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REPORTS

OF

CASES AT LAW,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM, 1858, TO AUGUST TERM, 1859, INCLUSIVE.

VOL. VI.

HAMILTON C. JONES,
REPORTER.

SALISBURY, N. C.:
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1859.

JUDGES OF THE SUPREME COURT.

DUKING THE PERIOD COMPRISED IN THIS VOLUME.

HON. RICHMOND M. PEARSON, CHIEF JUSTICE.
HON. WILLIAM H. BATTLE,
HON. THOMAS RUFFIN.

JUDGES OF THE SUPERIOR COURT.

HON. JOHN M. DICK,
" JOHN L. BAILEY,
" MATTHIAS E. MANLY,
HON. DAVID F. CALDWELL,
" R. R. HEATH,
" R. M. SAUNDERS,
HON. J. G. SHEPHERD.

ATTORNEY GENERAL.

WILLIAM A. JENKINS.

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TO THE NAMES OF CASES,

VOL. VI.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1858.

BROWN, BRAWLEY & CO. *v.* DAVID BOSTIAN.*

Where A covenanted in writing under seal, to deliver a quantity of flour to a partnership firm, and in the same instrument was a covenant on the part of the firm to pay for the same, signed in the name of the firm, with a seal affixed, it was *Held* that an action on the covenant could be maintained against A in the name of the firm for not delivering the flour, and that independently of the question, whether A could sustain an action on the same instrument against the firm.

ACTION of COVENANT, tried before BAILEY, J., at the last Spring Term of Mecklenburg Superior Court.

The plaintiffs declared on the following written instrument:

"This contract and agreement, entered into this 17th day of October, 1855, between John L. Brown for Brown, Brawley & Co., of the town of Charlotte, and State of North Carolina, and David Bostian of the county of Alexander, and State aforesaid, witnesseth, that the said Bostian, on his part, contracts and agrees to furnish Brown, Brawley & Co. with one

*Decided at last term.

hundred barrels of good merchantable flour, to be delivered in lots of twenty barrels during each month, commencing on 1st of November next. Said Brown, for Brown, Brawley & Co., contracts and agrees to pay to the said Bostian seven dollars per barrel for each barrel so delivered. It is mutually agreed between the parties, that any act of God shall nullify the above contract and agreement. Witness our hands and seals and day first above written."

BROWN, BRAWLEY & Co. [*seal.*]
DAVID BOSTIAN, [*seal.*]

The breach assigned was the non-delivery of the flour. It was proved that said Brown, was one of the firm of Brown, Brawley & Co., and that the covenant was executed by him and David Bostian.

The defendant objected that the action could not be maintained in the name of Brown, Brawley & Co., but that it should have been brought in the name of John L. Brown alone.

The question of law was reserved by the Court, and under his instruction, the jury found for the plaintiffs.

Afterwards, the Court, on consideration of the question of law reserved, gave judgment for the plaintiffs.

The defendant appealed.

Brown, *Wilson* and *Osborne*, for the plaintiffs.
Boyden, for the defendant.

BATTLE, J. The only question presented is, whether the action, upon the instrument declared upon, was properly brought in the name of Brown, Brawley & Co., and we think that upon both principle and authority, it was. According to the express terms of the written agreement, the defendant bound himself to deliver the flour to the plaintiffs, and the agreement is signed in their name, and sealed with a seal purporting to be theirs. It is true, that in the body of the instrument, the contract purports to be made between John L. Brown for the plaintiffs and the defendant; and John L.

Brown, for the plaintiffs, promises to pay the defendant for the flour upon its delivery. Brown, as a member of the firm, had full authority to make the contract, but not to bind the partnership by a seal. Had the defendant performed his part of the contract by the delivery of the flour, he might have found a difficulty in suing any person upon this written agreement. He could not have maintained an action upon it against Brown alone, because it was not signed in his name, nor could he have sued the partnership upon it, because Brown was not authorised to put their seal to it. The defendant, however, would not have been without an adequate remedy, as he could have brought an action against them for goods sold and delivered, and used the written instrument as evidence of the price and terms of payment; *Delius* v. *Cawthorn*, 2 Dev. Rep. 90; *Osborne* v. *The High Shoals Mining and Manufacturing Company*, 5 Jones' Rep. 177. There was nothing to prevent the defendant from binding himself, under seal, by the instrument in question, and the only difficulty is to ascertain the person or persons to whom he did so bind himself. We see no good reason, either technical or otherwise, why he should not be held to have bound himself to the firm, the present plaintiffs. Had Brown signed and sealed the instrument in his own name, it might have presented the technical difficulty of being a deed *inter partes*, in which no person but a party could sue upon it; and so are all the numerous authorities referred to by the defendant's counsel. But for the reasons already stated, this cannot be regarded as a deed *inter partes*. It is, in legal effect, the deed of the defendant, and the written evidence of a simple contract on the part of the plaintiffs; and it is well settled, that upon such an instrument, one party may be sued in debt or covenant as the case may require, while the other can only be sued in assumpsit; *Whitehead* v. *Riddick*, 12 Ire. Rep. 95, is a case in point in favor of the action.

There is no error.

PER CURIAM, Judgment affirmed.

MAJOR GREGORY *v.* ABNER DOZIER *et al.*

A covenant to pay a sum of money *in a good note on demand*, is not met by an offer to deliver to the covenantee a sealed instrument, *payable twelve months* after date, made by strangers to a stranger, or bearer, and not endorsed.

A *bond* or *sealed note* made payable to A B, or bearer, can only pass by a delivery to, and an assignment by, the obligee, under the statute; Revised Code, ch. 13, sec. 1.

THIS was an action of COVENANT, tried before SHEPHERD, J., at the last Fall Term of Camden Superior Court.

The plaintiff declared upon the following sealed instrument, viz:

"For value received, we, or either of us, promise to pay to Major Gregory or bearer, one hundred and three dollars, in a good note on demand. January 12th, 1857."

(Signed and sealed by the defendants.)

The execution of the paper, and a demand for a good note previous to the bringing of the suit having been proved; in defense it was shown, that when the plaintiff made the demand, the defendant, Dozier, offered to the plaintiff the following instrument, viz:

"$100. Twelve months after date, we, or either of us, promise to pay to E. L. Dozier or bearer, one hundred dollars, value received.

SAMUEL TILLETT, [*seal.*]
JOHN B. TILLETT, [*seal.*]"

The defendant offered to pay, in money, the difference between the sums called for in the two instruments. The plaintiff refused to take the note thus offered, alleging that it was not good, but offered to do so if the defendant, Abner Dozier, would endorse it, which was declined by him. The note was not endorsed by E. L. Dozier, nor did appear ever to have been delivered to him.

Evidence was then produced, to show that the bond, or sealed note, was "good."

The Court being of opinion that there was nothing shown by the defendants to prevent the plaintiff from recovering, so instructed the jury, who accordingly rendered a verdict for the amount with interest. Judgment and appeal by the defendants.

Pool and *Jordan*, for the plaintiff.
Hines, for the defendants.

BATTLE, J. We concur in the opinion expressed by his Honor, in the Court below, that nothing has been shown by the defendants to prevent a recovery by the plaintiff. The obvious meaning of the covenant was, that the defendants were, either jointly or severally, to give to the plaintiff, upon his demand, a good note for the specified amount, payable to himself, or at least so endorsed to him, that he could have an immediate remedy at law, in case it should be necessary for him to resort to an action to enforce the payment of it. The bond, or sealed note, which the defendants tendered in discharge of their obligation, (to say nothing of its not being for the proper amount) was made payable twelve months after date, and upon which, therefore, the plaintiff must have, for that time, been deprived of a remedy.

Another objection to it was, that without proof of a delivery of it to E. L. Dozier, the obligee, and an endorsement by him, the plaintiff could not have sustained any action upon it at all. See the case of *Marsh* v. *Brooks*, 11 Ire. Rep. 409, where it was decided that although a bill, or promissory note, may be payable to A B or bearer, or to the bearer, yet a bond cannot. That, being a deed, must be made to some certain obligee, to whom, or for whom, it may be delivered, and then no person can claim the bond but by the assignment of the obligee under the statute; Rev. Code, ch. 13, sec. 1. See also *Latham* v. *Respass*, Busb. Rep. 138. The judgment must be affirmed.

PER CURIAM, Judgment affirmed.

EDMUND B. SIMMONS *v.* JAMES W. MORSE.

A letter written and sent to the plaintiff, charging him with *trying to defraud the defendant for a long time, and with having done so as much as lay in his power*, and containing, besides, angry and threatening language, and forbidding all intercourse between them, was *Held* proper to be submitted to the jury to determine whether the language was intended in a sense injurious to the plaintiff, and the Court had no right to assume, on the trial, that the writing was not a libel.

THIS was an action on the case for a LIBEL, tried before SHEPHERD, J., at the last Superior Court of Currituck.

The declaration set forth the following letter as the ground of the action:

"*Mr. Edmund B. Simmons*—

"Sir: I hereby forwarn you not to go upon my lands, belonging to me, while breath remains in your body. I shall keep off your lands and you must keep off of mine. If you do not keep off of my lands you are in danger, and if you keep off and don't trouble me, I shall not trouble you. I don't wish for you never to speak to me as long as you live. I shall not speak to you. I want nothing to do with you as long as breath remains in my body, and blood in my veins, in no manner whatever. I desire you to be very careful and not trouble me any more. You have been trying to defraud me a long time, and has done it all you had power to do for the last ten or twelve years. I don't desire to hurt one hair upon your head, nor will not do it, if you will just keep off of my lands and not trouble me. If not, you will have to abide by what you receive. Wrote by and signed by

JAMES W. MORSE."

This paper was read by the defendant to one person, who was requested to carry it, and did carry it, to the plaintiff.

The Court intimated an opinion that the paper was not a libel *per se*, and thereupon the plaintiff submitted to a nonsuit and appealed to this Court.

Jordan and *Hines*, for the plaintiff.
No counsel appeared for the defendant in this Court.

BATTLE, J. The only question presented in this case is, whether the letter from the defendant to the plaintiff, upon which the action is brought, is a libel. The part of it which is particularly relied upon to show that it is so, is the following paragraph. "You have been trying to defraud me a long time, and has done it all you had power to do for the last ten or twelve years."

A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt or ridicule. See 2 Kent's Com. 16, and the cases there referred to. The distinction between written and verbal slander is so well known, that it is unnecessary to refer to it more particularly than to say, that any written slander, though merely tending to render the party liable to disgrace, ridicule or contempt, is actionable, though it do not impute any definite infamous crime punishable in the temporal courts. Hence, to publish, in writing, that a person is a *swindler*, or a *hypocrite*, or an *itchy old toad*, has been held to be libellous. So it is a libel to impute to a man a gross want of feeling, as that although he was aware of the death of a lady occasioned by his improperly driving a carriage, he had attended a public ball in the evening of the same day. See cases referred to in 3rd Chitty's Black. 123, note 9. The case of *Hoare* v. *Silverlock*, decided in the year 1848, and to be found in 64th vol. of Eng. C. L. Rep. 624, is an instructive one; it was there held that, in an action for writing and publishing of the plaintiff, that her warmest friends in giving up their adovcacy of her claims stated that they had realized the fable of the *frozen snake*, if "not guilty," be pleaded, and a verdict of guilty found, the plaintiff is entitled to judgment, since the jury may have understood that the words, *frozen snake*, were meant to charge the plain-

tiff with ingratitude to friends. And it was held further, that it is no objection, on a motion in arrest of judgment, that the words were not explained by *inuendo*, for the Court will notice that the words are commonly enough understood in this sense, to warrant a jury in so applying them. In the same case it was also decided, that it is a libel to publish of a woman, soliciting a relief of a charitable society, that she prefers unworthy claims, which it is hoped the members will reject forever, and that she has squandered away money already obtained by her from the benevolent, in printing circulars abusive of the secretary of the society. On the motion to arrest the judgment after a verdict for the plaintiff, and against which she showed cause in person, Lord DENMAN, C. J., said, "There is no ground for our interference. The third count is certainly good. We are not called upon here to take judicial notice that the term *frozen snake* had, or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not, a jury were certainly wrong in assuming that those words had the particular meaning. They are words well understood; there is no doubt that they are commonly known in a libellous sense; it must here have been left to the jury to say whether they were used in that sense or not, and we must take it that they considered them as so applied." The learned Judge, after distinguishing the case under consideration, from those which had been cited by the counsel, in argument, proceeded to say that "the fourth count is certainly injurious to the plaintiff, for it describes her as an applicant to the society for charity, but unfit to receive it, because she employs the money she obtains from the benevolent in circulating abuse of the secretary."

In the case now before us, the words "you have been trying to defraud me a long time, and has done it all you had power to do for the last ten or twelve years," are either *per se* or by aid of the context, calculated to damage the character of the plaintiff. The charge imputes to him an endeavor, through a long term of years, to defraud the defendant. The intimation of the Court that the action could not be sustained,

upon which the plaintiff submitted to a judgment of nonsuit, prevented the jury from declaring, by their verdict, the sense in which the words were to be understood. If, then, of themselves, or when taken in connection with other parts of the letter, the words might be understood in a sense injurious to the plaintiff, his Honor erred in not permitting the jury to pass upon them. Though the manner in which the plaintiff had attempted to defraud the defendant is not specified in the letter, and though the precise meaning, which the defendant intended to convey by the term to "defraud," is not very clear, yet it is certain that he intended to impute to the plaintiff some moral delinquency—some vice which rendered him an unfit associate. This we think is sufficient to bring it within the definition given above of a libel. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

Doe on the demise of ANTHONY ELLIOTT *and wife v.* JAS. NEWBOLD.

Where a baron and feme joined in a demise in an action of ejectment, dated before the coverture began, it was *Held* that they could not recover.

ACTION of EJECTMENT, tried before SHEPHERD, J., at the last Fall Term of Perquimons Superior Court.

Angelina Elliott was entitled to the land in question in 1844, and had then the undisputed right of entry. She intermarried with Anthony Elliott in 1847, and brought this action in 1856. The demise in the declaration, on which the only question in this action turns, was alleged to have been made in 1844, in the names of Anthony Elliott and his wife Angelina, jointly.

Another count in the declaration, on the demise of Francis Nixon, was abandoned in this Court.

The Court below held that the plaintiff could not recover

on the count in the name of the husband and wife. Plaintiff took a nonsuit and appealed.

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

PEARSON, C. J. In the action of ejectment the question is: Has the lessor of the plaintiff such a title as enabled him to make the lease set out in the declaration; and it is a well established rule that the lessor must show title at the *date of the demise;* for otherwise he had no right to make the lease. So, it is a well established rule that the lessor must have the right of entry at the time the action is commenced; for otherwise he could not enter to make the lease, and the *fiction* that he has made a lease, is only allowable where he could enter and make it, for the purpose of saving the useless trouble and expense of actually doing so; *Adderton* v. *Melchor*, 9 Ire. Rep. 349; *Skipper* v. *Lennon*, Busb. Rep. 189. So, also it is well established that a joint demise by two is not supported by showing title in one of the two at the date of the demise, the other having no title at that time; *Hoyle* v. *Stowe*, 2 Dev. Rep. 318; *Banner* v. *Carr*, 11 Ire. Rep. 45. In our case the "feme" lessor had title at the date of the demise, but the "baron" lessor had no title at the time, which was several years before the coverture. It follows that the lessors did not have such a title as enabled them to make the lease set out in the declaration, and the action cannot be maintained.

Mr. Smith assumed the position that a demise in the name of the feme alone could not be supported, because she did not have the right of entry at the commencement of the action, her legal existence being merged in that of the baron, who held the right of entry with her in her right, and he put the case in this way: If the demise in the name of the feme alone, cannot be supported, because she did not alone have the right of entry at the commencement of the action, and a demise in the name of the baron and feme cannot be supported, because the baron had no title at the date of the demise, it follows that

for the time between the date of the demise and the marriage, there is *a right without a remedy*, and to avoid this, he insists that the demise in the name of baron and feme ought to be sustained.

We agree with him thus far: If the demise is dated *before the marriage*, it cannot be supported either in the name of the *feme* alone, or in the names of the baron and feme; but we do not concur with him in the conclusion, that on that account the well established rules of law must give way in order to prevent a failure of justice; for that result will not follow. Let the demise be *dated on the day of the marriage* and be in the names of the baron and feme; a recovery can then be effected without violating any rule of law; and the possession being regained, in the action of trespass, for the mesne profits, the judgment in ejectment will be conclusive as to the title from the date of the marriage, and the only inconvenience will be that, as to the time before the marriage, the question of title will be open, and may be put in issue in that action. So, the only difference will be, that for the latter time, the title of the feme will be proven in the action of tresspass, instead of being proven in the action of ejectment.

A consideration of the nature of the action of ejectment, will show the justness of this conclusion. The writs of entry and assise involved the right of entry at the commencement of the action. If that was established, the demandant had judgment, and a writ of *habere facias seisinam* issued. The action of ejectment being substituted for these actions, in strictness, should have been confined to the right of entry at its commencement; for if before commencing the action, the party was required to be at the trouble and expense of making an actual entry and lease, the date of the demise would of course necessarily be at that time, but the courts in furtherance of justice, relaxed the principle to the extent of allowing the demise to be dated back to the time when the title of the lessor accrued, so as to decide the question of title, both at the date of the demise and the commencement of the action; there can, however, be no ground for insisting upon a further

relaxation, so as to allow the demise to be dated back to a time prior to the title of both lessors, where there is a joint demise, for the purpose of allowing one of them to set up title in himself before their joint right of entry accrued. The learned counsel did not cite any authority for this departure from well established rules, and we can see no reason for permitting it. There is no error.

PER CURIAM, Judgment affirmed.

CORNELIA W. HOLTON *v.* SARAH McALLISTER.

Where slaves were limited, by deed, in 1844 to A, *her heirs and assigns, and in case the said A should die before she has an heir of her body, then B shall have and possess* the same *as though they had never been given as aforesaid* to A, it was *Held* that on the death of A without having had issue, the limitation to B was valid.

ACTION of DETINUE, tried before SAUNDERS, J., at the last Fall Term of Richmond Superior Court.

This is an action of detinue for certain slaves, the children of a woman named Caroline, formerly the property of John McAllister. On the 20th of Dec., 1844, he, by deed of gift, conveyed her, with her increase, to his daughter, "Sarah Ann McAllister, her heirs and assigns, and in case the said Sarah Ann shall die before she has an heir of her body, then my grand-child, Cornelia W. McAllister, (who is the present plaintiff) shall have and possess the said Caroline and her children, as though she had never been given as aforesaid to my daughter Sarah Ann," with other limitations over in case the plaintiff should also die without heirs of her body.

Sarah Ann married in December, 1856, and died in February, 1857, without ever having had issue; and after a demand and refusal, the plaintiff brought this suit in September, 1857.

On the trial, the counsel for the defendant insisted that the

limitation over to the plaintiff was not good, and that the absolute property in Caroline and her issue, vested in Sarah Ann McAllister; that there were no effectual words of gift to the plaintiff of Caroline, or, particularly, of her increase. His Honor gave his opinion to the contrary, and there was a verdict for the plaintiff and judgment, from which the defendant appealed.

Winston, Sen., for the plaintiff.
Banks, for the defendant.

RUFFIN, J. The act of 1823, makes every limitation in remainder by deed effectual, which would be good by an executory bequest; and it seems plain, that, notwithstanding the words "heir of the body" of Sarah Ann, found in the deed, the event of her dying without heirs is tied up to her life, since the slave is to go over in case of her death "before she has" such heir. But if there could be any doubt on that point, it is removed entirely by the act of 1827, Rev. Stat. ch. 43, sec. 3, which provides that every contingent limitation in a deed or will, executed after the 15th of January, 1828, "made to depend upon the dying of any person without heir or heirs of the body, shall be held and interpreted to be a limitation to take effect when such person shall die without having such heir living at his death," unless the intention be otherwise expressly declared in the instrument. If, then, this deed, instead of making the limitation over to depend on Sarah Ann's death "before she has an heir of her body," had made it on her dying "without an heir of her body," it would have been good, since the deed is to be read as if the words "living at her death" had been added; and those words always made a good executory bequest, and, consequently, now make a valid limitation in a deed.

The other objections were properly abandoned by the counsel in this Court. For, unquestionably, the issue of a female slave goes with the mother, in remainder, by the rule of law. But here, the children of Caroline are expressly limited

over with the mother, and the words are, moreover, that upon the death of the daughter, the grand-daughter "shall have and possess the slaves;" and they amount to an express gift in remainder, or by way of executory limitation.

PER CURIAM, Judgment affirmed.

JAMES E. DUKES *et at v.* DEMPSEY JONES.

A bill of sale of property, absolute on its face, but intended as a mortgage, is void, as against a purchaser for valuable consideration, by force of the Rev. Code, ch. 37, sec. 22, (requiring mortgages, &c., to be registered.)

TROVER for the conversion of a horse, tried before SHEPHERD, J., at the last Fall Term of Hertford Superior Court.

The plaintiffs adduced in evidence a bill of sale, absolute, on its face, from A. J. Winborn to themselves, for the horse in question, dated 28th of August, 1856. The defendant then offered to prove that the bill of sale was intended as a mortgage to secure and indemnify the plaintiffs against loss or injury in staying certain executions against the said Winborn; and to prove further, that he was a purchaser of the horse in question, from the said Winborn, for a valuable consideration, between the time of the making of the bill of sale and its registration. The plaintiffs objected to this evidence, but it was received by the Court, and the plaintiffs excepted.

It was not contended on the trial, nor was any evidence offered to show that the bill of sale was executed *with intent* to defraud.

The Court charged the jury, that if the bill of sale was intended as a mortgage, not having been registered at the time of defendant's purchase of the horse in question, they should find for the defendant; but if it was intended as an unconditional sale, they should find for the plaintiffs. The jury found for the defendant. Judgment and appeal.

Winston, Jr., and *Yeates*, for the plaintiffs.
Barnes, for the defendant.

PEARSON, C. J. It is established by the verdict, that the defendant is a purchaser for valuable consideration, and that the bill of sale to the plaintiffs, although absolute on its face, was executed as a security, i. e., a mortgage to save them harmless in staying certain executions. Upon this state of facts, we concur with his Honor, in the opinion, that the bill of sale is void as against the defendant, by force of the statute, Rev. Code, ch. 37, sec. 22, which enacts, "No deed of trust or mortgage shall be valid, at law, to pass any property as against creditors and purchasers for valuable consideration, but from the registration of such deed."

The deed to the plaintiffs does not show the true nature of the transaction, and there is no principle upon which they can be entitled to stand in a better condition than they would, if the deed had set out the truth on its face. Such a conclusion would be a direct encouragement to falsehood and the suppression of truth. Had the deed been upon its face a mortgage, the defendant would be entitled to the property, because he purchased before it was registered; and the fact that it does not show the truth on its face, cannot be allowed to aid the plaintiffs, or impair the right of the defendant. In the former case, the plaintiffs would have lost their incumbrance, because it was not registered; in the latter, because by their folly, it was put in such a shape that it could not be registered, for the registration of a deed, absolute on its face, cannot be the registration of a mortgage; so that a deed which does not set out on its face the true nature of the transaction, is not susceptible of registration; *Gregory* v. *Perkins*, 4 Dev. Rep. 50; *Walton* v. *Stallings*, ibid. 56, where the subject is fully discussed.

The counsel for the plaintiffs, insisted that our case is distinguishable, because "it was not contended, and no evidence was offered to show that the bill of sale was executed with an *intent to defraud*." The position is based upon an entire mis-

apprehension. The plaintiffs acquired no title, and could acquire none against creditors and purchasers, because their deed has not been, and cannot be, registered, inasmuch as it does not set out the truth, and this result follows from the express provisions of the statute, without reference to, and independent of, the question of an intent to defraud.

The exception to the evidence was properly withdrawn. There is no error.

PER CURIAM, Judgment affirmed.

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

Where A, claiming under a lease from a stranger, took possession of land and continued in possession, cultivating turpentine trees, which had been previously boxed, and after the turpentine had run into the boxes, B, who was the owner of the land, entered and dipped the turpentine out of the boxes and converted it to his own use, it was *Held* that A could maintain trover for the conversion.

THIS was an action of TROVER, tried before SAUNDERS, J., at the last Fall Term of Harnett Superior Court.

This cause was before the Court at the December Term, 1857, (5th Jones' Law, 16,) in a more complicated form. The leading features of it, as now presented are, that, in December, 1853, one McKay cut 13,000 boxes into the pine trees in question, for the purpose of conducting the business of procuring turpentine, which in January following, he leased to the plaintiffs and put them in possession. Afterwards, to wit, on the 7th of January, 1854, Alexander Morrison obtained a grant from the State for the land on which these trees were situated, under which the defendants entered on the 4th of March following, and dipped the turpentine out of the boxes and converted it to their own use. This grant was offered by the defendants in answer to the action, but was rejected by his Honor; for which the defendants excepted.

Verdict and judgment for the plaintiffs. Appeal by the defendants.

Neil McKay, for the plaintiffs.
B. Fuller and *C. G. Wright*, for the defendants.

PEARSON, C. J. The defendants offered to show title, by a grant to them, dated 7th January, 1854. His Honor rejected the evidence as irrelevant, being of opinion that title in the defendants would not defeat the action. This question is presented: A, claiming under a lease from a stranger, takes possession of land, and continues in possession, cultivating turpentine trees, which had been previously boxed; after the turpentine had run into the boxes, B, who is the owner of the land, enters and dips the turpentine out of the boxes, and converts it to his own use, can A maintain trover against B for the conversion of the turpentine?

The question is settled by *Brothers* v. *Hurdle*, 10 Ire. Rep. 490; *Branch* v. *Morrison*, 5 Jones' Rep. 16.

In the first it is decided, that where one, who had no title, took possession of land, cultivated a crop, pulled and stacked the fodder, and gathered the peas, and put them into a crib on the premises, he might recover in trover for the fodder and peas against the true owner, who, being put in possession under a recovery in ejectment, converted the fodder and peas which were on the premises at the time he regained the possession.

The distinction is this: A tree, or other thing, when severed from the land, becomes a chattel. If the owner of the land be *in possession*, actually, or by construction, the chattel is instantly his property, and he may take it, or may presently bring trover against any one who converts it. But if the owner of the land be not *in possession* and his *estate is divested* by an adverse possession, then the chattel does not become his property, but is the property of the party in possession who severed it, and who may maintain trover for its con-

version against the true owner who had, at the time, a mere right, and not an estate in the land.

In the second case it is decided, that turpentine, which has run into the boxes, is thereby severed from the land and made a chattel, and that the party who was in possession and cultivated the trees, might maintain trover, notwithstanding the title was shown to be in the heirs of one Blount; adopting the conclusion and the reasoning of *Brothers* v. *Hurdle*, supra.

As the case is now presented, the title of the heirs of Blount is not shown. So, it is to be taken that the title is in the defendants by force of their grant; but the plaintiffs were in the adverse possession, whereby the estate of the defendants was divested and turned into a mere right; consequently, the turpentine, when severed from the land by being made to run into the boxes before the entry of the defendants, did not become their property, but was the property of the plaintiffs, according to the principle above announced.

This conclusion assumes that one, who cultivates turpentine trees, thereby acquires the possession in such a manner as to hold adversely, and divest the estate of the owner; the entering for the purposes of such cultivation, not being treated as several distinct trespasses, leaving the owner in possession, but as a continuing adverse possession, and an eviction of the owner. That such is the legal effect of the cultivation of turpentine, is fully settled. With color of title, it would ripen by seven years continuance. It prevents the owner from being able to convey the estate which is thus divested. And the owner cannot maintain trespass, or any action, except ejectment, until he regains the possession and gets the benefit of the *post liminii*, which enables him to maintain trespass for the mesne profits; but does not enable him to maintain trover for a thing which had been severed from the land and become a chattel. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* WILLIAM JENKINS.

Where it was charged, in a bill of indictment, that the defendant stole *an ox*, and it did not appear from the bill of exceptions that any question was made below, as to whether the animal was alive or dead at the time it was stolen; it was *Held* to be too late for him to rely, in this Court, upon matter incidentally stated, as going to show that the ox was dead when stolen.

THIS was an indictment for PETIT LARCENY, tried before SHEPHERD, J., at the last Term of Gates Superior Court.

