in a case agreed, to his Honor, Judge BAILEY. From Robeson county.

The question of the plaintiffs' right to recover arises out of the seventh clause of the will of Archibald McEachin, which is as follows: "Seventhly. I give, devise and bequeath to my children, to wit, Mary Jane McEachin, Ann Eliza McEachin, Margaret Annabella McEachin, Sarah McEachin, Peter McEachin and Flora McDonald McEachin, share and share alike, the following slaves, to wit, old Cate and her chil-

dren and grand-children, Peggy, Jack, &c., (mentioning about thirty,) also the negroes hereinbefore devised to my wife Annabella during her life-time only, the before mentioned slaves and their increase, if any, to the said Mary Jane, Ann Eliza, Margaret Annabella, Sarah, Peter and Flora McDonald McEachin, their heirs and assigns forever; and that so soon as any of my said children arrive to the age of twenty-one years, or should marry or may be about to marry, then and in that case I authorise and desire that my executrix and executor, or either of them, should call together three disinterested and intelligent freeholders, and being duly sworn to do justice; and should none be willing to act, I direct that application be made to the County Court to order three freeholders, either with or without my executor or executrix, to value the before-mentioned slaves, whether they be increased or decreased, and put them into as many lots as there may be of my children then surviving, and the first lot to be drawn shall be the property of the heir claiming such division, and the balance of the negroes to remain in common as before, until another application, and proceed as in the first case, until all the lots are drawn; and the negroes thus drawn shall become absolutely the property of the heir drawing the same, and shall exclude the said heir from any further claim in this stock of negroes, unless some one of the children or heirs should die without legal issue, in which case the surviving ones shall inherit equally."

Mary Jane, mentioned in this will, intermarried with the plaintiff Angus D. McLean, Ann Eliza with Neil A. McLean, Margaret Annabella with Joseph B. McCallum. These, with Peter McEachin, are the plaintiffs in this suit. Sarah McEachin, one of the above-named legatees, died intestate and without issue, after her share had been allotted to her, and her property was divided among her brothers and sisters. Several other partitions were made in pursuance of the directions in the will, until the common fund included only the shares of Peter and his sister Flora McDonald, and, on his arrival at full age, he caused a partition to be made between

them, which was assented to by the executor and executrix. Subsequently to this last division, Flora McDonald intermarried with the defendant James Q. McRae, who took the slaves allotted to his wife, into his possession, and has held the same ever since as his property. Flora McD., the defendant's wife, died without issue of her body, and the plaintiffs claim the property assigned to her, by the right of survivorship, according to the terms of the above will. It was agreed that the slaves were worth $4,600, and that if his Honor should be of opinion with the plaintiffs, they should have judgment for that sum, but if of a contrary opinion, a nonsuit should be entered.

Upon consideration of the case agreed, the Court gave judgment against the plaintiffs, who took a nonsuit and appealed.

Shepherd and *Kelly*, for plaintiffs.
Troy and *Banks*, for defendant.

BATTLE, J. We concur in the decision made by his Honor in the Court below. The only fair construction of which the seventh clause of the will (on which the question is raised) admits, is that each share became absolute in the child to whom it was allotted. The death, without legal issue, of either of the children to whom a share had been allotted is not provided for by the testator at all. The language of the will is that when a lot is drawn it shall become "the property of the heir claiming such division, and the balance of the negroes to remain in common as before, until another application, and then proceed as in the first case until all the lots are drawn, and the negroes thus drawn shall become absolutely the property of the heir drawing the same, and shall exclude the said heir from any further claim in this common stock of negroes, unless some one of the children or heirs should die without legal issue, in which case the surviving ones shall inherit equally." The evident meaning of this is, that a child to whom a share was allotted should no longer have any interest whatever in the common stock, how great soever its increase might

be, but should not be excluded from an equal division with the other children of the share of one of the owners of the *common stock* who should die without legal issue. That is the proper grammatical construction of the clause, and ought the more readily to be adopted, because it gives full force to, and is entirely consistent with, the expression that the "negroes drawn shall become absolutely the property of the heir drawing the same." If the provision of dying without lawful issue be held to extend to the child to whom a share had been allotted, then he or she would not have it absolutely, but only conditionally, contrary to the express words of the testator. But if the provision is confined to those only of the children to whom no separate shares had been allotted, but who still held their part of the negroes in common, no such inconsistency will exist, and full effect will be given to every part of that clause of the will. It is hardly necessary to say, that this construction cannot be affected by what the children may have done in dividing the share of Sarah upon her death without issue after it had been allotted to her. Our opinion, then, is, that the share of Flora vested in her, absolutely, upon its allotment to her, and became the property of the defendant by her intermarriage with him.

PER CURIAM, Judgment of nonsuit affirmed.

HENRY H. PURVIS AND WIFE *v.* JOHN WILSON.

In a petition for a partition of land, in a court of law, where the defendant denies the tenancy in common by a plea of *sole seisin in himself*, the proper course is for the court to try the question of title thus raised, and not to force the plaintiff to resort to an action of ejectment for that purpose.

THIS was a petition for the partition of land, tried before MANLY, J., at the last Fall Term of Bertie Superior Court.

The defendant pleaded to the petition that he had never

been a tenant in common, of the land in question, with the petitioners or either of them, but that he had a sole seisin in the premises.

Upon the hearing of the petition and plea, the plaintiffs moved that the issue of title, made by the pleading, be submitted for trial to a jury, which was refused by his Honor, who ordered that the proceedings on the petition should be suspended until the question of title should be tried in an action of ejectment. From which decision the plaintiffs appealed.

Garrett and *Barnes*, for plaintiffs.
Winston, Jr., for defendant.

PEARSON, J. Coparceners had a right to partition at common law; it was given to joint tenants, and tenants in common by statute. The remedy was in a court of common law by "writ of partition;" Fitzh. Nat. Bre. 256; Co. Litt. 169, a. n. 2. The inconveniences attending the mode of suing and having the partition made, induced the court of equity to assume a concurrent jurisdiction, but this did not affect the common law remedy; *Holmes* v. *Holmes*, 2 Jones' Eq. Rep. 334.

If the proceeding is in equity and the defendant denies the relation and avers a title in severalty, so as to put the title in issue, the court will not undertake to decide it, but will direct it to be tried by an action of ejectment, the defendant admitting an actual ouster, &c., and the plaintiff, after getting a judgment in that action, is entitled to a decree for partition. But if the proceeding is in a court of common law, and the defendant pleads "*non tenent insimul*" (sole seisin in himself) which is the "general issue" in the action for partition, Com. Dig. Pleader, 3 F. 3, Boothe on Real Actions, 246, the issue joined upon that plea is tried like other issues, and if found in favor of the plaintiff, there is judgment that partition be made.

The suggestion that when the defendant pleads "sole seisin," the plaintiff cannot proceed in his action, and is put to the

necessity of bringing another action, has nothing to sustain it. The court is just as competent to determine the question of title in an action for partition as it is in an action of ejectment, and it involves an absurdity to suppose that a defendant, by simply pleading the *general issue*, can, without a trial, defeat the action and force the plaintiff to institute another action to be tried before the same court.

It was insisted on the argument, in support of this suggestion, that although at common law the "general issue" in an action for partition was tried like other issues, yet the statute, Rev. Code, ch. 82, sec. 1, has the effect of introducing this anomolous mode of proceeding. The statute provides that "the Superior and County Courts and Courts of Equity, on petition of one or more persons claiming any real estate, &c." The object and effect of the statute is to change the process, and in respect to a court of law, to substitute a *petition* in place of the *writ* of partition, it having been found that the difficulties attending "the process" in partition, that is, summons, attachment and distress infinite, (there being usually many defendants,) were not obviated by 8 and 9 Will. 3 ch. 31 sec. 1. Allnatt on Partition, 66. There is nothing in the statute to countenance the idea that if the defendant, by way of answer, or plea, denies the relation, and alleges a sole seisin, the superior or county courts, are not to proceed and try the issue arising thereon, in the same way as when the action was by writ. It is only when the petition is filed in a court of equity that the action of ejectment becomes necessary; because in the course of that court, it will not decide the legal title to land. *Thomas* v. *Garvan*, 4 Dev. Rep. 223, was a petition for partition filed in the Superior Court of law for the county of Bladen. The defendant pleaded that she was not tenant in common with the petitioners, but was in the sole adverse possession of the land; the issues joined were tried in that court, and, the verdict being for the defendant, the petition was dismissed. The ruling was affirmed by this Court, on the ground that the defendant had acquired the title in severalty. The case necessarily turned

upon the question of title. There has been no instance of a disseisin since the time of Charles 2nd, except a "disseisin at election" for the sake of the remedy; for, accepting socage-service (which with us is the payment of taxes) is not such a concurrence on the part of the lord as is necessary to consummate a disseisin; so the learning in Co. Lit. 67, a. has now no application. If one has title as tenant in common, he is, in contemplation of law, in possession with his co-tenant in spite of any thing that has been done or said, unless he elects to consider himself "actually ousted" for the sake of bringing ejectment. Something is said in *Thomas* v. *Garvan*, supra, about putting the plaintiffs to their action of ejectment; but the Court passed upon the title, and it being decided that the defendant owned the land in severalty, the petitioners could have no better ground to stand on in an action of ejectment, than in the proceeding under the petition; and we presume the allusion made to the action grew out of an indistinct notion in regard to the course of a court of equity.

Rev. Code, ch. 118, sec. 2. "Any widow having claim to dower may file her petition in the County or Superior Court, &c." This statute, like that in regard to partition, substitutes a petition for the writ of dower. If the title is put in issue the court must pass on it; e. g., suppose the seisin of the husband at the time of his death is denied in a petition for dower, the idea of an action of ejectment is out of the question, for the widow cannot maintain it until her dower is assigned. There is error.

PER CURIAM, Judgment reversed.

WILLIAM K. LANE, *Adm'r.*, *v.* THE SEABOARD AND ROANOKE RAIL ROAD COMPANY.

Where a corporation has been brought into court under a wrong name, the court has power to amend the process by striking out that name and inserting the right one.

MOTION to amend the writ; before ELLIS, Judge, at the last Fall Term of Wayne Superior Court.

The proposition was to strike out "the Portsmouth and Roanoke Rail Road Company" named as defendants, and substitute therefor "The Seaboard and Roanoke Rail Road Company." It appeared from the writ that it had been served on David A. Barnes, a director in the Seaboard and Roanoke Rail Road Company, by delivering to him a copy. The motion was allowed by his Honor, and the defendants appealed.

Strong and *Dortch*, for plaintiff.
W. A. Wright, *B. F. Moore* and *J. H. Bryan*, for deft's.

BATTLE, J. Our act for the "amendment of process, &c.," (see Rev. Code, ch. 3) is so comprehensive, and the construction which our courts have always put upon it is so liberal, that the expression used by one of the Judges in the case of *Davis* v. *Evans*, 1 Car. Law Repos. 499, that "any thing may be amended at any time," has passed into one of the maxims of the law. This is almost literally true as to the amendment of the process and pleadings during the pendency of a suit. Thus, in the case of *McClure* v. *Burton*, 1 Car. Law Repos. 472, which was an action of covenant on a deed, the Court permitted the plaintiffs to amend, by striking out the names of some of the defendants, who, upon oyer, appeared not to be parties to the deed. In *Grandy* v. *Sawyer*, 2 Hawks' Rep. 61, the writ was allowed to be amended, by striking out some of the plaintiffs, and inserting others. Again, in *Green* v. *Deberry*, 2 Ire. Rep. 344, the writ was amended on the plaintiff's motion, by adding the names of other persons as plaintiffs. See also on this subject, *Quiett* v. *Boon*, 5 Ire. Rep. 9, and *Phillipse* v. *Higdon*, Busb. Rep. 380. In England, where the defendant was arrested by a wrong name, the plaintiff was permitted to amend by inserting the right one; *Stevenson* v. *Danvers*, 2 Bos. and Pul. Rep. 109; *Carr* v. *Shaw*, 7 Term Rep. 299.

In the present case, a summons was served upon the cor-

poration in a wrong name, by service on one of the directors of the corporation. We cannot distinguish it in principle from process served on any other defendant in a wrong name. If the Court have power to amend in the latter case, as it undoubtedly has, we are unable to comprehend the force of the argument which would deprive it of power in the latter. When created, corporations become persons—bodies politic it is true—but still persons, and when the power of suing and the liability to be sued is conferred and imposed upon them, it must be understood to be conferred and imposed under the same rules, regulations and restrictions which apply to natural persons, with such modifications only, as their peculiar nature makes necessary. It is not pretended but that they may claim the benefit of our act upon the subject of amendments, and they must submit to its operation when it is against them.

PER CURIAM, The Judgment of the Sup. Court is affirmed.

AZARIAH G. WATKINS *v.* SAMUEL HAILEY.

In an action of trespass *vi et armis* for assaulting and beating a slave, though the plaintiff recover less than four dollars, he is nevertheless entitled to a judgment for full costs.

THIS was an action of TRESPASS for an assault and battery committed by the defendant upon a slave, the property of the plaintiff, tried before MANLY, J., at the Fall Term, 1857, of Caswell Superior Court.

The jury found a verdict for two dollars damages, upon which finding, the Court adjudged that the plaintiff recover two dollars damages and the further sum of two dollars for costs, from which judgment they prayed and obtained an appeal to this Court.

S. P. Hill, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. The only question in the case is, whether the plaintiff is entitled to recover full costs. It is contended that he is not, by force of the 78th section of the 31st chapter of the Revised Code, which enacts that, "In actions on the case for slanderous words, and in actions of assault and battery, if the jury upon the trial of the issue, or enquiry of damages, do assess the same under four dollars, the plaintiff shall recover only as much costs as damages."

It is true that the action is in form trespass *vi et armis* for assaulting and beating the plaintiff's slave, and may therefore be, in some sense, called an action for assault and battery, but as it is brought for an injury to the slave, as property, it is not the action which is technically known as the action for assault and battery. It was trivial actions of that kind, that is for assaulting and beating the plaintiff himself, as well as trifling actions on the case for slanderous words, which the statute intended to discourage. Actions of trespass for injury to slaves still stand upon the same footing with those for injuries to any other personal chattels of the plaintiff.

The judgment for costs is reversed, and this Court proceeding to render such judgment as ought to have been rendered in the Superior Court, gives judgment in favor of the plaintiff for the amount of his recovery and also for full costs.

The judgment of the Superior Court, being in part reversed, the plaintiff is also entitled to a judgment for the costs of this Court.

PER CURIAM, Judgment reversed.

JOHN HARRELL *v.* JAMES NORVILL.

A warranty that a slave "is sound in mind and health" is not broken by the existence of a contraction of the little finger of each hand, though it diminished the usefulness and value of the slave.

ACTION of COVENANT, tried before SAUNDERS, Judge, at Fall Term, 1857, of Edgecombe Superior Court.

The following is the covenant declared on, viz: "Received of John Harrell twelve hundred dollars for negro slave Kennedy. The said slave I warrant sound in mind and health, and also warrant the right and title of said slave Kennedy to said Harrell, his heirs, &c."

The breach assigned was, that the slave was not healthy within the meaning of the term as used in the covenant.

The defect specified and proved, was a fixed contraction, inwardly towards the palm, of the little finger of each hand, to such an extent as to diminish the value of the slave one hundred dollars, which defect was not apparent. It did not appear whether the defect existed at the birth of the slave in question, or whether it was occasioned by an injury afterwards. There was no soreness, or want of strength in the fingers, and it was only their peculiar structure that prevented a free use of them.

The Court being of opinion that the alleged defect was not covered by covenant, the plaintiff submitted to a nonsuit and appealed.

Moore, for the plaintiff, argued as follows: The only question is whether the slave's hands were in a state of health.

"Health" is derived from "heal." Webster, *verb.* Health.

"Heal," as a trans. verb, means "to restore to soundness—to make sound."

As an intrans. verb—"to grow sound—to return to a sound state."

All derivatives of *heal* strictly preserve the sense of the root and imply soundness.

Health is "that state of an animal or living body in which the parts are sound, well organized and disposed, and in which they all perform freely their natural functions."

When applied to mind it expresses "soundness." Webster.

Healthful—"Being in a sound state, as a living or organized being, having the parts or organs entire, and their functions in a free, active and undisturbed operation." Webster.

See the derivative healthfulness, &c.

"Health" implies all that soundness does.

See "sound—soundness." Webster.

See "sound." Walker.

"Healthy" expresses more than "sound."

"We are healthy in every part, but we are sound in that which is essential for life." Crabbe's Syn.

"*Sound, sane and healthy.*"

The King visits all around; comforts the *sick*, congratulates the *sound*. Dryden.

Here, "sick" and "sound" are placed in opposition. Of course "sound" means "healthy."

"A sound pulse, a sound digestion, sound sleep, are so called, with reference to a sound and healthy constitution."—Watts—Johnston's Dict'y. *verb.* "Sound."

"Health is a faculty of performing all actions proper to a human body in the most perfect manner." Johnson.

Nyston's Medical Dictionary, a standard French work, defines as follows: "Sanite—exercice libre et facile des fonctions," which translated is, "*Health* is the free and easy action or exercise of the functions."

Soundness of mind in a slave, means that degree of intellect which enables the slave to discharge well all the ordinary labors imposed on slaves; *Sloan* v. *Williford*, 3 Ire. 307. "Soundness of body means that there is no malformation, and that the structure of the body has undergone no change, either from disease or accident, whereby to render it less fit for service," but it does not import that the structure of the body of the animal is perfect and free of defect, for there is no model; "but in regard to an organ, (and the same may be

said of a limb as the hand) as the eye, for instance, there is perfection, and if there be a defect in it, so as to make it unfit for ordinary purposes, (or as before said, less fit for service) the animal is unsound," and the defect is the same, whether "caused by disease or accident" or is coeval with birth; *Bell* v. *Jeffreys*, 13 Ire. 356.

The criticism, in the opinion of the court, on "health and soundness," is not correct. Every limb or organ which admits of being cured or healed of its infirmity, is unhealthful; every blind man is infirm; so is every man with a lame hand and fingers which cannot perform the ordinary functions of fingers. A feeble organ is not in health, though the residue of the body may be. A man with a paralyzed arm, though he eat and sleep and walk well, is not in health. The residue of his body may be both sound and healthy, but he is not sound in body, nor healthful in body, for the body comprises every part of the man. One whose leg is cut off cannot be healthful in body, for there is not the body of a man; nor can he be sound in body, not because he is sickly, but because there is not the body of a man.

Christ *healed* the *withered* hand; can it be said of that man that he was healthy? He *healed* the blind man and the dumb man. Did he heal a man that was healthy? We cannot heal health, therefore we cannot heal a healthy man.

What we can heal, must be unhealthy. The contracted fingers admit of healing, therefore they are not healthy. They are part of the slave, so *he* is not healthy.

Is a limb healthy which cannot, by reason of malformation, perform the ordinary functions of a limb?

No counsel appeared for the defendant in this Court.

BATTLE, J. Had the covenant in the present case been, that the slave was "sound and healthy," the defect in the conformation of the little finger of each hand, would have been a breach of it within the principle laid down by this Court in *Bell* v. *Jeffreys*, 13 Ire. Rep. 356. In that case, *myopia*,

or shortness of sight, was held by all the Judges not to be unhealthiness, but a majority of the Court decided that it was unsoundness, within the meaning of a warranty of soundness, when it existed to such a degree as to render the slave unfit to perform the common and ordinary business of the house or field. In the present covenant, the meaning of the term "sound" is restricted to the "mind and health," and imports that the slave was sound in mind and sound in health. No pretense is made that he was of unsound mind, and the only question is, was he of unsound health? And this, we think, notwithstanding the learned and ingenious argument of the counsel for the plaintiff, is expressly decided against him by the whole Court in the case above referred to of *Bell* v. *Jeffreys*. "The word 'healthy'" says Judge PEARSON, in delivering the opinion of the court, "in its ordinary acceptation, means free from disease or bodily ailment, or a state of the system peculiarly susceptible or liable to disease or bodily ailment." From that he concluded that mere shortness of sight was not unhealthiness, and with that conclusion the Chief Justice, RUFFIN, agreed. Now, it seems to us, that the defect in the structure of the little fingers can be no more a want of soundness in health, in the ordinary acceptation of the term "health," than was *myopia*, or shortness of sight, as it was proved to exist in the case of *Bell* v. *Jeffreys*.

PER CURIAM, Judgment affirmed.

BERNARDT ABPT v. WILLIAM R. MILLER.

A mercantile instrument, given in a partnership name, binds all the partners, unless the person who takes it knows, or has reason to believe, that the partner who made it was improperly using his authority for his own benefit to the prejudice of the other members.

Where a new partner came into a firm, and the same business was carried on at the same place as by the old firm, and one of the members of the new

firm gave a mercantile instrument in the name of the new firm, to secure a debt due by the old firm to one of its workmen, which was regularly entered on the books of the new firm, it was *Held* that the onus of proving that that paper was given in bad faith, and that the receiver of it knew, or had reason to believe it, rested upon the defendant.

ACTION of DEBT, tried before SAUNDERS, Judge, at the Fall Term, 1857, of Wake Superior Court.

The following case agreed was submitted for the judgment of the Court: James F. Jordan and William D. Cooke were partners in the business of manufacturing paper, under the name and style of "James F. Jordan & Co.," and had in their employment the plaintiff, F. B. Abpt, as a laborer, at one dollar and a quarter per day, from some time in the year 1852, until the 1st of January, 1854.

In July 1853, the defendant, William R. Miller, became a partner in the said company, which still continued to do business under its old name and style.

On the first of October, 1853, J. F. Jordan, who was the active partner, without the knowledge of Wm. R. Miller, executed to the plaintiff a note for $669, in part payment of his services, and signed it in the name of James F. Jordan & Co., which was regularly entered on the books of the company, as was the custom when notes were executed. On the first of January, 1854, he executed another note in the same manner for $100, for the balance due him.

The defendant pleaded the general issue and the facts specially set forth. It was agreed that if his Honor should be of opinion with the plaintiff, upon the above state of facts, judgment should be rendered for the sum of $769 with interest; otherwise, judgment was to be entered for the defendant.

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

Rogers and *Husted*, for plaintiff.
Fowle, for defendant.

PEARSON, J. The case of *Cotten* v. *Evans*, 1 Dev. and Bat. Eq. 284, settles this principle. A mercantile instrument, given in the partnership name, binds all of the partners, unless the person who takes it knows, or has reason to believe, that the partner who made it was improperly using his authority for his own benefit, to the prejudice of the other members; in other words, the question is not one of power, but of a known abuse of power, the enquiry being, was the security obtained in good, or bad, faith.

If the instrument be given to secure an individual debt of the partner giving it, which had been previously contracted, that is sufficient evidence of the abuse of power; it proves that the partner is improperly using authority for his own benefit, to the prejudice of the other members; and they are not bound unless there is proof of their concurrence either before or afterwards. In like manner, if an executor transfers a note of the testator in payment of his own debt, the transaction itself is evidence of fraud, and an abuse of power. This doctrine is settled by numerous cases, and is agreed to on all hands.

If, after business has been carried on for some time by a firm, one of the partners withdraws and a third person comes in, and the same business is carried on at the same place, by the new firm, and one of the members of the new firm, who had been a member of the old firm, gives a mercantile instrument in the name of the new firm to secure a debt of the old firm, a different question is presented, for it may well be that the creditor acted in good faith in taking the security; because he may reasonably suppose that the new firm, which consists in part of the same individuals, had acquired the stock on hand and the debts due to the old firm, in consideration of an undertaking to pay the debts due by it. If he acts innocently, and a loss is to fall either upon him, or upon the firm, evidently it should be borne by the latter. They conferred upon their partner the power to draw the instrument, and can only relieve themselves by proving that the party claiming benefit under it, knew, or had reason to believe, that he was

improperly using it. The onus of proof is on them. This is decided in *Cotten* v. *Evans*, supra, where the subject is elaborately discussed, and all the cases are examined.

There is a dissenting opinion in that case, and the subject underwent a thorough examination. Much can be said on both sides, and if the argument leaves the question doubtful, it proves that it can only be settled by adhering to the decision of the court.

The present is a much stronger case than *Cotten* v. *Evans*. The defendant comes into the firm, upon what terms is not stated, and the business is carried on under its old name and style, without any apparent change whatever, save that there is a new member. The plaintiff had been engaged as a laborer by the old firm, for an indefinite time, at one dollar and a quarter per day, and continued to perform service as before. A mercantile instrument, or promissory note of the new firm, is given to him by the acting partner, for a part of his wages, which is regularly entered on the books. Afterwards, another note is given in like manner for the balance. The services for which the notes were given were rendered in part before, and in part after, the defendant came into the firm.

It may well be that the plaintiff acted in good faith in taking these securities, because he may reasonably have supposed, and in all probability did suppose, that the defendant became a member of the firm by paying a sum agreed on, as a consideration for a share in the concern, whereby he became interested in the stock on hand, the unfinished work and materials, and the debts due it, and became bound for the debts outstanding against it; in other words, that he became a partner "for better or for worse." The defendant has offered no proof as to the terms upon which he became a member, and this is peculiarly within his knowledge; at all events, if a loss is to fall on the plaintiff, or on him, he should bear it; for he conferred on his partner the power to draw the securities, and the onus of proving that the defendant knew, or had reason to believe, that the power was improperly used, is on him.

The fact that the plaintiff was working under a continuing

contract for an indefinite time, is also entitled to much weight. It is true, his wages were estimated at so much per day; but there was an *engagement*, growing out of the nature of his employment, that the firm should employ him, and he should work for it so long as it was mutually satisfactory to the parties—a sort of tenancy at will; so that either party would have felt aggrieved, if the other had, without cause, abruptly broken off the relation; under it, the services ran into the time of the new firm. This makes the case much stronger than that of a pre-existing debt or executed contract, independent and wholly unconnected with the business of the new firm, as was the case in *Cotten* v. *Evans*.

There is error.

PER CURIAM, Judgment reversed, and, upon the case agreed, judgment for the plaintiff.

Den on the demise of JOHN W. HAMLET *and wife v.* WM. TAYLOR.

An Act of the General Assembly which provides that it shall be in force from and after its passage, is in force, and takes effect, from the first day of the session at which it was passed.

ACTION of EJECTMENT, tried before his Honor, Judge ELLIS, at the Fall Term, 1857, of Wilson Superior Court.

The following case agreed was submitted for the judgment of the Court: The feme lessor of the plaintiff, Zilpha, was seized and possessed of the land in question, from the death of her father in the year 1846, and on the 21st day of December, 1848, she intermarried with the other lessor, J. W. Hamlet; that no child has been born of the marriage; that on the 8th day of August, 1851, the husband, J. W. Hamlet, bargained and sold, by deed proven and registered in the common form, the said land to J. D. and M. Rountree, who in like manner sold and conveyed the premises to the defend-

ant, who entered and has been in possession ever since; and that before the commencement of this action, the lessors demanded possession which was refused them.

It was agreed that if the Court should be of opinion that the plaintiff was entitled to recover upon this state of the case, judgment should be rendered for the plaintiff; otherwise for the defendant.

On consideration of the case, his Honor, according to the agreement, gave judgment for the plaintiff, from which the defendant appealed.

Strong and *Dortch*, for the plaintiffs, argued as follows: The Act of Assembly of 1848, ch. 41, sec. 1, applies to this case.

At common law, an act of Parliament relates to the first day of the session in which it was passed, no matter how hard the consequences; *Latless* v. *Holmes*, 4 T. R. 660; *Panter's* case, 6 Bro. P. C. 553; Saunders on Pleading and Evidence, vol. 1, page 52, and cases there cited.

A judgment reacts, and now relates, to the 1st day of the term in which it is rendered, although it thereby operates to defeat contracts made before its actual rendition; *Farley* v. *Lea*, 4 Dev. and Bat. 169.

To remedy the former evil required an Act of Parliament in England, 33 Geo. 3, chap. 13; and an Act of the Legislature in this State, which declares that an Act of Assembly "shall be in force only from and after 30 days after the rise of the session in which it shall have passed, unless expressly otherwise directed;" Rev. Code, ch. 52, sec. 35.

In this case it has been "expressly otherwise directed," since the Act itself declares, "that from and after the passage of this Act, &c."

The time of passage of an Act is the first day of the session. See cases above cited, and *Weeks* v. *Weeks*, 5 Ire. Eq. 111.

The Act of 1843 has received a Legislative construction; Rev. Code, ch. 56, sec. 1.

No counsel appeared for the defendant in this Court.

BATTLE, J. The act of 1848, ch. 41, entitled "An act, making better and more suitable provision for *femes covert*," declares in the 1st section, "that from and after the passage of this act, whenever a marriage shall take place, all the lands or real estate owned by the feme covert at the time of marriage, and all the lands and real estate which she may subsequently acquire, by will, devise, inheritance or otherwise, shall not be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife, first had and obtained, to be ascertained and effectuated by privy examination, according to the rules now required by law for the sale of lands by deed belonging to femes covert."

The session of the General Assembly at which this act was passed, commenced on the 20th day of November, 1848, and the act was ratified on the 29th day of January, 1849. The feme lessor of the plaintiff became the owner of the land in controversy in the year 1846, and was married to the other lessor, on the 21st of December, 1848, so that the case turns upon the question, from what time the act referred to took effect.

At the common law, an act of Parliament, passed at any time during the session, had relation to the first day thereof, and was in force from that time, unless some other time was fixed upon in the act itself. *Latless* v. *Holmes*, 4 Term Rep. 660, *Panter's* case, 6 Bro. P. C. 553. The same rule was adopted in this State with regard to the acts of our General Assembly; *Smith* v. *Smith*, Mar. Rep. 26; *Sumner* v. *Barksdale*, Conf. Rep. 111. This was altered by the act of 1799, (ch. 527 of the Rev. Code of 1820,) 1 Rev. Sat., ch. 52, sec. 36, by which it is provided, that acts of Assembly shall only be in force from and after thirty days after the rise of the session in which they are passed, and not before, unless otherwise expressly directed in the acts themselves. (See also the Rev. Code, ch. 52, sec. 35).

In the case before us, the act was expressly directed to be in force from and after its passage, which takes it out of the

operation of the act of 1799, and brings it within the rule of the common law, as has been expressly decided by this Court in the case of *Weeks* v. *Weeks*, 5 Ire. Eq. Rep. 111.

In passing the Revised Code, the Legislature of 1854 treated the act of 1848, upon which we are commenting, as having been in full force from the third Monday of November in that year, which was the first day of the session. We are thus fortified in our exposition of the law by the opinion of that body. Had it been declared that the act was to be in force from and after its ratification, instead of its passage, then the day on which it was ratified, by the signatures of the speakers of the two Houses, would have been the day from and after which it would have been in force.

PER CURIAM, The judgment of the Superior Court is affirmed.

SAMUEL A. SPRUILL *v.* TRADER & TRADER.

A proposal by the owner of certain vessels then on their way from New York to this State, that if A would ship his produce on board those vessels, he, the owner, would guarantee him a certain price, which offer was not accepted at the time, *Held* that the proposal could not be considered as extending to other vessels, not then on their way, without a further engagement on the part of the ship-owner.

Proceedings in the garnishment of one creditor where there was an issue, and a verdict finding that there were no funds in the defendant's hands, beyond a certain amount confessed by him, create no estoppel upon an issue to try the same fact in another garnishment in behalf of another creditor.

A submission to a nonsuit by a plaintiff in the county court is not a voluntary abandonment of the suit, and he may appeal.

THIS was an issue made in a GARNISHMENT, and tried before CALDWELL, Judge, at the last Fall term of Hertford Superior Court.

The defendants were garnisheed as the debtors of Glines

and Graham of New York, against whom the plaintiff had taken an attachment and had obtained a judgment in Hertford Superior Court.

It appeared in evidence, that Glines, one of the above-named firm, had removed to Murfreesboro', in this State, and opened there a mercantile establishment; that about the last of November, or 1st of December, 1855, a conversation took place between him and the defendants, in which the latter said they had vessels on the way from New York to Murfreesboro', and expressed a wish to get lading for them. They asked the defendants if they had any corn to ship, to which defendants replied, that they had; that it had cost them seventy cents per bushel; that corn had fallen in price, and that it was a bad time to ship. To this, Glines rejoined, "If you will ship your corn in our vessels to New York, we will guarantee you seventy cents and a profit over and beyond"; to which proposition the defendants made no reply. It also appeared that, early in the month of December of that year, vessels belonging to Glines & Graham reached Murfreesboro', but the defendants did not ship any corn in them. In the month of January, 1856, (about the 22nd,) other vessels belonging to Glines & Graham, arrived at Murfreesboro', on board of which, corn, belonging to the defendants, to the amount of nine hundred and seventy bushels, was shipped. In consequence of ice in the sound and river, and boisterous weather, these cargoes did not reach New York till the last of February, or first of March ensuing, when corn had fallen from seventy-six to fifty cents per bushel.

Glines and Graham advanced cash on the corn shipped by them, which exceeded in amount the price for which the corn was sold in the New-York market, by some two hundred and fifty or three hundred dollars, and it was for this excess that the plaintiff sought to charge the defendants as the debtors of Glines and Graham.

The defendants contended that they had sold the corn to Glines & Graham at seventy cents, and relied on the proof, as

stated above, of the proposition of that firm to guarantee that price.

The Court, among other things, charged the jury, that if the defendants did not accede to the proposition of Glines & Graham, to guarantee a certain price for the corn, when it was made, it did not remain open to be accepted thereafter, unless assented to by Glines & Graham; for that the law required the assent of both parties to make a contract of guaranty binding. Defendants excepted.

Before the jury was empannelled, the defendants, by their counsel, moved to amend their answer, and also to plead the following facts: At ——— term of Hertford County Court, Lawrence and Lassiter, creditors of Glines and Graham, who had, before the plaintiff caused the defendants' indebtedness to be attached, made up an issue with the defendants, precisely similar to that about to be tried, wherein the jury had returned a verdict that there were no funds or indebtedness in the defendants' hands, beyond a certain sum confessed by them in that suit, and which had been paid by them to the said Lawrence and Lassiter, under the judgment of that court. These amendments were refused by his Honor, and the defendants' counsel again excepted.

Verdict for the plaintiff; judgment and appeal by the defendants.

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

PEARSON, J. We concur with his Honor, that as the defendants did not accede to the proposition of Glines and Graham, as to shipping the corn upon a guaranty that it should bring seventy cents per bushel at the time the proposition was made, it did not remain open, and the defendants could not therefore assent to it without the concurrence of Glines and Graham. "It takes two to make a bargain" is a maxim of law, the soundness of which strikes the good sense of every one, so that it has become a "common saying."

It may be, that if the defendants had shipped corn in the vessels that were then on their way from New York, and arrived in Murfreesboro' early in December, there would have been good ground for contending, that as the proposition was made in reference to those vessels, it remained open until their arrival. But the defendants did not avail themselves of that opportunity for making a shipment; so the question does not arise. We consider it very clear that they were "behind time" in shipping on the other vessels that arrived on the 22nd of January; because it does not appear that these vessels were "on their way to Murfreesborough from New York" at the time the proposition was made; consequently, there is no pretext for saying it was made in reference to them, and there is no ground to support the position that it remained open until their arrival.

Mr. Smith, for the defendants, assumed the position, that the proceeding in a garnishment is in the name of the absconding debtor (as plaintiff), to the use of the attaching creditor, against the debtor who is garnisheed, and from this he deduced the conclusion, that the proceedings in the garnishment of Lawrence and Lassiter, where there was an issue, and verdict that there were no funds in defendants' hands, except the amount confessed, was an estoppel of record, being upon the same fact put in issue by the present proceedings, and between the *same parties*, to wit, the debtor as plaintiff, and the present defendants.

We deny the premises. The proceeding in a garnishment is in the name of the attaching creditor, who, by force of the statute, is the assignee of the absconding debtor, for the purposes of the attachment; so the parties acting as plaintiffs, in the two proceedings, were not the same; and consequently the verdict in the former does not conclude; being *res inter alios acta*. It would be strange if this were not so, for the attaching creditor in one garnishment may be content, if enough is found to pay his debt, to let a verdict pass in favor of a defendant as to the residue; or at all events, he may not feel disposed to contest the matter, while the creditor in an-

other garnishment may be disposed to do so, and there can be no reason why the way should not be left open for him. This disposes of the question in reference to the amendment, and it is unnecessary to enter further into it.

It was then insisted, that as the plaintiffs were nonsuited in the county court, they had no right to appeal. It is every day's practice in the superior court, for a plaintiff to submit to a nonsuit, in deference to an intimation of the court, and appeal. The same practice is applicable to the county court. If the plaintiff thinks he has not made out his case, there is no reason why he may not submit to a nonsuit and take an appeal; for it does not amount to a retraxit or voluntary abandonment of his suit. There is no error.

PER CURIAM, Judgment affirmed.

JAMES W. BELL *v.* CALEB L. WALKER, *et al.*

Where a slave, of ordinary capacity, was apprenticed to a ship-carpenter, to learn the trade of a ship-carpenter and caulker, it was *Held* to be no defense in an action for a breach of his covenant, that the apprentice was obstinate and unwilling to learn the trade.

The value that would have been added to the slave by the trade, was *Held* to be the proper measure of damages in this case.

THIS was an action of COVENANT, tried before CALDWELL, J., at the Fall Term, 1857, of Washington Superior Court.

The plaintiff declared for breaches of the following covenant, viz: "In pursuance of a contract entered into between Caleb Walker and Jesse Herrington of the one part, and James W. Bell of the other part, all of the said county, I, said Caleb Walker and Jesse Herrington, jointly and severally agree and promise to take, keep, and employ negroes Peter, Woden and Abbott, treating them well, four years, and learn them the ship-carpenter and caulker's trades, and give annually the said James W. Bell a note for one hundred dollars for each of the negroes, with approved security, specifying

that each are not to be employed by water, at steam-mill or fishery, or be worked out of the county, except by permission of owner, and be furnished, &c."

The breaches assigned were, that the defendants had failed and refused to teach the said slaves the ship-carpenter's and caulker's trades.

It was proved that the three slaves, mentioned in the covenant, were sent to the defendants and remained with them for four years; that the defendants owned a ship-yard at Plymouth, in Washington county, where this business was carried on; that, during the term, the slave Peter was kept at work in the yard, and a part of the time in cutting and hewing timber in the woods, for the use of the yard, and a part of the time in hauling; that he made progress in acquiring skill in the trade of a ship-carpenter, but was not put to the business of caulking at all, and that he was apt and docile, and was properly taught in the ship-carpenter's trade. It was in evidence, that the other two slaves were kept at work mostly in the woods, in preparing timber and in hauling it to the yard; that they were put at caulking under other slaves employed in the yard, for two weeks, and at work on ships in the yard; that they were negroes of ordinary capacity; that they repeatedly declared that they would not learn the trade; that they were unwilling to be taught; that repeated efforts were made to instruct them; that they were taken away from several jobs, upon which they had been put, because of their bad work; and that they were kept at such work, relating to the business, as they could do to the best advantage.

It was also in evidence, that the felling, hewing and hauling ship-timber was, in this section of the country, a part of the ship-carpenter's trade, and a preliminary training towards their acquiring the art.

It was in evidence, further, that the two slaves, Woden and Abbott, were but little, if in any degree, improved in the trade, but that Peter was well instructed in the ship-carpenter's craft for the time he had been at work, but that no effort had been made to teach him caulking.

It was further proved that this trade would add $300 to the value of the slave.

It was insisted for the defendants: First. That they had only engaged to make reasonable efforts to instruct the plaintiff's slaves in their callings, and if these efforts were made, and the slaves could not, or would not learn, by reason of obstinacy or inaptitude, they were not responsible. Secondly. That if the defendants found that the slaves Woden and Abbott could not, or would not, after reasonable efforts, learn the more difficult parts of the trade, they were at liberty, if not bound, to keep them at the more easily acquired parts of the trade.

Thirdly. In respect to damages, that if the plaintiff was entitled to recover, the proper measure would be the expense and loss to be incurred in securing to the slaves the instruction which the defendants had failed to give them.

The Court charged the jury, that if the witnesses were to be believed, the defendants had violated their covenant, and that the unwillingness of the slaves Woden and Abbott to learn the trade, did not excuse the defendants. Upon the question of damages, his Honor recurred to the evidence as to the amount added to the value of a slave by the acquisition of these trades, and told the jury that the whole matter was for their consideration. The defendants excepted.

Verdict, $600 for plaintiff. Judgment and appeal.

Pool, *Winston*, *Jr.*, and *H. A. Gilliam*, for plaintiff.
Smith and *Garrett*, for defendants.

BATTLE, J. The covenant of the defendants bound them to use all necessary and reasonable means for giving to the slaves of the plaintiff, faithful, diligent and skilful instruction in the art of a ship-carpenter and caulker; *Clancy* v. *Overman*, 1 Dev. and Bat. Rep. 402. If the slaves were incapable of learning the art, that might be a defense, but a mere unwillingness to learn cannot be allowed to have that effect. It was proved that the slaves Woden and Abbott had ordinary capacity, and it does not appear that if proper measures had been taken to overcome their obstinacy,

and to compel the performance of their duty, they might not have made as much progress in learning the art of a ship-carpenter as the other slave, Peter. It was proved, indeed, that "repeated efforts were made to instruct them," but they declared they were unwilling to be taught, and would not learn; under these circumstances, it was the right and the duty of the defendants to coerce them by such means as the law allows to masters, to enforce obedience from their apprentices. And at all events, the least the defendants could have done, was to have notified the plaintiff that his slaves could not, or would not be taught, so that he might have made different arrangements for them.

We are clearly of opinion, then, that the covenant was broken, and the plaintiff was entitled to recover some damages for the breach. The question remains, was the proper measure adopted by the jury under the instruction of the court. We are satisfied that it was. It was testified, by some of the witnesses, that a slave instructed in the art of a ship-carpenter and caulker would be increased in value the sum of three hundred dollars. If the defendants had performed their covenant, the plaintiff would have been benefitted to that amount, in the increased value of each of his slaves, and of that he was deprived by their default; so that it seems clear, that in giving six hundred dollars, the jury adopted the proper rule as intimated to them by the Judge. If it be said that the slaves Woden and Abbott had received some, though but slight, instruction, and that a deduction ought to have been made from the amount of damages on that account, it may be replied that Peter was not at all instructed in the art of caulking, which called for some damages for that default in respect to him. The rule of damages contended for, on the part of the defendants, is objectionable, because of its uncertainty and the difficulty of its application to the circumstances of the case. The slaves were four years older, with habits of obstinacy increased by indulgence, and it would be almost impossible to ascertain, with any reasonable certainty, how much it would cost the plaintiff to have the slaves taught and

made as valuable as they would have been, had the defendants performed faithfully their covenant.

PER CURIAM, Judgment affirmed.

JAMES WHITE *v.* GEORGE N. GREEN.

In a suit brought to recover back money paid for the purchase of a forged promissory note, which had been taken without endorsement, it is not a ground of estoppel that the purchaser had obtained, to his use, a judgment against the ostensible maker, in favor of the supposed payee.

In a suit brought to recover back the purchase-money paid to the holder, without endorsement, of a note alleged to be forged, the ostensible maker of such note is a competent witness to prove the forgery, although he had given to the ostensible payee a bond to indemnify him against the consequences of refusing to let his name be used in the collection of it by suit.

One cannot produce his own declarations in evidence, though not interested at the time.

Assumpsit is the proper form of action for the recovery of money paid on the purchase of a forged note.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the Spring Term, 1854, of Bertie Superior Court.

The plaintiff's declaration contained two counts:

First. That the defendant had sold to him a forged note on one Eason Ward, for the sum of eighty-four dollars.

Secondly. For money had and received to the plaintiff's use.

The plaintiff produced in evidence a paper writing, purporting to be a note for eighty-four dollars, bearing date 15th of May, 1849, payable to Riddick Freeman, to which the name of the defendant was affixed as a witness, in his proper hand-writing. The body of the note was not in the hand-writing of either the defendant or of Riddick Freeman, and there was no evidence going to show by whom the body of the instrument was written. Riddick Freeman died in the month of September, 1850, and Blount Freeman became his administrator. The defendant sold the note to the plaintiff

on the 10th of February, 1851, which was delivered by the defendant to the plaintiff, but not endorsed or assigned in writing. The plaintiff caused to be issued a warrant against Eason Ward, in the name of Blount Riddick, as administrator, to the plaintiff's use, and on the trial thereof, the defendant was examined as a witness, who swore to the execution of the note by Eason Ward, and a judgment was rendered against him for the amount thereof by the justice of the peace before whom it was rendered. Whether this judgment was appealed from by Ward, or whether he had paid it, did not appear on the trial of the cause below.

Afterwards, however, the plaintiff brought this action against the defendant, alleging that the note in question was a forgery.

To disprove the allegation of forgery, the defendant offered to prove, that before the death of Riddick Freeman, he (defendant) had repeatedly stated that Eason Ward owed him eighty or eighty-five dollars. The evidence was objected to by the plaintiff's counsel, and excluded by his Honor; for which the defendant excepted.

Eason Ward was tendered as a witness for the plaintiff, and objected to on the part of the defendant. It was shown, in support of this objection, that he had given to Blount Riddick a bond to indemnify him for refusing to permit his name to be used in a suit against Ward for the collection of the note. The objection was overruled, and the testimony admitted; whereupon the defendant again excepted. Defendant also objected to the form of the action, but the court overruled the objection.

There was a verdict and judgment for the plaintiff, and an appeal by the defendant.

Smith, for the plaintiff.
Winston, Jr., for the defendant.

PEARSON, J. The judgment taken upon the note in the name of Blount Freeman, administrator of Riddick Freeman,

the payee, to the use of the plaintiff, cannot be used by the defendant as an estoppel on the question of forgery. He was not a party to that proceeding; it was *res inter alios acta.* Estoppels must be mutual. The justness of the rule is exemplified by this case, because the defendant was the witness upon whose testimony the judgment was obtained. If the plaintiff became satisfied that the note was a forgery, it was right in him not to collect the judgment, and his remedy to recover back the money paid for the supposed note, ought not to be affected by the fact that he had obtained a judgment.

The case turns upon the competency of Eason Ward as a witness for the plaintiff. He had executed to Blount Freeman, who had the legal title, a bond of indemnity not to allow his name to be used in enforcing collection of the note. So neither the plaintiff, nor defendant, could reach him at law. The only remedy was in equity, by a bill against him and Blount Freeman, charging that he held the note as trustee, and had combined with the maker to prevent its collection at law. It would be immaterial to the witness, whether the bill was filed by the plaintiff or the defendant.

The defendant excepts, because certain declarations of his, made before the death of Riddick Freeman, were rejected.

It is a sufficient answer to say, it does not appear when the defendant acquired the beneficial ownership of the supposed note; it may have been before these declarations. Besides, we can see no ground for departing from the rule, that one cannot manufacture evidence for himself, although he may not be interested at the time.

There is no objection to the form of the action. It is settled, that where a counterfeit bank bill or forged note is passed, the money may be recovered back in assumpsit.

PER CURIAM, Judgment affirmed.

JOHN J. GRANDY *v.* JOHN SMALL.

Where one undertook, by contract, to deliver an article, at a certain time and place, to be paid for on delivery, and, before and at the specified time, the vendor refused to deliver; *Held*, in an action for a breach of the contract, that the refusal dispensed with the necessity of a tender of the money on the part of the vendee, but that he is, nevertheless, bound to aver and prove readiness and ability to pay at the time and place specified.

ASSUMPSIT, tried before ELLIS, Judge, at the last Superior Court of Pasquotank.

The plaintiff declared for the nondelivery of a quantity of corn, and offered the following instrument of writing as evidence of the contract: "This is to certify that I have this day sold John J. Grandy five hundred barrels of corn, at three 25-100 dollars per barrel, to be delivered at Little River bridge, in clean, sound order, when called for. January 18th, 1854." Signed by the defendant. On the 31st of the same month, (January), the plaintiff gave notice to the defendant, in writing, that he was ready to receive and pay for the corn, and demanded that it should be delivered according to the contract. This writing was sent by Mr. Newbold, who left it at defendant's dwelling, he not being at home, but he saw the defendant that day, who admitted that he had received the paper, but said he did not intend delivering the corn, because the plaintiff had not sent for it according to contract. The witness further said, that he communicated this conversation to the plaintiff on the same day, and further, that he was not furnished with any funds to pay for the corn. On the next day, the plaintiff sent his vessel to Little River bridge for the corn, with one Palin, as his agent, to demand and receive the same, but the defendant again refused to deliver it, alleging the same reason as before; neither did this agent have any funds to pay for the corn, or any part of it.

The plaintiff proved, that on the last day of January, he had to his credit, in the Farmers' Bank of Elizabeth City, more than $2,000, which he was entitled to draw; also, that

corn was then worth, at Elizabeth City, four dollars per barrel; also that plaintiff could raise this amount at any time.

The defendant read in evidence another writing, which was signed by the plaintiff and delivered to the defendant at the same time with the one declared on, which is as follows: "This is to certify, that I have this day purchased of John Small, five hundred barrels of corn, at three dollars 25-100 per barrel—cash on delivery, to be delivered at Little River bridge, clean and sound. January 18th, 1854." Signed by the plaintiff.

In submission to an intimation of the Court, that the plaintiff was not entitled to recover on this evidence, he took a nonsuit and appealed.

Heath, for the plaintiff.
Jordan, for the defendant.

PEARSON, J. The acts to be done by the parties, under this contract, were concurrent; the plaintiff was bound to pay the money on the delivery of the corn; his doing so, was a condition precedent to the right of action, and the question is, whether there was any thing to discharge him from its performance.

Where a party is ready and able and offers to perform, and the other party refuses to accept, this is considered, in law, as equivalent to a performance for the purposes of the action.

In some cases, an offer to perform is dispensed with, and proof of readiness and ability is held sufficient to maintain the action; for example, *Abrams* v. *Suttles*, Busb. Rep. 99. Suttles had agreed to hire certain slaves to Abrams, the latter giving bond and good surety for the amount of the hire. Abrams applied for the slaves, and had with him a person who was fully responsible, and who was ready and willing to become his surety to a bond, such as was required by the contract, but Suttles refused to let him have the slaves, unless he would execute a bond which the contract did not require. This he declined to do and went off without executing a bond

and tendering it. It was held that the action could be maintained, because readiness and ability were proven, and the offer was dispensed with by the conduct of Suttles, for it was "a vain and idle thing" to draw up a bond, and offer it, when he was told it would not be accepted, and he should not have the slaves. So, *Ripley* v. *McLinn*, 4 Exchequer Repts. 344. Ripley had agreed, under an executory contract of sale, to deliver to McLinn a cargo of tea upon its arrival at Belfast. The tea arrived, and Ripley was ready and able to deliver it under the *contract of sale*, but McLinn refused to receive it under that contract, and contended that he was entitled to have it delivered to him under a *contract of copartnership*. Thereupon, Ripley refused to deliver it, and sued for a breach of the contract. It was held, the action could be maintained by proof of his readiness and ability, although there was no offer to deliver, and in fact a refusal to do so, on the ground, that as the defendant had refused to receive it under the contract of sale, it was not only "a vain and idle thing" to offer to deliver it, but he had a right to refuse to deliver it, as the defendant insisted upon having it under the alleged contract of copartnership. There are many cases of this class. The principle is this: If a party to an executory contract is in a condition to demand a performance, by being ready and able at the time and place, and the other party refuses to perform his part, an offer is not necessary. For if the offer be conditional—that is, provided the other party will perform, it is vain and idle, as he has refused to perform; and if the offer be absolute, and be accepted, the money or property is gone for nothing. Take a familiar illustration: one agrees to give one hundred dollars for a horse to be delivered at a future day; at the time and place he is ready with the money; the vendor refuses to deliver the horse; a conditional offer of the money is vain and idle; an absolute offer would put the money in the hands of the vendor who still keeps the horse.

In some cases, not merely the offer, but the readiness and ability are dispensed with, and the action may be maintained without the proof of either; for example, *Cort* v. *Ambergate*

Rail Road Company, 6 Eng. L. and Eq. Rep. 230. Cort had agreed to deliver to the company a large quantity of joint and intermediate chairs, (i. e. pieces of iron used to lay down rails,) to be delivered at certain times and in certain quantities. After delivering a portion of them, he was notified by the company that it was unable to go on with the construction of the road, and requested to deliver no more. He accordingly made no more, but sold the materials and discharged the workmen whom he had employed for the purpose of manufacturing them, and, after the time in which the contract was to be completed, brought an action. It was held that the action could be maintained, either on the ground that the averment of readiness and ability was supported by the facts of the case, (for after the company gave the notice, and requested the plaintiff to make no more, it would have been a useless waste of materials and labor, which might possibly enhance the amount of damages,) or on the ground that the plaintiff was prevented from being ready and able, by the act of the defendant, "for one may be prevented by a request not to do a thing, as well as by brute force."

So, if there be an engagement to marry on a certain day, and before the day one of the parties marries a third person, the other may, *after the day*, maintain an action for breach of contract, although the latter had in the meantime married also; because as the act of the other party made a performance impossible, it was not necessary to aver either an offer or readiness and ability at the day, and it was useless to remain single for the purpose of being in a state of readiness, although it would affect the amount of damages.

So, if A engages B to attend him in a tour on the Continent, in the capacity of courier, to start at a certain day, and, before the day, A notifies B that he has abandoned the trip, and requests him not to hold himself in readiness, or be at the expense of an outfit, and B, acting on this request, engages himself to another person, he may, *after the day*, maintain an action for breach of contract, without averring readiness and

ability on his part, because he was prevented by the act of the other party.

So, if one engages another to serve him as overseer for the next year, and, before the year begins, sells his plantation and slaves, and notifies the man he will not want his services, the latter may, *after the expiration of the year*, sue for a breach of contract, although he had engaged in other business, and could not aver readiness and ability.

The principle is this: If a party to an executory contract make a performance impossible, or request the other party not to hold himself in readiness, which is acted on, and thereby he is prevented from being ready and able at the day, he may maintain an action without proof of readiness, ability, or an offer; *Short* v. *Stone*, 8 Q. B. Rep. 358; *Hockster* v. *De Latour*, 20th Eng. L. and E. Rep. 157. These cases carry the doctrine further, and hold that when a party makes a performance impossible, or prevents a performance by an unequivocal act of abandonment and a request to the other side not to be in readiness, an action may be commenced even *before the day*. It is not necessary to enter upon this question, however, as in our case the action is commenced after the day.

Under which of these two classes does our case fall? Certainly not under the latter, for there is no impossibility in reference to the performance of the contract; nor was the plaintiff *prevented* either by "brute force or by a request," from being ready with the money when he came to demand the corn, nor was there an unequivocal abandonment of the contract on the part of the defendant, which could be tortured into a request that the plaintiff should not put himself to the trouble of providing the money; on the contrary, it is a mere declaration, at a time when the plaintiff had no right to demand a performance, "that he did not intend to deliver the corn, because the plaintiff had not sent for it according to the contract." There is as much reason for insisting that this amounts to a request not to be at the trouble and expense of sending a vessel, as not to have the money; in fact, there

would be more sense in it, as it might have a bearing on the question of damages; but the truth is, it was not intended, and was not understood, as amounting to a request in respect to either act. We are satisfied it falls under the first class. When the plaintiff sent the vessel to the bridge and demanded the corn, and the defendant refused to deliver it, the necessity of an offer of the money was dispensed with, for it was "vain and idle" to make the offer; but there was nothing to dispense with the necessity of averring and proving that the plaintiff was then and there ready and able to pay the money, so as to show that he would have performed his part of the contract, but for the refusal of the defendant to deliver the corn; which would be considered in law as equivalent to a performance on his part.

The principle requires that the party should be in a condition to demand a performance. Suppose the plaintiff had in fact not been able to pay the money, the idea of his being entitled to recover damages would shock all notion of justice, and yet, for the purposes of the contract, his not having the money at the bridge, was the same as if he did not have it any where. The argument by which readiness in respect to the money is dispensed with, also dispenses with the necessity of having a vessel at the bridge, and leads to the conclusion that the plaintiff was entitled to damages, although he was unable to raise the money or procure a vessel to be sent; in other words, the defendant's saying, before the day, that he thought the plaintiff had not sent for the corn in time, and therefore did not intend to let him have it, was a breach of the contract, for which, according to the cases relied on, an action would lie immediately, it being *idle and vain* after this, either to get the money or send the vessel! The argument proves too much, shocks common sense, and is a fair instance of the *reductio ad absurdum.*

This same point was decided in *Grandy* v. *McCleese*, 2 Jones' Rep. 142, and *Grandy* v. *Small*, 3 Jones' Rep. 8. We are convinced, after a full examination of the cases, that these

decisions are not only supported by the reason of the thing, but by the weight of authority.

PER CURIAM, Judgment affirmed.

JOSEPH B. SHAW *v.* JOHN J. GRANDY.

Where the buyer of a commodity is bound by the contract to name the day when it is to be delivered, and, on notice and request, refuses to do so, disavowing the obligation in toto, the seller, on showing that he has the commodity at home, can maintain an action for a breach of contract.

ACTION of ASSUMPSIT, tried before ELLIS, J., at the last Fall Term of Pasquotank Superior Court.

CASE AGREED.

"It is admitted that the contract between the parties is contained in the following copies of written memoranda signed by each of them, to wit:

"This is to certify that I have, this day, sold John J. Grandy, one hundred and thirty barrels of corn, at three dollars 25-100 per barrel, to be delivered at Newbegun creek landing, clean and sound. Dated December 4th, 1856." Signed by the plaintiff.

"This is to certify that I have this day purchased of Jos. B. Shaw one hundred and thirty barrels of corn, at three dollars 25-100 per barrel—cash on delivery—to be delivered at Newbegun creek landing, clean and sound." Dated the same day and signed by the defendant.

It is admitted that after the lapse of a reasonable time, the plaintiff, at Elizabeth City, the residence of the defendant, twelve miles from Newbegun creek landing, gave notice to the defendant that he was ready to deliver the corn in the order, and at the place, agreed upon, and demanded that the defendant should pay for the same according to the contract; to which the defendant replied, that he should not pay for the corn, as the plaintiff had not complied with his contract.

It is further admitted, that the plaintiff had in his barn, at his farm, seven miles from Newbegun creek landing, more than one hundred and thirty barrels of corn in bulk, but neither at the time of the notice and demand, nor afterwards, did he have any corn at Newbegun creek landing.

It is further admitted that the defendant had more than sufficient funds to pay for the corn.

It is agreed that if, upon the case stated, his Honor should be of opinion with the plaintiff, judgment shall be entered for fourteen dollars; if not, the judgment of nonsuit.

The Court, upon consideration of the case, being of opinion with the plaintiff, judgment was entered according to the case agreed, from which the defendant appealed.

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

PEARSON, J. This case falls under the second class of cases, which are discussed in *Grandy* v. *Small*, decided at this term, (*ante*, 50.) "The principle is, if a party to an executory contract is in a condition to demand a performance, by being *ready and able* at the time and place, and the other party refuses to perform his part, an offer is not necessary." The place is fixed by the contract, but the time is open. The plaintiff had a right, within a reasonable time, to require the defendant to fix upon a day when the corn was to be delivered. This was the legal effect of the notice that he was ready to deliver it at the place. The defendant, instead of fixing a day, said he should not pay for the corn, as the plaintiff had not complied with his contract. The legal effect of which was a refusal to fix a day. The question is, does the fact of this request and refusal, in connection with the fact that the plaintiff had the corn at some distance from the place, support the averment that he was *ready and able?*

As the time was open, it was useless for the plaintiff to be at the trouble and expense of transporting the corn to the place; because after he got it there, he would not be ready

and able to deliver it, because of the difficulty as to the time.

So, it was out of his power to be literally ready and able, unless a day was fixed on. After the request, it was the duty of the defendant to fix on a day, and upon the maxim, "*no one* shall take advantage of his own wrong," we are of opinion that his default, in this respect, enabled the plaintiff to support the averment of being ready and able, by proof of the fact that he had the corn at home. He was just as able, with the corn there, as if he had it at the place, for, in fact, he could not be able with it anywhere until a time was fixed. A different conclusion would put it in the power of a party to render nugatory, any contract where the time was open and it was his duty to fix the day, by his refusing to do so; which would be unreasonable. In *Grandy* v. *Small*, *supra*, the place was fixed by the contract, and the time was to be fixed by the plaintiff, the corn was to be delivered "when called for." It was not the duty of the defendant to fix the time as it was in our case. "So, note the diversity."

PER CURIAM, Judgment affirmed.

JAMES H. WALKER *v.* RICHARD T. ALLEN.

Where there were mutual covenants that A would, on a given day, make and tender to B a deed for a tract of land, upon which being done, B was to give bonds for the purchase-money, a tender of the deed, three days before the time agreed, was *Held* not to be a compliance with A's part of the contract, although when thus approached, B declared that he did not intend to comply.

ACTION of COVENANT, tried before SAUNDERS, J., at the Fall Term, 1857, of Halifax Superior Court.

The plaintiff declared on the following covenant in writing: "The said James H. Walker, for the consideration hereinafter mentioned, doth, for himself, his heirs, executors and administrators, agree to, and with, the said Richard T. Allen,

his heirs and assigns, by these presents, that he, the said J. H. Walker, shall and will, on, or before, if required, the 10th day of January, 1857, at his own proper costs and charges, by good and lawful deed, well and sufficiently grant and convey unto the said Richard T. Allen, his heirs and assigns, in fee simple, clear of all incumbrances, all that messuage, &c," (describing a house and lot in Halifax).

"In consideration whereof, the said Richard T. Allen, for himself, &c., doth covenant and agree to, and with, the said James H. Walker, his heirs and assigns, by these presents, that he, the said Richard T. Allen, shall and will, on the execution and delivery of the said deed as aforesaid, well and truly pay unto the said James H. Walker, &c., the sum of two thousand dollars," (in bonds with sureties.) Dated 5th day of December, 1856, and executed by both the plaintiff and defendant.

The plaintiff declared for a breach of the covenant, in not delivering bonds as specified in his contract. The defendant pleaded the general issue, conditions performed and not broken, and denied, by his plea, that the plaintiff had performed his part of the covenant.

It was proved that the plaintiff's wife was in possession of the premises when he married her, which was two or three years before the contract of sale, and that they were still residing there at the date of this contract; that on the 7th day of January, 1857, the plaintiff's brother, as his agent, was sent with a deed, in proper form to pass the fee simple by the plaintiff and his wife, (with a privy examination endorsed, and a judge's *fiat* for registration,) to the residence of the defendant, who lived at Gaston, about twenty miles from Halifax town, where the plaintiff resided, and that on his arrival, he informed the defendant that he had come, in behalf of the plaintiff, to execute the bargain about the premises; that he had brought the deed of the plaintiff and his wife, conveying the premises to the defendant, and had it ready, and at the same time produced and tendered it, declar-

ing his readiness to deliver it, on the defendant's complying with his contract.

The defendant declined receiving the deed, saying, that since making the contract, he found that his wife was unwilling to remove to the premises; that he did not intend to take the place, and if the plaintiff recovered any thing, he must recover it by law; that he would spend any amount of money, in reason, rather than go to Halifax, and that he hoped, under the circumstances of the case, plaintiff would let him off. This agent returned and informed his principal of what had taken place between defendant and himself, after which nothing passed between the parties before or on the 10th of January.

On the 21st of January, the premises were sold at auction and brought $1610. It was admitted, that if the plaintiff was entitled to recover more than nominal damages, the measure was the difference between what the defendant was to give and what the premises sold for. His Honor instructed the jury, that, upon the facts adduced, the plaintiff was entitled to recover. Defendant excepted. Verdict and judgment for the plaintiff, and appeal by defendant.

Conigland and *Batchelor*, for plaintiff.
B. F. Moore, for defendant.

PEARSON, J. This case falls under the second class of cases, which are discussed in *Grandy* v. *Small*, ante, 50. The principle is: "If a party to an executory contract is in a condition to demand a performance by being ready and able at the time and place, and the other party refuses to perform his part, an *offer* is not necessary." The time is fixed by the contract, to wit, the 10th of January, 1857, but the place is open. The plaintiff procured his wife to join in the execution of a deed to the defendant for the premises, which was duly acknowledged, with a fiat for registration, which he sent by an agent, who, on the 7th of January, offered to deliver it, if the defendant would execute the bonds according to the contract. The defendant declined receiving the deed, saying that he would

not comply with his contract. The question is, do these facts support the averment that the plaintiff was *ready and able* to deliver the deed *on the day?* No place being fixed by the contract, the rule is, where a party is bound to pay money, or deliver any thing, other than ponderous articles, it is his duty to take it to the other party. The plaintiff did take the deed to the defendant and tender it, but it was before the day. He then had no right to require the defendant to accept it and deliver the bonds; consequently the defendant had a right to refuse to accept it at that time. Did his repudiation of the contract relieve the plaintiff from the duty of again taking it to him on the day fixed by the agreement? The place is fixed by the law. So, it was not the duty of the defendant to fix a place, and he was in no default in not doing so. Herein this case differs from *Shaw* v. *Grandy*, decided at this term, (*ante* 56.) There, the place was fixed by the contract, and the time was open, and it became the duty of the defendant, under the circumstances, to fix a day. He was in default in not doing so. Here, the time is fixed by the contract, and the place by law, and we can see no ground upon which the plaintiff was discharged from the necessity of having the deed at the time and place. If he had carried it there, the class of cases above referred to, dispenses with the necessity of his making a formal offer to deliver it after the defendant had refused to perform his part of the contract; but the averment of readiness and ability to perform on his part, at the time and place, is not proved by his having the deed at home. It was certainly in his power, for aught that had been done or said, to have had the deed at the right place on the day. His not being ready and able was not caused by the default of the defendant, nor was he prevented by the defendant from having the deed there, or requested not to have it there; and as he intended to insist upon his legal rights, and knew that the defendant thought hard of it, it behooved him to see to it that all was done on his part that the law required. It is true, that the defendant had said positively that he would not comply, and begged to be discharged; but it is unreasona-

ble to infer that he thereby intended to dispense with any act on the part of the plaintiff that was necessary to be done in order to fix his liability. It is equally unreasonable to allow a party to go to the other before the day and extract a declaration that he does not intend to fulfil the contract, and then make use of it as an excuse for not performing an act that would be otherwise necessary, in order to perfect his cause of action! What right has he to do so? How does the declaration benefit the other party, or injure him? How is it to be known that if he had put himself in a condition to demand a performance, and made the demand at the time and place, the other, seeing that his liability was fixed, would not have changed his mind? Upon what ground is he to be deprived of the *locus penitentiæ?* If there be a request expressed, or implied, that he would not be at the trouble and expense of putting himself in a state of readiness, such request will be imputed to its effect upon the question of damages, and if acted upon, there is a consideration, and the case would fall under the principle of *Cort* v. *Ambergate Railway Company*, 6 Engish Law and Equity, 230, and others cited in *Grandy* v. *Small*, decided at this term, (*ante* 50,) and dispense with readiness and ability at the time and place. In this case there is nothing that can be tortured into a request not to do what was required on his part. No possible benefit could accrue to the defendant by dispensing with it, and there is no sense in supposing that he intended gratuitously to enable the plaintiff to subject him to the payment of damages in an easier manner than by strictly performing the stipulations of the contract.

This case is governed by *Grandy* v. *McCleese*, 2 Jones' Rep. 142; *Grandy* v. *Small*, 3 Jones' Rep. 8, and *Grandy* v. *Small*, *ante*, 50.

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

WILLIAM HAYS *v.* JOHN O. ASKEW.

Where a grantor of land reserves, for an "avenue," out of the area conveyed, a certain space, which had been used for the same purpose, it was *Held* that the legal effect of the deed was to grant the soil, subject to an easement in the grantor.

To raise an estoppel, the admission must be certain.

An estoppel, as a general rule, does not grow out of a recital; to give it that effect, it must show that the object of the parties was to make the matter recited a *fixed fact*, as the basis of their action.

ACTION of TRESPASS, tried before CALDWELL, J., at the last Fall Term of Hertford Superior Court.

The declaration against the defendant was for erecting upon a public road or avenue, a ware-house, so near to the store-house of the plaintiff as to obstruct his rights, and cause his chimney, when the wind blew, to throw back the smoke into his store-room, and otherwise injure him.

It appeared, in evidence, that the plaintiff erected a store-house, in 1849, on the side of a certain public road, leading to Ewer's landing, and that the defendant, in 1856, erected a ware-house twenty feet long, twelve wide and nine high, in and upon another road, alleged by the plaintiff to be a public road, leading to the road on the side of which the plaintiff's store-house was erected, one corner of which, was within six and a half feet of the store-house. It also appeared, in evidence, that the road in which the defendant erected his ware-house, was cut out, many years ago, by one Montgomery, for an avenue from his house into the public road, and was known as Montgomery's avenue; that the defendant succeeded Montgomery by purchase, and it was then called Askew's avenue. It was also in evidence, that this avenue had been used by the public, as a near cut, to get into the public road leading by plaintiff's store-house, from the year 1843, until the defendant erected his ware-house.

It also appeared, in evidence, that the defendant, in 1849, sold and conveyed to the plaintiff, by deed, three acres of

land, on which the said store-house was situated; the boundaries of which called for the public road above described and this avenue, and embraced, near the store-house, a part of the land which constituted the said avenue. At this point of the description in the deed, is this clause: "Here I reserve the width of twenty feet for my avenue: thence down the said avenue to the sweet gum, the first station, still reserving for ever the width of twenty feet, at least, for my avenue to my house." It was on this width of twenty feet that the ware-house complained of was built.

The defendant contended that the plaintiff was estopped by the operation of this deed, to say that the avenue was a public road, and the plaintiff insisted that the operation of this deed restrained the defendant from using the space reserved for any other purpose than as an avenue.

The Court charged the jury that the plaintiff could not be heard to say, that the avenue in question was public property; that, as between the parties, it was private property, and though the defendant retained it for an avenue, he was not disabled from using it for other purposes. The plaintiff excepted to these instructions. There was a verdict for the defendant, and judgment, and the plaintiff appealed.

Garrett and *Barnes*, for plaintiff.
Winston, Jr., for defendant.

PEARSON, J. The legal effect of the deed was to pass the *soil* of a part of the avenue to the plaintiff, leaving an *easement* or right of way, called an "avenue," in the defendant. It is clear that such is the legal effect of the deed; for otherwise, why was a part of the avenue included in the deed, and where was the necessity of saying any thing about the purpose for which the defendant reserved an interest in such part?

As the freehold vested in the plaintiff, we do not concur with his Honor in the opinion that the defendant might use it for the site of a ware-house, or for any other purpose than a

way. It follows that the plaintiff has a cause of action for the erection of the ware-house. Whether the action should be trespass or case, is not now presented, as the plaintiff is entitled to a *venire de novo.*

We likewise differ from his Honor as to the other part of the charge. To raise an estoppel, the admission must be certain. Here, there is no direct admission that this part of the avenue was not also a public high-way. There is no inconsistency in supposing that a part of one's avenue may be a public high-way; in truth, whether it was or was not a public high-way was not in the contemplation of the parties. Besides, an estoppel, as a general rule, does not grow out of a recital; to give it that effect, it must show that the object of the parties was to make the matter recited a *fixed fact*, as the basis of their action; as, for instance, in this case, in respect to the purpose for which the reservation is made—to be used as an avenue. So that had there been a recital, "whereas it is not a public high-way," the application of the doctrine of estoppel would have been questionable. In the absence of such a recital an estoppel cannot grow out of a mere inference in regard to a fact that was over and beyond the contemplation of the parties, so far as is shown by the face of the deed.

Gilliam v. *Bird*, 8 Ire. 286, relied on by the defendant's counsel, has no application. The kind of estoppel there discussed is strictly a mere rule of evidence, adopted to avoid the necessity of tracing back the title where both parties claim under the same person.

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

THE STATE *v.* HENRY, (*a slave.*)

It was held to be error in a Judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had

a right to have it cast into the scales and weighed in his behalf;" the true rule being, that in all cases, a good character is to be considered.

The fact that the prosecutrix in a case against a negro slave, for an assault with an intent to ravish, had made an indecent exposure of her person to the other slaves belonging to the same owner, but which was not known to the accused at the time of the alleged offense, was *Held* not to be admissible in evidence.

INDICTMENT for an assault with an intention to commit a rape, tried before CALDWELL, J., at the last Fall Term of Perquimons Superior Court.

The evidence sent up in the bill of exceptions was quite full, and seemed to be very strong against the prisoner, but as its quality is entirely disregarded in the opinion of the Court, it is not deemed proper to set it forth in the report of the case. The prisoner, in reply, had advanced evidence of his good character. His Honor, the Judge below, charged the jury upon the testimony, "that in a plain case a good character would not help a prisoner, but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf." To this the defendant excepted.

Upon the trial, the defendant offered to show that the prosecutrix had, previously to the time of the alleged assault, made an indecent exposure of her person to the other slaves of his master, but not in the presence of the prisoner. This evidence was ruled out by the Court, for which the prisoner excepted.

The prisoner was found guilty. Judgment was rendered, and the prisoner appealed.

Attorney General, for the State.

No counsel appeared for the defendant in this Court.

BATTLE, J. The charge of his Honor to the jury, as to the effect of the testimony, in relation to the character of the prisoner was, in our opinion, erroneous. It is not a rule of law that, in a plain case, the jury must not consider the evidence of the prisoner's good character, and that it is only "in a

doubtful case that he has a right to have it cast into the scales and weighed in his behalf." It is admitted that, in all cases, a person accused of a crime of any grade, whether a felony or a misdemeanor, has a right to offer in his defense testimony of his good character. Whatever is admitted as competent evidence must be for the consideration of the jury. Who, then, is to decide whether the case is a plain one, by which the testimony is to be withdrawn from them? It cannot be the court, because that would be deciding on the facts, and thus usurping the province of the jury. It cannot be the jury, because that would be deciding the preliminary question of competency, and thus usurping the province of the court. The advocate of the rule is thus placed in a dilemma, by taking either horn of which he is involved in an absurdity. The true rule is, that the testimony is to go to the jury, and be considered by them, in connection with all the other facts and circumstances, and if they believe the accused to be guilty, they must so find, notwithstanding his good character.

The pretended rule probably grew out of a remark which a Judge might very properly make to a jury, that if they believed the defendant was guilty, they ought not to acquit, although he had proved that he was a man of good character. Such a remark, properly understood, does not withdraw the consideration of character from the jury; it presupposes that the testimony of character has been duly weighed by them, and it can legitimately operate only as a caution to the jury; thus the testimony is not of itself to preponderate over all the other facts and circumstances given in evidence, and thus produce an acquittal, merely because the party charged had previously borne a good character. The Judges, no doubt, insensibly fell into the habit of varying the remark, so as to give it the form and effect of the rule to which we now object. Its inconsistency has not escaped the attention and animadversion of distinguished law-writers and jurists both in England and in this country. Sir William Russel, in his work on crimes and misdemeanors, says "it has been usual to treat the good character of the party accused, as evidence to

be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought *always* to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The matter of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail, but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their own conclusion upon the evidence, whether an individual, whose character was previously unblemished, has, or has not, committed the particular crime for which he is called upon to answer;" 2 Russ. on Cri. and Mis. 704.

The celebrated sergeant (afterwards Judge,) *Talfourd*, in commenting upon these remarks, said, "We may be permitted to add, that according to the language frequently adopted by Judges, in their charges, it may be proved that character is, in no case, of any value. They say that in a clear case, character has no weight, but if the case be doubtful—if the scale hangs even—the jury ought to throw the weight of the character into the scale and allow it to turn the balance in the prisoner's favor; but the same Judges will tell juries that in every doubtful case they ought to acquit, stopping far short of the even balance, and that the prisoner is entitled to the benefit of every reasonable doubt; in clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted; it is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render

that doubtful which would otherwise be clear. There may certainly be cases so made out that no character can make them doubtful, but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually out-weigh evidence which might otherwise appear conclusive. It is, in truth, a fact varying greatly in its own intrinsic value according to its nature; varying still more in its relative value, according to the proofs to which it is opposed, but always a fact, fit, like all other facts, proved in the cause, to be weighed and estimated by the jury." See Dickin. Quar. Sess. (6th Ed.) 563; Whar. Am. Crim. Law, sec. 644.

These observations show us that, even in England, where a greater latitude is allowed to Judges in expressing to the juries their opinions upon the weight and effect of testimony, the rule in question is not firmly established as a rule of law, and much less can it be tolerated in this State, where the Judges are restricted by the act of 1796, (Rev. Code, ch. 31, sec. 130,) from interfering with the peculiar province of the jury in deciding upon all questions of fact.

This supposed rule, in relation to the effect of character, is somewhat analogous to that laid down by the highest English law writers upon the subject of the testimony of the prosecutrix in an indictment for rape. Lord HALE (who is followed substantially by East, Blackstone and Russell,) says, "if she presently discover the offense and make pursuit after the offender," &c., "these, and the like circumstances, give greater probability to her testimony. But if she conceal the injury for any considerable time after she had opportunity to complain," &c., "these, and the like circumstances, carry a strong presumption that her testimony is false or feigned." In the case of the *State* v. *Cone*, 1 Jones' Rep. 18, it was held that such circumstances as the above, may very well be considered by the jury in their enquiry as to the guilt or innocence of the prisoner, but that it is not proper for a Judge in this State to lay them down as rules of law.

As the prisoner is entitled to a new trial for the error of the Judge, above specified, it is not absolutely necessary for us to notice the other alleged errors assigned in the prisoner's bill of exceptions. It may not be amiss, however, for us to remark, that the testimony which was offered to prove that the prosecutrix had made an indecent exposure of her person to the other slaves belonging to the owner of the prisoner, was irrelevant for any purpose, because it was not shown that the prisoner was informed of it.

Whether, if he knew of it, it would make the testimony competent, is at present a hypothetical question, upon which we give no opinion. The judgment must be reversed, and a *venire de novo* awarded to the prisoner.

PER CURIAM, Judgment reversed.

HENRY BAUCUM *v.* JAMES F. STREATER *et al.*

The statute of limitations to an action for the breach of a warranty of soundness, does not begin to run from the time when an injury befals the purchaser in consequence of the unsoundness, but from the date of the contract.

ACTION of ASSUMPSIT, tried before PERSON, J., at the Fall Term, 1857, of Union Superior Court.

The plaintiff purchased the slave, Mary, from the defendants, on 14th January, 1852, with a written contract of soundness, and five days afterwards he sold her to Mrs. Livingston with a like warranty of soundness. She brought suit against him for a breach of the warranty, and at fall term, 1855, of Montgomery Superior Court, recovered a judgment against him for such breach. He produced, in evidence, a record of this recovery, and contended that the statute of limitations only began to run from the date of such recovery, as he was not before that time advised of the slave's unsoundness.

The Court intimated an opinion that the cause of action arose immediately upon the making the warranty, and that, three years having elapsed from that date, the right of action was barred.

Plaintiff, in submission to the opinion of the Court, took a nonsuit and appealed.

No counsel appeared for the plaintiff in this Court.

Ashe, for the defendants.

NASH, C. J. The action is in Assumpsit to recover damages for a false warranty of soundness of a negro woman named Mary. The contract of warranty was made on 14th of January, 1852, and the writ issued on the 2nd day of October, 1855. The defendant relies on the statute of limitations. The sole question for us to decide is, when did the plaintiff's right of action accrue? The plaintiff sold Mary to a *Mrs. Livingston*, who sued him for a breach of his contract, and recovered judgment at fall term, 1855, of Montgomery Superior Court. If his right of action accrued from the date of that judgment, then the statute does not bar; if on the breach of the contract, then the statute is a bar. The action is on a contract of soundness, and if the slave was, at the time of its execution, unsound, the contract was instanter broken, and the cause of action then accrued to the plaintiff. It is not at this day an open question, whether the statute begins to run from the breach of the contract; the case of *Wilcox* v. *Plummer*, 4 Peters' Rep. 177, is full authority. The action was against an attorney for breach of duty in the management of a suit at law entrusted to him by the plaintiff. The Court say, where an attorney is chargeable with negligence, or unskilfulness, his contract is violated, and the action may be brought immediately, and the damage sustained by the plaintiff is not the *cause* of action. The Court, there, refer to the case of *Battley* v. *Faulkner*, 3 B. and A. 288, as being in accordance with their decision.

The plaintiff brought his action too late, and the statute of limitations is a bar. There is no error.

PER CURIAM, Judgment affirmed.

Doe on the demise of MARY L. WORSLEY *et al. v.* MILLY JOHNSON.

Where a person made a deed to another, conveying a life-estate in an unoccupied lot of land, and such life-tenant conveyed the premises in fee simple, it was *Held* that such purchaser is not precluded, by the rule of practice in ejectment, from denying the title of the vendor, beyond the life-estate conveyed, and the heirs of such vendor, can only recover by showing, either that their ancestor had a deed for the land purporting to convey a fee, or that he was in possession of the premises claiming a fee.

ACTION of EJECTMENT, tried before SAUNDERS, J., at the last Fall Term of Martin Superior Court.

The action was brought by the lessors of the plaintiff, as the heirs-at-law of Abner Cherry, to recover the possession of lot No. 39, in the town of Williamston.