The charge was for stealing *an ox*, and the questions raised below were, as to whether the Judge gave proper instruction to the jury in respect of their duty, in case they should have any *doubt*, and in refusing to instruct the jury that they could not convict on the uncorroborated evidence of an accomplice. Both these points were given up in this Court; but the defendant's counsel insisted that the expression, *an ox*, in the bill of indictment, means a *living ox*, and as the proof stated is, that the defendant shot the animal, and afterwards took it away, that the fact appeared that the animal was dead when stolen, and, therefore, there was a variance. The case does not state that there was any distinct fact put in issue below, as to whether the animal was dead, or alive, when stolen, nor that there was any exception taken below as to this point.

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

BATTLE, J. The grounds upon which the defendant based his application for a new trial in the Court below, have all been abandoned, and properly abandoned, by his counsel in the argument here. The case of the *State* v. *Shaw*, 4 Jones' Rep. 440, is an authority in favor of the charge of his Honor in relation to the doubt; while that of the *State* v. *Haney*, 2 Dev. and Bat. Rep. 390, shows that it is no legal objection to the conviction of a defendant, that it is founded on the unsupported testimony of an accomplice.

But the counsel for the defendant insists, before us, that his

client is entitled to a *venire de novo*, for the reason that there is, as he alleges, a variance between the charge in the indictment and the proofs as to the identity of the thing stolen. He contends that the indictment charges the defendant with stealing an *ox*, which *ex vi termini*, means a *live ox*, whereas, the testimony as set forth in the case stated by the Judge, shows, as he insists, that the ox was dead when it was stolen. Without intimating, or intending to intimate, the slightest opinion that the objection would be a good one, were it open to the defendant, we hold that he is not now at liberty to urge it. The case stated by the presiding Judge, upon an appeal to this Court, has long been considered, and properly considered, as the bill of exceptions drawn up and filed by the appellant. As such, the facts set forth in it, are taken to have been stated with reference only to the errors assigned by him to have been committed on the trial. Nothing ought to appear therein except what is necessary to raise the questions as to the sufficiency of the alleged errors. If an objection can be taken because more or less of the testimony, is set forth, than is proper for showing the pertinancy of the exception, the appellee will be in constant danger of being prejudiced by an apparent error, which a statement, more or less full, made in refence to it, would have removed. Thus, in the case before us, if the objection, which the defendant now insists upon, were a good one, (which we do not admit,) it might have been obviated by a statement, which, so far as we know, the facts might have justified, that before shooting the ox, the defendant furtively drove it to the place where he killed it. But as no such objection was taken, or even hinted at on the trial, we cannot know that all the testimony in relation to it, is stated in the bill of exceptions. The objection must, therefore, be overruled. It can hardly be necessary for us to say, that any error which may appear on the record proper, to wit, the process, pleadings, verdict and judgment, and which is not cured by the 3rd chapter of the Rev. Code concerning amendments, is open to the objection of the party in this Court; for by the 3rd section of 33rd chapter of the Revised

Code, this Court is authorised "to render such sentence, judgment and decree, as, on an inspection of the whole record, it shall appear to them, ought, in law, to be rendered thereon." It is manifest, that this cannot apply to the bill of exceptions, which, although it is made a part of the record, embraces, and is intended to embrace, only such alleged errors in the proceedings on the trial, as the appellant may think proper to assign and set forth therein.

As we find no error, either in the record proper, or the bill of exceptions, we must direct the judgment to be affirmed.

PER CURIAM, Judgment affirmed.

STATE *v.* SAMUEL SIMMONS.

Where a Judge, in his instructions to the jury, asked with emphasis, and in an animated tone, *where was the evidence to establish a particular fact*, it will be taken that he meant to deny that there was any such evidence.

Where, in a trial for murder, it appeared that two persons had formed the purpose of wrongfully assailing the deceased, and one of them, in furtherance of such purpose, with a deadly weapon, and without provocation, slew him, it was *Held* that both were guilty of murder.

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

The indictment charged that the felonious assault was made upon the body of one Nathan Simmons, by John B. Simmons, the son of the present defendant, and that the latter was present, feloniously aiding and assisting in the crime. The cause was removed, as to the defendant Samuel, from the county of Brunswick to the county of New-Hanover, but as to the principal defendant remained to be tried in the former county

The substance of the evidence was as follows:

One *Stanland* testified, that he (witness) and the deceased were standing near a fence, when the prisoner came up on the other side of it, having a gun. John B. Simmons, who was

the son of the prisoner, came up on the same side with the deceased, the latter also having a gun. The prisoner immediately accosted the deceased, and accused him of having killed his cow, and at the same time struck him with his gun; at the same time, John, the son, fell upon the deceased and stabbed him with a knife. The deceased ran off and was followed by John the son, to whom the prisoner called, directing him to take him. The deceased ran about fifty yards and fell dead. John immediately returned to where the assault was made, bringing back the gun of the deceased, and having in his hand the knife with which the blow was inflicted. When the persons present went up to the body, and one of them said, John had done it, the prisoner replied, "good enough for him." The witness stated that when the deceased was approached by the prisoner and his son, he was leaning against the fence, with his gun on the ground lying against his shoulder; that he did not raise it, or offer to raise it, until the prisoner struck; "he then raised it, but neither pointed it, nor offered to strike, or use it in any way; at this moment, John struck, and the deceased ran off, having the gun in his hand."

One *Hickman*, gave nearly the same account of the assault as the preceding witness. As to the deportment of the deceased, he stated that he was leaning against the fence, his gun on the ground, resting on his arm. His hand was on the barrel, six inches or a foot from the muzzle, but the deceased did not raise it until after the prisoner struck, nor until John gave him two thrusts with a knife; he then raised it, but did not attempt to use it in any way.

There was other evidence as to the common intent, and of a purpose to take the deceased; that John, as well as the other bystanders, were called on by the prisoner, to take the deceased, and were threated *with the law* if they did not assist. There was evidence that the prisoner said a few days after the occurrence, "he wished he had split the deceased's brains out."

The Court charged the jury that, "should they be satisfied

that the father and his son went in pursuit of the deceased, supposing him to have killed the cow, with the design of doing an unlawful act, and with the common purpose and understanding that they were to aid and assist each other, both being present at the commission of the act, each would be responsible for the acts of the other: So, if the jury should be satisfied that the prisoner struck the deceased with a deadly weapon, (and a gun was a deadly weapon) without any legal provocation, (and no such provocation had been shown) and the son, at the time he gave the stab, was excited or stimulated to do the act by any previous understanding with the prisoner, or by any thing he may have said or done at the time, he would be equally guilty with the son, and the jury in considering this question, after giving the prisoner the weight his good character deserved, had the right, and it was their duty to consider what had been said by the prisoner before—what he said or did at the time, as well as afterwards, in order to ascertain the *quo animo*, or motives which influenced the prisoner." Defendant's counsel excepted.

The prisoner's counsel asked the Court to charge, that if the son had reasonable ground to believe, at the time he gave the mortal stab, that his father's life was in peril, he had a right to kill, if necessary to save him. In response his Honor stated, "no doubt the son would have the right to interpose in behalf of the father; but he must show a proper case of interference; his word would not do; the evidence must satisfy the jury that such was the fact, and the Court asked with emphasis, and in somewhat an animated tone, "where was the evidence to establish the fact?" The defendant's counsel excepted.

The defendant was found guilty of murder. Judgment and appeal.

Attorney General, for the State.
E. G. Haywood, for the defendant.

PEARSON, C. J. Owing to the emphasis and animated tone,

with which his Honor put the interrogatory, "where was the evidence to establish the fact," the prisoner is entitled to have the question considered as if the Judge had instructed the jury, "there was no evidence of the fact."

The fact alleged was, that the prisoner's son, at the time he gave the mortal stab, had reasonable ground to believe that his father's life was in peril. This allegation is made by way of justification, or excuse, and the *onus* is upon the prisoner. We are of opinion that there was no evidence upon which the jury could have found the fact.

The testimony of the witness *Stanland*, is the only part of the evidence which furnishes a plausible ground for the suggestion of the existence of the fact, but upon examination, his testimony, so far from establishing the fact, negatives its existence. This witness and *Hickman* differ as to the precise moment of time, considered relatively, at which the deceased raised the gun. The one thinks it was just *after* he was stabbed; the other thinks it was just before he was stabbed. But neither of them represents the act of raising the gun as any thing more than a mere consequence of a change of position in the act of running off. The deceased and the prisoner were on different sides of the fence, and the manner of raising the gun did not furnish the slightest indication of a purpose to use it offensively. The witness *Stanland*, upon whom the prisoner relies, says, "after the prisoner struck, he (the deceased) then raised it, but neither pointed it—offered to strike or *use it in any way*. At this moment John struck, and the deceased ran off, having the gun in his hand." So, the fact alleged, i. e., that there was a reasonable ground to believe that the prisoner's life was in peril, by reason *of the manner* in which the gun was raised, is negatived, and the *precise moment*—whether just before or just after the stab, was not material; for taking it to have been before, it was not done in a menacing manner.

We can see no error in the charge. It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in

pursuance of the original understanding, or in furtherance of the common purpose. There was evidence, that the prisoner and his son had formed the purpose of beating the deceased, or of arresting him without a warrant, which is equally unlawful, and the act of the son was clearly in furtherance of the common purpose, so as to make the prisoner responsible for it; Foster's Crown Law, 351, 352. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* THOMAS M. WRIGHT.

Upon a charge for keeping a disorderly house, where it appeared that the defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons, when drunk, whom he did not encourage, (save by getting drunk himself) but would some times endeavor to quiet, by which disorder, only two families, in a thickly settled neighborhood, were disturbed, it was *Held* not to amount to a common nuisance.

THIS was a indictment for keeping a disorderly house, tried before SAUNDERS, J., at the last Fall Term of Richmond Superior Court.

The indictment charged that the defendant, on 1st day of July, 1857, and on divers other days, &c., "did keep and maintain a certain ill-governed and disorderly house, and in the said house, for his own lucre and gain, certain evil disposed persons, as well men as women, and as well free persons as slaves, of evil name and fame and conversation, to frequent and come together then and on said days, &c., and there, unlawfully and wilfully, did cause and procure, and the said men and women in the said house at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, making loud noises and otherwise misbehaving themselves, to the great damage and common nuisance of all the good citi-

zens of the State there inhabiting, residing and passing, and against the peace and dignity of the State."

The evidence was, that the defendant lived in the country, not on a public road, and that he did not keep spirits for sale; that the defendant often drank to excess; that he had five sons, all of whom were in the habit of getting drunk; that when in that situation, and at home, they would wrangle, curse and swear most profanely, and make a loud noise; that the father, at times, would try to keep them in order; that this loud noise and profane swearing would continue until after midnight, in so loud a manner as to be heard at a distance; that it was a thickly settled neighborhood. One witness swore that he lived within a half a mile of the defendant, and on several occasions—as many as a dozen times, as late as 12 o'clock at night, himself and family were disturbed by the noise.

Another swore that he lived three-quarters of a mile from the defendant, and was frequently disturbed by the noise, and that it was so loud as to be capable of being heard at least a mile and a half.

Three witnesses were examined for the defendant, who testified that they lived in the neighborhood, and within a mile of the defendant, and that they had not heard any such noise.

The Court charged that to convict the defendant, the jury "must be satisfied that the defendant kept a house in the county, and that it was a disorderly house, so much so as to disturb the neighborhood and such persons as might be passing and repassing; that if the jury should believe that there had been a loud cursing and profane swearing at a late hour of the night, the defendant being present, though made by his own sons, he not suppressing it, and such a noise as was calculated to, and did, disturb the people living in the neighborhood, they should convict, otherwise they should acquit." The defendant excepted.

Verdict, guilty. Judgment and appeal.

Attorney General, for the State.

Banks and *Kelly*, for the defendant.

PEARSON, C. J. Every one who reads the evidence in this case, will feel that the defendant is much to blame for having, by his own bad example, and his want of proper discipline, raised up a set of unruly and disorderly sons, but we are of opinion that the evidence does not support the allegations of the bill of indictment, so as to make out an indictable offense.

The dwelling house of the defendant, where the disorder and noise occurred, was in the country, and not on, or near a public road. The neighborhood was thickly settled, there being five families within the distance of a mile of him. Two of these families were frequently disturbed at a late hour of the night by the noise and uproar made by the sons of the defendant. The other three families were not disturbed by it, and did not hear it. The defendant did not join with the sons in making the noise. "At times he would try to keep them in order."

Admit, that if this disorder had been committed in a town, where all the good people of the State had a right to be, and to pass and repass, or on or near a public highway, upon the authority of the *State* v. *Roper*, 1 Dev. and Bat. Rep. 208, it would have amounted to a common, as distinguished from a private, nuisance, so as to be indictable, yet it is clearly not so, having been committed in the country to the disturbance of only two families residing in the vicinity. In *State* v. *Matthews*, 2 Dev. and Bat. Rep. 424, it is decided that one who lived in the country, and who occasionally entertained disorderly company, and permitted them to drink, gamble, curse, and make loud noises, and who took pay for their entertainment, was not the keeper of a public house, and was not liable to indictment for keeping a disorderly house. That case is stronger than ours in two particulars. It is true, the indictment alleges an assemblage of certain evil disposed persons, as well men as women of bad fame, and as well free persons as slaves, but the evidence shows that no persons were present but the defendant and *his five sons*. So, it is true, the indictment alleges that the defendant permitted the disorder for his own *lucre and gain*; but there is no evidence of this. On

the contrary, it is evident that the defendant was a *loser* rather than a *gainer* by the drunkenness and misconduct of his sons. "He did not keep spirits for sale."

The precedents all contain the averment, that it was done for "lucre and gain," and the distinction seems to be this: Where the defendant commands, or actively encourages, the unlawful act, he is as guilty as if he had committed it himself, there being no accessories in misdemeanors, and there need be no proof of the averment. But where he is passive and simply permits the act to be done, there it is necessary, in order to connect him with it, to prove that his permission was given, and that he allowed it for his "lucre and gain."

However this may be, it is clear that the evidence does not make out a *common nuisance*. There is error, and must be a *venire de novo*.

PER CURIAM, Judgment reversed.

DAVID JARMAN *v.* L. W. HUMPHREY.

Where the owner of a slave actively participated in legal proceedings for his emancipation, and for more than thirty years acquiesced in the judgment of the Court declaring his freedom, whether such proceedings were regular or otherwise, the title of such former owner is divested, and enures to the benefit of the colored person.

Where a person of color, for more than thirty years, was treated and regarded, as well by the community in which he lived, as by his former owner, as a free person, every presumption ought to be made in favor of his actual emancipation according to the requirements of law.

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

The case was instituted to try the question of the defendant's right to hold the plaintiff as a slave, and was submitted as on certain facts agreed.

The plaintiff was once the slave of Edward Williams, and

is now the slave of the defendant, unless he has been emancipated. He claims to have been emancipated in due form of law, under proceeding of which, the following is a summary:

First. A petition filed by Benjamin Jarman, addressed to the Superior Court of Onslow, setting forth that the petitioner, himself, had been the slave of John Jarman; that he had been manumitted by the County Court of Onslow for meritorious services; that he had a child while in bondage, named David; that the said David was, at the filing of the petition, about thirty years old; that he had been distinguished for honesty, industry and fidelity to his master; that his said master, Edward Williams, had been offered a large sum of money for him, but had refused, on account of the excellent conduct of David to take it, and had sold him to his father, the petitioner, for a reduced price. The prayer was for the emancipation of David.

Secondly. The affidavit of Edward Williams, stating that he had owned David for about thirty years; that during the whole of the time, his conduct had been in the highest degree exemplary and meritorious; that he had reposed unusual confidence in him, and his conduct had always been satisfactory; that the affiant had sold David to his father, Benjamin, at a reduced price, after having refused a very large offer from another, and that this was because he would not sell to any but his father.

Thirdly. The judgment of the Superior Court of Onslow, September Term, 1822, reciting that "whereas it had been made to appear to the Court that the said David, for his meritorious services, hath merit to be liberated, it is ordered by the Court that the said slave may be so liberated and set free."

Bonds were given as were required by the law then existing on the subject of emancipation. The bond to the Governor, conditioned for the good behavior of David, was signed by the former owner, Edward Williams. Full copies of all which proceedings are set out in the case. The said David further claims his freedom on the ground that he has acted and been considered as a free man ever since the year, 1822, up to the

time of the trespass complained of in this suit, April 1857, and it is admitted that he so acted and was considered. Benjamin Jarman was a slave at the time of filing his petition for the emancipation of his son David, and it was insisted that he could not own, and therefore could not emancipate the plaintiff.

Upon the consideration of the case, the Court being of opinion with the plaintiff, gave judgment that he recover one dollar and his costs, from which judgment the defendant appealed.

G. Greene, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. The plaintiff upon the trial placed his claim to freedom upon two grounds: *First*, a regular act of emancipation in the year 1822, according to the then existing law. And, *secondly*, that from the year 1822, he had for more than thirty years acted as, and been reputed to be, a freeman. His Honor decided in his favor in the Court below, but whether upon both the grounds, or upon one only, and if upon one only, then upon which, does not appear. The record of the Superior Court of Onslow county, at September Term, 1822, showing a license to Benjamin Jarman, (who was represented in his petition to be the owner, as well as the father of the plaintiff,) to emancipate him, appears to be regular and complete, and that, together with what is shown to have been done by the petitioner under it, would seem to be all that could be required to establish the plaintiff's right. But it is insisted by the defendant, that as, at the time when Benjamin Jarman filed his petition, he was, himself a slave, he could not own, and therefore, could not emancipate the plaintiff. The answer to that objection is furnished by what appears among the proceedings on the petition for emancipation. It is admitted that the plaintiff once belonged to one Edward Williams, and his affidavit is exhibited as the testimony by which the meritorious services of the plaintiff were proved, and in

that, the affiant further states that he had sold the plaintiff to his father, the petitioner, at a reduced price, after having been offered a higher price by others. The same person soon afterwards became one of the sureties of the plaintiff for his good behavior, in a bond which recited that he had been duly emancipated by the Superior Court of Law for Onslow county, as has been before stated. Now, if Benjamin Jarman were a slave when his petition was filed, the sale of the plaintiff to him by his owner, Williams, did not divest the title of the latter, and that title was undoubtedly divested in favor of the plaintiff, either by his acts in connection with the proceedings of the Court, or by his long acquiescence afterwards. With a slight alteration of the language used by this Court in the somewhat similar case of *Allen* v. *Allen*, Busbee Rep. 60, we say, that surely, after such a distinct acknowledgement by the owner, that the plaintiff had been emancipated, and he and all other persons had treated and regarded him as free for more than thirty years, every presumption ought to be made in favor of his actual emancipation according to all the requirements of law. See *Cully* v. *Jones*, 9 Ired. Rep. 168, *Stringer* v. *Bircham*, 12 Ired. Rep. 41.

PER CURIAM. Judgment affirmed.

B. B. McKENZIE, *County Trustee*, *v.* WM. BUCHANAN *and others.*

Taxes ordered to be collected to build or repair court-houses, jails, &c., under 30 ch., 1 sec. Rev. Code, are demandable and receivable from the sheriff by the Treasurer of public buildings, and not by the County Trustee.

The treasurer of public buildings cannot proceed, in a summary manner, against a sheriff for failing to pay him taxes levied for the building and repairing of the court-house, &c., but he must do so by an action at law in the regular manner.

MOTION for a summary judgment against the sheriff of

Richmond, and his sureties, tried before SAUNDERS, J., at the last Superior Court of that county.

The plaintiff sued in the character of county trustee, for monies levied and collected by the defendant, Buchanan, as sheriff, for the building, repairing, &c., of the public buildings.

The questions made by the bill of exceptions, are all superseded by the one reaching to the capacity of the county trustee, to sue at all for taxes levied to the use of the public buildings, upon which the decision in this Court is predicated. The Court below gave judgment for the plaintiff, and the defendants appealed.

Kelly, for the plaintiff.
Banks and *McDonald*, for the defendants.

BATTLE, J. Many objections were made on the trial, to plaintiff's recovery, which it is unnecessary for us to consider, because there is one, apparent on the record, which is manifestly fatal to the action. The summary proceeding, in this case, was instituted upon the authority supposed to be conferred upon the plaintiff, as county trustee, by the 5th section of the 29th chapter of the Revised Code. That section enacts that, "The county trustee shall annually call on the sheriff, clerk and master, and clerks of the courts in his county, and all other persons bound to account with him, for payment of all monies which may be in their hands, and if any of said officers shall fail to account for, and pay the same, the trustee, at the first court held for his county, after the first day of January in every year, shall move for judgment against such delinquent officer and his sureties, ten days notice having previously been given to them," &c. The monies which the county trustee was authorised to demand, and which the sheriff, or other officer was bound to pay to him, is specified in the section preceding, to wit, the 4th of the same chapter, which is as follows: "The county trustee shall demand, sue for and receive from the sheriff of the county, and from all other persons, all money which may be in their hands, due, and paya-

ble to, and for the use of the county, and shall apply them as the county court may direct." The authority hereby conferred is certainly very extensive, embracing, as it does, "all money" which may be in the hands of the sheriff, or any other person, "due and payable to, and for the use of the county," but it cannot, upon any fair construction, be made to include monies which the Legislature may have directed to be paid to another officer. By turning to the 30th chapter of the Revised Code, we shall find in the 1st section, a provision, making it the duty of the county court to lay and collect taxes annually, when necessary, "for the purpose of building, repairing and furnishing their several court-houses, jails, pillories and stocks," &c. The 4th section provides for the appointment of a treasurer of public buildings and prescribes his duties, among which is one that he "shall apply for, and obtain from the clerk all papers and documents, properly attested, which may be necessary for the collection of the taxes laid by the court—shall see that the same be collected, accounted for, and applied according to the intent of this chapter." By virtue of this clause, it is too clear to admit of a doubt, that the treasurer of public buildings, and not the county trustee, is the proper officer, to receive from the sheriff the monies which he may have collected of the taxes laid by the county court, for the purposes indicated in the first section. He does not appear, from any part of the act, to be invested with power to proceed against a delinquent sheriff in a summary manner, by motion, as provided for a county trustee, in the 5th section of the 29th chapter, to which we have referred. If, then, it become necessary for the treasurer of public buildings, to proceed against a defaulting officer, he must do so by an action at law in the regular manner. See *Cameron* v. *Campbell*, 3 Hawks' Rep. 285. It follows, as a necessary consequence, that this summary proceeding could not have been sustained in the name of the treasurer of public buildings, and *a fortiori*, it cannot be maintained in that of the county trustee for money which the law does not authorise him to col-

lect at all. The judgment must be reversed, and judgment that the plaintiff take nothing by his motion.

PER CURIAM, Judgment reversed.

STATE *v.* BILL, *a slave.*

Where it was proved that a burglary had been committed, it was *Held* not irrelevant nor improper to prove that the defendant was one of a band of runaways, encamped in a swamp, near the place where the felony was committed.

INDICTMENT for BURGLARY, tried before SAUNDERS, J., at the last Fall Term of Robeson Superior Court.

It was in evidence, that a man by the name of James Chason, (the prosecutor) lived on the borders of the Big Swamp, and on the night of Tuesday after Christmas, 1857, his house was broken open and certain articles of property stolen by a number of negroes; that the prisoner was present, but the rest of the negroes were unknown to the witnesses. It was also in evidence, that some short time after the commission of this act, about two miles from Chason's house, the camp of a number of runaway negroes was found.

It was alleged by the State that Bill, the prisoner, was a runaway at the time, and for the purpose of showing it, and that he was one of those collected in the swamp, the solicitor called one *Allen*, who swore that some week or more after the house of Chason was broken open, he, with a party of men, on searching the swamp, came upon a camp where a number of runaway negroes were assembled, and that the prisoner was one of them. Another witness, by the name of *Callahan*, swore that before the commission of the offense, he saw the defendant in the company of five or six runaways. The evidence of both these witnesses was objected to by the defendant's counsel, but received by the Court, for which the defendant excepted.

The Court charged the jury, that if the defendant was present, doing the acts himself, as testified to by the witnesses, or was present concurring in what was done—ready to aid and assist—it would render him guilty; and further, that "if the witnesses had sworn falsely—had even committed perjury, of which it was their province to judge, and they should give their verdict, and thus be imposed upon, they were not responsible; it was their duty to pass on the testimony—judge fairly—consider it well, and to draw a fair, candid and honest inference and conclusion, and pronounce such a verdict as in their opinion it authorised; their oath was to pass impartially between the State and the prisoner, and a true verdict given according to the evidence." The defendant's counsel excepted to the charge.

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

BATTLE, J. We have examined with that care which their importance demands, the alleged errors assigned by the prisoner's counsel, in their bill of exceptions, without being able to find any thing in either of them, which can entitle him to a *venire de novo*.

The only objection which seems to have any plausibility in it, and upon which alone the counsel have much insisted in their argument here, is the admission, by the Court, of testimony, to prove that the prisoner was a runaway slave at the time when the burglary was proved to have been committed, and that he was connected with a gang of runaways, who had a camp in the Big Swamp, within a few miles of the house which was broken open. It was contended by the counsel that this testimony was irrelevant, because the fact, that the prisoner was a runaway, had no proper tendency to prove that he committed the offense, and it was incompetent, because it was in effect, offering proof of his character, for the purpose of creating a prejudice against him in the minds of the jury. It was further insisted, that there was no evidence that the burg-

lary was committed by the swamp runaways, and it was, therefore, altogether irrelevant to show that they had a camp in the Big Swamp, and that the prisoner was one of their number. This testimony, the counsel contended, could have no legitimate effect upon the issue of the prisoner's guilt, while it was well calculated to raise an unjust suspicion that all the crimes committed in the neighborhood were to be attributed to these runaways.

This argument is more specious than strong. Upon the trial it was clearly proved, and was not denied by the prisoner's counsel, that the burglary, charged in the indictment, had been committed. The only question, then, was, whether the prisoner was the perpetrator, or one of the perpetrators, of the crime. Several witnesses testified that the house was broken open by a "number of negroes," and that the prisoner was present at the time; but what he did, it does not appear that any witness was able to state. It was, therefore, necessary (or at least was supposed to be so) to prove clearly, that he was present, either as an actor in the transaction, or was there for the purpose of aiding and abetting, if it should become necessary, those who did commit the offense. This might be done, in the absence of positive proof, by circumstantial testimony; and any testimony, which had the slightest tendency to point to the guilty parties, was clearly admissible. The house was broken and entered, and several articles stolen therefrom by a "number of negroes." What negroes? That was a proper subject of enquiry. A gang of them had a camp in the swamp not far off. Why could not that fact be proved, to show that they committed the crime? They were renegades, and a "number of them," and they were at the time, or about the time, in the vicinity of the transaction, and they were runaways; who as a class, have a known propensity to steal. That testimony, alone, would not have been sufficient to convict them, but it would have been a strong link, in any chain of circumstances, which might have been thrown around them by other proof, had they been on trial. As to the prisoner, Bill, there was other testimony. Several witnesses stated that

he was present when the crime was committed. He, of course, unless he admitted his guilt, must have insisted, either that the witnesses had sworn falsely, or were mistaken, and that he was not there, or that though present, he took no part in the transaction. To meet either of these views, the solicitor for the State, had the right, certainly, to show the probability of his having been there, by proving that he was in the neighborhood at the time; and if there, that he was a participator, because he was one of a "number of persons" who, in some respects, answered the description of those who did commit the offense. It was also competent for the solicitor to prove that he was a runaway, because that was a *fact*, and there is no rule of evidence which prohibits the proof of a *fact*, though it may be prejudicial to the party's character. Suppose a man were charged with the commission of a burglary in a city, could it not be proved that, about the time of the offense, he was seen in the streets near the place, at a late hour of the night, with burglars' tools in his possession? Such would certainly damage his character; and yet no person would doubt its admissibility. Indeed, in every case, depending upon circumstantial testimony, the proof of each and every circumstance, which tends to show the guilt of the party, must necessarily, to some extent, lessen him in the estimation of those who hear it. Our conclusion is, that the presiding Judge did not err in admitting the testimony to which the prisoner's exception extends.

The remaining two exceptions were not much relied on by the counsel, and certainly have no validity. If our decision be correct in relation to the admission of the testimony about the swamp runaways, and the prisoner's being one of their number, there was enough evidence to be left to the jury for their consideration, and it was for them alone to say, whether it satisfied them, beyond a reasonable doubt, that the prisoner was present when the burglary was committed, and was a principal either in the first or second degree in the commission of the crime.

The remarks of his Honor, to which the third exception re-

lates were, so far as we can discover, proper for the occasion, and were as fair and as favorable to the prisoner as he had any right to ask.

The motion for a *venire de novo* is overruled, and as we have been unable to discover any error in the record proper, it must be so certified to the Superior Court of law for the county of Robeson, to the end that the sentence of the law may be pronounced upon the prisoner.

PER CURIAM, Judgment affirmed.

ZECHARIAH OWENS *v.* WILLIAM KINSEY.

Where a party gave notice that he would take a deposition, on a given day, "at the house of W. P., (the witness) to be read in evidence in a case now pending in the Superior Court of law for the said county, wherein I am plaintiff and you are defendant," without mentioning in what county the witness resided, or in what county the suit was pending, there being no evidence that there was any other W. P., or any other suit than the one on trial, it was *Held* that the notice was sufficient.

ACTION of TROVER, for the conversion of an anchor, tried before DICK, J., at the Spring Term, 1858, of Currituck Superior Court.

On the trial below, the deposition of one *William Perry* was offered by the plaintiff, which was objected to on account of the insufficiency of the notice, which was as follows:

"To William Kinsey.—Take notice that, on Saturday the first day of December next, at the house of William Perry, I shall proceed to take the deposition of the said William Perry, to be read in evidence on the trial of a case now pending in the Superior Court of law for said county, wherein I am plaintiff, and you are defendant." "November 7th, 1855."

This suit, as the record shows, was then pending in the Superior Court of Currituck county.

It was objected that the notice does not specify in what

county the suit is pending, wherein the deposition is to be used, nor in what county William Perry lived. The objection was sustained by his Honor, and the deposition rejected. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

There were other exceptions, which are superseded by the view taken of the case by this Court.

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

PEARSON, C. J. The object for requiring notice, is to give the opposite party an opportunity to attend, and cross-examine. We think this purpose was answered by the notice, the sufficiency of which, is drawn in question.

It is objected that the notice does not set out the *county* in which the suit was pending. The names of the parties, and the fact that the suit was pending in a superior court of law, are set out, and we consider this sufficient to enable the defendant to know, with reasonable certainty, that the deposition was to be used in the suit, which was pending between them in the Superior Court of law for the county of Currituck, in the absence of proof that there was any other suit pending between them in a superior court of law in any other county.

It is also objected that the notice does not identify the place where the deposition was to be taken. The description is "at the house of William Perry," (the witness) and it is said this is deficient in certainty, in this: it does not set out the *county* in which William Perry lived.

We are to take it, that William Perry was a man of ordinary notoriety, and the defendant could have found the way to his house, in the same manner that he could to the "store of A B," or "the mill of C D." *The house where a certain individual lives*, is a description sufficiently definite to identify the place. The tract of land "on which A B now lives," is a sufficient description of the premises in a lease for years, or a deed conveying the fee simple; and, on the same princi-

ple, it must be held to indicate, with reasonable certainty, the place at which a deposition is to be taken. In the absence of any proof that there are more William Perrys than the one, whose deposition it was proposed to take, there is no more reason for requiring the notice to set out the county in which his house is situate, than the part of the county, or the water course, or public road, on, or near which, he lives.

Our conclusion is not at all opposed to the principle established by *Taylor* v. *Gooch*, 5 Jones' Rep. 404, and *Sloan* v. *Williford*, 3 Ire. Rep. 307. The object of the notice, as before stated, is to give the party an opportunity to attend and cross-examine; and, while on the one hand, we will not allow a party to be forced to attend on sunday, as is held in the latter case, or on a day when his presence is required at another place for the purposes of that very suit, as is held in the former, so, on the other, we hold that the principle is complied with substantially, if the notice describes the place with reasonable certainty.

We are not at liberty to express an opinion upon the question of title, made by the case, and we are the less inclined to do so, because we presume the deposition, which was improperly rejected, sets out facts relevant to that question. There is error, and a *venire de novo* is awarded.

PER CURIAM, Judgment reversed.

Den on the demise of WILLIS BARBEE *and wife v.* DAVID TAYLOR.

Where a certificate on the back of a deed, by a husband and wife, for the wife's land, purported to be of an acknowledgement in the county court, and an examination of the feme before some member of the court, but was subscribed with the name of *a Judge of the Superior Court*, it was *Held* that such certificate was ineffective.

EJECTMENT tried before HEATH, J., at the last Superior Court of Wilson County.

The lessors of the plaintiff are the heirs at law of Barshaba Crowell, and the only question on the trial was as to the efficacy of a deed for the premises made by James B. Crowell and his wife Barshaba to Dempsey Harrison, under whom the defendant claims. The deed purports to have been made on the day of , 1818, and to be unattested; and on it is a certificate in these words:

"North Carolina, } Court of Pleas and Quarter Sessions,
Nash County. } Second Monday of February, 1818.

James B. Crowell, one of the bargainors in the foregoing deed, came into court and acknowledged the execution thereof: and afterwards, Barshaba Crowell, the feme covert, came into court and was privily examined, separate and apart from her husband, the said James B. Crowell, touching the execution thereof by her, by , Esquire, one of the Justices of the said Court assigned for the purpose, and upon her examination, acknowledged that she executed the same freely and without the control or compulsion of her husband. Let it be registered," and to the certificate is subscribed the name "Henry Seawell" in the hand writing of the late Hon. Henry Seawell, who was in 1818, one of the Judges of the Superior Courts of Law.

The Court held, that the deed did not divest the estate of Mrs. Crowell and that the plaintiff was entitled to recover; and from a judgment accordingly the defendant appealed.

B. F. Moore, *Miller* and *Dortch*, for the plaintiff.
Badger and *Lewis*, for the defendant.

RUFFIN, J. The act of Assembly authorises and requires deeds to be proved or acknowledged before one of the Judges, or in the County Court; and it is necessarily implied that a certificate of the Judge on the deed should purport to be of the matters and things done before him, and those only. The tenor of this certificate is quite to the contrary—purporting to be of an acknowledgement in the county court, and an examination of the feme before some member of the court, for

whose name a blank is left. To proceedings of that kind, a Judge's signature is not the appropriate attestation, and therefore, it is ineffective. It was contended at the bar, that those parts of the certificate, in reference to the proceeding being in the county court, might, as being inconsistent with the signature of the Judge, be rejected as surplusage, and the Judge's signature would furnish a sufficient presumption of an acknowledgement had before him. But, if those parts be struck out of the certificate, there is really nothing left but the name of the Judge, without any certificate of any thing done before him.

It is easy to conjecture how the mistake happened, but not as easy to help the party from its effects.

PER CURIAM, Judgment affirmed.

STATE *v.* JOHN W. HAILEY.

A bill of indictment against a person by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless the same cause of action, and the elapse of two years is no bar to the prosecution.

Being against the same person, the words of the statute providing a saving of one year after the first prosecution shall have been abandoned, would have been a sufficient reply to the plea of the statute, even if there had been a bar.

INDICTMENT for assault and battery tried before SAUNDERS, J., at the last Fall Term of Anson Superior Court.

The defendant was indicted formerly under the name of "John W. Bailey," and he pleaded in abatement that his name was not John W. Bailey, but "John W. Hailey," which plea was admitted by the solicitor, and a new bill was sent and found by the grand jury; but from the time of the commission of the offence, to the finding of the latter bill, more than two years had elapsed, and the defendant insisted on that as a bar, but the solicitor replied the former bill of indictment

and the question was, whether the pendency of that bill was a saving.

His Honor was of opinion that it was not a saving, and gave judgment for the defendant, from which Mr. Solicitor Strange appealed.

Attorney General, for the State.
Dargan and *Kelly*, for the defendant.

PEARSON, C. J. Without reference to the proviso, we are of opinion that the proceeding against the defendant was within the time prescribed by the statute, (Rev. Code, ch. 35, sec. 8.) The first bill was found within two years after the commission of the offense; the second bill was a continuation, and a part of the same proceeding, according to a well settled principle; *State* v. *Johnston*, 5 Jones' Rep. 221; *State* v. *Haney*, 2 Dev. and Bat. 390; *State* v. *Tisdale*, ibid 159; *State* v. *Harshaw*, 2 C. L. Rep. 257.

If the solicitor had entered a *nol. pros.* and discharged the defendant, and then sent the second bill, as it was found within one year thereafter, the case would have come within the proviso; for it can make no difference whether the judgment on the first indictment is arrested, or the prosecution fails for some other cause, provided both indictments are for the same offense and against the *same person*, the words of the statute being "within one year after the first (prosecution) shall have been abandoned by the State," which are broad enough to include any cause by reason of which the first indictment is not prosecuted to judgment.

There is a similar proviso in reference to the time for bringing civil actions, in case judgment is arrested, or is reversed for error; Rev. Code, ch. 65, sec. 8, and the uniform and settled construction extends to cases where a *nonsuit* is entered.

There is error. This opinion will be certified, to the end, that the judgment in the Court below may be reversed, and a judgment entered for the State upon the verdict.

PER CURIAM, Judgment reversed.

CARTER & JACKSON *v.* WILLIAM P. BEAMAN.

Where one partner used the effects of the firm in the payment of his private debt, it was *Held*, in a suit for the price of these effects, not to be error in the Court to instruct the jury, that if the other partner assented to the settlement, or subsequently agreed to it, it was a bar to the recovery.

Where it appeared that each of the partners of a firm was in the habit of using the debts of the firm in satisfaction of his private debts, and entries of such facts duly made upon their books, it was *Held*, in an action by the firm, for the price of goods thus disposed of, that this habitual mode of dealing was proper evidence to repel the existence of fraud in such disposition, and to create a bar to a recovery for such goods.

Held further, that the payment of a debt of the firm, subsequently created, to the defendant by the complaining partner, was competent evidence to the same effect.

Held further, that the declaration of the offending partner was also competent.

ASSUMPSIT, tried before SHEPHERD, J., at the last Fall Term of Hertford Superior Court.

The action is assumpsit for the value of lumber sold and delivered to the defendant by the plaintiffs, as partners, to the amount of $385. The plaintiffs were both active partners, but the books were kept by Jackson, and were accessible to Carter. Each of the partners was in the habit of using debts to the firm in satisfaction of his private debts, and the books showed various entries by which the debtors were credited with the amounts thus settled, and the partner charged therewith in his account. The defendant made a settlement of the account against him with Jackson, in which he had credit for $72,00, for an account due to him from the firm, and a further credit for a debt which Jackson owed him, and entries thereof were duly made in the books by debiting Jackson to the defendant, and thereby closing the defendant's account. The defendant gave further evidence, that after that settlement, the firm became indebted to him, and that Carter paid the amount to him in money. This evidence was objected to on the part of the plaintiffs, but was received by the Court. The defendant also offered evidence, that during the

trial, the plaintiff, Jackson, said that Carter assented to the setment which he made with the defendant, but did not say whether it was before the settlement. At the close of the business, the assets were not sufficient to discharge the debts of the firm: but at what time that was, does not appear; and Jackson was then a debtor to the firm upwards of $1000, and Carter a creditor for about $500, as shown by the books. The plaintiffs also offered evidence, that Jackson was insolvent at and after January, 1857, but the Court deemed it irrelevant, and refused to admit it. His Honor instructed the jury, that the transaction between Jackson and the defendant was not a bar to the plaintiffs' recovery of the residue of the account after deducting the $72, unless Carter assented thereto, but that if he had assented to the settlement, or subsequently agreed to it, and they were satisfied thereof from the evidence, it was a bar. The jury found for the defendant, who had judgment, and the plaintiffs appealed.

Smith, for the plaintiffs.
Yeates and *Winston, Jr.*, for the defendant.

RUFFIN, J. It was held in *Cotton* v. *Evans*, 1 Dev. and Bat. Eq. 284, the invalidity of the acts of one copartner in using the name or effects of the firm did not depend upon a want of power in him, but in the fraudulent abuse of his power in making use of them for his own separate benefit, and in the concurrence in that fraud by the party dealing with him in accepting them for that purpose. Of course, such fraud is repelled, when it appears that the other partner assented to the transaction, and hence also it was established, in that case, that it did not require evidence of express or previous assent to the particular transaction, but that it might be inferred from other facts, such as a course of dealing in that way, acquiesced in by all the partners, with knowledge of such dealing, or with full opportunities of knowledge from the entries in the books, which they had access to, and examined, or ought to have examined. *Exparte Bonhomy*, 8 Ves. 540; *Exparte*

Peele, 6 Ves. 602. It imports such gross negligence, in a partner, of his own rights, and those of other persons, not to put a stop to such dealings, if he objects to them, and thereby prevent his copartner from deceiving those with whom he is having such transactions, as to amount to a fraud, on his part, and deprive him of the protection the law designs to give him.

The application of that doctrine to the present case, is demonstrative of its soundness. Jackson not only made frequent use of the joint effects for his own benefit, showing the openness and notoriety of those acts, but Carter also made the same uses of the effects, and proper entries were made of the whole of them in the accounts: so that one is obliged to understand that both parties allowed such dealings, or were wilfully blind. Besides, there is the further circumstance in relation to the transactions with the defendant, which strongly tends to the conclusion, that Carter approved of the settlement between Jackson and the defendant; which is that Carter himself, afterwards made a settlement with the defendant, for subsequent dealings with the firm, and paid the defendant a balance found due thereon, in cash, whence, it may be fairly inferred, that Carter approved of the manner in which the former account, against the defendant, had been closed. The Court is, therefore, of opinion that the case was properly put to the jury, upon relevant evidence, applicable to the principle of law. On the points of evidence, there is no doubt. Though, under the circumstances, the declarations of the alleged offending partner ought to weigh but little, yet the admissions or declarations of a party, to the record, cannot be excluded. It was also immaterial to this enquiry, how the accounts in company stood between Jackson and Carter, since the world could know nothing of that.

PER CURIAM, Judgment affirmed.

THEOPHILUS B. WELLS *v.* THE WILMINGTON AND WELDON RAIL ROAD COMPANY.

An action cannot be maintained against a railroad company as a *common carrier* for the loss or destruction of goods deposited on the road side, at a place where there was no regular station, and no agent, although a conductor of a freight train had promised to stop and take them.

Roadside deposits, made to save the trouble of hauling to a regular depot, are at the risk of the owners, until they are put on a freight car.

ACTION on the case, tried before ELLIS, J., at the Spring Term, 1858, of Edgecome Superior Court.

The plaintiff declared against the defendants as a *common carrier*.

The plaintiff placed eighty or one hundred barrels of turpentine at a point on the defendant's railroad, called "The Nicholson place," to be carried on a freight train to a distillery at Battleboro'. The place where the turpentine was deposited, was not a regular station on the road. They had no warehouse nor employees there, but frequently took on freight from that point. Two different conductors had promished, soon after the turpentine was placed at the point above named, to take it to the distillery "as soon as they could," which not being done for some weeks, the plaintiff applied to another conductor, who said "he would carry it on the following Monday morning; that he thought he could do so at that time." On that morning, some turpentine was taken from the "Nicholson Place" to Battleboro', but none of the defendant's, although there were empty cars in the train. The plaintiff's turpentine while lying at the Nicholson Place, was destroyed by fire.

The Court intimated an opinion that the plaintiff could not recover on this state of the facts, on which he submitted to a nonsuit, and appealed.

Conigland, for the plaintiff.
Moore and *Dortch*, for the defendants.

PEARSON, C. J. The declaration is against the defendant as a *common carrier*, for the loss of the turpentine. We concur in the opinion that the proof does not make out the case. The liability of a rail road company, as a common carrier, does not begin until the article is received by its agent, and is put into its custody for the purpose of being carried on the road. If the article is put on the platform at the company's depot, with the knowledge of the agent, that amounts to an acceptance, and it is not necessary that it should be entered on the way bill or freight bill, or any written memorandum made, in order to make the company liable for it to the same extent as after it is actually put on a freight train; for its duty, as a common carrier, begins whenever the article is received for the purpose of being carried, and the owner relinquishes his control over it; after that, it makes no difference in respect to the liability of the company, whether the article is sent off immediately, or is, for the convenience of the company, kept over and either permitted to remain on the platform, or is put into the warehouse. If, however, the article is kept over for the convenience of the owner, as if he should request that it might be put into the warehouse and not be sent until further instructions, then, as we apprehend, the company would not be liable, as a common carrier, but only as a depository, inasmuch as the article was not received for carriage, until such further instructions should be given. So, if the article reaches the place of destination, and is put on the platform of the depot, we apprehend the liability of the company, as a common carrier, is then at an end. The owner, or his consignee, should be there to receive it, and, in his absence, it is put in the warehouse as a deposit. Whether it is the duty of the company to give the owner or consignee notice of its arrival, is a question into which we will not enter; indeed, we were not at liberty to give a decided opinion upon the questions to which we have had reference, and their suggestion was merely for the sake of illustration. In our case, the turpentine was not carried to a depot, but was put at a place on the road side, at which articles were sometimes taken in, but the company had no

house there, and no agent there: and the idea that the turpentine was received and taken into its charge, so as to make the company liable as a common carrier, while it lay there on the ground, by the force and effect of the indefinite promises of the conductors to stop at some time or other, and take it in, is out of the question.

Upon a consideration of the intention and acts of the parties and the nature of the subject, this Court is of opinion that all those "road-side deposits," made to save the trouble of hauling to a regular depot, are at the risk of the owners until they are put on a freight car, and in that manner received by an agent of the company.

If the plaintiff had declared for a breach of contract in not receiving the turpentine on a particular day, or within a reasonable time, it is settled that he could not have recovered its value; *Ashe* v. *DeRossett*, 5 Jones' Rep. 299. Whether he could have maintained the action so as to entitle himself to nominal damages, upon the evidence offered, it is not necessary for us to enquire, because, in this Court, he has made his election to assume that the turpentine was received, so as to make the defendant liable as a common carrier, and reference is made to the other mode in which he might have declared, because the case seems to have been made up with that view. The plaintiff had a right to his election, and exercised it purposely to raise the question as to the defendant's liability for the value of the turpentine.

PER CURIAM, There is no error. Judgment affirmed.

Doe on the demise of H. STEVENS *v.* J. M. WEST, *et. al*

In all cases, where there are two persons, having the same name, the elder is presumed to be meant when there is no addition to the name.

Where a surveyor said, in evidence that he did not know where the beginning corner of a tract of land was, and had heard no reputation as to its

locality, it was *Held* not to be competent to ask him, as an expert, if he did not have an opinion as to the locality of the point in question, founded on a former survey.

THIS was an action of EJECTMENT, tried before PERSON, J., at the Spring Term, 1857, of the Superior Court of the county of Brunswick.

The lessors of the plaintiff claimed title to the land in dispute by descent from Mary, who was a daughter of Caleb Granger, and wife of William Blount, a former Governor of Tennessee. They proved that they were his heirs at law, and that the defendants were the tenants in possession at the time of the service of the declaration.

The lessors of the plaintiff showed, as the origin of their title, a duly certified copy of a grant from the register's office in New Hanover county, to John Watson for 640 acres of land, dated 13th of September, 1735; and in deducing their title from him, they produced a copy of a deed from him and his wife to Joshua Granger, dated 12th of January, 1737–'8. There was much other evidence introduced, both written and oral, which it is unnecessary to state. The only two exceptions upon which the counsel for the lessors of the plaintiff relied, in their argument before the Supreme Court, arose as follows: It appeared from the testimony that there were two persons of full age, in the year, 1737–'8, when the deed from Watson and wife was executed, who bore the name of "Joshua Granger," and they were father and son. It was necessary for the lessors to show that the deed was made to Joshua Granger the elder, and the defendant insisted that there was no evidence of that fact; whereupon the counsel for the plaintiff asked the Court to instruct the jury that "Joshua Granger, without addition, *ex vi termini*, as between father and son, in law, meant Joshua, the elder." This, the Court declined, but left it to the jury as a question of fact, telling them that there was evidence in the deeds and papers, which had been read, from which they could find the fact. For, this the plaintiffs counsel excepted.

The grant to John Watson was for 640 acres of land "in

New Hanover precinct opposite to the Thorough-fare to the N. W. River, and is called Newton, beginning at a pine, John Maulby's corner tree," &c. For the purpose of showing where this corner was, several witnesses were examined, among whom, was General Alexander McRae. He stated that he had seen an old pine buried in the mud, with a mark upon it, where the beginning corner was contended by the plaintiff to be, but he did not know where the corner was, and that there was no general reputation of its locality. He said, however, that he had an opinion about it, formed from a survey made by him several years ago, and that he was an expert in the business of surveying. Upon this, the plaintiff's counsel proposed to ask his opinion; but upon objection by the defendants, it was disallowed by the Court, and the counsel excepted. There was a verdict and judgment for the defendants, and the lessors of the plaintiff appealed.

London, *Strange* and *Troy*, for the plaintiff.
W. A. Wright, for the defendants.

BATTLE, J. The case comes before us upon two exceptions only, and our opinion is decidedly in favor of the plaintiff upon the first, and as decidedly against him upon the second. It is now well established, as a rule of the common law, that if there be father and son of the same name, and a promissory note, deed, or devise be made to a person of that name, it shall be taken to have been the father and not the son, unless it be proved that the son, and not the father, was meant. Thus, in an action upon a note, payable to *Henry Sweeting*, it appeared that there were a father and a son of that name, BAYLEY, Judge, held that *prima facie* the father was the payee, but he allowed proof that the son was meant, and was the person entitled to recover upon it; *Sweeting* v. *Fowler*, 1 Stark. Rep. 106, (2 Eng. Com. Law Rep. 316). To the same effect, see *Stebbing* v. *Spicer*, 65 Eng. Com. Law Rep. 827. So, in *Jones* v. *Newman*, 1 Wm. Black. Rep. 60, it was decided that a devise to John Cluer, was presumptively to the

father, and not the son, of that name, though the Court permitted parol evidence to be given to show that the son was the devisee intended. The rule may, perhaps, be laid down more broadly, that in all cases, where there are two persons having the same name, whether they stand to each other in the relation of father and son, or not, the elder is always presumed to be meant where there is no addition to the name. The reason is, that when one has a particular name, and afterwards there is a younger person to whom the same name is given, the first does not thereby cease to be known by that appellation, but the latter must be distinguished from him by the addition of *junior*, or perhaps in some other way. In 2 Fitzherbert's Natura Brevium, 267, we find a writ, called a writ *de idemptitate nominis*, which is to be sued forth, "where a man is sued in a personal action, and upon the *capias* or *exigent* awarded, another man who beareth the same name is arrested by force of the writ." In the note (a) to the page from which the above extract is taken, it is said that "in the case of *Wilson* v. *Stubbs*, it was resolved, if, in a writ against I S, I S the elder is taken, after judgment it shall be intended I S the elder. And yet, after judgment, I S the younger, if taken, cannot have an *idemptitate nominis*, but false imprisonment; but see the precedents contra." Now, whether I S, the younger, could, in such a case, have had a writ of *idemptitate nominis*, or would be driven to an action for false imprisonment for redress, it shows clearly, that he was arrested wrongfully under a *capias* against I S without addition.

The counsel for the defendants, in the case before us, was compelled to admit that, upon this question, the authorities were all against him; but he contended that the facts and circumstances were submitted to the jury for them to find, whether Joshua Granger, senior, or junior, was the person to whom the deed, from Watson and wife, was made. It is true, that the Judge did submit that question, as one of fact for the jury, upon the evidence before them, but he erred in refusing to give the instruction prayed by the counsel for the plaintiff,

that the presumption of law was, that the elder, and not the younger, was meant, so that the burden of proof, upon that point, should be thrown upon the defendants.

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

This result would make it unnecessary for us to express an opinion upon the second exception, and we should not do so, were it not almost certain that the question will be presented again upon the next trial, and it may possibly save them from expense and delay, for us now to declare the decided opinion which we entertain upon it. We think that the question upon which General McRae was asked to give his opinion, was not one of science, or skill, as to which, as an expert, he could be interrogated. The enquiry was as to the beginning corner of the Watson grant, and that was a simple question of fact, to be proved like any other fact. He might have been asked with propriety, had it been necessary, whether from the marks on the pine tree which he found buried in the mud, he believed that it had been marked as a corner, and was the corner tree of some tract of land. The ascertainment of the marks, on the tree, and the purpose for which they were put there were matters of science and skill appertaining to the business of a surveyor, but whether the tree was the corner of the Watson grant, or of some other grant or conveyance, was not at all a question requiring the peculiar knowledge of an engineer or surveyor. Thus, we find it stated that a "practical surveyor may express his opinion, whether the marks or trees, piles of stones, &c., were intended as monuments of boundaries; but he cannot be asked whether, in his opinion, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram." See 1st Greenf. on Ev. section 440, and the cases there cited.

For these reasons, we think that the testimony objected to was properly rejected; but for the error on the other point, there must be a new trial.

Per Curiam, Judgment reversed.

DAVID F. WHICHARD *v.* AMELIUS G. JORDAN *et al.*

A bond, executed for the purpose of raising money on loan, was made payable to A, who refused to advance the money on it. One of the obligors afterwards sold it to B. It was *Held* that these facts amounted to no evidence of a delivery to A.

The delivery of a deed to a stranger, to become the delivery to a party, must be a delivery for the use or benefit of the party.

The fact that this bond was afterwards partly described in a deed of trust made to A, as trustee, and signed by him, the object of which was to secure creditors, (B among them) is no evidence that it was ever delivered to A, or to B, for his benefit.

THE action is DEBT, on a bond for $500, dated April 21st, 1855, and payable to the plaintiff on demand, tried before CALDWELL, Judge. Plea *non est factum;* and on the trial, the question turned upon the delivery of the instrument. In support of the issue on his part, the plaintiff gave evidence, that the defendant Jordan wished to borrow the sum of five hundred dollars, and to enable him to raise it, he and the defendant Clark executed the bond in question, and then Jordan took it to one Stephens, to whom he, Jordan, owed a debt of a smaller amount, and proposed to Stephens to take the bond in discharge of his debt and to lend him the difference, and Stephens did so. When Jordan made application to Stephens, he told him that he had applied to Whichard to advance the money on the bond, but he had declined to do so, saying that he had no money. The plaintiff also gave, in evidence, a deed of trust, executed by Jordan and Whichard, on the 26th of October, 1855, in which several debts are recited, as due from Jordan to sundry persons, for which the defendant Clark and the plaintiff were respectively his sureties; among which, is mentioned "one note, originally payable to Daniel F. Whichard, and now held by Cornelius Stephens, for the sum of $500, subject to a credit for about $250, with James S. Clark surety," and conveying from Jordan to Whichard some real estate, two negroes and other personal estate, for the purpose of securing the payment of the

recited debts and indemnifying the sureties, upon trust to sell the estate, and with the proceeds, pay the debts *pro rata*. And the plaintiff further gave evidence, that the plaintiff afterwards exposed the property to public sale, under the deed, and that the defendant Clark purchased a part of it.

The Court instructed the jury, that the validity of the bond depended on the enquiry, whether there had been a sufficient delivery of it to the plaintiff, and that in the opinion of the Court, the evidence tended to show that no such delivery had been made, to which the plaintiff excepted, and after a verdict and judgment for the defendants, the plaintiff appealed.

Shaw, for the plaintiff.
Donnell and *Jenkins*, for the defendants.