To make out their title, the lessors of the plaintiff introduced a deed from Abner Cherry to Joseph Biggs, dated 8th of December, 1810, which, for the want of words of inheritance, conveyed only an estate for the life of the said Biggs in the lot in question; also a deed from Joseph Biggs to Wm. Mackey, dated 18th July, 1814, conveying a fee simple. The plaintiffs then proved that the defendant is the heir-at-law of William Mackey; that he died in 1817, and his widow had possession of the premises a short time; that they were then rented out by the guardian of the defendant until she intermarried with Thomas B. Pollard. The plaintiffs then introduced a deed from Pollard to Peter E. Maddera, dated 22nd Nov., 1828, and a deed of trust from Maddera to John Watts, for the debt of William Watts. They showed the pendency of a suit in favor of the defendant against Maddera, and on his death in 1850, its continuance against Watts; a recovery

of the lot in question by the defendant, and possession taken by her before this suit was brought.

It was in evidence that, in 1810, the lot was unoccupied; that Mackey built on it after he bought it from Biggs, and was the first person who had actual possession of it, and that he, and those claiming under him, had possessed it ever since, claiming it adversely to the plaintiffs and all other persons. Pollard died in ———, and Joseph Biggs in 1844. Proof of the descent of the lessors of the plaintiff from Abner Cherry was also adduced.

It was contended by the plaintiffs' counsel, that the defendant was estopped to deny their title in fee simple to the lot in dispute.

It was contended, on the other hand, by the defendant's counsel, that if the doctrine of estoppel applied at all, it only estopped the defendant from denying that Abner Cherry had an estate for the life of Joseph Biggs, which was all he professed by his deed to be able to convey; that never having had the actual possession, his constructive possession extended only to the estate he had, and that, as shown by the deed, was only a life estate; to that extent Joseph Biggs was estopped, and to that extent only could the defendant be estopped as privy in estate.

It was agreed that a verdict should be entered, subject to the opinion of the Court upon the law; that if his Honor should be of opinion against the plaintiffs, a judgment of nonsuit should be entered; otherwise, judgment should be entered in favor of the defendant.

His Honor, upon the consideration of the case, gave judgment for the plaintiffs, from which the defendant appealed.

Rodman, for plaintiffs.
Winston, Jr., for defendant.

BATTLE, J. The lessors of the plaintiff have not attempted to show any title in themselves, but seek to recover, upon the ground that the defendant is estopped to deny their title.

Admitting that to be so, still there must be a question, what is the extent of the title which is thus admitted? Abner Cherry, the ancestor of the lessors, never had actual possession of the lot in question, and there is not the slightest evidence that he ever claimed a greater interest than the life-estate which he conveyed to Joseph Biggs, under whom the defendant claims, by a conveyance in fee to her father. To the extent of that life-estate, the defendant is estopped to deny that Abner Cherry had the title; but before she can be prevented from showing that he had no estate in the fee, the lessors must prove that he had, or at least, claimed to have, such an estate. In *Murphy* v. *Barnett*, 1 Car. Law Repos. 100, (which was the first case in our courts where the rule was laid down, that where two parties claim under the same person, neither can deny the title of him under whom they both claim,) Thomas Barnett, the common source of both titles, claimed under a deed, which purported to convey the land to him in fee. The title thus derived, the defendant sought to impeach, but was prevented from doing so by the application of the rule above stated. So, in the case of *Ives* v. *Sawyer*, 4 Dev. and Bat. Rep. 51; *Gilliam* v. *Bird*, 8 Ire. Rep. 228; *Love* v. *Gates*, 4 Dev. and Bat. Rep. 363; *Johnson* v. *Watts*, 1 Jones' Rep. 228, and all the other cases on this subject, it will be found that it was admitted, or proved, that the person, under whom both parties derived title, was in possession, claiming the land in fee, or had a deed purporting to convey it to him in fee. In all these cases, the lessor of the plaintiff was held not to be bound to show a grant from the State, nor to prove that the title set up by the person under whom both parties claimed, was a good one. The rule in question was adopted as one, provided in justice and convenience, to prevent the necessity of such proof, and thereby to prevent the general rule, that in ejectment the plaintiff must recover upon the strength of his lessor's title, from operating harshly, and in many cases, unjustly. The very recent case of *Register* v. *Rowell*, 3 Jones' Rep. 312, may seem to be opposed to this, as it is not expressly stated in the report, that Kilby

Register, the common source of both titles, was either in possession, claiming the fee, or had a deed purporting to convey it to him; but it will be seen, from the objections made by the defendant to the plaintiff's recovery, that such was assumed to be the fact. And at all events, if it were not so, the objection was not taken by the defendant, and the attention of the Court was not called to it.

The counsel for the plaintiff, relies strongly upon an expression used by the Court, in *Johnson* v. *Watts*, aboved cited, where the title to the lot, now in controversy, was claimed by the present defendant as plaintiff against Watts, who was then the tenant in possession. It was said in that case, that "unless the defendant can show that he has in himself the outstanding title of Cherry's heirs, the lessor of the plaintiff must recover;" and for the want of such proof the lessor of the plaintiff did recover. That expression was manifestly used upon the supposition that it could be proved that Cherry's heirs had the outstanding title in fee. So, we say now, that so far as the rule upon which we are now commenting is concerned, (and if there be no other obstacle in their way,) they might recover in the present action, if they had shown that Abner Cherry, their ancestor, had ever been in the actual possession of the lot, claiming it in fee, or had a deed from any person purporting to convey it to him in fee. But the testimony shows affirmatively that he never was in the occupancy of the lot, and there is not the slightest evidence that he ever claimed a larger estate in it than what he conveyed to Joseph Biggs. Upon this ground alone, then, without noticing any other, we must direct the judgment for the plaintiff to be reversed, and a judgment of nonsuit to be entered according to the agreement of the parties.

PER CURIAM, Judgment reversed, and judgment of nonsuit.

FRANCIS NIXON *v.* HARVEY HARRELL.

A court has no power to set aside an execution for abuses of the sheriff in executing its commands.

MOTION to set aside an execution, heard before CALDWELL, J., at the last Fall Term of Perquimons Superior Court.

The execution had been levied on two slaves, the property of the defendant, Harrell, and the reasons assigned for setting it aside were as follows:

First. Because it appeared from the return of the sheriff, that he had not advertised the sale at three public places in the county.

Secondly. That the day advertised for the sale, and on which it took place, was very stormy, insomuch, that very few persons attended, and negroes of the value of $1500, sold for $250.

Thirdly. That the day of sale was fixed on by concert between the sheriff and the agent of the plaintiff, so that the defendant could not attend the sale, or that it was altogether inconvenient for him to do so.

Fourthly. That one Mrs. Gordon became the purchaser of the said slaves, at the price of $250; that her agent first forbade the sale, setting up, in her behalf, a claim to the property.

It did not appear that Mrs. Gordon was any privy to the execution.

The Court refused to set aside the execution, on the first ground, because a purchaser at sheriff's sale, in no wise connected with the execution, could not be affected by the negligence or misconduct of the sheriff in not advertising as directed by the statute; that the injured party had his remedy against the sheriff, as well for the penalty as in an action for damages.

And the Court refused to set aside the process on the other grounds taken, because, if there were fraud in the sale, the injured party had a full remedy. His Honor remarked, that

setting aside the execution would not divest the title of the purchaser.

Smith, for the plaintiff.
Jordan and *Badger*, for the defendant.

PEARSON, J. We concur in the opinion of his Honor, for the reasons given by him. The execution is regular in all respects upon its face. No irregularity in the manner of its issuing, or in the acts of the officer of the court, i. e., the clerk, is suggested.

The only grounds upon which the motion is based, are alleged acts of omission and commission on the part of the sheriff, after the writ had duly come to his hands. We hold that the court had no power to control the action of the sheriff by setting aside the execution. The party had his remedy against him.

The sheriff is not a mere officer of the court, like the clerk, i. e., an instrument in its hands to do its acts, and record its proceedings, but is an independent officer of the law, intrusted *to do acts of his own*, as distinguished from acts of the court. Writs are directed to him, not by the court, but by the sovereign to whom he is responsible. The principle, therefore, upon which the court has power to set aside its own acts, or the acts of its instrument, does not apply to the acts of the sheriff. The sheriff is an officer of very great antiquity. The name is derived from two Saxon words, meaning *reeve*, or officer of the *shire*. The Earls retain the honor, but the sheriff, *vice comes*, has the labor, of transacting all the King's business in his county ; 1 Bla. Com. 340. The *shire reeve*, or sheriff, is governor of the county ; Bac. Ab. Title, "Sheriff."

The idea that the court may control the action of the sheriff by setting aside a writ, in all respects regular, because of the subsequent acts of the sheriff, is new, and if such a power existed, some precedent could be found of its exercise.

PER CURIAM, Judgment affirmed.

RICHARD GARRETT *v.* WM. H. FREEMAN.

Where slaves working in a new ground, set fire to a log-heap, in very dry weather, within five yards of a fence, a dead pine-tree and dry trash being between the log-pile and the fence, by which fire was communicated to timber and a house on an adjoining tract, although it was calm in the morning when the fire was set out, it was *Held* to be negligence, for which the master of such slaves was liable.

ACTION on the CASE, tried before CALDWELL, J., at the last Fall Term of Bertie Superior Court.

The declaration was for the negligent act of defendant's slaves in setting fire to certain log-heaps in his new ground, whereby the fire escaped into the woods and grounds of the plaintiff and burned his timber and cooper's shop.

It appeared on the trial, that the parties lived on adjacent tracts of land; that the fence around the defendant's new ground joined the land of the plaintiff on one side, along which there was a road twelve feet wide, skirted by a ditch one foot and a half wide; that the weather was very dry; that there was trash on the new ground and log-piles, one of which, was from three to five yards from the fence, and a dead pine stood between the fence and the log-pile. Several witnesses testified, that they came to the new ground, at different times, from twelve to two o'clock; that the morning of the day on which the occurrence happened, was calm; that the wind commenced blowing about nine or ten o'clock, and blew more briskly as the day advanced; that when they got there, the log-pile was two-thirds consumed; that the pine tree was on fire, and had fallen across the fence and road, and the top of it was on the land of the plaintiff; that the defendant had left home early in the day, leaving two slaves, a man and a girl, in charge of the work, and on returning home, late in the evening, he went to the ground, and asked the male servant, where he had set out the fire, and how it got to the plaintiff's land, to which the servant, pointing to the log-pile, said, "there." The defendant replied, "I told you

not to set out the fire in the new ground, if the wind was blowing." The negro replied that, "when he set fire to the log-pile, the wind was not blowing, and he didn't know it was going to blow."

It was further in evidence, that if it had continued calm, the fire would not have injured the plaintiff, but an ordinary or brisk wind would necessarily drive fire to the plaintiff's land. A witness testified, that he was there between twelve and two o'clock, and the defendant's slaves were there.

Upon this state of facts, the Court charged the jury, that if the defendant's servants set fire to the log-pile, or to any part of the new ground, when the wind was blowing, so as to convey the fire into the land of the plaintiff, whereby he was injured, it would be such negligence as would render the defendant liable in this action; but if the servant put fire to the log-pile, or any part of the new ground, when it was calm, and, thereafter, the wind arose so high as to carry the fire into plaintiff's land, then, and in such case, the defendant would not be liable—that the act of God would not prejudice him. Plaintiff excepted. The plaintiff's counsel then moved the Court to charge the jury, that the defendant was guilty of negligence in not having more force on the new ground to put out the fire.

The Court declined so to charge, and said to the jury, that it involved the question already decided, whether the weather was calm, or otherwise, when the fire was set out. Plaintiff again excepted. The jury returned a verdict for the defendant, and the plaintiff appealed.

Winston, Jr., and *Garrett*, for the plaintiff.
for the defendant.

PEARSON, J. His Honor put the case upon the single fact of the condition of the wind at the time the log-pile was set on fire, being of opinion, that if it was then calm, there was no negligence. There is error.

A prudent man would not permit a log-pile to be made so

near the fence, (from three to five yards,) with a dead pine between the pile and fence, nor would he permit fire to be set to it without having the trash raked from around it. The weather was very dry, and, under the circumstances, it was gross negligence to fire the pile in the morning, when there was reason to expect, at least, an *ordinary* wind, during the day. A prudent man would have waited until after a rain, or at all events, would have started the fire after night-fall, so that the dew would prevent the sparks from communicating fire to the dead pine, or the trash. *Averitt* v. *Murrell*, 4 Jones' Rep. 323, was relied on for the defendant. In that case, the log-pile was twenty-five or thirty yards from the woods; "the trash was raked away from the log-piles carefully." It was not proved that the weather was "very dry," and there was no dead pine within a few feet of the log-pile. In our case, the dead pine, which was rendered combustible by the dryness of the atmosphere, caused the fire to get out. *Venire de novo.*

PER CURIAM, Judgment reversed.

EDWIN HOBBS *v.* ABRAM RIDDICK.

In a suit upon a contract to employ an overseer for a year, at stipulated wages, it appearing that the employee had staid the year out, the employer cannot give in evidence, that the overseer was lazy and trifling and made a poor crop.

ACTION of ASSUMPSIT, tried before CALDWELL, J., at the Fall Term, 1857, of Hertford Superior Court.

It appeared on the trial of the case, that the defendant had employed the plaintiff as an overseer, and agreed to give him one hundred and twenty-five dollars for the year's service; that the plaintiff continued through the year. Defendant offered to prove, that the plaintiff did not discharge his duty;

that he was frequently absent during crop time, and that by his neglect and willful unfaithfulness, the crop, in a great measure, had been sacrificed.

His Honor being of opinion, that the proposed evidence was the subject-matter of a cross action, rejected it. Defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Winston, Jr., for the plaintiff.
Smith, for the defendant.

PEARSON, J. Where an action can be maintained upon the *special contract*, the defendant is not at liberty to reduce the damages, by showing that the property was unsound, and relying upon a warranty or a deceit, or by showing that the articles were of inferior quality, or that the work done was defective, or that the services contracted for, were only partially rendered. But, when the plaintiff is driven to his *quantum valebat*, or *quantum meruit*, the damages may be reduced by proof of this sort, the distinction being between a partial and a total failure of consideration. In the former case, such matter must be made the subject of an independent action. The fact, that a slave, for instance, is unsound, ought not to be allowed to reduce the damages in an action for the price. If a deceit was practiced, the defendant has his remedy. It would be inconvenient, and the plaintiff's case would be too much complicated, if the jury, while trying his case, were required to go into the trial of an action of deceit, at the instance of the defendant, which action, the plaintiff is not presumed to have come prepared to defend. Besides, suppose the damages are reduced in the manner here attempted, and the defendant should afterwards bring his action of deceit, how is the plaintiff to avail himself of the fact?" *McEntyre* v. *McEntyre*; 12 Ire. 299; *Caldwell* v. *Smith*, 4 Dev. and Bat. 64; *Washburn* v. *Bacot*, 3 Dev. Rep. 396.

Where the plaintiff is forced to sue for the value of the

articles, or of the work, or services, the question of damages is open, except that, in respect to the amount, he is restricted by the terms of the special contract, and the price agreed is made the standard; *Farmer* v. *Francis*, 12 Ire. 280; *Dickson* v. *Jordan*, Ibid. 79.

The subject is very much complicated by conflicting decisions in the English courts. In some, the principles of the common law are rigidly enforced; in others, they are modified by an importation of ideas from the civil law, and the distinction between an action on the special contract, and an action for what the articles or labor are reasonably worth, which is an equitable action, is lost sight of.

There is no difficulty in regard to the rule as established by the decisions of the court: Our case turns upon its application.

The plaintiff continued in the service of the defendant for the *entire time*, according to the contract. It may be true, he was lazy and trifling, and not sufficiently regardful of the interest of his employer, still he served out his time. If he had left before the end of the year, or had done any act amounting to an abandonment of the service, or an unequivocal refusal to perform his duty, the case would fall under the principle of *White* v. *Brown*, 2 Jones' Rep. 403; *Dula* v. *Cowles*, Ibid. 454, and other cases; and the action on the special contract could not have been maintained. So, if the defendant had, during the year, notified him of his remissness in the discharge of his duty, and he had refused to alter his conduct, it may be there would have been sufficient ground to justify his discharge; but this was not done.

To the suggestion, that to allow the damages to be reduced would prevent the necessity of a second action, and thus avoid a multiplicity of suits, the reply is, besides the inconvenience pointed out above, as attending such a mode of proceeding, it would have the effect of encouraging purchasers and employers to refuse to pay the price agreed on; for, if allowed to reduce the damages, by proof of alleged inferiority in the quality of the articles sold, or remissness of duty on the part

of one who has agreed to perform services at a stipulated price, they would be much tempted to raise a difficulty in respect thereto, and thus the amount of litigation would be greatly increased. *Caveat emptor* (the principle of which extends to employers) is a maxim of the common law. A purchaser should examine the articles before he buys; an employer should make the necessary enquiries as to character, &c., before he takes a man into his employment at a stipulated price; or else he should protect himself by requiring such agreements and covenants, as will enable him to recover damages; but he should pay the stipulated price, unless there be such a total failure of consideration, or abandonment of his service, or unequivocal act of refusal to perform the duty, as will defeat an action on the special contract.

We are of opinion with his Honor, that the evidence offered by the defendant, was the subject of a cross action, and could not be allowed to have the effect of reducing the damages. There is no error.

PER CURIAM, Judgment affirmed.

JOHN P. HOUSTON *et al. Adm'rs.*, *v.* WILLIAM BIBB.

A, having a claim, with others, to certain slaves, joined in a suit for partition, wherein a certain slave is assigned to C. A became the administrator of his brother, and is sued as such by B for a debt, and in this suit, B alleges this slave to belong to the estate of his brother, and it is so adjudged by the court; the slave afterwards gets back into the hands of A, and B sues for it as the administrator of one claiming under the title of C; it was *Held*, that B is not estopped to assert title under C.

Where a defendant in an action of replevin, upon a recovery had against him, pays the damages assessed for a female slave, this is a judicial transfer of such slave, under Rev. Stat. ch. 101, sec. 5, but not of a child she had after the wrongful taking and during the pendency of the suit.

Nor does the adverse holding of the mother, in such case, for three years, create a bar, under the statute of limitations, as to such child. As to it, the statute only runs from its birth.

Houston *v.* Bibb.

THIS was an action of TROVER, tried before PERSON, Judge, at the last Fall Term of Union Superior Court.

The plaintiffs produced, in evidence, a bill of sale for a negro woman named Pene, from Jane Moore, to their intestate, N. Armfield, bearing date 9th of May, 1849. Also, the record of a suit, by petition, in the County Court of Union, filed by James Moore and wife Catharine, Elizabeth Carns and Jane Moore, for the partition of several slaves, among whom was the woman Pene, in which it appeared, that this slave, Pene, had been allotted to Jane Moore, and that the report of the commissioners was confirmed at April term, 1848, of the said court. They then proved that the slave Pene was taken from the possession of their intestate in September, 1849; that an action of replevin was instituted at the fall term, 1849, of Union Superior Court, against David and the said James Moore, for the negro Pene; that a good and sufficient replevin bond was given by the said David and James Moore, and the possession retained by them; that the action of replevin was not decided until the August term, 1857, of the Superior Court, and during its pendency, the slave in question passed from the possession of the Moores into that of the defendant Bibb. They proved the descent of Isham and Lewis, (the slaves for the conversion of whom this action was brought,) from the woman Pene, and a demand and refusal before the action was commenced.

The defendant produced, in evidence, a bill of sale to him, for the slave Pene, from one C. Austin, dated 6th day of January, 1851, and another for the same negroes from David Moore to C. Austin, dated 3rd December, 1850, and another from James Moore, administrator of Milton Moore, to David Moore, for the same, dated —— A. D. 184–.

The defendant produced, in evidence, the record of a suit in the Superior Court of Union county, determined at May term, 1849, in which one of the plaintiffs, John P. Houston, in his own right, was plaintiff, and James Moore, administrator of Milton Moore, was defendant, and proved that it was insisted, by the plaintiff in that suit, that the negro Pene had

belonged to Milton Moore, and was assets in the hands of his administrator, James Moore, and that it was so decided by the Court. He proved that James Moore obtained letters of administration on the estate of Milton Moore, at January term, 1848, of the County Court of Union.

He proved by Jane Moore and Mrs. Carns, that at the time of the execution of the bill of sale, by Jane Moore to Armfield, a controversy had arisen in regard to the title to the negro Pene, between the said Jane Moore and James Moore, the administrator of Milton Moore, the latter claiming her as a part of the assets of his intestate's estate; that no money was paid, or note given at that time, and that no consideration was given, except that Armfield was to defend the lawsuit, and if he lost it, was to pay her nothing, but if he gained it, was to return her the negroes, or others as good; that afterwards, he gave her his note for the negroes, as he said, to show in evidence in court, but with the understanding that it was not to be paid, and that it was destroyed by Armfield soon after court.

It was contended on the part of the defendant, that the plaintiff could not recover the slave Lewis, because he (defendant) had had three years' adverse possession of the mother before he was born, and that plaintiff was barred by the statute of limitations; and further, that the plaintiff could not recover either of the slaves:

1st. Because the plaintiff, John P. Houston, was estopped to deny the title of James Moore, as administrator of Milton Moore, to the slave Pene, and, of course, to her offspring born after the estoppel commenced.

2nd. Because the bill of sale, given by Jane Moore to the plaintiff's intestate, was founded upon an illegal consideration, and passed no title to the latter.

3rd. Because the recovery in the action of replevin, vested the title to Pene in David Moore and James Moore, which had relation to the taking possession of the said slave, and that the title to her offspring followed that of the mother.

His Honor charged the jury, in favor of the plaintiffs, upon

these several points, upon each of which the defendant excepted.

Verdict for the plaintiffs. Judgment and appeal.

Wilson, for plaintiffs, cited 4 Jones' Rep. 522.

Ashe, for the defendant, cited, on the point of the estoppel, *Armfield* v. *Moore*, Busbee's Law, p. 157; *Weare* v. *Burge*, 10 Iredell's Law, 169; *Montgomery* v. *Wynns*, 4 Dev. and Bat. 527; as to the statute of limitations, *Cotten* v. *Davis*, 4 Jones' Law Rep. 416, and *Woods* v. *Woods*, Jones' Eq. vol. 2, p. 420; and on the point of illegal consideration, he cited 1 Hawkins' Pleas of the Crown, p. 249; Blackstone's Com. vol. 4, p. 134, and Chitty on Contracts, p. 524.

PEARSON, J. 1st. The fact that the plaintiff Houston, as a creditor of Milton Moore, in an action against the defendant James, as administrator of Milton, charged him with the value of the slave Pene as assets, does not create an estoppel in this action, for it is not inconsistent with the fact, that the defendant James, by the proceeding for a partition, had lost his title as administrator, by force of an estoppel created between him and Jane Moore, under whom the intestate of the plaintiffs derived title.

2ndly. The transaction by which the plaintiffs' intestate acquired title to the slaves from Jane Moore, might have been tainted with *champerty*, and for that reason, illegal and of no effect, but there is no evidence of such champerty or illegal consideration. The testimony of Jane Moore and Mrs. Carns does not establish the fact. They swear, "at the time of the execution of the bill of sale, made by Jane Moore to Armfield, a controversy had arisen in regard to the title to the negro Pene, between the said Jane and James Moore, the administrator of Milton Moore; the latter claiming her as a part of the assets of his intestate's estate; that no money was paid, and no note given at that time, and that no consideration was given, except that *Armfield was to defend the law-suit, and if he lost it, was to pay her nothing, but if he gained it, was to*

return her the negroes, or others as good; that afterwards, he gave her his note for the negroes, as he said, to show in evidence in court, but with the understanding, that it was not to be paid, and that it was destroyed by Armfield soon after court."

This evidence may tend to prove, that Armfield cheated Jane Moore out of the slaves, but it has no tendency to prove that he was guilty of champerty; "He was to defend the law-suit; if he lost it, he was to pay nothing, but if he gained it, was to return her the negroes, or others as good!" If this be so, it shows that he was extremely liberal; but in truth, the testimony is not intelligible, and does not support the allegation that he undertook to defend the law-suit, and in *consideration thereof*, was to receive a part of the *subject in controversy.*

3rdly. The recovery in the action of replevin, as the law then provided, was the value of Pene at the time of the trial, "with a condition to be discharged by her surrender." Rev. Stat. ch. 101, sec. 5. The two slaves, now in controversy, were born pending that action. We can see no ground to support the position that this recovery related back to the time of the wrongful taking, so as to affect the title to the children; *their price* has not been taken into the account, so there could be no judicial transfer of them.

The slave Lewis was born within less than three years before the commencement of the action. There was no cause of action with respect to him until his birth; so the statute of limitations could not apply. The adverse possession of the mother cannot affect the question. The statute did not begin to run until there was a cause of action in respect to him.

PER CURIAM, Judgment affirmed.

JOHN A. MOORE *v.* JOHN Q. A. LEACH.

Where a testator devised land to his daughter and her children, she having children, at the time of the making of the will, who survived the testator, nothing appearing in the will to manifest a contrary intention, it was *Held* to be the intention of the testator, that the daughter and her children should take a joint estate in fee.

ACTION of COVENANT, tried before MANLY, J., at the last Fall Term of Chatham Superior Court.

The following case agreed was submitted for the judgment of the court:

The defendant, with his wife, Eliza, by their deed of bargain and sale, executed September 23rd, 1857, and perfected by the privy examination of the wife, bargained and sold to the plaintiff and his heirs, certain land, lying in the town of Pittsboro', being the same mentioned in the plaintiff's declaration, and by the said deed covenanted as follows: "And the said John Q. A. Leach, for himself and his heirs, doth covenant with the said John A. Moore and his heirs, that the said Eliza, at and immediately before the time of the sealing and delivery of these presents, is, subject to the said covenantor's right of entry, seized of a good, sure, perfect and indefeasible estate in fee simple, in the premises hereinbefore, by these presents, granted and sold, without any manner of remainder or remainders over, and also that the said John Q. A. Leach and wife Eliza, have now, or hath now, a good right and title, and lawful power and authority to grant, bargain and sell the said premises, and every part thereof, unto and to the use of the said John A. Moore and his heirs, according to the true meaning of these presents."

The only title claimed or set up by the said grantors, or either of them, at the date of these covenants, was under the will of George W. Thompson, the father of the wife of the defendant. The parts of the will, necessary to this case, are as follows:

"Item 3. I give and devise to my beloved daughter Eliza

Ann Leach (the wife of John Q. A. Leach,) and her children, the lawful heirs of her body, my houses and lots in the town of Pittsborough, whereon the said Leach now lives, together with all that appertains thereto, * * * to her, the said Eliza Ann Leach, and her children forever."

"Item 4th. I give and bequeath to my son George W. Thompson, the dwelling-house wherein I formerly lived, and wherein the said George W. Thompson is now living, with the plantation and all the lands belonging to my several tracts adjoining, containing fifteen hundred acres, be the same more or less, to him, the said George W. Thompson, his heirs and assigns forever."

At the time of the making of this will, Mrs. Eliza Ann Leach had three children, who all survived the testator.

It is agreed, that if, by the above will, Mrs. Leach took a fee simple estate in the premises, a judgment of nonsuit is to be entered, otherwise a judgment is to be entered for the plaintiff, and an enquiry of damages to be awarded as upon a judgment of *nil dicit* or *non sum informatus.*

Upon consideration of the premises, his Honor being of opinion with the defendant, gave judgment of nonsuit, and the plaintiff appealed.

Phillips and *Battle*, for plaintiff.
Miller, for defendant.

BATTLE, J. As early as the time of Lord COKE, it was held in *Wild's case*, 6 Rep. 17, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said that "the intent of the devisor is manifest and certain that the children (or issues) should take, and, as immediate devisees, they cannot take, because they are not in *rerum natura;* and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation." But, it is said in the same case, that "if a man devise land to A and his

children or issue, and he then has issue of his body, there, his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary; and, therefore, in such case, they shall have but a joint estate for life." See also Co. Litt. 9 a. This doctrine was recognized and made the rule of decision in the case of *Oates* v. *Jackson*, 7 Modern Rep. 439; S. C. 2 Strange's Rep. 1172. There, the testator devised lands to his wife for her life, and after her decease, to his daughter B and her children, on her body begotten, or to be begotten by W, her husband, and their heirs forever. B, the daughter, had one child at the date of the will, and afterwards others; and it was held that she took jointly, with them, an estate in fee. See also *Annable* v. *Patch*, 3 Pick. Rep. 360, where the same doctrine has been adopted in Massachusetts.

The same rule applies to bequests of personalty to a mother and her children, and if there be children living at the death of the testator, she and her children will take equally, unless there be something peculiar in the will, indicative of an intention in the testator that she should take for life with a remainder over to the children; 2 Jar. on Wills, 316 and 317; *Davis* v. *Cain*, 1 Ire. Eq. Rep. 304; *Chesnut* v. *Mears*, (in Equity) decided at the present term.

In the case now before us, there is nothing to prevent the application of the rule; on the contrary, it is manifest from the will, that the testator intended that his daughter and her children should take together the house and lots and other lands which he devised to them. The children were living at the time the will was made, and also at the death of the testator, and the words of the devise are *in presenti* "to her and her children forever." In another part of his will, he gives to his son a tract of land, to him, "his heirs and assigns forever," showing that he well knew how to use words of limitation for the purpose of conferring upon his son an estate in fee.

The judgment of the Superior Court is reversed, and upon the case agreed, judgment is given here for the plaintiff; and

this must be certified to the court below, for the purpose of enabling him to have an enquiry of his damages.

PER CURIAM, Judgment reversed.

THOMAS B. WORRELL *v.* JAMES H. VINSON *et al.*

A bequest of a fund to A and B and their *lawfully begotten heirs*, there being nothing in the will to control the technical meaning of the words, gives it to them absolutely, to the exclusion of a child of B.

Where a bequest was made to a trustee, in trust for A and B and their "lawfully begotten heirs," the trust being an executed one, is subject to the same construction as if the bequest had been of the legal estate.

A will made in another State, which is there subject to be construed by the rules of the common law, will have the same construction as if it had been made in this State, unless it appear by judicial decisions, or by the opinions of men learned in the laws of that State, that a different construction would there prevail.

ACTION of DEBT, tried before SAUNDERS, J., at the last Fall Term of Northampton Superior Court.

The action was brought on the following penal bond: "Know all men by these presents, that we, James H. Vinson, Jesse Ferguson and William Harrison, are held and firmly bound unto Thomas B. Worrell, executor of Cherry Beale, in the just and full sum of eight hundred and thirty-five dollars and thirty-two cents," &c. (Dated 17th of December, 1838.)

"The condition of the above obligation is such, that whereas Cherry Beale, by her last will and testament, which is of record in the County Court of Southampton, and of which Thomas Worrell, the executor therein named, took probate, after making several devises and bequests, she in the fourth clause of the will says: 'I lend one-fourth part of the remainder of my estate to my daughter Lucy Ferguson, and her daughter Lydia Ferguson, and if either should die, I lend the said fourth part of the remainder of my estate to the survivor during her natural life, and give the same to their lawfully be-

gotten heirs. I desire that Capt. James Barnes, of Hertford county, North Carolina, receive the legacy hereby lent to my daughter Lucy Ferguson, and her daughter Lydia, and pay it to them as they need it, and if both the said Lucy Ferguson and Lydia Ferguson die without a lawfully begotten heir, then I give the said legacy, or so much of it as remains, to my daughter Polly Murfee's children, to them and their heirs for ever;' and whereas, according to the report made by the commissioner Cobb, to the County Court of Southampton, of Thomas Worrell's executorial proceedings on the estate of the said Cherry Beale, the fourth part, to which the said Lucy Ferguson and Lydia Ferguson are entitled, under the will, is $412,66, which has been paid over by the said Thomas Worrell, to the above bound James H. Vinson, who hath been, by an order of the County Court of Southampton, made at December term, 1838, substituted as trustee in the room of James Barnes, who refused to accept the trust, confided to him by the will, for the benefit of the said Lucy and Lydia Ferguson:

"Now, if the said James H. Vinson, shall faithfully and justly discharge the duties of trustee aforesaid, by paying unto the said Lucy Ferguson and Lydia Ferguson, (now Lydia Vinson, the wife of the said James H. Vinson,) and to the survivor, so long as they, or either of them, shall live, the said sum of money as they shall need it, according to the true intent and meaning of the said Cherry Beale, and at the death of both the said Lucy Ferguson and Lydia Vinson, (formerly Ferguson,) the said James H. Vinson shall pay over the said sum of money, or such part thereof as shall remain in his hands, unto such person or persons as shall be entitled to it, under the will of the said Cherry Beale, and shall indemnify and save harmless the said Thomas B. Worrell, his executors, &c., from all loss and damage whatever, in consequence of any waste or misapplication of the said sum of money, or any part thereof, then the above obligation to be void, or else to remain in full force and virtue."

The defendant Vinson married Lydia Ferguson in 1837,

and there was born of the marriage, one daughter, who married one Edwards. In the year 1840, Lucy Ferguson died, and in the year following, (1841) Lydia Ferguson died, and after their deaths, but before the bringing of this suit, the plaintiff requested the defendant to pay over the legacy to him or to Edwards, which he refused to do. Edwards also made a demand before this suit was brought.

On the part of the defendant, it was insisted that the whole estate in the legacy vested in Lucy and Lydia Ferguson as tenants in common, and, on the death of Lucy, in the survivor absolutely, and that as Lydia survived, it passed to her husband, the defendant. Various alternative positions were taken by the counsel, which it is not essential to state.

The Court reserved the question as to the plaintiff's right to maintain the action, and left it to the jury to say whether the defendant had applied part of the fund to the necessary support of Lucy. The jury found the balance of principal, deducting payments to Lucy without interest. Afterwards, on consideration of the question reserved, his Honor gave judgment for the plaintiff, from which the defendant appealed.

Barnes, for plaintiff.
B. F. Moore, for defendants.

BATTLE, J. The plaintiff is not entitled to recover unless the bequest in the will of Cherry Beale to Lucy Ferguson and her daughter Lydia Ferguson, be construed to give them, or the survivor of them, a life-estate, only, in the money bequeathed, giving the remainder of the fund to the child of Lydia, under the limitation to her "lawfully begotten heir." In the events which have happened, it is not necessary, for the purposes of this case, to decide what interest vested in Lucy Ferguson and her daughter Lydia, as between themselves, and the only question which it is proper for us to consider is, whether the words, "their lawfully begotten heirs," mean children, or whether they are to be taken in their technical sense, and thereby give to the first takers the absolute

property in the fund. With regard to the will before us, we must say, as the Court said in *Donnell* v. *Mateer*, 5 Ire. Eq. Rep. 7, that "there is nothing in the context here, to control the technical meaning of the terms 'lawfully begotten heirs,' and, therefore, we are obliged to receive them in that sense, as meaning that class of persons, who, by law, take property by inheritance, or succession, from another. Thus understood, they are not words of purchase, but of limitation, in dispositions of this kind, as well as in conveyances of land." See *Ham* v. *Ham*, 1 Dev. and Bat. Eq Rep. 598; *Floyd* v. *Thompson*, 4 Dev. and Bat. Rep. 478; *Coon* v. *Rice*, 7 Ire. Rep. 217. This construction must prevail, whether we consider the money as given directly to Lucy Ferguson and her daughter, or to Barnes, in trust for them; because, if it were a trust, it was an executed, instead of an executory one, according to the well established distinction between those two kinds of trust. Limitations of the former are construed like those of the legal estate, while to the latter is given a more liberal interpretation, in order to carry out the general plan of the testator; *Saunders* v. *Edwards*, 2 Jones' Eq. Rep. 134.

The will before us was made and published in Virginia, but the parties have admitted that it is to be construed according to the rules of the common law, and this admission makes it our duty, according to the case of *Allen* v. *Pass*, 4 Dev. and Bat. Rep. 77, to put the same construction upon it, as we should upon a similar bequest made in this State; unless we are satisfied by judicial decisions made in Virginia, or by the opinions of professional gentlemen learned in the law of that State, a different construction would there prevail. In the present case we are not so satisfied; but, on the contrary, we are gratified to find that our opinion is fully sustained by that of the Hon John B. Minor, the distinguished Professor of the Law in the University of Virginia, which was, by consent, read as evidence in this cause. The opinion, to the contrary, of John R. Chambless, Esq., is, as we think, erroneous; and his error has, no doubt, been caused by his

not adverting to the distinction, above referred to, between executed and executory trusts.

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

PER CURIAM, Judgment reversed.

DANIEL WESTER *et al. propounders v.* THOMAS N. WESTER *et al. caveators.*

A nuncupative will of property beyond two hundred dollars, witnessed at one time by one witness, and the same declaration made at another time, witnessed by another witness, is not conformable to the statute requiring nuncupative wills to be proved by two witnesses, and cannot be established as such.

THIS was an issue of *devisavit vel non*, tried before his Honor, Judge MANLY, at the Spring Term, 1857, of Franklin Superior Court.

It was the case of a nuncupative will, which was declared in the presence of ——— Brown alone, who was charged to take notice, and see that it was put into legal form, in order to give it validity, provided the decedent did not dispose of his property by a written will. About a month afterwards, to wit, on the 15th of March, he stated he did not believe he could live long, and in the presence of another witness, Lewis Bartholomew, he made the same declaration as to the disposition of his property, and the same request of the witness as to putting it into legal form, if he did not dispose of his property by a written will. This witness did commit his wishes to writing, which is the script now offered for probate. There are several other facts stated in the exceptions and points of law raised upon them; but as the opinion of this Court disposes of the whole case upon the manner of its attestation, it is not deemed necessary to state more of the facts than the above. The counsel for the caveators contended, that the at-

testation of one witness to a nuncupative will, and that of another witness to the same declaration, was not an attestation of the same will by two witnesses. The Court below was of opinion, that the will was not made in conformity to the requirements of the act of Assembly, and so advised the jury. The propounders excepted.

Verdict against the will. Judgment and appeal.

B. F. Moore and *Lewis*, for the propounders.
R. B. Gilliam, for the caveators.

BATTLE, J. Upon one of the grounds of objection taken to the probate of what is propounded as the nuncupative will of Exum Wester, our opinion is so decidedly in favor of the caveators, that it is unnecessary to notice any other. The 11th section of the 119th chapter of the Revised Code enacts as follows: "No nuncupative will, in anywise, shall be good, where the estate exceeds two hundred dollars, unless proved by two credible witnesses present at the making thereof, and unless they, or some of them, were specially required to bear witness thereto by the testator himself," &c. In the present case, it is admitted that the estate exceeds two hundred dollars, and the question is whether, when the declaration of the alleged testator is made at one time to one of the witnesses, and at a different time to the other, there can be said to be two witnesses "present at the making thereof," within the words or spirit of the act. To us, it seems that it cannot be so. A will cannot be said to be made, until it is completed, and then there must be two witnesses present. Why are two required? Certainly to prevent fraud, imposition or mistake, and to accomplish that purpose, they must be present at the same time, in order that each may be a check upon the other, and that the recollection of one may be aided and corrected by that of the other. Besides, when a declaration of the alleged testator is made in the hearing of one witness, it is certainly not attested as the statute requires, and when the same words are uttered before another witness, it is not the

same declaration, but only a repetition or *quasi* copy of it, and that also is defective in the attestation. Hence it follows, that as neither declaration is made in the presence of two witnesses, it cannot be said that, within the meaning of the statute, it is "proved by two credible witnesses present at the making thereof." And this construction is strengthened by what immediately follows, "and unless *they*, or *some of them*, were specially requested to bear witness thereto by the testator himself."

The main, if not the only, argument in favor of the will, is derived from a supposed analogy to a written will, the subscribing witnesses to which may attest it at different times, and not in the presence of each other. But this argument is fully answered by the counsel for the caveators, when he says that the written instrument, which the witnesses subscribe, is the same identical paper; and he contends that a stronger analogy would be furnished, if one copy of a written will was attested by one witness, and another copy by a second, in which case, no person would pretend that the will was properly attested according to the statute. In support of his argument, the counsel for the caveators has referred us to several cases decided in our sister States, to wit, *Yarnall's Will*, 4 Rawle, 64; *Weedon* v. *Bartlett*, 6 Mumford, 123, and *Tally* v. *Butterworth*, 10 Yerger, 501. From the authority of these cases, the Editor of the second American edition of Jarman on Wills, has deduced the following proposition, to which we fully assent: "A nuncupative will cannot be established upon proof by one witness at one time, how the testator desired his property to be disposed of, and upon proof by another witness, at a different time, that the testator made the same declaration to him. The requisite number of witnesses must be present at the same time, and the *rogatio testium* must be done at that time." 1 Jarm. on Wills, 134, in note.

The judgment of the Superior Court pronouncing against the probate of the alleged nuncupative will, is affirmed.

PER CURIAM, **Judgment affirmed.**

JEREMIAH F. TAYLOR *v.* SCHOOL COMMITTEE No. 17 OF NORTHAMPTON COUNTY.

A school committee under the Act regulating common schools, (Rev. Code, chapter 66,) have no authority to employ a teacher for a period extending beyond the time when their office expires.

Whether a judgment in the ordinary form can be taken against a school committee for a teacher's wages, and whether the remedy is not by mandamus, *Quœre?*

ACTION of ASSUMPSIT, tried before SAUNDERS, J., at the last fall term of Northampton Superior Court.

The plaintiff declared on the common counts, and on the following special contract, to wit:

"The following contract is this day entered into between the school committee of district No. 17, for the county of Northampton, and J. F. Taylor:

"The said committee have engaged the said J. F. Taylor as a teacher of the school of the said district, for the term of ten months, commencing on the 21st of January, 1856, and agree to give him twenty-five dollars for each month. The said J. F. Taylor agrees to give instruction in the common rudiments of English education to all the scholars that may attend the said school during the said term—to superintend their moral deportment, and at the end of the time to furnish the said school committee with the number and names of the children who may have gone to his school, specifying the number of days each one went." Signed by the plaintiff, and by H. Harding, James Wright and James Vaner, as school committee —to each name being affixed a scroll, with the word seal written within it. The members of the committee, with whom this contract was made, went out of office on the first Monday in May, 1856, and were succeeded by John H. Harrison and James Brantley, who had been elected in their stead, on the first Saturday in April, preceding. It appeared in evidence that the new committee-men, soon after the first Monday in May, 1856, met and employed another teacher, of which the plaintiff

had notice; but he continued to teach until the 28th of that month, when he received a written notification from the committee, that they had employed another teacher, and dispensed with his services in that capacity; notwithstanding which, he continued to teach until the 4th of August, following, (the other teacher officiating during the same time.) For the services rendered previously to the first Monday in May, he received an order from the preceding committee on the superintendant, which was paid.

At the expiration of ten months from the 1st of January, 1856, the plaintiff demanded an order for full pay for the term, deducting the previous payments, which was refused, and this action was commenced against the defendants.

It was admitted that the plaintiff was duly qualified to fulfill, and did fulfill all the duties required of a teacher of the common schools.

It was proved that there were funds in the hands of the superintendant, belonging to school district, No. 17, sufficient, at the stipulated rate, to pay for the plaintiff's services for the whole ten months.

The defendants' counsel contended that the members of the former committee, had no power to contract for the services of a teacher longer than the duration of their own official term, and that their contract for a longer period was void for the excess.

His Honor charged the jury that the plaintiff was entitled to recover for the time that he had taught. Defendants excepted.

Verdict for the plaintiff. Judgment and appeal.

Conigland, for the plaintiff.
Barnes, for the defendants.

BATTLE, J. The act of 1844, chapter 36, entitled "An act to consolidate and amend the acts heretofore passed on the subject of common schools," provided, in the 8th section, for the election (in the several school districts into which each

county was to be divided) of three men, who were to be entitled "The School Committee." The election was to take place in the last Saturday in September, in each and every year; and the term of office of the committee was to commence on the first Monday in October, and to continue for one year, and until others were chosen. The Revised Code, which went into operation on the first day of January, 1856, in the 35th section of the 66th chapter, altered the time for the election of "The School Committee," from the last Saturday in September, to the first Saturday in April, in each and every year, and directed that their term of office should commence on the first Monday in May following, and continue for one year, and until others were chosen. The consequence of this change was, that the offices of all "The School Committees," who were elected in September, 1855, expired on the first Monday in May, 1856. This raises the question whether the contract made by the defendants, in the case before us, with the plaintiff, in January, 1856, was binding upon them after their term of office had expired. We think that by a fair construction of the act, (Rev. Code, ch. 66,) it did not, and that, consequently, the plaintiff is not entitled to recover in the present action.

The 27th section of the act provides that the several County Courts, "at the term held next after the last day of December in each year, shall appoint not more than ten, nor less than five superintendants of common schools for their county, whose term of office shall begin on the third Monday of April succeeding their appointment, and continue for one year, and until others have been appointed and entered upon their office." The section next succeeding, makes it the duty of the superintendants to meet on the day when their term of office commences, and elect one of their number chairman. We have already seen that "The School Committee" are to be elected on the first Saturday in April, and to enter upon the duties of their office on the first Monday of May following. The 36th section makes "The School Committee" a corporation, with capacity to purchase and hold real and personal estate for school purposes; and to prosecute and defend all

suits brought for, and against, the corporation. After providing in the 42 and 43 sections for the appointment, by the board of superintendants, of a committee of examination, and prescribing who may be teachers, the act, in the 44th section, declares that "The School Committee shall contract with a suitable teacher for their district, for such time as the funds of the district will allow; and at the end of the term of his employment, he shall render to the committee the number and names of the children who have gone to his school, specifying the number of days each one went, and the studies taught; and on his rendering such statements, the committee shall pay him by giving an order on the chairman, and no committee-man shall be a teacher." The 45th section prohibits the chairman of the board from paying any draft in favor of a teacher, "unless the same shall be accompanied with a report from the school committee, stating the name of the teacher in the district, the length of time for which the school may have been kept during the current year, and the several branches taught; and the chairman shall not pay such drafts, "unless the teacher exhibit a regular certificate of mental and moral qualifications, from a majority of the committee of examination, dated within one year of that time." Those provisions of the act satisfy us that the current year spoken of is the year commencing and ending with the official term of the school committee, and that the committee have no authority to employ a teacher for a period extending beyond the time when their office expires. Each school committee is to judge how long the funds of their district will allow for the employment of a teacher, and he is to make to them the report which the act requires. Each committee will then have the control of their own teacher, which teacher cannot be one of the committee, that is, of course, during the time for which the committee are to serve. Our conclusion, then, is, that as the contract, in the present case, was made by the plaintiff, with the school committee in their official, and not in their individual, capacity, it did not in law extend beyond

their official term, and that the plaintiff ought to have retired when discharged by the subsequent committee.

We are inclined to think, too, that, if the plaintiff has a right of action at all against the defendants, he has not adopted the proper remedy. If he be allowed to recover in the present action, he must make his recovery available by suing out an execution, and selling the property of the defendants, as a corporation. This property will consist, in nearly every case, of the school-house and the land on which it may be situated, together with such furniture and other articles as may be necessary for the purposes of the school. Surely the Legislature never contemplated any such result. The act provides in 46th section, that "no committee shall receive into their hands any of the funds set apart for common schools;" and we have seen that, by a previous section, the teacher shall be paid by an order from the committee on the chairman of the board of superintendants. If, then, at any time, the teacher have a legal claim on the committee for his services, and they refuse to give him an order on the chairman for the amount, he can have a full, complete and appropriate remedy by means of the writ of *mandamus*. It is true that the Court "will not, ordinarily at least, interfere by *mandamus* where there is another specific legal remedy;" *State* v. *Jones*, 1 Ire. Rep. 134. But it may well be doubted whether, when the Legislature authorises one set of public officers to make contracts, and directs that the contractors shall be paid by another public officer, upon an order from the first, there can be any other specific legal remedy, than that afforded by means of this extraordinary writ.

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

PER CURIAM, Judgment reversed.

THOMAS M. YOUNG *v.* HENRY McDANIEL.

To subject a party, under the statute of 1856, Rev. Code, ch. 34, sec. 81, for harboring a runaway slave, the act must be done secretly, as well as fraudulently.

ACTION on the CASE for harboring a slave, tried before PERSON, J., at the Fall Term, 1857, of Davie Superior Court.

Mr. Holt, the agent of the North-Carolina Rail-Road Company at Salisbury, a witness for the plaintiff, testified that the week before Christmas, 1856, the defendant McDaniel, came to the station at Salisbury with a wagon, and that the slave Henry, the property of the plaintiff, was with him. In unloading the wagon, he was assisted by Henry. After getting through with it, McDaniel said to Henry, "now, we will fix your business." The defendant then said to witness, "Henry belongs to Mrs. Young, and is going to South Carolina to see his wife; she put him in my charge; here is his pass, (holding a paper in his hand;) it is all right." Mr. Holt, without looking at the pass, gave the negro a ticket to Charlotte, for which he paid seventy-five cents. The defendant then said to Henry, "now, we will go to the livery stable and camp, and have some supper and hot coffee before you start," and asked the witness whether there would be time to do so before the train started. Henry had his clothes in a pair of saddle-bags.

Mr. Bell, the owner of the livery stable, stated that the defendant came to his yard that evening, with the boy, and said he belonged to Mr. Young, and was going to South Carolina to see his wife.

Mr. Carter, for the defendant, stated that he heard a conversation, in January, between the plaintiff and defendant, in which the latter stated, that Henry came to his camp, at night, about three miles from Mocksville, and told him he was going to South Carolina to see his wife; that he had a pass, and he had taken him to Salisbury; that there he had handed the

pass to the conductor and got a ticket for him, and that he went on towards South Carolina.

It was further proved, that the slave, in question, was gone until the middle of the ensuing March. Also, that McDaniel was unable to read writing.

The plaintiff's counsel requested the Court to instruct the jury, that if they should be satisfied that Henry was the property of the plaintiff, and that the defendant, knowing him to be a runaway, fraudulently did the act proved by Mr. Holt, the plaintiff was entitled to recover damages.

The Court refused the instruction as prayed, and told the jury they must be satisfied that the acts charged were done secretly as well as fraudulently. Plaintiff's counsel excepted.

Verdict for defendant. Judgment and appeal.

Boyden, for the plaintiff.
Clement, for the defendant.

NASH, C. J. The action is in case, brought under the act of 1856, Rev. Code, ch. 34, sec. 81, for harboring a slave, the property of the plaintiff. It is settled, by several cases in this Court, that to support such an action, it must be proved that the act was done secretly. The first case is that of *Dark* v. *Marsh*, 2 Car. Law. Repos. 249; this was followed by that of *Thomas* v. *Alexander*, 2 Dev. and Bat. Rep. 385; *State* v. *Hathaway*, 3 Dev. and Bat. Rep. 125, and finally by *State* v. *Burk*, 4 Jones' Rep. 7. This decision was made at December Term, 1856.

His Honor instructed the jury, that they must be satisfied the act of the defendant was done secretly, as well as fraudulently. To this, the plaintiff excepts. We see no error. The act of 1856, does not contain the word "secret," but the construction put upon it by our courts in defining the word "harboring," is founded on correct reasoning, and cannot now be departed from. The opinion of his Honor is in exact conformity with the opinion of the Court in *Dark* v. *Marsh*, *ubi supra*.

His Honor has set forth in the case the evidence given on the trial. The defendant carried the slave Henry to one of the most public places in the western part of the State, the Salisbury depot of the rail-road, and told Mr. Holt, the agent of the company, that Henry was the property of the plaintiff; was on his way to South Carolina to see his wife, and that he had a pass, and handed to the agent a paper as such pass. The defendant could not read writing. After he had purchased a ticket for the negro, he said, "we will now go to the livery stable and camp." To Mr. Bell, the keeper of the livery stable, he told to whom Henry belonged, and where he was going. Subsequently, he told the plaintiff fully what he had done. It is impossible for this evidence, under the decisions of our Court, to bring McDaniel within the operation of the statute. There is no error.

PER CURIAM, Judgment affirmed.

LEWIS WATKINS *v.* JAMES W. JAMES.

Where B promised to procure the money or a draft of a merchant who bought A's tobacco, and to credit a bond which he (B) held on A, and negligently failed to do so, it was *Held* that A was entitled to recover.

Inconvenience or loss, arising to a party from the breach of a promise, constitutes a consideration for the promise.

THIS was an action of ASSUMPSIT, tried before SAUNDERS, J., at the Spring Term, 1857, of Caswell Superior Court.

A full statement of the main facts of this case, is contained in the report of December Term, 1855, 3 Jones' Rep. 195. The only material change in the statement is, that Hudson's deposition was again taken, and he swore, that in the trade with the witness, for Watkins' tobacco crop, the defendant said, "all he was afraid of was, that Lewis Watkins would not deliver the tobacco in time, and if he (Watkins) would

do that, he, defendant, would see to the balance of the transaction." He also deposed, that Watkins did deliver the tobacco in time.

Upon the trial, his Honor charged the jury, that if they collected from the testimony, that the defendant agreed to attend to the getting of the money or draft, and failed to do it, then the verdict should be for the plaintiff; but if the defendant honestly endeavored to have the business settled, and failed to have it closed, by the refusal of the purchaser, then their verdict should be for the defendant. Defendant excepted. Verdict and judgment for the plaintiff. Appeal by the defendant.

Morehead, for the plaintiff.
Hill and *Fowle*, for the defendant.

PEARSON, J. When this case was before us, December Term, 1855, 3 Jones' Rep. 195, it was decided against the plaintiff, because there was no proof that the defendant had promised to procure the draft. The omission is now supplied. The verdict finds the fact, that the defendant agreed to get the money or draft, and had failed to do so. This disposes of the case so far as that point is concerned.

The defendant's counsel then insisted, that the promise was voluntary, *nudum pactum*, and would not support the action. *Brown* v. *Ray*, 10 Ire. Rep. 72, is decisive of that question. "To make a consideration, it is not necessary that the person making the promise, should receive, or expect to receive, any benefit. It is sufficient if the other party be subjected to loss or inconvenience." An undertaking to do any thing, is a sufficient consideration, provided it is acted upon, either by the one party's "entering upon the trust," or by the other's relying upon him to do so, provided loss is thereby sustained. Here, the plaintiff trusted to the defendant's promise to get the draft. But for the promise, he would have attended to the business himself. So, he has suffered loss by a breach of the defendant's promise which he relied on.

The defendant's counsel further insisted, that there is error in respect to the damages, for that it ought not to have been the value of the tobacco, but only the value of the draft. The record does not present this question. No instructions were asked for, or given, in regard to the measure of damages, and the question was not raised. There is no error.

PER CURIAM, Judgment affirmed.

F. B. BODENHAMMER *v.* WILLIAM NEWSOM.

By giving up the thing pawned to the pawnor, though for a special purpose, the pawnee loses his lien, as between himself and one that bought it from the pawnor.

ACTION of TROVER, tried before MANLY, J., at the last Fall Term of Forsyth Superior Court.

The plaintiff declared for the conversion of a horse.

A witness, by the name of *Reich*, stated that the horse in controversy had belonged to him, and being indebted to one Ledford in the sum of $100, with the plaintiff as his surety, he agreed to sell the horse to plaintiff, and work out the residue of the $100, upon condition that plaintiff would assume, as principal obligor, the payment of said debt, and thereupon, the horse was claimed and used as the plaintiff's. He further swore, that he was himself in the service of the plaintiff, and wishing to visit a relation, at a distance of a few miles, he borrowed the horse to perform the trip, promising, and intending, to return in the course of a day or two. While gone upon this visit, he swapped the horse away to the defendant without any authority from the plaintiff, and when he returned with the horse he got from the defendant, the plaintiff refused to acccept him in lieu of the other. He swore the horse was worth sixty-five dollars, but no price had been agreed upon between himself and plaintiff, the price being

left to be determined by the sum which the plaintiff might realise in his sale. A demand was made of the defendant a few days after the swap, which was refused.

The defendant's counsel, among other things, contended, that it was a mere pledge of the property to secure the plaintiff against responsibility, and the thing pledged, having been redelivered to the person making the pledge, he had a right to sell and make title.

His Honor, upon this point, instructed the jury, that if the horse were *pledged* to secure Bodenhammer, and in conformity with the pledge, passed into Bodenhammer's possession, he would have such a property in the animal as would enable him to maintain the action of trover, and a loan of the animal to Reich for a special use, under the circumstances stated by him, would not be such change or interruption of possession as to prevent a recovery, provided the pledge and possession were *bona fide* in Bodenhammer. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

McLean and *Fowle*, for the plaintiff.
Miller, for the defendant.

Battle, J. Among the instructions given by his Honor to the jury, was the following: "If the horse were *pledged* to secure the plaintiff, and, in conformity with that pledge, passed into the plaintiff's possession, and continued in his possession, he would have such a property in the animal as would enable him to maintain the action of trover; and a loan of the animal to Reich for a special use, under the circumstances stated by him, would not be such a change or interruption of possession as to prevent a recovery, provided the pledge and possession were *bona fide* in the plaintiff." With this instruction we do not agree, and we think it is opposed, in principle, to the recent case, decided in this Court, of *Smith* v. *Sasser*, 4 Jones' Rep. 43. The only difference between the facts of that case and the present, is the length of time during which the pawnor had the article in possession,

after a redelivery by the pawnee, before he sold it. But that cannot make any difference in the rule of law applicable to the transaction. By giving up the possession of the article pawned, the pawnee lost his lien, and it would be a fraud upon an innocent purchaser from the pawnor, if the pawnee were permitted to recover the pawn from him. In the case of *Roberts* v. *Wyatt*, 2 Term Rep. 268, it was made a question whether, even as between the parties themselves, a redelivery of the thing pledged, for a temporary purpose only, would not prevent the pawnee from recovering it back from the pawnor, after the purpose was fulfilled. It was, indeed, decided that the pawnee might recover from the pawnor; but if a doubt existed in such a case as that, it would hardly be pretended that a recovery would be allowed from one who claimed as a *bona fide* purchaser from the pawnor. See Story on Bailments, sec. 299.

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

PER CURIAM, Judgment reversed.

ENOCH OSBORNE *v.* ALEXANDER B. McMILLAN, *administrator.*

A covenant of quiet enjoyment inserted in a deed made by an administrator under the act, Rev. Code, ch. 46, sec. 37, does not bind the estate of his intestate, and no suit can be maintained against him in his representative capacity.

ACTION of COVENANT, tried before ELLIS, J., at the Special Term, June, 1857, of Ashe Superior Court.

The plaintiff declared against the defendant as administrator of James McMillan, upon a covenant of quiet enjoyment contained in a deed made by the defendant as administrator. The intestate of the defendant had given a bond to make title to the plaintiff of a tract of land lying in Ashe county, and died

before doing so. The defendant, under the act of Asssembly, made the deed, and added the covenant of quiet enjoyment on which this action was brought. The plaintiff, subsequently, sold the land, and conveyed it with the covenant of quiet enjoyment, upon which he was sued, and recovery had against him, upon the ground that his grantee had been ejected by suit on a paramount title. This suit was brought against the administrator of James McMillan, for damages on the same ground, to wit, the ouster of his grantee by title paramount. The Court being of opinion that the action could not be maintained, the plaintiff submitted to a nonsuit, and appealed.

Jones, for the plaintiff.
Boyden, for the defendant.

NASH, C. J. Previously to the act passed by the Legislature in 1797, (Laws of North Carolina, ch. 478, sec. 1,) it is conceded that there was no law in this State authorising an administrator to sell, or convey, the lands of his intestate. This act was brought forward in the Rev. Statutes, ch. 46, sec. 28, and again in the Rev. Code, ch. 46, sec. 37. It is conceded that all the previous requisites necessary to clothe the administrator with power to make the conveyance in question, have been complied with, and that "such deed conveys the title as fully as if it had been executed by the deceased obligor." Rev. Code, ch. 46, sec. 37. The administrator in his conveyance covenants, as administrator, for quiet enjoyment. He is sued in his representative capacity for a breach of the covenant. The question is, can the plaintiff maintain this action?—which is the only question before the Court. On the part of the plaintiff, it is contended, that the Rev. Code, in giving to an administrator power to convey the land, gave him all the power which the intestate had, and, therefore, he had the power, on behalf of the intestate, to enter into all such covenants as the intestate had, and thereby to bind his estate. This proposition cannot be supported. Before the passage of the act of 1797, when a vendor entered into a bond to make

title, and died before so doing, his heirs were the proper persons on whom the purchaser had the right to call for the necessary conveyance. If they refused to convey the title, the purchaser was driven into a court of equity, and to such a suit the heirs were necessary parties. This proceeding was attended with much delay, trouble and expense. To avoid this expense, trouble and delay, the acts were passed, and they are express in limiting the operation of the administrator's deed, so far as the estate of the intestate is concerned, to the title of the intestate. The title is one thing, the covenants are other things intended as a support of the title, and the parties may stipulate for any covenants they please, and if the purchaser chooses to take his deed without any covenant, his *title* is not thereby impaired.

Under the covenant of the defendant, the estate of the intestate was not bound, and the action, being against the defendant as administrator, cannot be sustained, and the judgment of nonsuit in the Superior Court was properly rendered. There is no error.

PER CURIAM, Judgment affirmed.

JONATHAN P. WINSLOW *v.* FREDERICK ELLIOTT.

Where a timber contract with a rail-road company was assigned for a valuable consideration, it was *Held* that an increased allowance, made by the company after the assignment, passed to the assignee, and, it having been collected by the assignor, in whose name the dealings with the company still continued, the assignee could recover it in an action of assumpsit for money had and received.

ACTION of ASSUMPSIT, tried before MANLY, J., at the last Fall Term of Randolph Superior Court.

Upon the trial it appeared that the defendant had become a stockholder to the amount of ten shares in the North-Carolina Rail-Road company, and being entitled in that capacity to a

preference in the letting of contracts, he was solicited by the plaintiff to get a contract for him for furnishing cross-ties; this the defendant accordingly did, and the articles which he entered into with the company, were assigned, for a consideration in money, to the plaintiff.

It also appeared that the engineer who superintended the construction of the rail-road, contracted with the plaintiff for the furnishing of extra cross-ties and pillars for a water-tank to be used on the road. It further appeared that there was no change on the company's books of the name of the contractor, but that the accounts were all kept in the name of Elliott, not only with respect to those cross-ties embraced in the original articles, but as to the timber contracted for with the plaintiff, which was done, as was explained by the engineer, to avoid a multiplicity of accounts.

After these contracts were entered into, and were in a course of fulfilment by the plaintiff, the company taking into consideration the increased price of provisions and labor, made an extra allowance of five cents a stick on certain descriptions of cross-ties, and ten cents on others. The contracts were completely fulfilled by the plaintiff, Winslow, in accordance with the requirements of the company.

It appeared further that the settlements at the company's office for the work done, of all kinds, under both contracts, were made with Elliott, in whose name the accounts were kept, but, in accounting with the plaintiff, he only paid him thirty cents a stick, the original contract price, and kept back the extra allowances.

It was also in evidence that the consideration agreed on upon the assignment of the contract, had been paid by the plaintiff to the defendant.

The Court was of opinion, on the foregoing state of facts, that the plaintiff was entitled, by virtue of the assignment, to all the advantages of the contract with the company, contingent and uncertain, as well as final and certain, and, accordingly, was entitled to the extra allowance on the cross-ties

which had been allowed to the defendant. The defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

J. H. Bryan, for the plaintiff.
Gorrell, *Miller* and *Dick*, for the defendant.

NASH, C. J. It is a principle, well settled in the courts of England, as well as in those of this State, that where privity exists between two persons, and one receives money to which the other in justice and equity is entitled, the law implies a promise on the part of the receiver to pay it to the latter; 2d Starkie on Ev. 63, and *Mitchell* v. *Walker*, 8 Ire. Rep. 243. This promise may be enforced by an action for money had and received, which rests upon equitable principles.

Apply this principle to the present case. Which of these parties, in justice and equity, is entitled to the money for which the action is brought? Elliott was a stockholder in the North-Carolina Rail-Road company, and being entitled, as such, to a preference in the letting of contracts, he agreed with the plaintiff to get for him a contract for furnishing cross-ties. This, the case states, he did. The contract, however, for the cross-ties was made between the rail-road company and the defendant, and was executed on 10th of March, 1853, and on 30th of April, 1853, was assigned in writing by Elliott to the plaintiff for a valuable consideration. In December, 1854, in consequence of the rise in the hire of laborers and of timber, the company passed an ordinance increasing the rates to be paid to contractors thereafter. The plaintiff completed his contract with the defendant, and the company paid to Elliott the sum due on the contract, including the increased rates with the original ones. The defendant paid over to the plaintiff the money so received by him, deducting the increased rates. The action is brought to recover the amount so retained by the defendant. Upon what principle of justice or equity can the defendant retain that sum? The whole amount due upon the contract was, by the company, rightfully paid to him. He was the original contractor, and the case states there was

no change, on the books of the company, of the name of the contractor, and the accounts were all kept in the name of the defendant. But to whose use was it paid? To the use of the person to whom it rightfully belonged. If A puts into the hands of B a horse to be sold, and he sells him, and receives the price, B receives it to the use of A, who can maintain an action for its recovery from B. Here, the defendant had sold his contract to the plaintiff before any portion of the work was done, and in assigning it to the plaintiff he transferred to him, not only the contract, but, in the language of the Court below, "all the advantages of the contract with the company, contingent and uncertain, as well as fixed and certain." When, therefore, Elliott received the amount of the increased rates, he received that sum, as well as that arising from the original rates, as the agent of Winslow, and held it as his trustee and to his use.

But, on behalf of the defendant, it is said that the promise by the rail-road company to pay the increased rates, was a voluntary promise without consideration and void, and if they chose to pay it, they might pay it to whom they pleased, and having paid it to him, the plaintiff could have no legal claim to it. It is true, the promise by the company, as to increased rates, was without consideration, and could not be enforced against them, but they did not choose so to forfeit their plighted faith. They paid it to the defendant as standing on their books, the rightful owner of the contract; which brings us back to the question, to whose use was the money paid? certainly to the use of the rightful owner of the contract—to him who, with the knowledge and consent of the original owner, had performed the work, and to whom the original owner had assigned the contract for valuable consideration, with all the interest in it, or growing out of it. The increased rates certainly grew out of the original contract and were an interest attached to it. The defendant is in possession of money which in justice and equity belongs to the plaintiff, and which, with a good conscience, he cannot retain. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* BENJAMIN J. HARRISON.

To submit a hypothesis to the jury, in the absence of proof tending to establish it, is error.

Because one of two men was killed by a gun-shot wound, and the other had marks of violence on his head, it does not follow, in the absence of proof as to who committed the act, that the latter was guilty of murder.

In stating a view of a homicide case, as an alternative view for one supposed to be rejected because the testimony supporting it was conceded to be discredited, it is error so to state the alternative proposition as to leave the jury to bring into their consideration the discredited testimony.

To instruct a jury, that "if the prisoner went to a house, carrying a deadly weapon, with the purpose of provoking a fight if he found a certain person there, and did so, he was guilty of murder, although the deceased made the first assault," was *Held* to be error.

THIS was an indictment for MURDER, tried before SAUNDERS, J., at the last Fall Term of Northampton Superior Court.

The murder was charged to have been committed on the body of one William Portis, and the evidence in the case, as set forth in the record, was as follows:

"*Mary Hodges*, witness for the State, testified that she was well acquainted with the prisoner and the deceased; that she lived with her father, Meecham Hodges; that the prisoner came to her father's the 16th of May, about 3 o'clock in the evening—was drinking—was drunk, and said he came there to stay, to which she objected; he had a gun—swore he would stay—threatened to shoot her and take her child—he lay down on the bed near the fire-place—but one room in the house—Portis, the deceased, came there about sun set—she invited him in—said how do you do Mr. Harrison; I am d—d pleased—how do you do? Portis replied, "sorter tolerable;" prisoner asked what he came for; said he had come to deliver a message to Mr. Hodges from his son; he began to deliver this message; prisoner said d—n you, you are drunk, and I'll make you drunker; and raised his gun, which was lying on the bed; pointed it at the deceased, who was standing at the fire-place, who advanced one step and

tried to *ketch* the gun, but it went off before he could close his grasp—shot in the head, and he fell and expired without speaking; she said the prisoner had killed him; he said yes, and he intended to kill him; she was greatly alarmed; thought her life was in danger; struck the prisoner with a chair; knocked him from the bed, and fell on the floor; continued to beat him until her father pulled her away; struck him with the chair a dozen blows; she then run over to Mr. Kemp's, a half a mile off—told what had occurred; said the prisoner had married her half sister, and had seduced her—was the father of her child, a boy six years old; Portis had neither done nor said any thing to the prisoner except what she had stated.

"In her cross-examination, she stated the prisoner had given her son a small knife; had also given one to her father, and offered her a bottle of cologne, which she refused; said her father was setting at the table, at supper, when the deceased came; her little boy met him and handed him his knife, with a whetstone, and asked him to sharpen it; he took them and walked to the fire-place; changed the knife from his right, to his left hand, when he attempted to ketch the gun; when shot, the knife and stone fell on the floor, which her father picked up and gave to her boy, who had lost it.

"Was asked if she had not had criminal intercourse with the deceased. Said she had not, nor with the prisoner since the birth of her child; prisoner had lived six miles off, and deceased half a mile, and was in the habit of coming to her father's.

"Was asked if she had not stated to Goodwin Daniel, that the prisoner ought to be hung, and would be, if her oath could hang him; said not; but she had said, the prisoner ought to be hung, and would be, if her oath would hang him, and she said so now; and Goodwin had said, at the same time, prisoner ought to be hung; that she was greatly agitated in her examination before the magistrate, and hardly knew what she had said; and the same case before the coroner; had not seen Portis before on that day, and did not know whose gun it was

that deceased had; had not raised or offered to raise it; described the position of the table, and where she was setting at the time of the shooting.

"*Meecham Hodges*, testified that the prisoner came to his house on the evening of 16th of May—was drunk—had his gun—threatened his daughter—lay on the bed; he went after wood; met Portis, told him Harrison was at the house and advised him not to go; said he would not; gave him bag of meal, sent by his son; returned, prisoner still on the bed, his gun by his side, him and his daughter at supper, he setting with his back to the prisoner; Portis came to the door, set his gun down on the outside of the house, and he came in—spoke to the prisoner, who answered, "I am d—d pleased, how do you do? replied, sorter tolerable; what did you come for? to which deceased said, to bring a message from his son; Harrison said, you are drunk, d—n you, I'll make you drunker; turned his head—saw Harrison shoot deceased in the head, who fell dead; Portis standing with back to chimney; he saw no knife; prisoner said he intended to kill his daughter; she then struck him with chair; he believed she would have killed him—pulled her away. He then pushed Harrison out of the door; him and Harrison had a scuffle for the gun; he got it, he very bloody about the head; he found the gun setting up against the house; carried it in—was loaded; claimed by Kemp.

"Cross-examined. Was questioned as to what he had said to Daniel; which he denied—thought prisoner ought to be hung.

"*Mr. Kemp* said, he had heard prisoner, Harrison, threaten to kill or whip first Portis caught at old Hodges.

"*Elizabeth Kemp* lived with her brother, half a mile from Hodges; Portis lived at her brother's—had been to Weldon the day of the affair; Portis left about sun-down with gun, said going turkey-hunting; Mary Hodges came there about dark—seemed agitated; told what had happened—witness too much frightened to recollect it.

"*R. Wheeler* testified, that Harrison came to the store

about two o'clock the day of the murder—had gun—bought two knives and bottle cologne; was drinky—left in a buggy, and did not say where going—boy returned same evening with buggy—saw no gun." The State closed.

"WITNESSES FOR THE DEFENSE."

"*Dr. Wm. Carstarphin*, testified to having seen the prisoner on the night of the occurrence; found very bloody and much bruised—a cut on the head, also a cut on the ear—thought it had been done with a sharp instrument—might have been done with a chair, but he thought not."

"Other witnesses were examined as to the wounds and injuries of prisoner; one witness thought the ear seemed to have been cut by passing something through it.

"The magistrate and coroner were examined as to what was said by the two Hodges'—that neither of them had said any thing as to the knife or gun, and denied what had been said by them as to their swearing to take the life of the prisoner.

"It is not deemed necessary to state this testimony, as it all went to impeach the testimony of Mary Hodges and her father.

"The Court, after repeating the testimony of Mary Hodges and Meecham Hodges, told the jury, if the testimony of these two witnesses was to be believed, then it was most clearly a case of murder; and whether they were to be believed or not, it was their province to determine.

"The prisoner's counsel say the testimony is not to be relied on; that their statement is unreasonable and contradictory, and too improbable to be credited; that the condition in which the prisoner was found, proves most clearly that the prisoner was set on by the deceased; that he was forced to kill to save his own life; or at most, it was a case of mutual combat, and as such, only a case of manslaughter.

"The killing being admitted, and that with a deadly weapon, the law pronounced it a case of murder, and threw upon the prisoner the necessity of making good his defense by direct testimony, or by satisfying the jury that the testimony

offered by the State, by a fair and legitimate construction, led them to that conclusion."

"The counsel for the prisoner say, that whilst they have offered no witnesses, as to the two State's witnesses, who alone were present at the occurrence, they have a right to impeach their statements, by showing it was not to be credited.

"1st. Because the story is in itself unreasonable; and from the manner of telling it.

"2ndly. By their contradictions.

"3rdly. The witnesses, by their feelings, had proved themselves to be unworthy of credit.

"This was certainly so, and whether they had succeeded or not, was for the jury to decide; for unless the testimony offered by the State, carries to the minds of the jury full and entire conviction of its truth, so far as to establish the guilt of the prisoner, to their entire satisfaction, it was their duty to acquit. The jury would decide as to the reasonable or unreasonableness of the story—the manner of the witnesses, their feelings and as to the alleged contradictions; it was also their duty to decide whether they had been corruptly false in any thing they had said or omitted to say. The prisoner's counsel say, as Mary Hodges had said nothing as to the deceased having had a knife, in her examination either before the magistrate or coroner, or in her examination in chief, it showed, most clearly, that she had been guilty of such corrupt omission, as to call upon the jury to reject her testimony altogether, on the maxim *falsum in uno falsum in omnibus.*

"In answer to this, the Court said, before the jury could reject the testimony on this ground, they should be satisfied the witnesses had been corruptly false on a matter material to the matter under investigation—the jury were to judge of what the witness had said—that she had not been asked any thing about a knife in her previous examination; and when interrogated by the counsel in her cross-examination, she had promptly answered the question.

"Should the jury come to the conclusion that these wit-

nesses had not given a true statement of the transaction, but should think, from the cut of the ear, the bruises, and other injuries on the person of the prisoner, there had been a conflict between the parties, then it would be their duty to find only a verdict for manslaughter, although the prisoner had used a deadly weapon.

"To find it a case of justifiable homicide, they should be satisfied that the prisoner acted in self-defense, or from a well-grounded apprehension that his own life, or person, was in danger.

"The prisoner's counsel objected to that part of Mary Hodges' evidence, in which she had been permitted to state the threats and conduct of the prisoner towards herself and her child, on his arrival at the house, and before the deceased came to the house of her father. The objection was overruled by the Court, and the evidence admitted.

"When the prisoner had concluded his evidence, the Attorney General recalled John Kemp and asked him if he was acquainted with the general character of Mary Hodges, and thereupon, his Honor inquired if it was necessary to ask that question as her character had not been assailed.

"His Honor charged the jury, that if the prisoner went to the house of Meecham Hodges, having a deadly weapon, for the purpose of taking the life of the deceased, if he should find him there, or of provoking him into a fight, and did so, then it would be a case of murder, although they should believe the deceased made the first assault."

Defendant's counsel excepted to this latter part of the charge. Verdict, guilty of murder. Judgment and appeal.

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

PEARSON, J. If his Honor had stopped after giving the general instruction in the first sentence of the charge, that if the testimony of Mary and Meecham Hodges was believed, it was a case of murder, the prisoner would have had no ground for complaint.

Or if he had stopped after entering into a discussion of all that had been said *pro* and *con*, in respect to their credibility, and meeting the objections that had been made to the reception of certain testimony, the prisoner would have had no ground for complaint.

But, in the conclusion of the charge, he lays down this proposition as a distinct and independent view of the case, "If the prisoner went to the house of Meecham Hodges, having a deadly weapon, for the purpose of taking the life of the deceased, if he should find him there, or of provoking him into a fight, and did so, then it would be a case of murder, although they should believe the deceased made the first assault."

In this, there is error, both in a particular, and general, aspect.

"For the purpose of taking the life of the deceased, if he should find him there," "although they should believe the deceased made the first assault."

This is an unquestionable proposition of law; but the question is, where is the evidence to present it? It assumes that the testimony of Mary and Meecham Hodges is unreliable, for, if that were believed, the case had been already disposed of, and the supposition that the deceased made the first assault, or any assault at all, is inconsistent with it. Putting that out of the case, the only testimony in respect to it is that of Kemp, who swore, "had heard Harrison threaten to kill or whip first Portis caught at old Hodges'." When this was said, is not stated. It might have been two or three years before, and from the incidental and loose manner in which it is set out in the case, we cannot suppose that it was made the sole ground upon which a proposition directly affecting the life of the prisoner, was to depend.

"Or for the purpose of provoking him into a fight, and did so, then it would be a case of murder, although they should believe the deceased made the first assault."

Besides being obnoxious to the same objection as the first proposition, this is not true as a matter of law. A man having a deadly weapon, goes to the house of another for the purpose

of provoking a third person, if he should find him there, into a fight, and does so. Does what? Provokes him into a fight. This makes the party guilty of murder in the absence of any reliable proof that he killed him, or who killed him! For putting the testimony of the two Hodges' out of the case, there is no evidence, save the fact that one man was killed by a gun-shot wound, and the other had marks of violence on his head.

This brings us to the general view, upon which we think the prisoner is entitled to have his case submitted to another jury. The proposition assumes that the jury might be unwilling to convict of murder upon the testimony of the two Hodges', and suggests an alternative ground, upon which it would be a case of murder, although the testimony of the two Hodges' was not, in the opinion of the jury, entitled to full credit. This was calculated to mislead, and the prisoner had a right to the instruction, that if the jury could not fully rely upon the testimony of these two witnesses, he ought not to be convicted of murder. After so elaborate a discussion, based upon the question of the credibility of these two witnesses, and the view presented by the case, upon the supposition that they were entitled to credit, the prisoner had a right to have the view presented by the case, that upon the supposition that they were not entitled to credit, examined with some particularity; and it was calculated to prejudice his case, to leave it to the jury in this *broad-cast* way, allowing them to take as much of the discredited testimony as was necessary to add on to the other circumstances, in order to make up a case of murder.

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

ELIAS CREACH *v.* JOHN McRAE.

Where A gave a license to B to get timber on his land, which was to be hauled to a given place, and there inspected, but not to be removed till paid

for, *Held* that trover could be maintained against one who removed, and appropriated, against A's will, timber deposited according to the terms of the contract.

Preliminary questions of fact, arising in the trial of a cause, as to the admissibility of evidence, must be decided by the Judge; and if he makes such decision with a proper *impression* of the law involved in the trial of the fact, it is not the subject of an appeal.

THIS was an action of TROVER, tried before SAUNDERS, J., at the Special Term, June 1857, of Columbus Superior Court.

The action was brought for the conversion of a quantity of timber which had been cut by one Maxwell on the plaintiff's land, and piled up on the side of the Wilmington and Manchester rail road. It was in evidence that the contract between Maxwell and the plaintiff, was that the former should cut the timber, haul it to the rail road, and have it inspected, for which he (M.) was to have four dollars a thousand, but that it was not to be removed until it was paid for. It was also in evidence that the defendant had agreed to purchase the timber of Maxwell, and had sent an inspector, by whom the timber was inspected, in the presence of both Maxwell and the plaintiff. Nothing was said at the time about the contract with Maxwell. The plaintiff requested the inspector to keep an account of this timber separate from the other timber of Maxwell which he inspected at the same time and place. It was further in evidence that Maxwell had left the country a short time after the inspection of this timber, and that a constable had levied on all of it except the lot in question. The plaintiff and defendant both attended on the day of sale, and both alleged their claims to this timber. After some parleying about an adjustment, they separated, the plaintiff forbidding the removal of the timber, and the defendant saying that he would send for it and take it off. Shortly afterwards, a man by the name of Scott, who was a regular conductor of a freight train on the rail road, professing to act as defendant's agent, came with his timber train and proposed to carry off the timber, which was objected to by the plaintiff, who stated to Scott the contract he had made with Maxwell.

The defendant objected to this evidence, but the objection was over-ruled and the evidence admitted. The defendant excepted for error.

It was in evidence that Scott carried the timber on his train towards Wilmington, but there was no evidence that it had been received by the defendant.

The plaintiff having closed his case, the defendant's counsel moved to nonsuit the plaintiff, on the ground that trover would not lie. The question was reserved by the Court, with the understanding that, if the Judge should be of opinion with the defendant, a nonsuit should be entered. The case was then submitted to the jury who found in favor of the plaintiff.

The Court was inclined to the opinion that the action was not maintainable, but, in order to present all the points made in the case for revision in the Supreme Court, declined to nonsuit. Defendant excepted.

Judgment for the plaintiff and appeal by the defendant.