RUFFIN, J. The case is to be treated as if the instruction had been, that there was no evidence on which the jury could find a delivery, and if it had been, it seems to this Court, that it would have been right. The bond was executed for the purpose of raising money on loan, from Whichard, and if he had lent the money and accepted the bond, when offered to him, no doubt it would have been a good bond, and it may be, that if there had afterwards been an actual transfer of the possession of the bond to Whichard, it might, by force of the sealing and delivery, have become effectual as a bond. But on that point, no opinion is called for in this case. There is no direct evidence of what actually occurred between Jordan and the plaintiff, or indeed, that there was an interview between them. On that point all the information consists of the representation by Jordan to Stephens; and that certainly repels the notion of a delivery before that time, to Whichard. It is clear, it was not intend- to deliver the bond to him, unless he would lend the money. No gift of the bond to him was meant, but only that it should be a security for what he should advance on it. Therefore, when he refused to make any advance of money, and did not take the bond, but it was kept by Jordan, it is manifest that no delivery was then made or meant of the bond, which

Whichard had substantially rejected. The subsequent transactions as little import a delivery to the obligee named in the instrument. Stephens was not the agent of Whichard, and, therefore, the possession taken by him, was not *ipso facto* a delivery to the latter. The delivery to a stranger, to become a delivery to the party, must be a delivery for the use or benefit of the party, and not rejected, but accepted by the party. It is impossible to imply that the delivery to Stephens was of that character. On the contrary, it was made to Stephens for his security and use, and was accepted by him under the mistaken notion, no doubt, that a deed to one person may be delivered to another for the benefit of the latter, exclusively, and be effectual, without the concurrence of the former. As that was the nature of the delivery, it would seem that a subsequent assent of Whichard would be immaterial, he taking no benefit from the instrument, and intending to take none. But there is no evidence of a subsequent assent. The recital of the debts, in the deed of trust, to which he was a party, does not amount to it. We are not considering, now, of remedies under the deed, upon the footing of the trusts declared in it. But the enquiry is, whether the fact that Whichard is a party as trustee to the deed, is evidence that a paper, purporting to be a bond, originally payable to him, which is mentioned in the deed, and in which he had no interest, was actually delivered to him or to another for him. Now, there is no recital in the deed of the delivery as a fact. But it is mentioned only as a part of the description of a security for a debt to Stephens, which it was intended to secure to him, and that the note, therefor, was originally payable to Whichard, and was then held by Stephens. From that, there can be no implication of a delivery to Whichard, or to Stephens for him, but it is rather to be deduced that the delivery, if any, was to the latter for his own use. In this point of view the case is even stronger against the plaintiff than it was in *Parker* v. *Latham*, where, after refusal of the bond, by the obligee, it was sent to her by one of the obligors, with the request that she would endorse it, and she endorsed to Respass. But the Court held that after she refused once,

it could not become the deed of the other obligors, the sureties, without an actual second delivery by them. It is to be observed also, that the force of the argument on this point, wholly fails, as the deed describes the instrument as a note, and not as a bond.

PER CURIAM, Judgment affirmed.

STATE *v.* HANNIBAL AND NED, *slaves.*

The act of 1854, Rev. Code, ch. 107, sec. 26, is to be received according to the import of its strong and general terms, and accordingly, a master cannot, now, arm his slave for any purpose.

In a proceeding before a justice of the peace, against a slave for carrying arms, the act gives the master a right to appeal.

In such proceeding, the magistrate has no right to give judgment against the master for a fine.

THIS was a proceeding against slaves for carrying arms, tried before SAUNDERS, J., at the last Fall Term of Bladen Superior Court.

The defendants are slaves of John T. Council, and were arrested, on a warrant, for having been found with guns in their possession, and were convicted by a justice of the peace, and sentenced to receive twenty lashes each, and it was adjudged that Council "pay a fine of five dollars each." The master appealed to the County Court, and there the judgment was, in all respects, affirmed, and he again appealed. In the Superior Court, the solicitor for the State, moved to dismiss the appeal, and it was refused by the Court. The case there, appeared to be this: Council kept a store in the country, and in order to guard it by night, he made one of these slaves sleep in a room under the same roof with the store room and adjoining it, and the other, in a house about a hundred yards off, and he gave each of them a gun, which they kept in their respective houses, where they were found by the informer.

His Honor held that the case was not within the statute, and discharged the slaves, but ordered the master to pay all the costs; and from that the State appealed.

Attorney General, for the State.
Banks and *E. G. Haywood*, for the defendants.

RUFFIN, J. The act, Rev. Code, ch. 107, sec. 33, expressly gives an appeal to the master on behalf of the slave, from every conviction before a justice of the peace, and the solicitor's motion was, therefore, properly refused. The principal question depends the 26th section of the same act. It provides that "no slave shall go armed with a gun, or shall keep such weapon, or shall hunt or range with a gun in the woods, upon any pretense whatsoever;" and it subjects an offending slave to punishment, not exceeding thirty-nine lashes, on conviction, before a justice of the peace. It seems to have been supposed in the Superior Court, that only cases in which slaves willfully, and of their own head, keep a gun or hunt with one, are within the purview of the statute; and that keeping a gun by the order of the master, and for the purpose stated on the trial, did not violate it. But the prohibition is expressed in the strongest and broadest terms, and rendered emphatical by the concluding words, *upon any pretense* whatsoever, and the policy of the provision is so obvious as to require no observations. If the question, then, depended on the terms of the act as it now stands, the Court would be of opinion that it must be interpreted according to the natural sense of the words, without admitting an exception where none is expressed. The correctness of that construction is, however, rendered perfectly apparent, by adverting to the earlier legislation on this subject. The earliest was in 1729, Ired. Rev. Code, ch. 5, sec. 7, which made it unlawful for a slave, on any pretense whatsoever, to range or hunt on any person's land other than his master's, with dog or gun, unless there be a white man in company. In the act of 1741, which is the foundation of all our laws touching servants and slaves, it is enacted

that no slave should go armed with a gun, or keep a gun, or hunt in the woods with a gun, under any pretense whatsoever, except such as should have a certificate as therein provided, with a proviso allowing the owner of a plantation to employ one slave on each plantation in hunting on his master's land for the purpose of preserving his stock or killing game for the master, if the master first got a certificate from the County Court, that the particular slave was allowed to carry a gun and hunt, which certificate the slave was always to carry with him; Ired. Rev. c. 24, secs. 40, 41, 42. The insertion of the exception proves that the general terms of the enactment were understood to cover every case and possible pretense, including that of a slave being armed by his master; and hence, the necessity of the express exception, which is confined to the single case of a slave with a certificate, hunting for the two purposes specified. Thus the law stood until 1836, when, for reasons, recollected by many, in revising and re-enacting the statutes, that exception was omitted; Rev. Stat. ch. 111, sec. 23, and there is the same omission in the revisal of 1854; Rev. Code, chap. 107, sec. 26. The former insertion and the present omission of the particular exception are conclusive, that the act is to be received according to the import of its strong and general terms, and therefore a master cannot now arm his slave for any purpose; consequently, the judgment of the justice, for the punishment of the defendants, was according to the law, and it was error to discharge them.

The Court is at a loss to discover the ground on which the the master was fined. When the slave is found hunting, any person is authorised to arrest and bring him before a justice of the peace for trial and punishment, and to take him home; and then the act adds, that the master shall pay the taker-up the same reward which is allowed therein for taking up a runaway, viz., five dollars, "which the person taking up shall be entitled to recover from the master." That only gives a civil action for the reward to the person entitled, but it creates no offense in the master, much less gives the justice authority to fine him upon the proceedings against the slave, to

which the master is no party, and in this case he is not named in the process, except in the description of the defendants as being his slaves. For that reason, indeed, it would seem, the judgment against him is void *ab initio* and could not be enforced by execution; and it is not easy to say, how it ought to be dealt with here. But in order to terminate the controversy, it is thought best to reverse that part of the proceedings of the justice; while in the rest, there is no error; which will be certified. The master must pay the costs of this Court.

PER CURIAM. Judgment affirmed in part.

ADAM BUTNER *v.* THEODORE F. KEELHN, *Executor.*

Wherever an action could have been *revived* against an executor, it may be *brought* against him.

ACTION ON THE CASE, tried before SAUNDERS, J., at Spring Term, 1858, of Forsyth Superior Court.

This was an action on the case for injuries done to the plaintiff's house, in which the testator was a lodger, by his conducting certain experiments with gun-powder and other inflamable substances, so carelessly and negligently, that an explosion took place, whereby the house was much torn and shattered. The testator himself was much injured also, and died in a few hours; and the action was brought against his executor. On the trial, the counsel for the defendant, insisted that the action did not survive against him.

There was a verdict for the plaintiff, subject to the opinion of the Court on that point, and afterwards the presiding judge was of opinion with the defendant, and set the verdict aside, and entered a nonsuit, and therefrom the plaintiff appealed.

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

RUFFIN, J. It was admitted by the counsel, for the defendant, that if an action had been brought against the testator, in this case, it might have been revived and proscuted against the executor. But it was contended that it could not be brought originally against the executor. The distinction is taken on the terms used in the acts of 1799 and 1805, and those prior, which are confined to the "revival" of actions for tort and preventing them from "abating," and do not give "actions" against executors or administrators. There is that peculiarity in the phraseology of all the older statutes on this subject. But from the passage of those acts of 1799, and 1805, actions for torts by a testator, which did damage to property, have been brought against executors, as well as those brought against the testator revived, upon his death, against the executor. The acts are for the amendment of the law, and received, therefore, a liberal construction; and, as there is the same reason for giving the action, as for reviving it against the executor, it was, in practice, extended to the former, upon the equity of the acts. Many such actions were brought against executors and their propriety never questioned. In the course of time, however, the objection was raised in a few cases. But they all received decisions favorable to the rights of the plaintiffs as in *Arnold* v. *Lanier*, 1 Law Repos. 529, and in *Howcott* v. *Warren*, 7 Ire. 20, and *Howcott* v. *Coffield*, 7 Ire. 24. In the two last cases it was held, that for damages done to land by overflowing with a mill-pond, a petition, under the statute, would lie both for and against executors, while it had been held also, in *Wilson* v. *Myers*, 4 Hawks' 73, that the nature of the injury, in such a case is not altered by the act giving the remedy by petition, but it still remained a tort. Those adjudications would seem sufficient to settle the construction of those acts, to say nothing of the long practice prevailing in the profession. But in *Rippey* v. *Miller*, 11 Ire. 247, it was decided that in an action of trespass against an executor for injury done to real estate by the testator, it would survive as to the damages for the loss, but not as to vindictive damages. If, therefore, this question depended up-

on the statutes before mentioned, the Court would be obliged to sustain it. All possible doubt is, however, now removed by law as expressed in the last revisal of 1854, in which it is enacted that executors and administrators shall have *actions* in like manner as the testator or intestate might have had against any person, *his executors and administrators* in all cases, except where such actions *being commenced, are not allowed by statute to be revived* on the death of a party. So, the law is plain, that whenever an action can be revived against an executor, it may be brought against him, and the judgment of nonsuit must be reversed, and judgment rendered for the plaintiff on the verdict.

PER CURIAM, Judgment reversed.

The State on the relation of WM. A. LATHAM *and others v.* F. F. FAGAN *and others.*

Where the money and property of an infant, without a guardian, was ordered by a decree of a County Court to be paid over to the clerk of that court, to be by him invested and managed, under the direction of the court, to the use of the infant, it was *Held* that such clerk and his sureties were liable on the official bond in force at the time of the making of the decree, independently of the time when the property was received.

THIS was a case agreed, tried before SHEPHERD, Judge, in which these facts are stated. Thomas Latham died intestate, leaving the relators, who are infants, his next of kin. Administration was committed to one Bowen, who filed a petition early in 1849, against the relators, praying that an account might be taken of the estate in his charge and settled, so that he might pay over the same. At May Term, 1849, a decree was made in the cause, ascertaining the estate belonging to the relators, who were then without a guardian, to be the sum of $220,88, in ready money, and a negro, at that time hired out for the year 1849, and directing the said estate to be paid and delivered to the defendant Fagan, then

the clerk of the court, to be by him invested and managed for the benefit of the relators, under the direction of the court; and on the 23d of May, 1849, the money, $220,88, was paid under the decree by Bowen to Fagan, and at the end of the year, the negro was also delivered to him, and he hired him out annually for several years, and afterwards, under an order of the Court, sold him, and he received the hires and purchase money. Fagan was elected clerk of the court in August, 1845, for four years, and in August, 1848, he renewed his bond, by giving that now sued on, with the other defendants as his sureties. In August, 1849, he was elected again, and was in office until August, 1853, regularly giving bond. It was agreed that if the defendants were liable in law on the bond of 1848, for the money received by Fagan, as the hires and price of the negro, then judgment should be entered therefor, and for the sum of $220,88, with interest on those sums, and if not so liable, then the judgment should be for the sum of $220,88, with interest thereon. His Honor was of opinion that the relators were entitled to the whole amount received by Fagan at any time, as damages for the breach of the bond; and from a judgment accordingly, the defendants appealed.

Smith and *E. W. Jones*, for plaintiffs.
Winston jr., and *Gilliam*, for defendants.

RUFFIN, J. When the case was opened, it was thought to be one of those, of which so many have been here, where independent acts of a clerk or sheriff were done, partly during one term of office and partly after a re-election, and that, in accordance with former decisions, the defendants were not liable but for money received, or for acts of omission or commission, happening during the term for which the bond was given. But on consideration of the act of 1848, ch. 40, the Court has adopted the opinion of his Honor. The act authorises the proceedings at the instance of an administrator, which were had in this case, and provides, after a decree finding a bal-

ance of money, or other estate in the hands of the administrator, due to an infant without a guardian, that the Court may direct the same to be paid and delivered to the clerk or the clerk and master, to be by him invested or managed under the direction of the Court for the use of the infant, and then creates a liability on the official bond, for the duties enjoined by the court in relation to the property. It is no part of our enquiry, whether other parties, on other bonds, may not also be liable, for the whole, or a part of this fund. It is sufficient if these defendants are liable; and the Court is of opinion that they are bound to make good all that Fagan rightfully got at any time under the decree. That required the whole fund to be paid or delivered to him, and it is not material when he received it, since it gave him the right to receive it at any, and all times, to be managed by him under the directions of the Court. His duty and power did not arise merely out of his relation to the Court, as its clerk, since the discretion is vested in the Court to make the clerk and master the *quasi* guardian of the infants instead of the clerk. If Fagan had not been re-elected, he would still, by virtue of the decree appointing him originally, have been the proper person to receive and invest the estate until some other had been designated by a new direction of the Court. He could not have accounted with his successor in office and delivered the fund to him without an order discharging him, and prescribing an investment by the successor. If, in the case that happened, of his re-election, he had, during his second term, accounted to the Court, and a new direction, founded thereon, had been given him, as being then the clerk, touching the investment, we should have held that a discharge of his bond, in the same manner as if he had been ordered to pay it to his successor, and had paid it. But no part of this fund came to him but by force of the decree in the cause, and he then undertook to manage it for the benefit of the infants under the orders of the Court, and from that nothing can discharge him but accounting to the Court, from which he derived his authority,

and paying over the estate in conformity with the subsequent direction of the Court.

PER CURIAM, Judgment affirmed.

STATE *v.* RICHARD ATKINSON, ALVIN SHALLINGTON AND BRYAN WILLIAMS.

Where declarations are called out against a party, there is no rule requiring the jury to believe implicitly a part of such declarations favoring the party making them, but it is their duty to consider the whole of the declarations together, to adopt such as they believe, and to reject such as they disbelieve.

Where defendants were indicted for a riot and an assault and battery on a slave, and relied upon declarations made by them at the time of the offense committed, to the effect that they were patrols. *Held* not to be error for the Court to tell the jury, that their not producing record or other evidence of such appointment, raised a presumption against them.

INDICTMENT for a RIOT, tried before CALDWELL, Judge, at the last Fall Term of Johnston Superior Court.

Mrs. Jernigan testified, that on a certain night after ten o'clock, and after the family had retired, she and her husband were awakened by the cries of one or more of their slaves; that she went out first, and at a short distance from their dwelling-house, she found one of her husband's slave's, Bill, tied with a rope and held by the defendant Shallington; that she seized it, and in the scuffle which ensued between her and this defendant, the slave made his escape; that she then heard Jack cry out at some short distance saying, "I am ruined," and on going to where he was, she found him tied, lying on the ground, with six wounds inflicted on his breast, abdomen, back and head; that the defendants had two bowie knives, and on her husband's coming up, two of them branished these weapons over his head, and one of them about his person; that one of the parties said he had come for revenge, and

would have it; that a lighted candle was brought out and was immediately blown out by some one of the defendants. This witness also proved that Atkinson said that Jack had cut his hand, and he would give him fifteen lashes, which was done, the boy then immediately sank down, and his bowels came out. She further proved, that after Jack was cut and tied, and before he was whipped, some one of the parties said that they were acting as patrols.

The defendants offered no evidence, but insisted that these declarations, having been called out by the State, were evidence for them, of the fact, that they were patrols.

The Court charged: That where the declarations of the defendants were called out as evidence against them, the jury were bound to hear and act upon all they said; but were not bound to believe all the parties said. And the Court also instructed the jury, that where parties were charged with an offense, and they had it in their power to produce a record or other evidence, to discharge them, the law raised a presumption against them, if the evidence was not produced.

The defendants' counsel excepted to the charge.

Verdict for the State. Judgment. Appeal by the defendants.

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

BATTLE, J. The first part of his Honor's instructions to the jury was clearly right. When the declaration of a party is offered in evidence against him, all that he said at the time must go to the jury, and must be considered by them, but there is no rule which requires them to believe every part of the statement, and to return their verdict in accordance with it. On the contrary, they are at liberty to scrutinize the statement; and if they believe a part of it to be improbable, or at variance with the other facts clearly established, they may reject such part, or hesitate in acting upon it, until other

proof is brought to sustain it; *Lawrence* v. *Rayner*, Busb. Rep. 113.

The other part of the charge is equally well sustained, both by principle and authority. The defendants were undoubtedly guilty of the riot, with which they were charged, unless they could defend themselves upon the ground of their authority as patrols, and the burden of proving such authority was upon them. This proof they might have made, either by the production of an order from the records of the county court showing their appointment, or by showing that they were employed as patrols by the patrol committee, as prescribed in the 83d chapter of the Revised Code, section the first. The failure or neglect to produce this evidence, necessarily left the presumption to arise that none such was in existence, and, therefore, the defendants were left to rely upon their own declarations, the benefit of which, his Honor gave them in his previous instructions. In the case of the *State* v. *Morrison*, 3 Dev. Rep. 299, it was decided that, though an indictment against a person for retailing spirituous liquors by the small measure, without a license, should contain the negative averment, of a want of license, the burden of proving that there was a license, lay upon the defendant. See also, *State* v. *Woodly*, 2 Jones' Rep. 276, where the subject of proving negative averments, in indictments, is fully discussed; and the distinction between the cases, where such averments, must be directly proved by the State, and where they will be inferred from the absence of proof on the part of the defendant, is attempted to be marked out and followed. In this case, there is no negative averment, and the allegation of their being patrols, comes from the defendants; and it is necessary to their defense, and it follows, as a matter of course, that they must prove it by such written or other evidence as the law requires. If the only testimony which they can produce is a part of their own declarations, as proved against them on the part of the State, the law will hold them to be guilty for want of other proof, unless the jury can rely upon their own

statement of the fact or facts, which constitute the ground of their defense.

In taking this view of the case, we have assumed, for the sake of the argument, that proof of their being patrols would have justified the acts of the defendants. But we are very far from thinking that the authority, which the law confers on patrols, can sanction such outrageous conduct as that disclosed by the bill of exceptions. The extreme punishment which the law allowed them to inflict on an insolent slave, was far short of the deadly "revenge" for which they said they had gone to the prosecutor's house, and which they took with their bowie-knives. Admitting them to have been patrols, on account of the manifest excess of their authority, they were guilty of the riot for which they were indicted.

Let it be certified that there is no error in the record.

PER CURIAM, Judgment affirmed.

THOMAS C. ARRINGTON *v.* WILMINGTON & WELDON R. R. CO.

Where an article was delivered to a common carrier, to be delivered to a factor, at a certain market, who had been instructed not to sell until ordered, and such carrier delivered it to a factor at a different market, who had no instructions concerning it, and was by him immediately sold, upon its appearing that the article in question rose in price, from that day until the suit was brought: *Held* that in a suit against such common carrier for misfeasance, the plaintiff was entitled to recover the highest price attained by the article within that period, such suit having been brought within a reasonable time.

Held further, that the receipt of the proceeds of the sale from the factors, making it, was no bar to the recovery of damages for this misfeasance.

ACTION on the CASE, tried before SAUNDERS, J., at the last Fall Term, 1857, of Nash Superior Court.

This is an action on the case, against the defendants as common carriers, and was submitted to the Court and jury on the

following facts: On the 5th of March, 1856, the plaintiff delivered at the defendant's depot, at Battleborough, nine bales of cotton, weighing 3953 lbs. in good order, and with the plaintiff's name on them, with orders to the company's agent at that place, to forward them by the road to his factors, Messrs. Odom & Clements, in Norfolk, Virginia, and the agent accepted them for that purpose. Instead of marking the bales in the name of Odom & Clements, as the consignees, they were entered on the books and way-bill of the company, as consigned to Messrs. McIlwaine, Son & Co., of Petersburg, in Virginia. The cotton was accordingly sent by the defendant's agent to McIlwaine, Son & Co., who received it, and sold it on the 28th of March, 1856, at 9⅝ cents a pound; and both in Petersburg and Norfolk, that was the price on that day, and the charges of factors were the same. The plaintiff advised Odom & Clements of his intention to forward the cotton to them, and ordered them to hold it until he should direct a sale, as he thought it would rise. He was informed afterwards, by them, that they had not received the cotton, and on the 25th of April, 1856, discovered from the company's books, that it had not been sent to Norfolk, but to Petersburg, as before-mentioned. On the first of May following, McIlwaine, Son & Co., rendered to the plaintiff an account of sales, and sent him the nett proceeds, which he received. The price of cotton advanced rapidly and regularly after the sale, and on the first of May, was twelve cents, and in September, 12⅝, of which the plaintiff was regularly advised by Odom & Clements. Storage was thirty cents per bale for the first month, and for each succeeding one, twelve and a half cents. The action was commenced August the 12th, 1856. The question, on the trial, was as to the amount of damages; and the presiding Judge instructed the jury that, as the rise and fall of the cotton was contingent, the plaintiff was only entitled to nominal damages, and there was a verdict for six pence, and judgment, and the plaintiff appealed.

Batchelor and *Miller*, for the plaintiff.

Moore and *Dortch*, for the defendant.

RUFFIN, J. In actions of this kind, and, indeed for torts by misfeasance generally, there seems to be no reason why the damages, assessed, should be nominal only, and not such as are commensurate with those sustained, since it must be the purpose of justice and law, to compensate the party injured, when practicable, for the actual loss arising naturally and directly from the wrong. The question, then, is, what loss to the plaintiff was caused by the conduct of the defendant. It was manifestly a real loss, to the amount of the difference in the proceeds of the cotton, if the defendant had, as in duty bound, carried it to the plaintiff's consignees, to be disposed of under his contemporaneous instructions, to hold it for farther orders, instead of consigning and carrying it to different persons and at a different market. The damages would have been but nominal, if the cotton had been sent by the plaintiff with orders to his consignee to sell immediately, or, perhaps, without orders, since it happened that it would arrive at each market by the same time, and the price and charges at each were the same. But this cotton was sent under orders to the Norfolk factors not to sell on arrival, but to wait for orders, giving as a reason, the plaintiff's belief, that the price would rise. If it had been duly carried to Norfolk, and the house there had, in violation of their orders, sold immediately, it certainly would have been a breach of duty, [unless in certain excepted cases of the factor being in advance, or under responsibilities for the principal, making a sale necessary,] and the factor would be responsible for the consequences, that is, the loss arising therefrom. If a day for the sale be fixed in the orders, and the factor make it before, the rule is, that the principal shall have the market price on that day, if better than that got at the sale; *Brown* v. *McGraw*, 14 Peters, 479. For the owner has the right to control his own property, and exercise his own judgment as to the market at different periods, and ordering a sale on arrival, or fixing a day certain, is the exercise of his judgment, and ties up the parties to that time, unless the order be subsequently modified. It is a common thing, however, not to designate any certain time of sale,

but to forward the goods to the factor, so as to have them ready for the market, when the necessities or the judgment of the owner may require a sale, and that is done by orders to the factors to store and wait for an order to sell; and in such a case, it is clear that the factor is in default if he sell before the order, as he would be if in the former case, he had sold after or before the time designated. There may be more difficulty in ascertaining the loss, as it would not do to allow the principal an indefinite time to close the transaction, and it would be a vain thing for him to give the order to sell after he knew the sale had been already made. It has, indeed, been decided by the Supreme Court of New York, that if a factor sell, after instructions not to sell, he is liable in damages for the difference between the price got by him and the highest price the article brought in the market before suit was brought, if the suit was commenced within a reasonable time; *Marfield* v. *Douglass* and *Goodhul*, 1 Sanf. Supm. Co. R. 360. This suit was certainly brought within reasonable time, as it was to the first term of the Superior Court of the county, in which the plaintiff lived, after the wrong done, and the writ was issued on the 12th of August. Certainly the rise after the suit could not be taken into the estimate, as by bringing suit the plaintiff necessarily restricted himself, to the damages which he then alleged he had sustained. But it is not material to consider this point farther, since there was no material variation of price between the 12th of August and the 1st of May, when the plaintiff became fully informed what disposition had been made of his property, by receiving the amount of sales and the nett proceeds from the Petersburg house, and we think every one must admit, that if he is to be compensated at all for his loss, the plaintiff was at least entitled to the price at the time he got the full advice of the sale.

It seems to follow, necessarily, from those positions, that the defendant is liable to the same measure of damages that would have been meted to the Norforlk factors, had the goods come to their hands, and they had, in disobedience of orders,

made the sale on arrival. For the wrongful act of the carrier in not delivering the cotton to those factors, and delivering it to others of their own choosing, at a different place, with orders to sell immediately, or without orders, leaving the factors to their own discretion, instead of that of the owner, has evidently been the direct cause of a loss to the plaintiff, to the amount, at least, for which his own factors would have been liable. It is said, those damages are vindictive, and more than could have been recovered in trover, and therefore, ought not to be given in this action. It is true, that in trover for an actual conversion, by a sale of the thing, the value at the sale is the measure of damages. But that arises from the form of the declaration, which supposes the property to be changed by the sale, and that there the injury and loss to the plaintiff was complete, and it has no application to an action on the case against a common carrier, who tortiously carried goods to a wrong place, and for immediate sale, instead of delivering them at the right place, where they would have been sold at the pleasure, and on the judgment of the owner, at a higher price. The miscarrying, if not willful, must have been the effect of very gross negligence; and in such a case, the carrier, ought, in justice and in commercial policy, to be held responsible for all the natural consequences of his default.

It was also insisted, in the argument, that the plaintiff had sanctioned the disposition made of the cotton by receiving the proceeds from the Petersburg merchants. But he did not receive the money in satisfaction of the wrong done him by the defendant. He took it for the liability of the factors, upon their own acts, after the goods came into their hands; which he might well do, as he could not have recovered more from them, either for money had and received or in trover. But the liability of the carriers for other, and further damages, for the wrongfully miscarrying of the cotton to a wrong and a bad market, and having it sold at the current price, was not intended to be, and was not affected by the plaintiff's receipt

of the actual proceeds from men, who, as far as they acted, were innocent of any wrong.

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

STATE *v.* SAMUEL KEISLER, *et al.*

Where, upon the trial of an indictment, for unlawfully playing cards in a tavern, it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been let by the month for a shoe shop, and was not under the control of the landlord; it was *Held* that the defendants could not be convicted under the 75th section of the 34th chapter of the Revised Code.

INDICTMENT for GAMING, tried before DICK, J., at the last Fall Term, of Forsyth Superior Court.

In this case it was proved, that the room, in which the gaming took place, was in the basement of Mr. Zeverly's hotel, in Salem; that it had been rented, by the month, to a Mr. Turner, for a shoe shop, and was occupied by him exclusively for that purpose; that he kept the key, and had the exclusive possession and control of the room, in question, at the time of the gaming, laid in the bill of indictment. It was proved that Turner and his wife boarded in the tavern with Mr. Zeverly, who used the rest of the house as a public tavern.

The playing at cards and betting being proved, the defendants' counsel asked the Court to instruct the jury, that upon the facts, above stated, the defendants could not be convicted. A verdict of guilty was entered by consent, subject to the opinion of the Court upon the point made by the defendants' counsel. Afterwards, the Court being of opinion against the defendants, gave judgment accordingly, from which they appealed.

Attorney General, for the State.
McLean and *Fowle*, for the defendants.

BATTLE, J. The counsel for the defendants contend, that their defence is fully sustained by the authority of the case of the *State* v. *Black*, 9, Ire. Rep. 378. That was an indictment against the defendants for playing at cards together, and betting money thereon, in a house situate on premises, occupied by one Marshall S. Black, in which he retailed spirituous liquors. From the testimony, it appeared that there were two adjoining lots owned by the same person, both fronting on the same street of a village. The owner occupied both as one tenement; his dwelling-house being on one of them, and on the other, there was a store or shop, situate on the front line, while there were a barn and stables on the back line. The shop was let to Marshall S. Black, who retailed merchandise and spirituous liquors therein; but the owner continued to occupy all the other parts of both lots, including the barn and stables. The gaming was carried on in the barn; and the Court held that it was not within the statute; that the place of gaming, and the place of retailing, must be the same house, or, at the least, parts of the same establishment; and the "premises" mean those places only which are occupied by the retailer with the house in which he retails, as one whole, and, so, could not include a house not occupied by him, nor let to him.

The counsel for the State, endeavored to distinguish that case from the present, by the fact, that there, the house in which the gaming was carried on, was entirely separate and distinct from the one in which the spirituous liquors were retailed, the two being so little connected with each other, both in position and occupancy that, as was said by the Court, "the barn could not be laid as Marshall Black's, in an indictment for burglary or arson." But in the present case, the counsel insists that the room, in which the offense of gaming was committed, was part of the building occupied as a tavern; and that though it was let by the landlord to another person as a shoe-shop, it was regarded by the law as still in the occupation of the landlord, and might be described to be his house in an indictment for burglary; and for this, he cited 2 East.

P. C. 507; 2 Russ. on Cr. 15, and several other authorities. The positions of the counsel, in relation to an indictment for burglary, may possibly be true, but we do not think that is the true test for ascertaining whether the indictment for gaming can be sustained. The section of the chapter of the Revised Code, which immediately follows that upon which the present indictment is founded, (see Rev. Code, chap. 34, sec. 76,) makes the keeper of the tavern, or the retailer, indictable for knowingly permitting the gaming, "in every such house, or any part of the premises occupied therewith." From this, the inference is irresistable, that other persons cannot be found guilty of unlawful playing at cards in a room, or other place, over which the landlord or retailer has no control, and for which, therefore, he could not be indicted. Such, we understand, from the bill of exceptions, is the case now before us. The room in which the gaming occurred was, at the time, in the occupation and under the exclusive control of another person, to whom the keeper of the tavern had let it for a shoe-shop by the month. It was in the basement of the house, and was used, as we know that in many places, basement rooms are often used, for purposes entirely foreign to those of tavern keeping. After he had rented it, the landlord had no further control over it during the continuance of the lease; nor with reference to that, had he any control over the lessee, merely because he and his wife were boarders. Had that, or any other part of the tavern, been let by collusion for the purpose of a gaming establishment, then it might not have been protected from the operation of the statute, and both the landlord and the players, and betters, might have been indicted. There is no suggestion of any such collusion in this case, and we are of opinion that the defendants have been wrongfully convicted, and are, therefore, entitled to a new trial.

Per Curiam, Judgment reversed.

WILLIAM W. BRANCH *v.* JOSEPH J. DANIEL.

Where the owner of a tract of land, uncertain as to quantity, covenanted to make title to the same, upon the covenantee's paying a certain sum and giving bond and surety for the balance of the purchase-money, *at a certain price per acre*, it was *Held* that an action could not be supported upon the covenant until there was a survey of the premises.

Possibly, a demand by the covenantee for a joint survey, and a refusal on the part of the covenantor to concur therein, might have been sufficient without an actual survey.

ACTION of COVENANT, tried before CALDWELL, J., at the last Fall Term of Halifax Superior Court.

The plaintiff declared upon the following covenant: "Know all men by these presents, that I, Joseph J. Daniel, of the county and State aforesaid of the one part, and William W. Branch, of the county and State aforesaid, of the other part: Witnesseth, that I, the said Joseph J. Daniel, hath, this day, bargained and sold to the said Branch, the whole of my lands on which I live, consisting of the lands I bought of Isaac N. Faulcon and Joe Williams, lying in the county and State aforesaid, on Mill Swamp and Reedy Branch, supposed to contain between eight and nine hundred acres, at five dollars per acre. I, the said William Branch, promise and agree to pay to the said Joseph J. Daniel five dollars per acre, for the whole of his said land, viz., three thousand dollars, I promise and agree to pay on or before the first day of January next, 1857; the balance to be paid in two equal instalments; one half the balance, January, 1858; the balance and remainder, the first of January, 1859.

"Either party failing to comply with the above obligation, promise and agree to pay to the other one thousand dollars forfeit damages, to be *recovered* out of our goods and chattels, &c., on failure to comply.

"I, the said Daniel, promise and agree to make the said Branch a deed on the payment of three thousand dollars cash, and bonds for the balance, at one, two and three years pay-

ments, satisfactorily executed to the said Daniel. Given under our hands and seals, this the 16th day of August, 1856." Signed and sealed by the plaintiff and defendant.

The breach alleged was the failure of the defendant to execute a deed according to the terms of the covenant.

It was proved that the plaintiff, with one McDaniel, went to the residence of the defendant on the 1st of December, 1856; that before they started, McDaniel, at the instance of the plaintiff, counted of his (plaintiff's) money, $3000, which the latter folded up and put into his pocket, requesting the former to go with him and become his surety; that the plaintiff told the defendant, on getting to his house, that he come to pay the $3000 towards the purchase of the land, and McDaniel informed the defendant that he had come, at the request of the plaintiff, to become his surety; that the defendant replied that he had declined selling his land; that they were in a frolic when the contract was entered into; that he would not take $8000 for it, and he hoped the plaintiff would let him off; that the plaintiff pulled out his money and said, he could pay the $3000 in bank bills, or could get the specie in a few days; that the defendant replied, he need not trouble himself as to the specie, or surety, as he had declined selling his land.

The defendant insisted that the covenant was vague and uncertain, and that no recovery could be had on it; also that the land ought to have been surveyed, and as the plaintiff had to move in the matter, he ought to have had the land surveyed, or demanded a joint survey.

The Court declined charging the jury as contended by the defendant, but told them, that if the witnesses were to be believed, the plaintiff was entitled to recover. Defendant excepted. Verdict for the plaintiff. Judgment, and appeal by the defendant.

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

PEARSON, C. J. The acts to be done by the parties, under

this covenant, were concurrent; and to entitle the plaintiff to recover, it was necessary for him to prove: 1st, either a performance on his part: 2nd, or, that he was ready and able, and offered to perform, but the defendant refused to accept, which is considered in law as equivalent to a performance, for the purpose of the action: 3rd, or that readiness and ability, on his part, was dispensed with, because, it was made impossible by the act of the defendant, or was prevented by his request.

These principles have been so recently discussed and decided, that it is unnecessary, at this time, to do more than make an application, to the case now under consideration; *Grandy* v. *Small*, 5 Jones' Rep. 50; *Shaw* v. *Grandy*, Ibid. 56; *Walker* v. *Allen*, Ibid. 58.

Performance on the part of the plaintiff, is not alleged, but he insists that the case falls under the second head; for that he was ready and able and offered to perform, and the breach assigned is, that the defendant refused "to execute the title, at the time, when the $3000 and security were tendered."

Assuming that the $3000, in bank bills, were the same as specie, and that the surety, who attended at the instance of the plaintiff, was good, still the averment, that the plaintiff was ready and able to perform his part of the covenant, was not true; and consequently, he was not in a condition to demand a performance on the part of the defendant. There was readiness and ability in respect to the cash payments, but in respect to the security, which was to be given for the balance of the price, the plaintiff was not ready and able, because, the amount, for which the notes were to be given, could not be fixed, until the exact number of acres was ascertained, and it was useless and trifling to talk about executing notes for the balance, at the time when the breach is assigned. If the plaintiff had purposed to make a joint survey, or to make a survey himself, and had been forbidden by the defendant from entering upon the land for that purpose, possibly, the case might have fallen under the third head; but nothing of the kind was

done, and it is unnecessary to enter upon a consideration of the case in that aspect.

To meet this difficulty, it was suggested by Mr. *Batchelor*, that he was ready and able, at the time, to have entered into bond, with a condition for the payment of such an amount as might thereafter, upon a survey, be ascertained to be the true amount. It is sufficient to reply, that a bond of this description was not in contemplation of the parties, and would not have conformed to the covenant, by which the defendant was entitled to simple and absolute bonds, for money, in fixed sums, which it is admitted could not, at that time, have been executed. There is error.

PER CURIAM, Judgment reversed.

JOSEPH HOOVER *v.* J. L. R. MILLER, *Adm'r.*

An inventory is but *prima facie* evidence to charge the executor with assets, so as to call on him for proof to rebut it.

ACTION of DEBT, tried before DICK, J., at the last Fall Term of Randolph Superior Court.

The action is debt on a bond of the intestate, to which the defendant pleaded, fully administered and no assets.

On the trial, the plaintiff gave evidence of assets in the hands of the defendant, to the value of $365,02; and to charge the defendant with a further amount of assets, the plaintiff gave in evidence the inventory, returned by the defendant, in which was included "three-eighths of a lease upon the Davis lot at the Sawyer gold mine," which the defendant had not sold. The defendant then offered evidence, that in fact, his intestate did not own the supposed term or lease; which was objected to by the plaintiff, on the ground, that the defendant was concluded by his inventory. But the Court held that the inventory was only *prima facie* evidence of the lease, and

that the defendant might show, by proof, that it had no existence, or was of no value, and admitted the evidence. The plaintiff then offered evidence, that the defendant had made a sham sale of the lease without having advertised it, and also offered to show, by miners, what the lease would have sold for, if due notice had been given. But the Court rejected the evidence offered, at the same time allowing the plaintiff to give evidence as to the value of the lease. Upon that evidence it appeared, that the intestate had worked the mine in the summer before his death, which occurred in October, but relinquished it, because the water rose in the shaft, so that it could not be kept down by a hand windlass and bucket, as it had usually been done, but would require a whim and horse-power, or steam engine to work it profitably.

The Court instructed the jury, that if they found there was a valid lease to the intestate, they should charge the defendant with the value of it, and that in estimating the value, they should consider the expense of working the mine, so as to get the gold, if any was there; and further, that if they found that the intestate had no lease, then they should find for the defendant on that point. The verdict charged the defendant with assets to the amount of $365,02, and found that he had no more; and from a judgment on the verdict, the plaintiff appealed.

Gorrell, for the plaintiff.
J. T. Morehead, for the defendant.

RUFFIN, J. As the verdict was found, all the points of evidence, as to what the supposed lease would have sold for, or as to its value, and the instructions relative thereto, are put out of the case, since it negatives the existence of any such lease. The only question, then, is, as to the effect of the inventory as evidence of the lease; and on that, the Court thinks his Honor ruled properly. An inventory has never been deemed conclusive on an executor, but only as throwing the onus on him to discharge himself, upon evidence, if he can,

as to a thing contained in it. It would be mischievous to hold otherwise, and often defeat the purpose of requiring an inventory; which is to get as true and full an account of the estate as possible, for the benefit of the executor, legatees and creditors. If they were to be taken as conclusive, executors would hardly ever make direct and positive inventories, but put down the title of all the property as doubtful, and all the debts as desperate. Indeed, but few honest men would undertake the office at such a risk; for an inventoried slave might be recovered from him on a better title, or a bond turn out to be forged, or to have been paid. The executor cannot possibly know the affairs of the testator perfectly, or even minutely. All that can be expected of him is, that he should make a fair and honest account, as they appear to him; and if he be mistaken, he ought to be allowed to show that; hence, as Swinburn says, an inventory is not binding, nor very much regarded at common law; for if it be too high, it shall not be prejudicial to the executor, and if too low, it shall be no advantage to him; but the value found by a jury on *plene administravit* pleaded, is binding. See Swinb. on Wills, 426. The modern English cases on this point, are collected in Williams' Exe'r. 1678–80, and show that, at most, the inventory is but *prima facie* evidence to charge the executor with assets, so as to call on him for proof to rebut it; which accords with the general understanding and practice here. In the case before us, although the defendant might from rumor, or the fact of the intestate's working the mine shortly before his death, have believed he had a lease, yet it may have happened, and probably did, that in truth, he had none that was valid, for the want of its being in writing, as required by the act of 1844, or it may have expired.

PER CURIAM, Judgment affirmed.

HAYWOOD AND PITTSBOROUGH PLANK ROAD COMPANY *v.* ELIAS BRYAN.

Where an Act of Assembly, incorporating a company, in which the State was not interested, *directed* that a certain per centage should be paid at the time of making subscriptions to its stock, but the company organized, and admitted a subscriber to participate in its meetings, and in the regulation of its affairs, without paying such per centage, it was *Held* that he could not afterwards disavow his membership, and refuse to pay his subscription.

Where the writings, appointing proxies to act in the meetings of the stockholders of an incorporated company, had, after being used, been thrown aside as useless, it was *Held* not to be necessary to show that search had been made for them, preliminary to the introduction of parol evidence of their contents.

Where a party had been permitted to subscribe to the stock of an incorporated company a certain amount, *payable in materials*, which would be needed in the operations, on his refusing to pay in such materials, it was *Held* that his subscription became demandable in money, and that an action of debt would lie for its recovery.

ACTION of DEBT, tried before SAUNDERS, J., at the Spring Term, 1858, of Chatham Superior Court.

The action was brought to recover the balance due upon a subscription to the Haywood and Pittsborough Plank Road Company, which was $400 00, with the privilege of paying the same in sawed lumber. Upon making such subscription, the defendant did not pay the preliminary per centage required by the charter; his participation in the affairs of the company was by proxies appointed, upon two occasions, to act in the meeting of stockholders, representing eight shares. The writings, by which the proxies were appointed, were not produced on the trial. It was shown that the by-laws of the company made no provision on this subject, and at the meetings of the stockholders after the committee upon proxies made their report, the papers conferring the authority, were thrown aside as useless, and generally left upon the floor of whatever room the meeting occupied; that in this case, the persons appointed had not preserved them; that the company had no archives except such papers as were produced in

Court; that these writings were not among them, but that the officers of the company had made no search for them. It also appeared that demands were made on the defendant, at the mill, for the lumber, as instalments were called for by the directors; that he neglected, and at last declined to furnish it. After due compliance with the requisitions of the charter, the defendant's stock was sold, and this action is brought to recover the balance.

The points of law, made by the defendant below, were: 1st. That the evidence upon the subject of the proxies, ought to have been excluded. 2ndly. That the non-payment of the preliminary per centage, rendered the contract null. 3rdly. That under the circumstances of the case, an action of debt would not lie. His Honor ruled these points against the defendant, for which, he excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

Phillips and *K. P. Battle*, for plaintiff.
Haughton and *Howze*, for defendant.

BATTLE, J. In considering the objections urged by the defendant, on the trial, against the right of the plaintiff to recover, we will notice first, that which denies validity to his subscription, because of his not having paid one dollar, on each share, at the time when he made it. The plaintiff owes its existence as a corporation to the act of 1852, ch. 108, the three first sections of which, prescribe the manner in which it shall be formed, and the name which it shall bear. The fourth section then enacts as follows: "That upon any subscription of stock as aforesaid, there shall be paid at the time of subscribing, to the said commissioners, or their agents appointed to receive subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid, or secured in such manner, and at such time or times as may be required by the board of directors of said company." The defendant did not make the first payment, which was requir-

ed at the time of his subscription, and he contends that such omission or neglect made his subscription null and void, and that consequently, he never became a stockholder in the company. The answer to this is obvious. Neither the section above recited, nor any other part of the charter, declares the subscription void for the want of such payment, and, therefore, the very foundation of the objection, which occasioned the difficulty in the case of *McRae* v. *Russell*, 12 Ire. Rep. 224, with regard to the Wilmington and Manchester Railroad Company is wanting. The State is not in any way interested in the company, either as a stockholder, or as a contributor to its funds, or as guarantor of its debts, and, therefore, it was a question solely between the company and the stockholders as to what should be the time, or the manner in which the amount subscribed should be paid. It may be, that at the first general meeting of the stockholders, the defendant might have been excluded from acting as one of them until he had paid the preliminary amount, required of him, according to the terms of his subscription, but they were not bound to do so, either by the terms of their charter or by any known principle of law. If they chose to trust him, for the money he owed them, it would be a strange rule, which would allow him to take advantage of their forbearance and his own neglect. They were at liberty to receive him as a stockholder, and if they did so, and he acted as one of them in organising the company, and in the regulation of its affairs, he cannot afterwards be heard to disavow his connection with it, and repudiate his contract to contribute to its funds.

But he alleges, that there was no proper evidence, that he ever did act as a stockholder; and this brings us to consider his objection to the testimony, which was allowed to be introduced to prove his proxies. This objection is easily disposed of. The written instruments, upon which it was contended, that his proxies appeared and acted, were clearly proved to have been throwned away, as waste paper, after they had been examined and verified by a committee appointed for that purpose. Those instruments must, therefore,

be considered as having been destroyed, and it was idle to require proof that they had been searched for, before admitting secondary evidence of their contents. The true rule on that subject is well expressed in *Robards* v. *McLean*, 8 Ire. Rep. 522, that "to admit secondary evidence, it is sufficient to show, that there is no reasonable probability, that any thing has been suppressed."

The last objection, which appears upon the defendant's bill of exceptions, is as far from being tenable as either of the others. The defendant's subscription was, in effect, for eight shares of the capital stock of the company, amounting to $400, to be paid in lumber, at his own saw-mill, at a certain agreed rate. He undoubtedly had the option to pay for the amount of his subscription in that way, and the company so understood it, and were acting in good faith when they called upon him for the lumber. We cannot see the force of the argument that, because his subscription was, by the consent of the company, to be paid in that manner, he did not become a stockholder until payment was made in full. The company would necessarily need plank for their road, and they had as much right to buy from the defendant as from any other person, and we are unable to perceive any difference between paying him with his own subscription-money, and with any other funds belonging to them. He had the option of paying by delivering lumber at his mill in discharge of his contract, but when he first neglected, and then refused to avail himself of it, it became an obligation to pay money, and the company had the right, as in other cases, after the sale of his stock, as prescribed in their charter, to sue him, in debt, for the sum thus ascertained to be the balance; *Hamilton* v. *Eller*, 11 Ire. Rep. 276. If this view of the case be correct, the cases of *Grandy* v. *Small*, 3 Jones' Rep. 8, and *Cole* v. *Hester*, 9 Ire. Rep. 23, referred to by the defendant's counsel, have no application.

PER CURIAM, Judgment affirmed.

Doe on the demise of SUSAN HART *v.* SAMUEL B. DOUGHERTY.

Where the owner of land, conveyed it to a bargainee, in consideration of certain profits and advantages, contained in a bond of even date therewith, which said bond provided, under a penalty, that the bargainor was to be supported for life by the bargainee, unto which bond, a "nota bene" was added, to the effect, that it was not to be *sold, made way with or disposed of;* it was *Held* that this did not amount to a condition annexed to the estate by way of defeasance, but that the bargainor's sole redress rested in the bond.

EJECTMENT, tried before DICK, J., at the last Fall Term of Orange Superior Court.

Both parties claimed title under Rebecca Hart, the plaintiff under a will, made by her, in 1848, and proved, November, 1856; the defendant under a deed, which had been proved and registered, dated 4th of April, 1856, the consideration of which, was alleged to be a bond, of the same date, for the maintenance and support of the bargainor during her life. The bond in question, is as follows: "Know all men by these presents, that I, Samuel B. Dougherty, am held and firmly bound unto Rebecca Hart, in the penal sum of $500, good and lawful money of the United States; to the true and faithful payment whereof to her, the said Rebecca Hart, her heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with my hand, and sealed with my seal, this the 4th day of April, 1856.

"The conditions of this obligation is such, that, whereas, the above bounden, Samuel B. Dougherty, hath contracted and agreed, for and in consideration of a certain lease, or quit claim, to him this day granted, by the above named Rebecca Hart, reference thereto had will more fully show, to provide for, keep, maintain and support her, the said Rebecca's natural life, and to see her decently buried after her death.

"Now, therefore, if the above named Samuel B. Dougherty, shall have performed the above specified duties, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

"N. B. It is mutually and fairly understood, by both parties, that the said Samuel B. Dougherty, cannot sell, make way with, or dispose of, the property, mentioned in said lease or quit claim, during her, the said Rebecca Hart's natural life."

The deed referred to in the above instrument, in its first clause, is as follows: "Know all men by these presents, that, I, Rebecca Hart, of the county of Orange, in the State of North Carolina, land-holder, for and in consideration of the profits, benefits and advantages, mentioned in a certain bond, I hold against Samuel B. Dougherty, of the said county of Orange, bearing even date herewith, do, by these presents, grant, &c."

This deed was attacked by the lessor of the plaintiff, on the ground of want of capacity in the bargainor, from extreme age, sickness and imbecility, and she introduced evidence, tending to show, that the defendant was poor and irresponsible for the fulfillment of the covenant of maintainance, which it is alleged he made; and it was contended, in her behalf, that it showed want of capacity in the alleged bargainor, thus to have parted with her estate to a destitute man without security, whereby it became liable to alienation and execution for his debts; her only means of redress being by legal proceedings on the bond above set forth.

In reply, the defendant insisted, that such was not the legal effect of these instruments, but that the bond, being executed at the same time with the deed, was to be considered as a part of it, and restrained the bargainee from alienation, and prevented any liability of the land for his debts. His Honor was called on so to instruct the jury, but he declined doing so, and the defendant excepted.

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

Graham, for the plaintiff.
Norwood and *Phillips*, for the defendant.

PEARSON, C. J. The only question presented, is as to the legal effect of the addition or "nota bene," made to the penal bond, which was executed by the defendant, and "the profits, benefits and advantages," of which, are referred to as the consideration of the deed, executed by Rebecca Hart, and having even date therewith. Is this addition, a mere *covenant* not annexed to the estate, and for a breach, whereof the remedy would be by action, or is it a condition annexed to the estate by way of defeasance, for a breach whereof the bargainor, or her heirs, might enter and defeat the estate of the bargainee and revest her original estate?

The words used are appropriate to the expression of an agreement or covenant, and we can see nothing to indicate that it was the intention to make a condition or defeasance, whereby the estate was to be void, if the bargainee should sell, or dispose of the property, in the life-time of the bargainor. Apt words of condition are used in the bond, and the bargainor seems to have relied exclusively upon it, as her security for the performance of the stipulations of the bargainee in respect to her support.

There is nothing whereby either, these stipulations, or that in respect to not selling or disposing of the property, can be annexed to the estate in the land, and the bargainor seems to have depended upon the personal obligation of the bargainee in respect to the one, as well as the other.

As there is no condition, we are not called upon to express an opinion upon the question suggested, i. e., whether, when an estate in fee simple is granted, a condition, which forbids alienation during the life-time of the grantor, is not void, as being repugnant to the nature of the estate, and inconsistent therewith. There is no error.

PER CURIAM, Judgment affirmed.

DUGALD McDUGALD *v.* McFADGIN AND TYSON.

Where a party had sold and delivered an article of a stipulated quality, and at a given price, an agreement to warrant it of a better quality, without any further consideration, was *Held* to be a *nudum pactum.*

Upon a *special contract* to deliver an article of a given description, upon which an action could be maintained, it was *Held* that damages could not be reduced by showing that the article delivered was of inferior quality. *Aliter*, where the party has to resort to a *quantum valebat* or *quantum meruit.*

ACTION of ASSUMPSIT, tried before DICK, Judge, at the Fall Term, 1858, of Chatham Superior Court.

For fear of misapprehending the statement of the case sent to this Court, the Reporter deems it proper to copy it literally. It is as follows: "The defendant pleaded the general issue. At the trial, the plaintiff declared specially upon the following written agreement, viz: "State of North Carolina, Moore County. The following trade is this day made between D. McDugald and McFadgin and Tyson. D. McDugald has sold 600 barrels of No. 1 rosin, to be delivered at the still, on the plank-road, at $2,25 per bbl. of 280 lbs. This 2nd day of September, 1854." Signed,

A. McFADGIN,
W. D. TYSON,
DUGALD McDUGALD.

It was shown that the above contract was entered into at the still of the plaintiff, mentioned in the writing, and that there were then piled up, at that place, a number of barrels of rosin, greater than was required to fill the quantity contracted for; that within a few days afterwards, McFadgin then counted, accepted, and marked with initials of Tyson and himself a large number of barrels. The witness could not say how many were counted, but thought there might have been as many as six hundred. After those taken by McFadgin had been rolled aside and marked, a considerable number were still left in the original pile. And to another witness, this defendant had afterwards expressed satisfaction with the purchase he had made of the plaintiff, and said he would

make a large profit by resale. The defense was, that the rosin was not, in quality and quantity, equal to the article stipulated for; that the quality was to be rated by the New York market; that if this were not so in the terms of the original contract, still the contract became such by subsequent understanding between the parties. Parol evidence of admissions by the plaintiff, tending to prove their allegations, was introduced by the defendant; also other evidence, to show that the rosin was not No. 1, in either Fayetteville or New York. For the plaintiff, it was insisted, that if the defendants accepted the rosin at the still, they were precluded from denying, in this action, that it did not fulfil the requisitions of the contract, and so, that evidence for such purpose was incompetent. It was also insisted, that the original contract could not be altered, subsequently, by any agreement made without a consideration.

His Honor admitted the evidence offered by the defendants as above, but charged the jury, that if they should find that the defendants accepted the rosin at the place mentioned in the writing, they would be precluded from afterwards questioning its substantial agreement with article contracted for. He further charged, that after a parol contract had been entered into, as above, it was competent for the parties to alter it, by parol, at their pleasure, and that such alteration would be binding, in the absence of any consideration, for them."

"Verdict for the plaintiff for $248. Rule by the plaintiff for a new trial. Rule discharged, and appeal to the Supreme Court."

Haughton and *Phillips*, for the plaintiff.
Headen, for the defendants.

PEARSON, C. J. The statement of the case is so obscurely made up, and the opinion of his Honor, upon the question, which seems to be presented, is so obviously erroneous, that we have much difficulty in satisfying ourselves that we correctly apprehend the point, which was intended to be raised. The

evidence is not set out, but it is stated, "parol evidence of admissions by the plaintiff, tending to prove their allegations, was introduced by the defendants," who alleged that the quality of the rosin was to be rated by the New York market, and if this was not so by the terms of the original contract, still, "the contract became such by a subsequent understanding between the parties;" and his Honor held *that such alteration would be binding in the absence of any consideration.*

The point, as we understand it, is this: the plaintiff having sold and delivered to the defendants 600 barrels of No. 1 rosin, at an agreed price, afterwards undertakes, i. e., warrants, without any further consideration, that the quality of the rosin is No. 1, according to the rates in the New York market. Is this subsequent undertaking binding, or is it void as a *nudum pactum?*

It clearly falls under the familiar doctrine of an executed or past consideration: suppose I sell a horse, and the next day, without any consideration, agree to warrant that the horse is sound: is not the warranty *nudum pactum?*

We see from the verdict, that a less amount is found for the plaintiff, than the stipulated price, and interest. As the case is to be tried again it may be well to put this matter right. If the agreement to warrant the quality of the rosin had been supported by a sufficient consideration, for instance, if the defendants had agreed to give an advance of five cents on the barrel, as a consideration of the warranty, it is clear, that in an action for the price, the damages could not be reduced by proof of the inferior quality of the rosin; *Hobbs* v. *Riddick*, 5 Jones' Rep. 80, where the authorities are referred to and the subject fully discussed; and this conclusion announced: "Where an action can be maintained on 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 where 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."

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

S. SATTERWHITE *v.* A. R. BURWELL.

An agreement to forbear the collection of money for "twelve months," means twelve calendar months.

ACTION of DEBT *qui tam*, for usury, tried before SAUNDERS, J., at the Spring Term, 1858, of Granville Superior Court.

The time of forbearance was stated in the plaintiff's declaration, to be from the 6th of Feb'ry, 1855, until, and upon, the 6th of February, 1856. The evidence was that the defendant agreed to wait twelve months.

The defendant's counsel contended that the words "twelve months," used by the witness, meant twelve lunar months, and if he was to be believed, there was a fatal variance between the declaration and proof, and called upon the Court so to instruct the jury.

His Honor declined giving such instruction, but *held* that the words, twelve months, without explanation or addition, meant calendar months. Defendant excepted.

Lanier, *Winston*, *Sr.*, and *Reade*, for plaintiff.
Eaton and *Davis*, for defendant.

PEARSON, C. J. The agreement was to forbear the collection of money for "twelve months;" and the question is, does it mean calendar, or lunar months.