E. G. Haywood, for the plaintiff.
Troy, and *W. A. Wright*, for the defendant.

PEARSON, J. The legal effect of the contract made by the plaintiff and Maxwell, was to give to the latter a *license* to cut the timber, haul it to the rail road, and have it inspected, but it was not to be removed, and, consequently, the right of property did not vest in Maxwell, until it was paid for. The right of property was in the plaintiff, and when the timber was removed without a performance of the condition precedent, the right of property drew to it the right of possession so as to enable the plaintiff to maintain "trover."

There is no *error of law* in respect to the reception of the declarations of Scott. If he was the agent of the defendant, his declarations were admissible. Whether he was the agent or not, was a preliminary *question of fact*, which it was the duty of the Judge to decide, and his decision is not the subject of review by this Court. The jury decide *all issues of fact* raised by the pleadings. The Court must decide all collateral ques-

tions of fact that arise in the progress of the trial. This being a "court of error," has no more power to review the decision of the Judge in the Court below, upon a mere question of fact, than it has to review the verdict of the jury. If the jury pass on a fact under erroneous *instructions*, or the Judge does so under an erroneous *impression* in regard to a question of law involved in the trial of the fact, such error, being one of law, is the subject of review by this Court. For instance, if the Judge submit a fact to the jury, where there is no evidence, or if he decide a preliminary fact himself, where there is no evidence to act on, it is error of law; *Munroe* v. *Stutts*, 9 Ire. Rep. 49. In our case, his Honor decided the fact which was preliminary to the admissibility of the evidence. We think there was some evidence for his Honor to act on. Whether it was sufficient is not our province to decide. The defendant had this timber inspected, claiming it under a contract with Maxwell. He said he would send and take it away; and, "shortly thereafter," Scott, a regular rail-road conductor, came and took it away. This furnished some evidence that Scott was acting in pursuance of the declarations of the defendant to that effect. There is no error.

PER CURIAM, Judgment affirmed.

ALEXANDER FINDLY *v.* GEORGE A. RAY.

A reference to arbitration will be binding if there be a *bona fide* difference of opinion between the parties as to their rights, although there be not a legal cause of action.

Unless there be some reason given by counsel why the Judge should remark particularly on the testimony of a witness, he may, with propriety, decline a request to do so.

An agreement by which one party is subjected to trouble, loss, or inconvenience, is not a *nudum pactum*.

Findly *v.* Ray.

THIS was an action of ASSUMPSIT, tried before MANLY, J., at the last Fall Term of Orange Superior Court.

The plaintiff had employed the defendant, who was a house carpenter, to do certain work upon his dwelling, about which the parties had a settlement, and the plaintiff's note, for a certain sum, was given, which, in a short time, was paid off. Afterwards, the plaintiff complained to the defendant that the charges were grossly excessive, and insisted that he should refund, whereupon the defendant agreed to refer it to two persons, who were named, to decide upon the value of the work and materials, and promised the plaintiff to refund any excess over the sum they should say. The persons to whom it was referred, met and decided the matter, giving their award in writing.

It was stated by a witness, thatone of the arbitrators, after the award was made, prepared a bond for the defendant to sign, which he refused to do; and he understood the plaintiff to say that the defendant would not be bound unless he could be got to sign it.

It was further in proof, on the trial, that the charges for the work, &c., were excessive, as decided by the referees. The defendant contended that neither the consideration, nor the promise, was sufficient to support an action.

The Court was of opinion that, if the jury found the charges to be excessive upon the testimony before them, an *express promise to refund* the excess would be binding, and so instructed the jury.

It was referred to the jury also to find whether there was an express promise to pay the excess, as it might be decided by the referees, in accordance with the agreement; if so, the promise was sufficient. But if it was an uncompleted negotiation for a reference, as, if the reference was to be by bond, and the bond was never entered into, the promise would be upon a *condition not executed*, and would not be binding. The defendant excepted.

As the jury were about retiring, defendant's attorney asked the Court to call their attention especially to the testimony of

one of the witnesses; but the Court perceiving no reason for remarking particularly on the testimony of that witness, declined doing so. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

No counsel for the plaintiff appeared in this Court.

Bailey, and *Fowle*, for the defendant.

PEARSON, J. In respect to the agreement to refer the alleged excess of charge to the determination of the two persons named, *Mayo* v. *Gardner*, 4 Jones' Rep. 359, is in point. To make such an agreement binding, it is not necessary that there should be a legal cause of action. It is sufficient if there be a *bona fide* difference of opinion as to the rights of the parties. If it be admitted that the defendant was under no legal obligation to refund the excess, still it is clear that the plaintiff honestly thought he was, and the mode of settling the difficulty which the parties mutually agreed to, is binding according to the authority of the above case, and the cases there cited.

In respect to the exception that the Court refused to call the attention of the jury particularly to the testimony of one of the witnesses, *Boykin* v. *Perry*, 4 Jones' Rep. 325, is decisive.

In respect to the objection, that the *express promise* to pay whatever sum the two persons named should decide to be the excess, is void for the want of a consideration; we are satisfied it does not fall under the class of *nude pacts*. Any benefit to the one, or loss, or trouble or inconvenience, to the other party, is a sufficient consideration. In this case, the plaintiff was subjected to the trouble and inconvenience of procuring the two persons named, to inspect the work and render their decision in writing. After this, the defendant was not at liberty to say his express promise had no consideration to support it; for the trouble and labor of having the inspection made, was undertaken upon the faith of this promise, and in legal parlance was done at his "instance and request." This distinguishes the case from *Hatchell* v. *Odom*, 2 Dev. and Bat.

Rep. 302. where the subject of consideration is fully discussed, and the court conclude that the promise in that case was *nudum pactum;* for "No benefit has resulted to the defendant's intestate from being permitted by the plaintiff to incur the expense and trouble of endeavoring to cure the plaintiff's slave. No inconvenience or prejudice has been occasioned to the plaintiff"—thus affirming the general doctrine, and making that case an exception. See notes to *Lampleigh* v. *Brathwait*, 1 Smith's leading cases, 193 (67.) There is no error.

PER CURIAM, Judgment affirmed.

JOHN E. GAMBLE *v.* JOHN W. BEESON.

A bond to pay a certain sum on or before a certain day for a gold-mine, with a condition to the effect, that "should the mine *prove valueless*, the bond to be null and void, otherwise of full effect," was *Held* to become absolute on the day named for payment, unless it had been ascertained before the day that the mine was *valueless*, and it was error to admit evidence of tests and examinations made after the day fixed for payment.

THIS was an action of DEBT, tried before MANLY, J., at the last Fall Term of Guilford Superior Court.

The plaintiff declared on the following bond:

"$150. On or before the 25th of December next, I promise to pay John E. Gamble, the sum of one hundred and fifty dollars, for value received of him. The condition of the above obligation is such, that should the mining interest of the James White tract of land, this day bought by me, prove valueless, it shall be null and void; otherwise of full effect. July 5th, 1853." J. W. BEESON, [*seal.*]

The defendant proposed to show by tests and working of the mine after the 25th of December, 1853, that the said land was valueless for mining purposes; which testimony was ob-

jected to by the plaintiff, but admitted by the Court; for which plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

McLean and *Fowle*, for the plaintiff.
Gorrell, for the defendant.

PEARSON, J. The time at which the tests and examinations were to be made, in order "to prove the mine valueless," is not expressed in the condition, and the question is, within what time was the test to be made? We think, according to the proper construction of the instrument, it was to be done "on, or before," the 25th of December, when the money was to be paid.

Suppose the money had been paid on the 25th of December, and afterwards, the mine, being tested, proved valueless, could it have been recovered back? If so, after what length of time? It is certain it could not have been recovered back. The legal effect of the bond was to impose on the defendant the duty of seeking the plaintiff and paying the money to him on that day. He was in default for not having done so. Shall he be allowed to take advantage of his own wrong, for the purpose of extending a condition which was made for his benefit? Such would be the effect, if he could avail himself of a test made after the day on which he was bound to pay the money. So, we conclude the bond became absolute on that day. Such was the object and intent of the parties.

The counsel for the defendant, being pressed by the argument, that if that day was not the limit of the time, after that it would be indefinite, suggested that the proper limit was the bringing of the action.

We can see no reason upon which this proposition can be supported. The defendant was in default by not paying the money on the day the bond became absolute. No laches can be imputed to the plaintiff for not suing forthwith, and if he chose to give indulgence, relying on the bond as an absolute security, an attempt to keep the condition open on that ground,

comes with an ill-grace from the defendant. His default was aggravated by not paying the money until the plaintiff was forced to sue him.

We have treated the case as if the evidence was offered to support the allegation that the mine proved valueless *after* the day, because that was the point presented in the argument, and not as if it was offered for the purpose of reflecting back in aid of tests previously made, so as to support an allegation that the mine had proved valueless *before* the day.

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

CHARLES H. HOOPER, *administrator of* ALEXANDER MOORE, Sen., *v.* SAMUEL MOORE, *adm'r. of* ALEXANDER MOORE, Jun.

No court takes judicial notice of the laws of another State or a foreign country, but it must be proved, as a *fact, to the court;* and when thus proved, it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case in hand, and its effect on the case; and it is error to refer the whole question to the jury without such instructions.

An executor appointed in the State where the testator was domiciled, may accept the office in such State and renounce it in this State, and an administrator cum. tes. an. appointed to take charge of assets here, has lawful authority to sue in this State.

THIS was an action of DETINUE, tried before MANLY, J., at the last Fall Term of Caswell Superior Court.

The plaintiff declared for the detention of the slaves Fanny and her children, and alleged title, as administrator with the will annexed of Alexander Moore, under the provisions of that will. The testator lived and died in Halifax county, in the State of Virginia. His will was duly proved in that county in April, 1850, and *Woodson Hughes*, the executor therein named, was qualified and received letters testamentary on the same. At January Term, 1855, of Caswell County Court, a certified copy of this will and probate, was produced and ordered to be recorded; whereupon, the execu-

tor, Woodson Hughes, formally renounced his right to qualify as executor in this State, and the same was duly entered of record; whereupon the plaintiff, Charles H. Hooper, was appointed administrator with the will annexed.

The defendant claimed the slaves as the administrator of Alexander Moore, Jun'r., and offered evidence to show that the said Alexander Moore, Jun'r., intermarried with Sally Cook, a grand-daughter of Alexander Moore, Sen'r., in the county of Halifax, in Virginia, and settled in the neighborhood of the plaintiff's testator; that shortly after this marriage, the said testator placed in the possession of the grand-daughter and her husband, the slave Fanny in question, who is the mother of the other slaves sued for; that Alexander Moore, Jun'r., held the slaves in question for ten years, during which time, he lived in the State of Virginia, and brought them thence to the county of Caswell, where he remained in possession of them until his death in 1852.

In order to show the law of Virginia controlling this transaction, the deposition of *Woodson Hughes, Esquire*, a gentleman of the legal profession in that State, was produced, who deposed that according to the law of Virginia, no inference of a gift could be drawn from the possession of the slaves, under the circumstances of this case.

The defendant's counsel insisted: 1st. That the executor, having qualified in Virginia, could not renounce the office as to effects of the deceased in this State, and that the appointment of the plaintiff as administrator, by the County Court of Caswell, was void, and conferred no power to bring this suit.

2ndly. That no statute of Virginia had been offered in evidence, altering the common law; that by the common law a gift was presumed, and that it was the duty of the Court to expound the statute and give the defendant the benefit of the presumption, notwithstanding the deposition of Mr. Hughes, and prayed the Court so to instruct the jury.

The Court was of opinion that the administration was

properly granted to the plaintiff, and that he had power to sue. Defendant excepted.

And upon the second point, he declined giving the instructions prayed for, but gave in charge the law of Virginia as proved by the deposition of Mr. Hughes, and left it to the jury to decide the question, whether it was a gift or a loan, free from any presumption either way. Defendant again excepted.

Under these instructions, the jury returned a verdict for the plaintiff; a judgment was rendered thereon, and the defendant appealed to this Court.

Norwood, for the plaintiff.
Morehead, for the defendant.

PEARSON, J. What is the law of another State, or of a foreign country, is as much a "question of law," as what is the law of our own State. There is this difference, however: the court is presumed to know judicially the public laws of our State, while in respect to private laws, and the laws of other States and foreign countries, this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved *as facts;* for otherwise, the court cannot know or take notice of them. This is familiar learning; 3 Wooddeson's Lec. 175.

In order to give effect to this presumption of a knowledge, on the part of the court, of the public laws of our State, it is provided that the persons who are entrusted with the administration of justice as a court, shall be men learned in the law; who either know it, or from their studies and pursuits of life, are supposed to have peculiar means of ascertaining it; and to guard against error in the County and Superior Courts, a Supreme Court is established, whose duty it is to review the decisions of the other courts, in respect to all questions of law. When an issue of fact involves a question of law, the jury are not entrusted to decide it; but it is the duty of the court to give to the jury instruction in regard to the law, and

it is the duty of the jury to be governed by such instructions. In this way, as much accuracy, and as great a degree of fixedness, in respect to questions of law, is secured, as the nature of the subject admits of.

Such being the case in respect to questions arising about our own laws, it would seem as a matter of course to be likewise so in respect to questions arising about the laws of other States, or of foreign countries, whenever, in the administration of justice, our Courts are called upon to deal with them.

The assertion of a contrary opinion is met at once by these considerations, which, as it seems to us, cannot be answered: i. e., if juries are incompetent to decide questions in regard to our own laws, and the court is required to give them instructions in respect thereto, are they any more competent to decide questions in regard to the laws of other States, or foreign countries? and do not they stand equally in need of instructions in respect to them? If such questions are to be decided by the juries, their decisions cannot be reviewed by the Supreme Court, and where is the security either for accuracy or fixedness? A jury is not a permanent tribunal, and no memorial is kept of its action, except the general conclusion—a *verdict;* which is binding only between the parties to the particular case.

But it is said our Courts are not presumed to know the laws of other States, or of foreign countries. Admit it; still, can it be questioned that the court is more competent to ascertain and understand such laws, than the jury? or that the jury stand as much in need of instruction in respect thereto, as in respect to our own laws?

Again, it is said the existence of such laws must be alleged and proved as *facts.* Admit it. But how are they to be proved? To the court, or to the jury? Surely to the court, because they are "questions of law."

We are aware that an impression prevails to some extent, that the proof is to be made to the jury. This originated from the expression "to be proved as facts," and many loose *dicta* are to be met with, scattered through the books, in which

these words have been inadvertently added to, so as to make the expression "to be proven as facts to *the jury*." After some examination, we have not been able to find any case where the question of the law of another State, or foreign country, has been left to be decided by a jury, without instructions from the court, in regard to it, except the case of *Moore* v. *Gwyn*, 5 Ire. Rep. 187, which will be again referred to, and the case that we are now reviewing. If the law be written, and its existence is properly authenticated, the court, availing itself of the aid of the judicial decisions of the country, puts a construction on it, and explains its meaning and legal effect, and the jury have nothing to do with it, save to follow the instructions of the court, as if it was our own law. If the law is unwritten, and its existence is presumed or admitted, then the jury have nothing to do with it. For example, if it be presumed, or admitted, that the common law prevails in the State of Virginia, and has not been altered by statute in respect to the particular question, our Court decides what the common law is: e. g., that the rule in Shelly's case applies; *Allen* v. *Pass*, 4 Dev. and Bat. 77. There the Court say, "The law of Virginia governs. It would have been gratifying to us, had we been furnished with *judicial decisions* of Virginia, showing the construction there placed on bequests of a similar character, but none such have been presented, we must therefore presume, and such is admitted by the counsel on both sides to be the fact," &c. Here the Court *reviews* the decision in the Court below, treating it as a question of law in all respects. Many other cases are to be met with in our reports, where this Court *reviews* the decision, which it could only do as a "question of law."

But if the existence of an unwritten law of another State, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the *credibility of the witnesses*, and it is the province of the court to inform the jury as to the construction, meaning, and legal effect of the law, supposing its existence to be proven; and to this end, the court should avail

itself of the judicial decisions of the State or country. For example, if the existence of a judgment in France, sued on here, is proved by a *sworn* copy, the jury passes on the credibility of witnesses, the rest is for the court. So, if the existence of the unwritten law of Russia is sworn to by witnesses, the jury passes on their credibility, but its meaning, &c., is for the court.

This view of the subject rests so firmly on the reason of the thing, that authority would not be required, but for the *dicta* and the case above referred to. There were two able and elaborate arguments in *Mostyn* v. *Fabrigas*, 1 Cowper, 161. BULLER was one of the counsel, and it is decided by Lord MANSFIELD. "The way of knowing foreign laws is by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is." In The Conflict of Laws, "Let us consider in what manner courts of justice arrive at the knowledge of foreign laws; are they to be judicially taken notice of, or are they to be proved as matters of fact? The established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts," sec. 637. "But it may be asked whether they are to be proved as facts to the jury, if the case is a trial at the common law, or as facts to the court? It would seem the latter, for all matters of law are properly referrible to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result, from foreign law, to be applied to the matter in controversy before them. The court is, therefore, to decide what is the proper evidence of the laws of a foreign country, and when evidence is given of these laws, the court is to judge of their applicability, when proved, to the case in hand." Sec. 638. In a note, it is added, "Is not foreign law, offered in all cases, to instruct the court in matters of law material to the point in issue? Can the court properly leave it to the jury to find out what the law is, and apply it to the case?" In 1st Greenleaf's Ev. sec. 486, the learned author says: "In regard to foreign laws, the better opinion seems to be, that

the proof must be made to the court rather than to the jury." He refers to STORY and the cases there cited. In *State* v. *Jackson*, 2 Dev. Rep. 563, RUFFIN, J., says, "A doubt has suggested itself to the Court upon the effect of its being left by the Judge, in the Court below, to the jury to draw their inferences. We suppose it was on the idea that foreign laws are facts, and that the jury alone could deal with them. The existence of a foreign law is a fact, the court does not judicially know it, and therefore it must be proved, and the proof, like all other facts, necessarily goes to the jury; but *when established, the meaning of the law*, its construction and *effect, is the province of the court.*"

In *Knight* v. *Wall*, 2 Dev. and Bat. Rep. 125, GASTON, J., says, "The courts of this State do not know the law of other States, and a controversy respecting that law is ordinarily one of fact, which must be decided on evidence by the jury, under the instruction of the court."

There seems to have been the same misapprehension in regard to this question, as at one time existed in respect to a verbal agreement. If the agreement be in writing, its construction, meaning and legal effect, are for the court, but if verbal, it was supposed, as the jury had to ascertain its terms, the whole matter was for them; whereas, it is now clearly settled that the jury has only to ascertain the words, and their construction, meaning, and legal effect, must be decided by the court as a question of law, and the jury instructed in respect thereto.

Thus it is to be seen that *Moore* v. *Gwyn*, *supra*, is opposed by both principle and authority. It is put upon the cases of *State* v. *Jackson* and *Knight* v. *Wall*, referred to above, and the Court seems to have been under the impression that the question was, "*what was the common law of Virginia?*" The "common law," that is, the laws imported from the mother country by the colonies, and adopted as the basis of their jurisprudence, is the same every where, and the question was not how it was understood in Virginia, but what was the "common law," supposing it to be proved that the

common law existed in that State, and had not been modified or altered by statute. Three witnesses proved the existence of the common law in that State, but each gives a different opinion as to what it was understood to be, (at the time, we suppose, of the alleged gift or loan,) and the jury are left unaided to find out, as best they could, what was the common law as understood in that State, which it was impossible for either jury or court to do, supposing the witnesses to be honest and equally intelligent. Whereas the Court was the proper tribunal to decide, and the question was, what was the common law, (as is done in *Worrell* v. *Vinson*, decided at this term, (*ante*, 91,) where the decision of the Court below is reversed, and the question treated as one of law, the only purpose of the depositions being to prove that the common law existed in Virginia, and as was done in *Allen* v. *Pass*, *supra*.

In our case, the Judge below erred in refusing to decide that, according to the common law, a gift was presumed, as is settled by repeated decisions, and in leaving it an open question of fact for the jury upon the deposition of Mr. Hughes. Unfortunately, the jury do not cure the error by finding the law correctly, as was the case in *State* v. *Jackson*, *supra*.

The other question, as to the power of the County Court to appoint an administrator, is settled, and is conceded in the argument.

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

JAMES McLEAN *v.* THOMAS WADDILL.

A diseased liver, accompanied with dropsical symptoms, and a swollen abdomen existing at the time of sale, which impaired the value of a slave, whether *chronic* or *temporary*, amount to a breach of a warranty of soundness.

McLean *v.* Waddill.

ACTION of COVENANT, tried before BAILEY, J., at the last Fall Term of Cumberland Superior Court.

The action was brought for a breach of a warranty of soundness in the sale of a slave. The case sent up states that the plaintiff offered in evidence a bill of sale from the defendant, dated 22d of January, 1852, in which were *full covenants of warranty of soundness.*

There was evidence that, in the latter part of January, 1852, the slave in question was affected with a diseased liver, and of a dropsical appearance; his abdomen was much enlarged, and the witness, who was a physician, gave it as his opinion that the slave was unsound. The witness could not say whether the disease was chronic or not.

Another physician stated that the boy was affected with a stiffness in the legs and arms.

The defendant proved that the plaintiff sold the slave in question at auction for $316; that the purchaser, after owning him for twelve months, and physicking him, sold him to one McCoy, in Robeson, for $500; and that he afterwards sold for $800.

The counsel for the defendant asked the Court to charge the jury, that unsoundness which would entitle the plaintiff to recover, must be organic in its character, or of such a nature as is likely to be permanent in its duration.

His Honor charged the jury that mere temporary sickness of the boy on the day of sale, or subsequent thereto, would not entitle the plaintiff to recover, but if the testimony of the physician satisfied them that, on the day of sale, the boy was laboring under the diseases stated by them, and that these affections impaired the value of the slave, the plaintiff was entitled to recover. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Shepherd, for the plaintiff.

No counsel appeared for the defendant in this Court.

PEARSON, J. A copy of the bill of sale is not sent. The

statement of the case sets out that it contained "*full* covenants of warranty of soundness." We are at a loss as to the meaning of the word *full* as here used. Possibly it means that there was a warranty of soundness in all respects. But, however that may be, the defendant certainly has no right to complain of the charge. It would seem that a "temporary sickness on the day of sale," for example, bilious fever, measles, whooping cough, would amount to a breach of a full covenant of soundness. Certainly, if a slave has a "diseased liver," and "his abdomen is much enlarged," whether the disease is chronic or not, and "these affections impair his value," he is unsound in the ordinary acceptation of the word; *Bell* v. *Jeffreys*, 13 Ire. Rep. 356.

PER CURIAM, Judgment affirmed.

DAVID F. CALDWELL, *assee*, *v.* JOHN F. RODMAN.

A promissory note, payable on demand, is due immediately, and the statute of limitations runs from the date.

THIS was an action of ASSUMPSIT, tried before MANLY, J., at the last Fall Term of Guilford Superior Court.

The action was brought on the following promissory note, viz:

"$206,65. NEW YORK, May 8th, 1849.

On demand, I promise to pay to the order of Mr. Jacob Best, two hundred and six 66-100 dollars, with interest, for value received."

One of the questions made upon the trial was whether the statute of limitations, which was pleaded, ran from the date or from the demand.

The Court, being of opinion that it ran from the date, instructed the jury to that effect. The plaintiff excepted.

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

Gorrell, for the plaintiff.
McLean and *Fowle*, for the defendant.

NASH, C. J. The question presented to the Court in this case, arises under the statute of limitations, which is pleaded by the defendant, and which provides that all actions on the case shall be brought within three years next after the cause of action accrued. The only question for us, is as to the time when the plaintiff's cause of action accrued. The note in question is made payable on demand, and is dated the 8th of May, 1849. The writ issued on 30th of October, 1854. The defendant contends that the plaintiff's cause of action arose immediately upon the execution of the note; of which opinion was the Court below, and in which we concur. Parties in making their contracts have a right to stipulate for such terms as they agree upon—to specify when, where, and how, the contract is to be performed. If no time or place is designated for the payment of money, as in a promissory note payable on demand, no special demand is necessary, but the money is payable immediately; Chitty on Bills, 269. The case of *Norton* v. *Ellam*, 2 Meeson and Wellsby's Exchr. Rep. 460, is directly in point. The note there was as follows, "I promise to pay £400, on demand, with lawful interest." The statute was pleaded. Baron PARK says, "I entertain no doubt at all on this point. It is the same as money lent, payable on request, with interest, where no demand is necessary before bringing the action. The debt which constitutes the cause of action arises immediately on the loan. It is quite clear that a promissory note, payable on demand, is a *present debt*, and is payable without any demand, and the statute begins to run from the date of it." In *Little* v. *Blunt*, 9 Pick. Rep. 488, the same doctrine is recognised, and so in *Newman* v. *Kittelle*, 13 Pick. 418. In this State the same principle was recognised as far back as 1798. See the opinion of Judge

Haywood in *Freeland, assee*, v. *Edmunds*, 2 Battle's, Haywood's Rep. 218, and *Lewis* v. *Lewis*, same book, 191. Where money is payable on demand, and no particular time specified for its payment, it is payable immediately without demand. Mr. Angel, p. 114, sec. 95, states, "It has been invariably held, that if a promissory note is made payable in money, on demand, the statute commences running from the date of the note, and no special demand is necessary. See also *Little* v. *Dunlap*, Busb. Rep. 40. The foundation of the principle is, that the execution of the note, or the borrowing of money, where no time for the payment is specified, creates a present debt, upon which an action can be brought immediately. In this case, as an action could have been brought upon the note on 8th of May, 1849, or, in the language of the act, *a cause of action* upon it then *accrued*, the statute runs from that time, and the bar is complete. It is to be remarked, that the principle we have been considering, does not apply to a promise of a collateral nature, where no debt is created, until its performance; as on a promise to deliver goods on demand, or to pay money within a limited time after demand, and other like cases.

On behalf of the plaintiff, however, it is contended that the act of Assembly passed in the year 1836, alters the common-law rule above stated, and makes notes payable on demand, to be *due* on demand. The 5th sec. of the 13th chap. of the Revised Statutes, passed in 1836, is as follows: "All bills, bonds, or notes, made payable on demand, shall be held and deemed to be due on demand, *made* by the creditor, &c., and shall bear interest from the time of the demand."

There would be much ground for the objection, if it were not for the alteration made in this provision by the Legislature in the act of 1856. The 5th sec. of the 13th ch. of the Revised Code, makes a most material alteration in that section of the act of 1836. By the act of 1856, bills, bonds, and notes, payable on demand, are made to be due when *demandable* by the creditor, and shall bear interest from the time they are *demandable*—thereby restoring the common law in this

particular. We have seen, that when a promissory note is made payable on demand, the money secured is immediately due, and is therefore demandable by the creditor. But these acts were passed for the purpose of regulating the time as to the payment of interest, and were not intended to operate or alter the law as to the power or right of the creditor to bring his action. The cases referred to in Meeson and Wellsby, and 9th and 13 Pickering, establish the principle that the contract providing for the payment of interest, makes no difference. There is no error.

PER CURIAM, Judgment affirmed.

NANCY AIREY *v.* R. J. HOLMES.

A deed of gift of slaves, taken into open court by the donor, and there acknowledged, for the purpose of registration, and, accordingly, registered, was *Held* to be delivered, and a written declaration on the same, afterwards, that it had not been delivered, and was not to have effect, did not invalidate it.

The holding of the property by the father, in the above case, was adverse to the rights of the donee, and prevented the ownership from vesting in her husband during her coverture, and after his death, the right of action survived to her.

ACTION of DETINUE, tried before DICK, J., at the Spring Term, 1857, of Rowan Superior Court.

CASE AGREED.

Jesse Holmes, on the 13th of May, 1820, drew up, signed, and had delivered, a deed of gift to his daughter, Nancy Holmes, then an infant nine years old, in the words and figures following, to wit: "Know all men to whom these presents shall come, greeting, that I, Jesse Holmes, of the county of Rowan, and State of North Carolina, for, and in consideration of, the natural love and affection which I have and do bear unto my beloved daughter, Nancy Holmes, and for divers

other good causes me thereunto moving, have given and granted, and by these presents do give and grant, unto the said Nancy Holmes, and the heirs of her body, a certain negro woman and child—negro woman named Susana, aged eighteen, and child named Jack, aged two months, and the increase of the said negro woman Susana, unto my said beloved daughter Nancy Holmes and the heirs of her body; and should the said Nancy Holmes die, and leave no issue or heirs of her body, then all my children will be entitled to the gift after my death; and should I die before my said daughter Nancy Holmes, arrives at the age of twenty-one, then Moses Holmes to have possession of the said negroes until my daughter Nancy Holmes arrives to the age of twenty-one years, without paying any thing but her tax; my said daughter Nancy Holmes to have, hold, and occupy and possess the said negroes and their increase, to the only proper use of the said Nancy Holmes and the heirs of her body, as above, for ever, and I, the said Jesse Holmes, all and singular the said negroes and their increase to my said daughter Nancy Holmes and the heirs of her body, as above, against all persons whatsoever, shall and will warrant and forever defend by these presents. In witness whereof, I have hereunto set my hand and seal, this the twentieth day of May, eighteen hundred and twenty." Ack'd. JESSE HOLMES, [*seal.*]

Witness,
J. H. FREELING,
LUCY FREELING.

Nancy Holmes, the donee, then resided with her grandmother, Nancy Owens, about a mile and a half from the residence of her father, and continued so to reside until her marriage with John Airey in 1828. She was not twenty-one years old at the time of her marriage, and her state of coverture continued up to April, 1854, when her husband, the said John Airey, died intestate, in the county of Rowan, leaving the said Nancy him surviving.

At May Term, 1820, of Rowan County Court, Jesse Holmes

went into open court and acknowledged this deed of gift, and caused the same to be registered.

Jesse Holmes kept possession of the slaves, conveyed in the deed of gift, until his death in 1856, claiming them as his own, listing them in his own name, and paying taxes for them. He also kept possession of the deed of gift till his death, and there is no evidence of any delivery of it to the donee other than as above set forth. On the 17th of April, 1845, on the occasion of making his will, he caused to be written on the deed of gift as follows: "This deed never was delivered to any person and aint to have effect," which writing he signed, and had attested by two witnesses. After this, he held and claimed these slaves as his own, and made parol dispositions of some of them to his other daughters, on their marriages, fifteen or twenty years ago.

It is agreed that Frank, the slave sued for, is one of the increase of the slave Susana, conveyed in the above-mentioned deed of gift, and is of the value of $1200, and that the slave was demanded before the bringing of the suit. It is also agreed that the suit was brought within three years after the death of John Airey, the plaintiff's late husband.

It is agreed between the parties, that if the Court should be opinion with the plaintiff, upon the foregoing case, judgment should be rendered for the said slave, Frank, valued at $1200, and if of a contrary opinion, judgment should be entered for the defendant.

Upon consideration of the case, his Honor gave judgment for the plaintiff, from which the defendant appealed.

Kittrell, *Fleming* and *Kerr*, for plaintiff.
Boyden and *Miller*, for defendant.

PEARSON, J. The donor went into open Court and acknowledged the execution of the deed of gift, and caused it to be registered; this amounts to a delivery, *Ellington* v. *Currie*, 5 Ire. Eq. 21.

The legal effect of the deed was to vest in the plaintiff the

ownership of the slaves, with a limitation over, in the event of her death without leaving issue, to the donor for life, and then to his other children, and with a further limitation, that in case he died before his daughter arrived at the age of twenty-one, Moses Holmes should have possession of the slaves until that time, without paying any thing but the taxes. Whether the limitations were valid is not the question; it is certain that the plaintiff acquired the ownership *in presenti*, by the force and effect of the deed. Under the maxim "*ut res magis valeat quam pereat*," the Court would hesitate before putting such a construction upon a deed as would defeat its purposes and render it inoperative, unless constrained by express terms. But in this case, there is nothing to create a doubt as to the proper construction.

The attempt of the donor, in 1845, to revoke the gift, and his declaration, written upon it, that it never was delivered, is of no effect.

The donor was, for many years, in the adverse possession, but the plaintiff was under the disability of infancy, and afterwards marrying while under age, the disability of coverture was created, which continued until within less than three years before the commencement of the action. The effect of an accumulation of disabilities is well settled.

The adverse possession of the donor prevented the ownership of the slaves from vesting in the husband of the plaintiff *jure mariti*, and upon his death the right of action survived to her.

PER CURIAM, Judgment affirmed.

JESSE G. GRIFFIN *v.* SAMUEL S. SIMMONS, *et al.*

The discharge of a debtor from prison, under the first section of the 59th chapter of the Revised Code, (that is, where he shall have remained in prison twenty days and been discharged by two magistrates out of court,) does not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, though such other creditor had notice of the debtor's application to be discharged.

RULE for the discharge of an INSOLVENT, heard before CALDWELL, J., at the last Fall Term of Washington Superior Court.

A *scire facias*, returnable to the November Term, 1856, of the County Court of Washington, had issued against the bail to the action, wherein the plaintiff's judgment had been rendered against Samuel L. Simmons, and at the said November term, the bail surrendered Simmons in open court, and he was committed to the custody of the sheriff.

To discharge himself from confinement, the debtor, S. S. Simmons, gave bond, payable to the plaintiff, conditioned for his appearance at the next term of the Court, (Feb. 1857,) to take the benefit of the act for the relief of insolvent debtors. Between the November and February terms, Simmons was arrested by the sheriff of Tyrrel county, on mesne process in his hands, and, for the want of bail, was committed to the jail of Tyrrel county, where he remained in close confinement for more than twenty days, and, having given ten days' notice to the persons at whose instance he was imprisoned, and to all his other creditors, including the plaintiff, of his intention to avail himself of the benefit of the insolvent law, on his petition he was brought before two justices of the peace of Tyrrel county, out of court, where, upon consideration of the case, it was adjudged by the said justices that he was entitled to take the benefit of the said act, and, having taken the oath prescribed by the said act, he was ordered to be discharged and set at large.

The rule now under consideration was obtained at February Term, 1857, of Washington County Court, no issue having been made in the case, and none having yet been made.

The presiding Judge being of opinion with the defendants, made the rule absolute, and adjudged that the defendant Simmons be discharged from custody; from which judgment the plaintiff appealed.

H. A. Gilliam and *Winston, jr.*, for the plaintiff.
Heath, for the defendants.

BATTLE, J. The discharge of a debtor from prison, under the first and third sections of the 59th chapter of the Revised Code, which is taken from the act of 1773, (ch. 100, sec. 1, of the Revised Code of 1820,) is, in express terms, confined to the debt sued for, and the cost of suit thereon. Those sections of the act make no provision for notice to other creditors, and the counsel for the defendants admit that the act does not profess to discharge the person of the debtor from arrest as to them. But the counsel contend that, by the operation of the 39th section of the constitution of the State, the debtor, who is discharged from imprisonment, under the sections and chapter of the Revised Code to which we have referred, is *ipso facto* discharged from arrest as to all his then existing creditors, whether with or without notice; and they rely upon the cases of *Burton* v. *Dickens*, 3 Murph. Rep. 103, and *Jordan* v. *James*, 3 Hawks' Rep. 110, as authorities directly in point in favor of their position.

The section of the constitution upon which the counsel rely, declares "that the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law." At the time when the cases above mentioned were decided, it was supposed that the word "confined" instead of "continued" was used in the constitution. It was so in all the printed copies of that instrument then published, but upon an examination of the original, deposited in the office of the Secretary of State, it was found that the word "continued" was the proper one, and it has been inserted in all the printed copies published by authority since that time. Whether the Court would have decided the cases of *Burton* v. *Dickens*, and *Jordan* v. *James*, differently, had they had a correct copy of the constitution before them, we cannot now say, nor is it necessary, in the view which we have taken of the present case, that we should determine how the cases ought to have been decided; for supposing that the words "confined" and "continued" in the connection in which

the latter is found, must receive the same construction, we, after much reflection, have come to the conclusion that it does not now embrace a case like the one before us.

The constitution gives, in express terms, to the legislature, the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debts; *Crain* v. *Long*, 3 Dev. Rep. 371. The sixth and several succeeding sections of the 59th chapter of the Revised Code, taken mainly from the act of 1822, (Taylor's Rev. ch. 113,) were enacted for the express purpose of preventing the imprisonment of honest insolvents altogether, upon their complying with the rules and regulations therein set forth. Without attempting to specify every thing which the debtor is required to do in order to obtain his discharge, it is sufficient to say that he must give bond and good security for his appearance at court, and may give notice to all his creditors of his intention to take the benefit of the act, and if he do so, and thereupon is permitted to take the oath prescribed in the act, he shall then be forever free from imprisonment for debt, as to every creditor, to whom notice may have been given. If he had property when he was taken by *capias ad satisfaciendum*, or was otherwise in the custody of the sheriff or other officer for debt, the act provides a mode for his making a surrender of it; or if he had no property, allows him to take the oath without any surrender, and if he will only pursue the plain requirements of the law, nothing but a fraudulent concealment of his property, admitted, or found by a jury, can prevent his relief from imprisonment. The object of the constitution, in the declaration that his person "shall not be continued in prison, after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors," will have been thus fully accomplished.

The provisions of the acts of 1773 and 1822, are brought together in the 59th chapter of the Revised Code, and form one act concerning "Insolvent Debtors." Being one

entire act upon the same subject, it is our duty to give to it such a construction as to make each part consistent with every other part, and to keep the whole within the bounds of the paramount authority of the constitution. This, we think, will be done if we construe each section according to the plain import of its language. A debtor who does not choose to avail himself of the privileges held out to him in the sixth and subsequent sections, but suffers himself to be committed to jail under the first or third section, must be content to discharge himself only as to the debt for which he is then sued; for to that extent only do those sections go. But if he prefer to take the benefit of those sections which will secure his exemption from imprisonment altogether, he is allowed a fair opportunity to do so; and there is no necessity for the constitution to step in and keep him out of prison under the first or third section.

Our opinion is, then, that the enactment of 1822, and the incorporation of its provision with those of the act of 1773 into one statute of the Revised Code, has produced a material and (as we think) a beneficial change in the effect which it was held that the constitution had upon the last named act when it stood alone.

The case of *Crain* v. *Long*, to which we have already referred, decided that the discharge of an insolvent under the act of 1822, would protect him from arrest by those creditors only, to whom he had given notice, because the act provided that he might, if he chose, notify all his creditors, and make his discharge good as against those only whom he did notify; and that it was his own fault if he did not give notice to all. The same principle must be applied to the statute contained in the 59th chapter of the Revised Code. Some of its sections give to an insolvent a plain and effectual remedy against the imprisonment of his person, and it is his own fault if he will not adopt it. The 39th section of the constitution was intended to impose on the legislature, the duty of passing an act by which the stern rule of the old law, that a creditor might imprison his debtor for life, should be abrogated. That was held to be done by the act of 1773, enforced by that of 1778,

even though the creditors other than the one at whose instance the debtor was in custody, were not therein required to be notified of the intention of such debtor, to apply for his discharge; and the constitutional injunction was supposed to be so imperative that all the creditors were held to be bound by the discharge, although they had no notice of the proceedings. This was certainly going very far toward the annihilation of that great fundamental principle that no person shall be deprived of his rights without having had an opportunity to be heard. The act of 1773, and the decisions upon it, went very far, too, toward the violation of another great principle, that a creditor might have his rights passed upon as to questions of fact as well as of law, by a Judge or two justices of the peace, out of court, without the intervention of a jury. Then came the act of 1822, which was intended to be, and has always been supposed to be, much more favorable to insolvent debtors, and which yet at the same time restored to their proper place in our law, the two great principles to which we have adverted. That act has fully complied with the injunction of the constitution, by providing the means whereby an honest debtor may, after a fair surrender of his property, if he have any, and without it, if he have none, be discharged without any imprisonment at all; and surely after having done this, it was competent for the legislature to enact that the effect of a discharge by a Judge, or two justices out of court, should be confined to the creditor at whose suit the debtor was imprisoned. But it is said that the construction put upon the act of 1773, cannot be varied by its having been revised and inserted in the Code, and for this is cited the cases of *Stallworth* v. *Stallworth*, 29 Ala. Rep. 16, and *Sartor* v. *Branch Bank at Montgomery*, Ibid, 353. This may be so if the act were inserted therein alone, or in connection with other provisions, which were not designed to operate upon it. But it must be otherwise, where it is incorporated with another act, which makes it necessary to vary the construction, in order that every part of the new act may have a consistent operation.

This view of the case renders it unnecessary for us to consider some other questions discussed at the bar.

Our conclusion is that the order made in the Court below, by which the defendant Simmons was discharged from custody, was erroneous, and must be reversed, and this opinion must be certified as the law directs.

PER CURIAM, Judgment reversed.

WILLIAM THOMPSON *v.* RICHARD MORRIS.

In an action for a deceit in the sale of a horse, where the unsoundness alleged was the loss of the frogs of the feet, which might have been discovered upon an ordinary inspection, nothing having been done or said by the seller to prevent enquiry, it was *Held* that the plaintiff could not recover.

The rejection of testimony tending to prove a fact, which fact is assumed by the court as being proved, is not error.

ACTION on the case for a DECEIT, tried before MANLY, J., at the last Fall Term of Orange Superior Court.

The deceit alleged, was in the sale of a mare, and the unsoundness alleged was, that the frogs of the animal's feet had either rotted out or fallen out. Upon this point, there was conflicting evidence, some portion of it tending to show that the frogs were gone, and another that they were in their natural state. In the course of the evidence, the plaintiff offered a blacksmith, who had been employed to put shoes on the mare while she belonged to the defendant, and asked him concerning a message that a son of the defendant had delivered to him, as coming from the father, touching the manner in which the shoes should be put on. This testimony was objected to by the defendant's counsel as being mere hearsay; that the son himself was the proper witness to prove the message sent by the defendant to the blacksmith. The evidence was excluded by the Court, and the defendant excepted.

With respect to the deficiency of the feet, the Court assum-

ed it to be an unsoundness, in case the jury should find that they were gone at the time of the sale, but instructed them, that if absence or loss of the elastic substance at the bottom of the foot would be observable, upon ordinary inspection, it was not such a defect or unsoundnes as would make the defendant liable, unless he did or said something to prevent enquiry or inspection. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Bailey and *Fowle*, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. We are unable to discover any error in the bill of exceptions, of which the plaintiff has a right to complain. Supposing that the message, which the defendant sent by his son to the blacksmith, as to manner in which he wished shoes should be put on his horse, was admissible, it could only prove an unsoundness and the *scienter* of the defendant, and that the Judge assumed to be true in his charge to the jury. The case then, turned upon the enquiry, whether the defect was so patent that the rule of *caveat emptor* applied. His Honor stated, that if the jury should find that the defect was a mere loss of the elastic substance or frogs at the bottom of the horse's feet, it was a patent one, and the defendant was not liable, unless he said or did something to prevent the plaintiff from making an enquiry or inspection. This construction was, we think, in accordance with the well-settled law on the subject. The plaintiff was injured, if at all, not by the deceit of the defendant, but by his own neglect in not discovering what the slightest inspection would have disclosed to him; *Duckworth* v. *Walker*, 1 Jones' Rep. 507.

PER CURIAM, The judgment must be affirmed.

ABSOLOM B. BAINES *et al. Executors*, *v.* JOHN H. DRAKE.

Where a slave is directed, in a will, to be sold after the expiration of a life-property therein, the executor is the proper party to make the sale, though not specially directed so to do.

Where power is given by a will to two executors to sell a slave, and one of them makes a parol sale, accompanied by a delivery, which is afterwards concurred in by the other executor, the authority is well executed.

Upon a special contract for the sale of a slave at a given price, in a suit brought for the price, the purchaser cannot give in evidence, that the slave was unsound and worthless. His remedy is by action for a deceit or on a warranty of soundness.

ACTION of ASSUMPSIT, tried before SAUNDERS, J., at the last Fall Term of Nash Superior Court.

The plaintiffs declared on a special contract for $900, the price of a negro slave Jack, whom one Jordan Sherod had bequeathed as follows:

"Item. I lend to my grand-daughter Chrischany Penelope Elizabeth Ann Strickland, one negro man named Jack, and one bed and furniture during her natural life-time, and after her death to be sold and the money divided between my two sons, Silas Sherod and Redmond Sherod." A. B. Baines and Isaac Strickland were appointed executors, and they both qualified.

The slave Jack was delivered to the legatee for life, who kept possession of him until her death, which occurred in 1856. Upon the death of the first taker, C. P. E. A. Strickland, the plaintiff Baines, acting under the authority conferred by the will of Jordan Sherod, took possession of the slave in question, and sold and delivered him to the defendant, at the price aforesaid, ($900) which the defendant agreed to pay.

The defendant offered to prove that Jack was utterly worthless, and of no value at the time of the sale; that he had been unsound for years before the sale—was sick at that time, and died of the same sickness a few days afterwards. The evidence was objected to by the plaintiffs and ruled out. Defendant excepted.

The defendant further contended, that the assent of the executors to the life-estate, took the whole property out of the executors; that they conveyed nothing to the defendant by the sale, and that there was, therefore, no consideration for the promise.

And further, that the power to sell the slave Jack was conferred by the will on both executors, and that the sale by one passed no property, so that in this point of view, there was no consideration for the promise declared on.

His Honor ruled these positions against the defendant, and gave it as his opinion, that the plaintiffs, on the facts adduced, were entitled to recover. Defendant excepted.

Verdict and judgment for the plaintiffs for the sum demanded. Appeal by the defendant.

Dortch, for the plaintiffs.
B. F. Moore and *Miller*, for the defendant.

BATTLE, J. There can be no doubt that it was the duty of the plaintiffs, by virtue of the power conferred upon them by the will of their testator, to take possession of the slave in question, after the death of the tenant for life, and sell him for the purpose declared in the will; *Allen* v. *Watson*, 1 Murph. Rep. 189; *Dunwoodie* v. *Carrington*, 2 Car. Law Repos. 469. The objection, that one of the executors could not alone make sale of the slaves, does not arise. It does not appear that a bill of sale was executed; but on the contrary, it is to be inferred from the statement in the bill of exceptions, that the sale was made by a delivery of the slave without any deed. This being so, it matters not whether the contract for the slave was agreed upon, and the actual delivery made, by one or by both the executors, for if effected by one only, the bringing of the suit for the price by both, shows a concurrence by both, and that, in legal effect, it was a sale by both.

The testimony offered by the defendant, to show that the slave was, at the time of the sale, unsound and utterly worth-

less, was properly ruled out, because it was irrelevant and and could not have had any proper effect upon the issue. The defendant received the slave, and if he were unsound and worthless, the defendant must sue upon a warranty or for a deceit, if he can prove facts sufficient to sustain an action in either form. The case of *McEntire* v. *McEntire*, 12 Ire. Rep. 299, is directly in point against the defense now attempted to be set up.

PER CURIAM, Judgment affirmed.

GEORGE B. WETMORE *v.* JESSE D. CLICK.

In an action of trover for the conversion of a personal chattel, if the defendant does not rely upon a title in himself adverse to that of the plaintiff's vendor, such vendor is a competent witness for the plaintiff to prove the sale to him.

THIS was an action of TROVER, for the conversion of a horse, tried before PERSON, J., at the last Fall Term of Davie Superior Court.

It appeared, from the evidence, that on the 1st of May, 1856, Hays and Green, as partners, were the owners of the horse in question. They sold it to one Griffin. On the 24th of June, one Deaver, a constable, took the horse out of the possession of the plaintiff, by virtue of an execution against Green, and sold it to the defendant.

There was no evidence of any sale by Griffin to the plaintiff, but there was evidence that the plaintiff had had the horse in his possession three or four weeks, claiming it as his property. The plaintiff then called Griffin, and offered to prove by him, that he had sold the horse to him (plaintiff). This evidence was objected to by the defendant's counsel, on account of the witness' interest in the suit, and excluded by the Court. Plaintiff excepted.

In submission to the intimation of an opinion by his Honor, that the plaintiff could not recover, because the title to the horse was shown to be in Griffin, the plaintiff took a nonsuit and appealed.

Badger and *Boyden*, for the plaintiff.
Clement, for the defendant.

BATTLE, J. The plaintiff's vendor, Griffin, was clearly competent, as a witness, for the purpose for which he was called. It appears, as well from the facts stated in the bill of exceptions, as from the instruction of the Court thereupon, that the defendant, having ascertained that he could not show a good title in himself, sought to defeat the plaintiff's recovery, by proving that the horse belonged to Griffin. The title of Griffin was not, therefore, the subject of dispute between the parties, except that the plaintiff insisted it had been transferred to him, before the conversion by the defendant for which the suit was brought. When Griffin, then, was introduced to prove the sale by himself to the plaintiff, his proposed testimony was against his interest, because, until the sale was proved, his implied warranty of title could not arise. But the counsel for the defendant says that it is an established rule, that a vendor of personal property can never be called as a witness, by his vendee, to prove the title of the latter, and that no authority to the contrary can be shown. The cases of *Nix* v. *Cutting*, 4 Taun. Rep. 18, and *Ward* v. *Wilkinson*, 4 Barn. and Ald. Rep. 410, (6 Eng. C. L. Rep. 466,) *are* authorities to the contrary, and will be found to support our proposition. It is true, that if the defendant had set up and relied upon a title adverse to that of Griffin, and the sale by the latter to the plaintiff had been admitted or proved, then the plaintiff could not have introduced Griffin as a witness to support his own title, because, being liable to the plaintiff upon an implied warranty, he would have had an interest in proving his own title to be good. It is in cases of that kind to which the authorities, cited and relied upon by the defend-

ant's counsel, apply. The distinction, between those cases and the one now under consideration, is certainly well founded, and it was, no doubt, a want of attention to it, which led his Honor into the error of rejecting the testimony of Griffin, though offered for the sole purpose of proving a sale to the plaintiff.

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

PER CURIAM, Judgment reversed.

WILLIAM A. GILLESPIE *v.* JACOB SHULIBERRIER.

Where, in the course of a long investigation, a point, upon which the Court had been requested to charge, was forgotten, but at the end of his charge, his Honor asked the counsel, on both sides, if there was any other matter upon which they wished instructions, who both answered in the negative, the omission was *Held* not to be a good ground of exception.

Where it was proved that the defendant, for some time previously, was depressed and low spirited, and affected by a monomania or insane delusion that his lands were wearing out and his plantation and buildings going to ruin and that he was threatened with starvation and the poor-house, it was *Held* that this was not such a state of lunacy as to throw upon the other side the *onus* of showing that the act was done in a lucid state of mind.

ACTION of COVENANT, trid before PERSON, J., at the last Fall Term of Iredell Superior Court.

The action was constituted under the direction of the Supreme Court upon a covenant to make title to a tract of land, entered into by the defendant on the 8th day of Oct., 1853, and the only question was whether the defendant was *compos mentis*, and had capacity to enter into the said contract at the time of its execution.

The evidence of about fifty witnesses was before the Court and jury; that of the defendant tending to show that early in the summer of 1853, and up to and after the 8th of October

of that year, his mind had been greatly impaired and disturbed, so much so as to render him incapable of making a contract, and particularly that he was affected by a monomania or insane delusion, to the effect that his land was wearing out, his plantation and buildings going to ruin, and that unless he sold his land and moved away, his family would be reduced to starvation, and have to go to the poor-house; while in truth his land was of superior quality, his farm and buildings in good order, and his farming operations prosperous, affording ample support for his family and something to spare. Several witnesses gave it as their opinion that he was a lunatic in the year 1853.

The evidence of the plaintiff tended to show that the defendant, although depressed and low spirited, had capacity to make a contract, and particularly the subscribing witness to the covenant sued on, and others who were present at its execution, and who represented him at that time as entirely *compos mentis*, and able to know what he was about.

The defendant's counsel, amongst other things, requested the Court to instruct the jury that, although the burden of proof was upon the defendant, to show that he was incompetent at the very instant when the contract was made, yet, if he had succeeded in showing lunacy or general insanity during the preceding summer, the law presumed a continuance of that state of mind, until the contrary was proved.

The Court did not give the instruction as prayed, or any instructions at all in reply to the prayer, not recollecting, when the charge was given, that any such request had been made, and there was no dispute between the counsel at the bar as to the law.

After calling the attention of the jury to the question, the Court proceeded in substance as follows: "The law presumes every man *compos mentis*, and capable of making a contract, until the contrary is proved. So you begin your investigation with this assumption, and it devolves upon the defendant who alleges a want of capacity to prove it. This he has undertaken to do, by showing the state of his mind both before and after

the 8th of October, 1853. Want of capacity proceeding from unsoundness of mind, is of three kinds, known as general insanity, lunacy and monomania. General insanity affects the whole mind—is permanent in its character, and continues without any lucid intervals. Lunacy is supposed to have some connection with the changes of the moon, and exists when a man is sometimes rational and sometimes deranged; and although a man may be a lunatic in this sense before doing an act, the law presumes him capable when the act is done, unless the contrary is proved. Monomania is a species of insanity and differs from it only in being confined to a particular faculty of the mind, or existing in reference to a particular subject."

"The being *compos mentis*, or having a legal capacity, is to possess such mind as enables a person to know what he is about. What then was the defendant about? He was about making the contract to sell a tract of land. Then he must be able to know the ingredients of that contract, such as, that he is the owner of the land, is willing to sell it for a given price, and that in consideration of that price, he enters into an agreement which obliges him to make title to the purchaser. It is not required that a man should have sense enough to make a prudent trade, but the law does require that every contract shall have the rational assent of his mind, be it a strong or a weak one. If, therefore, the jury shall be satisfied that the defendant was laboring under an insane delusion of mind, that he must sell his land to save his family from want and the poor-house, and acting under the influence of this delusion, he entered into the contract, it would not be binding upon him, because he would not then know what he was about in respect to a rational assent to the contract, his assent being the result of insanity."

After concluding the charge, the Court addressed the counsel, and asked if there was any other matter, upon which they wished the jury to have instructions, and they, on both sides, signified there was not.

The jury returned a verdict in favor of the plaintiff, to wit, that the defendant was *compos mentis*.

The defendant's counsel excepted for error in not charging as requested, and for error in the charge given, and his exceptions are, upon appeal, brought to this Court.

Boyden and *Fleming*, for the plaintiff.
J. E. Kerr, for the defendant.

BATTLE, J. Upon consideration of the bill of exceptions, taken as a whole, and comparing one part with another, we are satisfied that there is nothing in it which would justify us in setting aside the verdict of the jury, and awarding a *venire de novo*.

The only exceptions upon which the defendant's counsel insisted are, that the presiding Judge erred, first, in declining to give the jury a proper instruction which was asked; and, secondly, in giving them an improper instruction.

The first error, if there was one, was clearly waived by the counsel, and cannot be insisted upon.

The case states that his Honor did not give the instruction asked, or any instruction at that time, and that he forgot it when he came to charge the jury, after the testimony and the arguments of the counsel were closed. But after he had finished his charge to the jury, he turned to the counsel on both sides and asked them, "if there was any other matter upon which they wished the jury to have instruction, and they, on both sides, signified there was not."

It is not stated how long the trial lasted, but it does appear that about fifty witnesses were examined, and it is not at all surprising that when he came to charge the jury, his Honor should, for the moment, have forgotten the instruction prayed; and as he asked the counsel on both sides, whether there was any thing else to which they wished him to call to the attention of the jury, it must certainly be regarded as a waiver of all previous matters when they told him, or signified to him, that there was not.

The second alleged error is equally unfounded. It is that his Honor told the jury, "that lunacy exists when a man is sometimes rational, and sometimes deranged; and although a man may be a lunatic, in this sense, before doing an act, the law presumes him capable when the act is done, unless the contrary is proved." The counsel contends that there was some testimony tending to prove that the defendant was a lunatic in the year 1853, in the latter part of which, the contract in question was entered into; that the law presumed that he continued to be so when the contract was made, and the burden of proof was on the plaintiff and not the defendant, to show a lucid interval at that time; and for this position, he cites the case of *Cartwright* v. *Cartwright*, 1 Phil. Eccl. Rep. 110, (see also Stock on Non Compotes, 25 Law Lib. 28.)

It might be difficult to answer this objection, were it not also set forth in the bill of exceptions, that "there was no dispute between the counsel at the bar as to the law."

We can reconcile this apparent discrepancy only by supposing, that though "several witnesses gave it as their opinion, that he (the defendant) was a lunatic in the year 1853," yet in truth, they meant nothing more by the term "lunatic," than that he was, as all the other witnesses testified, "depressed and low spirited," and that "he was affected by a monomania, or insane delusion, to the effect that his land was wearing out, and his plantation and buildings going to ruin, and that unless he sold his land and moved away, his family would be reduced to starvation and have to go to the poor-house;" all of which was untrue. Upon the testimony thus understood, the proper enquiry was, whether he was competent to make a binding contract, when he entered into that upon which the suit was brought. That question was fairly submitted by his Honor to the jury, with such remarks as the nature of the testimony required, and we see no reason for disturbing the verdict which they found.

The judgment of the Court (after refusing to set aside the

verdict and grant a new trial) against the defendant, for the costs of the action, is affirmed.

PER CURIAM, Judgment affirmed.

HENRY B. WILLIAMS, *Adm'r.*, *v.* ADAM ALEXANDER.

The endorsement, by an obligee, of a payment, within ten years from the time of a note's falling due, is not evidence to rebut the presumption of payment, and the death of the obligee, shortly after making the entry, does not alter the case.

THIS was an action of DEBT, tried before CALDWELL, J., at the Fall Term, 1856, of Mecklenburg Superior Court.

The suit was brought on a bond of the defendant and Charles T. Alexander, bearing date 1st day of January, 1842, payable to the plaintiff's intestate, as guardian, twelve months after date. There was a payment of $50 endorsed on the 26th of February, 1845, and a further payment of $2,35, on the 29th of January, 1846, endorsed as being made by the said C. T. Alexander, which were both in the hand-writing of the plaintiff's intestate, who died in November, 1846. There was no evidence of the financial condition of the obligors.

The Court charged the jury, that the endorsement of the credit of $2,35, was evidence to them, as it appeared to have been made at a time when it was against the interest of the obligee to make it, and if they believed the payment had been made on 29th of January, 1846, it repelled the presumption that the whole note was paid, which otherwise would have arisen from the lapse of more than ten years from the time of its falling due, till suit was brought, and that as to both the obligors. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Boyden, for the plaintiff.
Wilson, for the defendant.

BATTLE, J. No authority has been shown for the proposition that a person can, either by what he says or does, make evidence for himself, even though it may have been against his interest at the time when it was said or done. The general rule undoubtedly is, that a party cannot offer in evidence his own acts or declarations, unless they form part of something done, which it is competent for him to prove. In such case we have never heard an exception contended for, that the acts or declarations were against the interest of the party doing or making them. If they are really against his interest, he will never offer them, and it is only when a change of circumstances, as in the present case, makes it his interest to offer them in evidence, that he will do so, and then, like all other interested testimony, they ought to be excluded. This is not like the case of a payment on a bond or note, established by other evidence than the proof of the obligee's or payee's hand-writing; nor like the case, where a person who has peculiar means of knowing a fact, makes a declaration or written entry of that fact, which is against his interest at the time, and after his death, is evidence of the fact as between third persons. See *Peck* v. *Gilmer*, 4 Dev and Bat. Rep. 254, and the cases there cited. Here the written entry is offered as evidence, not in a suit between third persons, but in a suit in which the personal representative of the party who made it, is plaintiff. It is now to his interest to introduce it, and it ought to be rejected.

PER CURIAM, The judgment must be reversed, and a new trial granted.

STATE v. JOHN, (*a slave.*)

It appeared that while the prosecutor and prisoner were examining a bank-note, which the latter had produced, the prosecutor felt the prisoner's hand in his pocket on his pocket-book, and immediately seized his arm, the prisoner

at the same time snatching the bill, a scuffle ensued, in which the prosecutor was thrown down, and the prisoner escaped with the pocket-book and bank-note, *Held* (BATTLE, J., *dubitante*,) not to be robbery, but only a case of larceny.

INDICTMENT for HIGHWAY ROBBERY, tried before MANLY, J., at the last Fall Term of Caswell Superior Court.

The indictment upon which the prisoner was tried, is as follows:

"STATE OF NORTH CAROLINA, } SUPERIOR COURT OF LAW,
Caswell County, } Fall Term, 1857.

The jurors for the State, upon their oath present, that John, a negro slave, the property of Samuel Watkins, in the county of Caswell aforesaid, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and fifty seven, with force and arms in the county aforesaid, in the common and public highway of the State, in and upon one Matthew Brooks, then and there being in the peace of God, feloniously did make an assault, and him, the said Matthew Brooks, in bodily fear and danger of his life in the highway aforesaid, then and there did feloniously put, and one pocket-book, containing divers, to wit, ten, bank-notes, for the payment of divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of two hundred and twenty-eight dollars, of the value of two hundred and twenty-eight dollars, of the goods and chattels of the said Matthew Brooks, in the highway aforesaid, then and there feloniously and violently did steal, take and carry away, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State."

There were two other counts in the bill, of the same tenor and effect, except that the second charged the stealing of the bank-notes alone, and the third the pocket-book alone.

The evidence upon the only point considered by this Court was, that on the 19th of June last, the prosecutor, Brooks, was in Milton in the county of Caswell, with a wagon and two horses and a portion of his crop of tobacco; that having sold the tobacco and made some purchases, he drove out of the

town intending to camp at a cross-road about three miles distant; that at a short distance outside of the limits of the town, at a bridge across a small stream, he stopped to water his horses, and while so engaged, it being then about dark, a negro came over the bridge from the town, and enquired which of the two roads near by he intended to travel; the witness told him, and, thereupon, the negro passed on along the road indicated; that at the same time, another person came over the bridge and took the other road; that the witness soon overtook the negro, and they travelled on together in occasional conversation, the negro walking and the witness sitting in and driving his wagon, until the negro told the witness that he had found a bill of money in the streets of Milton, and he wanted him to look at it, and tell him how much it was; that the witness objected on account of its being dark, but the negro insisted, and, after some further conversation, not material, a torch light was struck from matches with pine wood, and the bill examined; that the amount of the bill excited his suspicions, and he took particular notice of the negro's face, his clothes, &c.; that while the witness was examining the bill, the negro's hand was felt in his pocket upon his pocket-book; that the witness immediately seized his arm, the negro at the same time snatching the bill of money; that a scuffle ensued, in which the witness was thrown out of the wagon under the tongue, and when he arose the negro was running off, having taken the pocket-book from his pocket, and also the bill of money they were examining; that the pocket-book contained four fifty-dollar bills, a ten, several fives and a two, making in all two hundred and twenty-seven dollars; that the struggle occurred at a point in the public road about a mile from Milton, at about nine o'clock; that the negro in question, was a large and powerful-looking man. He also testified that the prisoner was the negro of whom he had spoken.

The case below turned chiefly upon the identity of the prisoner with the assailant described by the witness; and many exceptions were taken by the prisoner to the ruling upon questions as to the evidence offered by the State, and to

the charge of his Honor, but as the consideration of this Court is entirely confined to the sufficiency of the facts to constitute the crime charged, it is not deemed essential to state more of the record sent to this Court.

The prisoner was convicted, and, sentence of death having been pronounced by the Court, he appealed.

K. P. Battle, (who appeared with the *Attorney General*, for the State,) cited 2 Russell on Crimes and Mis. 71; 2 East's P. C. 711; Roscoe's Crim. Ev. 898, 535; 2 Russ. on C. and M. 670; *Lapier's case*, 1 Leach's Rep. 320; *Moore's case*, 1 Leach's Rep. 335; *Mason's case*, Russ. & Ryan, 419; *Wilkinson's case*, 1 Hale's P. C. 508; *State* v. *Trexler*, 2 Car. L. Repos. 90. He contended that though the struggle might have been to keep possession, it is robbery; for this he cited 2 Russ. on C. and M.; 2 East's P. C. 702, 709; Roscoe's Crim. Ev. Am. Ed. 898; Wharton's Am. Crim. Law, § 1701; Arch. Crim. Plea. 452; *State* v. *Trexler*, supra; *Rex* v. *Dyer*, 2 East's C. L. 767.

He cited and commented on the opposing authorities of *Gnosil's case*, 1 Car. and P. 304, 11; E. C. L. Rep. 400, and *Francis' case*, 2 Stra. 1015.)

No counsel appeared for the prisoner in this Court.

Pearson, J. Robbery is committed by force; larceny by stealth. The original cause for making highway robbery a capital felony, without benefit of clergy, was, an evil practice, in former days very common, of meeting travellers, and, by a display of weapons, or other force, putting them in fear, ("stand and deliver,") and in this way taking their goods by force. Hence the indictment (the form is still retained,) contains this allegation: "and him (the person robbed,) in bodily fear and danger of his life, in the highway, then and there, did feloniously put," and it was for a long time held that the allegation must be proved.

In Foster's Criminal Law, page 128, is this passage: "The prisoner's counsel say there can be no robbery without the circumstance of putting in fear. I think the want of that

circumstance alone ought not to be regarded. I am not clear that that circumstance is, of necessity, to be laid in the indictment so as the fact be charged to be done *nolenter et contra voluntatem.* I know there are opinions in the books which seem to make the circumstance of fear necessary, but I have seen a good MS. note of an opinion of Lord HOLT to the contrary, and I am very clear that the circumstance of actual fear at the time of the robbery, need not be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief rifleth his pockets, is not this robbery? And yet where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this, doubtless, is robbery. In cases where the true man delivereth his purse without resistance, if the fact be attended with those circumstances of violence and terror which, in common experience, are likely to induce a man to part with his property for the sake of his person, that will amount to a robbery. If fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it."

In Foster's day it would not have occurred to any lawyer, that the facts set out in the record, now under consideration, made a case of highway robbery. There was no violence—no circumstance of terror resorted to for the purpose of inducing the prosecutor to part with his property for the sake of his person.

Violence may be used for four purposes: 1st. To prevent resistance. 2nd. To overpower the party. 3rd. To obtain possession of the property. 4th. To effect an escape. Either of the first two, makes the offence robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general it does not make the offence robbery, but sometimes, according to some of the cases, it does. It is necessary, therefore, to see how the authorities stand in respect to it.

After Foster's day, the idea of robbery was extended so as to take in a case of snatching a thing out of a person's hand and making off with it, without further violence; but in *Plunket's case*, tried before BULLER, J., and THOMPSON, B., it was held, that snatching an umbrella out of a lady's hand as she was walking the street, was not robbery; and the court say, "It had been ruled about eighty years ago, by very high authority, that the snatching any thing from a person, unawares, constituted robbery; but the law was now settled, that unless there was some struggle to keep it, and it were forced from the hand of the owner, it was not so. This species of larceny seemed to form a middle case between stealing privately from the person, and taking by force and violence;" 2 East's P. C. 703. In *Lapier's* case, an ear-ring was so suddenly pulled from a lady's ear that she had no time for resisting, yet being done with such violence as to *injure her person*, the blood being drawn from her ear, which was otherwise much hurt, it was held to be robbery; 2 East's P. C. 708. So in *Moore's* case, 1 Leach, 335: A diamond pin, which a lady had strongly fastened in her hair with a *corkscrew twist*, was snatched with so much force as to tear out a lock of hair, it was held robbery, because of the *injury to the person*. Possibly the ground on which these two cases is put may be questioned, as the injury to the person was accidental, and seems not to have been contemplated, but they have no bearing on our case.

In *Davies'* case, the prisoner took hold of a gentleman's sword, who, perceiving it, laid hold of it at the same time, and struggled for it. This was adjudged to be robbery; 2 East's P. C. 709.

In *Mason's case*, 2 Russ. and Ry. 419, (in 1820) the prisoner took a watch out of a gentleman's pocket, but it was fastened to a *steel chain* which was around his neck; the prisoner made two or three jerks until he succeeded in breaking the chain; PARK B. instructed the jury that this was robbery; but doubts being expressed, he referred it to all the Judges, who were unanimous in the opinion that it was robbery, be-

cause of the force used to break the chain, which was around the gentleman's neck. This is all the Report says. It is short, and to me unsatisfactory, seeming to go back to the idea of robbery that existed before Plunket's case.

In *Gnosil's* case, 1 Car. and Payne, 304, (11 E. C. L. Rep. 400, 1824,) the prosecutor was going along the street, the prisoner laid hold of his watch-chain, and with considerable force jerked it from his pocket, a *scuffle then ensued*, and the prisoner was secured; GARROW B., "The mere act of taking, being forcible, will not make this offense a highway robbery. To constitute the crime of highway robbery, the force used must be either before, or at the time of, the taking, and must be of such a nature as to show that it was intended to *overpower the party robbed* or *prevent his resisting*, and not merely to get possession of the property stolen. Thus, if a man, walking after a woman in the street were, by violence, to pull her shawl from her shoulders, though he might use considerable force, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property." This decision was four years after *Mason's case*, and I suppose GARROW was then one of the Judges. According to this case, which is the latest that we have met with, our case is not robbery, even if it be admitted to fall under the third head of violence above enumerated. Our case is clearly distinguishable from Davies' case, for both parties *had hold of the sword and struggled* for it. If Davies had let it go, there would have been no necessity for violence, and his holding on, and struggling for it, could only be imputed to his determination to take it by force. In our case, the prosecutor did *not have hold* of the pocket-book; there was no struggle for it; but he had hold *of the prisoner's arm.* So he could not, by letting go the pocket-book, have avoided the necessity for violence, and the struggle in which the prosecutor fell under the tongue of the wagon, is fairly imputable to an effort on the part of the prisoner to get loose from his grasp and make his escape. The only difference between this case and that of *Gnosil*, is, that

the one succeeded in getting loose and the other was less fortunate. Suppose, in the struggle, the prosecutor had been too strong for the prisoner, and had succeeded in arresting him, there was a taking of the pocket-book and an *asportavit*, so as to constitute larceny in "picking of the pocket," but would any one have said it amounted to robbery? Can the nature of the offense be changed by the accident, that the prisoner succeeded in getting away, because the prosecutor happened to fall on the tongue and double tree, which broke his hold from the arm of the prisoner?

Our case is also clearly distinguishable from *Mason's case*. The watch was fastened to a *steel chain*, which was *around the neck of the prosecutor*. Had Mason let the watch go, there would have been no necessity for violence; his *holding on* and *jerking until* he broke the chain, could only be imputed to a determination to take the watch by force.

Trexler's case, 2 Car. Law Repos. 90, was also cited in the argument. That was an indictment for forcible trespass. The defendant had taken a bank-note out of the pocket-book of the prosecutor, who tried to get it away from him. He resisted and a struggle ensued. SEAWELL, J., *arguendo*, expresses the opinion that the evidence showed force enough to constitute robbery, although the prosecutor did not have hold of the bank-note. This, I suppose, was said to meet what BULLER says in *Plunkett's case*, "unless there was some struggle to keep it, and it were forced from the *hand of the owner*." However that may be, it is sufficient to say that was a mere *dictum*. It is true, Judge SEAWELL was greatly distinguished as a criminal lawyer, but a dictum in reference to a capital offence, cannot be much relied on when thrown out in considering a misdemeanor.

After much consideration, I am convinced that the facts set out in this record, do not constitute highway robbery. I am, therefore, of opinion that the judgment ought to be reversed, and a *venire de novo* awarded.

BATTLE, J. My associate, Judge Pearson, thinks that the

facts stated in the prisoner's bill of exceptions, do not constitute a case of robbery, but of larceny only. After an examination of all the authorities upon the subject, which I have been able to find, and much reflection upon the principles they seem to establish, I am constrained to say that I do not entirely agree with him. I feel, however, that I ought not to permit my dissent to go so far as to prevent my agreeing that the prisoner shall have a new trial. The absence of the Chief Justice, caused by severe sickness, leaves but two members on the bench, and my refusal to concur in reversing the judgment and having a *venire de novo* awarded, would have the effect to keep the prisoner in jail six months longer, which I am unwilling to do. Another reason influences me to adopt the course which I am pursuing, which is, that the attention of the Court and counsel were so much taken up on the trial with the main defense of the prisoner, to wit, the alleged defect in the proof of his identity, that the minute circumstances attending the taking of the prosecutor's pocket-book, do not appear to have been brought out with that fullness and particularity, as to make us sure that we have the true character of the transaction before us. That of course can and will be done on the next trial.

I will now content myself with a brief statement of the reasons which incline me to the opinion that, upon the facts and circumstances as they now appear upon the record, the prisoner is guilty of robbery.

All the more recent writers on criminal law concur, with singular unanimity, in defining what is the kind of taking with violence which is necessary to constitute robbery. Sir William Russell says, that "the rule appears to be well-established, that no sudden taking or snatching of property from a person unawares, is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it." 2 Russ. on Cr. and Mis. 68. In Archbold's C. P. 225, the same language is used. Roscoe's Crim. Ev. 898, (5th Am. from the 3rd Lon. Ed.) says there

must "Some injury be done to the person, or some previous struggling for the possession of the property." Mr. Chitty in his 3rd vol. Crim. Law, 804, has it, that "there must be a struggle, or at least a personal outrage." The language of Mr. East, in his 1 P. Cr. 708, is nearly the same with that of Russell, "That there must be some injury to the person or some previous struggle for the possession of the property." In his notes to 4th vol. Bl. Com. 243, Mr. Chitty says, "To constitute a robbery where an actual violence is relied on, and no putting in fear can be expressly shown, there must be a struggle, or at least a personal outrage." All these able and eminent writers upon the criminal law agree in this, that if there be a struggle for the possession of the property, or a personal outrage, it is robbery, and refer, in support of their position, to the cases, the most, if not all, of which are cited and commented upon in the opinion of my brother PEARSON.

Now, it seems to me, that in the case before us, the testimony of the prosecutor, Brooks, shows something very much like a struggle for the pocket-book before the prisoner succeeded in taking it from the pocket of the prosecutor and running off with it. The distinction between a struggle to escape and one to carry off the property, when the prisoner did both, is in my estimation almost too refined for practical use. I admit that the case of *Rex* v. *Gnosil*, tried before Baron GARROW, is an authority against the position that a mere struggle for the possession of the property, is alone sufficient to make out a case of robbery. I have only to say of that case, that it is but the opinion of a single Judge against the whole current of the previous adjudications; and it is a little singular that it does not seem to have been noticed by any of the text writers, whose works have been published since the decision was made. I am not inclined, therefore, to place much reliance upon it.

Having accomplished my purpose of stating shortly the reasons why I do not altogether concur in the opinion of my associate, I conclude with expressing again my willingness,

for the reasons above given, that the prisoner shall have another trial.

PER CURIAM, Let the judgment be reversed, and this opinion certified, to the end that the prisoner may have a new trial.

ELBRIDGE G. BREWER AND ORRIN WILLIAMS *v.* ORRIN A. TYSOR AND JORDAN TYSOR.

Where a contract for the performance of work is divided into three separate and distinct parts, there is no reason why the plaintiff should not recover for work done on the first two parts according to the contract, though the third part WAS NOT so finished.

THIS was an action of ASSUMPSIT, upon a special agreement, tried before MANLY, J., at the last Fall Term of Chatham Superior Court.

Upon the trial of the case at this term, it appeared that there had been a written contract, or articles of agreement, between the parties, in relation to the digging of a canal out of Rocky River to the spot where the defendants were constructing a mill, the terms of which were not stated, as it was abrogated and abandoned by the parties at the instance of the defendants, and a new oral agreement was made in the place of it. By this new agreement, which is the one declared on, the plaintiffs undertook to dig a portion of the canal before undertaken, and also to construct a dam across the river. It was agreed that there should be three divisions of the work: *First*, the dam. *Secondly*, half the canal from the dam down to a certain point. *Thirdly*, the remaining half down to the mill. The canal was to be dug 4 feet wide, and 3 feet deep. The canal was to be finished by the last day of May, but as to the time of finishing the dam, or whether there was any time stipulated, the testimony was conflicting. The agreement

contained a provision that when any one of the three divisions of the work should be finished, the defendants were to pay therefor, as follows: for the first section, $80, for the second section, $80, and for the third, $90. It appeared from the evidence that the 2nd and 3rd divisions of the work were finished within the time and according to specifications agreed on; but the dam was not finished by the first of June, and the defendants took the work out of plaintiffs' hands.

The Court instructed the jury, upon this state of the facts, that they might render a verdict for the plaintiffs, for the divisions of the work executed according to the terms of the contract, and if there were any division not so executed, (*ex gr.* not finished in the time agreed,) the plaintiffs could not recover any thing for that. The defendants excepted.

The jury rendered a verdict for the plaintiffs for the two finished sections of the work. Judgment and appeal by the defendants.

Phillips, *Howze* and *J. H. Bryan*, for the plaintiffs.
No counsel appeared for the defendants in this Court.

PEARSON, J. This case as it is now presented, differs wholly from that of *Brewer* v. *Tysor*, 3 Jones' Rep. 180. There the contract was *entire;* here it is divided into three separate and distinct parts. There can be no reason why the plaintiffs should not recover for the work done on the two parts which were finished according to the contract. There is no error.

PER CURIAM, Judgment affirmed.

WILLIE WALSTON *v.* JOHN MYERS *et al.*

A master of a steamboat, being a mere servant of the owners, is not jointly liable with them as common carriers.

ACTION on the CASE, tried before SAUNDERS, J., at the last Fall Term of Pitt Superior Court.

The action was brought against the defendants as common carriers for failing to carry safely from Washington to Williams' landing on Tar river, a flat-boat belonging to plaintiff, loaded with goods, which they had undertaken to tow from the former to the latter place.

There was a second count against the defendants (not as common carriers) for negligence and unskillfulness in towing his flat-boat, whereby it had been snagged and lost.

The defendants John Myers and Redding L. Myers were the owners of the steamboat Amidas, which was employed chiefly in towing flat-boats on the Tar river, and the other defendant, DeLand, was the master on board the said steamboat, employed by the owners as their agent and servant, to navigate and conduct the operations of the same, but had no property in the boat itself. On a certain day, the plaintiff's flat-boat, loaded with goods, was taken in tow at Washington, being firmly tied to the side of the steamboat in the usual manner, by lines from the bow and sides of the flat, and was so carried up the river safely to a point above Greenville. About two and a half miles above Greenville, and below Williams' landing, the flat was pierced by a snag and sunk, and the goods on board of her damaged. DeLand was on board of the steamer when the occurrence took place, but the other defendants were not present.

There was much evidence upon the question of negligence, which the charge of his Honor below makes it unnecessary to state.

The defendants contended, and requested the Judge to charge, that the action, though in form *ex delicto*, was founded upon the non-feasance of a contract, and that contract was made by the defendants, the Myerses alone, through their agent DeLand, and not jointly by all the defendants, and that, therefore, the plaintiff could not recover.

The defendants also contended that they were not common carriers; that their liability could only be founded on negli-

gence or want of skill, and asked his Honor to instruct the jury that there was no want of the requisite degree of skill and diligence established by the testimony.

His Honor charged the jury that, if they believed the evidence, the defendants were common carriers, and, as such, were liable to the plaintiff for damages to the flat and goods in the course of the carriage, whether they were guilty of negligence and unskillfulness or not; that if they believed the evidence, the defendants were guilty of a joint tort, and liable to the plaintiff. Defendants excepted.

His Honor declined giving the instructions asked for by the defendants' counsel, for which they also excepted.

Verdict and judgment for the plaintiff, and appeal by the defendants.

B. F. Moore, for the plaintiff.

Rodman and *Donnell*, for the defendants, cited, upon the matter of the defendants' joint liability, Chitty on Pleading, p. 100; Ibid. 96; Angell on Carriers, 487, §519, note 3; *Patton* v. *McGrath*, 1 Rice's (S. Ca.) Rep. 162; Abbot on Shipping, 90, 91.

On the question, whether the defendants were common carriers, they cited Angell on Carriers, p. 91, §86, 673, §668, note 2; *Caton* v. *Barney*, 13 Wend, 387; *Penn., Del. and Md. Nav. Co.* v. *Dandridge*, 8 Gill and J. (Md.) Rep. 109; *Wells* v. *Steam Nav. Co.*, 2 Conn. Rep. 204; *Alexander* v. *Greene*, 3 Hill; 1 Parsons on Con., p. 645, note 2; *Coggs* v. *Bernard*, 1 Smith's Leading Cases, 332.

PEARSON, J. His Honor was of opinion that the defendants were common carriers, and as such were liable, "whether they were guilty of negligence or unskillfulness or not." Such is the law in regard to common carriers, and we are inclined to the opinion that the defendants John and Redding Myers, the owners of the steam-boat, were common carriers in respect to the plaintiff's flat they had in tow; but the other defendant, DeLand, who was the servant of the owners,

was not a common carrier. It follows that he could not be made liable without proof of negligence or unskillfulness on his part; and yet, his Honor allowed a verdict to be rendered against him jointly with the other defendants; there is a judgment against all the defendants. There is error.

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

JAMES W. OSBORNE AND EMMOR GRAHAM *v.* THE HIGH SHOALS MINING AND MANUFACTURING COMPANY.

Where the agent of a corporation signed his name to an obligation to pay money, with his private seal affixed, it was *Held*, that although the instrument did not become the covenant of the corporation, yet it was evidence of a *contract*, on proof of the agency.