The rule in reference to these modes of computation was recently discussed, (*Rives* v. *Guthrie*, 1 Jones' Rep. 84,) and

we consider it unnecessary to enter upon the subject again; but shall content ourselves by presenting a general view, suggested by an examination of the authorities.

In the "civil law" computation by calendar months was adopted. In the "common law" the computation was by lunar months, as a general rule, but it was subject to a very comprehensive exception. The dividing line was this; where the common law rested upon itself for its origin, or was not derived from the civil law, lunar months obtained; that is, in the acts of parliament, in the proceedings of the common law courts, and in matters relating to real estate, the law, in regard to which, was derived from the feudal system, and rested upon it as a substratum. But where the common law was derived from the civil law, computation by calendar months obtained; for instance, in the proceedings of the ecclesiastical courts; the law merchant, in contracts constituting money transactions, (like that under consideration;) bailments, and in reference to personal estate generally; for in respect to these subjects, the rules of the civil law were adopted, with such modifications as were introduced by common custom, and such additions and alterations as were made by statutory enactment.

By a recent statute the exception is extended, and in "the construction of statutes," a "month" is now taken to mean a calendar month, unless otherwise declared. So that the computation by lunar months is confined within a narrow compass, and now makes the exception, and not the general rule; if, indeed, it be not entirely abolished by a liberal construction of the statute referred to. There is no error.

Per Curiam, Judgment affirmed.

JAMES GRACE *v.* JAMES HANNAH *et al.*

An administrator, duly appointed in another State, can *any where* endorse a negotiable paper, belonging to the assets within his jurisdiction at the intestate's death, so as to give the endorsee a right of action in this State.

A bond given in this State, not payable at any particular place out of the State, may be endorsed in another State, so as to support an action here, although there be no statute law in such State, making bonds negotiable.

A bond given in another State, where there is no statute making bonds negotiable, may be endorsed here, or any where else, where bonds are negotiable, so as to give a right of action in this State.

In a suit on the endorsement of a bond, made by an obligee living in a State where bonds are not negotiable, to one living in this State, an exception on the trial, which does not allege that the bond was both *made and endorsed* in such foreign State, is not available.

An exception, that no evidence was given below, that bonds were negotiable in the State where the one in question was given, will not be allowed, where it is certified to the Court, by the Secretary of State that, from the statutes of such State, filed in the Executive office, bonds are negotiable in such foreign State.

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

The plaintiff declared on two bonds for $200 each, payable to Eli Shepherd, and endorsed by Matthew Grace, the administrator of Shepherd. Pleas: *Non est factum* and no assignment.

After proving the execution of the bonds, and the endorsements of them by Matthew Grace, the plaintiff gave evidence of Shepherd's death, and of the grant of administration of his estate to the same Matthew Grace, by a court of Ordinary in Georgia. The defendants then gave evidence of a grant of administration of Shepherd's estate by the County Court of Anson, in this State, to the defendant Hannah, before the institution of this suit.

The counsel for the defendants thereupon insisted, "that the administrator, in Georgia, could not maintain an action on these bonds in this State, especially against one, who was the administrator here; and that, if he was not authorised by

law so to do, he could not, by transferring the bonds, vest in the assignee, a better right than he himself had." And the counsel further insisted, "that in the absence of proof to the contrary, the common law of England was presumed to obtain in Georgia; and, as by that law, bonds were not negotiable, and the plaintiff had not given in evidence any statute of that State, making bonds negotiable, the administrator of the obligee, in that State, could not assign the bonds of his intestate, so as to vest a legal title in the assignee." The Court overruled both of the objections, and after verdict and judgment for the plaintiff, the defendants appealed.

Osborne, for the plaintiff.
Dargan and *Kelly*, for the defendants.

RUFFIN, J. The facts are always set forth as they are applicable to the objections raised at the trial; and, thus considered, the Court cannot hold that there ought to be a *venire de novo*.

One of the positions of the appellants was, that the assignee of a foreign administrator can not sue on a bond in the courts of this State, for the reason, and for that only, that the administrator, himself, could not. The contrary, is settled law here; *Leake* v. *Gilchrist*, 2 Dev. Rep. 63. The administrator may not have the property in a bond, because his letters may not extend to it, as if he be not within the jurisdiction of the State in which the administration was granted, or other like reason; but this exception does not profess to impeach the validity of the administration in Georgia, for the want of the domicil or death of the intestate in that State, or because the bonds were not left by the intestate, and come to the possession of the administrator there. It puts the question exclusively on the power of the administrator to make an endorsement, even if the administration be valid, that will vest in the assignee the right of action here.

After verdict, then, it must be taken that every fact was established on the trial, necessary to invest this administrator

with the power to make an effectual endorsement, if any foreign administrator could, since the only objection here, was, that such an administrator could not make it in any case.

The proposition affirmed in the other exception is, that the law of England is the law of Georgia, as an English colony, and that by that law, bonds are not negotiable, and, therefore, that an administrator, in that State, cannot assign bonds of his intestate, so as to vest a legal right in his assignee. As a general proposition, that also is untrue, and might, for that reason, be properly overruled. If the bonds were given in this State, not payable at any particular place out of the State, an endorsee may sue here upon an endorsement made in Georgia, although by the law of that State, bonds may not be negotiable; *Riddick* v. *Jones*, 6 Ire. Rep. 107; *De la Chaumette* v. *Bank of England*, 2 Barn. and Adolph. 385. And if the bonds were given in Georgia, and were endorsed here, or at any other place, at which bonds are negotiable, they would likewise be within our statute, and the assignee would have an action here; *Hatcher* v. *McMorine*, 4 Dev. Rep. 122. The position is only true, then, in the special case that the bonds and endorsements were both executed in Georgia. Of course, we are now considering endorsements by the obligee, who has the unlimited power of assigning by our law, as just mentioned. With respect to endorsements by an administrator, there is a difference. The administration is necessarily limited to goods and credits of the intestate within the jurisdiction of the country granting it; and bonds, it seems, are *bona notabilia*, where the securities are at the death of the intestate. If these bonds, then, were in Georgia at the death of the intestate, and came to the administrator's hands there, the property in them became completely vested in the administrator, and he might, as the legal owner, transfer them by endorsement any where, in the same manner as the obligee himself might. He could not do so, if the bonds were here, because his administration did not embrace them, and he was not the owner. The possession of these bonds by the Georgia administrator, creates a presumption that they were

left and found by him, there. If they were, his right to them was perfect, and he was able to pass them by his endorsement; for, it is for that reason, that the endorsement of an executor or administrator, as Judge STORY says, is always made in his own name; Story on Promissory Notes, sec. 123. But of those exceptions to the general principle, the defendants cannot avail themselves, both because they do not show in their objections, that in point of fact, their case fell within either of the exceptions mentioned, and because they did not raise this point on the trial, but only that bonds were not transferable in Georgia, wherever made or endorsed by any person. If, however, the objection had been, that the bonds and endorsements were executed in Georgia, it would do the defendants no good, since, in truth, bonds and promissory notes are found to be negotiable by endorsement, under a statute of that State, and to have been since the year 1794. It is true, the statute was not given in evidence on the trial; but it is certified to us by the secretary of State, from the statutes of Georgia, in the executive office, and is full to the point, and, therefore, according to the case of *McDugald* v. *Smith*, 11 Ire. Rep. 576, these parties ought not to be sent back to another trial, since the result must be the same on that trial as on the last. In that case, a statute of Maryland was received in evidence, which was not duly certified, and the Court here held that, although it was erroneously admitted in the Superior Court, and for that reason, the judgment might be reversed, yet, it ought not to be reversed, because from the statute book, in the secretary's office, it was seen that, in fact, there was such a statute in that State, and would be to no purpose to grant a *venire de novo* on that ground. That is decisive of this case, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

PETER P. ELLIOTT *v.* PINKNEY A. WHITE.

Where the protest of a notary public, stated that he presented a bill, which purported to be drawn on a firm, to A, one of the members thereof, it was *Held* to be evidence that A was a member of that firm, and that the presentment was properly made.

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

The action is assumpsit, brought on a bill of exchange, drawn by R. L. Barkley of Trenton, in Tennessee, upon B. Elder, Brothers & Co., of New Orleans, for $372,00, in favor of the defendant, and by him endorsed to the plaintiff. It was tried on non-assumpsit; and in order to show due presentment for payment, the plaintiff gave in evidence the protest of a notary public of New Orleans, in which he stated, that on the day the bill came to maturity, in New Orleans, he "presented the bill to, and demanded payment thereof, from W. B. Chrisp, one of the firm, of B. Elder, Brothers & Co., of of this city, merchants, on whom it is drawn, who answered me that said bill could not be paid." The counsel for the defendant insisted, that the protest was not evidence of presentment, for payment, to the firm of B. Elder, Brothers & Co., nor that Chrisp was a member of that firm; but was only evidence of a demand on Chrisp; and prayed the Court so to instruct the jury. But the Court refused to give the instructions prayed for, and directed the jury, that it was sufficient *prima facie* evidence of a presentment to the drawees, B. Elder, Brothers & Co. The plaintiff had a verdict and judgment, and the defendant appealed.

Mitchell, for plaintiff.
Boyden, for defendant.

RUFFIN, J. By the universal law-merchant, the protests of a notary public are received as evidence of the presentment of bills of exchange, for acceptance and payment, and

the refusal of the drawee, and the reasons given for it. It establishes the facts, stated in it, in respect to each and all of those points, to the full extent the notary could do it, if he were examined as a witness before the jury, and were believed. That, indeed, was not contested at the bar; but it was admitted that the protest would be sufficient, if it had stated that the notary presented the bill to B. Elder, Brothers & Co., nominatim. It was contended, however, that the notary could not take upon him to say who constituted that firm, as the partners, and, therefore, that the protest was not evidence, that presentment to Chrisp was one, to the house, on which the bill was drawn. It is not doubted that the protest would have been sufficient if it had set forth a presentment to B. Elder, Brothers & Co., without going into the further particulars respecting the particular member of the firm. But certainly that does not vitiate it, since presentment to one of the firm, is a presentment to all, and it is just as competent for the notary to say to what member of the firm he applied, as to say that he applied to the whole firm, as the firm is, at last, composed of particular persons, and if he knows the firm, he knows the ostensible members of it. If he had been before the jury, he might have proved that the Chrisp, to whom he presented the bill, constituted the firm, or was one of the firm on which the bill was drawn, consequently, his protest is evidence to the extent his testimony would have been; for, the purpose of receiving it, is for the convenience of commerce, to dispense with witnesses, and make them unnecessary, by receiving the protest, as evidence, in their stead, of presentment and demand, at the proper time and place, and to the proper persons. When, therefore, the protest states, that the bill was presented to Chrisp, and that Chrisp was a member of the firm of B. Elder, Brothers & Co., merchants in New Orleans, on whom the bill was drawn, it states a presentment to the firm.

Per Curiam, Judgment affirmed.

ABEL COX *v.* JOHN D. BROWN.

Where a contract binds a party, collaterally, to answer for the default of another, as in the case of guaranties, and the like, notice must be given of such default before an action can be maintained for a breach of the contract.

The act of 1848, Rev. Code, ch. 65, sec. 10, saving causes of action against non-residents from the operation of the statute of limitations, applies to causes of action existing at the time the act went into effect, provided they had not been barred by a previous act of limitations.

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

The plaintiff declared on a guaranty, endorsed on a bond of $200, payable to him, defendant, by one Jesse Bray, and dated the 4th of April, 1839. The endorsement was as follows: "I guarantee the payment of the within note to Abel Cox, for value received." Signed John D. Brown.

It appeared on the trial, that a suit had been brought in the name of the defendant, to the use of the plaintiff Cox, against Bray, which was tried at the Spring Term, 1848, of Randolph Superior Court, and that a set off of $90, was thereupon established and allowed against the bond in question.

The plaintiff insisted below, that he was entitled to recover the said sum of $90, with interest. There was no evidence that any notice had been given to the defendant of the allowance of this set off, or of a demand to make good the guaranty, previously to the bringing of this suit. It appeared that Brown had, before the trial in 1848, removed to a distant State, and that he had permanently resided there ever since. The defendant relied on the want of notice to the guarantor, or a demand for payment of the damages, previously to the bringing of the action, and upon the statute of limitations.

His Honor directed a verdict to be rendered for the plaintiff's demand, subject to the opinion of the Court, upon the questions of law raised between the parties.

Afterwards, his Honor being of opinion with the defendant upon the points reserved, directed the verdict to be set aside

and a nonsuit entered; from which judgment the plaintiff prayed an appeal to the Supreme Court.

No counsel appeared for the plaintiff in this Court.
Gorrell, for the defendant.

BATTLE, J. It is now too well settled to be considered a debateable question, that where a contract binds a person collaterally, and depends upon the default of another, notice ought to be given of that default, in order to charge the person who is secondarily liable, as in the cases of guaranties and the like; *Grice* v. *Ricks*, 3 Dev. Rep. 62; *Sherrod* v. *Woodard*, 4 Dev. Rep. 360; *Adcock* v. *Flemming*, 2 Dev. and Bat. R. 225; *Reynolds* v. *Magness*, 2 Ire. Rep. 26; *Lewis* v. *Bradley*, Ibid. 303. In the case now before us, therefore, the plaintiff ought to have notified the defendant of the damage which he had sustained on the guaranty before the commencement of his suit against him. The reason why this notice is required is, manifestly, for the purpose of giving the guarantor an opportunity of paying the damage without being harrassed with the trouble and expense of a law-suit. On the question of notice, then, our opinion is in accordance with that which was expressed by his Honor in the Court below; but upon the question of the statute of limitations, we are inclined to differ from him.

We have seen, that until the plaintiff has given the defendant notice of the loss which he had sustained on his guaranty, he had no right to sue him, and it might be argued that until he gave the notice, he had no cause of action against the defendant, and that, therefore, the statute would not begin to run until that time. It has been contended, however, that if the plaintiff delay, for more than three years after he has been damnified, to notify the guarantor thereof, and thereupon commence his suit against him, he will be barred by the statute. However that may be, we are of opinion, that the operation of the statute was prevented from the present case by force of the act of 1848, ch. 59, (see Rev. Code,

chap. 65, sec. 10,) which provides that "when any person, against whom there is cause of action, shall be beyond sea, or a non-resident of the State, at the time such cause of action accrued, the plaintiff may bring his action against such person, after his return, within the times as are herein before limited for bringing such actions." It is true, that this statute was passed after the plaintiff had sustained the loss on the guaranty, which was in the spring of 1848; but the cause of action was then subsisting, and had not been barred under any previous statute. As the defendant had before that time left the State, and was then a non-resident, there was nothing, either in the spirit, or letter, of the act to prevent it from applying to his case. Had the action been barred by a previous statute of limitations, then it might well have been contended that the latter act could not, fairly, be construed to revive the claim as against the defendant upon his return. Such a construction, we held ourselves bound to adopt upon a similar act on the case of *Phillips* v. *Cameron*, 3 Jones' Rep. 390. Here the circumstances are different. The cause of action had just accrued (supposing that it could accrue before notice was given,) and was still subsisting when the last act was passed, and the act, therefore, might well stay the operation of the previous statute of limitations until the defendant should return to the State. It was certainly competent for the Legislature to give the act, relating, as it did, to the remedy only, a retrospective effect; but we would not like to put a construction upon it which would give it such an effect, unless it could be supported upon express words or a necessary implication. The present case does not require a resort to such a construction, as it is fairly embraced in the words "against whom there *is* cause of action."

Though we differ from his Honor upon the point of the statute of limitations, yet, as we agree with him upon the question of notice, the judgment of nonsuit must be affirmed.

PER CURIAM, Judgment affirmed.

NOAH BROWN *v.* CONSTANT GRAY *et al.*

Mere silence on the part of a vendor, who has knowledge of a *latent defect* in the article sold, renders him liable in an action for a deceit.

Aliter, where the defect is *patent*.

Where the appellant's bill of exceptions is so drawn up as not to show whether or not the Court below erred, he is not entitled to a *venire de novo*.

ACTION on the CASE, for a deceit in the sale of a slave, tried before PERSON, J., at the Spring Term, 1857, of Wilkes Superior Court.

The plaintiff proved the sale by a bill of sale from the defendants to him, dated 20th of February, 1855. There was no evidence of what took place at the sale, except that it was by public auction. It was proved that the slave was unsound at the time of the sale, and that the defendants knew it. The defendants' counsel contended that, admitting these facts, the plaintiff could not recover, for that, in order to charge the defendants he must prove either, that the defendants, at the time of the sale, made fraudulent misrepresentations or resorted to some device, by which to conceal the unsoundness of the slave; and he prayed the Court so to instruct the jury.

The Court refused to give the instructions prayed, but charged the jury, that upon the facts above stated, the plaintiff was entitled to recover. Defendants excepted.

Verdict and judgment for the plaintiff. Appeal by the defendants.

Mitchell, for the plaintiff.
Boyden, for the defendants.

PEARSON, C. J. In the sale of a chattel, the rule of our law is *caveat emptor*, and if the thing be unsound, to entitle the purchaser to maintain an action, he must prove, either, a warranty of soundness, or a deceit.

In regard to a deceit, the distinction is: where the unsoundness is *patent*, that is, such as may be discovered by the exer-

cise of ordinary diligence, *mere silence*, on the part of the vendor, is not sufficient to establish the deceit, although he knows of the unsoundness, because *the thing speaks for itself*, and it is the folly of the purchaser not to attend to it. So that, in such a case he will not be heard to say, he was deceived, unless the vendor made a false statement, or resorted to some artifice, in order to prevent an examination, or to hide the unsoundness, so as to make the examination of no avail.

Where the unsoundness is *latent*, that is, such as could not be discovered by the exercise of ordinary diligence, *mere silence*, on the part of the vendor, is sufficient to establish the deceit, provided he knows of the unsoundness; for, as the thing is not what it appears to be, and diligence does not enable the purchaser to discover its unsoundness, he is deceived, unless the fact is disclosed; so that, in such a case, without what the law considers laches on the part of the purchaser, the deceit is accomplished by the *suppressio veri*.

The first proposition: that, in regard to a *patent* unsoundness, to make out a deceit there must be proof of the *scienter*, and a *suggestio falsi*, is conceded on all hands.

The second, that in respect to a *latent* unsoundness, proof of the *scienter* and a *suppressio veri*, will be sufficient, we consider equally well settled, by the reason of the thing, and by the cases in our Court; *Cobb* v. *Fogleman*, 1 Ire. Rep. 440; *Case* v. *Edney*, 4 Ire. Rep. 93. The former was for a deceit in the sale of a female slave, who had a latent disease—cancer in the womb, but at the time of the sale was a a *stout, vigorous looking woman*. The defendant was silent in respect to her disease. The Judge, in the Court below, instructed the jury, that to entitle the plaintiff to recover, he must prove 1st, that the unsoundness existed at the time of the sale; 2ndly, that the defendant knew of, or had reason to believe its existence; 3rdly, but if these facts were proved, if the plaintiff also knew of the unsoundness, or had reason to believe it, he could not recover, and then instructed the jury, that there was no evidence on the last point. In this Court the positions of law were approved, and, indeed, were

not called in question, being taken by the profession as settled; and the decision was put not on, whether there was evidence on the last point, but on whether there was evidence of the scienter on the part of the defendant. The latter was for a deceit in the sale of a mare at auction by a trustee. The mare had a latent unsoundness, although on the day of sale, *she appeared to be well.* The defendant, Marvill Edney, the maker of the trust, was "present at the sale, but took no part in it, and said nothing, one way or the other, as to the property." There was proof that he knew of the unsoundness. The evidence was contradictory as to the *scienter* on the part of the other defendant, the trustee. The Judge, in the Court below, held "that as the legal title had passed out of the defendant, Marvill, he was not accountable as an owner would be, who procured an auctioneer to cry his property, and stood by in silence." As to the other defendant, the Court charged, that, "although he acted as trustee in making the sale, yet, like all other persons who sold, he was bound to act honestly, and to *disclose defects* if he believed them to exist. It was then left to the jury, whether the mare was unsound, and whether the defendant knew it—if so, *as he failed to state the circumstances*, he was liable on damages." In this Court, the positions of law, in reference to the deceit, were approved, but it was held that the defendant, Marvill Edney, although the legal title passed out of him, was liable for the deceit. In the conclusion of the opinion, the Court say: "It will not be understood that we think the mere silence of debtor, whose property is sold under execution, would amount to a fraud; for that is a proceeding *in invitum;* the sale is exclusively the act of the law."

Nothing could show more conclusively, that this doctrine was considered as settled, both by our courts and the profession, than the manner in which it is treated in these two cases; and after the elaborate argument of *Mr. Boyden*, we are satisfied that it is sustained by the weight of authority. The class of cases, *Mellish* v. *Matteux*, Peake N. P. 115; *Baglehole* v. *Watters*, 3rd Camp. Rep. 154; *Pinckering* v. *Dawson*, 4th

Taunt. 779, &c., where the property was sold "with all faults," is not in point. Nor the class of cases, *Laidlaw* v. *Organ*, 2 Wheat, 178; *Bench* v. *Sheldon*, 14 Barb. 66, &c., where *extrinsic circumstances*, affecting the price of the article exist, but in regard to which, *the means of intelligence are equally accessible to both* parties, such as the conclusion of peace in 1815, between England and the United States, and the passages to be met with in some of the best writers, which seem to conflict, are all to be attributed to the fact, that the distinction between a patent and a latent unsoundness in the thing, was not kept in view. These questions of law present no difficulty, and from the manner in which the statement of the case is made up, upon the defendants' exception, the judgment must be affirmed.

The defendants' counsel contended, "that admitting that the slave was unsound, and that the defendant knew it, the plaintiff could not recover, for that, in order to charge the defendants, he must prove, either that they made fraudulent misrepresentations, or resorted to some device by which to conceal the unsoundness," and prayed the Court so to instruct the jury.

This proposition is not true in its generality. If the unsoundness was patent it is true. If the unsoundness was latent it is not true. The case does not show whether it was patent, or latent, and it follows, that it was not error to refuse to give the instruction prayed for. In other words, it does not appear from the defendants' exception, whether the Court below erred or not; therefore, there is no ground upon which this Court can reverse the judgment.

PER CURIAM, Judgment affirmed.

LOUISA S. MOORE *et al v.* RICHARD W. BROWN, *Adm'r.*

To support the plea of retainer by an administrator or executor, it is *prima*

facie sufficient for him to produce a bond or note, and prove its execution by the intestate or testator, and the *onus* of proving a payment, or other matter of discharge, devolves on the opposite party.

PETITION for a distributive share, tried before CALDWELL, J., at the last Fall Term of Northampton Superior Court.

It was referred to the clerk of the Court to state an account of the assets in the hands of the administrator and the disbursements made by him; and while the matter was open before him, the defendant produced two bonds, purporting to be executed by the intestate, payable to the defendant; one, for two hundred and forty-nine dollars, payable one day after date, and dated 3rd of April, 1847—the other for one hundred and eighty-five dollars, payable in the same way, dated 12th August, 1848, which he insisted on as retainers. The commissioner allowed these claims, and the plaintiffs excepted to the report.

The first ground of exception was, that the papers offered were not the deeds of the intestate. 2ndly. That they had been paid.

The Court ordered issues to be tried by a jury, embracing these two questions, and it was upon the trial of these issues, that the exceptions, now under consideration, were taken.

It appeared, in evidence, that the defendant was the son of the intestate, Elsey Lawrence; that he arrived at full age in 1847, and continued to live with his mother until 1848, when he married, and in the latter part of that year, became insolvent. He continued to reside with his mother until her death, in the year 1852, when he became her administrator.

The Court left the question, as to the execution of the bonds, to the jury, upon the evidence adduced. Upon the other part of the case, he instructed the jury that, if an administrator alleges himself to be a creditor of the intestate by bond, as in this case, and insists on the same as a retainer, he must offer other evidence that the debt exists, over and beyond the mere production of the bonds, and that no other evidence had been offered. Such, said the Court, is the law, to guard against the danger of an administrator's finding bonds payable to

himself among his intestate's papers, which had been paid off in his life-time, but not cancelled. The defendant excepted.

The jury returned for their verdict, that the bonds in question, had been duly executed by the intestate; and on the second issue, that *they had been paid.*

The report was reformed in conformity with this finding, and the same having been confirmed, judgment was rendered thereupon for the plaintiffs, and the defendant appealed.

Barnes, for the plaintiffs.
Conigland and *Hardy*, for the defendant.

PEARSON, C. J. His Honor, in the Court below, was of opinion, that where an administrator claimed "a retainer" in respect to a bond, payable to himself, purporting to have been executed by the intestate, the production of the bond by the administrator, and proof of its having been executed by the intestate, was not sufficient, and the administrator was required to offer "other evidence of the existence of the debt." This, as he said, "was a rule of law adopted to guard against the danger, that an administrator might find a bond, payable to himself, among the papers of his intestate, that had been paid, but not cancelled in his life-time," and fraudulently attempt to set it up as a retainer.

We are not aware of the existence of any such rule of law; on the contrary, it is a rule of law, that the production of a bond, or single bill, for the payment of money, and proof of its due execution, establishes the existence of the debt, and is sufficient to support an action upon the instrument, or to entitle the party to the benefit of it by way of set off, or retainer; and if the opposite party alleges "payment" or other matter of discharge, the *onus* of proof is upon him.

We suppose that his Honor was misled by a misapprehension of the principle, decided in *Finch* v. *Ragland*, 2 Dev. Eq. 142, and *Whitted* v. *Webb*, 2 Dev. and Bat. Eq. 442, where it is held that to establish "a voucher," in respect to a note, purporting to have been given by the intestate to a third

person, it is not sufficient for an administrator to produce the note and prove its due execution; but he must prove payment by himself. The distinction is this: where an administrator claims a "voucher," he alleges not merely the existence of the debt, but the further fact, that *he has paid it* in the course of administration; of course, the *onus* of proving this fact, is upon him; but where an administrator claims "a retainer," it is in the nature of a cross action, and he alleges merely the existence of a debt due to him by his intestate, and the allegation of payment, or other matter of discharge, comes by way of plea from the other side, and of course, the *onus* of proving the alleged payment, or matter of discharge, is upon the party alleging it.

We assent to the suggestion, that notwithstanding an administrator is required to take an oath for the faithful discharge of his duties, he may be tempted to commit a fraud in consequence of his having free access to the papers of his intestate, and we think that, in the present case, there were many circumstances fit to be left to the consideration of a jury, tending to show that the notes had been paid, or satisfied, in some way. But it was error to hold, that as a rule of law, the *onus* of proof was upon the administrator, in respect to the allegation of payment, or other matter of discharge; and we are unable to see, in the fact of his being administrator, any ground for departing from the rule, that the production of the bond and proof of its due execution, established the existence of the debt, and entitled him to the benefit of it, in the absence of proof of payment, or other matter of discharge.

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

LUDWICK *et al Adm'rs. v.* MARY E. STAFFORD.

The forfeiture, under the act of 1820, for marrying a female under the age of

fifteen, arises, not from the offense simply, but from that, and a conviction following in due time.

(*Note.*—This provision altered by act of 1855, Revised Code, chap. 68, sec. 10, 11.)

ACTION of DETINUE, for four slaves, tried before MANLY, J., at the last Cabarrus Superior Court, and was submitted upon a case agreed.

J. R. Stafford, the intestate of the plaintiffs, intermarried in the year 1854, with the present defendant, who was then fourteen years of age, and had a father living, who did not give his consent to the marriage. At the time of the marriage, the defendant owned the slaves now sued for, and one other named Bethena, and the husband took them into possession, but said he held them as his wife's property, and not his own. He, however, sold Bethena, much to the dissatisfaction of the defendant, and he kept the others in his possession until his death in August, 1858. The defendant then took the four negroes into her possession, claiming them as her own, and refused to deliver them to the plaintiffs, the administrators of the deceased husband.

The presiding Judge gave judgment for the plaintiffs, and the defendant appealed.

R. Barringer, for the plaintiffs.
Jones, for the defendant.

RUFFIN, J. If the defendant's marriage had taken place a year or so later, her defense would have been more available, as the act of 1855, Rev. Code, ch. 68, sec. 10 and 11, corrects the unfortunate provision of the act of 1820, respecting the conviction of the husband, and enacts directly, that, by such a marriage as this, the husband shall get no interest in any effects of his wife, but they shall vest in trustees for her separate use; but under the law, as it stood at the time of the defendant's marriage, her property in possession, vested in the husband, and could only be divested by conviction for the misdemeanor, as provided in statutes of 1820 and 1836. The

forfeiture of the property did not arise from the offense simply, but from that, and a conviction following, within due time; *Shutt* v. *Carloss*, 1 Ire. Eq. 233.