ACTION of ASSUMPSIT, tried before PERSON, J., at the last Fall Term of Mecklenburg Superior Court.

The plaintiff declared upon, and proved, the following special contract, to wit:

"MARCH 20th, 1854.

"We do hereby hire to the High Shoals Mining and Manufacturing Company, the following negro slaves, to wit: Dick (and fourteen others, named,) for the term of one year from this date, for the sum of two thousand four hundred dollars. Witness our hands and seals."

JAMES W. OSBORNE, [*seal.*]
EMMOR GRAHAM, [*seal.*]
FREDERICK GOODELL, Agent, [*seal.*]

They further proved, that the High Shoals Mining and Manufacturing Company was a corporation, and that Frederick Goodell was its agent at the time of the execution of the contract.

The plaintiffs contended, that the legal construction of the paper was, that it was a hiring by the defendant, through their agent, Goodell, from the plaintiffs, Osborne and Graham.

The Court intimated an opinion, that the parties to the contract, by its proper construction, were, The High Shoals Mining and Manufacturing Company on the one part, and Emmor Graham, James W. Osborne, Frederick Goodell, or his principal, the High Shoals Mining and Manufacturing Co., on the other, and that plaintiffs could not recover on it.

In submission to which opinion, the plaintiffs took a nonsuit and appealed.

Wilson and *Graham*, for the plaintiffs, were stopped by the Court.

Guion, for the defendant, cited 2 Kent's Com. 556, 631; *Combe's case*, 9 Co. Rep. 76; *Frontin* v. *Small*, 2 Ld. Raym. Rep. 1418; *Wilks* v. *Back*, 2 East's Rep. 142; *Bogart* v. *De Bussy*, 6 John. Rep. 94; *Fowler* v. *Shearer*, 7 Mass. Rep. 14; American Jurist, No. 5, pp. 71, 85; *Cole* v. *Wendel*, 8 Johns. Rep. 117; also the notes to *Thompson* v. *Davenport*, 2 Smith's Leading Cases, 224; *Clark* v. *McMillan*, 2 Car. L. Repos. 265.

PEARSON, J. We differ from his Honor as to the proper construction of the contract. The parties to it were the plaintiffs on the one part, and The High Shoals Mining and Manufacturing Company on the other. It is true, Goodell, as agent, executes the instrument offered in evidence, and affixes thereto his private seal, so that it did not become the *covenant* of the company. Still it was *evidence* of a *contract* on its part, for the breach of which, an action of assumpsit will lie, it being proved that Goodell was the agent of the company. Angel and Ames on Corporations, 334.

The same point was presented at this term, in *Taylor* v. *School Committee*, (*ante*, 98.) The committee being a corporation was sued in assumpsit, the evidence of which, was a deed executed by the individuals composing the committee, each of whom had affixed his private seal. Although the case went off on another point, that question was yielded.

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

NATHAN S. A. CHAFFIN *v.* ALEXANDER R. LAWRANCE.

Where the instruction asked for by counsel impliedly assumes as true a fact that has not been proved in the case, it is not error in the court to refuse it.

A right verdict on the question of negligence will cure a wrong charge by the court on that point. (The case of *Scott* v. *the Wilmington and Weldon Railroad Company*, 4 Jones' Rep. 432, explaining the cases of *Ellis* v. *Portsmouth and Roanoke Railroad Company*, 2 Ire. Rep. 138, and *Herring* v. *Wilmington and Raleigh Railroad Company*, 10 Ire. Rep. 402, cited and approved.)

ACTION on the CASE, tried before PERSON, J., at the last Fall Term of Davie Superior Court.

In the Spring of 1855, the defendant, being the owner of a stud-horse, had a stand at Mocksville. The horse was groomed by a negro man belonging to the defendant. The plaintiff sent his mare by a negro man of his own, to be served by the horse at his stable where he was usually let to mares. The plaintiff's mare was tried and seemed to be anxious. The horse was let to her and she stood quietly until mounted, when she began to back, at the same time squatting and sinking in the haunches. The plaintiff's servant was holding the mare by the bridle. She soon sank down too low for the horse, when his groom pulled him away. About the same time, the mare squatted or sank down upon her rump, jerked the bridle out of the hand of the servant holding her, fell over upon her side and died instantly. It was in evidence that the ground was a little sidling, and very slippery in consequence of rain that morning; that it was a hard-trod stable-yard, the soil of which was thickly interspersed with small stones; that it was the place commonly used for the purpose, and had been for a long time; that there were signs of the slipping of horses' feet on the yard.

The plaintiff's counsel requested the Court to charge the jury that, if the ground was a little sidling and very slippery, there was negligence, in law.

The Court refused the instruction as prayed, but told the jury that if they should find that the ground was a little sidling

and very slippery, and that the operation would probably be attended with danger from these causes, there was, in law, negligence. Plaintiff's counsel excepted.

Verdict for the defendant. Judgment and appeal.

Boyden, for the plaintiff.
Clement, for the defendant.

BATTLE, J. The facts of the case, as they appear in the plaintiff's bill of exceptions, did not justify the instruction which his counsel called upon the Court to give. There was very slight, if any, evidence that the mare came to her death by slipping, supposing that the lot where the transaction took place "was a little sidling and very slippery," and that "there were signs of the slipping of horses' feet in the yard." The manner in which she is stated to have sunk down and fell dead, almost precludes the idea that her death was caused by slipping, and yet the instruction prayed, impliedly assumed that the fact was so. If the instructions prayed had been that, if the jury found that the lot was sidling and very slippery, and that in consequence thereof the mare slipped and fell, it was, in law, negligence, then the question of law would have been fairly raised; but that is not so where a material fact is to be assumed as true by the court which ought to be submitted to the jury. The counsel for the plaintiff cited and relied on *Herring* v. *Wilmington and Raleigh Railroad Co.*, 10 Ire. Rep. 402, and *Ellis* v. *Portsmouth and Roanoke R. Road Company*, 2 Ire. Rep. 138, to show "that when the plaintiff shows damage resulting from the act of the defendant, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless." The case of *Scott* v. *Wilmington and Weldon Railroad Company*, 4 Jones' Rep. 432, explains this proposition and shows that it applies only to those cases where the things damaged remain stationary and always in the same condition, and that it has

no appplication to those cases where the things injured, and the circumstances connected with them, are constantly varying. Hence, the Court say that there is a manifest distinction between burning a barn, or a fence, and running over and killing a slave or a cow, in the consideration of what shall be deemed negligence in those who have the management of the rail-road cars. In the former case, the barn or the fence remains *stationary*, while in the latter, the slave or the cow may be constantly changing his or her position. So that as things do not remain in the same condition, the question as to how the injury was done, is open for enquiry; and as the plaintiff alleges negligence, it is for him to make the proof.

In the present case, it ought to have been shown by the plaintiff how the animals were placed, and whether, from her position, the mare was likely to slip and did slip down, and thereby lost her life. From the facts as set forth in the bill of exceptions, we cannot see that the defendant was guilty of negligence, and as the verdict of the jury upon that question is apparently right, we need not examine the propriety of the Judge's charge. It is now well settled that a right verdict upon the subject of negligence, will cure a wrong charge, even supposing that his Honor's charge was wrong. Upon which, however, we do not express an opinion. See *Smith* v. *Shepard*, 1 Dev. Rep. 461; *Hathaway* v. *Hinton*, 1 Jones' Rep. 247.

PER CURIAM, Judgment affirmed.

Doe on the demise of JAMES H. K. RODGERS *v.* WILSON WALLACE.

A power to sell land, conferred on an executor, by will, is a common-law authority. It is an appointment that operates as a designation of the person to take under the will, and the purchaser is in under the will. No seisin is necessary to serve the power, and no adverse possession, short of seven years, under color of title, will stand in the way of its execution.

Rodgers *v.* Wallace.

Seven years' adverse possession, with color of title, reckoned from the day the authority began, would bar, because the power and the estate are regarded as the same thing.

ACTION of EJECTMENT, tried before BAILEY, J., at a Special Term (June, 1856,) of Mecklenburg Superior Court.

The land in controversy belonged to one Hugh Rodgers. He devised it as follows: "I will and bequeath to my beloved wife, Nancy A. Rodgers, during her natural life, the whole of the plantation whereon I now live, and all my house-hold and kitchen furniture," &c.

"*Secondly.* I will and bequeath that my son, Samuel H. Rodgers, shall have my plantation two years after his mother's death, and the two-thirds of the price thereafter.

"*Thirdly.* I will and bequeath to my son Hugh W. Rodgers, the one-third of the price of my land after two years from his mother's death, with an equal division of my books."

* * * * * *

"I will and ordain that my executors sell my plantation after two years from my wife's death, and apply the money as above specified."

"*Ninthly.* I also will and ordain, that my executors sell all the property not willed, at my death, and apply the proceeds to the payment of debts. I constitute and appoint my son Samuel H. Rodgers, and my brother's son Samuel W. Rodgers, my executors, to execute this my last will and testament."

The will bears date 5th of April, 1841, was proved and recorded at the October Term, 1841, of Mecklenburg County Court, and both the executors therein named qualified.

Nancy Rodgers died, October, 1847, and Samuel H. Rodgers, one of the executors above named, died in the year 1850. On the 16th of April, 1855, Samuel W. Rodgers, the surviving executor, made sale of the land in question to the plaintiff's lessor, James H. K. Rodgers, and conveyed the same to him by deed of that date, which was offered in evidence, on the trial of this cause, in support of the plaintiff's title.

The defendant offered in evidence a deed for the premises, from Nancy A. Rodgers and Samuel A. Rodgers, the widow and son of Hugh Rodgers, (the said Samuel A. being the same that was appointed executor in the will,) to Wilson Wallace, dated 11th day of January, 1845, and proved that he went into possession of the same at the date of the deed, and has had it ever since, claiming it as his own up to the time of bringing this suit.

The defendant's counsel contended, that Samuel W. Rodgers had no right to make the sale; that the said Samuel W. did not have the legal estate, but a mere power, the legal estate being in the heirs of Hugh Rodgers; that if he had power to sell the land, his deed to plaintiff's lessor was void, because he (the defendant) was, at the time of the sale, and the date of the deed, in the adverse possession of the same, claiming under color of title. The Court charged the jury, that Samuel W. Rodgers, notwithstanding the adverse possession of the defendant, had a right to sell. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Osborne and *Jones*, for the plaintiff.
Boyden and *Wilson*, for the defendant.

PEARSON, J. We concur with his Honor in the opinion, that Samuel W. Rodgers, the surviving executor, had a right to sell under the power given by the will, notwithstanding the adverse possession of the defendant at the time the power was exercised; and notwithstanding Samuel H. Rodgers, one of the heirs-at-law of the devisor, had executed a deed for the land to the defendant.

The power given by the will was a common-law authority, as distinguished from a power operating under the statute of uses. The distinction is pointed out in Sugden on Powers, at page 1. He says, "A power given by a will, or by an act of Parliament, as in the instance of the land-tax redemption act, to sell an estate, is a common-law authority." (As further in-

stances we may add, a power given to the sheriff to sell under execution, or to a clerk and master.) "The estate passes by force of the will, or act of Parliament, and the person who executes the power, merely nominates the party to take the estate."

He then points out the distinction between powers of this kind and a power of attorney to execute a conveyance. At page 251, "where a power is given by a will, without a seisin to serve the estates to be created, it is a mere common-law authority. The appointment merely operates as the designation of a person to take under the will." At page 253, "Where a seisin is raised by the will, and it operates, the appointment will create a use, and there cannot be a use upon a use; but when there is no seisin to serve the power, but the testator *devises at once*, for example, that A shall sell; upon a sale to B, the latter takes by force of the will," and the doctrine of uses is not involved.

In our case there is no seisin to serve the power. The testator simply says, "I will and ordain, that my executors sell my plantation, after two years from my wife's death, and apply the money," &c. So it is a mere common-law authority. The appointment merely operates as the designation of a person to take under the will. In other words, it is the same as if the will, instead of the power, had inserted the name of the purchaser; that is, "to his wife for life, then to his son Samuel H. Rodgers for two years, and then to James H. K. Rodgers and his heirs, (the party to whom the executor sold,) upon his paying such a sum as he and my executors may agree on as the price thereof." This removes all the supposed difficulty arising from the fact that the defendant was in the adverse possession at the time of the exercise of the power in the sale. If the adverse possession, under the color of title, had continued for seven years after the expiration of two years from the death of the wife, then it is clear that no estate could have been created by the exercise of the power, because the right of entry was lost, and in this respect the power and the estate are precisely the same; for if the name of the pur-

chaser had been inserted in the will instead of the power, his estate would have been barred by losing the right of entry, and the power is affected in the like manner. "The power must be regarded as the estate within the statute of limitations. Were it not so, the statute might as well be repealed, for it would be evaded simply by creating a power"; *Pickett* v. *Pickett*, 3 Dev. Rep. 11.

In this case, however, the seven years had not run, and the reference is made simply to show that a power of this kind is, in all respects, considered as the estate.

This also removes all the supposed difficulty arising from the deed executed by the widow and Samuel H. Rodgers, who was an heir-at-law of the testator. For supposing the deed passed his estate in the land, and not simply the two years to which he is entitled under the will, and his right to a share of the sum for which the land was sold, there is no difficulty in regard to a seisin to feed the use created by the power; for as this is a common-law authority, and the appointee takes under *the will*, and not by way of use, there is no necessity for a seisin to serve his estate.

This entitled the plaintiff to recover under the demise of James H. K. Rodgers, and it is unnecessary to consider the other demise.

PER CURIAM, Judgment affirmed.

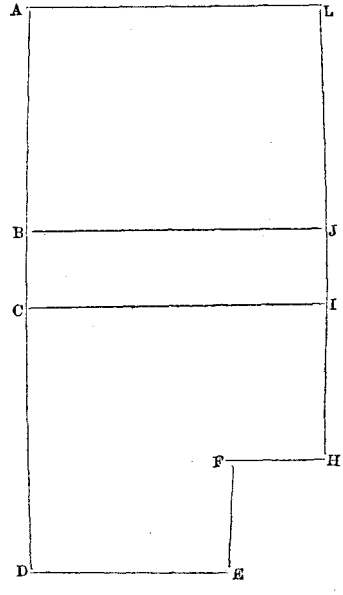
Doe on the demise of WILLIAM SAFRET *v.* JOHN HARTMAN.

Whether a marked corner, made at the time the deed was made, but not called for by name, was intended to be adopted in the deed, or whether it was intended by the bargainor that course and distance should prevail, is a question of fact, in the ascertainment of the boundaries of a tract of land, that should be left to the jury with proper instructions.

Whether the rule, that "when there was a line actually run by the surveyor, which was marked, and a corner made, the party claiming under the patent, or deed, shall hold accordingly, notwithstanding a mistaken description in the patent or deed," is not confined to grants by the State and old deeds, *quære?*

ACTION of EJECTMENT, tried before CALDWELL, J., at the Special Term (December, 1857,) of Rowan Superior Court.

The lessor of the plaintiff and the defendant, both, claimed title under George M. Hartman; the former by a deed to James Bean, dated 5th of February, 1850, and from Bean to plaintiff's lessor by deed, dated 21st of January, 1852. The defendant's deed was dated in 1845. The land in controversy is contained in the parallelogram B C I J.



The two tracts of land comprised in the deeds of the plaintiff and defendant, originally constituted but one tract, which was owned by George M. Hartman. It is admitted that the deed of the lessor of the plaintiff, covers the land in controversy. The call of the defendant's deed is, beginning at a post-oak, one of the old corners at A, which is admitted as a corner, thence south, with Smith's line, 145 poles, to a stone, and a

——, a new corner, B or C; thence east, 110 poles, to a stone, I or J; thence north, with the old line, 145 poles to a white-oak; thence to the beginning. Beginning at A, the distance gives out at B, and the defendant's deed would not cover the land in controversy if the line stopped where the distance gives out. Defendant insisted, however, that the line should not stop at the end of the distance at B, but should extend to a black-oak at C, and, in order to establish the black-oak as a corner, he called the surveyor, who proved that at C he found a black-oak marked as a corner, and, from the appearance, had been marked for eleven or twelve years, and that running from thence east 110 poles, he found a plainly marked line, at the end of which, he found a stone in the old line, with pointers around. He further proved by two witnesses, that about the time, and before the deed from George M. Hartman to John Hartman was executed, on the same day, the land described in plat A C I L was surveyed at the instance of the said George M. Hartman, for the purpose of dividing it between the defendant and one of the witnessses, Alexander Hartman, and, at that time, the black-oak was marked as a corner, and that the line C I was then marked. There was evidence tending to show that, after the date of the deed to the defendant, the bargainor, George M. Hartman, recognised the said line C I as the boundary. Plaintiff introduced a witness who swore that he heard the bargainor, George M. Hartman, say, before the deed was made, the surveyor told him there was a mistake in making the corner where he did, but that the bargainor could measure a rod or two from the black-oak and make a corner. It was further in proof that it was the object of the bargainor to divide the land equally between his sons, John and Alexander Hartman, but that he did not make a deed to Alexander for the part intended for him. Running by the plaintiff's call, the distance gives out at B, and running by the defendant's call, it gives out at the same point. If the line B J is adopted, then the tract which the defendant gets, will contain 99 acres, and the plaintiff 102; but, if the line C I is adopted, the defendant gets 107 acres, the plaintiff 94.

The plaintiff's counsel requested the Judge to charge the jury, that notwithstanding the line C I was run and marked first, before the deed was made, yet, if the bargainor ascertained that there was a mistake made in the survey, and it included more land in it than he intended to convey, he had a right to change the corner to some indefinite point according to the course and distance, and, if that were true, that the black-oak at C would not be the corner, but that it would be at B, the end of the distance called for in the defendant's deed.

His Honor declined giving the instruction as prayed for, but charged the jury that notwithstanding the black-oak was not called for in the deed, yet, if it was marked as a corner to the land conveyed, the line should be extended to the black-oak, regardless of course and distance. Plaintiff excepted.

Verdict and judgment for defendant. Plaintiff appealed.

Fleming, for the plaintiff.

Jones, for the defendant, cited *Cherry* v. *Slade*, 3 Murph. Rep. 86, reviewing the cases of *Bradford* v. *Hill*, 1 Hay. 22, *Burton* v. *Christie*, 2 Tay. 118, *Standen* v. *Bains*, 1 Hay. 238, *Person* v. *Rountree*, Mart. Rep. 18, S. C. 1 Hay. 378, *Johnson* v. *House*, 2 Hay. 301, *Blount* v. *Benbury*, 2 Hay. 353, ——— v. *Beattie*, 1 Hay. 376. He also cited *Reed* v. *Shenck*, 2 Dev. 76.

Pearson, J. George M. Hartman, for the purpose of dividing a tract of land between two of his sons, in the morning of the day on which he executed the deed in question, caused a survey to be made, in pursuance of which, a black-oak was marked as a corner, at one end of the dividing line; trees along the line were then marked, and a stone was set up with "pointers around" at the other end; afterwards the deed was executed. Its calls are, "beginning at a post-oak, one of the old corners, south with Smith's line 145 poles to a stone, and ——(a blank) a new corner, east, 110 poles, to a stone on the old line, north with the old line, 145 poles, to a white-oak, west 110 poles to the beginning." The question is, does the

deed extend to the "black-oak," or does it stop at the end of the distance? There was evidence, that after these two corners were made, and the line was marked, and before the execution of the deed, the surveyor informed George M. Hartman "there was a mistake in making the corner which he did, but that the bargainor could measure back a rod or two from the *black-oak*, and make a corner." His Honor was requested to charge, that if the bargainor, before he made the deed, ascertained that there was a mistake, he had a right to change the corner, and adopt, for the corner, a point at the end of the distance, instead of the "black-oak," and the point adopted would be the true corner. This was refused, and his Honor charged "that notwithstanding the *black-oak* was not called for in the deed, yet, if it was marked as a corner to the land conveyed, *at the time of the conveyance*, the line should be extended to it, regardless of course and distance." In this there is error. His Honor misconceived and misapplied the rule laid down in *Cherry* v. *Slade*, 3 Murph. Rep. 82. "Where it can be proved that there was a line actually run by the surveyor, which was marked, and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed." This rule presupposes that the patent or deed is made in pursuance of *the survey*, and *that the line was marked*, and the *corner that was made* in making the *survey*, was adopted and acted upon in *making the patent or deed*, and therefore permits such line and corner to control the patent or deed, although they are not called for, and do not make a part of it. Parol evidence being thus let in for the purpose of controlling the patent or deed, by establishing a line and corner not called for, as a matter of course, it is also let in for the purpose of showing that such line and corner was not adopted and acted on in making the patent or deed, because the rule presupposes this to be the fact. For this reason we are inclined to the opinion that the rule is confined to patents or grants by the State, where the law requires the survey to be made, and the Secretary of State to make out the grant in

pursuance thereof. Or possibly it may extend to *old deeds, ex necessitate*, where the growth of the marked corners and line-trees show that the survey had been made for the purpose of making the deed. The cases that we have examined where the rule is acted on, are all in reference to the location of patents. Such seems to have been the opinion of RUFFIN, J., who says, *stakes* have never yet varied the construction; *marked trees*, though *not called for*, *have*, when they were proved by the *annual growth* to have been marked for the particular tract. To relax the rule still further would be to let in an inundation of fraud, perjury and alteration of land marks." It is possible that the word "deed" has been interpolated into the rule in the many repetitions made of it, as a *dictum;* certainly, the reason upon which it is based does not apply as strongly to deeds, as to grants, and as it is a violation of principle, we are opposed to its extension.

It is not necessary, however, to express a decided opinion, or to prosecute the investigation far enough to form one, because in this case, the plaintiff offered to show that the line and corner were not adopted or acted upon in making the deed, and consequently the rule had no application admitting it to be extended to deeds of recent date. Besides, the evidence offered, that the bargainor had his attention called to the mistake, before he executed the deed, there is, in this case, the further fact, that the deed calls for "a stone and ——— blank a new corner" at the end of the distance, which is inconsistent with the fact that the "black-oak" was adopted and acted upon as the corner in making the deed; for if so, as it had been marked that very day, why was it not called for in the deed as the new corner intended? This was matter for the jury, and the charge, "if it (the 'black-oak') was marked as a corner to the land, conveyed at the *time of the conveyance*, the line should be extended to it," was erroneous, and misled the jury, taken in connection with the refusal to charge as requested. It was admitted that the black-oak had marks on it, as a corner, at the time of the conveyance, but the point was, did the bargainor adopt the black-oak as the

corner in making the deed, or did he reject it and adopt a stone, or the point at the end of the distance?

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

TOBIAS KESLER *v.* DANIEL KERNS.

An arbitration bond, after providing for the submission and award, concludes: "The decision of the whole, or any two of them, *shall be binding,* then the above obligation to be void; otherwise," &c. It was *Held,* that this was a condition for the performance of the award.

In a suit upon an arbitration bond, the validity of the award is not put in issue by the pleas of "conditions performed and not broken."

THIS was an action of DEBT, tried before CALDWELL, J. at the Special Term, (December, 1857,) of Rowan Superior Court.

The plaintiff declared upon a penal bond, executed by the defendant, of five thousand dollars, with the following condition: "The condition of the above obligation is such that, whereas, the above bounden Daniel Kerns hath this day contracted and agreed to choose one man, by the name of R. J. Holmes, and Tobias Kesler, another man by the name of S. J. Peeler, and they two have chosen another man named George Lyerly, who, in connection with them, shall arrange all the differences and make all settlements outstanding between them, and all matters and claims of both parties connected with the mills and mill-property now in dispute, of which the said chosen parties are to decide, and the decision of the whole, or any two of them, shall be binding, then the above obligation to be void; otherwise, to remain in full force and effect." To this declaration, the defendant pleaded "conditions performed and no breach."

The plaintiff produced, in evidence, an award signed by all the arbitrators, directing the defendant to pay the plaintiff a certain sum, and which he also proved had been demanded, but not paid. The recovery was opposed, upon the ground

that there was no obligation on the face of the bond, that the defendant should perform the award, but only to submit to one. He also objected on account of the vagueness and uncertainty of the award, which he insisted created no duty or liability to be performed by the defendant to the plaintiff. But his Honor was of a different opinion upon both points, and so charged the jury. The defendant's counsel excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

Fleming, for the plaintiff.
Boyden, for the defendant.

PEARSON, J. The bond has this clause: "the decision of the whole, or any two of them, *shall be binding*, then the above obligation shall be void; otherwise, to remain in full force and effect."

This, we think, is a condition for the performance of the award. That is the only way in which the *decision* could be *binding*.

The only pleas are "conditions performed and not broken." These do not put the validity of the award in issue; so the objections urged against it are not presented.

PER CURIAM, Judgment affirmed.

WILLIAM CAIN *v.* JOSEPH A. HAWKINS, *Administrator of* WILLIAM HAWKINS.

A creditor cannot charge as a *devastavit* in an administrator, an act done by his consent and with his concurrence.

ACTION of DEBT, upon an administration bond, tried before PERSON, J., at the last Fall Term of Davie Superior Court.

The plaintiff assigned as a breach of the defendant's bond, the non-payment of a debt, due him, of three hundred dollars.

At the return term of the suit, it was referred, by consent, to *Mr. Bingham*, as a commissioner, to state an account of the assets in the hands of the administrator. The report of the commissioner was returned to the last term, and exceptions to the same were filed by the plaintiff, to one item in the account, which is the sole matter of controversy. The exceptions are: 1st. That the commissioner charged the defendant with only $100 for the negro Sam, whereas, by the evidence taken in the cause, he was of the value of $850.

2nd. That the commissioner did not report that the defendant, in selling, as administrator of William Hawkins, the property of his intestate, was guilty of gross negligence in selling the slave Sam for $100.

Sam had been the nurse and constant attendant of John P. Hawkins, a son of the intestate, a cripple, who was unable to help himself, and when he was about to be offered for sale, much sympathy was expressed for him in the crowd of by-standers, and many persons said that "Sam must be bought in for John Hawkins." A subscription was drawn up and signed by divers persons there present, and by the plaintiff amongst the rest, to the effect that, if the slave Sam could be bought for J. P. Hawkins at a sum under four hundred dollars, they would go in as his sureties. When the slave Sam was put up, he came forward, lifting the cripple J. P. Hawkins, and placed him in the piazza where the selling was carried on; the crier called the attention of the crowd to J. P. Hawkins' condition, and then said, "J. P. Hawkins will give $100 for Sam, who will bid any more?" The crowd cried, "knock him off! knock him off!" No one bid any more, and he was knocked off to J. P. Hawkins at that price.

The plaintiff contended that the defendant was guilty of a devastavit, in permitting the slave to be sacrificed to a mistaken sympathy, amounting to an illegal combination.

The defendant replied, that the plaintiff himself was privy to this combination, and one of the promoters of the feeling to which the slave was sacrificed, and that he was concluded from complaining of the act.

To this, plaintiff rejoined, that he was misled in that respect by the public announcement, in the presence of the administrator, that the estate was good for its debts without Sam; that he was particularly misled by hearing the crier, who was the agent of the defendant, make that declaration at the time of the sale.

The testimony on these points was reported in full by the commissioner, and is quite voluminous. The portion of it bearing immediately on the matters in question, is recited by the Court in declaring its opinion. The Court below overruled the exception and confirmed the report. From which the plaintiff prayed and obtained an appeal.

Jones, for the plaintiff.
Boyden and *Clement*, for the defendant.

BATTLE, J. We are clearly of opinion that the exception of the plaintiff cannot be sustained. The testimony shows, beyond doubt, that he was present at the sale of the slave Sam, and concurred in the generally expressed desire that John P. Hawkins should buy him at an undervalue. He was one of those who signed the agreement to become one of the said John's sureties, provided the slave did not sell for more than four hundred dollars. Surely, after being, in part, instrumental in bringing about the result of the sale, he cannot be permitted to charge the administrator with a *devastavit* for not preventing it. But the plaintiff says, that he was induced to do so by a false representation made to him, that the estate of the intestate was amply sufficient to pay all the debts, and of course his among the rest. It is not proved, to our satisfaction, that if any such representation was made to the plaintiff, or publicly to the persons who were present at the sale, it was made by the defendant, or by any person authorised by him to make it. It is true, that some of the witnesses for the plaintiff, testify that they heard the crier make such a declaration when he offered the slave for sale, but it is positively denied by the crier himself; and the clerk who kept

the account, and several other persons, who were standing by at the time, testify that they did not hear the crier say any thing about the condition of the estate. The burden of proof is upon the plaintiff, and he has failed to sustain his allegations. It is unnecessary, therefore, for us to express an opinion as to the law applicable to the case, had the facts been proved. The only question of law upon which we do give an opinion is, that the plaintiff cannot charge as a *devastavit* in the administrator, an act which was done not only by his consent, but by his concurrence.

PER CURIAM, The order of the Court below, overruling the exceptions of the plaintiff and confirming the report, is affirmed; and this will be certified to the said Court, to the end, that such further proceedings may be there had in the cause as the law requires.

STATE *v.* DANIEL RAMSEY.

Where the deceased took hold of the bridle-rein of a horse, on which the prisoner was mounted, (who was about to go home from the place where they were,) and held it forcibly for from ten to forty-five minutes, in spite of the efforts of the prisoner to loosen the rein, and the prisoner, at the end of that time, struck the deceased with a gallon jug of molasses, which he casually had in his hands, several violent blows, the first of which knocked the deceased down; on death ensuing from these blows, it was *Held* to be manslaughter and not murder.

INDICTMENT for MURDER, tried before DICK, J., at the Fall Term, 1857, of Burke Superior Court.

The prisoner, Daniel Ramsey, was indicted for the murder of Benjamin Walker. The evidence for the State was as follows:

The prisoner and the deceased had been drinking together

in a grocery, an hour or two before the homicide; they both lived in Burke county, some miles from Morganton—were neighbors, and distantly related.

John Presnel swore, that an hour or two before the homicide, he sold the prisoner a gallon of molasses, and put it in a stone jug, which it did not quite fill.

Robert Brittain testified, that he handed the prisoner, who was on horse-back, a bag with a jug in it, which appeared to have something in it; that he rode off some twenty or thirty paces, when Walker, the deceased, called to him, and requested him to stop and come back, that they might take another drink together; that he stopped, and Walker, who was quite drunk, went to him; that the next thing he saw of them, Walker was lying on the ground, and the prisoner was getting on his horse; he thought that the prisoner was sober; that not more than fifteen or twenty minutes elapsed from the time he handed Ramsey the jug, before he saw Walker lying on the ground and the prisoner riding off.

John Ferree stated, that Walker called to the prisoner to stop, and went to him where he was sitting on his horse; the next thing he saw was the deceased lying on the ground in the street, and the prisoner riding off; that according to his judgment not more than ten minutes elapsed from the time Walker went to the prisoner, until he saw prisoner riding off.

Joshua Setzer stated, that he was in his shop near the street, and saw the parties together in the street near his shop. Walker was drunk, and had his hand on the bridle of the prisoner's horse, and was insisting on the latter's going back with him to the grocery to take another drink, which the prisoner refused to do. He stated further, that a few minutes afterwards he saw that the bridle was loose from the hand of Walker, and Ramsey was trying to ride off, but before he could do so, Walker again caught the bridle; that the prisoner then got off of his horse and struck Walker a blow with the jug as it was in the bag, and they both fell to the ground; that they both arose about the same moment, when the prisoner struck the deceas-

ed a violent blow in the face with the jug contained in the bag, and the latter fell to the ground, apparently lifeless; that the prisoner then struck the deceased with the same instrument two violent blows as he was lying on the ground, which broke his nose and mashed it down; that the prisoner then got on his horse and rode off; that Walker, after a while, was removed to a house where he died a few days afterwards. This witness was of opinion that a quarter, or perhaps half, an hour elapsed from the time he first saw the parties near his shop until Walker was knocked down.

Mrs. Hennessee deposed, that she saw the prisoner and Walker in the street near her house; that Walker had the prisoner's horse by the bridle; that the prisoner asked him to let it go, but the deceased said he would not, and that Ramsey must go back and get some more liquor; that the prisoner still refused to go back and attempted to get the bridle loose from Walker; the latter held on till the rein broke; that the prisoner then swore he would make him let go; that he then got off from his horse and struck Walker with the jug. The witness thought they were wrangling half an hour or three quarters before the blow was struck. She was asked what she meant by "wrangling," to which she replied, she meant "that the prisoner was trying to make Walker let his rein loose, and Walker was holding on, insisting on the prisoner's going back and taking another drink.

Knox Tate stated that, when he came to where the parties were in the street, they were standing still; Walker had the prisoner's horse by the bridle; that the prisoner attempted to get the rein from Walker and it broke; the prisoner swore he could not stand that, and getting off from his horse, struck the other with the jug and knocked him down; that he gave him two violent blows in the face with the jug after he was down, as he was lying on the ground; that the prisoner said "damn you, lie there," and, getting on his horse, rode off.

Doctor Tate stated, that seeing the deceased lying in the street very bloody, he had him removed to a house and examined him; that his skull was broken above the right eye,

and that his nose was broken and mashed down, until it was on a level with his cheek bones; that Walker died a few days afterwards from the wounds he had received. This witness further stated, that he had seen one gallon of molasses put into a stone jug and weighed, and that the weight was eighteen pounds; that he considered it a deadly weapon.

The Court charged the jury, that a stone jug containing a gallon of molasses and put into a bag, by which it might be used with more force, was a deadly weapon, in the hands of a man of ordinary strength, and was likely to produce death; that if they believed the testimony, the provocation was slight or trivial, and if they further believed, that the prisoner knocked the deceased down with the jug as described by the witnesses, and while he was on the ground inflicted two violent blows with the jug on the face of the deceased, breaking his skull and crushing his nose, thereby producing his death, it was a degree of violence, out of all proportion to the provocation given by the deceased, and was a case of murder. Prisoner's counsel excepted. The jury found the prisoner guilty of murder. Judgment was pronounced, and the prisoner appealed.

Attorney General, and *K. P. Battle*, for the State.

No counsel appeared for the prisoner in this Court.

BATTLE, J. There are some cases of homicide which are so near the dividing line between manslaughter and murder upon implied malice, that it is difficult to ascertain on which side they are to be found. The present case is one of that number, and it is only after a full examination of various instances of killing upon provocation more or less slight, and reflection upon the principles on which they have been decided, that we have been enabled to determine in which grade of guilt it is to be classed. In the case of the *State* v. *Curry*, 1 Jones' Rep. 280, we attempted the difficult task of stating, with some precision, the general rule, with the exceptions to it, which the Judges and the sages of the law have establish-

ed upon this subject. The general rule is, that a killing upon provocation is not murder, but manslaughter. But there are three well-defined exceptions:

"1. Where there is provocation, no matter how strong, if the killing is done in an unusual manner, evincing thereby deliberate wickedness of heart, it is murder.

"2. Where there is but slight provocation, if the killing is done with an excess of violence out of all proportion to the provocation, it is murder.

"3. Where the right to chastise is abused, if the measure of chastisement, or the weapons used, be likely to kill, it is murder."

His Honor in the Court below thought this case came within the second exception to the general rule, and the question is whether the circumstances, under which the homicide was committed, justify his opinion.

In the consideration of this question, the first inquiry which is to be made is, whether the provocation which the prisoner received before he struck the fatal blow, is to be deemed a slight or trivial one, as it was held to be by his Honor. The injurious and unlawful restraint of a person's liberty, is undoubtedly considered a provocation of a grade sufficient to extenuate a killing; as where a creditor placed a man at the chamber-door of his debtor with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him; and the debtor stabbed the creditor, who was discoursing with him in the chamber, it was held to be manslaughter only; *Rex* v. *Buckner*, Style's Rep. 467. So, where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison; the fifer resisted; and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war and they were not proved. "BULLER, J., considered it in two lights; first, if the sergeant had authority; and secondly, if he had not, on account of the coolness, deliberation and reflection, with which the stab was given." The jury found the prisoner

guilty of murder; but the Judges were unanimous that, as the articles of war were not proved, to show the authority of the sergeant to arrest, the conviction was wrong; *Rex* v. *Withers*, reported in 1 East's P. C. p. 233. See also 1 Russ. on Cr. and M. 488. The same doctrine was recognised as law in this State, in the case of the *State* v. *Craton*, 6 Ire. Rep. 173, where the two cases, above mentioned, were cited with approbation. It is not stated in either case, whether the illegal restraint of the prisoner's liberty was deemed a slight or a great provocation; but we must suppose that it could not have been either slight or trivial in the case of *Withers*, else the Judges would hardly have been unanimous in holding that an act of stabbing with a very deadly weapon, done apparently "with coolness, deliberation and reflection," was only manslaughter. The circumstances under which the homicide was committed in the present case, made out a case of provocation, certainly not less aggravated than in that of *Withers*. The parties were neighbors, friends, and distant relatives, and had been drinking together in a friendly manner only a short time before the fatal transaction. The prisoner got his horse, mounted him and took his bag, having in it a jug containing a gallon of molasses, and started home. He had proceeded about twenty or thirty steps, when the deceased, who was drunk, called to him to stop and come back and take another drink. He did stop, and the deceased came up and took hold of the reins of his bridle and would not let him go. The prisoner tried to get loose, but the deceased held on until the bridle-rein broke. He then became angry and got off his horse and struck the deceased with his jug in the bag.

This was from ten minutes to three quarters of an hour after the deceased stopped the prisoner, the witnesses differing as to the length of time the parties were together before the blow was struck. When that was done, both the prisoner and the deceased fell to the ground, and, upon rising, the former knocked the latter down again with the jug, and then struck him, while down, two more blows with the jug which

was still in the bag. The prisoner, then saying to the deceased, "damn you, lie there," mounted his horse and rode off. It cannot be denied that the act of the deceased was an illegal restraint of the prisoner's liberty, nor that his holding on to the prisoner's bridle-rein, against his remonstrances, until the rein broke, was well calculated to excite his passions, and they naturally prompted him to strike the deceased with what was most convenient, which was the jug in the bag then in his hands. The fall was well calculated to excite his passions still higher; and then, to strike again and again with what he still held in his hands, was the impulse of blind fury. There was no appearance of "coolness, deliberation and reflection," in his conduct, and the exclamation which follows, "damn you, lie there," was the dictate, and the evidence, of the *furor brevis*, which had just so fatally expended itself. That the act of the prisoner was highly culpable, no one can deny, yet no one can say that it did not proceed from the transport of passion naturally excited by the unlawful conduct of the deceased. It was the act of an *infirm* human being, during the brief period when the sway of his reason was disturbed, and before it could be calmed by reflection. He did not seek an instrument of death; and though he used a deadly weapon, it was one which the deceased, by making it necessary for him to dismount, compelled him to have in his hands at the moment.

We do not think that the provocation was slight, nor was it great. It was sufficient to arouse passion even in an ordinarily well-balanced mind, and the killing, though done with an excess of violence, was not out of all proportion to the provocation. Our opinion, therefore, is, that the conviction for murder was wrong, and as it was produced by an improper charge from the Court to the jury, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

MATILDA A. EVERTON *v.* MAJOR EVERTON.

In order to entitle a petitioner to a divorce under the 39th chap. of the Rev. Code, the charges contained in the petition ought to be in legal language, and to be articulate and certain as to acts, persons, times and places.

Cruelty towards the children of a wife by a former husband, especially if not charged as an intentional insult or indignity to her, is not a ground for a partial divorce.

Ill breeding, coarse and insulting language, jealousy and charges of adultery, not accompanied with acts or threats of violence, or by an abandonment of the marriage bed, were *Held* not sufficient ground for such a divorce.

Violent and cruel conduct in the husband in chastising slaves, near the sick room of his wife, whereby her indisposition was greatly aggravated, *not charged as having been intended to annoy, harass or insult her*, was *Held* not sufficient to entitle her to relief.

PETITION FOR DIVORCE AND ALIMONY.

APPEAL from an interlocutory ORDER of the Superior Court of Perquimons county, Judge CALDWELL presiding.

The petition, after the formal part, is as follows: "That sometime in the fall of 1852, a marriage was contracted, and duly solemnised, between your petitioner and the defendant Major Everton, now of the county of Currituck.

"Your petitioner further showeth that, from the time of her marriage with the defendant, she lived with him in the town of Elizabeth City, performing, in all things, faithfully, her duty as his wife, until sometime in the month of December, 1853; that the defendant then removed to the county of Perquimons, and took your petitioner with him; that your petitioner remained with him in the last county mentioned, and at all times and in all things discharged her duty, until sometime in the month of June, 1854, when she was compelled to flee from, and abandon the home of, the defendant, on account of his great neglect of, and his cruel conduct towards, your petitioner and her children by a former marriage.

"Your petitioner shows your Honor that soon after her intermarriage with the defendant, your petitioner discovered that the defendant did not entertain for her those feelings of love

and affection which he had induced her to believe, from his promises and conduct upon their marriage, that he did entertain, and that after their marriage, and before they removed from Elizabeth City, the defendant became morose and irritable; that often in her presence, and in the presence and hearing of other persons, he abused her verbally, using many low and vulgar epithets; that his language to her was frequently of the lowest and most vulgar character; that either defendant became, or affected to be, jealous of your petitioner, and accused her of illicit intercourse with divers persons, sometimes in her presence, and often to other persons,—all of which your petitioner avers was unfounded and without any cause on her part; for that she never at any time, either in the presence of the defendant, or while he was absent, acted toward, or spoke of, any person in any manner calculated to excite suspicion of improper conduct on her part, or otherwise than compatible with the strictest virtue. Your petitioner shows that the defendant, although he had often promised to treat with the greatest care and kindness her four children, (who were children by her former marriage,) soon became unmindful of his promises and often treated them with the most marked unkindness, and even cruelty; that he whipped one of her said children very severely without any reasonable excuse or provocation, and threatened to kill, or stamp to death, another one of the petitioner's children; that, although her said children, four in number, had sufficient property in the hands of their guardian to support them comfortably, who had contracted with the defendant for their board, and were not dependent upon the defendant for a support, yet your petitioner shows that the defendant became so unreasonably incensed against one of her said children, that she was compelled to send him, her said child, to live with a relative at a distance from the defendant; that he often threatened to send away, from his house, the other children, and one of whom was a child of very tender years, entirely too young to be in the keeping of any other person than a mother or some kind female relative.

"Your petitioner further shows that the defendant often used, in the presence and hearing of her daughter, then about fifteen years old, very low and vulgar language; that the defendant often told your petitioner to leave his house, stating that she should stay there no longer, at the same time charging your petitioner with illicit intercourse and intimacy with other men, and alleging that she was idle and extravagant; all of which charges and accusations your petitioner avers have been made against her without any foundation in truth, or any just cause, for that she was at all times attentive to the property under her control.

"Your petitioner shows that, upon one occasion, while living with the defendant in the county of Perquimons, and while your petitioner was ill and confined to her bed, the defendant became so lost to all sense of self-respect and his duty to petitioner, as to shoot with a gun, in her hearing, a very valuable negro woman, belonging to the said children of your petitioner, and threatened to kill her, and, on the same day, attempted to enter, by force, the room wherein petitioner was ill, to kill said slave, as he then said; that the defendant, not being content with so cruelly treating the said negro slave, he, while your petitioner was still ill and confined to her bed, tied, or caused to be tied, two of his own slaves, one of them grown, and the other one nearly so, and brought them, or had them brought, into the porch, or under the window of his dwelling, immediately adjoining the room in which your petitioner was lying dangerously ill, and whipped them, or caused them to be whipped, in his presence; that the disease with which she was then suffering, was much aggravated by the cries of the said negroes, and the confusion and noise made by defendant; that from the severity of the disease much increased, as your petitioner avers, it was, as advised by her physician, by the gross neglect of the defendant and his unfeeling conduct in shooting the slave as aforesaid, and whipping the slaves aforesaid, your petitioner's mind was very much impaired, and that she lost from the causes, before stated, her mind, almost entirely; that so much was she affected, that she only recov-

ered her reason after several month's attentive treatment by a skillful physician, and the attention of kind friends after she had been ordered to leave, and had left, the home of the defendant; that when she had thus been ordered and driven from the home of the defendant, and taken a house in Elizabeth City, for herself and her children, neither being the child of the defendant, he forced himself into the house, and then and there used to your petitioner such low and vulgar language as to attract the attention of the passers by, and attract and draw a crowd of persons; that the said abuse of the defendant and his vulgar language was heard at a great distance; that by the cruel conduct of the defendant, his barbarous and cruel treatment of the petitioner, as charged, his verbal abuse, low and vulgar language, often repeated to your petitioner, and his obscene conduct, as charged, the condition of your petitioner, is rendered intolerable, and life burdensome; that she has been a resident of this State for more than three years preceding the filing of this petition, and that the facts, the ground of her complaint, have existed to her knowledge for more than six months prior to the filing of her petition."

The prayer is for a decree of divorce from bed and board, and for alimony.

There was an amendment to the petition, setting forth the amount of the defendant's property.

The defendant filed an answer, denying most of the allegations as stated, and explaining others; but as the act of the assembly of 1856, Rev. Code, chap. 39, sec. 15, confines this Court to the consideration of the sufficiency of the petition, it is not deemed necessary to notice it further.

At Fall Term, 1857, upon the coming in of the answer, his Honor made the following interlocutory order, viz: "Upon the hearing of the bill and answer in this case, it is ordered by the Court that the defendant pay into the clerk's office, of the Superior Court of law for the county of Perquimons, one hundred and fifty dollars, for the benefit of the plaintiff, on or before the 15th day of January next, and in default thereof, the said clerk issue execution in the name of the said plaintiff,

against the defendant, for that sum." From which order, the defendant appealed.

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

BATTLE, J. This cause comes before us upon the appeal of the defendant from an interlocutory order made in the Court below, allowing alimony to the plaintiff *pendente lite*. Prior to the year 1852, such an order was not allowable, as this Court had decided some time before in the case of *Wilson* v. *Wilson*, 2 Dev. and Bat. Rep. 377; but the legislature, in that year, passed an act that authorised the courts, upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. In the act there was no express grant of the right of appeal from such decree, and the court held in *Earp* v. *Earp*, 1 Jones' Equity Rep. 118, that none was intended, and, therefore, none could be allowed. This decision, no doubt, caused the legislature of 1854, in passing the Rev. Code, to make the following provision in the 15th section of the 39th chapter: "In petitions for divorce and alimony, or for alimony, where the matter, set forth in such petition, shall be sufficient to entitle the petitioner to a decree for alimony, the court may, in its discretion, at any time pending the suit, decree such reasonable alimony for the support and sustenance of the petitioner and her family as shall seem just under all the circumstances of the case. And from such an interlocutory decree, there may be an appeal to the Supreme Court, but that Court shall re-examine only the sufficiency of the petition to entitle the petitioner to relief." From this, it appears that the Judge may, in the Court below, receive affidavits, in order that he may determine correctly what is, "under all the circumstances of the case," a just and proper allowance for the petitioner and her family. But it is manifest from the last clause of the section, that upon an appeal, the power of the Supreme Court is more restricted. We can re-examine only "the sufficiency of the

petition to entitle the petitioner to relief"—that is, to determine whether, supposing all the allegations of the petition to be admitted, or to be proved to be true, the Court would be authorised to grant the relief sought. A petition is filed for the purpose of obtaining a divorce *a mensa et thoro*, and also for alimony, under the 3rd section of the 39th chapter of the Rev. Code, and our duty is confined to the enquiry whether the petitioner has set forth in her petition sufficient causes of complaint to entitle her to relief. Now, the 5th section of the same chapter, requires that these causes shall be set forth "particularly and specially," which means that the charges contained in the petition "ought to be in legal language, and to be articulate and certain as to acts, persons, times and places." See *Whittington* v. *Whittington*, 2 Dev. and Bat. Rep. 64.

The third section of the act referred to, specifies several distinct causes for a partial divorce: "If a husband shall abandon his family or maliciously turn his wife out of doors, or by cruel and barbarous treatment endanger her life, or offer such indignities to her person as to render her condition intolerable, or her life burdensome," the Court may grant her a divorce *a mensa et thoro*, and may allow her suitable alimony. The enquiry then, is, whether the petition sufficiently charges such facts and circumstances as will bring her case within the meaning of either clause of the act. She does not pretend that her husband abandoned his family, or maliciously turned her out of doors, so that if she has alleged any cause for relief, it must be that he has, by cruel and barbarous treatment, endangered her life, or that he has offered such indignities to her person as to render her condition intolerable, or her life burdensome.

Before proceeding to the examination of the allegations of the petition, with a view to see whether they sufficiently charge either barbarous treatment of the wife, or indignity to her person, it may serve to enlighten our investigation, if we advert for a moment to the state of the English Ecclesiastical law upon the subject of partial divorces. By that law there

were three, and only three, causes for such divorces, to wit, adultery, cruelty and unnatural practices; Shelf. on Mar. and Div. 364, (33 Law Lib. 192.) The first, adultery, is with us made a cause for a total divorce *a vinculo matrimonii*, Rev. Code, ch. 39, sec. 2; and of the last, it is unnecessary for us to make any remark.

Sævitia, or cruelty, is perhaps the most frequent cause for a partial divorce, and the general ground on which the Court proceeds, in a case of that kind, is danger to the life or health of the party. There must be ill treatment and personal injury, or the reasonable apprehension of personal injury. "In suits founded on cruelty, (says Mr. Shelford, page 427,) the species of facts, most generally adduced, are, first, personal ill treatment, which is of different kinds, such as blows or bodily injury of any kind. Secondly, threats of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these, the court has no power to interfere, and separate husband and wife; it is necessity alone, which has conferred on the Ecclesiastical Court that power, and in regard to self-protection alone, must the exercise of that power be guided. Under any other circumstances, the court cannot put asunder those whom God has joined." Again, after speaking of the effect of a blow inflicted by a husband upon his wife, he says, "But a mere violent act, which occasioned pain and injury to the wife, unaccompanied with any threat or any intentional blow, will not warrant a sentence of separation, for the court has no authority to interfere in cases short of personal violence, or reasonable apprehension of it." See *Neeld* v. *Neeld*, 4 Hagg. Ec. Rep. 270. Again, it is said that "what merely wounds the mental feelings, is, in few cases, to be admitted, where they are not accompanied with any bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attentions and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences undoubtedly; not innocent,

surely, in any state of life, but still they are not that cruelty against which the law can relieve." Shelf. on Mar. and Div. 432, "Words of mere present irritation, however reproachful, (says the same author, at page 430,) will not enable the court to pronounce a sentence of separation." "Passionate words do not, according to the vulgar observation, break bones, and it is better that they should be borne with, than that domestic society should be broken up, and a husband and wife thrown as loose characters upon the world. Words of menace importing the actual danger of bodily harm, will justify the interposition of the court, as the law ought not to wait till the mischief is actually done. But the most innocent and deserving women will sue in vain for its interposition for words of mere insult, however galling; and still less will that interference be given, if the wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation;" see *Oliver* v. *Oliver*, 1 Hagg. Cons. Rep. 409.

It is manifest from these extracts, that, according to the ecclesiastical law of England, a divorce from bed and board on account of cruelty, cannot be obtained, unless the life or health of the wife is endangered, either by personal violence or by such menaces as would excite in a mind of ordinary firmness a fear of personal injury. Our act upon the subject, undoubtedly had reference to the English law. But as we took adultery from among the causes for a partial, and placed it with those for a total, divorce, thereby extending the latter, so we have added to the number of causes for the former, to wit, the abandoning of his family by a husband, or his maliciously turning his family out of doors. We have also, as we think, enlarged the meaning of the term "cruelty," by making it embrace, besides cruel and barbarous treatment, endangering life, such indignities to the person as make the wife's condition intolerable, or her life burdensome. Hence, we held in *Coble* v. *Coble*, 2 Jones' Eq. Rep. 392, that an indignity to the person did not necessarily imply a striking, or even touching, the body, but that a charge of adultery, accompanied by a withdrawal from the wife's bed, and threats of violence,

were sufficient to constitute the offence. The latter circumstance was sufficient to have brought the case within the English rule; but independent of it, we are strongly inclined to think, that a persistive charge of adultery against a virtuous woman, accompanied by a contemptuous declaration, that she was no longer his wife, and by an abandonment of her bed, is such an indignity to her person, as would entitle her to a partial divorce and to alimony. Whether any other circumstances of insult and injury, short of violence to, or threats against, her person, would be a sufficient ground of relief, and if any, what, it is not necessary for us now to say. If there be any such, they must have, as an essential ingredient, a wilful and malicious intent to offer insult, and do injury, and such intent must be alleged and proved. A wrong inflicted from mere thoughtlessness, or without due consideration for the feelings or situation of the wife, may deserve censure, but in the absence of malicious intent, it cannot be allowed the effect of sundering the strong bond of marriage.

This review of the English, and our, law, upon the subject of cruelty and indignity to the person, will enable us to determine whether the present petitioner has set forth in her petition, "particularly and specially," causes sufficient to entitle her to the aid of the court.

Before entering minutely into an examination of the facts charged, we feel bound to say, that the whole petition is obnoxious to the objection of too great vagueness and uncertainty in its statements; that it is wanting in particularity and certainty as to "acts, persons, times and places."

But, notwithstanding this general objection, it may be upheld, if it specifies, in any part of it, such facts as show a sufficient ground for relief. The facts which seem to be relied on for that purpose, may be divided into three classes.

First. The defendant's cruel treatment of the children of the petitioner by a former marriage.

Secondly. His abusive and insulting language to her and in her presence.

And thirdly. His abusive treatment of certain slaves near

her room while she was sick, and which treatment aggravated her disease, and thereby endangered her life.

1st. The charge of cruel conduct towards the children may be dismissed with a single observation. Even supposing such conduct might amount to an indignity to his wife's person, if it were intended as an insult to her, which we are not prepared to admit, there is no allegation that it was so intended. So far as appears, it may have been the effect of a mere ebullition of passion unduly excited, or an unreasonable dislike to one or more of the children. It vented itself upon the children, which no doubt wounded her feelings, but cannot, in any fair sense, be deemed an indignity to her person.

2nd. The charge of an imputation of adultery is made in general terms, without the specification of time, place and circumstances. She says that her husband "either became jealous, or affected to be jealous, of her, and accused her of illicit intercourse with divers persons; sometimes in her presence, and often to other persons." And in another part of her petition, she states that he "often told her to leave his house, stating that she should stay there no longer, at the same time charging her with illicit intercourse and intimacy with other men." But she no where intimates that he ever used violence to her person, or threatened to do so; that he ever abandoned her bed, or ceased to live with her as his wife; or that she became so indignant at such insulting imputations, that she left his house in consequence of them. Under these circumstances, we cannot give to this charge alone, and unconnected with any other, the force of being such an indignity to her person, as to render her condition intolerable and her life burdensome.

3rd. The last charge, or rather class of charges, is the one about which we have had the most difficulty. The petitioner alleges, that on one occasion, while she was living with the defendant in the county of Perquimons, "she was ill and confined to her bed, and the defendant became so lost to a sense of self-respect, and his duty to her, as to shoot with a gun, in her hearing, a very valuable negro woman belonging

to her children;" and on the same day, after threatening to kill the negro, he attempted by force to enter the room where the petitioner was confined, for the purpose, as he said, of killing said negro woman. And while she was still ill and confined to her bed, he tied, or caused to be tied, two of his slaves, and brought them into a porch, adjoining her room, and whipped them, or had them whipped there. She alleges that the consequence of such conduct was, that her mind became very much impaired, and she only "recovered her reason after several months' attentive treatment by a skillful physician, and the attention of kind friends, after she had been ordered to leave, and had left, the home of the defendant."

If these facts had been charged by the petitioner to have been done by the defendant for the purpose of annoying, harassing or insulting her, they might, taken in connection with the imputation of adultery, have made out a proper cause for a divorce. But, so far as appears from the petition, he may have had good cause for inflicting punishment upon the slaves, and the only error he committed was in using an improper instrument with which to punish the first, and to have selected an improper time and place for chastising the others. She does not say expressly, but only leaves it to be inferred, that he knew of her sickness, or that his conduct was calculated to aggravate her disease. She makes no positive averment that he, on that occasion, or at any time during her illness, ordered her to leave his house, but leaves that also to be inferred argumentatively from her account of her recovery, "after she had been ordered to leave and had left the home of the defendant." The language is singularly vague and indefinite upon this point of her being ordered to leave the defendant's house. She does not say distinctly by whom she was ordered, or when the order was given; she recites it as a mere incidental transaction, without any specification of time, place, person or circumstance.

We are, therefore, constrained to say, that none of the allegations, contained in the third class of charges, are, either alone, or in connection with the other charges, sufficient (or

at least sufficiently stated) to entitle the petitioner to the relief which she seeks.

The interlocutory order, from which the appeal is taken, must be reversed, and this must be certified to the Court below as the law directs.

PER CURIAM, Interlocutory order reversed.

WILLIAM SMITH, *Executor of* JAMES M. MINNIS, *v.* MERRIT CHEEK.

The Supreme Court has no power to issue a writ of error.

THIS was a petition for a writ of ERROR, filed upon notice given to the defendant in error, and assigning various errors in the record of a suit lately pending in the Superior Court of Orange county, wherein the present defendant in error was plaintiff, and the present petitioner, as the executor of James M. Minnis, was defendant.

As the opinion of this Court is founded entirely upon the want of authority in the Supreme Court to issue the writ prayed for in the petition, it is deemed unnecessary to set out the grounds upon which the application is based.

The cause was argued by *Fowle*, *K. P. Battle* and *Bailey*, for the plaintiff in error, and *Graham* and *J. H. Bryan*, for the defendant.

BATTLE, J. This is a petition, to this Court, for a writ of error, to be directed to the Superior Court of Law for the county of Orange, for the purpose of reversing a judgment rendered in that Court in favor of the defendant in error, against the petitioner, as the executor of James M. Minnis. The counsel for the defendant in error, opposes the petition, upon the ground that this Court has no power to issue a writ of error; and in support of his opposition, he relies upon the cases of *Binford* v. *Alston*, 4 Dev. Rep. 354, and *American Bible Society* v. *Hollister*, 1 Jones' Eq. Rep. 10.

In the first of these cases, RUFFIN, J., in delivering the opinion of the court said, "This Court acquires jurisdiction, as a revising tribunal, by *appeal*, and the extent of that jurisdiction, as well as the manner of exercising it, must necessarily differ in many respects from that which is possessed and exercised by those tribunals which take cognizance of causes by writ of error. In these, a release of error may be pleaded, and on the plea being found, then the judgment is, not that the judgment below be affirmed, for they cannot affirm an erroneous judgment, but that the writ of error be barred. (See 2 Williams' Saunders, 101, and the authorities there cited.) A writ of error is considered as a new action in which the plaintiff may be nonsuited, and when it is brought, contrary to an agreement, the court may compel him to submit to a nonsuit. But, when a case is regularly brought before this Court by appeal, our duty is defined by law, to examine the record, affirm the judgment, if it be correct, or, reversing it as erroneous, render such judgment as, in law, ought to have been rendered in the court from which the appeal was taken." In the latter case, which decided that a bill of review could not be filed in this Court for the purpose of reviewing an enrolled or recorded decree of this Court, PEARSON, J., said, "The Supreme Court has no original jurisdiction, except to repeal letters patent, and its jurisdiction is limited and expressly confined to the power to hear and *determine* questions of law upon appeal, and cases in equity brought before it by appeal or removal; no incidental power or authority is conferred, save only that of issuing such writs and other process as is necessary and proper for the exercise of the limited jurisdiction given to it, that is, to hear and determine cases by appeal or removal." And in another part of the opinion, he says: "No reason can be assigned why cases in equity should be tried a second time in this Court, that does not apply with equal force to the law side; and there can be no writ of error, for error in law, in a judgment of this Court." These remarks cannot have the full force of express adjudications upon the very point under consideration, because they were made *arguendo* only,

but they will be found to be fully sustained by the only admissible construction of the act which established this Court, and conferred upon it its jurisdiction. The original act of 1818, (ch. 962 of the Rev. Code of 1820,) entitled "An act concerning the Supreme Court," after providing for the establishment of the court by the election of three judges, &c., declares, in the 4th section, "that no cause shall hereafter be transmitted to the Supreme Court, except as hereinafter provided, but on appeal of one of the parties thereunto from the sentence, judgment or decree of a Superior Court," &c. The exception referred to in this section, is provided for in the 5th section, which allows of the removal of equity causes under certain circumstances. The supplemental act, passed at the same session of the assembly, (see ch. 963 of the Rev. Code of 1820,) declares, in the 4th section, "that the Supreme Court aforesaid shall have power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*, and all other writs which may be proper and necessary for the exercise of its jurisdiction, and agreeable to the principle and usages of law."

Under these acts, it is clear that the court had no power conferred on it to issue a writ of error. The language is plain and positive that no case at law can be brought before it, but on *appeal*, or by a writ of *certiorari*, which, under certain circumstances, is allowed as a substitute for an appeal; and it follows that any other mode of reviewing the sentence, or judgment, of the Superior Court of law, is necessarily excluded; and so, we learn, was the understanding of both the bench and the bar. The Rev. Statutes, which were passed in 1836, (see 1 Rev. Stat. ch. 33, sec. 6,) uses substantially the same terms in conferring jurisdiction upon the court, only that the different sections of the former acts are there brought together and consolidated in one. The Rev. Code of 1854, (ch. 33, sec. 6,) follows the Rev. Statutes, only adding "or otherwise" to the word "appeal," but it is manifest the terms "or otherwise" were intended to embrace only a proceeding in the nature of, and as a substitute in certain cases for, an appeal, to wit, a *certiorari*, because the provision which follows, is identical

with that contained in the Rev. Statutes, and in the first act of 1818, which is, that "in every case, the court may render such sentence, judgment and decree, as, on inspection of the whole record, it shall appear to them ought in law to be rendered thereon." This is rendered still more certain by the new provisions contained in the 19th section of the same chapter of the Rev. Code, in which it is declared that "bills of review and writs of error in civil cases, for any error apparent in the final decree or judgment of the Supreme Court, may be brought in that court within two years after such decree or judgment shall be recorded or enrolled." It can hardly be conceived that, if the legislature intended to confer upon this Court the power to issue writs of error to the Superior Court, it would not have given it in express terms, instead of leaving it to be inferred from the expression "on appeal or otherwise."

If any further argument be needed to show that this Court has no power to issue writs of error to the Superior Courts, one of no little weight may be derived from the facts that in the original establishment of our court system in 1777, authority to issue such writs to the courts of pleas and quarter sessions, was given in positive and direct terms, and has been continued both in the Revised Statutes of 1836, and the Revised Code of 1854. See act of 1777, ch. 115, (of the Revised Code of 1820,) 1 Rev. Stat. ch. 31, sec. 20; Rev. Code, ch. 31, sec. 17. The case of *Haughton* v. *Allen*, Conf. Rep. 154, referred to by the counsel for the petitioner, does not at all weaken the force of this argument, because it was the case of a writ of error from the Superior to the County Court, and merely decided that the garnishee in an attachment was entitled to the writ for the purpose of reversing, for error, the judgment against him.

There are very good reasons why the power to issue writs of this kind has never been conferred on this Court, some of which are pointed out by RUFFIN, J., in the case of *Binford* v. *Alston*, above referred to. Others may be seen by a consideration of the doctrine of writs of error, which are treated of by Sergeant Williams with his accustomed ability in his

elaborate note to 2 Saund. Rep. 101. See, also, 2 Bac. Abr. Tit. Error; Letter L. p. 497.

As we hold that no writ of error can issue from this Court to the Superior Court, it is unnecessary to consider the errors assigned in the case before us.

PER CURIAM, The petition must be dismissed.

WILLIAM S. HUDSON *v.* JOHN LUTZ *et al*, EXECUTORS.*

Where a grand-son was raised and cared for by a grand-father till he was fifteen years old, the relation rebuts the implication of a promise to pay for work and labor done by the boy on his grand-father's farm.

ACTION of ASSUMPSIT, tried before CALDWELL, J., at the Spring Term, 1856, of Catawba Superior Court.

The plaintiff declared for work and labor done; he was the illegitimate son of a daughter of the defendant's testator, and the mother and son had both lived in the family of the testator from the birth of the plaintiff, to the time of the testator's death, at which time the plaintiff was fifteen years old.

It appeared in evidence that the defendant's testator boarded and schooled the plaintiff; that the schooling was mostly in the winter season; that, after he became able to labor, he worked on the farm, assisted in getting wood, and taking care of stock when not employed in school, and that the testator spoke of him as a good boy, saying at the same time that he would do something for him; that in April, 1848, the testator called on one of the witnesses and told him to draw a note for a hundred dollars, saying that he wished to give it to the plaintiff; that he was a good boy, and he would give him that for the services of that year; that the note was drawn and signed by the testator, but was not delivered, and was

*This cause was decided at the last term of this Court at Morganton, but was omitted from the report of that term accidentally.

found among the testator's papers after his death. There was conflicting evidence as to the value of the plaintiff's services; some of the witnesses rating them as worth $150 a year, while others said they were worth nothing beyond his victuals and clothes. It was proved that his mother made his clothes, and he offered to prove that her services were worth his boarding, schooling, &c., which evidence was objected to by the other side, and excluded by the Court, for which plaintiff excepted.

The Court charged the jury, that the law, under the circumstances, did not raise a promise on the part of the testator to pay the plaintiff for his services, and he could not recover upon an implied assumpsit; but, if they could collect from the testimony, that there was an understanding or engagement between the parties, that the testator was to pay the plaintiff for his services, he would be entitled to recover. Plaintiff excepted.

Verdict and judgment for the defendant. Appeal by the plaintiff.

Hoke, for the plaintiff.
Lander and *Avery*, for the defendants.

PEARSON, J. The evidence in support of the allegation of an express promise to pay for the plaintiff's work, was certainly very slight; and we incline to the opinion, that his Honor would have been justified in telling the jury, there was no evidence to support it. The facts, that the defendant's testator said the plaintiff was a "good boy," had a note for $100 drawn, saying "he wished *to give* it to him," for his services for that year, and afterwards signed the note and left it among his papers, without delivering it, have a tendency to show a contemplated gratuity in respect to the plaintiff's services, rather than a special undertaking to pay for them; consequently, the plaintiff has no right to complain of this part of the charge.

The fact that the mother of the plaintiff performed services in the family, equivalent to his board, schooling, &c., had

no legitimate bearing, and was properly rejected; it was calculated to mislead by serving the purpose of a "make-weight" in getting up an impression that the plaintiff's was a "hard case."

The question then is, under the circumstances of this case, did the law imply a promise to pay the plaintiff for his services?

When work is done for another, the law implies a promise to pay for it; this is the general rule; it is based on a presumption, growing out of the ordinary dealings of men. But an exception is made, whenever this presumption is rebutted by the *relation of the parties.* The case of a parent and child is an exception; also, that of a *step-father* and child; *Hussey* v. *Roundtree*, Busbee 111, "The step-father is not bound to support his step-children, nor they to render him any services; but if he maintain them, or they labor for him, they will be deemed to have *dealt with each other in the character of parent and child*, and not as *strangers.*" The same principle applies to a grand-father and child, when the one assumes to act *in loco parentis.*

In our case, this relation existed to all intents and purposes. The circumstance that the plaintiff was illegitimate, has no bearing on the application of the principle; the "old man," in the fullness of his affection, forgave the transgression of his daughter, and allowed her and her child "to live with him as *members of his family* up to his death." The relation of the parties rebuts the presumption of a special contract, and puts the idea, that he was to be paid for furnishing them a home, or they were to have "a price" for work and labor done, out of the question. In the language of RUFFIN, Judge, "Such claims ought to be frowned on by courts and juries. To sustain them, tends to change the character of our people, cool domestic regard, and in the place of confidence, sow jealousies in families;" *Williams* v. *Barnes*, 3 Dev. 349. In that case, a son, *after* he was *twenty-one years of age*, continued to live with his *mother* and act as overseer for her, and it was held by a majority of the court, that the relation of the parties was a circumstance that ought to have been left

to the jury, as tending to rebut the presumption, that he was to be paid "a price" for his work. In this, the plaintiff had been raised and cared for as a son by his grand-father, and the relation, *per se*, rebuts the presumption of a promise to pay for his services, during his minority. There is no error.

PER CURIAM, Judgment affirmed.

*** His Honor, the CHIEF JUSTICE, was prevented by sickness from attending the court during the greater part of this term, which accounts for the fact that so few opinions of his appear in this number.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1858.

STATE *v.* JACOB JOHNSON.*

The finding of a new bill of indictment for the same felony, varying the terms in which the offence is charged, is simply adding a new count, and the whole constitutes but one proceeding; an order, therefore, for the removal of a cause, applies to the several bills that have been found against the defendant.

Where one count in a bill of indictment charges the offence to have been committed in one county, and another count charges it in another, the general rule is, that the counts are repugnant, and the indictment will be quashed on motion, or the prosecutor be compelled to elect which he will proceed on.

Where a new county is established, by an act of Assembly, out of part of an old one, and the act provides that felonies committed in that territory which is now the new county, shall be tried in the Superior Court of the old county, there is no repugnancy in charging it to have been committed in these two counties, severally, in different counts of the indictment.

INDICTMENT for MURDER, tried before his Honor, Judge CALDWELL, at the last Term of Sampson Superior Court.

This cause was before this Court at June Term, 1855, (2 Jones' Rep. 247,) and for error, apparent in the record of the trial of the cause below, a *venire de novo* was awarded.

*This cause was tried at December Term, 1856, and omitted by accident.

Upon this matter being certified to the Superior Court of Cumberland, to wit, at the Fall Term of that Court, the solicitor for the State sent a new bill of indictment, which was found by the grand jury of that term, and which charged the homicide to have taken place in the county of Harnett, on the 22nd February, 1855. On this indictment he was arraigned and pleaded not guilty. The prisoner then filed an affidavit for a removal of the cause from the county of Cumberland, which was ordered to the county of Sampson for trial.

The record transmitting the cause to Sampson county, sets out the former bill of indictment, which contained two counts; one charging that the felony took place in the county of Cumberland, and the other, that it took place in the county of Harnett; also, the new indictment found at Fall Term, 1855.

On the trial below, the solicitor entered a *nolle prosequi* upon the bill of indictment found at Fall Term, 1855, and the defendant was put on his trial on the original indictment.

Under instructions from the Court, to which there was no exception, the jury found the defendant guilty of murder.

The defendant's counsel then moved in arrest of judgment, upon the ground, that it did not appear from the record that the indictment, upon which the defendant was tried, had ever been ordered to be removed from the county of Cumberland. They insisted that on the pending of the second bill, the other was superseded and put out of the way, so that the order of removal applied only to the second bill of indictment.

His Honor, being of opinion with the defendant on this question, ordered the judgment to be arrested, from which judgment the solicitor for the State, (Mr. Strange,) appealed to the Supreme Court.

Attorney General, for the State.
C. G. Wright and *Shepherd*, for the defendant.

Pearson, J. The motion in arrest of judgment made in the Court below, and the opinion of his Honor, were founded in an entire misconception of the effect of sending a new bill

for the same offence. It was there treated as instituting a separate and distinct proceeding, so that it was considered that the order of removal applied only to the last bill, and carried that alone, to the county of Sampson for trial, leaving the first bill in the county of Cumberland: this we say, was an entire misconception; the effect was simply to add another count to the bill of indictment; the whole constituted but one proceeding, to be treated as if the bill had at the first contained three counts, instead of two. If the counts be inconsistent, it is ground for a motion to quash, or the State may be ruled to elect upon which the trial shall be had; but this is only done to prevent injury to the accused, but never when the counts are only variations in the mode of charging the same offence; and the fact that the counts are all in one bill or in two bills, both being found by the grand jury, makes no kind of difference; *State* v. *Haney*, 2 Dev. and Bat. 390; *State* v. *Tisdale*, ib. 159.

It is upon this ground, that although the solicitor for the State enters a *nol. pros.* upon the first bill, and sends another upon which the prisoner is tried and convicted, he is subjected to the costs of the old bill, both being treated as one and the same bill; *State* v. *Harshaw*, 2 Car. L. R. 251.

The order of removal in this case, carried both bills to the county of Sampson: they together constituted the case to be tried, in reference to which the order of removal was made, so that the trial was well had upon the first bill.

In this Court, a motion in arrest was made, upon the ground, that one count of the indictment charges the homicide to have been committed in the county of Cumberland, and the other count charges it in the county of Harnett, which is repugnant. It would seem that this is a fatal objection, unless there be something *peculiar* in the connection between the counties of Cumberland and Harnett; for, under our system, the issue must be tried by a jury from the county of the venue, and the trial must be had in that county; so it would be impossible to try upon an indictment in which one count charges the offence in Cumberland, for instance, and another count

charges it in Wake. But in regard to the county of Harnett, the statute by which it is created provides, "The Superior Courts of law and equity for the county of Cumberland shall have jurisdiction of all capital felonies, that have been, or shall be committed, in the county of Harnett," A. D. 1854, ch. 9, sec. 10. This removes the difficulty. Harnett county is treated, for the purpose of the trial of capital felonies, as if it still continued to be a portion of the county of Cumberland. There is no repugnancy in the two counts, and only that variation in charging the same offence, for the purpose of meeting any probable state of the evidence as it may turn out on the trial, that has been sanctioned and practiced for ages in drawing bills of indictment as well as declarations. In arson, for instance, one count may charge the house to be the dwelling of A, and another may charge it to be the dwelling of B; this being a collateral circumstance, not directly forming a part of the body of the offence, or affecting the guilt of the prisoner, and it is charged in different ways to permit a variance between the *allegata* and the *probata*.

There is error in the order of the Court below arresting the judgment. This opinion will be certified, to the end that the Superior Court may proceed to judgment and sentence agreeably to the decision of this Court, and the laws of the State.

PER CURIAM, Judgment reversed and *procedendo*.

STATE *v.* WHIT, (*a slave.*)

It is not giving undue weight to the statement of a witness, for the Court, in its charge, to make an explanation protecting him from unjust animadversions of counsel, especially where the erroneous ruling of the Court had afforded the occasion of such animadversions.

Counsel, in the conduct of a suit, have no right to read a statement of facts contained in the report of a former trial of the same case in the Supreme Court, for the purpose of contrasting such statement with the statement of the witnesses in the trial pending.

State *v.* Whit.

Where a Judge in the progress of a trial had promised the prisoner's counsel that one who had been introduced as a *State's witness*, might again be introduced as a State's witness, if the counsel should find it necessary, it was *Held* not to be error to retract such promise, on its appearing that an unfair advantage over the opposing counsel was sought to be obtained in eliciting such promise.

THIS was an indictment for BURGLARY, tried before DICK. J., at the last Fall Term of Chowan Superior Court.

The offense was alleged to have been committed in the smoke-house of Dr. Charles Smallwood, which was within the curtilage of the dwelling-house.

Mr. Lewis Thompson, was produced as a witness for the State. He testified that he went early in the morning to the residence of Dr. Smallwood, on the day after the offense was committed; that in the garden which lies adjacent to the smoke-house in question, he found a track of some person who had passed across the garden and through a gate that opened into the yard; that he could not see the track in the yard owing to the grass, but he found the same track on the outside of the yard, in the road, and followed it to his plantation, a distance of two and a half miles; that he was acquainted with the track of the defendant, and believed it to be his.

The counsel for the defendant then asked Mr. Thompson, if he had ever measured the foot, or the shoe of the defendant, or ever had him in his employment; to each of which questions the witness answered in the negative. He was then asked, if he had ever seen the prisoner before his arrest; to which he also answered that he had not.

The solicitor then asked the Court to permit Mr. Thompson to state how he became acquainted with the track of the defendant, and what were his reasons for believing the track spoken of to be that of the defendant. The Court refused to permit the witness to give this evidence upon the call of the solicitor, but told the defendant's counsel they might call it out if they chose to do so; but this they declined. In commenting on this part of the testimony, one of the defendant's counsel said that "the witness Thompson had asserted with

great confidence that he believed the track seen in Dr. Smallwood's garden was the track of the defendant, and he had not been able to give a single reason for his opinion; that he had never seen the defendant until after he was arrested, and had not measured the defendant's foot or shoe."

The Judge, in the course of his charge to the jury, remarked, that it was due, as an act of justice to Mr. Thompson, to remind the jury that defendant's counsel had the permission of the Court to call for the reasons of Mr. Thompson's belief, and they had declined to do so. To these remarks of his Honor, the defendant's counsel excepted.

During the argument of the cause, one of the defendant's counsel commenced reading the facts of this case as stated in 4 vol. of Jones' Rep. of a former trial in this Court, and was contrasting the testimony, as stated in the reported case, with that delivered by the witnesses, Smallwood and Vaughn, on this trial. To this the solicitor objected, and the Court refused to let the counsel proceed in this mode of discrediting the witnesses. The defendant's counsel again excepted.

Vaughn was examined extensively as to the defendant's confessions, and as to the breaking, &c. At the close of the cross-examination, one of the prisoner's counsel desired to know if they could be permitted to call this witness back and ask him as to another point, if in the progress of the case it became necessary. The solicitor objected to this, unless the counsel would state what the point was to which the proposed examination would be directed; at all events, he objected to the witness being considered any further as a State's witness after being thus called back. The Court, however, informed the counsel that they should have the privilege of again examining Mr. Vaughn if it became necessary.

One *Jordan*, who was the brother-in-law of Mr. Pritchett, the owner of Whit, was produced by the State and examined as to the ownership of the defendant. On being turned over to the defendant's counsel, he was asked what he had heard Vaughn state, on a previous occasion, about the prisoner's confessions. This was objected to by the State's solicitor, be-

cause the preliminary enquiry had not been made of Vaughn. The defendant's counsel then proposed to call Vaughn, under the assurance made to them by the Court, and examine him as to this point. The solicitor objected to Vaughn's being called back in the character of a State's witness; he insisted that the point to which they wished to recall the witness was known when he asked the Court for its permission to call him back; that it had been concealed in order to prevent the State from discrediting Jordan, and to get the benefit of this evidence without losing his right to conclude; that if the preliminary question had been asked on Vaughn's former examination, he should have been aware of what was intended, and proved the ownership of the defendant by some other witness, and that the object of the counsel was to anticipate him in this respect. All this was admitted by prisoner's counsel.

On this point, the Court, being of opinion with the State's counsel, ruled that, under the circumstances of the case, the defendant would not be permitted to call back Vaughn as a State's witness. For which, defendant's counsel again excepted.

The prisoner was convicted, and on judgment being rendered, he appealed to the Supreme Court.

Attorney General and *K. P. Battle*, for the State.
J. Parker Jordan and *H. A. Gilliam*, for defendant.

BATTLE, J. We have examined the alleged error assigned by the prisoner's counsel in his bill of exceptions, with that care which the importance of the result to the prisoner demands, without being able to discover in them any thing which can entitle him to another trial. We will notice the exceptions, in the order in which the counsel has argued them.

1st. The first is that, the presiding Judge erred in the remarks which he made to the jury in relation to the testimony of the witness Thompson. The counsel contends that these remarks were in violation of the act of 1796, (see Rev. Code, ch. 31, sec. 130,) because they were calculated to give undue

weight to the testimony of that witness, and had thus invaded the province of the jury in passing upon his credibility. In support of his position, the counsel relies upon the cases of the *State* v. *Shule*, 10 Ire. R. 153, and *Nash* v. *Morton*, 3 Jones' Rep. 3. In the first of these cases it was held that the Court had no right to lead the jury to a verdict, by an intimation that the testimony was sufficient to support it; and in the other, it was decided that a Judge had no right, by speaking in strong and emphatic language, to give additional force to the positions of one of the counsel, and afterwards to tell the jury that it was a plain case, and if they did not agree, he would detain them until the close of the Court. These were palpable violations of the spirit of the act, but we do not think that they furnish any authority for impeaching the charge of the Judge in the present case. The witness Thompson had stated that he believed that certain tracks which he had seen near the house, where the burglary was committed, were those of the prisoner. This testimony was called out by the solicitor for the State without any objection from the opposite counsel, who, however, immediately asked the witness whether he had ever measured the foot, or the shoe of the prisoner, or had ever had him in his employment, or had ever seen him before his arrest; to each of which questions the witness answered, that he had not. The solicitor then requested the witness to state the reasons that induced him to think that the tracks were those of the prisoner, to which the prisoner's counsel objected, and the Court sustained the objection, but said that the latter might call for the reasons upon which the opinion of the witness was founded, which, however, was declined. In their argument to the jury, upon this part of the case, the counsel for the prisoner sought to weaken the force of this testimony, by remarking that, though the witness had asserted, with great confidence, that the tracks were the prisoner's, yet he could not assign a single reason for it. It was in noticing this argument that the Judge called the attention of the jury to the fact, that he had given permission to the prisoner's counsel to call for the reasons of the witness' belief,

and they declined to do so. This, the Judge said he did in justice to Mr. Thompson. We are clearly of opinion that the Judge acted right, and that, under the circumstances of the case, it was his duty to make the remark which he did. Thompson's opinion about the identity of the tracks which he saw, with those of the prisoner, was, in truth, inadmissible, unless shown to be founded on sufficient reasons, and if objected to, ought to have been rejected. But being admitted without objection, the solicitor had the right to call for the grounds of the witness's belief, and the Judge erred in not permitting him to do so. The prisoner's counsel had no right to complain of it, as it was done upon their objection, nor had they any just cause to complain that the Judge gave them the option to examine the witness, themselves, upon the point in question. The witness himself had the best reason to complain, because he was placed in a false position by the error into which the Judge, at the instance of the prisoner's counsel, had fallen. Surely, then, it was not only the right, but the duty of the Judge, to save the witness from the injurious comments of the counsel, by calling the attention of the jury to the fact, which had occurred in open Court, in the progress of the trial. This was done not for the purpose of giving undue weight to the testimony of the witness, but to ensure a fair and impartial consideration of it by the jury. In doing this, his Honor was fully supported by the case of *Bailey* v. *Pool*, 13 Ire. R. 404, to which we were referred by the counsel for the State. That case states that "in commenting on the defense, his Honor called the attention of the jury to the different circumstances relied upon in the defense, among which was the pressure of Pritchard's arm; that they might in connection with it consider the question put and withdrawn by the plaintiff's counsel." This Court decided that there was no error in so doing, because the putting a question and withdrawing it by the counsel was a fact, transpiring in the course of the trial, brought before the jury by one of the parties, and in relation to the question under investigation. As in *Bailey* v. *Pool*, so in the present case, the jury were at liberty to take

into their consideration what had occurred before them relative to the examination of the witness, and if they could legally do so, the Court, in charging them, had a right to call their attention to it.