PER CURIAM, Judgment affirmed.

WM. T. WOOTEN, *Adm'r. de bonis non*, *v.* SARAH JARMAN.

Where a slave was placed by a father in the possession of a daughter, and remained in such possession until the father's death, after which an issue was made up to try the validity of his will, which pended for eight years, when the will was established, it was *Held* that a demand made by an administrator *pendente lite* and a refusal, did not make the daughter's possession adverse to the rights of the executor proper, and he was not barred by three years possession, under such circumstances.

ACTION of TROVER, tried before HEATH, J., at the last Fall Term of Lenoir Superior Court.

The action is trover for a female slave, Chaney, and her five children. It was originally brought by John Davis, the executor of Windall Davis, deceased; and upon the death of the executor, was revived by the present plaintiff, as administrator *de bonis non*, *cum tes. an.* It was tried on the general issue and the statute of limitations, and the facts were these: The woman, Chaney, belonged to the testator, Windall Davis, and was, by him, in 1837, put into the possession of the defendant, who was his daughter, and hath held the woman ever since; and during that period the five children were born. In 1848, Windall Davis died, leaving a will, dated in 1833, in which he bequeathed Chaney to other persons. Upon the death of the testator, his will was offered for probate, and was contested, and the issue pended until 1856, when the will was established and letters testamentary issued thereon to John Davis, the executor named in the will; and he soon afterwards demanded the slaves from the defendant, who refused to give them up, and he brought this action on the 14th day

of April, 1857. On the part of the defendant, it was then shown, that on the caveat to the will being entered, administration *pendente lite* was committed by the Court to George Jones, and that in the latter part of year 1848, he demanded the negroes from the defendant, and she refused to deliver them, and claimed them as her own.

The presiding Judge instructed the jury, that Jones, as administrator *pendente lite*, had the right to demand, sue for, and recover the slaves from the defendant, if they belong to the testator's estate, and that the statute of limitations began to run against him, Jones, from the demand made by him; and that there was no such want of privity between Jones and the testator's rightful executor, as would prevent this action from being barred, as it was brought more than three years after the conversion by the defendant in refusing to surrender the negroes to Jones, on his demand, and claiming them as her own in 1848. The jury found accordingly, and from the judgment the plaintiffs appealed.

Strong, *J. H. Bryan* and *Dortch*, for plaintiffs.
McRae, *Stevenson*, *J. W. Bryan*, and *G. Green*, for def't.

RUFFIN, J. The action of the plaintiff would not be barred, if there had been no administrator *pendente lite*, since the defendant held as bailee of the testator at his death, and would stand in the same situation to the executor. The loss of the plaintiffs' action and title, is supposed, then, to arise from the right of the administrator *pendente lite*, to demand and recover the slaves from the defendant. It may be true, that such an administrator may sue for property which belonged to the deceased, as well as for a debt to him. Yet, it may not follow, that the rights of the executor, after probate, are to be affected by the omission of the administrator to bring a suit of either kind. His powers and responsibilities are very limited. He cannot be sued, nor can he sell any property, save only, from necessity—*bona peritura*. If he brings a suit he cannot prosecute it after probate, because all his powers then

cease by their own limitation; and, until the recent act of 1854, the executor could not make himself a party to it, and carry it on. As was said in *Satterwhite* v. *Carson*, 3 Ire. Rep. 549, not only do the powers of the temporary administrator cease upon the decision of the controversy touching the will, but the letters testamentary, or of administration, then granted, are full letters, purporting to be original, and taking no notice of the letters to the temporary curator. In that case, the executor recovered from the sheriff, the value of a slave, which he had, *pendente lite*, sold under execution against the administrator *pendente lite*, although the sheriff had paid to the administrator $200, out of the price of the slave, for the excess of the proceeds of the sale after satisfying the execution. On the same principle, the executor could have recovered in detinue or trover from a purchaser of the slave from the sheriff, or from the administrator *pendente lite*. That shows that such an administrator is not to administer the estate, and does not acquire a general property in the effects. The connection between him and the executor, if any, is very slight, being only, that the administrator *pendente lite* may collect the debts and effects, and that for those, which come to his hands, he must account to the executor on the probate. Those paying to him the money, or delivering the effects, are, of course, discharged from a second liability to the executor; since the law affirms those rightful acts of the administrator *pendente lite*. But no authority is found, that by either his tort or his laches, he can impair the rights of the executor, or hurt the estate.

Hence, the Court inclines to the opinion that this action would not be barred, were the subject of it a chattel of any kind. But, with respect to slaves, situated as these were, the plaintiffs' right is clear. The mother, was put by a father, into the possession of a child, and they remained there up to the father's death. Then it depended entirely upon the result of the contest about the will, whether the father died testate or intestate, and on that, under the act of 1806, depended the right of property in the slaves, whether it was in the father's

executor, or in the daughter as an advancement; and until probate, it was *prima facie* in the daughter; or at all events, not in the administrator *pendente lite*. He could not, therefore, have recovered them, and was not guilty of laches in not suing for them; and it is thus manifest, that the ground fails, on which it was held, that the defendant's title had become good, or that the action of the plaintiff was barred by the statute of limitations.

PER CURIAM, Judgment reversed.

STATE *v.* NAT, *a slave.*

It is not to be presumed that a master will cause his slave to fly upon his being accused of a capital offense, and therefore, the flight of a slave, under such circumstances, operates against him as well as against a white man.

Where, upon the trial of a slave for a capital offense, the credibility of slaves is drawn in question, it was *Held* legitimate for the Judge to direct the attention of the jury to the fact, that they were fellow servants of the prisoner, and that he might illustrate the matter by comparing it to cases of persons nearly related in blood.

Where witnesses, upon a trial, exhibit feeling and partiality, the presiding Judge may, with propriety, comment upon such deportment, and point it out as a circumstance, calculated to affect their credit.

INDICTMENT for an attempt to commit a rape upon a white woman, tried before CALDWELL, Judge, at the last Fall Term of Northampton Superior Court.

On the trial, the State offered to prove, that immediately after the offense and the charge against the prisoner, he fled, and though searched for under process, by an officer, he could not be found for a week or two. The defendant's counsel objected to this evidence, but it was admitted by the Court. The defendant excepted.

One of the counts, in the indictment, charged the defendant to be the property of one Edwards, in whose possession

he was, and had been, and who superintended his defense. On the trial, two slaves were introduced by the defendant, to show an *alibi*, to wit, Sam and his wife Lucy. It appeared that Lucy was domiciled in the family of Mr. Edwards at the time the offense was committed, and that Sam, her husband, came to see her once in three weeks. In the charge of the Court to the jury, his Honor said, there was a conflict in the testimony, as to the whereabouts of the defendant, at the time the offense was committed; that a jury, when they came to sit in judgment upon the integrity of witnesses, had a right to look, and ought to look, to the relation in which they stand to the parties and to the cause; that it was settled by authority, that when near relations deposed for near relations, their testimony was to be received, and ought to be received, with many grains of allowance; and left it to the jury to say, how far the relation of the said Sam and wife Lucy to the said Edwards, and their being the fellow servants of the prisoner, affected their credit. Defendant again excepted.

Sam and Lucy, on their respective examinations, showed much feeling and partiality for the prisoner, and the Court, upon this part of the case, said to the jury, that it was not always necessary to introduce witnesses to impeach a witness; that a witness might discredit himself by his deportment on the stand, and he left it to the jury to say, whether these two negroes were self-possessed and impartial, and how far their credit was affected by their deportment, when giving their evidence. Defendant's counsel again excepted.

The jury found the defendant guilty. There was judgment, and appeal by the prisoner.

Attorney General, for the State.
Barnes and *Hardy*, for the defendant.

BATTLE, J. The counsel for the prisoner have, in their bill of exceptions, assigned two errors as having been committed on the trial by the presiding Judge; the first, in the

admission of improper testimony; and the second, in an improper instruction to the jury.

The testimony to which objection was made, was, that soon after the offense was alleged to have been committed, the prisoner had fled, and could not be found by the officer, who went with process for the purpose of apprehending him. The counsel admit that, had the prisoner been a free man, the testimony would have been proper, according to a well established rule of evidence in the criminal law on that subject. See Roscoe's Crim. Ev. page 17, of 5 Am. from 3 Lon. Ed. The reason for the rule, as they contend, is, that a free man has full control of his own actions, and upon being charged, or upon the apprehension of being charged, with a crime, may go or stay as he pleases, while a slave is bound absolutely by the will of his master, and must go or stay, not as he himself may choose, but as his master may order. Hence, the counsel conclude, that as the slave may be sent or carried off by his owner against his will, the prosecutor ought not to be allowed to prove that he could not be found, as evidence of his flight, unless it be first shown that his absence was caused by his own voluntary act. In support of this conclusion, it is further urged, that the law presumes the slave is engaged in the performance of his duty to his master, and that if he be absent, it is because his master has sent him off either on business, or to avoid the danger of losing him, should he be taken and tried. The argument is an ingenious one, and was made very plausible by the manner in which it was stated and illustrated by the counsel; but it cannot stand the test of critical examination. Its fallacy consists in assuming, as a presumption, that the master will commit a great crime to avoid the risk of losing his slave. The presumption of guilt arising from flight at the time, or soon after an offense has been committed, is not at all conclusive against the person charged, and may be weakened, or entirely rebutted by other circumstances; and this may just as well apply to slaves as to free persons. If it be proved that the slave did not fly of his own accord, but was carried or sent off by his master, then

the presumption against him, arising from his absence, will be entirely repelled. In the present case, the testimony was offered to prove, "that immediately after the offense, and the charge against the prisoner, he fled," and could not be found for a week or two by an officer with process. From this, we cannot understand otherwise, than that the proof was offered to show that he fled voluntarily, and not that he was sent off and kept out of the way by his master. Such testimony was as well calculated, we think, to raise a presumption of guilt against a slave, as it would have been against a free man. Before the exception, as contended for, in favor of a slave can be admitted, it must be proved by him that his flight was not his voluntary act, but was coerced by his master.

The exception to the charge of his Honor is equally untenable. It is founded upon a misapprehension of the instruction which was given to the jury. The credibility of the witnesses, Lucy and Sam, who were introduced for the prisoner to prove an *alibi*, was impeached. One ground of impeachment was, their relation to the prisoner as his fellow servants, and his Honor intended to illustrate how that might operate against the effect of their testimony, by comparing it to the case of persons nearly related to each other by blood. When a mother is called as a witness to testify in favor of a son on a capital trial, it has been decided in the case of the *State* v. *Ellington*, 7 Ire. Rep. 67, and *State* v. *Nash*, 8 Ire. Rep. 35, that such a near relationship did affect the credit of the witness. In like manner the relationship of being fellow servants, his Honor thought, and we think, affected the credit of the witnesses, and whether that was communicated to the jury, in one form of expression or another, it did not violate the law, when they were told at the same time, that they were to be judges of the extent to which the credit of the witnesses was impaired by such relationship.

The latter part of the charge was based upon what was stated as a fact, and which must have been apparent both to the Court and jury, that the witnesses, while under examination,

showed much feeling. Such a fact, transpiring in the presence of the Court and jury, his Honor had a right to notice and comment upon, and we think his remarks very pertinent and proper, and that the prisoner has no just cause to complain of them. The motion for a new trial must be overruled; and as we find no error in the record, it must be so certified to the Superior Court of law, for the county of Northampton, to the end, that sentence may be pronounced upon the prisoner.

PER CURIAM, Judgment affirmed.

RAY AND PEARCE *v.* JAMES BANKS AND A. H. McKETHAN.

Where A was indebted to B, and drew a note negotiable and payable at a bank, which was endorsed by C and D for the accommodation of the maker, and delivered to the creditor of A, by whom it was endorsed to E for a valuable consideration, it was *Held* that the latter could recover against the maker of such note, or any of the endorsers thereon, although the same had never been discounted at the bank, nor offered for such purpose.

(This case distinguished from *Dewey* v. *Cochran*, 4 Jones' Rep. 184, and *Southerland* v. *Whitaker*, 5 Jones' Rep. 5.)

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

The action is assumpsit brought under the statute against Banks as the maker, and McKethan as endorser, of a promissory note for $1600,26, and payable to William T. Mullins, ninety days from date, and dated Nov. 28th, 1854, and negotiable at the branch Bank of Cape Fear, at Fayetteville, or at the Bank of Fayetteville, at the option of the holder. Upon *nonassumpsit* pleaded, it was submitted to the Court on the following facts agreed.

William T. Mullins, the payee, executed to Banks, the maker, on the 15th of May, 1849, a power of attorney, authorising him "for me, and in my name, to draw and endorse promissory notes, payable at the Bank of Cape Fear, at Fayette-

ville, checks on the said bank, or any other bank, and bills of exchange, as may seem to the said Banks expedient." Banks was indebted to Ferdinand McLeod, at the date of the note, in the sum mentioned in it, and by way of securing and paying the same, made the note, and endorsed it in blank in the name of Mullins, by himself as his agent, and procured the defendant, McKethan, to endorse it in blank, and delivered it to McLeod in payment of his debt, and he endorsed it to the plaintiffs for value. It was not discounted, nor offered for discount, at the bank; and Banks made payments on it after maturity, which reduced the balance due on it, for principal and interest, to the day of trial, to $770,60. On these facts, the Superior Court held, that the plaintiffs were entitled to recover the balance; and from a judgment therefor, the defendants appealed.

W. Winslow, for plaintiffs.
Fuller and *C. G. Wright*, for defendants.

RUFFIN, J. The Court is of opinion that the judgment was proper against both of the defendants. As against Banks, there is a plain liability, founded on value in his pre-existing debt to McLeod, and his endorsement for Mullins, was within the scope of his authority. But if it had not been, he would still have been bound to the holder for value, upon the same principle on which the maker of a note to a fictitious payee, is bound, when he endorses the note in that fictitious name. He is not allowed to impeach such a note after putting it into circulation as a true one.

The case is equally clear against the other defendant as endorser. It is true, he endorsed the note at the request of Banks, and, therefore, for his accommodation; and of course, a holder, without value given, could not recover from him. But as soon as the note was passed for value, that consideration attached both to the note and the endorsement. Now, an endorsement necessarily imports a contract on the part of the endorser with those claiming under him, that the endorser has

a title to the note and can transfer it; and, therefore, if it does not warrant the genuineness of the prior signatures, it at least, admits them, and also their sufficiency; as is obvious, from the liability of an endorser of a forged note, or one made by an infant or a married woman.

Those positions were but slightly contested at the bar as principles of the law-merchant. But they were supposed to be much qualified in this State, by the two recent decisions of this Court in the cases, *Dewey* v. *Cochran*, 4th Jones' Rep. 184, and *Southerland* v. *Whitaker*, 5 Jones' Rep. 5. But those cases are much misconstrued in thus applying them. They were not intended to affect, and do not affect notes and endorsements, founded on actual transactions, for value; as, for example, notes given upon sales, or intended to raise money in the general market. The decisions apply only to the cases before the Court, which were those of notes made to enable the principal to borrow money from a bank, and with that purpose sufficiently indicated, as it was thought, on the face of the papers themselves. It is well known that, in practice, our banks do two kinds of business. They discount notes for the holder, provided, as required by the charters generally, they are negotiable at the particular bank. In a transaction of that kind, the holder, or offerer, as he is commonly called, at the bank, is the borrower, and the proceeds are passed to his credit on the books of the bank, and the note is usually called, "business paper," and is, in the course of business, to be paid in full at maturity. They likewise do another kind of business, which is called "accommodation," because the maker of the note, or the principal, is the borrower, and it is usual to allow two or three renewals of those notes, either for the whole, or a part, of the sum lent. Formerly, accommodation paper was in the common form of promissory notes, expressed to be negotiable at bank, payable to A B or order, and endorsed by A B; consequently, A B would be regarded, in the course of business, as the offerer and borrower, and it would require his check to get the proceeds of a discount. To avoid that circuity and inconvenience, it was the custom,

by way of distinguishing accommodation, from business paper, for the last endorser of a note of the former kind, to make some memorandum at the foot of the note, such as, "credit the maker," or "for renewal of maker's note," or the like; thus indicating the purpose of the note, and who was the offerer and real borrower, on whose check the money was to be paid. In consequence, however, of the expense of protests and of some losses by the banks, for want of protests and proper notices to endorsers, the form of these accommodation notes was generally changed, and it became customary to make the note payable to the cashier of the bank, and the sureties to bind themselves as joint makers. That has been the usual course of business for, perhaps, twenty or thirty years past, and has become so settled, that the Court feel obliged to recognise it, and also its operation on the obligation of the parties to such accommodation papers. It is obvious, that a surety may find it greatly to his interest to be on paper of that description, rather than on that distinguished as business paper; for in the first place, he might consider that the principal would be able and ready to meet the debt upon the instalments usually allowed on accommodation at bank, while his means would certainly not enable him to pay the whole sum at the maturity of the note which the holder might require; and in the next place, he has the assurance arising out of the settled practice of the banks, that payment will be coerced upon a failure to meet the regular instalments, and that his, the surety's responsibility, will not be extended indefinitely or unreasonably, as might be the case, if the paper were in private hands. Such being the state of things, the Court, in those cases, thought it reasonable to impart to those notes the legal operation, and that only, which the parties to them, really intended them to have, namely, that they should stand as securities for loans of money from the bank to the principal, and not be the subjects of dealing with third persons advancing money on them, or taking them, as other notes in the market might be taken. That is the whole scope of the decisions under consideration, and Judge PEARSON is careful to point out,

in the last case, the distinction, and to show that such notes carry their purpose and character on their face, sufficiently to inform those to whom they are offered. To apply the doctrine of those cases to the present, in the sense contended for on the part of the defendant, would be a most unreasonable interference with the established course of trade, and justly alarm the mercantile community.

PER CURIAM, Judgment affirmed.

BENJAMIN JOHNSON *v.* NAT DUNN *et al.*

Where one covenanted to hire slaves, in pairs as sawyers, at so much per month, to be delivered on several given days, and he failed to deliver them on the days stipulated, but afterwards two of the pairs were produced and accepted, and one pair was not produced at all, it was *Held* that these stipulations were several and divisible, and that the hirer was entitled to recover on the covenant for the services of the slaves delivered and accepted.

Where it was covenanted that certain slaves should be hired for a year, at so much per month, and it was stipulated that the owner should have the right to take them away whenever he became dissatisfied with their treatment, and there was a further stipulation, to refer matters, in dispute between them, to a common referee, it was *Held* that this agreement to refer, did not prevent the owner from exercising his discretion as to taking them away, and, therefore, that this act formed no bar to his recovery for the service they had rendered.

ACTION of COVENANT, tried before CALDWELL, Judge, at the last Fall Term of Halifax Superior Court.

The plaintiff declared upon the following instrument, viz:

"Memorandum of an agreement, this day entered into between Nat Dunn and Benjamin Johnson, of Halifax county, North Carolina.

"The said Johnson agrees to hire to said Dunn three pairs of sawyers, at twenty-five dollars per month per pair, to be paid on or before January 1st, 1856. One pair to commence work by the 19th of February, and the other two by the first of April; provided, they do not run away before.

"The said Johnson agrees for the said Dunn to keep the said hands all the year, at the above rates, unless he becomes dissatisfied with their treatment, in which case, we agree to refer the matter of disagreement to two men, chosen by the parties.

"And L. H. B. Whitaker hereby binds himself, as security, for the payment of their hire at the above mentioned rate. Witness our hands and seals, at Halifax county, this the 13th day of February, 1855." Signed by the plaintiff, defendant, and Whitaker, with seals affixed to their names. The breach alleged was, the non-payment of the hire of the sawyers according to the contract.

It appeared in evidence, that the first pair of sawyers were delivered by the plaintiff to the defendant, on the last of February, or the first of March, 1855; the second pair, on the 10th of April thereafter, and that the third pair were not delivered at all, but were hired, by the plaintiff, to one Hyman for the year. It appeared also, that sometime in the summer of 1855, the plaintiff wrote a letter to the defendant, in which he complained that the sawyers, then in the latter's possession, were not well treated; that their food was not of a proper kind; that no house had been erected as defendant had promised, and that they were worked in a dense, sultry and unwholesome swamp. The slaves, hired by Hyman, went into his possession about the first of August, 1855, and remained with him until the first day of January following. It was proved also, that the plaintiff and defendant met on the 23rd of that month, when the plaintiff said to the defendant, "I suppose my negroes have run away." The defendant replied, that they had gone away some two or three weeks before. The plaintiff, thereupon, proposed to refer the matter to men. The defendant objected, unless the assent of Whitaker could be obtained. The latter could not be found, and no reference was made on that account. In the course of this last conversation, the defendant demanded the return of the sawyers, which was refused by the plaintiff.

The Court charged, that according to the interpretation of

the covenant, as understood by him, if the jury believed the witnesses, the plaintiff could not recover; that there was evidence to be left to them, that the plaintiff had assented to the sawyers going into the possession of Hyman.

Plaintiff excepted to the charge. The jury found a verdict for the defendant. Judgment. Appeal.

Miller and *Moore*, for the plaintiff.
Conigland, for the defendants.

PEARSON, C. J. The defendant resists a recovery, on the ground, that there are stipulations on the part of the plaintiff, which were dependant covenants, and a performance of which, it was necessary to allege and prove as a condition precedent to the right of action, and that the proof failed in these particulars. His Honor was of opinion with the defendants, and held that, according to the proper construction of the covenant, the evidence did not entitle the plaintiff to recover. There is error.

1st. The contract was entire in regard to the hiring of the three pairs of sawyers, and the plaintiff could not recover as he had failed to deliver one pair.

This Court is of opinion, from the wording of the covenant and the nature of the subject, that it was devisible, and was several in respect to the pairs of sawyers. The time at which they were respectively to commence work, is several, and although the whole price is to be paid at the end of the year, yet, a several rate of twenty-five dollars a month, per pair, is fixed, and, considering the nature of the work, the only certainty required, was in reference to a pair, as a saw cannot be operated without two practiced hands.

2nd. Neither pair was delivered, so as to commence work at the time stipulated.

The covenant seems to allow some margin in regard to time, by making the qualification, "provided they do not run away before;" but independent of this, the defendant, Dunn, having accepted them after the time, and having taken the benefit of their labor, in part performance of the covenant, is not at lib-

erty to refuse to pay a rateable price for it, because, he was not entitled to their services, except under the covenant. It may be, he might have refused to accept them after the time, and entitled himself to recover damages for an entire breach, but having treated it as continuing, by accepting them under it, he became liable for its performance on his part; and is left to a cross action for damages in respect to a prior breach on the part of the plaintiff, which was severed, and made independent by his subsequent acts—treating the covenant as still continuing and in force. It is a clearly recognised principle, that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to; *Franklin* v. *Miller*, 4 Ad. & Ell. 599; *Boon* v. *Eyre*, 1 H. Bla. 273; *Campbell* v. *Jones*, 6 T. R. 570.

3rd. The plaintiff violated the covenant by taking away the two pair of sawyers, and hiring them to one Hyman, before the expiration of the year. This objection is fatal according to the principle of *Brown* v. *White*, 2 Jones' Rep. 463, and *Dula* v. *Cowles*, ibid. 454, unless the plaintiff had a right to take his hands away by the terms of the covenant. This raises a question of construction. The stipulation that Johnson "may take the hands away, if he becomes dissatisfied with their treatment," necessarily constitutes him the judge in regard to the matter, and gives him the right to take them away whenever he is willing to assume the responsibility; for, unless he is to be the judge, so as to have the right to act *promptly*, his purpose, in making the stipulation, could not be effected, and to require him to wait, until the question could be settled, whether or not he had good grounds for his dissatisfaction, or was merely making a pretext, would involve a continuation of the very condition of things, against which it was the object to guard.

The additional stipulation, "to refer the matter of disagreement to two men, to be chosen by the parties," would not have the effect of preventing this consequence, if it be treated as a *condition precedent*, for the other party might refuse to

go into a reference, or a difficulty occur as to the choosing of their men, or delay be caused in some other way, and it could not have been the intention, as is to be inferred from a consideration of the subject-matter of the contract, to expose the right of the plaintiff to take away his hands, if he became dissatisfied with their treatment, to be in this way hindered, delayed, or defeated. This stipulation is satisfied as giving to it the effect of an *independent agreement* to refer the matter of disagreement, after the plaintiff had taken away his hands. So that, in that case, instead of the plaintiff bringing an action for damages, by reason of the maltreatment of his slaves, as alleged by him, or of the defendant bringing an action for breach of covenant, in taking them away without cause, as alleged by him, such matter of disagreement, was to be settled by means of a reference.

This construction renders the two stipulations consistent, is justified by the wording of the instrument, and gives effect to the intention of the parties.

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

ADAM WINNINGHAM & CO. *v.* THOMAS REDDING.

To support the plea of tender, it must be shown that it was made before the commencement of the suit.

Paying money to a magistrate, without obtaining, upon an appeal, a rule to pay the money into Court, is not according to the practice upon this subject, and will not avail the defendant any thing.

APPEAL from a justice's judgment, tried before SAUNDERS, J., at the last Fall Term of Randolph Superior Court.

The plaintiffs' offered evidence to show, that they were to thresh the defendant's wheat for the 17th bushel; but the defendant had the option to pay for the threshing, in money, at the market value of the wheat due for toll.

The defendant proved, that when the plaintiffs called upon

him for the wheat due for threshing, he offered to pay, in money, seventy-five cents per bushel, which the plaintiffs refused, saying, the defendant had offered them eighty cents per bushel, which they had refused. On the trial before the magistrate, defendant produced, and paid to the magistrate $6,28, in specie, which was admitted to be the true amount at eighty cents per bushel. This sum was returned into Court, by the magistrate, with the papers in the case.

A verdict was taken for the plaintiffs subject to the opinion of the Court, upon which his Honor subsequently gave judgment for the plaintiffs, and the defendant appealed.

Gorrell, for the plaintiffs.

No counsel appeared for the defendant in this Court.

BATTLE, J. The opinion expressed by his Honor, in the Court below, was fully sustained by cases previously adjudicated in this Court. See *Murray* v. *Windley*, 7 Ire. Rep. 201, and *Haughton & Booth* v. *Leary*, 3 Dev. and Bat. Rep. 21. To support the plea of tender, it must be shown that it was made before the commencement of the suit. If it were made afterwards, it cannot be pleaded as a bar; because it admits the necessity of the suit, as well as the justice of the demand, and the plaintiff ought, therefore, to have his costs. But, say the Court, in the last mentioned case, "by the modern equitable practice, the defendant, in such a case, pays principal, interest and costs, up to the time, into Court, and the Court lays the plaintiff under a rule to take the money, or proceed further in the case at his peril." The defendant omitted to adopt such a course in the present suit, and the consequence is, that judgment against him, in the Court below, for the full amount of the plaintiffs' claim, and for all the costs, must be affirmed.

PER CURIAM, Judgment affirmed.

Doe on the demise of JOHN NEWLIN *v.* MATTHEW OSBORNE.

Where the fraudulent donee of a tract of land, made a deed of trust of the same, to secure a debt to a third person, under which the land was sold for a valuable consideration, and without notice of the fraud, for which the purchaser gave his bond to the creditor and took the trustee's deed, it was *Held* that his coming to a knowledge of the fraud after such sale, and before such bond was collected from him, would not affect his title.

EJECTMENT, tried before DICK, J., at the last Fall Term of Alamance Superior Court.

Both the plaintiff and defendant claimed title under one Thomas Davis. The former exhibited a bond executed to him by Davis, and the record of a suit and judgment thereon in 1848. Execution had issued on this judgment, which was levied on the land in question, and it was sold to the plaintiff, at public auction, and a sheriff's deed made to him accordingly.