2. The second exception is, that the Court would not permit the prisoner's counsel to read to the jury the statement of this case as reported in 4th Jones' Rep. 349, on the application for a new trial by the prisoner after a former conviction. The bill of exceptions states that "during the argument of the cause, one of the defendant's counsel commenced reading the facts in the same case as reported in the Supreme Court, and was contrasting the testimony therein of the witnesses, Smallwood and Vaughn, with their testimony on this trial," when, on the objection of the soliciton for the State, he was stopped by the presiding Judge, who remarked, "that he could not allow him to proceed in that manner, that while the Court conceded to the counsel the right to read to the jury any principle of law laid down by the Supreme Court, still he had not the right to read the facts there stated, for the purpose of contrasting them with the facts now deposed to by the witnesses. The counsel insisted upon his right to read the whole case to the jury, but submitted to the opinion of the Court."

In his argument before us, the counsel insists that his sole purpose was to read the case for the purpose of commenting to the jury, upon the law therein stated, as by the act of 1844, (see Rev. C., ch. 31, sec. 57, cl. 15) he had a right to do. From the facts set forth in the bill of exceptions, we are bound to understand otherwise, and that his object, in contrasting the testimony of the witnesses, as reported, with that given on the trial, was to discredit the witnesses before the jury. So understanding it, we are bound to say that the course of the counsel was wrong, and it was the duty of the Judge to stop him. The facts as stated in the published reports were not in evidence before the jury at all, and the counsel had no right to refer to them for the purpose of impeaching the testimony of the witnesses as sworn to on the trial. The case of

the *State* v. *Oneal*, 7 Ire. Rep. 251, cited by the counsel for the State, shows that if counsel, in their argument, state as facts what has not been proved, the Court, may, in its discretion, correct the mistake at the moment, or in the charge to the jury.

3. The third and last exception insisted on in the argument before us, has reference to the course pursued by the Judge in relation to the examination of the witness Vaughn. It appears from the bill of exceptions, that after this witness had been examined by the State, and cross-examined by the prisoner's counsel, the latter stated that they might wish to examine him upon another point, at a subsequent stage of the trial, and asked permission of the Court that they might recall him as a State's witness if they should find it necesssary to do so. The solicitor objected to this, and asked the counsel to state for what purpose they wished to recall the witness, which they declined to do; but the Court, nevertheless, gave the permission desired. Afterwards, the solicitor for the State introduced a witness, named Jordan, to prove that the prisoner was the property of him who was alleged in the bill of indictment to be the owner. The counsel for the prisoner then, in cross-examination, proposed to ask Jordan what the witness Vaughn had, at a former time, told him about the confessions of the prisoner. This was objected to, because the preliminary question had not been put to Vaughn, and the objection was sustained by the Court. The counsel then proposed to recall Vaughn, under the permission already given, for the purpose of asking the preliminary question according to the decision in *Edwards* v. *Sullivan*, 8 Ire. Rep. 307. The solicitor again objected on the part of the State, and assigned as a reason that the prisoner's counsel knew before that he intended to introduce the witness Jordan, (who was a brother-in-law of the owner of the prisoner,) and the counsel concealed the purpose for which he asked the privilege of recalling Vaughn with a view to get the benefit of Jordan's contradiction of Vaughn, and at the same time, prevent him from being at liberty to impeach Jordan; and further, that

they might still retain the right to conclude the argument to the jury. The case states, that all this "was admitted by the defendant's counsel," and thereupon, the Judge withdrew the permission to recall Vaughn, unless they would introduce him as their witness; which the counsel declined to do.

After much reflection, we cannot discover any error in the conduct of the Judge, of which the prisoner's counsel have the right to complain. It is the duty of the Judge, who presides at a trial, to see that it is properly conducted, so that neither party shall take undue advantage of the other, either in the examination of the witnesses, or in the arrangement of the argument. To accomplish this object, the Judge must necessarily be entrusted with some discretionary power, as he undoubtedly is, in many cases; a well established instance of which is in the discretion given him to permit a witness, once examined, to be called again at any time before the verdict is rendered. See *State* v. *Noblett*, 2 Jones' Rep. 418, and the cases therein referred to. In the present case, the counsel for the prisoner, wished to secure the real or supposed advantage of having the concluding argument to the jury. This was a legitimate advantage, if it could be properly obtained. When asked by the solicitor to state the purpose for which they wished permission to recall Vaughn as a State's witness at a subsequent stage of the trial, candor required them to disclose it, or to withdraw their application to the Court. Had they made it known, the solicitor might possibly have called another witness instead of Jordan to prove the fact of ownership. If they had withdrawn their application, then the solicitor would have had no right to enquire as to the manner in which, in that particular, they intended to conduct their defense. What this Court said in the *State* v. *David*, 4 Jones' Rep. 353, has, we think, a strong bearing upon the present exception. The question was, whether the counsel for the prisoner, who, because of his not having introduced any testimony, was entitled to make the concluding argument, was bound to open the case and state the ground of his defense. This Court decided that he was, and added, "common fair-

ness suggests that this is the proper course, otherwise the State would be taken wholly at a disadvantage, and the prisoner's counsel might suggest views of the case, and draw inferences from the evidence, which would go the jury unanswered, unless the presiding Judge should feel himself called upon to notice them. This would be objectionable. The proper rule is, that the party having a right to conclude opens the argument, the opposite party then has an opportunity to reply, and he, in his turn, may reply by way of conclusion." It is manifest from this, that it is the object of the rules of practice, which the presiding Judge must enforce, to secure for both parties a fair and impartial trial. It follows, that if it appeared to the Judge, in the present case, that the course pursued by the prisoner's counsel, was calculated to deprive the solicitor of his just rights in the management of the cause, as we think it did, then the permission given them to recall Vaughn was properly withdrawn, and they cannot except to it as error.

Our conclusion upon the whole case is, that there is no error assigned in the bill of exceptions, which entitles the prisoner to a *venire de novo;* and we do not find any in the record which makes it our duty to arrest the judgment.

This must be certified to the Superior Court of Chowan, to the end that the sentence of the law may be pronounced upon the prisoner.

PER CURIAM, Judgment affirmed.

STATE *v.* GEORGE, (*a slave.*)

Where a slave was indicted for murder, with two others as accessories, and they being all surrounded by an angry and threatening crowd of people, and being in irons, the principal was struck in the face by one much excited, and bidden to *tell all about it*, and the defendant was bidden to tell about it, or they (the crowd) *would hang him;* it was *Held* that confessions made within an hour of these demonstrations, the crowd still continuing, were inadmissible.

State *v.* George.

THIS was an indictment for MURDER, tried before DICK, J., at the last Spring Term of Chowan Superior Court.

The prisoner was indicted, with two other slaves, Aaron and Gause or Gauzey, for the murder of their master, William D. Davenport. There was a count also against Gauzey as principal, and Aaron and the prisoner George, as accessories before the fact.

It appeared that the deceased came to his death by gunshot wounds, inflicted on his breast, on the night of 2nd of February, 1858. The gun was discharged about seven o'clock at night, while the deceased was standing in his back piazza, not far from the houses occupied by the accused and other slaves belonging to him.

The confessions of the prisoners, being offered in evidence, they were objected to, upon the ground, that they were unfairly and illegally obtained. The following are stated as the circumstances attending the obtaining of the confessions:

Mr. John A. Benbury stated, that he heard of no threats up to twelve o'clock of the day; that Gauzey was taken up about one o'clock, and was brought into the house; he, as well as George and Aaron, was in irons and closely guarded; that one Lindsay came up to Gauzey, very much excited, and said to him, "you had as well tell me whose that gun is, or I'll kill you," at the same time he struck him a blow in the face; he then added, "Aaron and George say you know all about it, and if you don't tell all about it, I'll kill you." The witness Benbury then interposed, and no confession was made then.

Joseph B. Davenport stated, that "he said to the prisoner George," "tell about it; they will hang you if you don't;" that he then made no confession; that there was a large crowd on the ground, and they were much excited. Shortly after the above, the confessions now offered to be given in evidence were made."

S. W. Davenport stated, that he heard several men say, that the negro who did it deserved to be burnt, but this was not in the presence, or hearing of either of the prisoners.

The Court overruled the objection, and the evidence was ad-

mitted. The prisoners were found guilty of murder, and upon judgment being pronounced against them, the defendant George appealed to this Court.

Attorney General, for the State.
Winston, Jr., *Smith* and *H. A. Gilliam*, for defendant.

PEARSON, J. The evidence discloses a horrid murder, committed under circumstances well calculated to excite and alarm the people of the neighborhood. It was the duty of every good citizen to do his utmost in order to find out the perpetrators of the crime, but care should have been taken not to exceed the limits allowed by the rules of law. The prisoner may be guilty, but, to justify a conviction, his guilt must be proved according to law. This has not been done, because of error in admitting as evidence the confessions of the prisoner whose case is now before us, and also in admitting the confessions of Gauzey, which had such a bearing upon the case of the prisoner, standing charged as an accessory, as to entitle him to the benefit of the objection.

The confessions were extracted by means calculated to excite *the fear of present death in the firmest mind.* The prisoners were in irons; a large crowd had assembled and became very much excited; one strikes Gauzey in the face, and threatens to kill him "if he don't tell all about it;" another says to George, "tell about it, *they* will hang you if you don't," and there "they" stood—an infuriated crowd! This was as direct an appeal to his fear as could have been made, and had he confessed at the instant, it was conceded in the argument, the evidence would not have been admissible; but it was insisted that as the confession was made afterwards the objection did not apply. What length of time intervened is not stated; the case merely sets out, that, "shortly after the above," the confession was made. It is apparent that not more than an hour—possibly only a few moments, intervened, and *the circumstances of terror remained the same.* There was the same infuriated crowd to which the attention of the

prisoner had been directed. Some of them said, "the negroes who did it deserved to be burnt." True, the prisoner did not hear this, but the demonstrations of a crowd where such sentiments are uttered, can be judged of and felt by an unfortunate being, who knows that he is within its power, without hearing what is said. To support the distinction contended for, it was necessary to show that such a length of time had intervened, and such an entire change of circumstances had taken place, as wholly to remove the effect of the influence which had been brought to bear upon the prisoner,—as that the crowd had dispersed, or the prisoner had been taken to some other place where he could feel secure from any sudden burst of its fury. We are satisfied that the confession was made from fear, under that instinct which prompts us to avoid *present* danger and risk the future. The prisoner felt that it was necessary to appease the crowd.

A confession extorted in this way, may, or may not, be true. But there is no guaranty of its truth, and by the rules of evidence, it is inadmissible.

This case furnishes an apt illustration of the wisdom of the rule. If such evidence was received, crowds would always assemble when there was a charge of the commission of a horrid crime, in order to extort a confession. The prisoner is entitled to a *venire de novo*.

PER CURIAM, Judgment reversed.

WILLIAM H. DAVIS *v.* R. H. RAMSEY.

Where it was shown that a road had been opened by the award of a church, upon a controversy between two of its members, for which the applicant for the road was to pay the owner of the land a price in money, and that such applicant had used the said road, as of right, for more than twenty years, it was *Held* that it was *prima facie* but a private road, and that a long and general usage of it by the public, in the absence of any evidence of a proceeding in Court to lay it out, or appoint overseers on it, is not sufficient to give it the character of a public road.

Davis *v.* Ramsey.

THIS was a petition to discontinue a road, tried before CALDWELL, J., at the Fall Term, 1857, of Pasquotank Superior Court.

The petitioner showed that there was a cross-road in the said county, leading from the Griffin Swamp road to the Lee slip, and connecting the two, which was wholly upon the lands of the petitioner, except two or three hundred yards, and for about that distance the road formed a line between the land of the petitioner and the defendant.

The petitioner showed by *John Cartwright*, *B. Cartwright* and *William Blount*, that they were farmers and lived upon their farms, which were situated near the eastern extremity of the said road; that they seldom, or never, used the road, and never to go to any public place, mill or landing, but only to look at Mr. Davis' crops in crop season; that they had no wish or desire to have the said road kept open; that it was of no convenience to them.

Benoni Cartwright stated, that he once knew an overseer to work on the road.

By *Ambrose Hollowell*, the petitioner showed that he (witness) lived at the eastern extremity of the said road, and nearer to that terminus than any other person except the defendant; that he had been living upon and cultivating a farm there for several years; that said road was of no convenience to him; that he used the road occasionally to pass to church; that the distance saved to him in going to church by this road, was but little—scarcely any. All the witnesses stated, that if a person at the east end of the road, wished to go to to the west and back, the distance saved in the two transits would be from two to three miles. These witnesses further stated, that they did not believe the public interest required the road to be kept open. They stated the road had been used as a public road for twenty years or more.

Miles Davis, for the plaintiff, stated that he had known the road for more than twenty years; that it was opened in 1833 or 1834, and had been, as he believed, during all the time

since, used as a public road by every person desiring to use the same.

Edwin Reed, for the plaintiff, stated that he lived within two miles of the road; that he had lived nearer and used it for mere neighborhood travel, but it was of no convenience to him.

William Hinley, for the plaintiff, had been plaintiff's overseer for several years up to 1856; also for plaintiff's father upon the same, for several years previous to 1852, the time of his death, and that the road was very little used. By several of these witnesses, the petitioner showed that when this road was opened, and for many years thereafter, Benjamin Charles owned and occupied a farm situated on the south side of said road, and near half-way from the termini of the same, and that at the eastern end, Joseph White owned and occupied a farm lying on the south side of the road, and Jas. Palmer, one on the opposite side; that all three of these farms lay immediately on the said road, and that it was of much service and convenience to these three proprietors while they resided there, but that they had all sold and moved off, and their farms are now owned by the plaintiff; that there is now no person or proprietor of land residing on this road, except the defendant, at the west end on the Griffin Swamp road.

All these witnesses testified that it would save the petitioner much expense in keeping up fences; that he had now to keep up near two miles of fencing, which would, by stopping up this road, be dispensed with; that all kinds of timber were getting scarce in that neighborhood.

The witnesses further stated, that the defendant's residence had for twenty, or twenty-five years been a location for a physician, and that persons living at the east end of the road, or in sound neck, a neighborhood at the east end, going for a physician, would be saved three or four miles by this road; that the people in sound neck, which was a large neighborhood, used this road, either in going for a physician or in visiting at the west end.

There was no record-evidence that the road had ever been

laid out by authority of the County Court, or that an overseer had ever been appointed on the same.

Doctors *Piemont* and *Speed* were examined for the defendant. They stated that they lived in Elizabeth City, twelve miles from the road; that they used the same in visiting patients at the east end of the road, and when having patients at the Harvey place, on Pasquotank river, and at Dry Ridge. They preferred this road in going to and from these places, because it was nearer and better than the other.

Rev. Mr. Kennedy, witness for the defendant, living in Elizabeth City, stated that in fulfilling his appointments to preach in this locality he travelled the road in question, rather than the other, because he believed it to be the nearest and the best.

Mr. Harington, for the same, stated, that he is a butcher, living in Elizabeth City, and that he always drove cattle, purchased in the east end and sound neck along this road, and thinks it nearest and best.

They showed that closing of the road would materially injure the value of defendant's lands as a location for a physician.

Mr. Coppersmith, for the defendant, stated that he was present when the road was made, and helped to make it; that it passed through the land of one Benjamin Charles, which had formerly belonged to one Thomas Pool; that he heard Charles say at the time the road was being made, that it was made for Dr. Ramsey; that the church had compelled Pool to give Dr. Ramsey a road, for which he was to pay seventy-five dollars, and the road was always called *Ramsey's road.*

The defendant also produced the records of the church, by which it appeared that Pool had been required to give Ramsey a road on the site of the road in question.

It was insisted by the defendant that this was not a public road, but a private one, the purchase of which he had obtained through the instrumentality of the church, of which he and a former owner of the land were fellow members, and for

which he had paid, and that being private property, the Court had no right to take it away from them.

But his Honor held that it was a public road, and being of opinion that it was not beneficial to the public, adjudged that it should be discontinued.

From which judgment the defendant appealed to this Court.

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

PEARSON, J. What constitutes a "public road" is a question of law. His Honor, instead of stating *the facts*, upon which he came to the conclusion that the road, in controversy, was a public road, has set forth all the *evidence;* which presents this question: taking all to be true, is this a public road? We are of opinion that it is not.

Many witnesses say that it has been used as a public road more than twenty years, but when their testimony is scrutinised, it amounts only to this: during all of that time the road has been open, and every person took the liberty of travelling over it who chose to do so. Such is the case with every private road in the country, so long as it remains open. One witness, *Benoni Cartwright*, stated that "he once knew an overseer to work on said road," but the case states "there was no record evidence that the road had ever been laid out by authority of the County Court, or that an overseer had ever been appointed on the same." We do not decide that these facts are necessary to constitute a public road, although, under the provisions of our statutes, it is difficult to see how there can be a public road in our State without them, when it has been open any length of time; but we think the absence of these facts has a strong bearing upon the present enquiry, and tends to explain the evidence. It certainly calls for an explanation of the testimony of Benoni Cartwright. Did he mean the overseer of some adjoining proprietor, or an overseer appointed by Court, with hands duly assigned to him? If the former, it amounts to nothing; if the latter, it

is singular that there is no entry to that effect on the record, and that it was only done on one occasion.

But the whole matter is fully explained by the evidence offered by the defendant. In 1833, the road was opened for the defendant by one Pool, who was required by the church "to give Dr. Ramsey a road," and did so at the cost of seventy-five dollars. After this the defendant continually claimed and used the road *as a right*, and not as a mere favor, and the road being in this way opened, and kept open, has been used by every one who saw proper to travel it.

The commencement of the easement being thus shown, precludes the idea of its being a public road.

The order of the Court below will be reversed, and the proceeding dismissed at the cost of the petitioner.

PER CURIAM, Judgment reversed.

WILLIAM G. POOL *v.* MAJOR EVERTON.

If a husband and wife live apart, and one having notice that the husband does not hold himself liable for debts of the wife's contracting, trusts her for necessaries, he cannot recover for them against the husband, without showing that the wife had good cause for the separation.

THIS was an action of ASSUMPSIT, brought before a justice of the peace, and by appeal taken to the Superior Court of Pasquotank, where it was tried before DICK, J., at last Fall Term.

The plaintiff was a physician and declared for professional services rendered to the wife of the defendant while she was living apart from him; he living in the country on his farm, and she in Elizabeth City. The defendant had given public notice, by advertisement in the town and vicinity, that he would not be liable for the debts of his wife, and the plaintiff was aware of such notice having been given at the time the service was rendered. Mrs. Everton had filed a petition for

a divorce, in the Superior Court of Pasquotank, and on its return had moved for an allowance, *pendente lite*, which, on an appeal to the Supreme Court, (ante 202,) was refused her, on account of the insufficiency of the allegations. This application was pending at the time this suit was brought.

The foregoing facts were stated as a case agreed between the parties, and submitted for the judgment of the Court. It was agreed that if the plaintiff was entitled to recover at all, the judgment should be for $15.

His Honor, upon consideration of the case, was of opinion that the plaintiff was entitled to recover; from which the defendant appealed.

No counsel appeared for the plaintiff in this Court.
Heath, for the defendant.

PEARSON, J. According to the common law, the legal existence of the wife is merged in that of the husband, so that she is incapable of making a contract, whereby to bind either herself or her husband. She may, however, as his agent, make a contract that will be valid as to him, and an agency may be constituted either by express authority or by implication, in respect to such matters as are usually confided to the wife.

But this implication of agency can only be made while the parties continue to live together. If they separate, and live apart, the idea of an implied agency is out of the question. The effect of the notice (such as was given in this case) is merely to inform the public of the fact of the separation which operates as a revocation of any implied agency that existed while they lived together.

If a wife leaves the "bed and board" of the husband *without good cause*, so far from his being liable for any contract she may make, even in respect to the food, clothing, or shelter necessary for her existence, he is entitled to an action and may recover damages against any person who administers to her wants and supplies her with necessaries; *Barbee* v. *Armstead*, 10 Ire. Rep. 530.

This rule of the common law, which may seem harsh, is based upon the ground that it is wrong to harbor the wife by doing any act which will make it more easy for her to continue in the violation of her conjugal duties.

If a wife has good cause for separating and refusing to live with her husband, he is bound to pay for necessaries furnished to her which are suitable to their condition and habits in life. To create this liability, the law implies a request on his part, and the implication is made *ex necessitate*, to prevent the wife from starving: on the same principle that the contract of a lunatic, under certain circumstances, is supported. *Richardson* v. *Strong*, 13 Ire. Rep. 106. Although in the case of the husband, this implication may be against the truth, yet, it is sustained by the maxim that "no one shall take advantage of his own wrong;" *Hindly* v. *Westmeath*, 13 E. C. L. Rep. 141; 14 ibid. 188, 11 John. Rep. 281. To make the principles applicable, the husband must be put in the wrong. It follows that any one who furnishes the wife with necessaries while she is living apart from her husband, *takes the responsibility*. If he is able to prove that the wife had good cause for the separation, he will recover the value of the articles furnished, or of the labor done. If not able to make such proof, he is exposed to the action of the husband. Few persons are willing to take this responsibility, and in order to provide for the wife, until the question, whether she had good cause for separation, can be decided, our statutes allow alimony pending the suit for a divorce, upon her own allegations, provided they are sufficient, if true, and she makes affidavit to the truth thereof in the mode required.

In our case there was no evidence tending to show that the wife had good cause for separation, but his Honor was of opinion with the plaintiff. There is error, as the facts were agreed on. The case should have been put in such a shape as to make the decision of the point of law end the litigation. In the manner presented we can only direct a *venire de novo*.

Per Curiam, Judgment reversed.

JOHN WOOSTER & CO. *v.* JOSEPH R. BLOSSOM.

A wharfinger has a double remedy for his wharfage, i. e., a lien on the article and a *personal lien* or claim on the owner. If the owner of the article sells it, and *gives notice* to the wharfinger of such sale, on tendering the wharfage then due, he is discharged from liability for future wharfage. Such notice may be given either verbally or by a *delivery order*.

ACTION of ASSUMPSIT, tried before PERSON, J., at a special term (January, 1858) of New-Hanover Superior Court.

Mr. Amringe, a broker, testified, that in the month of February, 1853, acting in the character of an agent for the plaintiffs, he sold to the defendant 1500 barrels of rosin, then lying at the plaintiffs' wharf, in the town of Wilmington, and that the rosin was to remain at their wharf for ten days, free of wharfage, and after that time at the rate of one cent per barrel per week for the first week, and a half a cent per week afterwards. In this transaction the defendant requested that the name of the purchaser might not be disclosed. In a day or two the defendant paid the witness the price of the rosin, which he paid to the plaintiffs without making known to them the name of the purchaser.

Sometime in March, ensuing, the witness sold the rosin for the defendant to A. H. Van Bokelin, and in the name of the defendant he tendered to the plaintiffs the wharfage due up to the time of this second sale, to which the plaintiff Wooster replied, that he should have nothing to do with Van Bokelin, but should look to defendant for the wharfage, whom he knew all the time to be the purchaser.

The rosin remained at plaintiffs' wharf until October following, when it was removed, and this suit was brought to recover the whole wharfage.

The Court charged the jury, upon this evidence, that the plaintiff was entitled to recover; defendant excepted.

Verdict for the plaintiffs. Judgment and appeal.

W. A. Wright, for the plaintiffs.

Strange, for the defendant.

PEARSON, J. The question is somewhat complicated by the fact, that the plaintiff was the owner of the wharf, and also of the rosin. Divest it of that circumstance, and it is a plain one. A wharfinger has a double remedy for his wharfage: a lien on the article, and a "personal lien" or claim on the owner. If the owner sells and a "delivery order" is handed to the wharfinger, with a tender of the wharfage, there is no further claim on the vendor, and the personal lien attaches to the vendee, on the ground that the wharfinger is no longer *liable* to the vendor for the safe-keeping of the article, and of course, has no further *claim* on him, but the wharfinger's liability and his corresponding claim pass over to the vendee. This must be so, otherwise the sale of the article would be clogged by imposing on vendors the necessity of requiring from the vendee, in every instance, an indemnity against the liability for future wharfage, because it would no longer be in his power to remove the article, or to compel the vendee to do so. In other words, as soon as the vendor's connection with the article is terminated, and the wharfinger has due notice thereof, his liability also ceases, and it is not in the power of the wharfinger to hold him at his mercy. In *Barry* v. *Longman*, 12 A. and E. 642, (40 E. C. L. Rep. 144,) such is assumed to be the law, and the question made was, whether it was indispensable that a "delivery order" should be handed to the wharfinger, or whether it was sufficient to give him verbal *notice* of the sale. It was held that such notice is sufficient to put an end to his claim or "personal lien" (as it is therein expressed,) against the vendor; on the ground that such notice has the same effect as a delivery order to put an end to his liability to the vendor for the safe-keeping of the article.

If the vendor, as a part of the agreement of sale, assumes to the vendee that he will pay the wharfage for, say, ten days after the sale, it is clear that this private arrangement in no way affects the rights of the wharfinger, being a matter in which he has no concern.

In our case the plaintiff, as vendor, by his agent the broker,

assumes, as part of the agreement of sale, to relieve the vendee from wharfage for ten days, or, which is the same thing, being also the wharfinger, he agrees to make no charge for that time; "the rosin to remain after the expiration of that time at the customary rates," we are unable to see any ground upon which the accident that the plaintiff was both vendor and wharfinger, can take the case out of the general rule stated above. His liability, as wharfinger, to the defendant, terminated when he was notified of the sale to Van Bokelin, and there is no principle upon which he can be allowed to elect to hold defendant liable after his connection with the rosin was at an end and he had no longer the power to remove it.

PER CURIAM, Judgment reversed.

THOMAS W. HENDRICKSON *v.* JOHN A. ANDERSON.

Where an overseer employed upon a special contract for a year, was turned off by his employer during the year, in a suit upon the contract in which the plaintiff sought to recover the entire sum stipulated, it was *Held* that proof, that the overseer had engaged in other employment during the residue of the year for which he received wages, was admissible in diminution of damages.

Whether the misconduct complained of by an employer against an overseer, was a sufficient ground for discharging him, is a matter to be determined by the Court.

ACTION of ASSUMPSIT, tried before DICK, Judge, at the last Spring Term of Hertford Superior Court.

The plaintiff proved an agreement that he should serve the defendant, in the character of overseer and manager of his slaves, for the year 1855, and an agreement on the part of the defendant to pay him $150. It was also proved, that he was in defendant's service up to 10th of September, in that year, when he was discharged upon the allegation of miscon-

duct, and the defendant refused to hold himself bound to pay wages thereafter.

For the purpose of proving misconduct, the defendant introduced evidence tending to show that the plaintiff was often absent from the farm; that he rode the farm horses at night on patrol duty; that he gave parties to companies assembled at his sleeping apartment, which were kept up till midnight, where excessive drinking was indulged in, in which he participated to the extent of intoxication, to the annoyance of the family residing in the dwelling-house close by; that the stock became poor, and that the farm exhibited evidence of neglect and inattention. Upon this evidence, the counsel for the defendant asked the Court to tell the jury, that the facts established by the evidence, amounted to such negligence and misconduct as in law to authorise the defendant to discharge the plaintiff, and that consequently he had no right to recover for the time elapsing after such discharge. The Court refused to charge in so many words, as requested by the counsel, but charged them as is set forth below.

For the purpose of mitigating the damages claimed, the defendant offered to prove, that shortly after the plaintiff's discharge he set in as an overseer with another employer, and remained in that capacity at a compensation of twelve dollars and a half per month for the residue of the year. Which evidence was objected to by the plaintiff and excluded by the Court. Defendant excepted.

His Honor charged the jury, "that if the defendant did the acts alleged, and was negligent and inattentive as insisted by the defendant, he certainly had a right to discharge him. If, however, they believed the facts to be otherwise, the plaintiff was entitled to recover; and this being a special contract, the measure of his damages would be the residue of the amount stipulated to be paid, and it was not material whether the plaintiff found employment elsewhere after his discharge and was paid therefor." Defendant again excepted.

Verdict for the plaintiff for the wages during the remainder of the year Judgment and appeal.

——— ——— for plaintiff.
Barnes, for defendant.

BATTLE, J. This was an action of assumpsit upon a special contract, the terms of which were, that the plaintiff was to serve the defendant for one year in the capacity of an overseer, and for his services, as such, the defendant agreed to pay him one hundred and fifty dollars. The plaintiff alleged and proved his readiness and ability to perform his part of the contract, and that he was prevented from doing so by the act of the defendant.

The defense set up, and proposed to be proved by the defendant was, that the plaintiff had so misconducted himself while in his service, that he was justified in discharging him.

Upon the testimony offered on this point, the counsel for the defendant asked the Court to instruct the jury, that the facts, if believed, constituted in law a good cause for turning the plaintiff off, and thus preventing him from fulfilling his engagement. The counsel was undoubtedly entitled to this instruction, if the testimony was sufficient to support it, and the refusal of the Court to give it, would have entitled the defendant to a new trial, unless the error had been corrected by a proper finding of the jury. The case stated in the bill of exceptions, leaves us in some doubt, whether the presiding Judge did not give the instruction substantially prayed. But we will not put our decision upon this objection, as there is another upon which the defendant is clearly entitled to a *venire de novo*.

The bill of exceptions sets forth that, for the purpose of reducing the damages, the defendant offered to prove that after the plaintiff had been discharged from his service, he sought and obtained employment in the same neighborhood for the residue of the year, for which he was paid wages at a certain rate. This testimony was objected to by the plaintiff and rejected by the Court, and for this the defendant excepted; and we think that the exception was well taken.

The action is brought for a breach, by the defendant, of a

special contract, whereby the plaintiff was prevented from performing a stipulated service, and thus entitling himself to a certain amount of compensation. It is not and cannot be assumpsit on the common count for work and labor during the year, because the work and labor was not done; on the contrary, the *gravamen* of the complaint is, that the wrongful conduct of the defendant prevented the plaintiff from completing the work and labor for which he had stipulated. It was necessary for him to aver and prove his readiness and ability to perform his part of the contract in order to entitle himself to sustain his action at all; and that being done, the question necessarily arises, what is the amount of the damages which he ought to be allowed to recover? The proper answer would seem to be the amount which he has actually sustained in consequence of the defendant's default. It would seem to be a dictate of reason that if one party to a contract be injured by the breach of it by the other, he ought to be put into the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vindictive damages. The true rule then is, to give him neither more nor less than the damages which he has actually sustained, and so we find the authorities to be; thus in the case of *Costigan* v. *The Mohawk and Hudson River Rail Road Company*, 2 Denio Rep. 609, to which we are referred by the defendant's counsel, the following propositions are laid down by the Court: where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is, in general, bound to pay the full amount of wages for the whole time.

But, in a suit for the stipulated compensation, the defendant may show, in diminution of damages, that after the plaintiff had been dismissed, he had engaged in other lucrative business. This, however, must be proved by the defendant, and must not be presumed. The same principle will be found

in other cases to which the counsel for the defendant has referred; *Shannon* v. *Comstock*, 21 Wend. Rep. 457; *Hexter* v. *McRae*, 24 Wend. Rep. 304. See also 2 Greenl. Ev., sec. 261; Abbot on Shipping, 442, 443. According to these authorities, which are founded, as we think, on reason, the testimony offered by the defendant, for the purpose of reducing the damages claimed by the plaintiff, ought to have been received, and for the error of the Court in rejecting them, there must be a *venire de novo*.

PER CURIAM, Judgment reversed.

STATE *v.* EDWIN EVANS *et al.*

The allegation *of the want of a license*, in a bill of indictment, for selling and delivering spirituous liquor to a slave, must be proved on the part of the State.

(The case *State* v. *Woodly*, 2 Jones' Rep. 296, cited and approved, and this case distinguished from *State* v. *Morrison*, 3 Dev. Rep. 299.)

INDICTMENT for selling spirituous liquor to a slave, tried before DICK, J., at the last Spring Term of Chowan Superior Court.

The indictment contained two counts; the first for selling and delivering spirituous liquor to the slave, and the second for delivering it, as agent, to the same slave, in each of which it was averred that the defendants were not the owners of the slave in question, and that they had no order from the owner, or from any other person having the management of the slave, for the delivery or gift to him.

On the trial, it was contended on behalf of the defendants, that it devolved on the State to show that the defendants had no order or other written permission from the owner or manager to furnish spirituous liquor to the slave described in the bill. But his Honor held otherwise, and so charged the jury. Defendants excepted.

Verdict and judgment for the State. Appeal.

Attorney General, for the State.
Heath, for the Defendants.

BATTLE, J. The indictment, in both of its counts, negatives the fact, that the spirituous liquor alleged to have been sold and delivered, or delivered as a gift to the slave, was for the owner or employer, or, by the order of the owner or of any person having the management of the said slave. This was proper, as was expressly decided in the case of the *State* v. *Miller*, 7 Ire. Rep. 275, where the subject is fully discussed and explained. Such being the case, we cannot perceive any sufficient reason why the averment, though a negative one, should not be proved on the part of the State. It is unquestionably the general rule, that every fact necessary to constitute a substantial offense, must be charged in the indictment, and proved on the trial by the State. The case of *State* v. *Woodly*, 2 Jones' Rep. 276, which was fully argued by counsel, and maturely considered by the Court, clearly recognises this rule as founded alike on reason and authority. It is true, there is an exception, or rather an apparent exception, to the rule, arising from necessity, or that great difficulty in procuring the proof, which amounts practically to such necessity, or in other words, where the prosecutor could not well show the negative, and where the defendant could easily show the affirmative. The case of the *State* v. *Morrison*, 3 Dev. Rep. 299, may be cited as one coming within the exception. There, upon an indictment against a person for retailing spirituous liquor by the small measure, without a license, it was held that the prosecutor need not produce proof of a want of license, but the license must be shown by the defendant in his defense, and that the absence of such proof on his part, was evidence that he had no license. The Court, in commenting upon that case, in the *State* v. *Woodly*, said that it imposed no hardship upon the defendant to require him to produce his license, which was a written document, and which his interest, as well as his duty, required him to keep as a justification for acts which he might do every day, and many

times every day. But the present case is very different, for it is manifest that the owner, employer, or manager, of a slave, can as easily be called on the part of the State, to prove that he gave permission in writing to the slave to purchase, or receive as a gift, spirituous liquors, as for the defendant to call him or any other person, to prove the contrary; and we think it best to adhere to the general rule until the Legislature may think proper to alter it. The verdict and judgment must be set aside, and a *venire de novo* awarded to the defendants, and for that purpose this opinion must be certified to the Court below as the law directs.

PER CURIAM, Judgment reversed.

STATE *v.* WILSON PERRY *and others.*

In a bill of indictment under 71 ch., 7 sec. of Rev. Code, where it is charged that a mill-owner "did keep in his mill a false toll-dish, for the purpose of exacting more toll than by law he of right ought to do," and that "by means of said false toll-dish, he exacted unlawful toll," against the statute, &c., it was *Held*, that these allegations were sufficiently supported by proving that the mill-owner kept a measure containing one-seventh, and another one-sixth of a half bushel, with which he openly took toll of all customers.

Held. That the words *false toll-dish*, as used in the statute, mean a toll-dish measuring more than one-eighth of a half bushel.

Held. That it was not necessary to aver the capacity of the toll-dish charged to be a *false* one.

Held further, That it ought to be averred in the bill, that the mill was one used for grinding wheat and corn; but when it was charged that it was a mill where a false toll-dish was used to exact more toll than was lawful, contrary to the statute, it does appear, with sufficient certainty, that it was a mill for grinding corn and wheat.

THIS was an indictment against the owner of a public mill for keeping a false toll-dish, tried before DICK, Judge, at the last Spring Term of Perquimons Superior Court.

The indictment, in its material parts, was as follows:

"State of North Carolina, Perquimons County.

"The jurors for the State, upon their oath, present, that Wilson Perry, James Davis and Ambrose Mundin, late &c., in the county &c., on 1st day of January, 1857, and from that time since &c., have been the owners of a certain public *steam-mill* in the said county; and the jurors aforesaid, do further present, that the said Wilson Perry, &c., owners of the said public steam-mill as aforesaid, did, on the first day of August, A. D. 1857, and on divers other days, both before and since, keep in their said mill, a false and fraudulent toll-dish, for the purpose of exacting more toll from the good citizens of the State, than by law, they, of right, ought to do, and that they, the said Wilson Perry, &c., have, by means of the said false and fraudulent toll-dish, exacted unlawful toll of many of the good citizens of the State, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State."

The act of Assembly, under which the defendants were indicted, Revised Code, chap. 71, sections 6 and 7, is as follows:

Sec. 6. "All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the indian corn and wheat, and one fourteenth part for chopping grain of any kind, and every miller and keeper of a mill, making default therein, shall, for each offense, forfeit and pay five dollars to the party injured."

Sec. 7. "All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll-dishes for each measure; and every owner by himself, servant or slave, keeping any mill, who shall keep any false toll-dishes contrary to the true intent and meaning of this chapter, shall be deemed to be guilty of a misdemeanor."

CASE SENT UP BY HIS HONOR.

"It was proved on the part of the State, that the defendants owned a steam-mill in the county of Perquimons, six

months or more preceding the finding of this bill, constructed for the sawing of lumber, and grinding grain for toll, and as such, was kept and used by them; that there were kept in the mill a half bushel measure, and no peck measure, and also measures containing 1-6 and 1-7 of a half bushel, and these two latter were used for measuring and taking toll from the grain brought there by customers for grinding; that the measures contained respectively what they purported to contain in quantity; that the defendants, on divers days before the finding of the bill, and within six months preceding, took from their customers, as toll, one-seventh of the corn and one-sixth of the wheat ground at their mill; that this rate of toll was the established and known usage of the mill, and was known to all those who carried there their grain for grinding, and that the toll-dishes were constructed to contain respectively the one-seventh and the one-sixth of a half bushel, and did contain that full measure."

The Court charged the jury, that if they believed the facts to be as above stated, the defendants were guilty. Defendants excepted.

Verdict for the State. Judgment and appeal.

Attorney General, for the State.
Smith and *Jordan*, for defendants.

PEARSON, J. It is indictable at common law to cheat by means of false weight, or false measure; but when more than the proper amount is openly exacted, and is submitted to by the opposite party with a knowledge of the fact, there is no fraud, which is a necessary ingredient to constitute the offense. In respect to owners of public mills, in addition to this liability at common law, the statute imposes a penalty for the mere act of taking more than one-eighth part as toll for grinding corn and wheat, without reference to the question of fraud, Rev. Code, ch. 71, sec. 6. And by the 7th section, the owner is made liable to indictment for keeping in the mill "a false toll-dish contrary to the true intent and meaning of this chap-

ter." The defendants are indicted under the 7th section, and the first question is, does the proof make out the offense? They kept in their mill two toll-dishes, one containing a seventh, and the other a sixth, of a half bushel. But it is insisted these were not false toll-dishes, for they contain the measure which they purport to hold, and to make them false, it is necessary they should contain more or less than they purport. We admit that such is the ordinary meaning of the word "false" as applied to a measure, but we are satisfied such is not the sense in which it is used in the statute. The words "contrary to the true intent and meaning of this chapter," are added to the words "false toll-dish," in order to explain the sense in which the word is used. According to the statute, the proper toll is one eighth; the proper toll-dish is a measure containing one-eighth; and a *false* toll-dish, as contra distinguished from a *proper* one, is a measure which purports to be a toll-dish, and is used as such, but contains more than "one-eighth." In this sense, the defendants kept in their mill a false toll-dish.

The defendants' counsel moved in arrest of judgment for two supposed defects in the bill of indictment. The draftsman confounded, to some extent, the common law offense of cheating by a false measure, the penal offense under the 6th section of the statute for taking unlawful toll, and the indictable offense under the 7th section of keeping a false toll-dish; but by rejecting a part as surplusage, and by aid of the statute, Rev. Code, chap. 35, sec. 14, we think "sufficient matter appears to enable the Court to proceed to judgment." See *State* v. *Boon*, 4 Jones' Rep. 463. A bill would be good in this form: The jurors &c., present, that A B on the first day of January, A. D. 1857, and from that day &c., was, and has been, the owner of a certain public mill, situate in the said county, *for the purpose of grinding wheat and corn for toll*, and that on the 1st day of August, A. D. 1857, and on divers other days &c., the said A B, in his mill aforesaid, did keep a false toll-dish of the contents of more than *one-eighth of a half bushel and peck of full measure, to wit, of the contents*

of one-seventh part of a half bushel, contrary to the form, &c.

The first objection taken, that the bill does not allege the purpose for which the mill was used, would be fatal, but for the fact, by afterwards introducing the word toll-dish, in the connection that it was used, for the purpose of exacting more toll than was lawful, it does appear, with ordinary certainty, that it was a mill used for the purpose of grinding wheat and corn for toll. "Taking toll" has a definite sense, although it is general; but when connected with the fact, that it was taken in a *mill* by means of a *toll-dish*, it becomes particular, and, in the ordinary meaning of the word, necessarily conveys the idea of a mill for grinding wheat and corn for toll. It is true, that other grain, e. g. rye and buckwheat, are sometimes ground; but it is a universal fact, that a mill used for grinding grain at all, is always used to grind wheat or corn, or both. It must also be observed, that the indictment pursues the words of the statute, where there is the same want of precision, and the purpose of grinding wheat and corn is taken for granted; and the regulation of toll for grinding is confined to those species of grain.

The other objection, that the indictment does not aver the contents of the false toll-dish, so that the Court may know that it was more than one-eighth of a half bushel, is untenable. We think it sufficient to aver that it was a false toll-dish, contrary to the form of the statute. The Court knows, from the statute, that one-eighth is the proper measure; so, of course, a false toll-dish is one, the contents of which is more than one-eighth, and *cui bono* aver under a videlicet that it was one-seventh, when the averment would be sustained by proof of a measure of the contents of one-fifth or any other measure more than one-eighth? Besides, in this respect, also, the indictment pursues the words of the statute, and if these words are sufficient to create an offense, they must, as a general rule, be sufficient to charge it; *State* v. *Stanton*, 1 Ire. Rep. 424. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* FRANCIS NIXON *and others.*

An indictment under the statute, Rev. Code, chapter 71, section 7, against a mill-owner for keeping a false toll-dish, is not sustained by proof that he took one-sixth part of each half bushel of corn with a half gallon toll-dish, (that being the true measure of the toll-dish under the act.)

INDICTMENT for keeping a false toll-dish, tried before DICK, J., at the last Spring Term of Perquimons Superior Court.

The indictment is as follows:

"Superior Court of Law, Fall Term, 1857.

"The jurors for the State, upon their oath, present, that Francis Nixon, Nathan Winslow, Benjamin Skinner, Tristram L. Skinner, and Edward Ward, late of the said county, on the first day of January, in the year of our Lord 1857, and on divers other days and times, between that day and the day of the taking of this inquisition, at and in the county aforesaid, were possessed of, and did keep, a certain public mill, and do still possess and keep the said public mill, situate in or near the town of Hertford, for the purpose of grinding for toll, wheat and corn; and that during all the time aforesaid, in the county aforesaid, the said defendants did unlawfully keep false toll-dishes at the said mill, by which false toll-dishes, the good people of the said State were compelled to pay, then and there, and did pay, then and there, to the said defendants, more than lawful toll for the corn and wheat then and there ground, and that the said defendants did, then and there, unlawfully receive of the good people of the State more than lawful toll, to wit, one-sixth of the corn, then and there ground, contrary to the form of the statute, &c."

Upon the trial, the jury returned a special verdict, as follows:

"The jurors, &c., find that the defendants, for more than two years before the finding of the bill, and up to the finding, were proprietors in possession of, and keeping, and using, a steam-mill for sawing lumber and grinding grain in Perquimons county; that during this time, they kept for the use of the mill, two measures, a half bushel, and a peck measure,

and also kept a half gallon measure, used for a toll-dish, and no other toll-dish either for wheat, corn or chopped grain; that these measures held what they purported to contain; that the defendants took from their customers, as toll, one-sixth part of corn, and one-eighth of wheat, and measured off the toll in their half gallon measure, both from a peck and half bushel; that this rate of toll was fully known and understood in the county, and to all the customers of the mill; that this rate of toll has been the established rate at that mill for more than six years.

Whether upon these facts the defendants are guilty, the jury are unadvised," &c.

The Court, being of opinion against the State, upon this finding, gave judgment for the defendants, from which the solicitor for the State appealed.

Attorney General, for the State.
Smith and *Jordan*, for the defendants.

PEARSON, J. For the construction of the statute in regard to mills, see *State* v. *Perry*, (ante 252,) decided at this term.

The defendants are indicted for keeping a false toll-dish. The only measure used for that purpose was a half gallon. This by "dry measure," is the eighth part of a half bushel, which is the measure of the toll-dish, required by the statute. So, the proof does not sustain the charge. The defendants are liable *to the penalty* for taking the sixth of the corn. How they managed to take a sixth by means of the half gallon measure, is not stated; whether it was by not "striking" even, or heaping the measure and guessing at the intended quantity, does not appear, and we are not at liberty to express an opinion as to whether they are liable at common law. We are confined to the offense charged in the bill of indictment. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* ASA JACOBS.

A Judge has not the right to compel a defendant, in a criminal prosecution, to exhibit himself to the inspection of the jury, for the purpose of enabling them to determine his *status* as a free negro.

THIS was an indictment against the defendant as a free negro, for carrying arms, tried before MANLY, J., at the last Spring Term of Brunswick Superior Court.

The State offered the defendant to the inspection of the jury, that they might see that he was within the prohibited degree. The defendant objected to this measure, but the objection was overruled, and the evidence admitted. Defendant excepted. Verdict and judgment for the State. Appeal by the defendant.

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

BATTLE, J. The case of the *State* v. *Chavers*, (ante 11,) decided that the color of the defendant was competent evidence for the consideration of the jury, upon the question whether he was a free negro within the meaning of the 66th section of the 107th chapter of the Revised Code. There, the testimony was offered by the defendant's exhibiting himself to the jury at the instance of his own counsel, but in the present case it is offered by the State, and the question is, whether the State has the right to compel the defendant to exhibit himself, against his consent, to the jury, for the purpose of enabling them to decide upon his *status* as a free negro within the statute. Upon consideration, we are decidedly of opinion that he *can not;* because it is, in effect compelling him to furnish evidence against himself in a criminal prosecution. Nothing is better settled, than that a defendant in a criminal charge, cannot be compelled to produce a private paper which would be evidence against him on the trial; *Rex* v. *Worsenham*, 1 Ld. Raym. Rep. 705; *Rex* v. *Mead*, 2 Ld. Raym.

Rep. 927; *Rex* v. *Shelly*, 3 Term R. 142. Courts of law would not compel a party to produce a deed or other private paper, even in a civil case, where it was intended to be used as evidence against him; *Huldane* v. *Harvey*, 4 Burr. Rep. 2489. So strong was this rule, and so much did it interfere with the ascertainment of the truth in trials at law, that our Legislature, in the year 1821, passed an act empowering the courts of law to require the parties, under certain circumstances, to produce books and papers in their possession, or power, which might contain evidence pertinent to the issue on the trial, (see Rev. Code, ch. 31, sec. 82). This act does not extend to criminal prosecutions, and as to them, therefore, the law remains as it was before. If, then, the defendant, in a criminal charge, as a general rule, is protected from being compelled to furnish evidence against himself, upon what reason can he be made to exhibit himself to the jury for the purpose of affording testimony necessary to convict him of a crime? Why should this be an exception to that great conservative rule which the generous spirit of the common law has established for the protection of accused persons?

The *Attorney General* says, that the defendant is required by law to be present at the trial, and that the jury must necessarily see him, and that therefore, it cannot be a violation of his rights, for the State to compel him to offer himself for the inspection of the jury. Admitting that the State has a right to compel his presence at the trial, it does not follow that he is bound to stand or sit within view of the jury. Indeed, if he were so bound, why call upon him to exhibit himself to them?

Another argument of more weight is, that the testimony when afforded to the jury, is not incompetent, though it might have been an act of tyranny in the Court to compel it. But this argument proves too much, and would be equally available, if admitted in favor of the competency of a deed, or other private paper, which a court might wrongfully have compelled a defendant to produce. Surely, in such a case, the *manner* in which the deed or paper was produced and

offered, would be error, although the deed or paper, if fairly brought before the jury, would be competent evidence. So, the confession of a supposed criminal will be competent, or otherwise, according to the circumstances under which it was made. In the present case, we know that the presiding Judge did not intend to compel the defendant to offer himself to the inspection of the jury by an act of arbitrary power, but he did it in what he deemed the exercise of a rightful authority; if in that he erred, as we think he did, his error may have prejudiced the cause of the defendant, and for that the defendant is entitled to another trial.

PER CURIAM, Judgment reversed.

ROLAND R. SELLERS *to the use of* JAMES A. LILES *v.* EDWARD H. STREATOR.

Where one partner executed a bond in the name of the firm, under seal, for a debt due by the firm, in an action by the obligee on such bond, a debt due by the obligee to the firm is a good set-off, notwithstanding the plaintiff is allowed to enter a *nol. pros.* as to one of the firm, and proved that only the partner retained as defendant, signed the instrument.

THIS was an action of DEBT, tried before PERSON, J., at the Fall Term, 1857, of Anson Superior Court.

The suit was commenced by warrant against Thomas Britt and Edward R. Streator, merchants and partners, trading under the name of Britt and Streator, to answer Roland R. Sellers to the use of James A. Liles, of a plea of debt, due by note for sixty dollars, with interest. From the judgment of the justice of the peace there was an appeal to this Court, and here the plaintiff declared in debt against Thomas Britt and Edward H. Streator as partners, &c., upon a bond which is set forth as being signed by "Britt and Streator" with a scroll representing a seal. The defendants admitted the exe-

cution of the bond, whereupon, the plaintiff read it to the jury and closed his case.

The defendants then produced, in support of their plea of set-off, justices' judgments in their favor, against Roland R. Sellers, the plaintiff, for more than the amount of the debt claimed by him.

The plaintiff then asked leave to enter a *nolle prosequi* as to Britt, which was allowed, and then he proved that the signing of Britt and Streator to the bond was in the handwriting of Edward H. Streator; and the plaintiff contended, that inasmuch as one partner cannot bind the other by deed, that this was the debt of Streator alone, and, therefore, the defendants' judgments could not be allowed as a set-off. But the Court held otherwise, and the plaintiff excepted.

Verdict and judgment for the defendant, and appeal.

Kelly, for the plaintiff.
Ashe, for the defendant.

BATTLE, J. The debt for which the def't. Streator endeavored to give the security of the sealed note of Britt and Streator, who were partners in trade, was undoubtedly the debt of the firm, and the judgments obtained by them against the plaintiff, possessed that mutuality of claim which justified the Court in allowing the one to be set off against the other. Streator certainly did not execute the bond as his own individual obligation, and it cannot be treated as such. In the case of *Delius* v. *Cawthorne*, 2 Dev. Rep. 90, it was decided that an agent, who had only a parol authority, could not bind his principal by a bond, nor would the instrument, though sealed by him, in the name of his principal, be the bond of the agent. It would not be so, because it did not purport to be his deed. For the same reason, though one partner cannot bind the firm by deed, yet the deed will not be that of the partner who executes it. And, in truth, a debt intended to be thus secured, would remain the simple contract debt of the partnership, and must be so treated in any action upon it.

Considered in that light, and supposing it to have been declared upon in a proper manner, the plaintiff could not, by suing one only of the partners, prevent the firm from pleading and proving as a set-off a debt to them from the plaintiff.

In this particular case, there is another fatal objection to the plaintiff's recovery. From the record, it appears that he declared upon a bond executed by two obligors, and according to his own allegation, he proved a bond executed by one person only. The instrument proved, then, was a different one from that which was declared on; so there was a fatal variance between the pleadings and the proof.

PER CURIAM, The judgment must be affirmed.

CRUTWELL, ALLIES & CO. *v.* DE ROSSET AND BROWN.

One of the several partners of a firm (a party to a suit) can make a good release, under seal, to an interested witness, and such release will discharge the witness from all liability to the rest of the firm.

ACTION on the CASE, tried before PERSON, J., at a Special Term, January, 1858, of New-Hanover Superior Court.

The action was brought against the defendants as common carriers, for failing to carry and deliver a quantity of iron taken on board their steam-boat for transportation.

The defendants and James Cassidy were the owners of the steamer Fayetteville, used upon the Cape Fear River to tow vessels across the bar, and when necessary, to lighter them also. She had received some iron belonging to the plaintiffs from the British schooner Invoice, and in consequence of the explosion of the boilers, the steamer was sunk and the iron lost.

There was a second count in the declaration against the defendants for negligence as bailees for hire, but this count was abandoned on the trial.

The boat Fayetteville was in charge of Captain Davis, who was offered by the defendants as a witness. He was objected to by the plaintiffs on the ground of interest.

The defendants then offered a release in due form, but sealed by A. J. DeRosset, per R. F. Brown, and by R. F. Brown, the firm being composed of A. J. De Rosset, John Potts Brown and R. F. Brown.

The Court held the release insufficient, and excluded the witness. Defendants excepted.

Verdict and judgment for the plaintiffs. Appeal.

Strange, for the plaintiffs.

Wm. A. Wright and *Baker*, for the defendants.

PEARSON, J. After the plaintiffs had abandoned the count against the defendants as bailees for hire, "the gist" of which was negligence, it would seem that the evidence of the witness rejected, was immaterial, for upon the other count, the question of negligence did not arise; but as the witness was rejected upon the ground of *incompetency*, because of interest, the defendants are at liberty to avail themselves of the exception.

This Court is of opinion that the release was sufficient. Considering it as an act of the firm, by two of its members, we incline to the opinion that it was valid, although done "by a deed," for there is a distinction between the power of a partner to bind the firm to pay money, or to do any other act *by way of contract*, (in which cases it cannot be done by deed, for the reason, that the question in respect to the consideration, would be thereby concluded,) and the power to grant an acquittance, or *execute a release;* for no consideration is necessary to give effect to these acts, and they can only be done by deed.

But in the second place, considering the release as the deed of the two members of the firm, by whom it was executed, it clearly has the effect of binding them so as to bar any action that they might institute; and it is equally clear that the

other member could not maintain an action without joining them; in which case the release of two of the plaintiffs would be a bar to the action.

There is error. A *venire de novo* is awarded.

PER CURIAM, Judgment reversed.

PASCHAL McCOY *v.* THE JUSTICES OF HARNETT COUNTY.

A petition for a mandamus, alleging a contract between the petitioner and the justices of a county, by which he was to be paid a certain sum for building a court-house, and a certain other sum for building a jail, "in monthly installments, for lumber and work," and praying for a writ of mandamus to compel *the payment of what is due*, without averring that any particular sum is due, is defective.

A writ of alternative mandamus, commanding the defendants to provide the means, and pay *whatever sum is now due*, without an allegation that any particular sum is due, is defective.

Where it appears from a contract for erecting a public building, sought to be enforced by a mandamus, that the work was to be done under the direction of a superintendent, who was to make monthly estimates of work done and materials furnished, and to certify the same, and that the contractor was to be paid monthly on the production of such certificates, a petition for a mandamus, and a mandamus commanding payment to be made, without averring the existence of such certificates, or accounting for their nonproduction, is defective.

Where a petition for a mandamus, and a writ issued in pursuance thereof, are defective in substance, they will be quashed on motion, at the cost of the petitioner.

THIS was a petition for a MANDAMUS, to be directed to the justices of Harnett county, to compel them to pay for work done and materials furnished on a court-house and jail for said county, heard upon a motion to quash, before MANLY, J., at the Spring Term, 1858, of Harnett Superior Court.

This cause was before this Court at December Term, 1856,

upon points to which the present considerations have no reference.

The petition, on which the order for a mandamus was founded, was filed at the September Term, 1855, and set out that a majority of the acting justices of the peace for the county of Harnett, made an order, authorising commissioners to let out the building of a court-house and jail, on the public square in Toomer, for the use of their county; that the said commissioners entered into a written contract to let the building of these houses to the plaintiff, and that by the said written contract, the said justices became bound to pay him $18,400, that is, $12,000 for the court-house, and $6,400 for the jail, both of which buildings, were to be executed according to specifications contained in the said contract; that the plaintiff was to furnish all the materials, and was to receive payments in monthly installments for material and work, reserving 10 per cent. as a guaranty for faithful performance on his part; that the petitioner commenced collecting materials, and had proceeded as diligently as practicable to perform his part of the contract; that on one month's compensation being due, plaintiff applied, through the commissioner with whom he contracted, for his pay, to the justices of the said county, sitting in the County Court of that county, which they refused to make, and that they utterly denied their obligation to pay the plaintiff any thing.

The prayer is "to grant unto him a writ of mandamus, commanding the justices aforesaid, to make immediate and ample provision for paying your petitioner according to the said contract, and that they be required also to pay to him whatever sums are now due, by levying all necessary taxes for the purpose thereof, and also whatever may hereafter become due, or show cause, if any they have, to the contrary."

Upon which petition an alternative mandamus was ordered to issue, commanding the said justices to pay the said money as prayed for, and to levy taxes for that purpose as prayed, or show cause to the contrary.

The writ was issued according to the order, returnable to Spring Term, 1856.

The returns made by the justices of Harnett to this mandamus, and the exceptions thereto, were considered in this case, when formerly in this Court, and the opinion of the Court filed. See *McCoy* v. *Justices of Harnett*, Jones' Rep. vol. 4, p. 180.

At ——— Term, 1857, of Harnett Superior Court, an amended petition was filed, setting out all the matter contained in the former petition, and alleging further, that at —— Term, 1857, of Harnett County Court, a majority of the justices being present, in open court, the plaintiff again applied for what was due to him for work and materials, and requested them "to make a provision for payment of his entire contract as the same shall fall due," which they refused to do. The prayer of this amended petition is the same as that of the original.

At Spring Term, 1858, of Harnett Superior Court, a motion was made to quash the proceedings, which the Court, *pro forma*, refused, and the defendants appealed to this Court.

The contract between the plaintiff and defendants, is set out in a copy attached to plaintiff's amended petition. The portion thereof material to the questions considered by the Court, is as follows: "2nd. The work shall be executed under the constant supervision and direction of the parties of the second part and their superintendent, by which superintendent, the classification, measurement and calculation of the quantities, and the amount of the several kinds of work embraced in this contract shall be determined, and which superintendent shall have full power to reject or condemn all work and materials, which, in his opinion, does not conform to the spirit of this contract, and who shall also decide every question, which can or may arise between the parties to this agreement, relative to the execution thereof, and his decision shall be final and binding upon both parties." * * *

13. "In consideration of the full and faithful performance by the party of the first part, of the several stipulations herein contained, the aforesaid parties of the second part, hereby agrees to pay to the party of the first part, for the work here-

in specified, at the rate and price hereinafter mentioned, upon the monthly and final estimates certified by the superintendent of the parties of the second part, it being understood that the party of the second part will retain 10 per cent. of the said monthly estimate in their own hands, until the contract is completed, as security for the faithful performance of the same by the party of the first part." This contract was executed by the plaintiff and by Neil McKay and others, as commissioners appointed by the County Court of Harnett.

Haughton, for the plaintiff.
Strange and *Fuller*, for the defendants.

PEARSON, J. A *mandamus* is a high prerogative writ, and is only granted where one has a *special* legal right which cannot be recovered by an ordinary action. The petitioner must show himself entitled to some *specific* right; *Tucker* v. *Justices of Iredell*, 1 Jones' Rep. 451.

The Court is of opinion that the proceedings in this case are defective. The petition does not make the allegations which are necessary to show with certainty what the Court is asked to command the defendants to do, and the writ does not set out the thing which the defendants are commanded to do, with such certainty as to enable them to do it. It alleges "that in pursuance of the contract the petitioner commenced collecting materials and has prosecuted the work, and when *an installment for the first month* was due, he called upon the defendants, for payment, which was refused." (This was in September 1855.) It further alleges, that in September, 1857, the petitioner applied to the defendants, in open court, for payment "of what is due him for the work already done, the materials furnished, &c.," which was refused.

It is stipulated in the contract, that the commissioners are to appoint a superintendent, who is to make monthly estimates of the work done, and the materials furnished by the petitioner; which estimates, certified by the superintendent, are to be paid, deducting 10 per cent. The petition is defec-

tive in this; it does not aver the amount that was due, and which is claimed as an installment for the first month. It does not allege that the superintendent made an estimate at the end of the first month and gave a certificate thereof, or account in any way for the omission of this allegation. So that both in respect to the amount claimed, and the mode by which it has been, or ought to have been, ascertained, there is less certainty than is required in a common count in assumpsit for work and labor done.

These objections apply with greater force to that part of the petition, which has reference to what is supposed to be due for work and materials up to September, 1857. It is not alleged that estimates have been made, nor is there any allegation of the grounds on which the superintendent failed to make them, if such be the fact. Nor, in short, is there any allegation from which even a conjecture can be founded as to the progress of the work in 1857.

The writ is also defective. This follows, as a matter of course, for it must pursue the petition, and can have no greater certainty. Accordingly, it commands the defendants "to pay to Paschal McCoy *whatever sum is now due him* on account of furnishing materials and doing work upon the courthouse and jail," &c. What sum are they commanded to pay? Is it left to them to fix the amount? If not, how is it to be fixed? A sovreign never issues a command, unless the thing to be done is certain; so that a failure to do it, will justly incur the consequences of a wilful disobedience. Suppose, in our case, the defendants make return that they have not paid the petitioner, because they have not been able to agree upon "the sum that is now due him," would this be a sufficient return? If so, what traverse could be taken by the petitioner? It is manifest that the mode of proceeding, under the writ of mandamus, is wholly inapplicable to such a state of things; *Tucker* v. *Justices of Iredell*, *supra*.

The other branch of the petition and writ, by which the defendants are commanded to put themselves in a state of readiness to pay the amount that may *thereafter* become

due for such work and materials as may afterwards be done, or furnished, presents an interesting question. The work may never be done, or the materials furnished. In the case of individuals, where one agrees to pay for work after it is completed, the other party acts upon the ordinary presumption, that he will provide the means of doing so, and trusts to him in this respect, relying on a remedy in the event of a failure; but there is no proceeding that can be instituted upon the presumption, or in anticipation, of such failure.

It is not necessary to pursue the consideration of this subject, as the case is disposed of on the ground stated above. Nor is it necessaary to consider the various other suggestions that were made in support of the motion to quash.

The order of the Superior Court, overruling the motion to quash, is reversed. Let the proceedings be quashed, and judgment be entered against the petitioner for costs.

PER CURIAM, Judgment reversed.

Doe on the Demise of THOMAS F. HASSELL *v.* W. W. WALKER.

1. Where a lessor of the plaintiff in ejectment has been refused the privilege of having a count on his demise stricken out, it affords to the defendant no ground of exception.
2. A party who is estopped by the production of his own deed conveying the land in dispute, cannot show a better title acquired to him from another subsequently to his deed.

(*Jordan* v. *March*, 9 Ire. Rep. 234; *Love* v. *Gates*, 4 Dev. and Bat. Rep. 363; *Johnson* v. *Watts*, 1 Jones' Rep. 228, explained, and the rule governing the action of ejectment, allowing a party to show a better title derived from a different person than the one under whom both claim, distinguished from a strict estoppel.)

ACTION of EJECTMENT, tried before DICK, Judge, at the last Spring Term of Tyrrel Superior Court.

S. S. Simmons, in whose name there was a count in the

declaration, appeared in open Court, and through the defendant's counsel, requested the Court to have the count in his name stricken out, which motion was refused, and the defendant excepted.

The lessors of the plaintiff produced in evidence a deed from S. S. Simmons to the defendant, and a deed from the defendant to him for the land in controversy; also a deed for the same from the said S. S. Simmons to the lessor Hassell.

The defendant in order to meet the estoppel created by the defendant's deed to S. S. Simmons, offered to show title to the premises in one Joseph W. Simmons, and that he (defendant) held the land as the lessee of said J. W. Simmons, under a lease made before this suit was brought, and after the deed from S. S. Simmons to the plaintiff.

This evidence was objected to by the plaintiff and ruled out by the Court. Defendant again excepted.

Verdict for plaintiff on all the counts. Judgment and appeal.

H. A. Gilliam and *Heath*, for plaintiff.
Winston, Jr., and *Smith*, for defendant.

BATTLE, J. The right of a purchaser to use the name of his bargainor in an action of ejectment is settled; *Posten* v. *Henry*, 12 Ire. Rep. 340. This being so, the defendant has no just cause of complaint, that the Court, at the instance of the bargainor, refused to permit the count on his demise to be stricken out. If such refusal was error at all, it was an error of which the bargainor only had the right to complain. It would seem from the case of *Scott* v. *Sears*, 9 Ire. Rep. 87, that he did have such right upon paying his part of the cost incurred up to the time of the motion, but we are satisfied that it was his right alone, and the defendant had nothing to do with it.

The deed from the defendant to Samuel S. Simmons, one of the lessors, created a strict estoppel against him, and he could not resist a recovery on the demise in the name of Simmons. The case of *Jordan* v. *March*, 9 Ire. Rep. 234, cited

by the defendant's counsel, depends upon its peculiar circumstances, arising out of conflicting recoveries at law against the same person and sales made on executions issued thereon, and it is manifest that it cannot have any bearing upon a question of strict estoppel like the present. Equally inapplicable is the principle decided in *Love* v. *Gates*, 4 Dev. and Bat. Rep. 363; *Johnson* v. *Watts*, 1 Jones' Rep. 228, and other cases, that though where in ejectment, both plaintiff and defendant derived title from the same person, neither, as a general rule, can dispute such title, yet the defendant may defend himself, if he can, by showing that there was a better title outstanding, and that he had acquired it. The general rule here spoken of, is not (as has often been said) one founded on an estoppel, but was adopted as a rule of justice and convenience, to prevent the plaintiff in ejectment, from being compelled, in deducing his title, to go back beyond the source from which both he and the defendant derived their respective claims. The exception is rendered necessary to prevent a wrong being done to the defendant when he has another title in himself superior to both. It is hardly necessary to repeat that this has no application to a case of strict estoppel.

PER CURIAM, Judgment affirmed.

WILLIAM MORING *v.* GEORGE W. WARD.

A paper-writing signed by the owner of land, acknowledging the receipt of a certain bond for money, for the "purchase of the cypress timber," on the land, with a further agreement, to let the purchaser have a certain length of time "to cut the timber off of the land," was *Held* to *create an estate*, so as to enable the purchaser to occupy the land and take the cypress timber for the time stated in the instrument.

THIS was an action of TRESPASS, tried before DICK, J., at the last Fall Term of Bertie Superior Court, and the counsel for

the parties made, and submitted to the Court, for its judgment, the following:

CASE AGREED.

"On the 16th of November, 1854, one Samuel S. Simmons made a contract of purchase of certain growing cypress trees from the plaintiff, and took from him a paper-writing, of which the following is an exact copy:

"Received of Samuel S. Simmons, his obligation for eight hundred dollars, for the purchase of the cypress timber I own, lying on Cub Cypress Broad Creek," (describing it by definite boundaries). "I further agree, to let the said Simmons have eight years to cut the timber off of the said land. Given under my hand this 16th November, 1854.

(Signed,) WILLIAM MORING."

"Said cypress trees, and the land on which they grew, were, at the time the said paper was given, owned by the plaintiff, in fee, and were in his possession.

"Said Simmons, on receiving said paper, gave to plaintiff the following paper, which is the same spoken of in the obligation above set out.

"$800. Six months after date, I promise to pay to William Moring, or order, eight hundred dollars, for value received. Interest from date. November, 1854.

(Signed,) S. S. SIMMONS."

"On 21st February, 1856, Simmons made a deed of trust, conveying all his estate, of every kind, to trustees, for the payment of debts. The said debt of eight hundred dollars, due the plaintiff, is not in way provided for in the said trust, whilst it conveys 'the interest of the said Simmons in the said timber trees.' Said Simmons has not cut any part of said trees, nor had he made any arrangement to do so, or incurred any expense concerning them.

"Said Simmons has never paid any thing on the said note. By his deed of trust he has stripped himself of all his estate, and thereupon became, and is, insolvent, to the extent of several hundred thousand dollars. The plaintiff sued on the said

note, and, at May Term, 1856, got judgment; several executions on which have been returned, "nothing to be found."

"Within ten days after Simmons made his trust, plaintiff notified him and his trustees, that the license to cut the said timber, if any had been given, was thereby revoked, and requested them severally to return the paper which he had given Simmons, and take back Simmons' note, which they, each and all refused to do.

"The trustees of Simmons never did any thing in regard to the said timber trees, except to sell their interest in them to the defendant, which they did some two months before this suit was brought. Before the defendant bought, he knew that the plaintiff had warned Simmons and his trustees not to cut the said timber, that the license had, by plaintiff, been revoked, and that nothing had been paid to the plaintiff. As soon as defendant purchased, the plaintiff warned him not to interfere with the said timber trees, nor go on the said land, and this before the defendant had incurred any expense, or made any arrangement to cut. The day before the writ was brought, the defendant went upon the land and cut one cypress tree, for which this suit is brought. The plaintiff was living upon and cultivating a part of the tract, of which the part above described, is a part."

It was agreed, upon the foregoing case, that the Court might enter a verdict and render a judgment for five cents, if the plaintiff be entitled to recover; otherwise, a judgment of nonsuit. His Honor gave judgment, *pro forma*, for the plaintiff. Defendant appealed.

Winston, Jr., for the plaintiff.
H. A. Gilliam and *Smith*, for the defendant.

PEARSON, J. A lease for years is a contract, by which one agrees, for a valuable consideration, called *rent*, to let another have the occupation and profits of land for a definite time. At common law, a lease could be made by parol, for any

number of years, but entry was required to execute the contract and *vest an estate* as a *term for years.*

Not only the land, but *any part* thereof, the herbage, trees, minerals, i. e., coal, copper, &c., could be made the subject of a term for years.

The rent or consideration was most usually reserved to be paid annually; in which case, if is was the value, or nearly so, it was called "*rack rent*;" but the whole might, according to the contract, be paid at the outset, and was then called "a fine," and in such cases it was usual to reserve something nominal, i. e., "a peppercorn," to be paid annually, during the continuance of the term. This was done simply to mark the relation of the parties, and in long leases, was a prudent precaution, lest peradventure the lessee, or his assignee, might seek to make an improper use of the long possession, and disavow the estate of the lessor. For instance, suppose the value to be $100: if, by the contract, it was to be paid annually, for eight years, the lease would be upon rack rent; if the $800 was paid down, the lease would be upon "a fine."

In our case the contract is in writing, as required by statute; the statute of uses transfers the legal estate, and perfects *the term* without entry; a definite time, i. e., *eight years* from the date of the covenant is fixed; a note for $800 is accepted as "fine," and there is a subject capable of being leased i. e., the cypress trees on a tract of land, the boundaries of which are set out. So, the question is narrowed to this: Was it the intention of the parties to make, by this instrument, a mere personal contract, the remedy, for a breach of which, would be against Moring or his personal representative in damages, and would not affect the land in the hands of the purchaser; or

Was it the intention to make a term for years, and create an estate, which is protected by an adequate remedy?

The rule, *ut res magis valeat quam pereat*, and every principle of construction, force us to the conclusion, that it was the intention to create an estate, so as to enable Simmons to occupy and take the cypress trees for eight years, and not to leave it in the power of Moring to deprive him of the enjoy-

ment thereof. Assuming this to have been the intention, the authorities cited in the argument are full, to sustain the position that no technical words, or set form, are required to make a valid lease for years.

A term for years, being assignable, it follows that the defendant was possessed of an estate, which gave him the right to enter.

The judgment is reversed, and upon the agreement, judgment of nonsuit.

PER CURIAM, Judgment reversed.

LANCELOT POYNER *v.* S. H. McRAE.

A covenant, containing the terms of hiring a slave, and providing that the slave *is not to go out of this State*, does not mean that the party is to prohibit the slave from going out of the State at all events and under all circumstances, but to forbid him from taking the slave out of the State to work, and to bind him to the use of all proper care and reasonable diligence in preventing him from escaping beyond its limits.

ACTION of COVENANT, tried before DICK, Judge, at the last Spring Term of Currituck Superior Court.

The action was brought to recover the value of a slave, Cuse, who had runaway and finally escaped from service, on the following deed: "State of North Carolina, Currituck county. $720. Twelve months after date, for value received, we, or either of us, do promise to pay Lancelot Poyner, or order, the sum of seven hundred and twenty dollars, as the hire of four boys by the name of Jack, Dick, Cuse and Bill, during the year 1855; said negroes to have good winter and summer clothing, boots and socks, and said boys to be at my risk in going to and from my swamp up Roanoke, and not to go out of this State. Witness our hands and seals, January 1st,

1855." Signed and sealed by the defendant, and two others his sureties.

The breaches assigned were:

1st. That the slave was to be at the defendant's risk in going to and from his swamp up Roanoke.

2nd. That he was not to go out of the State.

The slave Cuse, at the time of hiring, belonged to one James Woodhouse, then an infant, the ward of the plaintiff; and the hiring took place at Currituck, where they resided. The defendant resided at Plymouth, in Washington county, about eighty miles from Currituck. The distance between the two places is usually travelled by passing over Albemarle Sound, from Edenton to Plymouth. The slave Cuse, with the others, mentioned in the deed of covenant declared on, were hired by the defendant to work in a shingle swamp, on the Roanoke river, in Martin county, about five miles above Plymouth, whither they were carried, and remained employed until the month of June, when Cuse applied to the defendant for permission to visit Currituck, representing that his young master was sick, and he wished to see him. The defendant gave him leave to go. The slave left Plymouth, but did not go to Currituck. Very shortly after leaving Plymouth, he was seen and recognised in the streets of Norfolk, Va., under the control of no one. He has not been since heard of, and is considered as having finally escaped from his condition as a slave.

On the trial, by consent of counsel, a verdict was rendered for the plaintiff for the value of the slave, with leave to set it aside and enter a nonsuit, if the Court, on consideration, should be of opinion against the plaintiff's right to recover.

His Honor decided against the plaintiff, whereupon the verdict was set aside, and a nonsuit ordered to be entered, from which the plaintiff appealed.

Smith, for the plaintiff.

Heath and *H. A. Gilliam*, for the defendant.

BATTLE, J. A literal construction of that clause in the

covenant alleged to be broken, to wit, that the slaves which the defendant had hired were "not to go out of this State," would make him liable to the plaintiff's recovery in this action. But there is an ancient and well-established maxim, "*qui hæret in litera hæret in cortice*," which makes it the duty of the expounder of a written instrument to pay more regard to the intention, as apparent from its whole scope and design, than to the strict grammatical import of any particular word or phrase. An apt illustration of this maxim may be found in the case of *Clancy* v. *Overman*, 1 Dev. and Bat. Rep. 402, in which the defendant had entered into a covenant, that he would "teach and instruct, or cause to be taught and instructed," a negro boy belonging to the plaintiff, "the art and mystery of the coachmaking business." The action being for an alleged breach of that covenant, and it appearing from the testimony, that the slave had not capacity sufficient to enable him to learn the business, the Court held that the covenant was not an absolute engagement, that he should at all events learn that trade, but only that the defendant should give, or cause to be given, faithful, diligent, and skillful instruction. So, in the present case, the meaning of the parties was not to prohibit the slaves, by the clause in question, from going out of the State at all events and under all circumstances, but to forbid the defendant from taking them to work out of the State, and to bind him to use all proper care and reasonable diligence in preventing them from escaping beyond its limits. It is not pretended that he took the slave in question out of the State himself, and the case of *Woodhouse* v. *McRae*, ante 1, which was an action on the case for negligence in permitting the escape of the same slave, shows that there was not a want of ordinary care to prevent the escape.

It is our opinion that the proper construction was put upon the covenant in the Court below, and the consequence is, that the judgment there rendered, must be affirmed.

PER CURIAM, Judgment affirmed.

Doe on the demise of HARRIS TYSOR *v.* DANIEL SHORT *et al.*

A deputy sheriff had a justice's execution in his hands, which he levied on certain articles of personal property, and upon the defendant's land; some of these articles he sold and properly applied the proceeds; as to the rest, he returned, that they were not sold for the want of bidders, being claimed by different members of the defendant's family; the office of his principal having expired, as a deputy of the new sheriff, before the return day of the execution, he made an endorsement on the execution, that the levy was "renewed," and returned it, with both endorsements on it, to the County Court, where (on notice) an order of sale was obtained; *Held* that such order was valid.

ACTION of EJECTMENT, tried before MANLY, Judge, at the last Spring Term of Moore Superior Court.

The case is fully stated in the opinion of the Court.

Kelly, for the plaintiff.
Haughton, for the defendants.

BATTLE, J. This was an action of ejectment, tried at Moore Superior Court, before his Honor, Judge MANLY, at Spring Term, 1858. The plaintiff's lessor claimed under a sheriff's deed, founded on certain levies and subsequent proceedings on justice's judgments, and sought to recover against the defendants in the executions, John and William Hancock, and also against Daniel Short, who has been permitted to defend as their landlord.

The lessor of the plaintiff had obtained judgments rendered by two justices of the peace against John and William Hancock severally, on 24th of June, 1854, on which executions issued on 29th day September following. These executions were severally levied on 2nd day of October, 1854, upon certain articles of personal property, and "for the want of a sufficiency of goods and chattels," were levied on the land in controversy. These levies were made by K. H. Worthy, sheriff, by R. A. Cole, D. S., and on the 15th day of December, 1854, the personal property was exposed to sale by Thomas W. Ritter,

sheriff, by R. A. Cole, D. S., when some articles were sold, and the rest not sold for the want of bidders, being claimed by different members of the family of the defendants. The return, after stating these facts, adds: "Then renewed my levy on the above named land, this 15th day of December, 1854, to wit, on 300 acres, more or less, as the property of John Hancock, sen'r., on the south side of Deep River, adjoining the lands of Harris Tysor and others; the land on which the said Hancock now lives." Signed, T. W. Ritter, sheriff, by R. A. Cole, D. S. The execution against William Hancock had the following return: "No goods nor chattels of the defendant to be found in my county, therefore, levied the above execution on a certain tract of land, supposed to contain 300 acres of land, as the property of William Hancock, on the south side of Deep River, adjoining the lands of Harris Tysor and perhaps others. Oct. 2nd, 1854." (Signed) K. H. Worthy, sheriff, by R. A. Cole, D. S. "I renewed my levy on the above named lands, this December 15th, 1854." (Signed,) T. W. Ritter, by R. A. Cole, D. S.

These levies were returned to the County Court, of which the defendants therein were duly notified, and orders were, by the Court, duly made for the sale of the land, and it was sold by the sheriff under writs of *vend. expo.* duly issued, when the plaintiff's lessor became the purchaser and took a deed from the sheriff.

The defendant contended that the levies were illegal and insufficient to sustain the orders of the County Court, founded thereon, and that the sale of the land was therefore void. His Honor held otherwise, and a verdict was rendered in favor of the plaintiff. The defendant moved for a new trial, which was refused, and a judgment given against him, from which he appealed.

In the argument here, the counsel for the defendant urges two objections against the plaintiff's recovery. The first is, that after the justice's execution had been levied by the sheriff Worthy, it was, before the return day, renewed by his successor Ritter; and the second is, that it appeared from the

return, endorsed on the execution against John Hancock, that he had porsonal property, and that therefore the order for the sale of the land was void.

The first objection is clearly untenable. At the sale of the chattels, all of them which were not sold, were claimed by other persons, and for that reason no person would bid for them. The writ of execution was still in the hands of the officer, and he certainly had the right to levy upon the defendant's land, or renew a former levy, as it could not possibly be a wrong to the defendant to do either the one or the other. It appears that the same person was the deputy of both the former and the existing sheriff, and it was his duty, under the authority of the one or the other, to make a return of the levy to the next succeeding County Court. He had nothing to do with the land, except to return the execution with the levy endorsed, to the Court; and this was done, and the returns show levies by both sheriffs. We cannot imagine any good, or even plausible reason, why the levies should annihilate each other; and if either were good, it is sufficient to sustain the order of sale by the Court. We have examined the cases of *Nesbitt* v. *Ballow*, 3 Hawks. Rep. 57, and *Tarkington* v. *Alexander*, 2 Dev. and Bat. Rep. 87, referred to by defendant's counsel in support of his first objection, and neither of them opposes the view which we have taken of it. In the first of these cases, it was merely held that an officer could not return "*nulla bona*" on a justice's execution, before the return day, for the purpose of proceeding against the bail; and the second has no relation to the levy and return of a justice's execution on land.

The second objection is equally without any valid foundation to support it. The case of *Henshaw* v. *Bronson*, 3 Ire. Rep. 298, relied upon by the counsel, decided that the County Court would be justified in refusing to make an order for the sale of land levied on, where it appeared that personal chattels had also been seized, and the return did not show what had been done with them. In the present case, the return did show that some of the articles levied on, had been sold,

and the proceeds properly applied, and that the remainder could not be sold, because they were claimed by other persons. The present case differs from the one relied upon in another important particular, to wit, that the Court did make the order of sale, and the land was sold under it.

In *Jones* v. *Austin*, 10 Ire. Rep. 20, in overruling a similar objection, the court said: "But when the order is made, then the Court must be presumed to have acted rightly—to have acted upon an admission or waiver of notice, or a waiver of the search for goods and chattels, or of an account of those appearing to have been levied on, before the levy was made upon the land. No collateral enquiry can, then, be made into the regularity of the order; that is, an enquiry not made in a proceeding instituted by the party expressly for the purpose of having it set aside for irregularity, or reversed for error. And until thus set side or reversed, it will sustain any right acquired under it, and therefore will sustain the title of a purchaser, at a sale, made under an execution issuing upon it."

PER CURIAM, The judgment must be affirmed.

WILLIAM CAIN, JR., AND SAMUEL CAIN *v.* ISAAC WRIGHT.

An action of detinue cannot be maintained by one of several tenants in common of a chattel, even though the defendant should fail to plead the non-joinder of the others in abatement, and the objection may be taken upon the general issue or by demurrer, or by motion in arrest of judgment.

ACTION of DETINUE for the recovery of a slave Louis, tried before MANLY, J., at the last Spring Term of Bladen Superior Court.

The slave in question had been bequeathed to Martha McMillan, by the will of James Cain, in the following words: "I give and bequeath unto my daughter, Martha McMillan,

one negro boy named Louis, and all the property heretofore given to her by me; but if she dies without issue, the property shall return to my other children, and be equally divided among them."

At the death of the testator, he had living, beside the legatee Martha, eight other children, to wit, Ann, Sarah, Elizabeth, Mary, James, Samuel, William and Jonathan, who have since died, with the exception of William and Samuel, the plaintiffs.

On the death of Martha without issue, and previously to the bringing of this suit, a demand was made by the plaintiffs of the defendant, for the slave Louis, which was refused to be delivered up.

The defendant claimed, through a bill of sale from the husband of Martha McMillan, conveying the absolute interest.

The recovery was resisted on two grounds:

1st. That this particular form of action cannot be maintained by two tenants in common of slaves, without the joinder of the other tenants.

2nd. That Martha McMillan, under her father's will, took an absolute estate in the negro in question; the limitation over to *the other children* being too remote.

There was a verdict for the plaintiffs, subject to be set aside, and a nonsuit entered, in case the Court shall be of opinion with the defendant upon the above points.

Upon consideration of the questions reserved, the Court being of opinion with the defendant, ordered a non-suit according to the agreement, and the plaintiffs appealed.

No counsel appeared for the plaintiffs in this Court.

C. G. Wright, for the defendant.

PEARSON, J. An action of trover, or any other action, *ex delicto* for damages, may be maintained by one of several tenants in common, unless the *nonjoinder* be pleaded in abatement, and the plaintiff recover his aliquot part of the damages, for the reason that damages are divisible. It is otherwise in the action of "detinue." Treating it as an action *ex*

contractu, it falls under a well-settled general rule, and treating it as an action *ex delicto*, we think it cannot be maintained by one of several tenants in common, and the objection may be taken advantage of, upon the general issue, or by demurrer, or motion in arrest; for in detinue the specific thing is recovered which is not *divisible;* so the plaintiff cannot recover his aliquot part, and if allowed to recover at all, must get the whole, which would be more than he is entitled to.

The same reason applies to the action of replevin; and although it is an action *ex delicto*, one of several tenants in common cannot maintain it. The reason and authorities cited in *Hart* v. *Fitzgerald*, 2 Mass. Rep. 509, to which we were referred on the argument, fully support this distinction.

As the first point is with the defendant, we are not at liberty to enter upon an interesting question presented by the second. The *only subject* of the gift, being a negro *man*, does not that prevent the limitation over from being too remote by confining it to a life in being?

There is no error.

PER CURIAM, Judgment affirmed.

JOSEPH E. KENNEDY *v.* R. M. C. WILLIAMSON, *Administrator of* ROBERT McKINNIE.

A settlement of accounts between parties is presumed to have taken in all matters of charge and discharge, then due, on both sides.

THIS was an action of ASSUMPSIT, tried before SAUNDERS, J., at the Special Term (February, 1858,) of Wayne Superior Court.

The plaintiff declared for the price of boarding the defendant and his horse for a certain period, and the defense relied upon was payment and set off, and accord and satisfaction.

The service having been proved on the part of the defend-

ant, it was proved that the plaintiff was in the possession of the defendant's intestate's slaves and used them during the time for which board is sought by plaintiff to be recovered, and that the services of these slaves was worth $138,37½.

It was further proved, by *Everitt Smith*, that after defendant's intestate had left the plaintiff's house he (plaintiff) told him that they (plaintiff and defendant) had had a settlement, and that he (plaintiff) had paid McKinnie for his negroes. He also stated that after defendant's intestate had left plaintiff's house, the latter sent to the former fifty dollars, which was credited on a note held by said intestate on the plaintiff.

One *John T. Kennedy* swore that he had heard the plaintiff and defendant's intestate talking about a settlement they had had.

One *Richard Rayner* testified, that after the intestate had left plaintiff's house, and when plaintiff was on his way to market, he (witness) told plaintiff he heard that McKinnie had a note against him for $600. The plaintiff replied, that this was so, but that "if he charged, or had charged him board, he would not owe, or he would not have owed him any thing." Witness did not remember which form of expression was used, "that when he returned from market, he would pay him what he owed, or if he owed him any thing."

Upon this evidence, the counsel, for the defendant, asked the Court to instruct the jury, "that if there had been a settlement between the parties, the law presumed that it was a full settlement; also, that if the plaintiff paid the defendant's intestate $50, as proved by the witness Smith, the law raised the presumption that the intestate was not indebted to the plaintiff."

His Honor declined giving the instructions asked, and defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Strong, *Husted* and *McRae*, for the plaintiff.

K. P. Battle, for the defendant, cited *Scott* v. *Williams*, 1 Dev. Rep. 376; *Perkins* v. *Hart*, 11 Wheat. Rep. 237;

2 Starkies' Ev. 598; *Brewer* v. *Knapp*, 1 Pick. 337; *Ward* v. *Green*, 2 Car. L. Repos. 108; *Copeland* v. *Clark*, 2 Ala. Rep. 388; *Nichols* v. *Scott*, 12 Verm. Rep. 47; *Patterson* v. *Martin*, 6 Ire. Rep. 111; *Farmer* v. *Barnes*, 3 Jones' Eq. Rep. 109; *State* v. *Floyd*, 13 Ire. Rep. 382.

BATTLE, J. When it is ascertained upon proof, or is admitted that there was a settlement of accounts between parties, if the law raises a presumption that it was a full settlement of all matters of account between them at the time when it was made, the Judge erred in refusing to give the instruction which the defendant's counsel asked for. There was certainly testimony, tending to show, that there had been a settlement of accounts between the plaintiff and defendant's intestate, and upon the supposition, that the jury should find the fact to be so, the defendant had a right to an instruction from the Court, as to any presumption which the law might raise from it. The question, then, is, whether in the case supposed, there was any presumption of law that the settlement between the parties was a full one, and of course, included the plaintiff's claim for board, unless he could show that such claim was not taken into the account. Upon this question, we think that the authorities referred to by the defendant's counsel, as well as the reason upon which they are founded, are decidedly in his favor. It is not necessary to notice more than one or two of the cases upon the subject. In *Nichols* v. *Scott*, 12 Verm. Rep. 47, it was held that a settlement was presumed to be in full. So, in the recent case of *Farmer* v. *Barnes*, 3 Jones' Eq. Rep. 109, it was said by this Court, that "this settlement and note, closing the balance, raises a presumption that all matters of charge and discharge were taken into the account, especially, as it was admitted that the settlement was made in reference to the deed of defeasance, which was, in a few days afterwards, executed." So in the case before us, when it was testified that the plaintiff owed the defendant's intestate on account, $138,37½, for the hire of negroes, and also a note for several hundred dollars, and af-

ter the time, when both the accounts owing to, and from him, were due, the plaintiff said that he and the intestate had had a settlement, and about the same time sent $50, to be credited on the note held against him by the intestate, we think the law raised a presumption that his account had been taken into the settlement, and was thereby satisfied. The presumption was not conclusive, and he was at liberty to show that the fact was otherwise; but in the absence of proof on his part to that effect, his account must be considered as having been settled. Every presumption of this kind, is founded (as was said in *Dupree* v. *Dupree*, 4 Jones' Rep. 387,) upon the principle, that the thing presumed is ordinarily the consequence of that from which the presumption is raised. "Thus, as it is common in England, for the purchaser of goods to give his note for the price, a note given after the purchase of goods is, in the absence of direct proof, presumed to have included the price of such goods; *Motrie* v. *Harriss*, 1 Moody and Malkin, 322, so, an order for money is not usually left in the hands of the drawee, unless the money has been paid. Hence, the possession of the order is admitted as evidence of the payment; *Blount* v. *Starkey*, Tayl. Rep. 110." For the same reason, a settlement of accounts between two parties, is presumed to have included all the items on each side, because such is ordinarily the case with persons who enter into such a settlement.

Our conclusion is, that the defendant was entitled to the instruction which he asked, and it was error in the Court to refuse it.

PER CURIAM, Judgment reversed, and a new trial granted.

LEWIS WEBB *v.* THE PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR.

The service of process authorised to be made on a director of a corporation, under the 24th sec. of 26th ch. of the Revised Code, as applied to the Bank of Cape Fear, means one of the eleven principal directors, annually elected by the stockholders, and not a director appointed by the authorities of the bank for its branches or agencies.

ACTION of ASSUMPSIT, tried before his Honor, Judge MANLY, at a Special Term of Beaufort Superior Court.

The suit was brought by warrant on a ten-dollar bank note, issued by the defendant, payable at Washington, to the bearer on demand, which had been demanded and protested for non-payment. The case was brought to the Superior Court by appeal. Service of process was made by a summons left with James Ellison, one of the directors appointed by the president and directors of the Bank of Cape Fear, for the branch of Washington, who was not a director appointed by the stockholders of the parent corporation.

The defendant pleaded in abatement to the writ; to which the plaintiff demurred. The Court overruled the demurrer, and the defendant appealed.

Dortch, for the plaintiff.
Rodman, for the defendant.

BATTLE, J. The only question presented by the pleadings is, whether the summons served upon one of the directors of the defendant's branch, at the town of Washington, was a sufficient service of process within the meaning of the 24th sec. of 26th ch. of the Revised Code. That section declares, that "the service of summons, if against any insurance company, railroad, banking or other joint stock incorporated company, shall be made by leaving a copy thereof with the president or other head, cashier, treasurer or director of such company." The act of 1833, (sec. 2, Rev. Statutes, p. 47,) by which the

defendant was rechartered as a banking corporation, provides in the 4th section, "that for the well-ordering the affairs of the said corporation, there shall be eleven directors, of whom at least seven shall be residents of Wilmington, or within fifteen miles thereof, elected yearly by the stockholders, at a general meeting, to be held annually at Wilmington, on the first monday in January." By the 5th section, a president is to be chosen by the directors, or a majority of them, from among themselves, and it is declared in the same section that "the president and directors of the principal Bank, for the time being, shall have power to establish branches or agencies of the said bank at such place, or places, within this State, as they may think proper," and to commit the management thereof to such persons as they may select, provided that there shall not be less than three directors at each of such branches or agencies. The charter, in several other sections, speaks of the directors of the bank, but always means thereby the eleven directors directed by the 4th section to be elected annually by the stockholders. Thus, in the 6th section, where the appointment of officers, clerks and servants at the principal bank and its branches and agencies is given to the "president and directors for the time being"—so, in the 8th section, where the directors, under whose administration it is contracted, may, under certain circumstances, be made responsible for the excess of a greater debt than they shall be allowed by law to incur. Again, where the president and directors are by the 9th section compelled to make loans to the State in certain contingencies. It appearing from these, and other parts of the charter, that when the term directors is mentioned, it means the directors of the corporation, in contradistinction to the local directors of a branch, or agency, unless otherwise explained, we may well infer that when the directors of the bank are mentioned in any other act of Assembly, the general directors of the corporation are intended, unless it is otherwise expressed. Such a construction of the Act in question, is the more readily adopted, because the service of the summons will then pursue the exigency of the process which runs

against "The president, directors and company" of the bank; and this construction will undoubtedly satisfy the words of the act.

We understand that the main argument in favor of the sufficiency of the service in the present case, was the convenience of allowing it, because the bank note, upon which the warrant was brought, was payable at the defendant's branch at Washington. The answer is, that though payable there, it was not the debt of the branch, but of the whole corporation; besides, the argument proves too much, for if the summons could be served upon a director at Washington, it might have been served on a warrant on the same note on a director at Asheville, where the defendant has another branch. We have no doubt that the Legislature, in providing for service upon a banking corporation by the term "director," meant one of those persons who were to be elected annually by the stockholders for "the well-ordering of the affairs of the corporation," and not one of those directors who were to be appointed for the management of such branches and agencies, as the president and directors of the principal bank should think proper to establish.

Our conclusion, therefore is, that the warrant in the present case, was not properly served upon the defendant.

The judgment must be reversed, and then a judgment be given on the demurrer for the defendant.

PER CURIAM. Judgment reversed.

JOHN W. DAVIS, *Adm'r.*, *v.* ALONZO JERKINS *et al.*

The right of navigation, being of most importance to the public weal, is paramount to all conflicting rights.

The Act of Assembly, Rev. Code, chapter 101, section 28, requires of the owner of a toll-bridge, not only to erect and keep in good repair a *draw* sufficient for the purposes of a free navigation of the stream, but also to

provide the means of raising it, and to have it raised whenever steamboats and other vessels are passing it.

THIS was an action of TRESPASS *quare clausum fregit*, tried before SAUNDERS, J., at the Special Term, February, 1858, of Wayne Superior Court.

The suit was brought for damages for striking and carrying away a part of the toll-bridge over the Neuse river, belonging to the plaintiff's testator. The intestate, and those under whom he claimed, had for forty years owned a public ferry across the river, at the point where the bridge in question was located, (owning also the land on either side of the stream,) which, for the last ten years before the injury complained of, had been under the privilege accorded by the act of Assembly, supplied by a toll-bridge erected in lieu thereof.

The defendant Jerkins was the owner of a steamboat, which usually navigated the river Neuse, between New-Berne and Smithfield, on a part of which, the bridge in question was situated.

It was in evidence, that the bridge had a "a draw" in it, which was intended to allow boats to pass; that this draw was difficult to be worked; that it was not supplied with machinery of any kind to raise and lower it, but that this had to be done by getting on the bridge, taking up a part of the flooring and pushing down with poles the parts of the sections of the draw which lapped under the bridge, which had the effect to raise the other ends of the section; that at high water this opening could be but partially effected, the water not permitting the descent of the end under the bridge, so as to make an entire opening; that when entirely opened, the sections composing the draw would be at right angles with the line of the bridge, but on this occasion such was not their position, and that only about ten feet of the space was opened; that there were no hands at the bridge to raise the draw, nor were any usually kept there for that purpose; that this was always left for the boat hands to do, and that it required four or more hands to do it; and detained each boat from fifteen

minutes to half an hour, and sometimes even longer; that on the occasion complained of, there was a high freshet in the river, and the boat of the defendant Jerkins, under the charge of the defendant Pittman as captain, on a downward trip was stopped at this point by the bridge; that she laid to and put her hands on the bridge to open the draw, which was done as far as its condition would admit; that the boat endeavored to take distance up the stream, so as to take the centre of the opening, but, either from the want of due caution, or from a defect in the power of the boat, she was not able to do so, but in passing struck the bridge and carried a part of it away; that this was not done wilfully, but from accident, and the question was, whether there was such negligence as to make the defendants liable.

His Honor left it to the jury to say whether there was a proper and sufficient draw in the bridge, and if there was, whether the defendants were guilty of negligence in passing it. To this instruction, defendants excepted.

Verdict and judgment for the plaintiff. Appeal by the defendants.

Strong, *Fowle* and *McRae*, for plaintiff.
Haughton, *Dortch* and *Stevenson*, for defendants.

BATTLE, J. The river Neuse, at the place where plaintiff's toll-bridge spans it, is a navigable stream, and being so, the defendants had the right to navigate it with their boats, at all times, without obstruction from any person, unless such obstruction were authorised by the sovereign power; this sovereign power would have been the General Government, had the congress of the United States passed any act in relation to this river, in execution of the power "to regulate commerce with foreign nations and among the several States;" Con. of U. S. Art. 1, sec. 8; *Wilson* v. *Blackbird Creek Marsh Company*, 2 Peters' Rep. 248, (8 Curtis, 105). But as no such act was ever passed by congress, the Legislature of this State is the only sovereign under whose authority a bridge, or any

any thing else, could be erected, whereby any impediment to the free navigation of the river could be created; *State* v. *Dibble*, 4 Jones' Rep. 107; *The State of Pennsylvania* v. *The Wheeling and Belmont Bridge Company*, 18 Howard's Rep. at p. 432.

It cannot be doubted that the toll-bridge, owned by the plaintiff's intestate, was, in the condition in which it was proved to be at the trial, a serious obstruction to the passage of steam, and other boats, up and down the river. The question then is, whether the owner had any authority from the Legislature to put it there, and keep it up in the condition described. He contends that he had such authority under the 28th section of the 101st chapter of the Revised Code, which enacts that "in all cases where the proprietor of a ferry shall prefer building a good and substantial bridge over any water-course, instead of keeping a ferry, he may do so, and may claim and hold such bridge under the same rights, and in the same manner, by which the ferry is claimed and held, &c.," with a proviso, however, "that on all such bridges the proprietor shall erect a draw where the free navigation of the stream may require it." The erection of the bridge is undoubtedly authorised by this act, and it is equally clear that the owner was bound to erect, and keep in good repair, a draw sufficient to allow of the free navigation of the river. The Legislature, in requiring the draw, recognises the superior claims of the right of navigation, which, by the general law, is a right paramount to all others. Thus it was held in *Lewis* v. *Keeling*, 1 Jones' Rep. 299, "that the right of navigation is paramount, because it is of most importance to the public weal." In that case the superiority of the right of navigation was asserted over that of fishing, but the same principle "that it is of the most importance to the public weal," will give it the preference over all other conflicting rights.

This being established, we think that a fair construction of the act, according to its spirit and intent, requires us to hold that it was imposed upon the owner of the bridge, not only to erect, and keep in good repair, a draw sufficient for the

purposes of a free navigation of the stream, but also to provide the means for raising it, and to have it raised, when steam-boats and other vessels were passing. It is manifestly putting the right of the owner of the bridge above that of the navigators of the river, to subject the latter to the necessity of stopping their boats and raising the draw with their own hands, thereby causing them much delay, and oftentimes exposing them to danger; and we are surprised that they have submitted patiently to the inconvenience so long.

But perhaps it may be said that this construction of the act will very much impair, if it do not destroy, the value of toll-bridges across navigable streams, by requiring the owners of them to keep hands to raise the draw when boats are passing. If so, it must be submitted to as the necessary result of enforcing the paramount right of navigation, which, as we have seen, is for the *public weal.* But we do not believe that it will necessarily produce that effect. The owner of a toll-bridge must have a keeper attending at the bridge for the purpose of collecting his tolls. If we are not much mistaken, the draw may be constructed in such a manner as, by the aid of proper machinery, to be easily raised by the keeper; or at least by him with very little other assistance. But whether this is so or not, the paramount right of navigation must be maintained, even though it may be at the expense of other rights.

This view of the case makes it unnecessary for us to decide any other question raised in the argument.

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

HILLIARD LEWIS *v.* JACKSON W. BRINKLEY.

The defendant had agreed to deliver a deed to the plaintiff before two o'clock, and failing to do so, the plaintiff offered to receive the same after that time during the day; but while the deed was being prepared he left, declaring he had waited long enough, and refused to receive the deed next day when tendered, *it was held* that the plaintiff was entitled to recover from the defendant a sum advanced as part of the price.

ACTION of ASSUMPSIT, tried before CALDWELL, J., at the last Spring Term of Wilson Superior Court.

The defendant agreed to meet the plaintiff next day and execute to him a deed for a lot in the town of Wilson, between the hours of 10 A. M. and 2 P. M. The plaintiff paid defendant fifty dollars, in part of the purchase money, and it was further agreed, that if either party failed to perform the contract, he should forfeit to the other, fifty dollars.

The parties met, as had been stipulated between them, but the deed was not delivered before two o'clock, although the plaintiff twice suggested to the defendant that this had better be done. After two o'clock, the plaintiff still expressing a willingness to take the deed, they went together to an attorney to have one prepared. Before the deed was prepared, being almost dark, the plaintiff left the place, declaring that he had waited long enough, and would not wait any longer, and that he must have his deed or his money. In reply, the defendant requested the plaintiff to wait a few minutes and he should have the deed. On the next day, the defendant tendered the plaintiff a deed prepared by the attorney, but the plaintiff refused to accept it, and this action was brought to recover the fifty dollars advanced as part of the price. Upon these facts, the Court charged that the plaintiff was entitled to recover. Defendant excepted.

Verdict for plaintiff. Judgment and appeal.

Dortch, for the plaintiff.
Strong, for the defendant.

PEARSON, J. We concur with his Honor in the view taken by him of this case. As the deed was not delivered before two o'clock, the defendant was in default, and plaintiff had a good cause of action at that time. It was therefore gratuitous, and a matter of favor on his part, to agree to go to an attorney, so that the deed might be prepared and accepted *nunc pro tunc*. It comes with an ill grace from the defendant to insist, that after dallying about the matter and detaining the plaintiff 'till almost dark, he had a right to deliver the deed on the next day, although the plaintiff had, the day before, twice "quickened his diligence" within the appointed time, by suggesting that the deed had better be executed, and had finally, after his patience was exhausted, started home, notifying the defendant that he would not accept the deed afterwards, but should insist on having the money. The plaintiff certainly had a right to put an end to the continuance of the favor that he had granted. The defendant had no right to trifle with him any longer, and was bound to hand him back his money, (the fifty dollars paid). Whether he was not also bound to pay the fifty dollars forfeit, is a question not presented by the case.

PER CURIAM, Judgment affirmed.

WILLIAM J. CAMLIN *v.* JOHN T. BARNES.

A Court has no power to order a new process to bring in a new defendant during the pendency of a suit.

Motion to amend, heard before CALDWELL, J., at the last Superior Court of Wilson county.

The writ was issued in April, 1857, returnable to the Fall Term of that year against John T. Barnes. The cause was put to issue and stood on the trial docket at this term, when, upon the suggestion that Lewis J. Dortch had been partner with

the defendant, it was moved that the plaintiff have leave to amend by issuing process to bring in William T. Dortch, the administrator of Lewis Dortch, to answer to this action. This was objected to by the said William T. Dortch, who was present in Court, and the motion refused by the Court.

From which decision, the plaintiff appealed.

Strong, for the plaintiff.
Dortch, for the defendant.

PEARSON, J. There are exceptions to every general rule, and we think that an exception is at last presented by the present case to the rule which has grown up in the construction of our statute of amendments, i. e., "the Court has power to amend any thing at any time."

The case falls under the first class set out in *Phillipse* v. *Higdon*, Bus. Rep. 380, "every court has ample power to permit amendments in the process and pleadings of any suit *pending before it.*" So, if this be an *amendment*, the Court has power to make it. But it is not an amendment. The effect of the order is to *make*, and not to *amend*, this process. We put our decision on the ground, that whenever it is necessary to issue *new* process to bring in a *new* defendant, the operation amounts to something which exceeds an amendment, in the broadest signification in which the word has ever been used.

Among the great number of cases on the subject of amendment in our reports, it is no where decided, or intimated, that the Court has power to issue new process. See the confusion that would result: The new defendant must make "defense" and enter his pleas. This he does at the term in which he is brought in; of course he cannot be required to do it *nunc pro tunc*. No fiction can effect that. So, there are distinct and unconnected pleadings at different times in the same suit; to say nothing of the fact, that the defendant, who is already in, must be made to stand by until the new man can be arrested and brought in.

But again: the issuing of a writ is the commencement of a suit; consequently, the suit, as against the different defendants, is commenced at different times, and the pleas and orders in this "double headed monster," will be of different dates, unless the power of the Court can be stretched so far as to make the new defendant "consider himself" as having been sued *nunc pro tunc*. It was not the intention of the Legislature to confer upon the courts the power to produce such a legal absurdity. We concur in opinion with his Honor.

PER CURIAM, Judgment affirmed.

SAMUEL MASTERS *v.* BRYAN GARDNER.

When arbitrators are chosen to settle a copartnership, it is for them to say what does, or does not, constitute a part of the copartnership effects.

ACTION of DEBT, tried before CALDWELL, J., at the last Spring Term of Craven Superior Court.

The plaintiff declared on a submission bond, which recited that there had been a partnership between the plaintiff and defendant in the business of making and distilling turpentine in the State of Georgia, which had been dissolved, and certain matters of difference having arisen between them, they obliged themselves, in the bond declared on, to submit "all the said matters of controversy and all matters of difference in relation to, or in any wise concerning, said partnership;" with a final obligation to *stand to, abide by and perform* the the award of the arbitrators.

The breach assigned was that the defendant refused to perform the award of the arbitrators.

The defendant offered to prove that there was error and mistake in the award in the charge of $250 for two mules; for that they were the private property of the plaintiff, and

not within the terms of submission, which only embraced copartnership property.

The testimony was objected to and rejected, for which the defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Donnell, for the plaintiff.
J. W. Bryan and *Haughton*, for the defendant.

PEARSON, J. We concur with his Honor, that whether the *two mules* were the private property of Samuel Masters or belonged to the copartnership, was a question embraced within the terms of the submission, and the parties were concluded, in respect thereto, by the award. It would seem to be a matter of course that when arbitrators are chosen to settle a copartnership, it is for them to say what does or does not constitute a part of the copartnership effects. Unless they have authority to settle this question, it would be impossible to make a settlement. *Brown v. Brown*, 4 Jones' Rep. 126, is decisive of this point.

PER CURIAM. Judgment affirmed.

WILLIAM S. ASHE *v.* A. J. DEROSSETT, *Adm'r of* SAMUEL POTTER.

Where it was agreed between the owner of a rice mill and a planter, that if the latter would bring his rice to the former's mill, it should have a priority in being beat, to which he, the owner, had become entitled, and it was not so beat, but was kept in the mill to await another turn, and, before it was beat at all, the mill and the rice is question were consumed by fire, *it was Held* that damages for the loss of the rice could not be assessed for the breach of this contract.

The notes of an attorney taken on a former trial of the same cause, which he swears he believes to be correct, though the witness does not fully remember the evidence, are admissible.

ACTION of ASSUMPSIT, tried before PERSON, J., at a special term, (Jan'y, 1858) of New-Hanover Superior Court.

The defendant's intestate was the owner of a rice mill, and the plaintiff sent his rice to be beat. It was proved that the usual custom of the mill was to take one tenth as toll, and to beat each man's rice in turn, fifteen hundred bushels being considered as a turn, and, while at the mill, the owner of the rice was to run the risk of loss by fire, occurring without blame on the part of the bailee. There was not evidence of negligence, but there was evidence going to show that Potter told Ashe, the plaintiff, that he, as the owner of the mill, was entitled to a turn which would soon come 'round, and that the latter might bring his rice to the mill and he should have it beat in that turn. Upon which the plaintiff took his rice to the mill, but it was not worked on at that turn, and after that turn, the mill and contents, including the rice in question, were consumed by fire. It was for this failure and refusal to beat the plaintiff's rice according to the contract, that this suit was brought, and the plaintiff insisted upon the value of the rice destroyed as the measure of the damages.

The defendant, among various other objections, opposed the demand for damages for the loss of the rice, as not being the consequence of the breach of contract relied on.

His Honor was of opinion, if a breach of the contract had been established, that the loss of the rice being a natural consequence, was the proper measure of the plaintiff's damages, and so instructed the jury. The defendant excepted.

Upon the trial, *Mr. Wright*, a gentleman of the bar, was tendered to prove what a deceased witness had proved on a former trial of this suit. Mr. Wright had managed the cause on that occasion, and took notes of the witness' evidence. He said he did not then recollect the substance of the whole of the witness' testimony, but that to the best of his knowledge and belief, his notes, taken at the trial, contain the substance of all the deceased witness then swore. The plaintiff's counsel then offered to read the notes, which was objected to by the defendant, but admitted by the Court. Defendant excepted.

The plaintiff had a verdict for the whole value of the rice destroyed. Judgment and appeal by defendant.

Strange and *W. A. Wright*, for plaintiff.
E. G. Haywood and *London*, for defendant.

PEARSON, J. The defendant's counsel contended that the plaintiff could not recover, in respect to the burning of the rice, because the injury was too remote. His Honor was of a different opinion. There is error.

Where one violates his contract, he is liable only for such damages as are caused by the breach; or such, as being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application. In regard to that, we differ with his Honor. There is nothing to show that the contingency, that the rice might be burnt if left in the mill, was in the contemplation of the parties. On the contrary, its being burnt was an accident unlooked for, and unforeseen, and can, in no sense, be considered as having been caused by the fact, that it was not beat in the turn promised by the defendant's intestate, consequently the damages were too remote, and the jury ought not to have been allowed to include the value of the rice in estimating damages for the breach of the promise; *Boyle* v. *Reeder*, 1 Ire. Rep. 607; *White* v. *Griffin*, 4 Jones' Rep. 139.

Jones v. *Ward*, 3 Jones' Rep. 24, is an authority for the admissibility of the evidence which was objected to.

As the case goes back for a new trial, it may be well to call the plaintiff's attention to the point, that, although the declaration sets out a sufficient consideration to support the promise sued on, no evidence in support of the alleged consideration is set out in the statement of the case.

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

JOHN PHILLIPS *v.* WILLIAM J. HOUSTON, *Adm'r. of* FRANCES PHILLIPS.

Where the donor in a deed of gift, handed it to a third person, *signed and sealed*, to have it proved and registered, without retaining any authority or power to control it, which, on being returned to the donor, was delivered to another person in like manner and for the like purpose, but who neglected to have it registered until after the donor's death, it was *Held* that the delivery to the first person, to whom it was handed, was a complete delivery.

ACTION of DETINUE, tried before CALDWELL, J., at the last Spring Term of Duplin Superior Court.

The defendant's intestate was the mother of the plaintiff, who resided in the State of Alabama; it was in proof that she called upon one Kinnair, to draw a deed of gift to the plaintiff for Jack, declaring that the plaintiff was one of the oldest of the family, that he had worked hard and helped make the property of the estate, and had never received his full share of it, and that she wished to give Jack to him. Thereupon Kinnair wrote a deed of gift to the plaintiff, which was *signed and sealed* by her, and witnessed by the said Kinnair and one Holland. She delivered the deed to Holland, and requested him to take it to the court-house and have it recorded. This he promised, but failed to do, upon the allegation that the donor had given him no money to pay the fees. Holland returned the deed to the donor, who shortly thereafter gave it to one Kennedy, with directions to deliver it to one Moore, with a request that he should take it to court and have it recorded. Kennedy placed the deed among his papers, where it remained until the donor's death, he alleging that he forgot it. After the death of Mrs. Phillips, Kennedy gave the deed to Moore, who had it proved and registered. The jury returned a verdict in favor of the plaintiff, subject to the opinion of the Court, upon the question whether the deed was duly delivered, under the circumstances above stated. On consideration, his Honor was of opinion with the plaintiff upon the question reserved, and gave judgment on the verdict. The defendant appealed.

William A. Wright, for the plaintiff.
J. H. Bryan, for the defendant.

BATTLE, J. In the case of *Hall* v. *Harris*, 5 Ire. Eq. 303, it was said by the Court, that the delivery of a deed "depends upon the fact that a paper, *signed and sealed*, is put out of the possession of the maker." That, we think, is the true test, and if it appear that the grantor, or donor, has parted with the possession of the instrument to the grantee or donee, or to any other person for him, the delivery is complete, and the title of the property granted, or given thereby, passes. But it will be otherwise, if the grantor or donor retain any control over the deed; as if he, when he hands it to a third person, request him to keep it and deliver it to the person for whom it is intended, *unless* he shall call for it again. These principles will be found to govern all the cases, beginning with *Tate* v. *Tate*, 1 Dev. and Bat. Eq. 22, running through *Baldwin* v. *Maultsby*, 5 Ire. Rep. 505; *Snider* v. *Lockenour*, 2 Ire. Eq. 360; *Ellington* v. *Currie*, 5 Ire. Eq. 21; *Roe* v. *Lovick*, 8 Ire. Eq. 88; *Gaskill* v. *King*, 12 Ire. Rep. 211, and *Newlin* v. *Osborne*, 4 Jones' Rep. 157, down to *Airey* v. *Holmes*, ante, 142. Tried by the above mentioned test, the delivery of the deed, in the present case, must be declared to be complete. The donor handed the paper, *signed and sealed*, to a third person, for the use of the donee, without any reservation whatever, and when it was returned to her, she immediately handed it to another person, for the donee, without the slightest intimation that she was to have any control over it. The delivery, however, was perfect, when the instrument was handed to the first person, and it made no difference whether it was registered before or after the donor's death. His Honor was right in giving judgment for the plaintiff, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

WILMINGTON AND MANCHESTER RAIL ROAD CO. *v.* JOHN WRIGHT.

A corporation authorised to be constituted under an act of Assembly, cannot take a bond, payable to it, until the pre-requisites have been performed to give it corporate existence.

ACTION of DEBT, tried before ELLIS, J., at the Fall Term, 1857, of Wayne Superior Court.

The plaintiff declared on the following bond:

"On demand —— promise to pay to the Wilmington and Manchester Rail Road Company, or order, twenty-five dollars, for value received, being the first instalment of five per cent. on five shares of stock subscribed, by ——— in said company. October 30th, 1847. J. WRIGHT, [*seal.*]

The plaintiff also declared for the remaining instalments of the five shares, which was resisted, on grounds, relating to the validity of the subscription, the want of proper advertisement, &c., but as these points are not considered by the Court, the exceptions relating to them, are omitted.

The defendant's counsel resisted the recovery on the bond, upon the ground, that there was no proof whatever, that on the 30th of October, 1847, the date of the said bond, and when it was presumed to have been executed, that the plaintiffs had a corporate existence, under the act of Assembly, by which they were chartered.

His Honor instructed the jury against the defendant on this point. Defendant excepted. The charge of the Court on the other points, becomes immaterial.

Verdict for the plaintiff on the bond, also for the remaining instalments. Judgment. Appeal by defendant.

J. H. Bryan and *Dortch*, for the plaintiff.
Wm. A. Wright, for the defendant.

PEARSON, J. To make a grant, there must be a grantor, a grantee and a thing granted; to make a bond, there must be

an obligor, an obligee, and a thing to be done. The paper sued on in this case, as a bond, is of no force and effect, because there was no obligee capable of receiving it. The plaintiff was not in esse—had no legal existence at the time the bond bears date. The act of the Legislature gave to it an inchoate existence, but it did not become a corporate body capable of acting *for itself, and in its own name,* until certain pre-requisites had been complied with, which was not done until after the date of this instrument.

As the error, in respect to the alleged bond, entitles the defendant to a *venire de novo*, it is not necessary to consider the other points made in the case. It will be an interesting question, how far the nullity of the bond may affect the validity of the subscription, and the liability of the defendant in respect to the several instalments, for which he is sued.

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

COOK & JOHNSON *v.* DUGALD McDUGALD.

An order of the County Court permitting a creditor, not notified, to make up an issue of fraud in a proceeding under the insolvent debtor's act, a refusal to treat certain specifications of fraud, suggested by the plaintiff, as nullities on account of vagueness, and because not filed in time, and an order to continue the cause, can, neither of them, nor altogether, be appealed from; because a decision of them, in an way, would not put an end to the cause.

Motion to discharge a debtor from custody, under the act for the relief of insolvents, heard before MANLY, J., at the last Spring Term of Cumberland Superior Court.

A ca. sa. had issued from a justice of the peace against the defendant, and a bond taken returnable to March Term, 1855, of the County Court. The defendant filed a schedule, which on monday of the term, he proposed to swear to, but the plaintiff, in the ca. sa., asked for, and obtained time, till friday of the term, to make up an issue of fraud and file specifica-

tions. On that day, the plaintiff gave notice that he declined to make up such issue, whereupon Cook and Johnson asked, and obtained leave, to make up the issue of fraud, and they filed specifications, suggesting that the defendant had concealed property, money and effects, in various instances and particulars. The new plaintiffs then filed an affidavit, upon which, the cause was ordered to be continued till the next term of Court.

These several motions were opposed by the defendant, who filed a statement, in writing, specifying the grounds of his opposition, to wit:

"1. That the specifications, or what purports to be such, are mere *suggestions*, and not specifications.

"2. That what purports to be specifications of fraud, is but an affidavit of John H. Cook, suggesting fraud.

"3. That if there be any suggestions of fraud, they have not the written affidavit of any one annexed, setting forth, that he verily believes them to be true.

"4. For that such suggestions or specifications, are not sufficiently explicit.

"5. For that in point of fact, no issue is made up, and until that is done, the Court cannot continue the cause."

The exceptions thus drawn up were overruled by the Court, and the defendant appealed to the Superior Court.

Upon motion, in the Superior Court, the defendant's appeal was ordered to be dismissed, upon the ground, that it had been improvidently allowed. Whereupon, the defendant appealed to this Court.

Banks and *Haughton*, for the plaintiffs.
Kelly and *Fuller*, for the defendant.

BATTLE, J. The several orders of the County Court, from which the defendant appealed to the Superior Court, were of such a character, that not one of them presented a question, upon which a judgment against the plaintiffs, could put an end to the cause. If such had been the case, and the defend-

ant had a right to such a judgment, which the Court refused to give, he might have appealed at once to the Superior Court. Although it is admitted, that it is not every order which the county court may make in the progress of a cause, that is, the subject of an appeal, yet, as TAYLOR, C. J., said in *Hunt* v. *Crowell*, 2 Murph. Rep. 424, "Whenever the question presented to the county court, is such, that a judgment presented to it one way, would put an end to the cause, it may be appealed from." This rule was adopted as the true test in the case of *Mastin* v. *Porter*, 10 Ire. Rep. 1, and according to it the appeal, in the present case, was improperly taken, and, therefore, was rightfully dismissed from the Superior Court. The making suggestions of fraud by creditors, under the insolvent debtors' act, Rev. Code, ch. 59, and the ordering of issues to be made up thereupon, to be tried by a jury, are matters proper for the County Court, and the defendant cannot be entitled to any judgment in reference to them, which would put an end to the cause, and it follows, that any appeal by him, from such, would be premature. Such were the orders in this case, with the additional one, for the continuance of the cause, and a judgment upon neither could have been final.

The order of the Superior Court dismissing the appeal is affirmed, and this opinion will be certified to the Superior Court, to the end that the appeal to that court may be dismissed, and that a writ of *procedendo* may issue to the County Court, directing it to proceed in the cause according to law.

PER CURIAM, Judgment affirmed.

Doe on the demise of SAMPSON BENNETT *v.* BURRELL WILLIAMSON.

A mortgagee, who has had seven years' possession of the mortgaged premises previously to the entry of the defendant, who is a stranger, can recover possession, whether the mortgage debts have been paid or not.

ACTION of EJECTMENT, tried before MANLY, J., at the Spring Term, 1858, of Sampson county.

The title of the lessor of the plaintiff depended upon possession for seven years, under a mortgage deed, the debt secured by which, had, as alleged by the defendant, been satisfied. The point in question was, whether the mortgage had been satisfied, and the Court charged the jury, that if there was seven years' possession, under an *unsatisfied* mortgage, the plaintiff was entitled to recover, otherwise, he was not. The plaintiff excepted.

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

C. G. Wright, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. It is not distinctly stated in the bill of exceptions, that the defendant was the mortgagor, and from the manner in which the case was submitted to the jury, we infer that he was not. Taking him then to be a stranger, we do not perceive any reason why the plaintiff's lessor, who was a mortgagee, should not recover by virtue of a seven years' possession, whether the mortgage debts were, or were not, satisfied. If they were not satisfied, then his recovery would be for his own benefit; but if they were satisfied, then he would recover the legal title; holding it, however, as trustee for the mortgagor. There is no intimation, in the case, of a reconveyance of the legal title from the mortgagee to the mortgagor, and in a suit by the former, against a third person, to recover the possession of the mortgaged premises, we are not aware of any principle upon which such conveyance would be presumed.

It is well known that in the action of ejectment, the lessor of the plaintiff must recover upon the strength of his legal title, without respect to any equitable interest which may be in another. In the present case, there being no actual, or presumed, reconveyance of the legal title from the mortgagee

to the mortgagor, he had a right to recover if he had had seven years' adverse possession of the land before the entry of the defendant. The question, whether the mortgage debt had been satisfied or not, will arise between him and his mortgagor in case of his recovery.

PER CURIAM, The judgment must be reversed, and a new trial granted.

IN RE JULIUS H. ZOLLICOFFER'S WILL.

After a will had been formally executed, one of the subscribing witnesses, upon his own motion, but with the consent of the decedent, took it and kept it to submit to the examination of counsel, and did not return it, nor have any discourse with the testator afterwards, it was *Held* that the act of publication was complete, and that it could only be revoked by one of the modes prescribed by the statute.

ISSUE *devisavit vel non*, tried before ELLIS, Judge, at the last Spring Term of Halifax Superior Court.

The only point upon which exception was taken by the caveators, was in relation to the due publication of the will, and upon that, the proof was as follows:

The will was written by Mr. Simmons as dictated by the testator; after it was written, it was read over to him, and he assented to it. Testator, whilst on his bed, signed it; the paper was then placed on a table by the bed-side, and the subscribing witnesses signed it in his presence, and at his request. After this was done, Mr. Simmons, who wrote the will, and was a subscribing witness to it, remarked to Mr. Zollicoffer, that there were two important provisions in the will, and he suggested the propriety of allowing him to take the will and submit it to Mr. Moore, of Raleigh, with a view of getting his opinion whether the will, as written, would carry out the objects contemplated by the testator. To this, the decedent assented. Mr. Simmons said "it was his intention, if it did

not carry out the old man's design, to get Mr. Moore to draft one that would do so, but he did not mention his purpose to Mr. Zollicoffer." He also stated that the suggestion was entirely his own. The witness took the paper, but for the want of a fit opportunity, he did not submit it to the lawyer as he designed. He saw Mr. Zollicoffer two or three times after the date of the will, but did not speak to him upon the subject of it before his death; he lived within six or eight miles of the residence of the supposed testator, but no enquiry was made of him, during this period, respecting the paper-writing in question. One witness said, that three weeks after the paper was writtten, Mr. Zollicoffer called upon him and another person, to bear witness that the instrument, in the possession of Mr. Simmons, was not his will; that he was not in a proper state of mind when he executed it. This was some time before his death.

The caveators insisted that the paper-writing was not definitely published, the decedent having consented for Mr. Simmons to submit it to a lawyer, so as to render it capable of destruction, otherwise than by revocation; that the whole was one transaction; and they ask the Court to instruct the jury, that if they believed this was so, and that it was the purpose of Mr. Zollicoffer that it should be his will, only on condition of its being inspected and approved by Mr. Moore, then it was never published as his will.

The Court instructed the jury, that the circumstance testified to by Mr. Simmons, as to carrying the paper to Raleigh for examination by counsel, did not affect its validity, or tend to show it to be an unfinished act. The caveators excepted.

Verdict in favor of the propounders. Judgment and appeal.

Jenkins and *Fowle*, for the caveators.
Moore, for the propounders.

BATTLE, J. We agree with his Honor, before whom the issue of *devisavit vel non* was tried, that after the script was signed by the testator and subscribed, in his presence, by two

attesting witnesses, the proposal made by one of them, and assented to by the testator, to take the script to a lawyer, for the purpose of ascertaining whether the provisions were properly expressed, did not prevent it from being a complete will. Assuming that the purpose of the testator was to alter the script, if the lawyer should so advise, there was nothing said or done, at the time, to render the act of publication incomplete. The testator had done all the law required to make a complete will, before the proposal was made by the witness, and being complete, the will could be revoked only in one of the modes prescribed in the statute, viz., by burning, cancelling, tearing, or obliterating the same, or by some other will or codicil in writing, or by some other writing, properly executed for the purpose. See Rev. Code, chap. 119, section 22. The judgment of the Court below, pronounced in favor of the script as the last will of the testator, is affirmed.

PER CURIAM, Judgment affirmed.

SALISBURY AND TAYLORSVILLE PLANK ROAD COMPANY *v.* THOMAS A. ALLISON

Where it was agreed between the president of a plank-road company and a subscriber to the stock, that the latter might pay for a subscription previously made to the stock of the company, in work to be done on the road, the company furnishing the materials wherewith to do the work; it was *Held* not to be a defense to an action for the recovery of the subscription, that the payment had not been made in work, because the materials had not been furnished, according to the contract.

THIS was an action of ASSUMPSIT, tried before BAILEY, J., at the last Spring Term of Rowan Superior Court.

The plaintiff declared for the non-payment of $1000, subscribed by the defendant to the capital stock of the company. The defendant's subscription was proved. The pleas were general issue, payment and set off, and accord and satisfac-

tion. The defendant relied upon the following facts, as a defense against the claim: He entered into a contract with the president of the company, subsequently to his subscription, to make one mile of the road, the president agreeing to furnish the plank, and the defendant engaging to do the grading and to lay down the plank. The president told the defendant, that if he made the road according to the contract, it would about pay his subscription. In pursuance of this agreement, the defendant graded about three quarters of a mile, and laid down plank for about half a mile. He did not lay down any more plank, because the plaintiff failed to furnish it. It was in evidence that the company was insolvent, and that after the commencement of this suit, the road was sold under an execution, to pay its debts.

The Court charged the jury, that if the company agreed to receive the work which the defendant might do upon the the road, as a payment of his subscription, they must ascertain what it was worth, and deduct that amount from his subscription, and that the plaintiff would be entitled to recover the remainder. That the plaintiff's failure to furnish materials, so as to enable him to work out his subscription, was no defense to this action. The defendant excepted.

Verdict and judgment for the plaintiff. Appeal.

J. E. Kerr and *Jones*, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. The matter which the defendant set up as a defense to the action, could not avail him under either of his pleas. It manifestly could not be used under the general issue, nor was it a set off. It was not a payment, nor an accord and satisfaction, because the work was not completed. It may be true, that it was the fault of the plaintiff that the work was not done, and that such default may give the defendant a good cause of action against the plank road company; but what was not done, cannot in law be considered as done, so as to amount to a payment or satisfaction.

The insolvency of the company, and its consequent inability to pay the damages which the defendant might recover against it for a breach of its contract, cannot, in a court of law, make any difference, and it is no part of our duty to decide now, whether any other tribunal can give relief. The charge of his Honor, in the Court below, was entirely correct, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

State on the relation of JOHN U. KIRKLAND *v.* E. G. MANGUM.

Where the parties to a suit agreed to submit their case to arbitrators, and that the award should be a rule of Court, but only the first part of which agreement was entered of record, it was *Held* that the Court, entertaining the suit, had the power to amend the record *nunc pro tunc*, so as to make it show that the award was to be a rule of Court.

MOTION to amend a record, heard before SAUNDERS, J., at the last Spring Term of Orange Superior Court.

A suit was pending in the County Court of Orange county between the plaintiff and defendant, which was agreed to be referred to two arbitrators, and an entry of such agreement was made of record in the suit. The arbitrators acted on the case, and having made up an award, it was moved that the order of reference be amended by adding, *nunc pro tunc*, the words "and their award to be a rule of court." The evidence was contained in the statement of Mr. Norwood, who says that he was counsel for the defendant, and Mr. Nash for the plaintiff; that the parties agreed to submit the matters in controversy between them to their two counsel, and that the award should be a rule of court. The latter part of the agreement was not entered in the order of reference. Upon this evidence, the amendment prayed for was allowed, from which the defendant appealed to the Superior Court.

His Honor in the Superior Court affirmed the judgment of the Court below, and the defendant appealed to this Court.

Graham, for the plaintiff.
Bailey and *Fowle*, for the defendant.

BATTLE, J. It cannot be denied that every court of record has the power to amend its own record, at any time, by inserting what has been omitted, or striking out what has been erroneously inserted, so as to make it speak the exact truth in relation to its own proceedings; *Phillipse* v. *Higdon*, Bus. Rep. 380; *Pendleton* v. *Pendleton*, 2 Jones' Rep. 135; *Mayo* v. *Whitson*, Ibid. 231. This is an important power, which it is the duty of every court to exercise upon every occasion which requires it, because every record imports absolute verity, and no person can allege or prove anything to the contrary. In the exercise of this power, the Court may act upon such testimony as may be satisfactory to it, and upon an appeal from its action, this Court is confined to the question, whether it had the power, and cannot enquire how it has exercised it; *Pendleton* v. *Pendleton*, and *Mayo* v. *Whitson*, *ubi supra*. These propositions are not denied by the defendant's counsel, but he contends that the matter, which the County Court ordered to be spread upon its record by way of amendment, was matter of private agreement between the parties to the suit, which they never authorised to be entered of record, and that, therefore, the Court had no *power* to order it to be inserted as an amendment. The argument is founded upon a misapprehension of what the County Court did undertake to do, which was to have entered upon the record, *the whole of what the parties agreed should be so entered.* In showing this, the Court called to its aid the testimony of John W. Norwood, esq., the counsel of one of the parties to the cause, and ordered the record to be amended, only so far as that testimony satisfied it of the truth of what the parties agreed should be entered. The Court had power, undoubtedly, to hear the testimony and to decide what it proved, and with its

decision we have no right to interefere; but if we had, we cannot say that we should have come to a different conclusion upon the effect of the testimony.

PER CURIAM, The judgment of the Court below, is affirmed.

STATE *v.* JOHN GREGORY.

Where confessions, which had been illegally elicited from one accused of a homicide, were pronounced to him, by the person obtaining them, to be illegal and wrongfully extracted, and he was informed that such confessions could not be used against him, and he was fully cautioned against making further confessions, it was *Held* that voluntary confessions, subsequently made by the prisoner, were admissible.

Where evidence was given to the Court, in presence of the jury, of confessions illegally obtained, and afterwards the Judge rehearsed the evidence thus given, for the purpose of cautioning them against permitting it to have any effect upon their minds, except to weaken the force of voluntary confessions subsequently made, it was *Held* not be error.

INDICTMENT for MURDER, tried before ELLIS, J., at the last Spring Term of Halifax Superior Court.

Evidence was offered by the State, of confessions made by the prisoner to one Faucette, which was objected to by the prisoner's counsel, upon the ground, that Mr. Parker, the examining magistrate, had shortly before that, induced the prisoner to confess, by holding out hopes of his being favored, if he would do so.

Parker was then introduced to the Court, to state what were the circumstances under which the confessions were made to him, and he stated that before he commenced officially to examine into the case upon the question of commitment, he told the prisoner, that it would be better for him to confess the homicide, and throw himself upon the mercy of the Governor for a pardon. The prisoner made no admis-

sions then, but subsequently, on the examination, he did confess some material facts against himself. The magistrate becoming sensible of the impropriety of his course, went to the prisoner and told him that he had acted improperly in this respect; that his confessions were illegally obtained from him; that they, on that account, could not be used against him hereafter on his trial; but that if he, after that, made any further confessions, they would be evidence against him, and advised him not to make any more.

It was after this, that he made the confessions proposed to be proved by Faucette.

The Court held the evidence admissible. Defendant excepted.

The Court, in the instructions given to the jury, said in relation to the confessions made to Faucette, that "they were not, necessarily, to act upon them as true, but would weigh them as they would any other evidence, and it was for them to say whether they would believe them or not; in doing so, they ought to look to the circumstances under which they were made; the fact that he was tied at the time, and in charge of an officer; that questions were asked him; that hope of favor was held out to him by the examining magistrate, and though he had been subsequently warned not to confess, or it would be given in evidence against him, yet, it was proper for the jury to consider how far his mind may still have been operated upon by those promises."

The prisoner's counsel asked the Court to charge the jury, that what Parker said about the promises held out, was not evidence to the jury, but only to the Court.

The Court charged the jury that such was not evidence, and was only recited to them, that they might consider how far they tended to discredit the confession made to Faucette. Defendant excepted.

Verdict, "guilty of murder." Judgment. Appeal by the defendant.

Attorney General, for the State.

Barnes, for the defendant.

BATTLE, J. After the repeated cautions given to the prisoner by the examining magistrate and the officer who had him in charge, not to confess, for that if he did, it would be given in evidence against him, and after he had been told that what he had already said could not be admitted against him, we must suppose that his subsequent confessions were free and voluntary. If he were a being of sufficient intelligence to be responsible for crime, he must have understood the reason why the caution was given, and the prudence, if not necessity, of acting upon it. Confessions made under somewhat similar circumstances, were received in evidence in the case of *State* v. *Cowan*, 7 Ire. Rep. 239, and our opinion is, that they were properly admitted in the present case.

The only other objection is equally unavailing to the prisoner. The testimony of the examining magistrate, Parker, given to the Court, at the instance of the prisoner, for the purpose of excluding the confessions which the Attorney General proposed to prove by the officer, Faucette, was necessarily heard by the jury. It was not introduced as evidence to them, and of course, ought not to have been permitted by them to have any influence upon the result in making up their verdict. His Honor, nevertheless, fearing that it might have some weight with them, to the prejudice of the prisoner, called it to their attention in his charge to them, solely for the purpose of informing them that it was not evidence which they had a right to consider, and that, therefore, they must reject it from their deliberations altogether. The object of his Honor was certainly a humane one, and we cannot perceive how his course could have, in any way, prejudiced the cause of the prisoner. That the presiding Judge may notice a fact which transpires in the presence of the jury, is clearly shown by the case of *Bailey* v. *Pool*, 13 Ire. Rep. 404. There, the jury were told by the Judge that they might consider, as under the circumstances, bearing against the plaintiff the fact that his counsel had put, and immediately withdrawn, a particular question to one of the witnesses. This Court held that it was not error, " because it was a fact transpiring in the course

of the trial, brought before the jury by one of the parties, and in relation to the question under investigation." A similar instance may be found in the case of *State* v. *Whit*, decided at this term, *ante*, 224. It was not error then for the presiding Judge, in the present case, to mention the fact, that testimony, which, according to our mode of conducting trials, must necessarily have been heard by the jury, had been offered to him for a particular purpose. Surely, then, it could not be error for him to tell them, that though they had heard the testimony, it was not evidence for them, and was to be considered, if at all, for the purpose of weakening the force and effect, of the confessions made to Faucette.

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

PER CURIAM, Judgment affirmed.

STATE *v.* JOHN McLEOD.

An indictment for larceny, charging, in one count, the thing stolen to be "a certain writ of *fi. fa.* belonging to the Superior Court,"—in another count "a certain process of and belonging to the Superior Court," and in a third "a certain record of and belonging to the Superior Court," is too vague to authorise a conviction under it.

An allegation in a bill of indictment, charging that the defendant stole a *fi. fa. issued from the Superior Court office* is not sustained by proof that the *fi. fa.* was made out, but retained by the clerk, at the instance of the defendant, until the amount was paid to him.

INDICTMENT for LARCENY, tried before SAUNDERS, J., at the last Spring Term, of Randolph Superior Court.

The defendant was indicted on the following bill of indictment, viz:

"State of North Carolina, Randolph county, } Superior Court of Law, Fall Term, 1857. }

"The jurors for the State, upon their oaths present, that John McLeod, late of Rahdolph county, on the 1st day of June, A.

D. 1857, with force and arms, at and in said county, a certain writ of *fi. fa.* belonging to the Superior Court of law, for the said county of Randolph, then and there being, then and there unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors for the State, upon their oaths present, that the said John McLeod, afterwards, to wit, on the day and year aforesaid, at and in the county aforesaid, a certain process of, and belonging to, the said Superior Court of law for the said county of Randolph, then and there being, then and there, unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

"And the jurors for the State upon their oaths aforesaid, do further present, that the said John McLeod, afterwards, to wit, on the day and year aforesaid, at and in the said county, a certain writ of execution against him, the said John McLeod, for the sum of one hundred and seventy-one dollars and three cents, issued from the said Superior Court of law, for the said county of Randolph, and belonging to the said Superior Court of law, for the said county, then and there being, then and there unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors for the State upon their oaths present, that the said John McLeod, afterwards, to wit, on the day and year aforesaid, a certain record of, and belonging to, the said Superior Court of law for the said county, then and there being, then and there unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The clerk of the the Superior Court testified that, as clerk of the Superior Court of Randolph, he issued, on the 5th day

of June, 1854, a writ of *fieri facias* against the defendant, which he did not place in the hands of the sheriff because the defendant so requested, but held it up so as to give him an opportunity to pay it off without further cost; that on the 8th of August, the defendant paid him $100, which he endorsed on the back of the execution, he also gave the defendant a receipt for the same; that on the 27th of September, 1854, he called and paid him the balance, and the witness gave him a receipt for $171,03, the whole amount of the execution, forgetting to take up the receipt for one hundred dollars. The witness went on to state the circumstances under which the defendant secretly took the *fi. fa.* from the office table where he had laid it but a moment before, and under which it was found upon his person immediately thereafter, but as the remainder of the testimony does not conern the questions considered in the opinion of the Court, it is not deemed necessary to detail it. The defendant's counsel insisted that the facts, as proven, did not support the allegations of the bill, and called upon his Honor so to charge the jury; which was declined by the Court. The defendant excepted. A motion in arrest of judgment was made in the Court below and overruled.

Verdict for the State. Judgment, and appeal by the defendant.

Attorney General, for the State.

No counsel appeared for the defendant in this Court.

PEARSON, J. The first, second and fourth counts are defective in this—no description of the thing stolen is given—"certain writ of *fi. fa.*, belonging to the Superior Court"—"a certain process of, and belonging to, the Superior Court"—"a certain record of, and belonging to, the Superior Court," is too vague. In *State* v. *Kent*, 3 Hawks. 618, the thing is described as a certain *twenty dollar* bank note, on the *State Bank of North Carolina*. So in *State* v. *Boon*, 4 Jones' Rep. 466, it is agreed that "a certain piece of gingerbread," without stating the owner, for the purpose of identification, would

be too vague on an indictment for larceny, and the decision is put on the ground, that the averment of an intent to defraud a particular individual out of the piece of gingerbread, was sufficient to identify it. In all the cases, it is held to be necessary, that some description, sufficient to identify the thing, with certainty to a *general intent*, should be given, although a particular description is not required, as the thing may not be susceptible of it; for instance, a hog may be described by averring the owner, although it is very general, as the man may own one hundred hogs; and a bank note, by averring its denomination and the bank that issued it, although it may have in circulation a thousand notes of the same denomination. Such general description is allowed *ex necessitate*. In this case, there is no description, and judgment must be arrested on these counts.

The third count, in the opinion of the Court, is good. The amount of the execution, and the fact, that it was against John McLeod, sufficiently identify it. But this count alleges that the execution was *issued* from the Superior Court. This allegation is not proven; on the contrary, the proof is, that it was not issued; for, although the witness says that he issued it on 5th day of June, 1854, yet he explains it, by stating that he filled it up and retained it at the request of the defendant, who paid it, and so it never left the office. It is settled by the decisions of this Court, that a writ, or execution is not issued until the clerk hands it to the sheriff, or to the party, or his agent. It is evidently used in this sense, Rev. Code, ch. 45, sec. 29, "The clerks of the County and Superior Courts shall issue executions on all judgments, unless otherwise directed by the plaintiff, within six weeks, &c."

By reason of this variance, the conviction of the defendant was erroneous, and he is entitled to a *venire de novo*.

Whether the paper, which was filled up by the clerk, falls within the meaning of the statute, we are not at liberty to decide.

PER CURIAM, Judgment reversed.

WILLIAM ARCHIBALD AND RHODA HIS WIFE *v.* WM. H. DAVIS,

A description of land calling for a *point* or *stake* as a beginning, and course and distance for all the rest of the description of the boundaries, is so vague, that no land can be located under it.

(*Massey* v. *Belisle*, 2 Ire. Rep. 177; *Mann* v. *Taylor*, 4 Jones' Rep. 272, cited and approved.)

ACTION of TROVER, tried before CALDWELL, J., at the last Spring Term of Beaufort Superior Court.

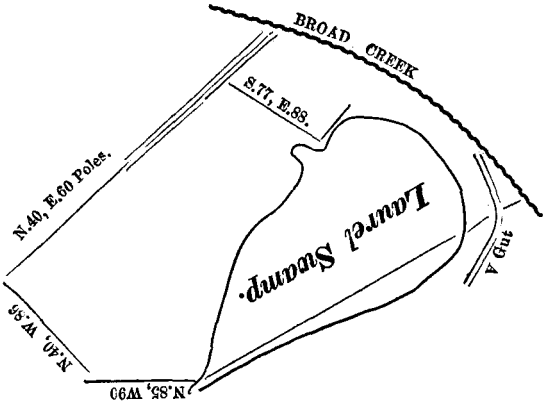
The action was brought for the conversion of a quantity of pine timber taken from off of a tract of land, the title of which is the main subject of this suit; the plaintiff offered in evidence the copy of a grant which issued to one Knight in 1716, but failed to show that it covered the *locus in quo*; next, a petition by the heirs of one Latham, the ancestor of the plaintiffs, (of whom the female plaintiff was one,) to divide the real estate from him descended, the appointment of certain commissioners who made a report which was confirmed and recorded, of which the following is the part material to this controversy:

"LOT NO. 3."

Lot No. 3, drawn by, and allotted to, William Archibald and Rhoda his wife.

* * * * * * *

"also, 144 acres land on the south side of deep run creek, adjoining the lands of Henry Hobbs, and known as the Manduel lands described in the plot as number 10, valued at $108." The plat to which the above refers accompanied and constituted a part of it; the following diagram represents what was insisted on as describing the land in question, and which was, with the above report, insisted on as color of title.



One Garrett testified that he was a chain carrier when the lands of James Latham were divided; that the lot assigned to the plaintiff was called the Manduel tract; that his widow lived on it at the time; that certain men now dead, showed the beginning corner some hundred and fifty yards north of the house—the residence of the said Manduel, near a grave yard at the head of the plat, and they ran then westwardly within a short distance of the grave yard, and north of it to a pond, and then ran up it to the end of it, and then ran to the south-east and south to Tarkill creek, and then back to the beginning." It appeared that one of the lines as run, is over 190 poles, the call of which is for 60 poles, and it was insisted by the defendant that to stop at the end of the distance, the logs hauled off would not have been on the land claimed by the plaintiffs, and the Court in respect to that, charged that in the absence of more certain boundaries, course and distance must govern. It was admitted that the land claimed by the plaintiff laid on Laurel swamp, but it was denied that the lines embraced the *locus in quo*. It was proved that the plaintiffs had had possession of a field within the boundaries as contended for by them for more than seven years before the bringing of this suit. It was in proof that on one occasion

after one Flynn had made a survey running the lines as the plaintiffs claim them to be, the defendant met with the feme plaintiff and offered to buy the logs which he had hauled off, which she refused to sell. It was contended by the plaintiffs that this was an admission of the plaintiffs' title to the property in question. The Court charged the jury that the plat of the commissioners called for no boundaries save course and distance, that if they believed the defendant had offered to buy the land from the plaintiffs after the Flynn survey was made, that was some evidence of title; but if the proposal was made under a misapprehension, that such an offer should pass for nothing.

The defendant excepted. Verdict for the plaintiff. Judgment. Appeal by the defendants.

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

PEARSON, J. Assuming that the proceedings for partition, and the plat which formed a part thereof were color of title, so as to extend the possession of plaintiffs beyond their actual occupation to the boundaries of the plat, and entitle them to recover for a trespass committed any where within the same, provided the plat could be located so as to identify any particular tract, we think his honor erred in not holding that the description furnished by the plat was too vague to be susceptible of being located, "because in law it covered no land;" *Mann* v. *Taylor*, 4 Jones' Rep. 272, *Massey* v. *Belisle*, 2 Ired. Rep. 177. The description furnished by the plat is this, "Beginning at a *point* in Laurel Swamp; thence along the margin of the swamp to *a point*; thence North 85 deg. W. 90 poles; thence 40 deg. W. 86 poles; thence N. 40 deg. East 60 poles to *a point* in a pond; thence along the pond to *a point*; thence S. 77 deg. 88 poles to the beginning, containing 144 acres on the south side of Broad creek, Lot 10." It is manifest this description is too vague to admit of a location. There is no telling from it at what particular place on the swamp the beginning point is to be fixed, nor what dis-

tance along the swamp the line is to be run in order to reach the second point, for both corners are "immaginary points," and no mode of finding the location is furnished by the plat.

An attempt was made to help out the location by the testimony of one Garrett, who was a chain-carrier when the land was divided. He testifies that "certain men now dead, showed the beginning corner some hundred and fifty yards north of the house, near a grave yard *at the head of the plat*, the lines were reversed by crossing over to the pond, running westwardly within a short distance of the grave yard, and north of it to a pond, then up the pond to the end of it, then to the south east, &c. Supposing this description of the beginning corner with the alteration "at the head of the *swamp*" instead of "head of the plat," (as we presume the witness intended) to have been set out in the plat, it may have been sufficient; but parol evidence is inadmissable to aid, or add to the description of land in a deed, or other instrument. When the writing gives a description e. g. a marked tree, or stone, or the mouth of a branch, or any mode by which a point can be fixed, then parol evidence must necessarily be resorted to in order to "fit the dscription to the thing"; but where there is no description, or one that is too vague, if parol evidence were received, the boundaries of land would depend upon the "slippery memory of man."

The wisdom of the rule which excludes such testimony is fully exemplified in this instance. The witness is unable to be definite in any particular;—"*some* hundred and fifty yards north of the house near a grave yard at the head of a swamp." His memory enabled him to point out a spot which *certain men*, now dead, showed as the beginning corner. There is no tree, stone or any thing else to aid his memory as to the precise spot. Again, he says "they run up the pond to the end of it." Here, he contradicts the plat; for it represents the line as striking the pond some distance from the end of it.

It is not necessary to notice the other points presented by the case.

Per Curiam. Judgment reversed and a *venire de novo*.

THE FARMERS' BANK OF NORTH CAROLINA *v.* JOHN J. FREELAND.

Upon the surrender in court of a principal, by his bail, it is sufficient to entitle the plaintiff to have the former committed to custody, that the affidavit filed by him, alleges "that the defendant is about to remove from the State."

MOTION to commit the defendant to custody, heard before SAUNDERS, J., at the last Term of Guilford Superior Court.

The defendant was surrendered in open court by his bail, and the plaintiff filed the following affidavit as the foundation of a motion to commit him into custody:

"W. A. Caldwell maketh oath, that he believes the defendant, John J. Freeland, is about to remove from the State, and that the defendant hath not property sufficient to satisfy the judgment, which can be reached by *fieri facias*."

The Court refused the motion to commit, and plaintiff appealed.

Gilmer, for the plaintiff.
McLean and *Graham*, for the defendant.

BATTLE, J. The record does not state the ground upon which his Honor, in the Court below, refused to order the defendant into custody upon plaintiff's motion. It has been suggested in the argument here, that he did not deem the affidavit, filed on behalf of the plaintiff, to be sufficient under the act of 1844, chap. 31, (see Rev. Code, ch. 59, sec. 19,) because, after stating the affiant's belief, that the defendant had not property sufficient to satisfy the judgment, which can be reached by a *fieri facias*," it did not add his belief, that the defendant did have "property, money or effects, which cannot be reached by a *fieri facias*." That may be so, and yet the Judge's decision was wrong, because the act specifies three things, any one of which, if sworn to, will authorise the issuing of a *capias ad satisfaciendum*, and of course a com-

mitment into custody. The first is, that which has been mentioned; a second is, that the defendant has fraudulently concealed his property, money or effects; and the third is, that he "is about to remove from the State." This was expressly decided in the case of *Maxwell* v. *Walk*, 8 Ire. Rep. 517; and as the affidavit of the plaintiff's agent, in the present case, stated that the defendant was about to remove from the State, the Judge ought, upon the plaintiff's motion, to have made the order for committing the defendant, who had been surrendered in open court by his bail, into the custody of the sheriff; his refusal to make the order was error, for which the interlocutory order, from which the appeal was taken, must be reversed, and a certificate to that effect must be certified to the Court below.

PER CURIAM, Judgment reversed.

THOMAS ADAMS *v.* ARCHIBALD H. HEDGEPETH.

The signing and sealing of a party at the foot of a bail-bond, without his name's being mentioned in the condition, or any other part of the body of the instrument, does not constitute him the bail of the party sued.

SCIRE FACIAS to subject bail, tried before SAUNDERS, J., at the last Spring Term of Orange Superior Court.

The facts of the case are: the plaintiff, Adams, brought suit against defendants William H. Campbell, George Jackson and Pride Jones, returnable to August term, 1856, of Orange County Court, and a bail-bond was returned, which is as follows, viz:

"North Carolina, Orange County.

"Know all men by these presents, that we, William H. Campbell and George Jackson, and ————, all of the county aforesaid, are held and firmly bound unto R. M. Jones, sheriff of Orange county, as sheriff of the county aforesaid, in

the just and full sum of seven hundred dollars, current money of the State aforesaid, &c.

"The condition of the obligation is such, that if the above bounden William H. Campbell, George Jackson, who have been arrested by the said Richard M. Jones, sheriff aforesaid, upon a writ returnable to the County Court of Orange county, at the suit of Thomas Adams, do well and truly make his personal appearance at the next County Court, to be holden for the county of Orange, on the 4th monday of August, 1856, then and there, to answer to the said Thomas Adams of a plea, that they render to him the sum of three hundred dollars, which to him they owe, and from him detain, to his damage fifty dollars, and then and there to stand to, and abide by, the judgment of the said Court, and not depart the said Court without leave, and said ———, the securi—— of the said Wm. H. Campbell, George Jackson, well and truly discharge ——— as special bail of the said Wm. H. Campbell, Geo. Jackson, in the said Court, then the above obligation to be void, otherwise to remain in full force and effect."

WM. H. CAMPBELL, [*seal.*]
GEORGE JACKSON, [*seal.*]
A. H. HEDGEPETH, [*seal.*]

The bond was made from a printed blank form, and the the chief difficulty arises from an omission to fill the blanks.

The defendant contended that the above instrument is not a bail-bond according to law; that it is vague, and uncertain, and creates no obligation against him.

His Honor being of a different opinion, gave judgment against the defendant, from which he appealed to this Court.

Norwood and *Winston, Sen.*, for the plaintiff.
Bailey and *Fowle*, for the defendant.

BATTLE, J. There is an objection apparent upon the face of the instrument, declared upon as a bail-bond, which is fatal to its validity as such, and which is of course decisive of the case of the plaintiff, without reference to any other objection.

The name of the defendant is not only not inserted in the body of the bond, but it is not stated in the condition that he is the special bail of the principal obligee. His name and seal do indeed appear at the bottom of the condition, along with those of the defendants who had been arrested in the action, but in what character he undertook to bind himself, does not appear in any part of the instrument. By an act of gross neglect the blanks, in the printed form, were omitted to be properly filled up, and hence the apparent error. In the case of *Vanhook* v. *Barnett*, 4 Dev. Rep. 268, there was a similar omission, in the body of the bond, of the name of one of those who signed and sealed it as a surety, and the court held the omission to be immaterial; but that was the case of an administration bond, and there was no necessity for it to appear in the condition that the defendant, whose name was omitted, was one of the sureties. (See the form of the condition of an administratson bond in the Rev. Code, chap. 46, sec. 4.) But in a bail-bond, the condition should set forth the name of the person who is special bail, in order that it may appear in what capacity he is bound, and how he may discharge himself. As the instrument, in question, does not purport to bind the party as special bail, it more nearly resembles the case of a deed signed and sealed by a person who does not purport therein to be a grantor. Such an instrument cannot operate as a grant from such person; as we decided recently, in the case of *Kerns* v. *Peeler*, 4 Jones' Rep. 226. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

BRITTON, TODD AND HARRISON *v.* MICHAEL THRAILKILL.

A promise to pay the debt of another, superadded to the original debt which still remains in force, is within the Statute of frauds, and will not sustain an action.

A promise to pay the debts of a third person, cannot be sued on to recover each debt separately, but one action should be brought for the whole together.

ACTION of ASSUMSIT, tried before SAUNDERS, J., at the last Spring Term of Chatham Superior Court.

The action was commenced by a warrant before a justice of the peace against a party, for the debt of his son, and brought up by appeal. It appeared on the trial that the son was making preparation to leave the State, and the defendant was very desirous to facilitate and hasten his departure. The plaintiffs having various and separate debts against the son, were about to take out bail warrants against him, upon which it was agreed and promised by the defendant, the father, to the said plaintiffs, that if they would not do so, but allow him to leave the State, he would pay the whole amount of their debts, which amounted to about $250. The plaintiffs did forbear according to the agreement, and the defendant having refused, on demand, to pay this debt, which was one of those owing the plaintiffs, the action was brought.

The recovery was resisted on the ground,

1st. That the promise not being in writing, was within the statute of frauds.

2nd. Being a promise to pay the debts of the son, a separate action could not be brought for each, but one action should be brought for the whole together.

The Court overruled both objections, and gave his opinion that the plaintiffs were entitled to recover. Defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

J. H. Bryan, for the plaintiffs.

Haughton, for the defendant.

PEARSON, J. We are not of opinion that the plaintiffs were not entitled to judgment, and that both of the objections taken by the defendant were fatal to the right of recovery. The promise sued on, was, in so many words, a promise to pay

the debt of another, which was superadded to the original debt, which remained in full force. It does not fall within the class of cases referred to in *Draughan* v. *Bunting*, 9 Ired. Rep. 10, which was cited on the argument, where the original debt is released and the promise in question is substituted, as where a creditor discharges a debtor who is in custody, and thereby discharges the original cause of action for which the new promise is substituted, for the plaintiffs did not have the son of defendant *in custody*, but were "*about to take out a bail warrant*," and the rule of law, that a voluntary discharge of the person of a debtor from custody is a discharge of the debt, does not apply. Notwithstanding the plaintiffs, at the instance of the defendant forbore to take out bail warrants, their debt against the son remained in full force, and the promise of the defendant was in addition thereto.

On the other ground, the Court is also with the defendant. There were several distinct and independent debts due by the son. The defendant, however, made but *one promise*, and of course is liable to but one action had the promise been valid. So the case does not fall within the principle held in *Waldo* v. *Jolly*, 4 Jones 174, which was cited.

There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

PETER EVANS *v.* GOVERNOR'S CREEK TRANSPORTATION AND MINING COMPANY.

A party claiming title to property, seized under an attachment, may interplead at any time before final judgment in the attachment.

Where, in a case of attachment, an application was made in the County Court for leave to interplead, which was allowed, but was dismissed for the insufficiency of the bond tendered, on a second application, accompanied with a sufficient bond and refusal, it was *Held* the applicant had a right to appeal to the Superior Court, but in that Court, on overruling the decision of the County

Court, it was error to issue a procedendo, as there was nothing in the Court to proceed with. The proper course was to go on with the interpleader in the Superior Court.

This was an application for leave to interplead in an attachment, which came up by appeal from the County Court of Chatham to the Superior Court, and was there heard before SAUNDERS, J., at the last Spring Term.

The plaintiff had taken out an attachment against Thomas Andrews, returnable to November Term, 1857, of Chatham County Court, which was levied on a tract of land on Deep River. At that term, the applicant, the Governor's Creek &c. Company, filed a petition stating the grounds upon which they claimed the property, and asked the Court to adjudge that it be delivered to them. A bond was filed for the prosecution of the interpleader, but exceptions being taken, time was allowed the applicant until Thursday of the next term to file a good bond, or justify the present. At February term, 1858, a good and sufficient bond not having been put in, and no justification of the bond theretofore filed, the interpleader was dismissed. The applicant asked leave to file another bond during the term, and produced to the Court a good and sufficient one, which was refused, and the applicant appealed to the Superior Court.

In the Superior Court, his Honor ordered a procedendo to issue to the County Court of Chatham, commanding them to receive the bond last filed in the office, and to proceed with the trial by submitting the issues therein to a jury in that Court. From which order the plaintiff prayed an appeal to the Supreme Court.

Haughton and *Morehead*, for the plaintiff.
Cantwell, for the applicant to interplead.

PEARSON, J. Ever since the case of *Dodson* v. *Bush*, 1 Car. L. Repos. 236, the construction of the attachment law, in reference to the subject of interplea, has been considered settled. "No time is limited by the act of Assembly, when the

party claiming the property attached, shall interplead. We think that he may do so on the return of the writ of attachment, or at any time afterwards, so that it is done before final judgment in this cause." As the statute allows the party to interplead at any time during the pendency of the proceeding in attachment, if we suppose the county court committed no error in making the rule, that the interplea should stand dismissed unless the bond was justified on the first day of the next term, and in making that order absolute on failure to justify at the time, thus putting the petition to interplead upon the footing of an ordinary action when exception is taken to the prosecution bond, it is very clear that according to the construction of the statute, fixed by *Dodson* v. *Bush*, *supra*, the party was entitled to renew his application at any time afterwards, when he might be prepared to file a sufficient bond; consequently the Court erred in refusing the application which was made on Thursday of the term, when the Governor's Creek Company, having procured a sufficient bond, tendered it and applied a second time to be allowed to interplead.— Here, at least, the distinction between this proceeding and an ordinary action made a difference. Although we agree with his honor in the opinion that the County Court ought to have accepted the bond and allowed the interpleader, yet we are of opinion he erred in ordering a *procedendo commanding* the County Court to *receive the bond* and proceed with the trial. A procedendo, as the term imports, can only issue when a proceeding has been instituted in the inferior court, and is interrupted by an appeal; in such cases the superior court puts the matter right, and directs the inferior court to proceed.— Where the county court refuses to permit a suit or other proceeding to be instituted before it, and an appeal is taken to the superior court for error in such refusal, the course is for the superior court to take jurisdiction of the cause, and to dispose of it finally; because there is nothing in the county court which can be proceeded with. This distinction is pointed out and acted upon in *Russell* v. *Saunders*, 3 Jones' Rep. 432. There, the county court refused to dismiss and accepted

the bond, and a procedendo was issued, but the court say "If the county court had dismissed the suit, so as to put the case out of that court, upon an appeal, on reversal of the order of the county court, the further proceedings in the case would have been properly in the superior court. So, in our case, the bond ought to have been received and the interpleader allowed in the *Superior Court.* There is no precedent for the order that was made. It purports to be a procedendo, but is in fact a kind of *mandamus.* In *Shaffner* v. *Fogleman*, Busbee 280, the county court having dismissed the petition, it was held to be the duty of the superior court to hear and determine the cause, and it was said that a procedendo to the county court would not have been proper. It was said in the argument, that in *Dodson* v. *Bush*, *supra*, a procedendo issued. True; but in that case, the petition to interplead was *allowed*; so, a case was constituted in that court; in this, the petition was refused and the proceeding dismissed. These two cases will serve to illustrate the distinction on which the Court has acted. It was also suggested that the fact of the original attachment being pending in the county court, forms a ground for making this case an exception. We are unable to perceive upon what principle it can have that effect; for the proceeding by interpleader, although it grows out of the original attachment, is distinct and independent, and under it, the right of property is to be conclusively tried as to the parties, without any further reference to the proceeding under the attachment, and the order to the county court would be a command to institute a new suit, and not a direction to proceed with one.

The transcript is made up in a very confused manner. As we understand it, the judgment of the Superior Court allowed the petitioner to interplead; his honor being of opinion that the bond was sufficient, and that the party had made application in due time. This judgment is affirmed, but the order directing a procedendo was irregular, and must be vacated, so as to leave the matter in the Superior Court, to be there heard and determined.

PER CURIAM, Judgment affirmed.

JAMES BURNETT AND WIFE AND JAMES A. PAUL AND WIFE *v.* THOMAS J. BEASLY, *Admr.*

Where a guardian of infants gave a license to a party to cut timber on the land of his wards, and the wards, in a suit against the guardian for a settlement, recovered the money received by him for a part of the timber so cut and carried off; it was *Held*, that they could not sustain an action of *trespass* against such party, for cutting and carrying off a portion of the timber.

This was an action of TRESPASS, *quare clausum fregit*, tried before MANLY, J., at a Special Term, 1858, of Beaufort Superior Court. On the part of the plaintiffs, it was proved that William J. Smith was guardian of the plaintiffs, the children of one Capps, five in number, two of whom are the female plaintiffs. As guardian of these children, while yet minors, Smith licensed Windly, the defendant's intestate, to cut timber upon their land. In virtue of which license, Windly did cut eighty thousand feet of timber, for which he had agreed to pay Smith $1 per thousand feet, making in all eighty dollars. Windly paid of this sum twenty dollars, and agreed to pay the rest when he should remove the timber from the land. After this, the feme plaintiffs married the other two plaintiffs, and at the County Court of Hyde, the husbands and their wives filed a petition against their guardian, Smith, for their filial portions. In that suit, it was referred to the clerk to state an account of the amount due from the guardian to his wards. The clerk made a report, stating the account, therein charging the guardian with one fifth of the sum received of Windly for the timber cut, and paid for by him, to wit: four dollars for each of the wards. This report was confirmed, and a judgment taken by the petitioners for the sum reported, and the amount recovered was paid by Windly into the clerk's office. This action was then brought by the husbands and their wives against the administrator of Windly for cutting and carrying off the timber above spoken of.

The defendant contended that the receipt from Smith by

the plaintiffs of their respective shares of the money received for the timber, was a ratification of the license given by Smith to Windly, and precluded them from recovering in this action. The court refused to sanction the view presented by the defendant, and charged the jury that the plaintiffs were entitled to recover.

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

Shaw, for the plaintiffs.
Rodman for the defendant.

PEARSON, J. There is a numerous class of cases in which a party is allowed an election, to treat an act as a wrong, and sue in "tort," or to adopt it as having been done by, or for him, through an agent, and sue in "contract." But in such cases, it is well settled, that after taking benefit under the act, putting it on the footing of a contract adopted by him, he is not at liberty afterwards to shift his ground and sue for the original act as a tort; because he has elected to waive the "tort." This is so consonant to the plain principles of justice as not to need an authority to support it; many are cited in the argument, we will refer to but one, *Wilson* v. *Poulter*, 2 Strange 859. It was for "trover," "for ready money."—The wife of a bankrupt brought to the defendant 3000 in money; at her request he bought with it thirty India and and South Sea bonds, and delivered them to the bankrupt's wife. The plaintiff, who was the assignee, succeeded in seizing twenty-two of the bonds, and brought this action for the money with which the other eight bonds had been purchased. "The court, without hearing any argument for the other side, were all very clear in opinion that the seizing part of the bonds was an affirmance of the defendant's act in laying out the money, and that the plaintiff could not avow the act as to part and disavow it for the rest."

In our case, as the guardian had no authority to sell the timber, the plaintiffs could have sued the defendant for the

tort in the first instance; but after they had taken benefit under the act of their guardian, and received from him a part of the price, as upon a contract which he had made for them, they were not at liberty to "disavow it for the rest," and treat the entry of the defendant as a trespass. There is error.

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

HUGH B. BRYAN *v.* JOSHUA LAWRENCE.

Stills, put up for distilling, incased in brick and mortar-work, are fixtures that pass by a deed conveying the fee.

A large copper kettle, put up for cooking food for hogs, incased in brick and mortar-work, is a fixture that passes with the land.

Rough plank, put into a gin house to spread cotton seed upon, though not nailed down, is a fixture that passes in like manner.

ACTION of TRESPASS, *quare clausum fregit*, tried before ELLIS, J., at the last Spring Term of Edgecombe Superior Court.

The plaintiff purchased of the defendant his farm in Edgecombe county, by deed in fee, and went into possession of the same. Upon the premises, thus conveyed, there were two stills, used for distilling brandy, incased in brick and mortar work, and covered with a shelter, which could not be removed without pulling down the work. There was also on the land a large kettle, put up in the same manner, which was used for cooking food for hogs. There was about 800 feet of plank which had been laid down in an undressed state, as an upper floor of a gin-house, used to spread cotton seed upon. They had been placed there the winter before, were rough and of different lengths, and were not nailed or otherwise fastened down.

After the plaintiff had taken possession under his deed, the defendant entered into the premises, took down the stills and kettle, and carried them off. He also took the plank out of

the gin-house and carried it away. For these acts, this suit was brought. The above facts were stated in a case agreed by counsel, with an agreement that if the court should be of opinion with the plaintiff, he should give judgment for a sum specified; but if of opinion with the defendant, he should enter a non-suit. His Honor gave judgment for the plaintiff, and the defendant appealed.

Jenkins, *Attorney General*, for the plaintiff.
No counsel appeared for the defendant in this Court.

BATTLE, J. The question, of what are, or are not fixtures, as between the vendor and vendee of real estate, has not often been the subject of judicial decision in this State, and the counsel for the plaintiff has been unable to refer us to any case in our reports upon the subject. He has, however, called our attention to two cases in the English, which throw much light upon the question which we are now called upon to decide. The first is the case of *Colegrave* v. *Dias Santos*, 2 Barn. and Cres. 76, (9 Eng. C. L. Report 30,) where a house was sold in which were grates, kitchen ranges, closets, shelves, brewing-coppers, locks and bolts, as well as stoves, cooling-coppers, mash-tubs, water-tubs, and blinds. The fixtures were not excepted, and it was held that the grates, kitchen ranges, closets, shelves, brewing-coppers, locks and bolts, passed to the vendee, as such, but that the other articles, enumerated above, did not pass. In the other case of *Wiltshear* v. *Cottrell*, 1 Ell. and Black 674, 22 Eng. C. L. Rep. at page 687, which was a sale of land, it appeared that there were on the land staddles which were erected for the support of ricks, and were stone pillars mortared to a foundation of stone and mortar, let into the earth, and were capped with stone mortared on the pillars. There was also a threshing machine, fixed by bolts and screws to posts which were let into the ground, and the machine could not be got out without disturbing some of the soil. The staddles, ricks and the threshing machine were decided to be fixtures which passed with the land to the vendee.

Upon the principle of these decisions, we have no doubt that the purchaser acquired a good title to all the articles taken away by the defendant in the present case. The stills and kettle became fixtures by being fixed in and enclosed by the brick-work, and by their not being liable to be taken away without taking down the brick-work. The plank became a part of the gin-house by being put in it for the purpose of being used with it, and in that view, it makes no difference whether they were nailed to the sleepers, or not. Had they been laid upon the sleepers in piles, for safe keeping or for convenience, or spread there to dry, and not to be used with the house, they might have been regarded as personal chattels, and of course would not have been included in the sale of the land. The judgment in favor of the plaintiff upon the case agreed was right and must be affirmed.

PER CURIAM, Judgment affirmed.

JOHN FLY *v.* GRAY ARMSTRONG.

For an overseer to be very often at grog-shops in the neighborhood of the the farm that he had engaged to superintend, drinking spirits and amusing himself during the business hours of the day, is at least, ordinary negligence in the discharge of the duties of an overseer.

THIS is an action of ASSUMPSIT, brought by an overseer against his employer for wages, tried before ELLIS, J., at the last Spring Term of Edgecombe Superior Court.

The defendant was the owner of two farms, lying near Rocky-mount depot, and engaged the plaintiff to superintend and manage them for the year 1856. He took possession, and had charge of these farms for the first three months of that year, when he was discharged by the defendant, and left the business. The action was brought for the wages stipulated to be paid for the whole year.

The defendant insisted that the plaintiff had failed to discharge the duties of his position with ordinary diligence; in other words, that he was guilty of ordinary negligence.

The proof was, that he was very often seen at grog-shops, and at a bowling-alley at the depot, in the working hours of the day, and on sundays, during the three months while he had charge of the farms, and in going from one of these places to another during the time aforesaid, in a hurried manner, and was at one time engaged in playing at cards about 10 o'clock in the morning, of a week day. Frequently during this time, he was proven to be excited with spirits, but not drunk. The plaintiff urged in reply, that it was not shown that this conduct of the plaintiff was of any special injury to the defendant; and further, that there was no proof that the defendant ever remonstrated with the plaintiff, or complained of his conduct in the particulars here stated. The defendant contended, that if the jury believed that the plaintiff had acted as testified to, such conduct justified the defendant in discharging him, and called upon the Court so to instruct the jury as a matter of law.

The Court declined charging the jury as requested, but told them that the plaintiff was bound to use ordinary diligence in the discharge of his duties as an overseer. The defendant excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

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

BATTLE, J. What is ordinary care, ordinary prudence, or diligence, is a question of law to be decided by the court upon the facts to be found by the jury. But a mistake of the court in leaving a question of law to the jury may be rendered harmless by a verdict in accordance with law upon the facts; *Hathaway* v. *Hinton*, 1 Jones' Rep. 243, and the cases there referred to. The facts and circumstanees upon which the ver-

dict was found in the present case, are set forth in the bill of exceptions, and the question of law, applicable to them, is open to our review. That question is, did the acts and conduct of the plaintiff constitute such ordinary neglect in the performance of his duties as overseer, as to justify the defendant in discharging him; for if they did, then, it is conceded, that the plaintiff could not maintain his action upon the special contract. We cannot, upon looking at the proofs, hesitate for one moment in saying that the plaintiff was guilty of ordinary, if not of gross negligence of the proper duties of his business. He had engaged by his contract to superintend two farms of the defendant, and he was bound thereby for a reasonable attention to the defendant's hands, and for ordinary skill in conducting the operations of the farms. Both these things required his personal presence on the farms, and with the hands, at the usual, and accustomed times for work. Instead of being there, we learn from the testimony of several witnesses, that he was frequently seen at the depot near which he lived, drinking at grog shops, and on one occasion playing at cards. These visits at the depot were most frequent on Sunday, but they were not unfrequent on the other days of the week, and they were made at different hours of the day—morning, noon, and at night. Can there be any doubt that such a course of conduct, continued for three months, was a neglect of his business? Would any farmer, of ordinary prudence, have borne with it, even as long as the defendant seems to have done?

But it is said the defendant did not remonstrate with him. We are not aware of any rule of law which requires proof of the defendant that he had done so. The parties were equally free, and are presumed to have equally understood the duties and obligations incurred by their contract.

It is said further, in the argument here, that there was no proof that the inattention of the plaintiff had caused, or was likely to cause, any injury to the defendant. The obvious reply is, that it had a tendancy to damage him, and he was not

bound to wait until his crops were ruined before he removed the cause of the impending evil.

Our conclusion is, that the presiding Judge erred in leaving to the jury a question of law which he ought to have decided himself; that his error has not been corrected by a proper finding of a jury, and that, consequently, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

DARIAN SMITH *v.* JOHN F. RIDDICK.

Where a person had been sent for a physician, and not finding the one sent for, had spoken to another, and on the arrival of the latter, before the service was performed, the manner of his employment and the nature of the service were talked over and explained to the patient in the presence of the physician, in an action brought by the physician against the messenger, *it was held* not to be error in the Judge to leave it to the jury to say whether he had been informed before hand whom he was going to see, and for what purpose; and that if he was so informed, the messenger would not be liable.

ACTION of ASSUMPSIT, tried before SAUNDERS, J., at the last Spring Term of Stokes Superior Court.

The plaintiff declared for services rendered, as a physician and a surgeon, to a sick person at the defendant's request. The defendant was sent for Dr. Pettis to assist in a surgical operation, and not finding him, the defendant went to the house of the plaintiff, and said "I have come after you to go and see a sick man. This is all the witness heard. The plaintiff and the defendant went off together, and proceeded until they reached a point about three miles from the house of the sick man. Here the defendant separated from the plaintiff, who went on to the house of the patient in company with another person with whom he fell in company, and who was going to see the sick person. The doctor, who was in attend-

ance on the sick man, explained to him what had occurred, and said that the plaintiff would assist in the operation, which was assented to, and the operation was performed.

The question was whether the defendant was liable.

The court left it to the jury to say whether, or not, they believed the plaintiff had been informed, beforehand, as to where he was going, and for what purpose. If so, the defendant being a mere messenger, was not liable. Plaintiff excepted.

Verdict for defendant. Judgment. Appeal by the plaintiff.

Morehead, for the plaintiff.
McLean, for defendant.

PEARSON, J. There is no error. The evdience tended to show that the plaintiff was aware of the fact that the defendant acted merely as a messenger, and did not intend, or expect, to make himself personally liable for the services which were to be rendered to the sick man. The doctor, who was in attendance, explained to the sick man, in the presence of the plaintiff, what had occurred, that is, that the defendant who had been sent for Dr. Pettis, not finding him, as the case was urgent, had applied to the plaintiff to come in his place, and the plaintiff would assist in performing the operation, which was assented to. If the plaintiff was not willing to assist at the instance and on the credit of the sick man, it was his duty then to have made known his objections.

To hold the defendant liable, under these circumstances, would deter every one from doing the charitable office of going after a doctor for a sick neighbor.

PER CURIAM, Judgment affirmed.

GATES & BROWN *v.* WILLIAM A. J. POLLOCK.

Where one, of two partners, who had entered into a contract to do a job of work according to specifications, executed an instrument, under seal, certifying that the contract was forfeited on their part, and that there had been a settlement and payment to him, of a certain sum as a "present," it was *Held* that such instrument amounted to a release, and took away the cause of action as to both partners.

ASSUMPSIT, tried before CALDWELL, J., at the Spring Term, 1858, of Lenoir Superior Court.

The plaintiff declared upon a special contract, in writing, executed 7th October, 1856, and in all the usual counts in assumpsit.

It was stipulated in the contract, that plaintiff should mix the mortar, do the plastering in the best style, at ten cents the yard, and finish the job in eight weeks: on the part of the defendant, that he should furnish all the materials,—furnish hands to wait on the workmen, and pay the plaintiffs ten cents per yard.

It appeared, in evidence, that the plastering was not executed within the time agreed on, by reason of defendant's not furnishing materials, and hands to wait on the workmen, and that the plastering was not done in the best style, but was a fair piece of work, and was worth, in the opinion of the witness, from ten to twelve and a half cents per yard. The suit was commenced on the 9th day of December, 1856, and on that day, it appeared on the part of the defendant, that Brown, one of the plaintiffs, executed to defendant an instrument, in writing, which is as follows:

"This is to certify that, I, W. H. Brown, being satisfied that the obligation that he and John B. Gates gave W. A. J. Pollock, is forfeited by Brown and Gates, and I, Brown, give this receipt in full settlement with the said W. A. J. Pollock, for one hundred and twenty-five dollars, which the said Pollock makes a present to me, W. H. Brown. December 9th, 1856. W. H. BROWN, [*seal.*]"

It appeared also, that defendant took possession of the house and used it as a hotel, and for other purposes. And it also appeared in evidence, that plastering of the best quality would be worth fifteen cents per yard. The defendant insisted that the plaintiffs could not recover, as there was a special contract, and the plaintiffs had not complied with it; and that they could not recover on the *quantum meruit* count, because there was a special contract. And the defendant also insisted, that the instrument executed to him by said Brown, was a release, or if not, a bar to the action, under the plea of accord and satisfaction.

The Court charged the jury, that according to the testimony, the plaintiffs had not complied with the special contract, and could not, therefore, recover on it. But if they believed that defendant took possession of the house, and used it, the plaintiffs were entitled to recover whatever their work and labor were worth; that they ought not, in assessing the damages, to go beyond ten cents per yard for the plastering, but might go below that sum. And the Court also charged, that the paper-writing, offered in evidence, was not a release, and did not support the plea of accord and satisfaction, but they might allow it as a payment of $125. Defendant excepted

The jury returned a verdict for the plaintiffs, and allowed the defendant the $125, as a payment.

Strong, for plaintiffs.
McRae and *Stevenson*, for defendant.

BATTLE, J. The instrument offered by the defendant cannot be taken in any other sense, than as a release by the plaintiff, Brown, of all his interest in the contract for the work and labor done by him and his partner on the house of the defendant. If he alone had made the contract and performed the work, he could not have maintained an action upon it, in the face of such an instrument. See *Stinson* v. *Moody*, 3 Jones' Rep. 53, and the authorities therein referred to. The defence would be clearly admissible under the plea of the gen-

eral issue, *non assumpsit*. If one of the plaintiffs be barred, then the present action cannot be maintained in the name of himself and his partner, as it is too well settled to require a reference to any authority, that if there be too many plaintiffs, the suit must fail, though some of them may have a good cause of action. This may be a hard case upon the plaintiff, Gates, for it is possible that there might have been some collusion between the defendant and the other plaintiff to deprive him of his just rights. If so, it may be a question whether he can obtain relief in another tribunal. As to that, we give no opinion, it being our duty in the present case, only to say that the action cannot be maintained.

PER CURIAM. The judgment must be reversed, and a new trial granted.

JOSEPH MARTIN *v.* JOHN MARTIN.

Where a sheriff returns upon a *fi. fa.*, two credits for money received thereon, at different times, and, suppressing a third credit, returns not satisfied, it was *Held* that such return was false, and subjected him to the penalty of $500, under Rev. Code, ch. 105, sec. 17.

The penalty of $500 given by Rev. Code, ch. 105, sec. 17, may be sued for in the name of the person bringing the action alone, and he need not set out that any one else is to share the damages with him; as that is shown by the act itself.

ACTION of DEBT, tried before CALDWELL, J., at the Spring Term, 1858, of Stokes Superior Court.

The plaintiff declared for the penalty of $500, given by the 105th chapter, section 17, of the Revised Code, against defendant, as sheriff, for making a false return. The proof was, that a writ of *fieri facias* was issued from the Court of Equity of Stokes county, in favor of one John Brown against the plaintiff in this case, Joseph Martin, Benjamin C. Tucker and Jacob S. Salmons, for the sum of $1000, to be discharged by

the payment of $721,75, with interest on $383, from April Term, 1856, and costs $37,87, returnable to the Spring Term, 1857, of the said Court, which was placed in the hands of the defendant, as sheriff of that county, more than twenty days previous to the return term.

The sheriff returned this writ at the said Spring Term, 1857, with two credits, endorsed as follows:

"January 15th, 1857. Received on this *fi. fa.*, by sale of defendant's property, $226,27, after deducting the sheriff's fees, $37,27, leaves a nett of $189, in sheriff's hands."

"March 9th, 1857. Received on this execution one hundred dollars." There was also endorsed on the execution, "not satisfied."

The plaintiff read in evidence the defendant's receipt for $365, received from one of the defendant's in the execution, in part of the *fi. fa.*, dated 4th of February, 1857, which sum was not endorsed on the *fi. fa.*

The defendant's counsel contended that the plaintiff could not recover:

1st. Because the failing to endorse the credit of $365, paid on 4th of February, 1857, did not make the return false, and was only such an act as would subject the sheriff to an action on his official bond.

2nd. Because the writ and declaration was in the name of plaintiff alone, and did not set forth that the plaintiff sued, as well for the person aggrieved, as for himself.

3rd. That the plaintiff had not shown that he was aggrieved by the defendant's omitting to endorse the credit of $365 on the process:

Consequently, that the defendant did not owe, or detain from the plaintiff $500.

A verdict was taken in favor of the plaintiff for $500, subject to the opinion of the Court.

The Court being of opinion with the defendant, set aside the verdict and entered judgment of nonsuit, from which the plaintiff appealed.

Morehead, for the plaintiff.
McLean and *Graham*, for the defendant.

PEARSON, J. "Not satisfied," is an insufficient return to a writ of *fieri facias*, for the reason, that it does not set forth the ground upon which the officer has failed to make the money. But it may, nevertheless, be a false return: for instance, suppose the officer has made the full amount required by the execution, and return it "not satisfied," such a return is clearly false: it may be, if he has made only a part of the amount, and without any reference to the part received, returns it "not satisfied," it would not be a false return, because, taking it literally, the execution is not satisfied, and the return may have referred to that part merely; but where, as in our case, the return is made in reference to the part received, and sets forth a payment in January, and another in March, suppressing the fact of the other payment in February, then "not satisfied," is used in the sense of not satisfied as to the residue, and is necessarily false in respect to the payment suppressed; for, in that case, the return cannot be taken as having referred to the fact, that it is not literally satisfied.

The objection, that it is not set out, either in the writ or the declaration, that the plaintiff sued as well for the use of the party aggrieved, as for himself, is not well taken. The statute confers upon the informer the right to sue. It imposes a penalty of $500, "one moiety thereof to the party aggrieved, and the other, to him that will sue for the same," consequently, he is the only party plaintiff; and there can be no more necessity for setting out the persons for whose use the action is brought, than there is where a bond is sold without endorsement; in which case the action must be in the name of the obligee, and the addition, that it is brought for the use of the purchaser, has no legal effect, and he is not noticed as a party of record, such addition being treated merely as a memorandum, showing to whom the money may be paid; which purpose is answered in this case, by the averment in the declaration that

the debt is due by force of the statute, whereby it appears that the party aggrieved is entitled to one moiety. The rule of proceeding is so stated by Chitty, 1 vol. 128: "Where a penal statute gives the whole, or a part of a penalty, to a common informer, and enables him to sue generally for the same, debt is sustainable, and he need not declare *qui tam*, unless where a penalty is given for a contempt."

Harrington v. *McFarland*, Conf. Rep. 408, which was cited in the argument, proves too much: for the declaration makes the State a *co-plaintiff* with the informer: whereas, although the action was brought for the use of the State as well as himself, he had no right to join the State as a plaintiff, but was required to sue in his own name, so as to be alone responsible for the costs of the action, as plaintiff of record. But we consider the authority of Chitty, and the cases cited by him, conclusive.

The judgment must be reversed, and a judgment for the plaintiff upon the verdict.

PER CURIAM, Judgment reversed.

JOSEPH MARTIN *v.* JOHN MARTIN.

The penalty given by the 105th chapter, 17th section of the Revised Code, for making a false return of process, applies to process in civil cases only, and not to that in criminal proceedings.

The return of "not to be found" on a capias, is not true, because of the defendant's being out of the State at the time the return is made, if the the officer had an opportunity of making the arrest previously, while the process was in his hands.

ACTION of DEBT, for a penalty, tried before SAUNDERS, J., at the last Spring Term of Stokes Superior Court.

The plaintiff declared for the penalty of $500, given by the statute, Rev. Code, ch. 105, sec. 17, against a Sheriff for making a false return. The plaintiff exhibited in evidence a

writ of capias in favor of the State against one James Martin, returnable to the October term, 1855, of Stokes superior court, which had been placed in the hands of the defendant, as sheriff, more than twenty days before the return day, upon which he returned "not to be found." It was also proved that in the summer of 1855, he met James Martin, the defendant in the capias, at a tax gathering in his county, and informed him he had a capias against him; Martin offered to give, as surety for his appearance, a person then present, but was put off, for the time being, by the sheriff. Before the company dispersed, he (James Martin) went again to the sheriff and proposed giving the bond, stating that his surety was an old man and wanted to go home, to which the sheriff replied that he was then busy, and it would do as well another time. The defendant in the capias, then went off without giving security for his appearance, and shortly afterwards left the State, and did not give security at all; neither was he ever taken into custody under the said capias.

The defendant contended 1st. That as the return was true, at the time it was made, the action could not be maintained for making a false return.

2nd. That the act of the General Assembly, on which this suit was brought, did not extend to process in behalf of the State in criminal cases, but was confined to process in civil cases.

The Court was of opinion, that under the 17th section of 105th chapter of the act in question, the sheriff was liable to a penalty of $100 for failing to execute the process, but not for the penalty of $500 for a false return, as the return was true at the time it was made. Plaintiff excepted. Verdict for the defendant. Judgment and appeal.

Morehead, for the plaintiff.
McLean and *Graham*, for the defendant.

Pearson, J. It is properly conceded, in this Court, that there is error in respect to the return's not being false, "be-

cause it was true in point of fact when made." But we are of opinion with the defendant upon the objection arising out of the construction of the statute. Its provisions do not apply to a return made to a *capias* in a criminal proceeding.—The words of the statute, it is true, are very general: "all writs and other process to him legally issued and directed."—Rev. Code, chap. 105, sec. 17. These general words are restrained by other parts of the section, i. e. "one moiety to the party grieved." It is evident that the word "*party*" is here used to signify a *person*;—either some individual, or a corporate body other than the sovereign. "Where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable." This excludes a process to arrest the body of one charged with an offence against the State; for the sheriff is bound to execute such process without reference to the time of its delivery to him. "And, moreover, be further liable to the action of the party grieved, *for damages.*" This likewise excludes such process; for a neglect of duty, in respect thereto, is not redressed by an action for damages in the name of the State, but by an indictment for a misdemeanor in office, as a high offence against the public.

The Court is of opinion that the provision of the statute does not apply to the case under consideration, and on that ground the judgment of the Court below is affirmed.

PER CURIAM. Judgment affirmed.

JOSEPH H. BAKER, *Adm'r of* NANCY FOXHALL *v.* JOSEPH J. B. PENDER.

A limitation as follows: "But should my wife die without heirs of her body, *then at her decease*, the whole of the property to go to the use and benefit of my daughter," was *Held* to be good as to the remainder; for that the restriction to the time of the wife's decease prevented the limitation over from being too remote.

Baker *v.* Pender.

A transposition of the sentences of a will is allowed by the rules of construction, when necessary to express the intention of the testator.

This was an action of DETINUE, for a certain slave called John, tried before his Honor Judge ELLIS, at the Spring Term, 1858, of Edgecombe Superior Court.

The case was submitted for the judgment of the Court upon the following

CASE AGREED.

1. John Jackson, of the said county, died in or about 1798, having made his last will, and being possessed of certain slaves, of one of which, the slave in controversy was the increase.

2. At February Term, 1799, of Edgecombe county court, his will was duly proved, the material portion of which is as follows: "I give and bequeath to my loving wife, Charlotte Jackson, all the real and personal property I may die possessed of, after the payment of my just and lawful debts, in the following manner to wit: that thereout of, my daughter, Nancy J. Jackson, be boarded, clothed and educated in as genteel a manner as the nature of the case will admit of; that neither real or personal property be sold, given, or otherwise disposed of, more than is thought, by my executors, is necessary for the genteel support of my wife and child; that when my said daughter, Nancy J. Jackson, marries or arrives at years of maturity, that then my real property, as well in this county as in Cumberland county, in the State of Tennessee, be at the disposal of her and her heirs forever, and that at such time as aforementioned, my loving wife gives to my said daughter Nancy, one good bed and furniture, one horse to be worth one hundred dollars, a good woman's saddle and bridle, and one hundred pound Virginia currency, either in hand or a bond for that amount payable in twelve months after my daughter should arrive of age; the balance of the property to be for the sole use and benefit of my wife, to her and her heirs lawfully begotten of her body for ever; but should my wife die without heirs of her body, then, at her decease, the whole of the property to go to the use and benefit of my said

daughter Nancy and her heirs forever, and until that matter is fully ascertained, that none of the negroes be sold, or otherwise disposed of, by gift, &c.; and should my said daughter Nancy die previous to the death of my said wife, and without marrying or having heirs of her body, that then the land and property which I have above bequeathed my said daughter, to revert back. It is further my will and desire that, in case my said wife, Charlotte, should die without issue, and preceding the death of my daughter, and then that my daughter should die without marrying and issue of her body, that then the property shall be equally divided between Figures, Sally and Nancy Phillips, the brothers and sisters of my wife."—Charlotte Jackson was appointed, and alone qualified as, executrix, the others having renounced.

3. Charlotte, the widow, married a second husband, John D. Ward, who died in or about 1823. By him she had issue, Joseph J. E. Ward, who died intestate in 1831 or '32, and said Charlotte died in 1855.

4. Nancy, referred to in the above will, was the testator's daughter by a former marriage; she married William Foxhall, and died in, or about, 1820. She had issue by her said husband, William, one child, Mary Ann Foxhall, who survived the said Nancy about ten years. The plaintiff, Joseph H. Baker, at February Term, 1857, of Edgecombe county court, administered on the estate of the said Nancy.

6. The slaves aforesaid with their increase, after the death of John J. Jackson, remained in the possession of his widow, Charlotte, until her death in 1855; after which, they went into the passession of the defendant, and were so possessed by him when the plaintiff demanded them, and he refused to give them up. Therefore, this suit was brought.

7. It is agreed that if the Court should be of opinion that the plaintiff is entitled to the slave in question, then judgment shall be entered for the value thereof at twelve hundred dollars.

Upon consideration of the case, his Honor being of opinion

with the defendant, gave judgment accordingly; from which the plaintiff appealed.

McRae, *Bryan* and *E. G. Haywood*, for the plaintiff.
Badger, *Rodman* and *Moore*, for the defendant.

PEARSON, J. Without entering into the question whether the word "then" is an adverb of "time," or a mere "relative" adverb, about which much is to be met with in the books, we are satisfied that the words "at her decease" fix the happening of that event as the time at which the limitation over must take effect, if it takes effect at all; and consequently, that it is not too remote; "at" is a more precise word of time, than "after," and it is settled that "after her death" is sufficient to restrict the limitation; *Pinbury* v. *Elkin*, 1 P. W. 563; *Wilkerson* v. *South*, 7 Term Rep. 555; 1 Fearne 473; Smith 557; 2 Roper 1549.

This conclusion is irresistible, unless these words can be rejected as surplusage, and we see no ground upon which that can be done; for the testator manifestly had a meaning which these words were used to express. Or unless they can be explained away by the interpolation of some other words.

It was suggested that the testator did not mean to give the slaves to his daughter if his wife left a child or a grandchild at her death, and that a proper construction requires other words, so as to make the expression "then at her decease *without issue.*" This may be granted, and still the limitation would be good, because it is tied down to the time of her death, and must take effect *at that time*, or not at all. The substance of it being—if at her death she has no issue, the limitation will take effect; but if she has issue at that time it fails, although such issue should afterwards become extinct. So in either case, the fate of the limitation will be decided at her death, although it depends on the contingency of her dying without issue.

It was further suggested that the effect of these words is explained away by the latter part of the clause, in which ul-

terior limitations are given, by which it is made evident that the limitation in question is put on an indefinite failure of issue, and is consequently too remote. The argument failed to satisfy us of the correctness of the conclusion sought to be deduced.

Another view of the subject has suggested itself, which we are convinced is the true one: The effect of the clause, considered as a whole, is to give the land to his daughter, and the slaves to his wife, with *cross limitations to the survivor* in the event of the other dying, without marrying and without issue, with respect to the daughter, and without issue, in respect to the wife. The sense is confused by being expressed in an inartificial manner, and by leaving the disposition of one part unfinished and taking up the other, and then mixing both.—We believe this to be the proper reading to give expression to the meaning in a clear and orderly manner: i. e. "In the first place, I give all my estate, both real and personal to my wife, subject to the payment of debts and the support and education of my daughter, until she marries or arrives at age. At her marriage, or arrival at age, I give to her my real estate," (and some few articles of personalty) "to be at the disposal of her and he heirs forever. If she dies *previous to the death of my wife*, without marrying or having heirs of her body, then the land and property bequeated to her, is to *revert back*, (that is to belong to my wife.) The balance of my estate to be for the sole use and benefit of my wife and the heirs of her body. If she dies *preceding the death of my daughter* without heirs of her own body, *then* at her *decease*, the whole of the property to go to the use and benefit of my daughter and her heirs forever; and until that matter is fully ascertained, (by her death, or that of my daughter) none of the negroes are to be sold or otherwise disposed of, and then, if my daughter should die without marrying and issue of her body, the property to be equally divided between Figures, Sally, and Nancy Phillips, the brother and sisters of my wife."

To give it this reading, requires only the transposition of two sentences, which is allowed by a well-settled rule of con-

struction, when necessary to express the intention. The first, simply keeps separate the disposition of the property given to the daughter, and that given to the wife. The second, in respect to the limitation over to the daughter at the death of the wife, is necessary, in order to make the dispositions consistent and sensible. "It is further my will and desire, that in case my said wife, Charlotte, should die without issue and preceding the death of my daughter"—here, one expects to find some gift to the daughter, and to make sense of it, the limitation over to her must come in, otherwise there is a chasm and an awkward leap—"and *then* that my daughter should die, &c." "*that then*, the property should be equally divided &c."—It is impossible to read this will attentively, and believe that it was the intention of the testator, should his daughter die, and her issue become extinct in the life-time of the wife, that the property given to her, should, at her death, devolve upon the personal representatives of the daughter, and pass to her next of kin. To guard against this result, he resorts to cross limitations between his wife and daughter, and in the event of her surviving, he makes an ulterior limitation over to the brother and sisters of his wife. For some reason or other, if his daughter died and her issue became extinct, he intended, that the property should not go to her collateral relations, but should go to his wife, if she was then living, if not, that it should go to her brother and sisters. As he says, in the event of my daughter getting all of the estate, by my wife's death preceding her's, I intend it shall go to the brother and sisters of my wife, in preference to the collateral relations of my daughter, it is absurd, to suppose that he intended it should go to the latter, in preference to the former, in the event that his daughter's death preceded that of his wife: why should he intend to make a different disposition, if his daughter died before his wife, than that which he makes if she dies after his wife?

The whole is made clear and consistent, and every expression and limitation is allowed due weight, by giving to the will the effect of making cross limitations. If the wife sur-

vives, her estate becomes absolute. If the daughter survives and gets the whole estate, then, in the event of her issue becoming extinct, it is limited to the brother and sisters of the wife. It may be, this ulterior limitation is too remote, but it is not on that account entitled to less weight, as tending to show the intention; so, also, although the limitations over to the wife, failed by the marriage of the daughter, and that to the daughter failed by her death in the lime-time of the wife, they both point out the intention as cearly as if these events had not occurred. We are of opinion that the limitation over to the daughter, at the death of the wife, was not to take effect unless the wife's death preceded that of the daughter, and as the wife was the survivor, the cross limitation to the daughter failed, and the wife's estate became absolute; consequently the plaintiff, who is the personal representative of the daughter, is not entitled to the slaves sued for. There is no error.

PER CURIAM, Judgment affirmed.

Doe on demise of SAMUEL TOPPING *v.* NANCY SADLER, *et. al.*

In locating a patent of ancient date, evidence in respect to marked trees, though not called for in the grant, is admissible.

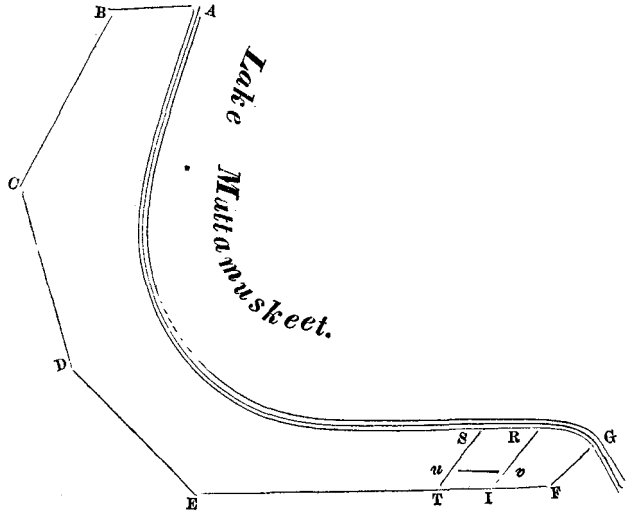
Where one of the calls in a deed was for a *patent line*, and there was one patent proved, a line of which would be reached by extending the line in question beyond the distance called for, and no other patent was alleged to be near the premises, *it was held* that the call was sufficiently definite to allow the extension of the line to the patent line.

A husband can maintain an action of ejectment on a separate demise by himself, though he holds under a deed to himself and wife.

THIS was an action of EJECTMENT, tried before CALDWELL, J., at the last Spring Term of Hyde Superior Court.

The plaintiff introduced a patent to James Clayton, dated 4th of March, 1775, which he contended began at the point

A in the annexed diagram and pursued the lines A, B, C, D,



E, F, G, and for the purpose of establishing these as the lines of the grant, he offered evidence of marked trees on the lines A, B, and E, F. This evidence was objected to by the defendant for the reason that there were no marked trees called for in the grant. The evidence was admitted by the Court and the defendant excepted.

The plaintiff then offered a deed from Joseph McGowan to himself and wife, dated March 8th, 1819, in which the land conveyed was described as follows: "beginning at Isaac Swindell's upper corner tree—a cypress, standing at the lake side, (which was admitted to be at R in the annexed plat,) running westerly with the lake, 100 poles to a juniper post (admitted to be at S,) thence a southerly course, 80 poles to the patent line (T,) thence with the patent line easterly 100 poles, to Swindell's line (I,) thence with Swindell's line to the first station." The line from S to T, if run to the patent line at T, measured 145 poles, and took in the *locus in quo*, which is the small

parallelogram, *u*, *v*, I, T; but the defendant contended that it should stop at the end of the 80 poles, in which case the next call would run with *u*, *v*, and would not include the disputed territory. The plaintiff proved that he had been in possession of a part of the land embraced in his deed for fifteen years.

The defendant asked the Court to charge the jury as contended by him in respect to the lines, and also that plaintiff should have declared on a joint demise by him and his wife, and that he could not recover on his own demise alone.

The Court declined giving the instructions prayed, and left it to the jury to ascertain the back line of the patent called for in the deed. Defendant excepted.

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

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

PEARSON, J. The evidence in respect to the "marked trees," was admissible under the rule recognised by this Court in *Safret* v. *Hartman*, ante 185, although "marked line trees" were not called for in the grant which the plaintiff was endeavoring to locate. The grant was of ancient date, to wit: 4th of March, 1775.

2. The call in the deed to the plaintiff and wife "thence southerly 80 poles to the patent line, then with the patent line easterly," clearly has reference to the line of the patent that covered the land, to wit: the patent of 1775, in the absence of any proof that there was another patent which covered the land. This call being sufficiently definite, was properly allowed the effect of controlling the distance.

3. If a husband and wife have possession of land belonging to the wife in fee in severalty, and there is a subsequent eviction, the husband alone may maintain ejectment. The fact that the husband has also an estate jointly with the wife, cannot have the effect of putting him in a worse condition than if he had no estate except such as he acquired *jure*

mariti, for he has all that, and something more. This is self-evident; the learning in the books merely shows that in case of a conveyance to husband and wife, there is a *fifth unity*, to wit: that of person, and he cannot sever the relation, or do any act by which to defeat her estate, in case she survives him; but *non constat*, but he may make a lease for years which will be valid during the coveture, in the same way as if he had nothing in the land except as husband; consequently, he may maintain ejectment on his own demise. We presume an action might be maintained on the joint demise of husband and wife, in such a case, as they are enabled to make a joint lease by statute, which binds the wife provided certain requisites are attended to.

PER CURIAM. Judgment affirmed.

GEORGE HURDLE, *Assignee, v.* ORPHEUS S. HANNER.

A, held a note on C, which was assigned after it was due, on which the assignee sued C, it was *Held* that a note, which C held upon A, with another obligor B, was a good set-off.

ACTION of DEBT, tried before MANLY, J., at the last Spring Term, of Alamance Superior Court.

The plaintiff declared on a promissory note of the defendant payable to James M. Klapp, and endorsed by him to the plaintiff after it became due. Klapp, and one Sterling W. Holt, were in co-partnership under the firm and style of J. M. Klapp and Holt, and in the course of their commercial transactions, had given a note for $125, to the defendant Hanner. This note was offered as a set-off to the action, but the Court was of opinion, that there was not that mutuality, necessary to make it a proper set-off, and rejected it. Defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

No counsel for the plaintiff.
Bailey, for the defendant.

PEARSON, J. A set-off is a cross action by the defendant against the plaintiff, which is allowed by statute to avoid a multiplicity of suits, when the debts are mutual, i. e., when the parties are the same, and the debts are due in the same right; accordingly, in *Worth* v. *Fentress*, 1 Dev. Rep. 419, to a plea of set-off, plaintiff was allowed to rely upon several matters of defense by way of replication, which could only be done under the statute of Ann, which permits several defenses to be made by *plea*, but does not extend to the replication by treating the plea of set off, as an action on the part of the defendant; so, in *Wharton* v. *Hopkins*, 11 Ire. Rep. 505: to a plea of set-off against the assignor of the plaintiff, he was allowed to rely upon a set-off, which the assignor was entitled against the defendant by way of replication. "In all cases of joint obligations, or *assumptions of co-partners in trade*, or otherwise, suits may be brought against all or any number of the persons, making such obligations, assumptions or agreements," Rev. Code, ch. 31, sec. 84. If the defendant had sued Klapp alone, on the note given by him and Holt, before Klapp had transferred the note in controversy to the plaintiff, there can be no doubt that he, Klapp, could have relied upon it by the way of set-off; it follows that if Klapp had sued the defendant on the note in controversy, he might have relied upon the note of Klapp and Holt by way of set-off; because he had the right to sue Klapp alone, and the set-off is a cross action between the same parties. As the note was assigned to the plaintiff after maturity, it was subject to the same defense that could have been made to it while it was held by the assignor.

The case of the *State Bank* v. *Armstrong and others*, 4 Dev. Rep. 519, was cited as opposed to this conclusion: We do not think so. The original action was brought against five obligors, and it was held, that one of the defendants could not rely upon a debt, due to him alone by the plaintiff, as a set-off, on

the ground that, in the cross action the parties were not the same as in the original action. We admit, if the defendant had sued Klapp and Holt jointly on the note due him, then Klapp, according to that case, if it be correctly decided, could not have used the note, due to him alone by the defendant, as a set off, because there would have been different parties to the original and cross actions. But no such difficulty is presented as our case stands. The original suit is by Hurdle, who stands in the place of Klapp, against the defendant, and the cross action, or set-off, is by the defendant against Klapp. So, the parties, in both, are the same, and the circumstance, that the defendant has also a several cause of action against Holt, on the same note, does not affect the principle There is error.

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

WILLIAM R. WEBB *v.* WILLIAM O. BOWLER.

The affidavit required under the 16th section of the 7th chapter of the Revised Code for an injury to the property of another, must set out that the defendant absconded, or concealed himself, within three months after the injury was done; and the attachment must be issued within that time.

It was *Held* that a defect in the affidavit, in not stating that the defendant absconded, &c., within three months after the injury was done, may be taken advantage of by motion to dismiss, without the property's having been replevied.

A false warranty, or a deceit in the sale of personal property, is not "an injury to the property of another" for which an attachment is authorised to be issued under the 16th section, 7th chapter, Revised Code.

MOTION to dismiss an ATTACHMENT, before SAUNDERS, J., at the last Spring Term of Person Superior Court.

The attachment was predicated on the following affidavit, viz:

"*State of North Carolina, Person County.*

W. R. Webb maketh oath before me, W. R. Reade, a jus-

tice of the peace, in and for the county and State aforesaid, that William O. Bowler hath endamaged him in his property by a false warranty in the sale of a slave, and by falsely and deceitfully selling the said slave as sound, he knowing that the said slave was unsound, to the amount and in the sum of one thousand dollars, to the best of his knowledge and belief, and that he so absents himself, from the county and State aforesaid or so conceals himself that the ordinary process of law cannot be served upon him. Sworn to and subscribed on this 4th day of September, A. D. 1857."

The attachment was made returnable to the next Superior Court of Person county, and was returned levied on a house and lot in Roxboro.

The defendant's counsel moved to dismiss the attachment upon the ground that it was improvidently issued, and that there was not sufficient matter set forth in the affidavit to authorise the Court to take jurisdiction of the case.

To this it was objected, that the property levied on not having been replevied, counsel had no right to make this motion, nor the Court to entertain it.

The Court overruled this reply of the plaintiff, and upon consideration of the motion, ordered the attachment to be dismissed. From which judgment, the plaintiff appealed.

Moore, for the plaintiff.
Winston, sen., and *Miller* for the defendant.

PEARSON, J. The position assumed in the argument that a claim for damages for the breach of a warranty was embraced by the attachment law, prior to the amendment in the Revised Code, is not tenable. It had been settled by general acquiescence, that the debt, or demand must be such as could be recovered by an action of debt, or upon *indebtatus assumpsit*, and not a demand for unliquidated damages for breach of contract. The same distinction applies to the jurisdiction of a single justice of the peace, and is well marked by the case of *Tyer* v. *Harper*, 1 Dev. Rep. 387, where it is *held* that a

single justice has not jurisdiction for a breach of contract in failing to deliver a certain quantity of goods, so as to make a full load, which was to be paid for *per hundred.*

Considering this proceeding in reference to this amendment, Rev. Code, ch. 7, sec. 16, there are two objections to it, both of which are fatal. It is necessary to set out in the affidavit that the defendant absconded or concealed himself within three months after the injury was done, and the attachment must be issued within that time.

It was said the Court cannot notice the omission, unless the defendant replevies so as to make himself a party, and then takes advantage of it by demurrer, or motion to dismiss. We do not think so, for the statute is peremptory, and the court is bound to notice it; sec. 17, "If any attachment shall issue under the preceding section, in any other *manner*, or *time*, than is herein allowed, the same shall be void, and the court shall not proceed therein."

Again, it was said the omission may be cured by setting it out in the declaration, and so the order to dismiss was premature. In the first place, to permit the plaintiff, to file a declaration, would be to "proceed;" but waiving this: It is true, some defects in the writ may be cured by the declaration, but there is a marked distinction between an ordinary writ, and an attachment. In this latter, the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as some protection to the absent defendant, the statute requires all the material facts to be set out in an affidavit, which is made the groundwork of this proceeding. By the section under consideration, the fact that the defendant absconded, or concealed himself within three months, is made as material to the right to issue the attachment, as the fact that an injury was done to the plaintiff's property, and to allow the omission of either in the affidavit, to be cured by the declaration, which is not sworn to, would deprive the defendant of a safe-guard required by the statute, to wit: the oath of the plaintiff, and make that provision of no effect.

2. We are of opinion that a false warranty, or deceit in the sale of personal property, is not embraced under the terms "an injury to *the property* of another," in the 16th section. "Property" is sometimes used in a broad sense as synonymous with "estate," but the legal signification of the two words is not the same. "Estate" is the broadest term, and includes "choses in action." "Property" is confined to things that are tangible. In *Campbell* v. *Smith*, 3 Hawks' Reports, 590, HENDERSON, J., says "a debt, or duty, is not property. A person has an interest in a duty, but a property in a *thing* only." "Personal property" means goods or chattels —things, which at common law, could be seized under a *fi. fa.*, or be the subject of larceny. *Pippin* v. *Ellison*, 12 Ired. Rep. 61; *Hurdle* v. *Outlaw*, 2 Jones' Equ. 76. Here the matter is fully discussed, and opinions filed by two of the Judges; and it may be remarked that the latter case, which was one of great importance, and attracted much notice, was decided at December Term, 1854; and it is fair to presume that the attention of the Legislature was called to it. But at all events, these decisions fix the meaning of the word "property," and we are not disposed to unsettle it; being satisfied from a consideration of the amendment made by the section before us, that such was the sense in which it is there used. Had the intention been to include all injuries affecting one's estate, whereby he acquired a cause of action, apt words would have been used to express so general an idea. The words of the section were evidently well considered; "an injury to the proper person (excluding slander, &c.,) or property," that is, a thing tangible, and not a mere right. In making this extension to an *exparte* proceeding, there was an obvious reason for restricting it to such wrongs, as, from their nature, if committed, could be clearly proved, i. e. that a house was burnt, a negro killed, or a horse taken away. To this we impute the use of the particular word "property."— What property of the plaintiff was injured? Not the negro! Or suppose property to include a chose in action; what chose in action of the plaintiff, was injured? He had none to be

injured prior to the act complained of; and really, the idea of an injury done to a *right of action* involves a legal absurdity; especially, when such a right of action is not pre-existing, but arises, and is brought into existence by the very act that is complained of as doing an injury to it.

PER CURIAM. There is no error. Judgment affirmed.

DANIEL F. THOMPSON *v.* HUGH KIRKPATRICK.

Either of the two copies of an order appointing an overseer of a road, directed by law to be issued by the clerk, is a proper and *sufficient* evidence of the overseer's appointment.

THIS was an action of DEBT for a penalty, tried before SAUNDERS, J., at the last Spring Term of Orange Superior Court.

The plaintiff declared as an overseer of a road, against the defendant, for failing to send his hands to work upon the public road after due and sufficient warning. The only question was, as to the competency of the evidence to establish the plaintiff's appointment as overseer; to do this, the plaintiff introduced an order, which had been duly issued by the clerk of the county court, it being the copy which had been served on him. The clerk of the court produced a book, headed "road docket," which he proved belonged to his office, and was used for the purpose of recording the road districts, and the appointment of overseers. The entry in this book, which was relied on, was objected to, as being loose and unintelligible. (A further description of it is made unnecessary, by the view taken of the case by this Court). The evidence was admitted by the Court, and the defendant excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

Bailey and *Fowle*, for the plaintiff.
Phillips, for the defendant.

PEARSON, J. The county court is directed to appoint overseers of the public roads, and the clerk is directed to furnish the sheriff with two copies of each order making the appointment; one is to be delivered to the overseer, the other is to be returned to court, "with the date of its reception, and the date of the service, endorsed thereon." The purpose of the latter is, to enable the State to charge the overseer, if he neglects to keep the road in repair. The former is the commission of the overseer, and its purpose is to enable him to prove his appointment, so as to recover against any person who may fail to work on the road when duly notified. These copies are proper and *sufficient* evidence of the appointment; like letters testamentary, or the certificate of the ordinary, or clerk of the county court, of his appointment of an administrator. The case states, that the plaintiff offered in evidence one of the copies. It certainly could make no difference, that it was the copy which the sheriff had returned to court; nor ought the plaintiff to have been prejudiced by the omission of the sheriff to make the proper endorsement on it; as it was proved that a copy had been served upon the plaintiff. So, we think the fact of his appointment was duly established, and the introduction in evidence of the "road-book," or rough memorandum, kept by the clerk, was unnecessary; of course, we need not notice the objections made to it.

PER CURIAM, Judgment affirmed.

PETER WAGONER *v.* THE NORTH CAROLINA RAIL ROAD COMPANY.

A warrant against a Rail Road Company "for the non-payment of a certain sum "due by damage sustained," there being nothing in any other part of the proceedings to make it more certain, is fatally defective.

Whether service of process on a mere station agent on the North Carolina Rail Road is good; Quere?

APPEAL from a proceeding by warrant, tried before SAUNDERS, J., at the last Spring Term of Alamance Superior Court.

The questions in this case were—

1. Whether the warrant was sufficient on its face to authorise the Court to proceed to judgment.

2. Whether the service was sufficient.

The following is a copy of the warrant:

"*State of North Carolina, Alamance County.*

To any lawful officer to execute and return within thirty days from the date hereof, (sundays excepted:)

You are hereby commanded to summon the North Carolina Rail Road Company or James S. Scott, agent, and them safely keep, so that you have them before me, or some other justice of the peace for the said county, to answer the complaint of Peter Wagoner, for the non-payment of the sum of $35 due by damage sustained."

The warrant was returned "executed on James S. Scott." This person was the agent of the corporation, at the Graham station on the said rail road, with power to receive freight on goods transported, and fare from passengers departing, for which he was bound to account monthly; but he had no other power, or authority, over the affairs of the said company. The case came up by successive appeals to the Superior Court. A motion was made to dismiss the proceeding for want of sufficient certainty in the warrant, which was refused by his Honor. Defendant submitted to judgment for twenty-five dollars, with leave to appeal to the Supreme Court.

Appeal by defendant.

Winston, sen., for the plaintiff.
McLean, for defendant.

PEARSON, J. There is error. The warrant issued by the justice of the peace is fatally defective in this, it does not set out with certainty, the manner in which the damage was sustained. It may be that the injury was done to the plaintiff's person, or to his fencing, or houses, or slaves, or cattle. So the

proceeding does not enable the court to see that the injury was of such a nature, as to enable the plaintiff to sue by warrant.

It is unnecessary to decide whether service could rightfully be made, so as to bind the company, on Scott, who was the agent at Graham station. By the Revised Code, ch. 17, sec. 7, where an injury is done to cattle, or other live stock, a warrant may be served on the president, or any director, *stockholder*, or *acting* agent. This would seem to conflict with the 7 sec. of the charter of the company, which provides "That notice of process upon the *principal agents* of said company, or the president, or any of the directors thereof, shall be deemed due service to bring it before any court."

The judgment in the court below must be reversed, and judgment entered for the defendant.

PER CURIAM, Judgment reversed.

R. F. JOHNSTON *v.* SPRUCE W. McRARY.

Where the terms of a contract, for the sale and purchase of a cotton crop, were all reduced to writing, and signed by the buyer, except as to the time of delivery, it was competent to prove by parol, that at the time the written contract was entered into, a day was fixed for the delivery of the cotton.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the last Spring Term of Davie Superior Court.

The plaintiff agreed, on 26th of May, 1855, to purchase the defendant's cotton crop, to be delivered to him at Holtsburg; it was to be paid for, on delivery, by note, with certain names to it as sureties, to run for twenty days. This much of the contract was reduced to writing on a leaf of the defendant's memorandum book. On the 5th day of June, following, the plaintiff sought the defendant at Lexington, his residence, and and at Holtsburg, with a note, executed according to the terms agreed on, but could not find him. He had gone with

the cotton to Holtsburg on the 2nd day of June, and it remained there till monday following, when he took it off to Charleston and sold it. The defendant proposed to prove, that at the same time when the written contract was made, it was agreed between the parties that the delivery of the cotton was to be on saturday, the 2nd of June. This was objected to on the part of the plaintiff, as tending to vary the written agreement. The evidence was excluded by his Honor, and the defendant excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

Clement, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. The terms of the written contract, by which the plaintiff agreed to purchase the defendant's crop of cotton, certainly gave to each party the right to have it performed in a reasonable time. The place of performance was fixed upon in the written terms, but the precise day was not therein specified, and yet, as the parties lived in different counties, and had to do concurrent acts, it was necessary that some day should be agreed on for that purpose. This must, of necessity, be done by parol, or we must hold that either had the power to nullify the contract, by refusing to fix upon the day by an agreement in writing. The counsel, for the plaintiff, does not insist upon this, but admits that it might have been done by parol, *after* the time when the written contract of purchase and sale was entered into; *Shaw* v. *Grandy*, ante 56. He objects, however, to the parol proof, that it was done at the time of the contract, because it was not inserted among the written terms, and would, therefore, have the effect to vary them. This is, we think, taking too strict a view of the subject. It is conceded that parol testimony is inadmissible to contradict, vary or add to, a written instrument. To that effect, are all the cases, referred to by the plaintiff's counsel; but in the very first one, which he cites, to wit, *Clark* v. *McMillan*,

2 Car. L. Repos. 265, it is said that such testimony is admissible to explain and elucidate a written contract left doubtful. Such, we apprehend, is the purpose of the parol testimony offered in the present case. The written contract left the time of performance open and uncertain, and the proof was offered to show that a particular day had been agreed upon, to make certain, what was otherwise indefinite. This was not in any proper sense to contradict, vary, or add to, the written contract, but was rather to explain and elucidate what the parties meant by the reasonable time, implied in the written terms, and whether it was thus explained and elucidated at the same time when the written contract was made, or at a subsequent time, cannot make any difference. It was error, therefore, in the Court to reject the testimony, for which the judgment must be reversed, and a new trial granted.

PER CURIAM. Judgment reversed.

E. C. GRIER *v.* E. G. YONTZ.

Where a bidder for land at a sheriff's sale, failed to pay the money bid, which fact was returned upon the execution, and a new process issued to sell the land, under which it was sold for a less price than was bid at the former sale, it was *Held* that the sheriff was not entitled to recover the difference between the sum bid at the former sale, and that for which it sold at the second sale.

ACTION of ASSUMPSIT, tried before SAUNDERS, J., at a Special Term, (June, 1858,) of Mecklenburg Superior Court.

The following facts were submitted, in a case agreed, for the judgment of the Court.

The plaintiff, as sheriff of Mecklenburg county, had in his hand several writs of *venditioni exponas* against William S. Daniel, returnable to the April Term, 1856, of Mecklenburg County Court, by which he was authorised to sell a tract of land levied upon as the property of Daniel; that as sheriff,

he advertised the land and sold the same to E. G. Yontz, the defendant, who became the last and highest bidder at the sum of $1300; that Yontz informed the plaintiff he would pay his bid during the week, which he failed to do: that the plaintiff made the following return upon the writs in his hands, to wit: "The property in this order of sale, was duly advertised and sold at the court-house, in Charlotte, on the 28th April, 1856, to E. G. Yontz, at $1300, and no money paid;" that alias processes were issued by the creditors of Daniel, and placed in the sheriff's hands, under which the land was sold at the risk of Yontz, who had notice of the fact, and purchased by another person at the price of $1100, which was paid down, and a deed for the land was made to the purchaser; that, at different times, prior to the latter sale, the plaintiff, as sheriff, offered to make to Yontz a deed for the land, cried off to him, if he would pay the amount of his bid, which he failed to do.

Upon these facts, it is submitted to the Court whether the plaintiff, is in law, entitled to recover, and if the Court should be of opinion that he is so entitled, a judgment may be rendered in his favor; otherwise, that judgment shall be rendered for the defendant.

On considering the case, his Honor was of opinion with the defendant. The plaintiff submitted to a non-suit, and appealed to this Court.

Wilson, for the plaintiff.
Boyden and *Osborne*, for the defendant.

BATTLE, J. The question presented in this case, is one of much practical importance, and we regret that the counsel were unable to refer us, on the argument, to any adjudicated cases settling the principle upon which it ought to be decided. In the sale of chattels, it appears to be settled, at least in New York, that if the vendee refuse to receive and pay for the article, the vendor may, upon notice, re-sell it, and charge the vendee with the difference in the price, if it sell for less than it did on the first sale. It seems, that after a refusal to receive

the article by the vendee, the vendor may, without taking any further care of the article, or by depositing it with a third person for his use, recover the whole price; and the right to resell and charge him with the difference in the price is given, for the reason that, it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. See the opinion of KENT, C. J., in *Sands* v. *Taylor*, 5 John. Rep. 411, Sedg. on Dam. 282.— Whether this rule would apply as between the vendor and the purchaser of lands in ordinary cases, it is not necessary for us to decide, as we do not think it can be applied to the case of a judicial sale, made under circumstances like the present. In the case of *Tate* v. *Greenlee*, 4 Dev. Rep. 149, it was decided by this Court, that a sale of lands by the sheriff, under execution, was not within the act of 1819, (Rev. Code, ch. 50, sec. 11,) making void parol contracts for the sale of lands. GASTON, J., in delivering the opinion of the Court, after admitting that the act was broad enough in its terms to embrace the case of a judicial sale, proceeded to show, conclusively, that such a sale could not have been in the contemplation of the Legislature. "To give validity to the contract," he says "it is required that the same, or some note, or memorandum thereof, should be signed *by the party to be charged therewith*, or his authorised agent. Now, in judicial sales, who is the party to be charged as vendor? Can the sheriff be regarded as such a party? The sheriff is a public officer, acting in obedience to an execution, commanding him in the name of the State, to cause to be made, of the property of a delinquent debtor, a sum of money judicially ascertained to be due to his creditor. A levy, by the sheriff, on the land of the debtor, divests neither the possession nor the estate of the debtor. In making the sale, the sheriff acts as a minister of the law, in obedience to its mandate, and in execution of the authority which that mandate confers upon him over the property of the debtor. The State or the law, sells by its agent, the sheriff." After some further remarks, he says, "These considerations lead me to the result, that the sheriff cannot claim the pro-

tection of this act against a purchaser at an execution sale paying the price of his purchase, and demanding a conveyance. He cannot, because such a sale, is not within the meaning of the act. The converse of the propcsition necessarily follows; neither can the purchaser set up this act as a bar to the demand of the sheriff for the purchase money, the sheriff tendering a conveyance of the property."

It was thus decided that the sheriff might sue the purchaser for the price, and recover the full amount of his bid. But suppose he does not pursue that course, but on the contrary, makes a special return of the fact that he has advertised and sold according to law, and that the purchaser refused to pay his bid, and thereupon a *venditioni exponas* is sued out, under which, he sells the land to another person at a less price; upon what principle is it that he can sue the first purchaser in his own name for the loss on the second sale? If he be allowed to recover, who will be entitled to the money? By suing out the *venditioni exponas*, the creditor treats the debtor as still the owner of the land, and he relies upon that for the payment of his debt. After the return of the execution, the sheriff has no longer any power to sell the land, until he is authorised to do so by new process. If he has any claim against the former purchaser, it can be only a chose in action, which, of course, the creditor cannot reach, without violating all the principles and analogies of the law. If, then, the sheriff be permitted to recover, it must be either for his own use, which cannot be well supposed, or for the benefit of the debtor, which would also be a strange result, which the law never contemplated. The truth is, the law has given the sheriff a plain remedy against a refractory bidder, and if he, whether with or without the concurrence of the creditor, will not pursue that, the law will give him no other. Nor can the reason assigned by Chief Justice KENT for giving the vendor of chattels a right to re-sell, and look to the vendee for any loss upon it, apply to the sheriff when selling lands. The property cannot perish on his hands, while he is pursuing his remedy against the purchaser, who may become insolvent.

Upon principle, then, it would seem that the present action cannot be sustained; and no authority has been produced in support of it. After a diligent search by the counsel for the plaintiff, he tells us that the only case which he can find re-resembling the present, is *Miretta* v. *Dent*, 2 Bailey, (S. C.) Rep. 291, which is referred to in the the third volume of U. S. Digest, p. 376, see 443. The note of it, as contained in the Digest, is that, "Where a purchaser, at sheriff's sale, fails to comply with the conditions, the sheriff may immediately re-sell, and the first purchaser is liable for the difference between the first and second sale." We regret that the volume which contains the report of the case is not in our library, and we therefore cannot tell whether the sale was of a real, or chattel property, and it manifestly differs from our case, in the fact that, the re-sale was made immediately. We cannot, therefore, regard it an authority, in opposition to the conclusion to which, we think, principle leads us. We concur in the opinion of his Honor in the Court below, that the action cannot be maintained, and the judgment is affirmed.

PER CURIAM, Judgment affirmed.

[JUDITH E. BLACK *v.* HUGH McAULAY.

A limitation over, upon the contingency, that the first taker "shall die under age, *or* without leaving children," fails, if the first taker arrives at full age, although he may afterwards die without leaving children.

A limitation over of property, in this State, after an indefinite failure of issue, by a will made in another State, is too remote, as the common law is presumed to prevail in such State.

ACTION of DETINUE, tried before DICK, Judge, at the Spring Term, 1857, of Cabarrus Superior Court.

The action is brought for several slaves, the issue of a woman, Letitia, who was bequeathed by Mary Grier to her daughter, Adeline, in the following words:

"I give to my daughter, Adeline, my negro woman, Letitia, with her future increase, but should she die before she arrives at the age of twenty-one years, or without leaving issue, I give the said woman, Letitia, to my daughter, Judith."

The testatrix lived in Alabama, and the will was made and probated in that State.

Adeline, the above named legatee, intermarried with the defendant, Hugh McAulay, and died in 1848, in possession of the slaves, in question, long after arriving at the age of twenty-one, but without leaving issue. The defendant held the slaves *jure mariti*. It was insisted, 1st, that the title of Adeline, to the slaves in question, became absolute on her arriving at twenty-one years. 2nd. It was further insisted, that as this limitation is contained in a will made in the State of Alabama, where it is presumed that the common law prevails, Mrs. Black's title is put upon a contingency too remote, being an indefinite failure of issue.

The legatee, Judith, intermarried with Samuel E. Black, who died during the pendency of the suit, and it was then carried on in her name. She claims that her sister having left no issue, although she lived beyond the age of twenty-one, by the contingent limitation, the property became vested in her.

Osborne, for the plaintiff.
R. Barringer, *Jones* and *Boyden*, for the defendant.

PEARSON, J. It is settled, that when a limitation over is made, "if the taker of the first estate, dies before arriving at full age, *or* without children, the word "or" is construed to mean "and," so that the limitation over does not take effect, unless both contingencies happen, and the first estate becomes absolute upon the happening of either; 2 Fearne, 97, Jarman on Wills, 444.

Our case is stronger; for treating the word "or," as used in the disjunctive, when the first contingency happened, that is, when Adeline arrived at the age of twenty-one, her estate be-

came absolute, as the other contingency—her death "*without issue*," taken alone, made the limitation over too remote, according to the principles of the common law.

There is no errorr.

PER CURIAM. Judgment affirmed.

Doe on the demise of WILLIAM STOKES *v.* JACOB FRALEY.

Where the plaintiff brought an action of trespass, q. c. f., to which the defendant pleaded *general issue, liberum tenementum*, and which were found for the plaintiff, it was *Held*, in an action of ejectment, brought by the same plaintiff against the same defendant, for the same land, that the former finding did not estop the defendant from denying the plaintiff's title, for that title was not put in issue by the pleadings, but only the defendant's.

ACTION of EJECTMENT, tried before BAILEY, J., at the last Superior Court of Rowan.

CASE AGREED.

The lessor of the plaintiff and defendant owned adjoining tracts of land, and the part in dispute is a slip, in the form of an acute angled triangle, lying along the division line between them. At Spring Term, 1856, of Rowan Superior Court, an action of trespass *quare clausum fregit* was tried, in which William Stokes was plaintiff and Jacob Fraley was defendant, in which the plaintiff declared for a trespass committed by the defendant, upon the slip of land, now sued for. The pleas in which action, were, general issue and *liberum tenementum*. It is admitted that proof and the title of both parties were fully gone into, and were substantially the same as those relied on in the present action; in which said action, a verdict was rendered for the plaintiff, sixpence damages were assessed, and judgment given for the plaintiff. In this action, it is contended that the verdict and judgment in the former suit, estop the defendant from denying the plainsiff's title. It is agreed, that if the Court should be of opinion with the

plaintiff on this point, judgment shall be entered for the plaintiff for sixpence damages, otherwise, that a judgment shall be entered for the defendant.

The Court, being of opinion with the plaintiff, on the case agreed, gave judgment accordingly.

Defendant appealed.

Osborne and *Boyden*, for the plaintiff.
Jones and *Barringer*, for the defendant.

PEARSON, J. In the action of trespass, q. c. f., the defendant pleaded the "general issue," and also pleaded specially "*liberum tenementum*; to this plea, the plaintiff replied, by way of traverse, to wit, that the *locus in quo* was not the freehold of the defendant. Upon this issue, the question of title was fully gone into, and both issues were found in favor of the lessor of the plaintiff. The question is: does this establish his title by force of an estoppel?

The effect of the finding on the general issue was, that the plaintiff was in possession, and was entitled to recover against a wrong-doer; and further, that the defendant had committed the trespass complained of, and was liable to the plaintiff's action, unless he (the defendant) had title to the land.

The effect of the finding on the issue joined on the special plea, was, that the defendant had not title to the land; but *non constat*, that the lessor of the plaintiff had title; it may well be that neither had title; and although the possession of the lessor of the plaintiff, was sufficient to enable him to recover in the action of trespass, q. c. f., against the defendant, who was a wrong-doer, that will not enable him to recover in the action of ejectment, because, in that action, he must recover upon the strength of his own title, and not the weakness of his adversary's. He can derive no aid from the record of recovery in the former action, either by estoppel or otherwise, for *his title* was not put in issue; the title of the defendant was alone put in issue.

In *Rogers* v. *Ratcliff*, 3 Jones' Rep. 225, the finding was

for the defendant, and if he had relied alone on his special plea, there would have been an estoppel in respect to his title. The decision in that case, does not conflict with our opinion in this; and both tend to a proper explication of the doctrine of estoppel. There is error. Judgment reversed, and a judgment for the defendant on the case agreed.

PER CURIAM, Judgment reversed.

STATE UPON THE RELATION OF WILLIAM MURPHY *v.* HENRY TROUTMAN, *et. al.*

Where a sheriff had a writ against a resident of another State, who was known by the sheriff to be in his county upon a temporary visit, and such sheriff was also informed by one of whom he enquired, that the person sought would be at a particular place, near the county line, on a certain day mentioned, on his way out of the State, and he failed to be present on the day mentioned, when, if he had been there, he might have arrested the defendant, and showed no reasons for not going there, it was *Held* to be negligence.

Where a sheriff is shown to be guilty of negligence in failing to serve a writ, the *onus* of of showing that the defendant in the writ was insolvent, devolves upon him.

Where a sheriff negligently failed to arrest a person upon a writ for debt, and it appeared that such person had some property in a distant State, and had numerous friends and relations in the county, whom he had come to visit temporarily, it was *Held* to be error in the Court to instruct the jury that they should give only nominal damages.

ACTION of DEBT upon the official bond of the defendant as sheriff of Iredell county, tried before BAILEY, J., at the last Spring Term of Rowan Superior Court.

The relator, Murphy, had taken out a capias ad satisfaciendum, against one Julius W. Houston, for the sum of —— dollars, which came to the hands of the defendant on the 4th day of September, 1855. Houston was a resident of the State of Alabama, and on a visit to his friends and relations, in the county of Iredell, at the time the writ was put into the

hands of the sheriff. The sheriff did not know Houston, and enquired of Mr. Roseborough where he was to be found; the latter informed him that he was understood to be staying at the house of his brother, Dr. Houston, about two and a half miles from Statesville. This information was given him in Statesville. The sheriff lived about seven miles from Statesville. Mrs. Thom, who was an aunt of Houston, testified that she lived about twenty miles from Statesville, near the county line; that the sheriff made enquiries of her about Julius Houston, stating that he wished to see him on business; she told him, that she had seen him, and she expected that he would be at her house on friday evening, or monday following, on his way to Alabama. He came to her house on monday as she had told the sheriff. He rode up in a carriage with his mother, whom he left at the house, and went on to the house of a neighbor about a mile and a half off; he returned soon afterwards, went into Mrs. Thom's house about 12 o'clock in the day, took a sup of coffee, staid a short time, and then proceeded on his way to Alabama. It was further in evidence that the sheriff came to Statesville on the monday above spoken of. He met Houston and his mother, on his way to that place. When he arrived at Statesville, he was informed that Houston had left the place about two hours before his arrival, and that the persons whom he had met were Houston and his mother. There was no evidence that the sheriff was at Mrs. Thom's on monday. The return of the sheriff was that Houston was "not to be found."

The plaintiff then read the deposition of Julius W. Houston, who stated that he had no money, or other property, in the county of Iredell, at the time he was there; that he had some money and effects in the State of California when he was in Iredell, and at the time the deposition was taken, but did not state the amount.

The Court was of opinion that the sheriff was guilty of negligence in not serving the writ, and the plaintiff was entitled to some damages, but not substantial damages, inasmuch as he had not proved that Houston had the ability to pay the

amount due him. The plaintiff and defendant both excepted.

The jury found a verdict for the plaintiff for sixpence damages, and both parties appealed.

Boyden, for the plaintiff.
Osborne, for the defendant.

PEARSON, J. We concur with his Honor, that the defendant was guilty of negligence; but we differ from him, in respect to the question of damages. As the plaintiff had put the defendant *in the wrong*, he was liable for such damages as had been sustained thereby; which, *prima facie*, was the amount of the debt that was lost, and it was for the defendant to mitigate the damages, by proving that the effect of his wrongful act was not so great, because the debtor, who had been suffered to leave the State, had not the ability to pay the debt, and his arrest would not have enabled the plaintiff to realize the amount, or any part thereof; or, if a part only could have been thereby realized, then, to limit his liability to that amount. In *Sherrill* v. *Shuford*, 10 Ired. Rep. 200, it is said "the true inquiry is, has the defendant by his negligence deprived the plaintiff of any legal means of securing the payment of his debt?" In our case, the debtor had money and effects in the State of California; an arrest would have been a legal means of forcing him to assign that fund for the benefit of the creditor, and the principle is not affected by the circumstance that California is at so great a distance. The principle is the same as if the fund had been in an adjoining State, or in our own State. The distance affected only the degree of facility with which the fund could be made available, and not the principle upon which the creditor's right depended.

But as the defendant was put in the wrong, the plaintiff was entitled to assume higher ground. The debtor, it appears from the evidence, had brothers and other near relations in the county of Iredell. If his arrest would have induced them to become bail, that would have been a legal means of secur-

ing the payment of the debt, and the negligence of the defendant has deprived the plaintiff of an opportunity to try it.

Upon the question, whether the loss shall fall on the plaintiff, who has been vigilant, or on the defendant, who has neglected his duty, it is not a sufficient answer to say the contingency of securing the debt in that manner was too remote. The plaintiff "quickened the diligence" of the defendant, and ought not to have been deprived of the chance of thereby securing his debt. At all events, upon the question of damages he had a right to have it submitted to the consideration of the jury, with instructions that if they were satisfied, from all the circumstances, that the debtor, if arrested, would have given bail, or if imprisoned, would have assigned his money or effects in California, or otherwise secured the debt, or some part of it, they ought to assess corresponding damages.

There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

ALBRED H. MARSH *v.* E. D. HAMPTON, *et. al.*

Where a party, who was alleged to have made a fraudulent conveyance, remained in possession of the property after the conveyance, what he said about the nature of his possession, was *Held* to be competent in impeachment of the conveyance.

ACTION of TROVER, tried before SAUNDERS, J., at the last Spring Term of Davidson Superior Court.

This was an action of trover to recover the value of a negro, alleged to have been converted by the defendants. The plaintiff claimed the property, in question, as a trustee, for the benefit of Mrs. Moore, and her family, under a deed made by James Elliott, her father, for that purpose. The slave, in question, had originally belonged to Isaac A. Moore, who had conveyed him in trust to secure a debt to Dr. Beall. His

father-in-law, Elliott, lifted this lien, and took a conveyance for the property to himself, and then conveyed as aforesaid, for the benefit of his daughter, Mrs. Moore. The defendants claimed under an execution against Moore, under which the slave was sold.

The defendants impugned the conveyance to Elliott, and from him to the trustee, as being fraudulent. It was in evidence, that after the conveyance in trust, the slave remained in the possession of Moore as before, and it was proposed by the defendant to give in evidence the declarations of Moore, to the effect, that the property was his, and that he held it adversely to the claim now set up by the plaintiff. The Court rejected the evidence. Defendant excepted.

Verdict for the plaintiff. Judgment. Appeal by defendant.

J. H. Bryan, for the plaintiff.
Kittrell, for the defendants.

BATTLE, J. We are unable to perceive any sufficient reason why the testimony, offered and rejected in the present case, was not as competent as that which was decided to be admissible in the cases of *Askew* v. *Reynolds*, 1 Dev. and Bat. Rep. 367, and *Foster* v. *Woodfin*, 11 Ired. Rep. 339. The case states that after the purchase of the slave by Elliott, he permitted him to remain with Moore, the former owner, who was his son-in-law, and that after the conveyance by Elliott to the plaintiff as trustee for Moore's wife, the slave remained still in the possesrion of Moore and wife, except when he was occasionally at Elliott's. It is certain, then that, the slave was never out of the possession of his former owner, and it was while he was thus in the possession of Moore, that the declarations by which he claimed the slave as his own, were made. The principle of the decision, in the cases to which we have referred, is that the declarations of a party in possession are admissible, to prove the character of the possession, as, whether he holds it for himself or for another, and in that view it is com-

petent, after a conveyance by the former owner, if he be permitted still to retain the possession. Here, we presume, the testimony was rejected because the possession might be supposed to be that of the wife, for whose separate use the slave had been conveyed to the plaintiff, as a trustee. But the difficulty is that it does not appear that Moore's possession had ever been changed, and the contrary is to be inferred from the expression in the case that it remained after the conveyance, as before. Our opinion is, that the testimony ought to have been received by the Court, and submitted to the jury. The jury were not bound to believe it, or to infer from it that the title to the slave had not passed by the conveyance to the plaintiff; but upon the question of imputed fraud, they had a right to hear and consider it, and to give it whatever effect they might think it fairly entitled to.

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

PER CURIAM. Judgment reversed.

STATE *v.* FRANK *(a slave.)*

Where the facts, relied on to convict, were not a series of dependant circumstances, it was *Held* not to be error for the Court to instruct the jury that, though the State had failed to establish any one, or more, of the facts relied on for conviction, yet, if enough had been shown to satisfy them, beyond a rational doubt, of the defendant's guilt, it would be their duty to convict.

Where the error complained of was in no degree prejudicial to the cause of the defendant, it was *Held* not to be a ground for a *venire de novo*.

INDICTMENT for MURDER, tried before SAUNDERS, J., at the last Spring Term of Forsyth Superior Court.

The defendant was indicted for the murder of Eli, a slave. It appeared in evidence, that Eli had for a wife a free woman of color, by the name of Lucy Hine, who was indicted with

Frank, but they were permitted to sever in the trial—her trial being removed, on affidavit, to another county.

The State offered several witnesses, who testified that for the last four years, Frank had been intimate with Lucy; that it had been endeavored to keep this intimacy a secret from Eli, but that on one occasion, he (defendant) had been detected at her house, and a fight had taken place between the two, in consequence of the discovery.

On the 29th of March last, early in the morning, the body of Eli was found in a mill-pond, about half a mile from the house of the woman Lucy. It exhibited several bruises on the head, which seemed to have been produced with an axe; which were shown to have caused the death of the deceased. Blood was traced, very distinctly, from the place where the body was found, to the house of the woman Lucy. In the house also, upon the floor and walls of the house, there were signs of blood, though recent attempts had been made to wash them out. There were, also, the ashes of burnt clothes in the fire place.

One witness testified to having seen the tracks of two persons, the one large, and the other smaller, going, and returning, whilst three other witnesses stated that they saw but the tracts of one, going and returning. The three witnesses measured these tracts, and found them, as they said, to correspond with the shoes of the prisoner. It was in evidence, that the deceased was at Lucy's house, at about one hour of the sun; that about the same hour, the prisoner and Lucy were seen together, about a mile distant from the house, in which direction they were going. The case states that there was other evidence, but not material to the exceptions taken upon the trial.

The solicitor insisted that the murder, as well as the time and place had been proved, and also the motive and opportunity for the perpetration of it, had been shown.

The defendant's counsel insisted, 1st: That to justify a conviction, the circumstances should be as satisfactory as, at least, one eye-witness. 2nd. That the circumstances must exclude every other rational hypothesis, or they should acquit. 3rd.

That if any one of the links, in the chain of circumstances, was wanting, the prisoner was entitled to an acquittal.

The Court, in his charge, said he assented to these different propositions, with only some modification of the last; that if the jury should believe that, if the State had failed to establish any one, or more of the facts, which were insisted on as material to establish the guilt of the prisoner, yet, if enough had been shown to satisfy them beyond a rational doubt, of his guilt, it would be their duty to convict. On the point of the tracks and the witnesses, the Court said, that one witness had said there were the tracks of two persons, going, and returning, from the house to the pond, whereas, three witnesses had sworn that there were the tracks of only one; that the rule of law was that, when the witnesses were equal in character and their opportunities of judging, numbers should prevail; but that this was a question for the jury. The defendant's counsel excepted.

Verdict against the defendant for murder. Judgment and appeal.

Attorney General, for the State.
Morehead and *McLean*, for the defendant.

BATTLE, J. The objection upon which the prisoner's counsel moved, in the Court below, to set aside the verdict of the jury and to "enter a mistrial," has been properly abandoned here, because the law upon the subject is too well settled to be brought into question again; see *State* v. *Tilghman*, 11 Ire. Rep. 513.

The errors assigned in the bill of exceptions, upon which the counsel seek to obtain a new trial, are equally without foundation, and the motion based upon them, must be overruled. The three propositions, for which the counsel contended in favor of the prisoner, were all assented to by the Court, except that the last was submitted to the jury with some modification. The right of the prisoner to complain must depend, then, upon the enquiry, whether this modification was proper.

The third proposition was that, if any one of the links in the chain of circumstances was wanting, the prisoner was entitled to an acquittal. The Court said upon this, "that if the jury should believe that the State had failed to establish any one, or more of the facts, which were insisted upon as material to establish the guilt of the prisoner, and yet, that enough had been shown to satisfy them, beyond a rational doubt, of his guilt, it would be their duty to convict." This charge was, we think, entirely correct. If the only facts alleged to have been proved, were a series of dependant circumstances, each one of which was essential to the continuity of the chain, then, the proposition of the counsel would admit of no variation or modification; but as there are, in almost every case, depending upon circumstantial evidence, a number of independent circumstances alleged and relied upon, one or more of these may well be thrown out, without impairing the integrity or strength of the chain, and a court may well say that, if enough remains to satisfy the jury, beyond a rational doubt, of the truth of the accusation, they ought to convict. If what seems to us so plain a proposition, needs any authority for its support, it will be found in the cases referred to by the Attorney General, of *Commonwealth* v. *Webster*, 5 Cush. Rep. 313; *State* v. *Sumner*, 5 Black. (Ind.) Rep. 579.

The instruction of the Court upon the testimony of the witnesses in relation to the tracks which were seen between the house of Lucy Hine, where the deceased was supposed to have been killed, and the pond, where his body was found, was, in our estimation, entirely immaterial, and, could not, in any manner, prejudice the cause of the prisoner. Whether there were two sets of tracks, as deposed to by one witness, or only one set, as sworn to by three witnesses, did not, in any manner, affect the fact, about which there was no dispute, that the tracks spoken of by the three witnesses, were measured and found to fit the shoes worn by the prisoner. The other witness, who spoke of the two sets, did not deny this, nor can any possible inference be drawn from his testimony, that it was not true. It was totally immaterial, therefore,

whether more credit is to be given to the testimony of the three, than to that of the one. Indeed, it seems to us, that it was rather in favor of the prisoner to impeach the testimony of the witness who swore to the finding of two sets of tracks, because, on account of the known connection of the prisoner with Lucy Hine, who was also charged with the murder, it would be an additional circumstance against him that tracks, corresponding with his, were found with other tracks, which it might be supposed were made by this woman. At all events, the instruction of the Court upon this part of the case, even supposing it to be objectionable, (which, however, we do not decide) could not have prejudiced the prisoner, and of course, cannot furnish any grounds for a new trial.

There is no error suggested to warrant an arrest of judgment. We must, therefore, direct it to be certified to the Superior Court of law for the county of Forsyth, that there is no error in the record.

PER CURIAM, Judgment affirmed.

STEPHEN SMITH *v.* HENRY SASSER.

Where a Judge presents a case to the jury in an aspect not authorised by the evidence, and lays down a principle of law as applicable thereto, and as governing the case, it was *Held* to be error.

This was an action of TROVER, tried before CALDWELL, J., at the Spring Term, 1858, of Wayne Superior Court.

The declaration was for the conversion of a gun. The statement made out by his Honor, as a bill of exceptions, says the question was, whether the gun in question was sold conditionally to one Kennedy, or pledged to him by the defendant, and states the following testimony as bearing upon the question:

The deposition of one Best, was to the effect, that Bright Kennedy, being the owner of the gun, gave the barrel to one

Ausement for the purpose of having it stocked, and a lock put on. Kennedy was unable to pay Ausement for the repairs done by him, and the latter was about to sell the gun for his charges, when Kennedy got Sasser, the defendant, to buy the gun, for which he paid Ausement five dollars and fifty cents. Sasser then loaned the gun to Kennedy, with the understanding that it should be his (Kennedy's) whenever he paid him (Sasser) five dollars and fifty cents.

Ausement testified that he repaired the gun for Kennedy, and meeting the latter at a public place, he offered him the gun upon condition that he would pay him for the repairs done upon it. He not having the means to pay his charge, the witness spoke of selling it. Kennedy then brought Sasser to him, who paid him the money, $5,50, and took the gun into his possession. The gun was to be his (Sasser's) till he got his pay. Sasser then delivered the gun to Kennedy, who took it off and traded it.

The Court instructed the jury, that if they believed the testimony of the witness Best, that it was a conditional sale of the gun, and not a pledge. That as to the testimony of the witness, Ausement, the rule was, that where a witness deposed to a clear state of facts, it was the duty of the Court to state the law arising thereon; that Ausement's testimony was not of that character, and in such a case, it was the duty of the Court to leave it to the jury to say what they understood from the testimony, and if a pledge, the plaintiff was entitled to their verdict. Plaintiff excepted.

Verdict for the defendant.

J. H. Bryan and *Dortch*, for plaintiff.
Haughton, *W. A. Wright* and *Strong*, for defendant.

BATTLE, J. It is a matter of regret, that a cause, involving so petty an amount of property, should have to be sent back for a second new trial, yet, there is such a manifest error, apparent upon the plaintiff's bill of exceptions, that we must award him another *venire de novo*. The case is stated

to have been "trover for a gun, and the question, on the trial was, whether it was sold conditionally to one Kennedy, or pledged to him by defendant." Now, there was a clear mistake, in saying that the question was, whether it was a conditional sale or a pledge to Kennedy. Supposing the defendant, Sasser, to have bought the gun, as testified by the witness Best, he certainly could not have pledged it to Kennedy, for instead of his owing Kennedy any thing, the latter was the debtor for the repairs of the gun. If the defendant became the absolute owner by his purchase, he might have sold it conditionally to Kennedy, and then the plaintiff would have acquired no title by his purchase from the latter; *Ellison* v. *Jones*, 4 Ire. Rep. 49; *Ballew* v. *Sudderth*, 10 Ire. Rep. 176. His Honor's instruction upon the legal effect of Best's testimony would have been right, had he stated the question properly, which was, that if the sale to Kennedy was only conditional, the plaintiff could not recover. But the mistake in stating the question, arising upon Best's testimony, was well calculated to mislead the jury, and no doubt did mislead them, when taken in connection with what his Honor told them in relation to the testimony of the other witness, Ausement. That testimony tended to show, that the gun was pledged instead of being sold to the defendant, Sasser, and that the latter was to keep it until Kennedy should repay him the money, which he had advanced, to pay for the repairs, to Ausement. If it were only pledged to the defendant by Kennedy under the arrangement of the parties, then his delivery of it to Kennedy was a waiver of his lien, and the plaintiff acquired a good title in trading for the gun with Kennedy, as we decided when the case was before us at December term, 1856. See 4 Jones' Rep. 43. His Honor, however, instructed the jury, that the testimony of this witness was not clear in the statement of facts, and that if the jury understood him to say that it was a pledge, the plaintiff was entitled to their verdict, but if a conditional sale, they must find for the defendant. Pledge or conditional sale to whom? Why, to Kennedy, as the Judge had stated in the beginning of the case, whereas,

in truth, Ausement's testimony presented no question between a pledge and a conditional sale to Kennedy.

The proper charge should, as we conceive, have been that, if the jury believed that Best gave the true account of the transaction, then the defendant was the absolute purchaser of the gun from Ausement, and sold it conditionally to Kennedy, and the plaintiff acquired no title by his purchase from him. But if they placed more reliance on Ausement's testimony, and inferred from it, that the gun was pledged to the defendant by Kennedy, under the arrangement by which the price of the repairs was paid to the witness, then the delivery of the gun to Kennedy, by the defendant, deprived him of his lien for the pledge, and the plaintiff got a good title from Kennedy.

For the errors committed by his Honor, in the particular above referred to, the judgment must be reversed, and a new trial granted.

PER CURIAM, Judgment reversed.

Doe on the demise of JAMES J. MAXWELL *v.* R. J. McDOWELL.

This Court will not pass upon the propriety of discharging a rule for the production of papers, under the 82nd section of 31st chapter of the Rev. Code, unless the *facts* are stated upon which the application is based.

An affidavit, produced to the Court below, is not a statement of the facts necessary to sustain such an application, but is only *evidence* offered to enable the Court to ascertain the facts. (*Wallace* v. *Reid*, 10 Ire. Rep. 61, cited and approved.)

THIS was a motion, made before SAUNDERS, J., at the Special Term, June 1858, of Mecklenburg Superior Court, in an action of ejectment, for a rule for the production of papers.

The application was based upon the following affidavit:

"James J. Maxwell maketh oath, that he is advised, and believes, that the original deed, made by Cyrus Williamson to

the defendant, and under which he is informed the defendant claims the land in controversy, contains evidence pertinent to the issue, and which affiant believes will be material for him on the trial of this suit. Affiant further swears, that the defendant, as he is informed, and believes, has in his possession a writing, signed by the said Williamson, dated at, or about, the time the deed aforesaid for the land was made, embracing the purchase by the defendant of a horse, buggie, cow, &c.; which paper-writing, affiant is advised, and believes, contains evidence pertinent to the issue in this suit, and is material for him upon its trial; that he is informed, and believes that both the papers, referred to, are in the possession of the defendant."

Upon the exhibition of this affidavit, the counsel for the plaintiff moved that the defendant be put under a rule to produce the two instruments of writing mentioned in the affidavit.

His Honor refused to make the order asked for, and the defendant, upon motion, was allowed to appeal.

Wilson, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. The 31st chapter of the Rev. Code, section 82, empowers courts of law, to compel from parties "books, or writings, in their possession, or control, which contain evidence pertinent to the issue," which may be on trial, "in cases and under circumstances, where they might be compelled to produce the same by the ordinary rules of proceeding in equity." The question, then, is, would a court of equity compel the defendant to produce the title deeds, under which he claimed the land in controversy; but we are not at liberty to decide it upon the record as it now stands. As this Court said, in *Wallace* v. *Reid*, 10 Ire. Rep. 61, "no *facts* are stated, upon which to enable this Court to decide whether it was erroneous to discharge the rule or not." "The affidavit, which is sent as a part of the case, is only *evidence*. The Court should have ascertained and stated the facts, so as to present the

question of law." Upon the authority of that case, we must affirm the judgment in the present.

PER CURIAM, Judgment affirmed.

CHARLES HINSON *v.* ROBERT KING.

In an action for a deceit in the sale of a chattel, the defendant may, upon the question as to his knowledge of unsoundness, give in evidence what was told him by the person from whom he purchased it.

Where a witness could not say whether a conversation, as to the unsoundness of an animal sold, took place before or after the sale, it was *held* that the Judge, on the trial, gave proper instruction in telling the jury that upon the question of the *scienter*, the evidence amounted to nothing.

THIS was an ACTION for a DECEIT and FALSE WARRANTY in the sale of a mare; tried before BAILEY, J., at the last Spring Term of Rowan Superior Court.

There was evidence tending to show that the mare was unsound, and that the defendant knew of such unsoundness at the time he sold to the plaintiff. In reply to this allegation, the defendant offered to prove by one Malone, that he had purchased the animal in question from him, and that he represented it to him as being sound; the evidence was objected to by the plaintiff, but admitted by his Honor; for which the plaintiff excepted.

The defendant read the deposition of one William L. Archibald, in which there were the following question and answer: *Qu.* "State whether, or not, you ever told the defendant King, that her eyes were defective, and if you had any consultation with him, state whether it was before, or after the defendant King, sold the mare to Hinson."

A. "I cannot answer either of the questions definitely.—As well as I recollect, I had some conversation with Mr. King on the subject. I cannot say exactly what it was, or whether it was before, or after he sold to Hinson, but it could not have

been that her eyes were unsound, or defective, as I did not think so, but may have told him that I did not like her eyes, or that I did not consider her eyes very strong."

The Court charged the jury that to enable the plaintiff to recover upon the second count, he must prove that he knew of the unsoundness before the sale; that if it was after the sale, it would amount to no proof; it must be before, or at, the sale; that the witness, Archibald, had stated that he did not know whether the conversation which he had with the defendant, was before or after he had sold the mare to the plaintiff, that as the plaintiff had left the matter in doubt, so far as the evidence of this witness went, it was the same thing as if there was no evidence. The plaintiff excepted to this part of his Honor's charge.

Verdict and judgment for the defendant. Appeal by the plaintiff.

Osborne and *Wilson*, for the plaintiff.
R. Barringer and *Boyden*, for the defendant.

Pearson, J. Upon the question of the "scienter," the testimony of Malone was admissible, and it was for the jury to estimate the weight to which it was entitled. Suppose one passes a counterfeit bank bill; to meet the imputation that he knew it to be counterfeit, he would certainly be allowed to prove that he received it at par, and that the person of whom he received it, said it was good, or passed it as good. We see no distinction between the two cases. It will be conceded, we imagine, that the defendant was at liberty to prove that he bought the mare; such testimony would be relevant, as tending to shew that he was less apt to have known the condition of the animal's eyes than if he had raised her. The same reason applies to the fact that he gave a fair price, and to what he was told by the vendor at the time of the sale; it was part of the *res gestæ*, and was relevant in respect to the "scienter." We concur with his Honor in the view taken by him of the testimony of *Archibald*. As he could not say whether

the conversation took place *before* or *after* the sale, of course the jury could not; so the testimony amounted to nothing.—*Edmonston* v. *Shelton*, 4 Jones' Rep. 451; *Mathis* v. *Mathis*, 3 Jones' Rep. 132, *Sutton* v. *Madre*, 2 Jones' Rep. 320.

PER CURIAM. There is no error. Judgment affirmed.

WILLIAM H. WILLARD *v.* DAVID CARTER.

In an action against the owner of a vessel, for failing to deliver goods according to his written contract, which excepted in his favor the dangers of the sea, the master in charge of the vessel was *Held* to be competent to prove that the goods were lost in consequence of a storm at sea.

ACTION of ASSUMPSIT, tried before CALDWELL, J., at the last Spring Term of Hyde Superior Court.

The action was brought against the defendant as a common carrier, for failing to deliver a quantity of cotton and naval stores to the plaintiff's consignee in the city of New York, according to his written undertaking so to do. It was in proof that the defendant owned a vessel, called the Orapeake, sailing between the ports of Washington, N. C., and the city of New York; that the cotton and naval stores in question, were received on board the defendant's vessel, for the purpose of being carried from the former to the latter place, and bills of lading were produced in evidence, wherein the defendant agrees so to deliver the said commodities, the "dangers of the sea only excepted." The plaintiff proved the non-delivery of a part of the goods and their value.

The defendant offered to prove by the master, in charge of the ship, that the goods were lost through the dangers of the sea, to wit, in consequence of a storm at sea. The evidence was objected to by the plaintiff, and excluded by the Court. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Rodman, for the plaintiff.
Donnell, for the defendant.

PEARSON, J. Where the "gist" of the action, is the *negligence* or *misconduct* of an agent, he is not a competent witness, as in an action against the owner of a coach for damages, caused by a collision, through the negligence or want of skill of the driver, *Whitamore* v. *Waterhouse*, 4 C. and P. 383; *Green* v. *New River Company*, 4 T. R. 589; or where the defense rests upon such negligence or misconduct, as in an action by the owner against underwriters, where the question was, whether there had been a deviation, the master of the ship is not a competent witness to disprove the alleged deviation; *De Symonds* v. *De La Cour*, 2 N. R. 374; for, in all such cases, the agent has a direct interest to exculpate himself, and the same proof, by which the principal is charged, will be sufficient to enable him to charge the agent.

But where the liability of the principal does not depend upon the negligence or misconduct of the agent, and the action can be maintained without reference to, or proof of such negligence, or misconduct, there the agent is competent, and the relation which he sustains to the party, will go only to his credit; thus, a salesman is competent to prove the delivery of goods; *Theobold* v. *Tregott*, 11 Mod. R. 262; a factor who sells for the plaintiff, is competent to prove the contract of sale; *Dixon* v. *Cooper*, 3 Wils. 40: A servant is a witness for the master in an action against the latter for a penalty, as for selling coals without measure by the bushel, though the act was done by the servant; *E. Ind. Co.* v. *Gossling*, Bull. N. P. 289. In all such cases the agent has no *direct* interest; for although he may, by possibility, be made liable over, yet it is contingent, and it does not necessarily follow from the fact, that his principal is liable; but depends on a future enquiry into the ground of that liability, and other proof will be necessary to charge him, than that by which the principal was charged; 1 Starkie's Ev. 111, and cases there cited.

A common carrier is liable for the safe delivery of goods as

an insurer, except against the acts of God, and the public enemy; and in an action against him, the negligence or misconduct of his agent who conducts the business, is not involved, as his liability is without reference to it, consequently, the agent would be a competent witness to prove that the loss of the goods was occasioned by the act of God, or the public enemy; for if it be supposed that the loss occurred in some other way, as that the goods were stolen without default on the part of the agent, the principal would be liable, and still the agent would not be liable over; so that his liability is contingent, and depends upon a ground which is not involved in the action against the principal, to wit: whether the loss was occasioned by his neglect or misconduct. *Walston* v. *Myers*, ante, 174, will serve as an illustration. That was a contract for inland carriage by water. The first count charged the defendants as "common carriers;" the second for negligence and unskilfulness in towing a flat boat, whereby it was snagged. One of the defendants, *De Land*, was the master, and the others were the owners of the steamboat. The Court say, "the owners, (supposing them to be common carriers) were liable, whether there was negligence, or unskillfulness or not." "But De Land, who was the servant of the owners, was not a common carrier. It follows that he could not be made liable without proof of negligence or unskillfulness on his part, and yet his Honor allowed a verdict to be rendered against him jointly with the other defendants." So the liability of the owners, as common carriers, did not involve the question of negligence or unskillfulness on the part of the master, and had the action been against them alone, as common carriers, the master would have had no direct interest.

Our case differs from that of an ordinary common carrier in two particulars, but neither, (as it seems to us,) affects the principle of evidence. The defendants were common carriers upon the "high seas," and the master was liable to be sued by the shippers in the first instance, either severally or jointly with the owners; for "in favor of commerce" the law does not compel the merchant to seek after the owners and sue them, al-

though it gives him power to do so, but leaves him a twofold remedy, against the one, or the other. This liability of the master, however, is only in respect to the shippers; as between him and the owners, the common law liability growing out of their relation still obtains. If a recovery is effected against the master, there being no default on his part, he has his remedy over against the owners; so, if a recovery is effected against the latter, they have a remedy against the master, *provided* the loss was occasioned by negligence or misconduct on his his part, as is the case between ordinary common carriers and their agents; Abbot on Shipping 91. So, as between the master and the owners, "the principle in favor of commerce" has no bearing, and consequently does not affect the principle of evidence where owners are sued alone.

The liability of the defendants as common carriers is restricted by the bill of lading: "The dangers of the sea only excepted." The effect of this clause is to exempt the owners from some grounds of liability, other than those which fall under the terms "acts of God and the public enemy;" but notwithstanding this restriction, their liability does not necessarily involve the question of negligence, or misconduct on the part of the master, and they are liable without reference to, or proof of such negligence or misconduct; as where goods are stolen on board the ship by the crew or other persons.—See many cases referred to in Abbot on Shipping, part 3, ch. 3, where the owners are liable, although the master was in no default. So the introduction of this restriction, although it lessens the extent of liability, does not limit it to losses caused by the negligence, or misconduct of the master, and consequently it does not affect the principle of evidence, because the liability of the master depends upon a future inquiry as to the ground upon which the owners are made liable, and is necessarily contingent. So his interest, when called to prove that the loss was occasioned by a danger of the sea, like that of the agent of an ordinary common carrier, who is called to prove that the loss was occasioned by the act of God, or the public enemy, is not direct, and must go to his credit and not to his competency.

We regret that the researches of the diligent counsel did not enable them to cite any case in point. In the absence of authority, we are left to decide upon general principles.

There is error in rejecting the witness, *venire de novo*.

PER CURIAM. Judgment reversed.

THOMAS McCRACKEN *v.* GEORGE McCRARY *et al.*

Where a written instrument went into the hands of a person who left the State, and there was no evidence that it had been lost or destroyed, it was *Held* that giving notice to the opposite party to produce it on the trial, would not make it competent to introduce secondary evidence of its contents.

THIS was an action of COVENANT, tried before SAUNDERS, J., at the last Spring Term of Alamance Superior Court.

The action was brought on the following instrument:

"Thomas McCracken:

"You will please to let the bearer, Mr. Thomas G. Brown, have the note made by him, and General Joseph S. Holt, security, and we, the undersigned, will be responsible to you for the same on this order.

Signed, GEORGE McCRARY, (*seal*)
H. C. TROLINGER, (*seal.*)"

A witness for the plaintiff, proved that he (plaintiff) held a note on Thomas G. Brown, with Joseph S. Holt as surety, which he gave up to the said Brown, upon his producing to him the above instrument. The plaintiff's counsel proposed to ask the witness as to the amount and date of the note given up to Brown, but defendants' counsel objected, upon the ground, that the note itself was the best evidence of its contents. The plaintiff then showed a notice to the defendant to produce the instrument in question. It was still objected, on behalf of the defendant, that the note was delivered to Brown,

and there was no evidence that it was ever in the possession of the defendants.

The plaintiff then showed that Brown had left the State of North Carolina, and lived in a distant State.

The Court thereupon admitted the evidence, and the witness went on to state that he had no precise remembrance of the note in question, but that he made a calculation of the amount when it was surrendered to the obligees, and after deducting several endorsed credits, the remainder due on the paper was $149 and some cents; but he could not say precisely as to the fractions. The defendants excepted.

Verdict and judgment for plaintiff. Appeal by the defendants.

No council appeared for the plaintiff in this Court.
Hill and *McLean*, for the defendants.

PEARSON, J. There being no evidence that the bond was in the possession, or within the control of the defendants, the notice to produce it amounted to nothing. The fact, that the bond was delivered to Brown, and that he had left the State, tended to show that he had it in his possession; if so, the fact of its being out of the State, did not make parol evidence of its contents admissible; *Threadgill* v. *White*, 11 Ire. Rep. 591; *Davidson* v. *Norment*, 5 Ire. Rep. 555; 1 Greenleaf, 113. The calculation made by the witness, was based on the contents of the bond and the endorsed credits, consequently, it was secondary evidence, and was inadmissible, in the absence of proof that the bond was lost or destroyed.

There is error, *venire de novo*.

PER CURIAM, Judgment reversed.

JAMES F. SIMMONS *v.* THOMAS S. GHOLSON, *Trustee.*

A deed of trust, executed in another State conveying land and other property situated in this State, which was acknowledged before a commissioner for this State, resident in the other State, and which, on being presented to the clerk of the county court of the county where the property was situated, was adjudged by him to have been duly proved, and was ordered by him to be registered, which was also done, was *Held* to have been duly authenticated.

This was an INTERPLEA filed by Thomas S. Gholson, in an attachment taken out by the plaintiff against The Virginia and North Carolina Planing and Lumber Company, tried before MANLY, J., at the last Superior Court of Northampton County.

The defendant, Gholson, filed a petition in writing, claiming the property levied on by the attachment, by virtue of a deed of trust, executed in the State of Virginia, for the purpose of securing the creditors of the company, and an issue was joined between the plaintiff and the defendant Gholson, to try whether on the day of the levy, the said Gholson was the owner of the property.

Upon calling the cause in the court below, it was admitted by the plaintiff that the deed of assignment to Gholson was made in good faith, and to secure *bona fide* debts, but it was insisted that the same was inadmissible as evidence, and inoperative to convey the property mentioned therein, because the same was not duly probated and registered in the county of Northampton, where the property was situated, and for other reasons not involved in the view of the case taken by this Court. The probate of the deed in question, is as follows:

"State of Virginia, City of Petersburg, to wit:—I, Alexander Donnan, a commissioner for the State of North Carolina, resident in Petersburg, Va., do hereby certify that the Virginia and North Carolina Planing Mill Company, by Joseph H. Cooper, President of said Company, and Thomas S. Gholson, parties to this deed, bearing date 28th day of May, 1855, and hereto annexed, this day personally appeared be-

fore me, in my said city, and acknowledged the same as their act and deed; and I do further certify, that the said Virginia and North Carolina Planing Mill Company, by Joseph H. Cooper, President of said Company, further acknowledged the schedules hereunto appended as a part of the said deed.

L. S. Given under my hand and seal, this 28th day of May, A. D. 1855.

ALEXANDER DONNAN,
Commissioner for N. C."

Upon the production of the said deed, with the above certificate attached, before the Clerk of the County Court of Northampton, he made the following certificate upon the deed.

"State of North Carolina, Northampton County.

The foregoing deed in trust was exhibited in the County Court Clerk's office, and the execution thereof appearing to be properly certified by commissioner Donnan, the same with Donnan's certificate, is ordered to be certified and registered.

Test, JOHN E. ROGERS, C. C. C."

Following which, on said deed, is this certificate of the public register:

"This deed came to hand May 29th, 1855, and was then registered. Book No. 36, pages 53—58.

SAMUEL CALVERT, P. R."

His Honor being of opinion with the plaintiff upon this, and the other matters of law, presented by the case, the defendant submitted to a judgment, and appealed to this Court.

Moore, for the plaintiff.
Barnes, for the defendant.

PEARSON, J. The question is, was the probate of the deed, which purports to have been executed by the Virginia and North Carolina Lumber and Planing Company and Thomas S. Gholson, duly taken, so as to authorise its registration? This depends upon the power of the clerk of the county court to take the probate.

"The clerks of the several courts of pleas and quarter ses-

sions shall have authority, in their respective counties, to take the probate, or acknowledgement of deeds of trust, or mortgages, at any time, *in as full a manner* as their respective courts can, or may do." Rev. Stat. 37th ch., 25th sec. By the act of 1852, 133d ch., the same provision is made in respect to the probate of all deeds which are required to be registered, except the deeds of *femes covert.*

The several courts of pleas and quarter sessions are authorised to take the probates of all deeds which are required to be registered, in their respective counties. When the grantor, or the witnesses, are beyond the limits of the State, the deed may be acknowledged, or proved before the commissioner appointed by the Governor, and such deed, with the certificate being exhibited to the court of pleas and quarter sessions where the property is situate, shall be ordered to be registered.

Probate of a deed is taken by hearing the evidence touching its execution; i. e. the testimony of witnesses, or the acknowledgement of the party, and from that evidence *adjudging the fact* of its due execution. Where the evidence is offered to the court, the entire probate is taken by it, but where the agency of a commissioner is resorted to, a part of the probate, i. e. hearing the evidence, is taken by him, and certified to the court, and thereupon the probate is perfected by an adjudication, that the certificate is in due form, and that the fact of the execution of the deed is established by the evidence so certified.

By the statute, above referred to, the clerk is authorised to take the probate of deeds in as full a manner, as the court can, or may do; and as the court can either take the entire probate, or perfect the probate which has been in fact taken by a commissioner, it follows that the clerk can do so, likewise.

It was insisted in the argument, that the power of the clerk is confined to taking entire probates, and that he cannot take the probate where the evidence is furnished by the certifiate of a commissioner. This inference is drawn from the use of the words "to take the *probate*, or acknowledgement," but we

cannot accede to its correctness; and believe the construction contended for, is too narrow, and that the true construction confers upon the clerk full power to take the *probate* for the purposes of registration, as well in the one manner, as the other. From a perusal of the whole chapter it is obvious that there is much want of precision in the use of words; sometimes, "take the probate or acknowledgement" is used in the sense of "taking the proof," e. g. "before whom the deed shall be *proved* or *acknowledged*." At others, it is used in the sense of taking "the probate," which, as we have seen, consists of the two acts, of taking the evidence, and adjudicating thereon the fact of due execution. It is clear that the words are used in the latter sense, in the section under consideration.

PER CURIAM. There is error. *Venire de novo.*

Doe on the demise of JOHN R. TAYLOR *v.* JOSEPH GOOCH.

It was held to be error, to permit a deposition, taken out of the State on monday of the term at which the cause was tried, to be read in evidence.

THIS was an action of EJECTMENT, tried before ELLIS, J., at the Spring Term, 1858, of Warren Superior Court.

The only point in the case necessary to be stated, is the exception of the plaintiff's counsel to the deposition of Edward Hopgood, which had been taken on the monday of the term, at which the cause came on to be tried, and was tried. The deposition was taken in the town of Petersburg, State of Virginia. The plaintiff objected to the reading of the deposition, but the objection was over-ruled, and the evidence admitted.

Winston, sen., and *Fowle*, for the plaintiff.
Moore, for the defendant.

PEARSON, J. It was error to allow the deposition of *Ed-*

ward Hopgood to be read in evidence. It was taken in Petersburg, Virginia, on monday, which was the first day of the term, at which the case was to be tried in Warrenton, and on that day the parties, in contemplation of law, were expected to be at the place of trial, advising and consulting with their counsel as to the witnesses, and proofs, and other matters, connected with the cause; so it was unreasonable to require the plaintiff to attend in Petersburg on the same day. "By our law, it is deemed requisite to the purposes of truth, and justice, that one, against whom a deposition is to be read, should be present when it is taken, and be allowed to cross-examine. For that purpose, it prescribes a reasonable notice of the time and place of taking the deposition, so that the parties may be actually present; and no practice should be countenanced, which tends to impair that right;" *Sloan* v. *Williford*, 3 Ire. Rep. 307. The principle of that case disposes of the question.

Jordan v. *Jordan*, 17 Alabama Rep. 466, was cited in reply to the objection. There, one of the depositions was taken before, and the others on the first day of the term. The *place* of taking the deposition is not stated. The cause was in a court of chancery. It was held *first:* that the commission being returnable on the first day of the term, had not expired when the depositions were taken. It is unnecessary to say, whether we concur in this opinion or not; because our decision is not put on the ground that the commission had expired. There may be a distinction between a commission, issuing from a court of equity, where it is in the ordinary course of the court to hear cases upon depositions, and a commission issuing from a court of law, which is out of the ordinary course of the court, and depends upon the provisions of a statute.

Second. That the objection, for the want of notice, was not tenable, because *there* was a *decree, pro confesso*, made on notice of publication, and in such cases, the 10th rule of Chancery Practice, authorises the deposition to be taken by proceeding *exparte*, without notice: so the decision has no bearing on our case.

In reply to the suggestion, that it was a matter of *mere discretion*, to be exercised by his Honor in the Court below, either to receive, or reject the deposition, for the insufficiency of the notice, and consequently, it cannot be reviewed by this Court, it is sufficient to advert to the fact that, in *Sloan* v. *Williford*, sup., the decision, in respect to the admissibility of the deposition, was reviewed, and a *venire de novo* awarded for error in regard to it. Indeed, it is self-evident, that this cannot be a matter of mere discretion, as it would have been had the deposition been taken a few days before the commencement of the term, on a motion to continue upon the ground of surprise, and because the party wished for time to reply to the deposition. We do not enter upon the other points presented by the case, because the statement of facts differs, in some particulars, from that made when the case was before us at June term, 1857, and as it goes back for another trial, we presume, if it comes up again, the parties will be compelled to have all the facts fully set out.

There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

GEORGE W. SCOTT *v.* LETITIA BROWN, *Administratrix.*

Because the Judge, on an examination before him, has adjudged that a party, offered as a witness, was a joint owner of the property sued for, and therefore incompetent as a witness, it is no ground for him to non-suit the plaintiff, and the cause should proceed before the jury as if no such fact had been adduced to the Court.

ACTION for a DECEIT and FALSE WARRANTY, tried before BAILEY, J., at the last Spring Term of Cabarrus Superior Court.

The plaintiff offered to read the deposition of Cyrus Scott to prove the contract of sale. The defendant objected, and introduced a witness to the Court who swore that he heard

George W. Scott and Cyrus Scott both say they were going to purchase the jackass in question for their joint benefit, each to own one half; that after the purchase was made, he heard both the plaintiffs and Cyrus Scott say they had purchased the animal jointly, and that they each owned an interest of one half in him. Upon considering the testimony, his Honor rejected the deposition.

The cause then was examined before the jury, and evidence was adduced by the plaintiff tending to show the plaintiff was the sole owner of the property in question, and that the contract was made with him alone.

The defendant's counsel introduced evidence tending to show the contrary, and he insisted that all the evidence was for the Court and not for the jury, and that the Court ought to non-suit the plaintiff.

The Court declined to non-suit the plaintiff, but left the questions of the ownership of the animal, and the other facts adduced on the trial, to the consideration of the jury. Defendant excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

Jones and *R. Barringer*, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. We concur in the opinion of his Honor that the testimony offered by the plaintiff, tending to show that he was the sole purchaser of the jackass in question, as well as that introduced by the defendant to rebut it, were for the jury only, and it would have been error if the Court had undertaken to decide it. The testimony which the defendant had offered, in the first place, for the purpose of showing the interest of Cyrus Scott, and thereby to exclude his deposition, was properly addressed to the Court, because its sole object was to show the incompetency of the witness, which of course could only be determined by the Court. The Court thought that there was sufficient *prima facie* evidence that Cyrus Scott was

a joint purchaser of the jack, and therefore properly excluded his deposition. But the fact, whether the plaintiff was the sole, or only a joint purchaser of the animal, was a material one in the cause, having nothing to do with the competency of the witnesses, other than Cyrus Scott, and was properly submitted to, and passed upon by, the jury. The charge of his Honor upon it was right, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1858.

WILLIAM RAMSOUR & CO. *v.* E. S. BARRETT.

To ante-date a credit, so as to produce the effect of reducing the amount due on a note, to a sum within the jurisdiction of a justice of the peace, is an evasion of the law, and such jurisdiction will be ousted of the case on a plea in abatement.

ACTION of DEBT, tried before BAILEY, Judge, at the Spring Term, 1858, of Lincoln Superior Court.

The action was brought by warrant, before a justice of the peace, for the sum of $95,52, on the 5th day of October, 1857.

The note, declared on, was for one hundred and three dollars, due on 24th of August, 1856. On the 5th of October, 1857, on a settlement of matters between the defendant and the plaintiff, the former became a creditor to the latter, to the amount of $7,48, which was entered on the note in question; but in order to produce the effect of reducing the note below one hundred dollars, and to give a justice of the peace jurisdiction of the matter, the credit was dated back to October 5th, 1856, instead of October, 1857. The case was brought

up to the Superior Court by appeal, where the defendant pleaded to the jurisdiction, and the above facts being stated in a case agreed, the same were submitted for the judgment of the Court.

Upon consideration of the case agreed, his Honor gave judgment for the defendant, from which the plaintiff appealed.

Thompson, for the plaintiff.
Bynum and *Hoke*, for the defendant.

BATTLE, J. We cannot distinguish this case, in principle, from that of *Moore* v. *Thompson*, Busb. Rep. 221. It was there held that the plaintiff could not give a justice of the peace jurisdiction by entering a fictitious credit upon a bond, without the consent of the defendant, and against his wishes. So, in the present case, the plaintiff cannot be allowed to accomplish the same purpose by giving a real credit a fictitious date, so as thereby to reduce the debt, against the will of the debtor, to an amount within the jurisdiction of a single magistrate. The false date to the credit, in the present case, is just as much an attempt to evade the law, as was the false credit itself, in *Moore* v. *Thompson*, and neither can receive the sanction of this Court.

PER CURIAM, Judgment affirmed.

JAMES DRAKE *v.* JOHN FLETCHER.

In the twenty days within which, under the 8th sec. 59th ch. Rev. Code, a *ca. sa.* must be executed, Sunday was *held* to be *inclusive*.

THIS was a motion to dismiss a capias ad satisfaciendum heard before PERSON, Judge, at the last Spring Term of Henderson Superior Court.

The only question in this case, was whether a *capias ad*

satisfaciendum, executed on the defendant twenty days before the term of the Court to which the same was returnable, is *inclusive* or *exclusive* of sunday.

His Honor being of opinion that sunday was to be counted as one of the twenty days, refused to dismiss the proceeding, from which the defendant appealed.

J. W. Woodfin, for the plaintiff,
Dickson, for the defendant.

BATTLE, J. The only question presented for our decision is, whether the twenty days, within which, under 8th sec. 59th ch. Rev. Code, a *capias ad satisfaciendum* must be served before the term of the County Court to which it is made returnable, is inclusive, or exclusive, of sundays. The process cannot be executed on a sunday, but we cannot perceive any good reason why that day may not be computed in the time allowed to the defendant for preparing to take the benefit of the act for the relief of insolvent debtors at the next term of the court; and such, we believe, has always been the construction put upon this, and all other acts of a similar kind. Thus, by the act of 1777, Rev. Code, ch. 31, sec. 50, a writ of *capias ad respondendum*, issued from the county court, must be executed on the defendant five days before the term to which it is to be returned, and it has always been considered that served on wednesday before the monday on which it is returnable, is sufficient, and it is manifest that sunday is included in the time.

It is an additional argument in favor of this construction, that when sundays are to be excluded, as in the case of the return day of warrants issued by justices of the peace out of court, the Legislature so declares in express terms. See Rev. Code, ch. 62, sec. 7.

PER CURIAM, Judgment affirmed.

GEORGE S. MILLS *v.* WILLIAM TABER, SR.

Where the account, on which an action was brought, was read over to the defendant, who said, "he supposed it was right, and was willing to settle, and give his note, but he thought the plaintiff had not given him all the credit to which he was entitled," it was *Held* that these expressions did not amount to a new promise, so as to rebut the statute of limitations.

ACTION of ASSUMPSIT, for goods sold and delivered, tried before SAUNDERS, J., at the last Spring Term of Polk Superior Court.

The defendant relied on the statute of limitations, to rebut which, the plaintiff offered a witness, who testified that he read the account over to the defendant, who said in reply, he supposed it all right, and he was willing to settle, and give his note, but he thought the plaintiff had not given him all the credit to which he was entitled.

His Honor was of opinion, that this acknowledgment took the debt out of the statute. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Edney, for the plaintiff.
Dickson, for the defendant.

PEARSON, J. To avoid the operation of the statute of limitations, there must be a promise, either express or implied, to pay a certain and definite sum, or an amount capable of being reduced to a certainty, by reference to some paper, or by computation, or in some other infallible mode, not depending on the agreement of the parties, or the finding of arbitrators, or a jury; *McRae* v. *Leary*, 1 Jones' Rep. 91.

The promise relied on, in our case, fixes no definite sum, but the amount is left open,—dependent on the alleged credits, as to which there might be a disagreement, which could only be settled by reference to a jury, or to arbitration. So it falls within the principle stated above. In *Shaw* v. *Allen*, Busb. Rep. 58, the promise relied on, was nearly in the precise words used in this case. There is error.

PER CURIAM. Judgment reversed.

JOSEPH LANCE, *Adm'r.*, *v.* ADOLPHUS LANCE *et al.*

A grant or gift of chattels by deed, with a reservation of a life-estate to the grantor, or donor, will pass nothing.

THIS was an action of TROVER, tried before BAILEY, J., at a Special Term (July, 1858,) of Buncombe Superior Court.

The action was brought by the plaintiff, as administrator, for the conversion of one horse, a number of cattle, hogs, stock, farming tools, &c., left by the plaintiff's intestate, at the place of her residence, at the time of her death, of which it was proved that the defendants were in possession immediately thereafter, and which they refused, on demand, to surrender to the plaintiff, claiming them as their own.

The claim of the defendants is founded upon a deed, executed by the plaintiff's intestate to the defendants, conveying the property in question to them, their heirs and assigns, with this reservation: "It is the distinct understanding and agreement, that I, the said Sarah Lance, am to have the free use of the above named property, at any, and all times, * * * so long as I live."

The plaintiff contended that the above reservation took back all the personal estate mentioned, and therefore, passed nothing, and asked his Honor so to instruct the jury, but the Court declined to give such instruction, and the plaintiff excepted.

Verdict and judgment for the defendants, and the plaintiff appealed.

Avery, for the plaintiff.
J. W. Woodfin and *Merriman*, for the defendants.

BATTLE, J. It is a general rule, that a conveyance of a life-estate in chattels, by deed, is a transfer of the whole interest, and no remainder can be limited after it. So, a grant or gift of chattels, by deed, with a reservation of a life-estate to the grantor, or donor, will pass nothing, because the life-

estate is the whole interest, and nothing remains for the instrument to operate upon. This rule is well established as law, in this State, as well as in England, as appears by the case, among others, of *Hunt* v. *Davis*, 3 Dev. and Bat. 42, to which we were referred by the plaintiff's counsel. The law has been altered by our Legislature, in relation to slaves, by the act of 1823, (Rev. Code, ch. 37, sec. 21) but remains as it was before, with respect to all other kinds of chattel property.

Where, from the peculiar phraseology of the instrument, the benefit of an estate for life can be given to the grantor, or donor, by construing the apparent reservation into a covenant, on the part of the grantee, or donee, that the other party shall enjoy the profits of the chattels granted, or given, then, *ut res magis valeat, quam pereat*, the grantee or donee shall take the property, subject to the covenant, to which the grantor, or donor, must resort for enforcing his rights. Such was the case of *Howell* v. *Howell*, 7 Ire. Rep. 190, cited and relied on by the defendants' counsel. No such construction can be put upon the deed now before us, because the donee did not execute the instrument, and therefore, cannot be held to have made any covenant in it. It is a clear case of conveyance of personal chattels other than slaves, with the reservation of a life-estate in the grantor, and comes directly within the operation of the general rule.

The judgment in favor of the defendants must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

DAVID ARROWOOD *v.* MADISON GREENWOOD.

An error in dismissing a suit for the supposed want of a prosecution bond, cannot, at a subsequent term, be taken advantage of by motion, but only by a writ of error.

THIS was a motion, heard before PERSON, Judge, at the last Spring Term of Macon Superior Court.

The suit had been pending for two or three terms, and at Spring term, 1857, the defendant was put under a rule to give security for the prosecution of his suit on or before the second day of the next term, or it was to stand dismissed; at the next term it was ordered to be dismissed under the rule of the last term.

At this term, on motion to reinstate the cause on the docket, it was made to appear that a sufficient prosecution bond was given at the time the writ was issued, and was on file at fall term, 1857, when the cause was dismissed under the rule of the preceding term.

His Honor ordered the judgment of dismissal to be reversed, and the cause reinstated; from which order the defendant appealed.

J. W. Woodfin, for the plaintiff.
Gaither, for the defendant.

PEARSON, J. We are of opinion that the error in dismissing the suit for the want of a prosecution bond, when, in fact, a sufficient bond was filed, cannot be taken advantage of by *motion*. The error of fact should be alleged by a writ of error.

Upon a careful examination of the cases, this seems to be a proper classification:

An interlocutory judgment, in favor of a plaintiff, may be amended, or set aside at any time before final judgment is entered, for the parties are still in court.

A judgment which is void, may be set aside and treated as a *nullity*, at any time; *Pearson* v. *Nesbitt*, 1 Dev. Rep. 315.

An *office judgment* (as it is termed), that is, a judgment entered without the concurrence of the court, either actual, or implied, may be set aside at any time, and treated as a nullity, *Winslow* v. *Anderson*, 3 Dev. and Bat. Rep. 10, because of irregularity.

In our case the judgment is not interlocutory;—nor is it

void—nor is it irregular; but it is erroneous, because of a fact which was not presented to the Court, and of which it did not have cognizance. The only mode by which such an error can be corrected is by writ of error for matter of fact; in respect of which, there is a specific time allowed by the statute; whereas, a motion to vacate, or set aside a judgment, may be made at any time.

PER CURIAM. Judgment reversed.

STATE *v.* WILLIAM PARHAM, *et. al.*

In an indictment against two for fornication and adultery, one may be convicted and punished without, or before, any conviction of the other, (*State* v. *Cox*, N. C. Tm. Rep. 165, cited and approved, and the case distinguished from *State* v. *Mainor*, 6 Ired. Rep. 340.)

This was an INDICTMENT against the defendant, Parham and one Anne Branton, for fornication and adultery, tried before SAUNDERS, J., at the last Spring Term of Cleaveland Superior Court.

The evidence was, that the female defendant, being a single woman, had had a bastard child within the last two years, which the male defendant had acknowledged to be his, and he confessed that, within that period, he had had criminal intercourse with the female defendant.

There was other evidence as to the cohabitation, all of which was submitted to the jury, and a verdict as to both defendants, was rendered by the jury. The female defendant excepted because the confessions of the male defendant were allowed to go to the jury against her, and the Court granted her a new trial, whereupon the male defendant objected that, no judgment could be awarded as to him, because of the new trial as to the woman. The Court overruled the objection, and proceeded to judgment, from which he appealed.

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

BATTLE, J. The principle established by the case of the *State* v. *Cox*, N. C. Term Rep. 165, (page 597 of 2nd edition,) is, in our opinion, decisive of the present. It was there held that a man may be indicted separately under the act of 1805, (Rev. Code, ch. 34, sec. 45,) for fornication and adultery. If he may be indicted separately from the woman, he may, as a necessary consequence, be convicted and punished without, or before, any conviction of her. The authorities referred to, in that case, show that in conspiracies, and other offences where the concurrence of two or more is necessary to their commission, one party may be convicted and punished before the other is tried, or after he is dead. See 1 Strange's Rep. 193; 2 Ibid 1227; 3 Burr. Rep. 1263; 1 Ld. Raym. 484; 2 Salk. 593. If, then, the man can be indicted and convicted for fornication and adultery, without the woman, we cannot see why he may not be tried separately, where they are indicted together, or why, if both be convicted, a new trial may not be granted as to her, without disturbing the verdict as to him.—The *State* v. *Mainor*, 6 Ired. Rep. 340, in which it was decided, that if there be a verdict upon an indictment against both, finding the man guilty, and the woman not guilty, no judgment could be pronounced against him, because of the inconsistency of the verdict, does not impugn the principle. In that very case, it is said by the Court, that he may be tried by himself and convicted, and there judgment may be given against him "because, as to him, the guilt of the other party is found, as well as his own." It is manifest, that in such a case, the guilt of the woman is not found as to her, for that remains to be ascertained upon her trial, which is subsequently to be had. So, in the case before us, the guilt of both parties is found as to the male defendant, but the new trial granted to the woman leaves her guilt, so far as it may affect herself, still to be ascertained upon the second trial. It is only "when one of the parties has been previously tried and ac-

quitted, or when both are tried together and the verdict is for one, that the other cannot be found guilty, for he cannot be guilty, since a joint act is indispensable to the crime of either, and the record affirms that there was no such "joint act." The present case is not within either of the alternatives, and his Honor was right in pronouncing judgment upon the man, although he had set aside the verdict against the woman, and granted her a new trial.

PER CURIAM. The judgment is affirmed.

STATE *v.* WILLIAM F. CONDRY.

One charged with a crime, who turns State's witness against his associates, under an assurance that his disclosures are not to be used against him, may be cross-examined as to what he told counsel about the offense, while he was himself charged.

INDICTMENT for PASSING COUNTERFEIT MONEY, tried before DICK, J., at the Fall Term, 1857, of Caldwell Superior Court.

The allegation on the part of the State was, that the defendant passed to one Robert Nicholson, a counterfeit ten dollar bill on the bank of Cape Fear. Nicholson was called as a witness, who testified that himself and the defendant were associated together in the business of passing counterfeit money; that they went to Morganton on this business; that the bill in question was furnished to him with that purpose, and that he did pass the same in Mr. Erwin's store, in that place; that he then went to the defendant and got three more ten dollar bills; that in attempting to pass one of these, he was detected and taken before a Judge, who was then holding the Superior Court of Burke county, upon the question of commitment; that he employed Mr. Gaither, a gentleman of the bar, to advise and assist him professionally on that occasion. He went on to disclose minutely the instances in which they had

co-operated in carrying on the business, out of which disclosure, several objections were raised, but are not material to be stated, as they are anticipated by the view of the case taken by this Court.

On his cross-examination, Nicholson, the witness, was asked in relation to certain statements which he made to his counsel, Mr. Gaither, about the bill in question, when he carried it to Mr. Erwin's store, and whether he then said that he had got it from the defendant.

The Solicitor objected to this inquiry, upon the ground that what took place on that occasion, between himself and his counsel, was confidential, and could not be called out, either from him, or his attorney. The Court sustained the objection, and the evidence was excluded. Defendant excepted.

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

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

PEARSON, J. There is error. The rule that communications between client and attorney are confidential, and shall not be disclosed, does not embrace within its operation, the question of evidence presented by this case. The principle upon which the rule is founded is this: No man is required to criminate himself. The relation of attorney and client has existed, and has been fostered, as necessary to the due administration of the law, in every civilized country. And, in order to give full effect to the benefit of this relation, and encourage a free and full disclosure on the part of the client, it was necessary to adopt the rule, that, as he could not be called on to criminate himself, so, communications made to his attorney should not be used for that purpose. Under this rule, courts of law will not permit an attorney to give such communications in evidence, and, in a court of equity the maxim is: no man need discover legal advice which has been given to him by his professional advisers, or statements of fact which have passed between himself and them, in reference to the matter in litiga-

tion. *Mitford's Plea.* 195. The principle of the rule does not embrace this case, for the witness is *an accomplice*, who is allowed to give evidence in favor of the State, with the express understanding that he is to *disclose his own guilt;* consequently, a rule which was adopted in order to prevent a party from being required to criminate himself, and to avoid the danger of being criminated by a communication made to his attorney, has no application. Upon this point, the defendant is entitled to a *venire de novo*, and it is unnecessary to refer to other points.

PER CURIAM. Judgment reversed.

STATE *v.* GEORGE SCATES.

Where one charged with a crime has received a proper caution, by which he is apprised that his confessions thereafter made, will be used against him, what he may afterwards say about the crime is admissible, although he may have formerly made confessions which were extorted by threats, or induced by promises.

Where a Judge charged the Jury that if one person inflicts a mortal wound, and before the assailed person dies, another person kills him by an independent act, the former is guilty of murder, it was *Held* to be error.

INDICTMENT for MURDER, tried before SAUNDERS, J., at the Spring Term, 1858, of Cleaveland Superior Court.

The charge was for the murder of a small child of the age of about two years, by burning and by a blow. The deceased was the child of the prisoner's wife, born previously to his marriage with her, and it was proved by one *Ettress* that the prisoner's mother was greatly displeased at the marriage, and told the prisoner that, if he did not put the child out of the way, she would; that the prisoner was a weak-minded man, but considered as perfectly sane. This witness saw the child a few days after it was burnt, and there was no mark, then, on

the forehead, but he saw such a mark some days before its death. The burning took place about the first of March, and the child died about the first of April.

Dr. Hill saw the deceased about twenty hours after it was burnt. He dissected the burnt parts, and found the injuries very extensive, the arms, back and thighs were roasted,—crisped like a piece of leather. He stated that there was a wound in the forehead, as if from a blow; he was fully satisfied the burning in itself was fatal, and must have produced death, but he "doubted as to the immediate cause of death—thought it was produced by the blow." He explained on cross-examination that he thought the burning the primary cause of the death, but that it was probably hastened by the wound on the head.

The prisoner was arrested in South Carolina, and while in that State, he confessed that he did kill the child in the absence of the mother; that his (the prisoner's) mother persuaded him to do it, and proceeded to tell how it was killed. The person to whom this confession was made, one *Hullender*, stated that while the prisoner was in his custody, he told him that he would have to go to jail, and that it might be better for him to confess and tell the truth, whereupon the confessions, as above stated, were made. These confessions were excluded by the Court. The Solicitor for the State then produced one *Henry Ettress*, who testified that, after the prisoner was brought back into the State, he was committed to the custody of a guard, of whom the witness was one; that after the prisoner had been about an hour in custody of the guard, he told him to go on and tell how it happened, and not to tell a lie. The prisoner commenced making a statement when he was interrupted by one *Harry*, a member of the guard, who told him to be cautious, and tell the truth as to what he said against himself, for that he would have to testify against him. Notwithstanding this caution, the prisoner went on to state how he had burnt the child, but he said nothing about his mother, and did not tell how the wound on the forehead was inflicted. This confession was objected to as having been ob-

tained under the hope of favor, assured to him on the occasion of the first confession, but the evidence was admitted by the Court. Defendant's counsel excepted.

The Court charged the jury that the confession of the prisoner had been received by the Court, but it was for the jury to say whether they were made, and if made, how far they were true; that as to the cause of the death, it was for them to say whether it had been produced by the burning, or other means, and that if produced by the burning, they should be satisfied that the burning was the act of the prisoner; "and even should they share in the doubt expressed by the doctor, that the blow had caused its immediate death, yet if satisfied that the burning was the primary cause of the death, and the blow only hastened it, it would be their duty to convict."—Defendant again excepted.

Verdict "guilty." Judgment and appeal by the defendant.

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

BATTLE, J. No principle of law is better established than that the confessions of a prisoner shall not be admitted as evidence against him, when they have been obtained from him through the influence of the passions of either hope, or fear. It is also well settled in this State, as well as in England, that when confessions have been thus extorted, any others subsequently made, shall be attributed to the same source, unless it be shown that, by means of a caution, or otherwise, the improper influence has been removed from the mind of the prisoner, so that the subsequent confessions cannot be taken to have proceeded from it. *Arch. Crim. Plea.* 129–130; 2 *Stark. on Ev.* 46; *State* v. *Roberts*, 1 *Dev. Rep.* 259. But when the prisoner has received a proper caution, by which he is apprised that his confessions, if made, will be used against him, what he afterwards may say about the crime, with which he is charged, and his connection with it, is admissible as evidence against him, although he may formerly have made con-

fessions which had been extorted by threats, or induced by promises. See *State* v. *Cowan*, 7 Ired. Rep. 239; *State* v. *Gregory*, ante 315. In the present case, we think, the prisoner was sufficiently cautioned to put him upon his guard, and that the confessions made afterwards must be deemed to have been free and voluntary.

Upon the other point in the case, we are decidedly of opinion that the prisoner is entitled to a new trial. As to the cause of the death of the deceased, his Honor charg-charged the jury that if they "should share in the doubt expressed by the doctor, that the blow had caused the immediate death, yet, if satisfied that the burning was the primary cause of the death, and the blow only hastened it, it would be their duty to convict." This instruction was given upon the supposition that the blow was inflicted by another person, and the proposition could be true only when the testimony connected the acts of such person with the prisoner, so as to make them both guilty, and we at first thought such was the proper construction to be put upon the language used by his Honor; but, upon reflection, we are satisfied that a broader proposition was laid down, to wit: that if the prisoner inflicted a mortal wound, of which the deceased must surely die, and then another person, having no connection with him, struck the child a blow, which merely hastened its death, the prisoner would still be guilty. The testimony presented a view of the case to which this proposition was applicable, and it becomes our duty to decide whether it can be sustained upon any recognised principles of law.

Murder, is the killing with malice prepense, a reasonable being, within the peace of the State. The act of killing, and the guilty intent, must concur to constitute the offense. An attempt, only, to kill with the most diabolical intent, may be moral, but cannot be legal, murder. If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was

killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was no understanding, or connection between them. It is certain that the second person could be convicted of murder, if he killed with malice aforethought, and to convict the first would be assuming that he had also killed the same person at another time. Such a proposition cannot be sustained.

The prisoner must have a new trial. This renders it unnecessary for us to consider the effect of the alleged erroneous entry of the verdict.

PER CURIAM. Judgment reversed.

PETER CANSLER *v.* ABRAM FITE.

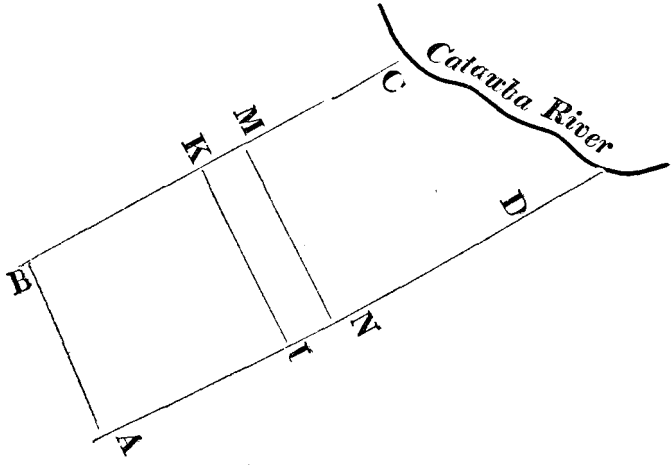
Where the line of another tract is called for in a deed, that line must be run to, regardless of distance, even though such line itself may have to be ascertained by course and distance.

The declarations of a previous owner of land while owning it, as to its boundaries, are evidence against one claiming under him.

A call for a marked tree, *near* the line of another tract, no such tree being found, will not control course and distance.

ACTION of TRESPASS Q. C. F., tried before PERSON, J., at the Fall Term, 1857, of Gaston Superior Court.

Both plaintiff and defendant claimed under one Cox. He originally owned the land, described in the annexed diagram, by the letters C, B, A, D. In 1787, he made a deed to Nathaniel Farrar for that part of the land next to the Catawba river, described as follows: "Beginning at a red-oak on the bank of the river (C) runs S. 44, W. 127 poles to a spanish oak, in, or near Richman's line; thence S. 46, E. 120 poles to a stake, near Bonner's corner pine; thence N. 44, E. to a stake on the bank of the river; thence up the river to the beginning." This is the land claimed by the defendant.



On the 6th of August, 1788, Cox conveyed the other end of the tract to one Alexander Nelson, and it is thus described in the deed: "Beginning at red-oak (A) and runs N. 46, W. 120 poles, to a black-jack (B), thence N. 44, E. 127 poles to a spanish oak, Nathaniel Farrar's corner; thence with his line S. 46, E. 120 poles, to a pine; thence with Cobb's line to the beginning." This was the conveyance under which the plaintiff claimed title, and he insisted that Farrar's line was at M, N. The defendant contended that it was at K, I, and it was conceded that if M, N, was the line, the defendant was a trespasser, and plaintiff had a right to recover. If, however, Farrar's line was established to be K, I, the defendant would be entitled to a verdict. In running the second line of the plaintiff's deed from B towards C, the distance gives out at K. In running by Nathaniel Farrar's deed from C towards B, the distance gives out at M. The call is for a spanish oak, at or near Richman's line, but there was no evidence of any spanish oak at M, or at any other point on the line C, B; there was

some evidence tending to show that it had stood at K, and that K, I, was Farrar's line. There was some evidence, also, that M, N, was the actual line.

The Court charged the jury, that if the evidence satisfied them that Farrar's line was, in fact, either M, N, or K, I, they would find accordingly; but if the evidence was not sufficient to satisfy them where Farrar's line, in fact, was, then, inasmuch as both, plaintiff and defendant, claimed under Cox, and he conveyed to Farrar, under whom defendant claims, before he did to Nelson, under whom the plaintiff claims, they would first ascertain where the calls of course and distance, according to Farrar's deed, would reach to, and make the corner and line of that tract conform thereto, and having thus established the line of the Farrar tract, they would run the lines of the Nelson deed to it, regardless of course and distance. Defendant excepted.

Nathaniel Farrar had conveyed to John Farrar, through whom the defendant claimed title, and it was proposed by the plaintiff to give in his declarations while he owned the land, as to where the line of the Farrar tract was. This was objected to by the defendant, but admitted by the Court. Defendant excepted.

In the deed of one, the intermediate grantors in the chain of title to the defendant Fite, another tract of land is described as beginning at C, and among the other descriptions, the deed sets forth that this tract was "part of a patent granted to Robert Abernathy, 19th of September, 1783," one of the calls of which, is, for a Spanish oak *in* or *near* Richman's line, and it was urged that this showed where the Richman line was, and that, therefore, he had a right to run to K, as being in accordance with that call. The Court charged the jury, that there was no evidence where the Richman line was. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Guion and *Lander*, for the plaintiff.
Bynum and *Thompson*, for the defendant.

PEARSON, J. That the distance set out in the deed from Cox to Nelson, is controlled by the call for "Nathaniel Farrar's corner, thence with his line, &c.," is settled by *Corn* v. *McCrary*, 3 Jones' Rep. 496. The location of this corner and line, can only be made by the "course and distance" set out in the deed from Cox to Farrar, and it was contended that as it depended on course and distance, it was no more certain than the line arrived at by the course and distance in the deed from Cox to Nelson, and, therefore, ought not to control it. We do not concur in this view. The deed from Cox to Farrar, has nothing to depend on but course and distance. It was made first, and is to be first located. Afterwards, when Cox made the deed to Nelson, besides course and distance, he adds the material description, "Nathaniel Farrar's corner, —thence with his line," &c., showing thereby, that it was his intention to convey to Nelson the residue of the tract formerly owned by him, a part of which had been conveyed to Farrar, and excluding the idea that he intended to leave a small strip between the two undisposed of. So that Farrar's corner, and Farrar's line, whether marked or unmarked, and in whatever manner it is ascertained, whether by course and distance, or otherwise, is made the boundary of the land conveyed to Nelson. In other words, Cox, having conveyed to Farrar a part of the original tract, intended to convey the residue to Nelson, and the call for Farrar's corner and line, controls the course and distance, in order to carry this purpose into effect.

In respect to the question of evidence, we concur with his Honor. There is no reason why the declarations of Farrar, while he was the owner of the land, are not admissible in evidence against those claiming under him.

In respect to the question as to Richman's line, we also concur with his Honor. There was no evidence by which the jury could locate that line; and supposing it to have been located, the call for "a spanish oak, *in or near* Richman's line," would not control course and distance, because the spanish oak could not be found; and the word "near," is not

sufficiently certain. How near? One pole or fifty? Either would satisfy the term "near;" *Harry* v. *Goodman*, 1 Dev. and Bat. Rep. 76. There is no error.

PER CURIAM, Judgment affirmed.

EPHRAIM KIZER *v.* HENRY RANDLEMAN.

Under the act of Assembly, forbidding a credit of more than ten dollars for liquors sold, (Rev. Code, ch. 79, sec. 4,) it was *Held* that champagne wine is included.

THIS was an action of ASSUMPSIT, tried before BAILEY, J., at the Spring Term, 1858, of Lincoln Superior Court.

The action was commenced by a warrant, for articles sold, and brought to the Superior Court by appeal. It was proved that the plaintiff kept a grocery, and retailed spirituous liquors by the small measure, under a license from the county court. The bill exhibited against the defendant was for $39. It was proved that the defendant admitted that twenty-six dollars of the account was just, but he said that it contained a charge for nine bottles of champagne, whereas, he had got only six. It was in evidence, that the champagne was worth $15.

The Court instructed the jury, that the plaintiff had a right to recover whatever the champagne was worth, and that if the other part of the account was for spirituous liquors, he could not recover for that, provided it amounted to $10; but if the other part was made up of groceries, other than spirituous liquors, and of spirituous liquors, and the spirituous liquors did not amount to $10, he had a right to recover the amount admitted by the defendant to be due, to wit, $26. Defendant excepted.

Verdict for $26. Judgment. Appeal by the defendant.

Lander and *Thompson*, for the plaintiff.
Hoke and *Avery*, for the defendant.

BATTLE, J. The only question presented, in this case, is whether champagne wine is "liquor" within the meaning of the Revised Code, ch. 79, sec 4. That section enacts that "no keeper of an inn, tavern, or ordinary, or retailer of liquors by the small measure, shall sell to any person on a credit, liquors to a greater amount than ten dollars," &c. The term "liquors" is certainly broad enough in its meaning to embrace champagne wine, and being thus embraced in the letter, we think it equally so in the spirit of the act. The object was to prevent tippling to an unreasonable extent, by preventing a credit for it, to an amount greater than ten dollars. Extravagant potations of wine may not be quite as injurious to health as the drinking of the same quantity of ardent spirits, but it may become equally fatal to the morals of those who are tempted to indulge in it.

An additional argument that vinous, as well as spirituous liquors, were intended to be embraced in this section of the act, may be derived from the fact, that in the 6th section "spirituous liquors" are particularly specified as those for the retailing of which a licence must be obtained from the county court. Why use a more extensive term in the 4th section, unless other than spirituous liquors were intended? Our opinion is that, upon a proper construction of this section, it embraces, both in letter and spirit, vinous, as well as spirituous liquors, and that, consequently, his Honor, in the Court below, erred in holding that champagne wine was not embraced in it. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

STATE *v.* ALFRED JENKINS.

A store-house, two hundred and fifty yards distant from the dwelling, (in which last, the owner usually slept) which was on the opposite side of a road—to which there was no chimney—in which there was no bed or bed-stead, but in which the owner sometimes slept twice a week, and at other times not once in two weeks, was *Held* not to be a dwelling-house, in any sense of the word, and, therefore, that burglary could not be committed by breaking into it.

THIS was an indictment for BURGLARY, tried before SAUNDERS, J., at the Spring Term, 1858, of Rutherford Superior Court.

The bill of indictment charged the burglarious breaking and entering the dwelling-house of William F. Fowler, &c.

The proof was, that the building in which the offense was alleged to have been committed, was a store-house, standing at the distance of two hundred and fifty yards from the dwelling-house of the owner, on the opposite side of the road; that Fowler, the owner, occasionally slept in the store room, on a pallet, spread on the counter, with bed-clothes kept there in a box; that there was no bed, or bedstead in the apartment; that there was no chimney to the building; that he slept in the store in this way, sometimes twice in a week, and at other times, not as often as once in two weeks; that no other person slept there.

His Honor instructed the jury, upon this state of facts, that the house was one in which burglary might be committed. Defendant excepted.

Verdict, guilty. Judgment and appeal.

Attorney General, for the State.
Shipp and *S. C. W. Tate*, for the defendant.

BATTLE, J. The main question, in this case, is, whether burglary can be committed by breaking into a store-house, in which the owner occasionally slept, when he had a dwelling-

house two hundred yards distant, in which he usually slept with his family. That it may, seems to be fully sustained by the case of *State* v. *Wilson*, 1 Hay. Rep. 279, upon which his Honor relied in the Court below. In the report of that case, it is stated that the prisoner was pardoned by the Governor; but whether the pardon was granted on account of any doubt about the correctness of the decision, we are not informed. However that may be, the counsel for the present prisoner contends that the decision is not sanctioned by principle, and is opposed by the authority of other cases.

In the case of the *State* v. *Langford*, 1 Dev. Rep. 253, referred to by the prisoner's counsel, the subject of burglary is so clearly and forcibly explained by HENDERSON, J., that we must be excused for extracting several sentences from it: "Burglary is the breaking and entering into the *mansion* house of another, in the night time, with an intent to commit some felony within the same, whether such intent be executed or not. It is almost the only case where crime in the highest degree is not dependent on the consummation of the intent; in almost all other offenses, there is a *locus penitentiæ*. But the law throws her mantle around the dwelling of man, because it is the place of his *repose*, and protects, not only the house in which he sleeps, but also, all the other appurtenances thereto, as parcel, or parts thereof, from meditated harm. Thus the kitchen—the laundry—the meat, or smoke-house, and the dairy, are within its protection; for they are all used as parts of one whole; each contributing, in its way, to the comfort or convenience of the place, as a mansion or dwelling. They are used with that view, and that alone, and it may be admitted that all houses, contiguous to the dwelling, are, *prima facie*, of that description. But when it is proved that they are used for other purposes, as for labor, as a workshop,—for vending goods, as a store-house, this destroys the presumption. It then appears that, they are there for purposes unconnected with the actual dwelling-house, and do not render it more comfortable, or convenient as a dwelling; in short, that they are not parcel or part thereof, but are used for other and dis-

tinct purposes. The house, as a dwelling, is equally as comfortable and convenient without, as with, them. Their contiguity to the dwelling may afford convenience, or comfort, to the occupant as a mechanic, or laborer, or shop-keeper, but none to him as a house-keeper."

The principles of the law of burglary, thus laid down, are not at all controverted by TAYLOR, C. J., who dissented from the judgment of the Court in that case; for he bases his opinion entirely upon the ground, that the store-house, which was broken open, was situated so near to the dwelling-house of the prosecutor, and was so connected with it, as to be within its protection.

The breaking into a store-house then, as such, is not burglary, and cannot become so, unless its situation makes it a part of the dwelling-house, or unless it is otherwise made to assume the character of a dwelling-house. This may be done by being used *habitually, and usually*, by the owner, or his clerk, or servant, as a place for sleeping; but not by being used *occasionally, only*, for such a purpose. In the latter case it is not, and cannot, properly, be called a dwelling-house—the place of a man's *repose*, which it is necessary for the law to protect from nocturnal invasion, by denouncing the penalty of death against the invader. Thus we find it stated in 1 Hale's P. C. 557, 558, that if a man hire a shop, in which he, or his servant, usually, or often, lodge, burglary may be committed therein; but, says Mr. East, in his Pleas of the Crown, vol. 2, page 497, generally speaking, it seems that a mere casual use of a tenement as a lodging, or only upon some particular occasions, will not constitute it a dwelling-house for this purpose. In *Brown's case*, all the Judges agreed that the fact of a servant having slept in a barn, the night it was broken open, and for several nights before, being put there for the purpose of watching against thieves, made no sort of difference in the question, whether burglary, or not; so (it was said in Smith's case) a porter lying in a ware-house to *watch goods*, which is only for a particular purpose, does not make it a dwelling-house, but if all communication with the dwell-

house, of which it is a part, be not excluded, it may still be a part of the house in which burglary may be committed. See 2 East Pl. C. 497, 501; Arch. Crim. Pl. 300, and Roscoe's Cr. Ev. 351.

Testing the present case by the principles thus established, we shall find that the store-house of the prosecutor was not, at the time when it was entered by the prisoner, one in which burglary could be committed. The prosecutor had a dwelling-house in which he *usually* resided, and slept with his family. The store-house was standing two hundred yards distant from it, on the opposite side of the public road. It had no chimney, and there was neither a bed nor bed-stead in it. The owner slept there sometimes as often as twice a week, and at other times not once in two weeks. When he did sleep there, it was upon a pallet on the counter, the bed-clothing being kept in a box at the store. His sleeping there must, therefore, be regarded as only *occasional*, and that could not, in any sense, either technical or otherwise, constitute the store his dwelling-house.

The judgment must be reversed, and a *venire de novo* awarded. This result withdraws from our consideration the other questions made on the trial of the cause.

PER CURIAM, Judgment reversed.

JOHN F. LITTLE *v.* DAVID LOCKMAN.

Upon the trial of an issue of *devisavit vel non*, the Court has no discretion to make any, but the losing, party pay the costs.

THIS was a motion to direct the taxation of costs, heard before PERSON, J., at the last Fall Term of Lincoln Superior Court.

At the preceding Term of the Court, an issue of *devisavit*

vel non was tried, and the jury found that the paper writing propounded, was not the will of the decedent. Upon this verdict, there was no judgment for costs. The propounders of the script being dissatisfied with the proceedings and judgment below, appealed to the Supreme Court, where the judgment was affirmed.

In the Superior Court below, John Little, the propounder, moved the Court that the costs be paid out of the estate.

The Court heard evidence, and, on consideration, was of opinion that he had no power, *at this time*, to make such an order; that if he had the power, he would make the order as asked.

From this judgment the plaintiff appealed.

Lander, *Bynum* and *Thompson*, for the plaintiff.
Guion and *Boyden*, for the defendant.

PEARSON, J. We concur with his Honor, in respect to the power of the Court upon the question of costs. It is true that the probate of a will is "a proceeding *in rem*," and no one, although cited to hear proceedings, is obliged to make himself a party; yet, when the persons interested make themselves parties for, or against, the alleged will, and an issue is made up, it is to be tried and determined like all other issues; and there is no provision in our statute which distinguishes the proceeding from that of any other matter at common law, as distinguished from a proceeding in Equity. It is admitted that in Equity, there is a broad discretion on the subject of costs, but in this, which, as we have seen, is a proceeding at common law, the statute gives no discretion; and provides that the costs shall abide the decision of the cause. So, the Court can render no other judgment than that, the successful party recover of the other party his costs. The fund, that is the assets of the estate, is not in court so as to be under its control. The administrator of the deceased is no party to this proceeding; how, then, can the Court enter judgment against him for the costs of a proceeding to which he was not a party, and in

which he had no opportunity of being heard in respect to the question of costs, or any thing else?

PER CURIAM. Judgment affirmed.

RANKIN, PULLIAM & CO. *v.* WILLIAM H. THOMAS.

Where a part of the declarations of a party confess a *prima facie* cause of action, and another, matter *in avoidance*, it was *Held* not be error in the judge to instruct the jury that, they might reject the latter declarations, if they believed them untrue, and find a verdict for the plaintiff on the former part.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the Special Term, July, 1858, of Buncombe Superior Court.

The action was brought for goods sold by the plaintiffs, who are merchants in the city of Charleston. The evidence was that an account of the goods was presented to the defendant by the plaintiffs' counsel, and he was asked whether it was necessary to take testimony in Charleston, to prove the persons composing the firm of Rankin, Pulliam & Co., and that the goods were shipped to him. The defendant said in reply that "there was no necessity for making this proof; that he had ordered the goods, and the account was correct, and that the goods had been shipped to him in the usual way, but that the plaintiff had contracted to deliver the goods at Athens, Georgia, and they had not been delivered there, and that he could prove this by David Rankin, a clerk in the store of the plaintiffs." This conversation occurred about three years before the trial, and it was proved that David Rankin had, since then, been in the county of Buncombe long enough for his deposition to have been taken, and that nearly the whole time since then, he had lived in the city of New York.

The Court charged the jury, that as the plaintiffs relied on the admissions of the defendant, they were bound to take in-

to consideration *all* that he said to the plaintiffs' counsel, as well that which was in his favor, as that which was against him, and that if the contract was as he alleged,—that the goods, were to be delivered at Athens, Georgia, the plaintiff, could not recover; because there was no evidence that they were delivered at that place. The Court further instructed the jury, that although they might *hear* all the defendant said, and *consider all*, they were not bound *to believe all;* and they might take into consideration the fact that the defendant had not taken the deposition of the clerk, if he had it in his power to do so. The defendant's counsel excepted.

There was a verdict for the plaintiffs and a judgment, from which the defendant appealed.

N. W. Woodfin and *Merriman*, for the plaintiffs.
Gaither and *J. W. Woodfin*, for the defendant.

PEARSON, J. We think the question, in respect to the admission of the defendant, was left to the jury in a very clear and satisfactory manner, and the defendant had no reason to complain of it. If the allegation, "that the plaintiffs had contracted to deliver the goods at Athens," had been so connected with the other admissions, that it could not be stricken out and treated as surplusage, and still leave enough to establish the fact of the sale and delivery of the goods, the exception on the part of the defendant, would be well taken. But such is not the fact. According to the statement of the case, the defendant admits that "he had ordered the goods—the account was correct, and the goods had been shipped to him in the usual way"—thus confessing a *prima facie* cause of action, and then he adds, by way of avoidance, "but the plaintiffs had contracted to deliver the goods at Athens"; and he treats it as a matter alleged in avoidance, by averring his ability to prove it by David Rankin. So, if this part of the admission be rejected as surplusage, because not believed to be true, enough will be left to support the action.

If the admission had been in this wise, "I ordered the

goods, the account of them is correct, *but they were ordered to be delivered to me at Athens*", the exception would have been well taken; for strike out the admission as to the place of delivery, and there is not enough left to prove the facts necessary to give the plaintiffs a cause of action. But this point, although earnestly made in the argument is not presented by the case as stated in the record. There is no error.

PER CURIAM. Judgment affirmed.

Doe on the demise of JOHN REYNOLDS *v.* THOMAS CATHENS.

Where the bargainor in a deed remained in possession, without any understanding or permission from the bargainee, and while thus in possession, made a deed to another, and such second bargainee entered and held the land for seven years, claiming it as his own, it was *Held* that the prior bargainee was barred.

ACTION of EJECTMENT, tried before PERSON, J., at the Fall Term, 1857, of Wilkes Superior Court.

The lessor of the plaintiff produced a deed from Sarah Wilkie to himself, dated 9th of September, 1839, and another from the said Sarah Wilkie to the defendant, dated the 18th of May, 1843, both of which covered the premises in dispute; he further proved that Sarah Wilkie was in possession of the premises on said 9th day of September, 1839, and continued in possession four or five years thereafter, and that at the time of the service of the declaration, the defendant was in possession, claiming the land under Sarah Wilkie.

The defendant proved that in 1843, he went into the possession of the premises, claiming them as his own, by virtue of the deed made to him by Sarah Wilkie, and that his possession was adverse to the plaintiff, and all other persons, and that this possession was continued for seven years. Upon this, he

insisted that the plaintiff's entry was barred, and he called on his Honor so to instruct the jury. This he declined to do, but instructed them that Sarah Wilkie, by continuing in possession, after her deed to Reynolds, became his tenant, and that the defendant by his entry under, and claim from, her, became his tenant also, and, therefore, that the possession was not adverse. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

No counsel for the plaintiff.
Mitchell, for defendant.

PEARSON, J. It is a well settled principle that one who obtains pessession from another, cannot by any words or act in which the other does not join, make his possession adverse, for the purpose of taking advantage of the statute of limitations. Upon this principle, a particular tenant who holds over after the expiration of his estate, is considered a *a tenant at sufferance*, to prevent his possession from being adverse. So, one who enters under a contract of purchase, before obtaining a deed, cannot, by mere words, or a mere act of his own, make his possession adverse, because it is not consistent with good faith, and fair dealing.

His Honor fell into error by a misapplication of the principle. Our case is not that of a vendee, who is *let into possession* before the execution of the deed for title, but of one who, as owner of the land, had been in possession before the execution of the deed, and thereafter, continues to hold possession until he executes a deed to a *third person*, who, under this deed, as color of title, holds possession for more than seven years. In respect to the possession of Sarah Wilkie, the vendor, under whom both parties claim, we are unable to see any principle of law which prevents it from being adverse to the lessor of the plaintiff. She was not his tenant for years—at will, or at sufferance; nor did she enter under, or obtain possession from him. As far as the case discloses, she continued in possession without any understanding, or permission, on the

part of the plaintiff's lessor, notwithstanding the deed which she had executed; the legal effect of which, was give to the plaintiff's lessor the right of possession, but in defiance of which right, she maintained and continued her possession. It would, consequently, seem that this possession was adverse. In *Johnson* v. *Farlow*, 13 Ired. Rep. 84, it is said, if the vendor had obtained color of title after the execution of the deed, and continued possession under the new title, thus acquired, for seven years, it would have thereby been ripened into a valid title against the vendee. However this may be, our case goes further, for Sarah Wilkie, while in possession, (in 1843,) executes a deed to the defendant, under which he enters and holds possession for more than seven years. He had color of title, and his possession was adverse, for he was, during all that time, exposed to the action of the lessor of the plaintiff. This is the *true test* of what constitutes adverse possession, and the rule of law is, where one holds possession and *exposes himself to an action*, for twenty years, without color of title, or for seven years, with color of title, as between individuals, and supposing the land to have been granted, so as to oust the State, he thereby acquires a good title, and it is held in *Langston* v. *McKinnie*, 2 Murph. Rep. 67, that the *fact* that the color of title is derived from the person under whom the opposing party claims, does not take the case out of the operation of the rule.

We consider these authorities, and the "reason of the thing" conclusive against the opinion of his Honor. But we will add, in accordance with the argument of the defendant's counsel, that the analogies of the law all tend to the same result; for instance: A child holding a slave by a parol gift, cannot by words, or by a mere act of his own, make his possession adverse to that of his father; but if the child makes an absolute conveyance of the slave to a *third* person, and he holds under that title for more than three years, he is protected; for the reason that, during all that time, he was exposed to the action of the father.

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

Doe on the demise of A. J. PATTON *et al v.* FELIX AXLEY *et al.*

A deed, granting a lease of land for the purpose of being explored for minerals, wherein the rent is made payable quarterly, and a forfeiture is created by a non-user for a year, but with a right in the lessees to discontinue their operations at any time, nothing more being said as to the duration of the lease, was *Held* to convey an estate from year to year, and that six months' notice to quit was necessary, before the lessors could terminate the lease.

ACTION of EJECTMENT, tried before DICK, Judge, at the Fall Term, 1857, of Cherokee Superior Court.

The only question in this case was, whether, according to the proper construction of the deed, offered in evidence by the plaintiffs, the estate thereby granted, was an estate for years, or an estate at will. It was agreed that if the deed passed an estate for years, the notice given was insufficient, and that the Court should enter judgment of nonsuit, but if an estate at will, judgment should be rendered for the plaintiffs. The following is the deed in question :

"Know all men by these presents, that we, the undersigned, have entered into the following agreement. In the first place, A. J. Patton and G. F. Morris, on their part, have this day rented and leased unto F. F. Oram and Felix Axley, a certain tract of land, situated in Cherokee, North Carolina, in district No. 6, containing 170 acres of land, more or less, for the purpose of examining for minerals. The said Oram and Axley are to have the right to enter into the peaceable possession of the said land, and to carry on any operations they may deem proper and right, to develope whatever minerals the land may contain, with all the rights and privileges that may be necessary to carry on the said mining operations. In consideration of the above grant of the right of the said land, the said Oram and Axley agree to pay to the said Patton and Morris, the one-twentieth part of whatever minerals may be

found on the said land, after the ore is dressed and ready for market, to be delivered at the said mine, with the exception of iron ore, for which the said Oram and Axley agree to pay the said Patton and Morris, at the rate of 12½ cents for every 2240 lbs. of iron ore they may use. The payments, hereby provided for, are to be made at the end of each and every quarter. It is, however, understood, that in case the said operation is abandoned, at any time, for the space of one year, it is to operate as a forfeiture of all the rights hereby conveyed. The said lease and rights hereby given and granted, are continued so long as the party, or successors, may deem it proper to operate." Signed and sealed by plaintiffs and defendants.

His Honor being of opinion with the plaintiff, upon the case agreed, gave judgment accordingly, from which the defendants appealed to this Court.

Gaither, for the plaintiff.
J. W. Woodfin and *Coleman*, for the defendants.

PEARSON, J. This case turns upon the construction of the deed, which is set out as a part of the record. His Honor was of opinion that its legal effect is to create a tenancy at will, we are of opinion that its legal effect is to create a *tenancy from year to year*, and consequently, the notice given was not sufficient; for, to determine an estate from year to year, *six months'* notice, either on the part of the lessor, or of the tenant, *before the expiration of the current year, that at that time* the estate will be considered as terminated, is necessary. This is familiar learning in the text books.

We arrive at the opinion that the deed creates a tenancy from year to year: from a consideration of the purpose, for which the lease was made :—that the rent reserved is payable quarterly :—that a condition is annexed, whereby the term is to be forfeited by a non-user, for one year, on the part of the lessors, who were to work the mine ;—that they have, at any time, the right to discontinue the operation of the mine, and that the formality of a *deed*, would hardly have been

thought necessary, if only a tenancy at will was to be created, which could be terminated, at any time, upon reasonable notice; *Kitchen* v. *Pridgen*, 3 Jones' Rep. 49.

PER CURIAM, Judgment reversed, and judgment of nonsuit, according to the case agreed.

*** His Honor, the CHIEF JUSTICE, was absent during the whole of this term, on account of sickness.

INDEX

TO THE PRINCIPAL MATTERS

OF

VOL. 5, JONES' LAW.