The defendant, who was the son-in-law of Davis, claimed title under a deed from the said Davis to himself, the consideration of which was expressed to be $1600. This deed was dated on the 12th of April, 1845. He exhibited also a deed of trust, made by himself to one Murchison, for the securing of debts due to one Vestal. This deed was dated 17th of May, 1845. He also exhibited a deed from Murchison, the trustee, to Jeremiah Osborne, dated 28th of May, 1846, which recited a consideration of $726,10, as being then paid. The trustee testified that he sold the land in question, at public auction, to Jeremiah Osborne, after due advertisement. This sale was advertised to be for cash, and was so offered; but after it was cried off to Jeremiah Osborne, by an arrangement among the parties, Vestal took the said Jeremiah's bond for the money, with the present defendant as security; whereupon, a deed was executed by the trustee to the said Jeremiah. The bond to Vestal was afterwards sued on and collected, under an execution in 1850. There was much evidence, tending to show, that the conveyance of Davis, to the defendant, was fraudu-

lently to hinder and delay the lessor of the plaintiff in the collection of his debt, and it was insisted by him, that the deed of trust to Murchison, and the sale by him to Jeremiah Osborne were, in furtherance of this fraudulent purpose, and that the two latter were privy to that design. On the other hand, it was contended by the defendant, that the deed of trust, and the sale to Jeremiah Osborne, were *bona fide*, and that the latter was a purchaser, for full consideration, and without notice of the alleged fraud. So that, the title being out of the lessor of the plaintiff, he was not entitled to recover in this action.

The Court instructed the jury, "that if the conveyances of Davis to the defendant, were made to hinder, delay, or defraud the plaintiff's lessor, in getting satisfaction for his debt, they were fraudulent and void as against his execution; but if they were satisfied that Jeremiah Osborne had purchased the land for value and without notice of the alleged fraud, his title would be good, and would bar the plaintiff's recovery. But, that although Jeremiah Osborne had purchased for value, if at the time of his purchase, or before he paid the purchase-money, he had notice of the alleged fraud, he had not a good title, and the plaintiff was not barred of his recovery by reason of it." Defendant excepted to this charge.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

Graham, for the plaintiff.
T. Ruffin, Jr., for the defendant.

PEARSON, C. J. His Honor was of opinion, that, assuming the conveyance, from Davis to the defendant, to be fraudulent as to creditors, and that the fraud was not purged by the conveyance from the defendant to Murchison, in trust, to pay a *bona fide* debt due to Vestal, and, assuming further, that Murchison sold and conveyed the land to Jeremiah Osborne for a valuable consideration, which was satisfied by the note of Jeremiah Osborne, given and accepted by Vestal in dis-

charge of the debt of Davis to Vestal, in respect to which, the deed of trust had been executed, so that Jeremiah Osborne had acquired the title as a *bona fide* purchaser for valuable consideration, without notice of the fraud between Davis and the defendant; yet, if Jeremiah Osborne, *afterwards*, and before he paid the note given by him to Vestal, received notice of the alleged fraud, his title was, by the force of such notice made void and of no effect; and the plaintiff was entitled to recover.

In this opinion we do not concur Without discussing the subject generally, a particular view will be sufficient. In order to give to the fact of notice, any effect, either at law, or in equity, it is necessary that it should be received in time to enable the party to avail himself of it. After a purchaser has paid the price, and taken a conveyance, it comes too late. In our case both acts had been done; Jeremiah Osborne's note had been given and accepted in discharge of the debt secured by the trust, and when he received notice of the fraud, he had no more ground, or means by reason thereof, for resisting the collection of the note by Vestal, than he would have had for recovering the money back if it had been paid.

It is unnecessary to notice the other points.

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

WALTER A. JORDAN *v.* JACOB LASSITER, *Adm'r*.

Where, in an action against a carpenter for the negligent use of fire, by which a house, on which he was working, was destroyed, the question was, whether the plaintiff had assented to, and approved of, the manner in which he had used the fire, it was *Held* that the facts, that the fire was made at a place where the plaintiff's agents, with his knowledge, and without objection, had several times made it, and that he declared the burning of the house to be an accident, for which he did not blame the defendant, were some evidence to go to the jury.

ACTION ON THE CASE, tried before SAUNDERS, J., at the last Fall Term of Montgomery Superior Court.

The declaration was for negligence on the part of the defendant's intestate in so using a fire, built near the plaintiff's house, for the convenience of himself and his agents, as to cause the destruction of the building, and of a quantity of lumber procured for the construction of the same. There was evidence, tending to show, that defendant had made the fire quite near the building, about which there were shavings and other combustible materials; that there was considerable wind, and he had not taken proper caution to prevent the fire from communicating with the shavings; that while he and his assistants were engaged at work the shavings took fire, and although all proper exertions were made to extinguish the flames, the building and lumber were entirely destroyed.

The defendant proved, by one *Morris*, that the fire, on this occasion, was built at the spot where he, (the witness,) who was an employee of the plaintiff, had often built it before; that the plaintiff was frequently present at the fires thus made by him, and made no objection to them; that there were some shavings about these fires then, but not so many as when the house was burned. Another witness proved that, on one occasion, shortly after the house was destroyed, the plaintiff said it was an accident, for which he did not blame Hicks, (defendant's intestate).

The charge of his Honor as to the general question of negligence, &c., was not excepted to, but the defendant's counsel moved his Honor to charge the jury, that if they believed, from the evidence, that the plaintiff assented to, or approved of, the building of the fire at the place where it was, the defendant's intestate would not be liable. His Honor declined so to instruct the jury, saying, that there was no evidence to justify such a charge. The defendant's counsel excepted.

There was a verdict for the plaintiff, and judgment, from which the defendant appealed.

Mendenhall, for the plaintiff.
Kelly, for the defendant.

BATTLE, J. The only question presented in this case, is, whether there was any testimony to be submitted to the jury upon the prayer of the defendant, for an instruction that, "if the plaintiff assented to, or approved of, the building of the fire" at the place mentioned by the witnesses, the defendant's intestate would not be liable." If there were any such testimony, it was error, in the Judge, not to have left it to be weighed by the jury, but if there were none, then, he was right in so deciding. It is often a difficult question to determine whether there is, or is not, any evidence tending to establish a fact, which it is necessary for one of the parties to prove. That difficulty was felt and expressed by this Court in the cases of *Cobb* v. *Fogleman*, 1 Ire. Rep. 140; *State* v. *Revels*, Busb. Rep. 200, and *Sutton* v. *Madre*, 2 Jones' Rep. 320. Circumstances, which merely raise a conjecture of a fact, ought not to be submitted alone to the jury as proving, or tending to prove, that fact, but, if they be such as to raise more than a mere conjecture, the Judge cannot pronounce upon their sufficiency to establish the fact, but must leave them to be weighed by the jury, whose exclusive province it is to decide upon the effect of the testimony. In the present case, the plaintiff had shown enough to fix the defendant's intestate with negligence, so that the burden was thrown upon the defendant to release his intestate from liability by proof, either positive, or circumstantial, that the plaintiff "had assented to, or approved of," the act which was alleged to be culpable neglect. Upon a careful examination of the testimony, we think that there were some circumstances, testified to by some of the witnesses, which tended to show this assent or approval. We allude to that part of the testimony which proved that the fire was built by the intestate in the same place in which the plaintiff, or his hands, had made it and renewed it from time to time, for several weeks before, and that after the house was burnt, the plaintiff said it was an accident, and

that he did not blame the intestate. It is true, that one witness stated, that about three weeks before the house was burnt, he heard the plaintiff say to the intestate, that he thought the fire was too near the house; but, at most, that was only evidence in opposition to that of the other witnesses, who testified that the plaintiff never objected to the fire being made at the place designated, and could not prevent the latter testimony, if it were otherwise proper, from being submitted to the consideration of the jury. Whether it was sufficient to establish the fact contended for by the defendant, it is not for us to say; but, thinking as we do, that it was *some* evidence, tending to the establishment of that fact, we are bound to declare that the presiding Judge erred in holding that it was not so, and on that account refusing to permit it to go before the jury. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

STATE *v.* EPHRAIM EMORY *et al.*

What is said by a person of color, (otherwise incompetent to testify,) in explanation of the nature of the possession which he *then* has of land, is admissible as a part of the *res gestæ;* but what he says about such possession after he has left the land, *is not* admissible.

INDICTMENT for a FORCIBLE TRESPASS, tried before SAUNDERS, J., at the last Fall Term of Granville Superior Court.

One Fuller, a free negro, occupied a house, in the forcible taking possession of which, it was alleged the trespass was committed. It was proved that the family of Fuller was put out of possession of the premises with violence, and that he and they were kept out from that time, forth.

The defendants offered to prove, that on the next day after the forcible eviction, Fuller, the free negro, stated that he had

agreed with the defendant, Ephraim Emory, that he might come and take possession of the house in question. This evidence was rejected by his Honor, and the defendants excepted.

Verdict—guilty. Judgment and appeal.

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

PEARSON, C. J. Fuller, being a free negro, was not competent as a witness, and could not have been heard *on oath*, to prove the fact alleged, to wit, that he had agreed that Emory might take the possession. We are unable to see any principle upon which *his* naked statement, on the day after the matter occurred, is admissible to prove the fact; his statement is certainly not more to be relied on than his oath.

While he was in possession, his statements in explanation of the nature of such possession, would have been competent as part of the *res gestæ;* but after he was turned out, his statement in reference to a fact, alleged to have taken place before, is not aided by the principle of evidence referred to, and is a mere naked declaration in regard to a matter that had past, unsupported by any test of truth.

There is no error. This will be certified.

PER CURIAM, Judgment affirmed.

THE COMMISSIONERS OF SALISBURY *v.* CHARLES T. POWE.

A town ordinance, prohibiting a "*person from a place*" infected with small pox, to enter such town, was *Held* to embrace those persons only, who left such infected place after the passage of the ordinance, and came immediately or directly to such town.

ACTION of DEBT for a penalty, which came by appeal from a a magistrate to the Superior Court of Rowan, and was tried

before MANLY, J., at the last Fall Term of that Court. *Plea, nil debit.*

On the trial, the plaintiff gave in evidence the charter of the town, passed in 1848, by which the commissioners of the town have power to prohibit persons recently from any place, where a contagious disease is believed to exist, from entering the town, and goods and chattels from being brought from such place within the town; and by an ordinance to fix a penalty for the breach of any of the rules established by them on this subject; which penalty shall be recovered by action of debt in the name of the commissioners of the town of Salisbury, in any court having jurisdiction. The plaintiff also gave in evidence an ordinance passed by the commissioners of the town on 10th day of March, 1858; by which, after reciting that the small pox exists at Gold-Hill, in the county of Rowan, it was, for the better protection of the citizens of the said town, ordained, amongst other things, that any and every person from Gold-Hill, is hereby prohibted from coming within the corporate limits of the town of Salisbury, under a penalty of fifty dollars for each and every offense; and that no person shall bring into said town any goods or chattels from said place, under the penanty of fifty dollars, for each and every offense; and that any citizen of the said town, who shall receive, or permit to remain, on his premises, any person, goods or chattels, from said place, shall forfeit and pay the sum of fifty dollars for each and every offense; and that no stage, or passenger therein, coming through Gold-Hill, shall enter within the corporate limits of the said town, under the penalty of fifty dollars for each and every offense; and that the ordinance be in force from its passage, until it shall be repealed. The plaintiff then gave further in evidence, that the ordinance was immediately published, and that on the 9th day of March, 1858, the defendant, who was a resident in Salisbury, was on a journey from Salisbury to Wadesborough, and on his way, passed through the place, called Gold-Hill; that he stopped there a short time, and, being a practicing physician, visited a patient, who had the small-

pox, and then proceeded to Wadesborough; and that, on the 15th of March, 1858, the defendant returned to Salisbury, without having been at Gold-Hill after the 9th of March, but with a knowledge of the ordinance.

The Court instructed the jury, that the plaintiff could not recover; and a verdict and judgment were given for the defendant, and the plaintiff appealed.

Boyden, for the plaintiff.
Fleming, for the defendant.

RUFFIN, J. The case may be within the mischief, against which the charter and ordinance were directed. Yet, if it be not within the enactment also, the action cannot be sustained. The ordinance was probably drawn in haste, under the panic inspired by the vicinity of a dangerous contagious disease. At all events, it is loosely worded—not directly providing, even against a person with the disease on him, entering the town. It recites, that small-pox was then at Gold-Hill, without any allusion to the period it had been there, and then enacts that every person from Gold-Hill is prohibted from coming into Salisbury. The expression, "person from Gold-Hill," is not to be construed so as to include every one who had been in that place, or came from it at any indefinite period before; as that would be an unreasonable by-law, which could not be supported. No doubt, those persons were meant, who had been at Gold-Hill recently, and since it had been infected with small-pox, and who, therefore, might bring the disease with them. That would have been a reasonable precaution, which would have sustained an ordinance expressed in that manner. But such are not the terms of this ordinance. On the contrary, it uses simply the language quoted, "a person from Gold-Hill;" which may have several other meanings, but not one that can include this case. A citizen of Salisbury will say of a citizen of Gold-Hill, whom he sees in Salisbury, that he is "from Gold-Hill"—signifying his residence there. On the other hand, when one at Salis-

bury speaks of a person coming there from "Gold-Hill," without any words referring to time, he means coming immediately or directly from it; and the same language in the law can only mean the same thing, with the addition, that the coming must be "from the place" after the law, forbidding it, was passed. The defendant did not come to Salisbury direct from Gold Hill, nor had he been there after the ordinance, and, therefore, he is not within it.

PER CURIAM, Judgment affirmed.

HENRY B. WILLIAMS, *Adm'r.*, *v.* ADAM ALEXANDER.

Where it appeared that a credit was intered on a bond within ten years before the suit was brought, by the obligee, who died also before the ten years had expired, it was *Held* proper evidence to go to the jury, to rebut the presumption of payment arising from the lapse of time.

THIS was an action of DEBT, tried before SAUNDERS, J., at the Special Term (June, 1858,) of Mecklenburg Superior Court.

The declaration was on the bond of the defendant, due on the 1st of January, 1843. The writ was issued on the 15th day of June, 1855. The execution of the specialty was admitted; it was also admitted that the endorsements of credits, on the bond, were in the hand-writing of T. L. Hutchison, the obligee, and that he died on the 4th of November, 1846; one of these endorsements was a receipt for fifty dollars, from Adam Alexander, the present defendant, dated the 26th of February, 1845, and the other was a receipt for $2,35, from C. T. Alexander, a co-obligor in the bond, dated the 29th of January, 1846. And the only question was, whether the latter endorsement was evidence to go to the jury, to rebut the presumption of payment arising from the lapse of time.

By the consent of parties, a verdict was entered for the plaintiff, with leave to set it aside and enter a nonsuit, if upon

consideration of the point of law reserved, the Court should be of opinion with the defendant.

Afterwards the Court being of opinion with the defendant, ordered a nonsuit, from which judgment the plaintiff appealed.

Boyden and *Brown*, for the plaintiff.
Wilson, for the defendant.

BATTLE, J. When this case was before us at December Term, 1857, (see 5 Jones' Rep. 162,) it was submitted without any argument on the part of the plaintiff. Had our attention been called at that time to the authorities which the learning and industry of his counsel have now been able to produce, our decision would have been then, as it is now, in his favor.

The general rule of evidence undoubtedly is, as we, on the former occasion, stated it to be, that a party cannot offer, as testimony in his own favor, his acts or declarations, unless they form part of something done, which it is competent for him to prove. We then thought that it was no exception to the rule, that the acts or declarations were done, or made at a time when they were against the interest of the party doing or making them. In this, we find that we were mistaken, and we are glad that we are able to avail ourselves of this early opportunity for correcting the mistake. An instance of this exception, to which we allude is, that the endorsement by the obligee of a bond, or the payee of a note, of the payment of interest or part of the principal of a bond or note, made at a time when it was against his interest to make it, may be used as evidence by him to rebut the presumption of payment, or repel the bar of the statute of limitations, arising from the lapse of time. The doctrine on this subject is traced, by all elementary writers, to the case of *Searle* v. *Lord Barrington*, which is to be found reported in 2 Stra. 826; 8 Mod. Rep. 278; 2 Ld. Raym. 1370, and 3 Bro. Par. Cas. 593. It was an action on a bond, and the defendant pleaded *solvit ad diem*, and relied on the presumption arising from the lapse of twenty-eight years from the date of the bond, in support of

his plea. To repel this presumption, the plaintiff offered in evidence two endorsements of the payment of interest on the bond, one of which was within twenty years, and this evidence, after argument, was held to be admissible. The case is said to have undergone much discussion, and the judgment, in it, was finally affirmed in the House of Lords. This case has been oftentimes referred to in subsequent cases, and the principle, deducible from it, has been approved or doubted, according to the view which the Judges who alluded to it took of the facts, (which are somewhat differently stated by the different reporters,) upon which it is supposed to have been decided. See Stark. on Ev. 306, and note 3, to that page. An able review of it may be found in the opinion delivered for the Court, by SPENCER, C. J., in *Roseboom* v. *Billington*, 17 John. Rep. 184. His conclusion, upon a full consideration of the subject, discussed in that and other similar cases, expresses what we conceive to be both the general rule and the exception to it. "An endorsement, therefore, on a bond or note, made by the obligee or promisee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making such endorsement, unless it be shown that it was made at a time when its operation would be against the interest of the party making it. If such proof be given, it would be good evidence for the consideration of the jury," that is, to repel the presumption of payment arising from lapse of time, or to remove the bar of the statute of limitations. In the case before us, such evidence was given. The obligee died several years before the presumption had arisen, and the entry of the payment on the back of the bond was found to be in his hand-writing. It must, of necessity, then, have been made when it was against his interest, and at a time when we cannot imagine a motive for making a false entry. It is the ordinary course of business for obligees to make such endorsements, and as they furnish evidence against the obligees at the time when they are made, they ought to be admitted as evidence for them when it becomes necessary, and when it appears, from other evidence, that it is morally certain that

they speak the truth, both as to the fact of the payment, and the date when it was made.

His Honor was right in ordering the nonsuit, in the Court below, upon the authority of the decision in this Court, but as we think that we erred in making that decision, we now feel it our duty to correct it, by directing the judgment of nonsuit to be reversed, and ordering judgment to be entered for the plaintiff upon the verdict, according to the agreement of the parties.

PER CURIAM, Judgment reversed, and judgment for the plaintiff.

MOSS, BELL & CO. *v.* HUGH H. PEOPLES.

For one to go with an absconding debtor to a Railroad depot, where he took passage in the train, and to take his horse back to his residence, knowing of the debtor's fraudulent intention to abscond, is such aiding and assisting as will make the party liable under the statute.

ACTION ON THE CASE, for fraudulently removing a debtor, tried before SAUNDERS, J., at the Special Term (June, 1858,) of Mecklenburg Superior Court.

The plaintiff, after establishing his debt, offered evidence that Williamson, the debtor, resided within three or four miles of a depot on the North Carolina Railroad; that the defendant was his son-in-law, and had, with his wife, been at the house of Williamson some days before he left. There was also evidence, tending to show, that the defendant knew of the intention of the debtor to leave. Williamson and the defendant left before day and went to the depot, which was a public place, where they remained a short time, when Williamson left on the freight train, which passed at its usual hour. Williamson had cotton on this train, with which he went to Columbia, in South Carolina, and sold it. The defendant re-

turned to the house of Williamson, and remained there openly for a day, during which time, he stated that he was expecting Williamson to return.

The counsel for the plaintiffs argued, that if the jury should believe that the defendant knew it was the intention of Williamson to abscond, and went with him to the depot, and brought back his horse, that, in itself, was evidence of aiding and assisting, and made him liable, and asked his Honor so to instruct the jury.

The Court declined giving the instruction prayed, but told the jury, to entitle the plaintiffs to a verdict, they should be satisfied that the defendant knew of the intention of Williamson to leave the country, and that he aided and assisted him in making his escape, with the intent to hinder, delay and defraud his creditors in the collection of their debts; "to aid the debtor in any way, would be such aiding; but the bringing back the horse, where he could be attached, would not, in itself, furnish such evidence." The plaintiffs excepted to this charge.

Verdict for the defendant. Judgment. Appeal by the plaintiffs.

Osborne and *Lowrey* for plaintiffs.
Boyden, for defendant.

PEARSON, C. J. Assuming that it was the purpose of Williamson to abscond with an intent to defraud his creditors, in which sense the word "leave" is used in the statement of the case, and, that the defendant knew of this intention, the plaintiff was entitled to the instruction, that the fact of his going with him to the depot, together with the fact of his bringing back his horse, amounted to "aiding and assisting" him to "remove," within the meaning of the statute, and the error in refusing to give this instruction, is not cured by the general instruction given, instead of it. Indeed, the effect of the general instruction was nullified by such refusal, and by the reference, which was made to the circumstance that the horse,

after being brought back, could have been attached by creditors.

We are led to this conclusion, by the principles to be deduced from *Godsey* v. *Bason*, 8 Ire. Rep. 264; *Wiley* v. *McRee*, 2 Jones' Rep. 349; *Moore* v. *Rogers*, 3 Jones' Rep. 90. "The statute is remedial, for the prevention of frauds on creditors, and is entitled to a liberal interpretation." "*Aid or assistance*, is the doing of some act, whereby the party is enabled, or it is made easier for him to do the principal act, or effect some primary purpose." In our case, the two acts of going with the debtor to the depot, and bringing back his horse, made it easier for him to abscond and leave the country secretly, so as not to attract the attention of his creditors, by giving to the movement the appearance of the ordinary act of a gentleman, who is going to market to sell his cotton.

Going with him to the depot, aided the purpose in two ways; it lulled suspicion, and it nerved and encouraged the debtor, so as to enable him to act his part. "Conscience doth make cowards of us all," and the presence of a friend may have been necessary to assist him in keeping up the appearance of an honest man. If one is about to commit an assault, the mere presence of a friend gives courage, and helps him on to do the act. So, if one is about to cross a dangerous ford, the fact that a friend crosses with him, is of essential assistance, although he does not guide or help in any way, save by his presence. These are principles, grounded in human nature, and reference must be had to them, in order to determine what acts of one will aid or assist another.

Carrying back the horse, aided the debtor. It served the purpose by covering his escape. Suppose the horse had been left standing at the rack after the debtor had started off on the freight train, suspicion would have been aroused, and a hot pursuit might have intercepted him while making sale of his cotton in Columbia. This consequence was averted by the act of taking back the horse; and in this connection, the fact that the defendant, after he got back to the house of the debtor, falsely announced, both on that and the succeeding

day, that "he was expecting him to return," ought to have had a significant bearing. *Venire de novo.*

PER CURIAM, Judgment reversed.

S. S. FARRAR & BROTHERS *v.* ABRAM REDWINE.

Where, to a schedule filed by an insolvent debtor, a creditor alleged in his specifications, that two notes had been fraudulently transferred to secure a feigned debt, and the jury found these allegations to be true, whereupon the debtor filed a new schedule, admitting that the debt, secured, was feigned, but to acquit himself of the fraud, alleged that the trustee had run away with the funds, and he surrendered all his claim upon the trustee; it was *Held* that the creditor was entitled to make suggestions of fraud, and to have an issue as to all the matters set out in the new schedule concerning the fraudulent transfer of these notes.

THIS was an application to take the insolvent debtor's oath, before MANLY, J., at the last Fall Term of Union Superior Court.

The defendant, Redwine, who is the applicant in the case, had filed a schedule, in which, among other things, is this clause: "4th, a claim against Wyatt Austin, for the surplus remaining in his hands after satisfying the trust, executed to him by A. Redwine, on the 16th of August, 1857, amounting to about $2930,40. The circumstances of which, are as follows: A. Redwine, to secure the payment of the following notes against him: one note in favor of A. Goss, for $3500, to which Wyatt Austin was security, &c., conveyed on the 16th of August, 1856, in writing, by deed, in trust to the said Wyatt Austin, the following property and choses in action: 1st. One horse and buggy, household and kitchen furniture; one note on John M. Cocheram and Thomas Boyington, for $2,343, due the 1st of January, 1858, with interest from the 1st day of October, 1856; a second note on the same, for $2,017,40, due 1st day of January, 1859, with interest from 1st of Octo-

ber, 1856; one note on F. L. Staton, for $40, due 1st of October, 1856; one note on Alexander Jones, for $20, due 1st of January, 1857. The said Austin paid out of the fund, conveyed to him in trust, to J. H. Woodward $190, to A. Goss, in notes, $272, and was entitled to retain, as due himself, $300, with interest. He paid H. M. Houston, agent of Dewing, Thayer & Co., a debt due the said firm, of about $630, which last debt was not provided for in the said trust, and was paid without any authority from said Redwine. The foregoing is all that the said Austin ever paid on account of the said Redwine. The said Austin, shortly after the execution of the said trust, sold the $2,343 dollar note to Daniel M. Fesperman, and the other note on the same, for $2,017,40, to H. M. Houston. The said Austin agreed, with said Redwine, to satisfy the debt due to Goss, and apply the remainder to certain judgments obtained against him in the County Court of Union. On the 28th February, 1857, said Redwine had a settlement with Goss, and after allowing credit for all the said Redwine had paid, as well as $272 paid by the said Austin, there was a balance due on said note of between $800 and $900, for which balance, the said Redwine gave his own note *and took up the old note*. With the exception of the $272, Austin never paid a cent to the said Goss, the said Redwine having made all the other payments himself—the whole, in truth, is now, and has been, since the 28th of February, 1857, satisfied."

Upon this schedule being filed in the County Court of Union, suggestions of fraud and concealment were filed by the plaintiffs, and an issue made to try the same, upon which the jury rendered the following verdict: "They find that the defendant, A. Redwine, is guilty of fraud in the two Georgia notes, and that after deducting the amount of the $1,392, which he paid to his creditors, which leaves a balance of $2,867 of said notes, fraudulently conveyed away." Whereupon it was adjudged by the County Court, "that the said Redwine be imprisoned until a full and fair disclosure of all the moneys, property or effects, be made by the said Redwine." This was at April Term, 1858, of the County Court.

Afterwards, viz., at July Term, the defendant, A. Redwine, filed a new schedule, which, in a great many respects, is identical with that previously filed; but with respect to the matters referred to in the verdict of the jury, the schedule is as follows: 4th. "The following notes and property, or the proceeds and surplus thereof, remaining in the hands of Wyatt Austin, to whom they were conveyed by the said A. Redwine, by a deed in trust, executed to the said Wyatt Austin, on the 16th day of August, 1856, one note on Cocheram and Boyington, due on the 1st of January, 1858, &c., (describing them as in the former schedule). The facts, touching which said notes and property, are as follows, viz., by the said deed in trust, the said Redwine conveyed to the said Austin the notes, &c., to secure the payment of a debt, due from A. Redwine to A. Goss, for $3,500, due in July, 1855, to which Wyatt Austin is surety. Yet, in fact, the said Redwine owed the said Goss no such amount, but only about $272 with interest." * * * * "The two notes on Cocheram and Boyington, as the said Redwine is informed, the said Austin, without the knowledge of the said Redwine, sold and disposed of greatly under their value—the one of $2,343, to Daniel M. Fesperman; the $2,017,40 to Hugh M. Houston, as the said Redwine has been informed, for $700 cash, $500 in notes, and about $630 in a note from Redwine to Dewing, Thayer & Co. * * * * "Upon being informed that the said Austin had sold the Cocheram and Boyington notes, and becoming dissatisfied with his management of the fund, he called upon him in the month of February, 1857, when Austin sent certain notes to A. Goss, to satisfy his debt, amounting to about $272, and promised, at July Term, 1857, of Union County Court, to pay all the judgments, pending in the said Court, against the said Redwine. But some time after this, about the middle of April, 1857, Austin absconded from the county, without ever accounting to him for any part of the effects conveyed to him, except as above described." These exceptions as credits, are enumerated, and amount to $1,392. The schedule then proceeds, "and after deducting which, he is indebted to him

for all the balance of the effects conveyed. The said Redwine therefore surrenders, not only the effects so conveyed in said trust, but all the proceeds, balance and surplus thereof, and all the property and effects that may have been substituted therefor, and all the claim, interest, demand, action, and right of action, either at law or in equity, which he, the said Redwine, may have on account of the same against the said Austin, or any other person."

To this schedule, the plaintiffs' counsel made specific suggestions of fraud and concealment; amongst others, as follows: "that the defendant has money to the amount of more than ten dollars, as part of the proceeds of the sale of the Cocheram and Boyington notes, to H. M. Houston, paid him by Wyatt Austin."

"That he has notes and effects concealed in the hands of Alex. Goss."

"That he has money concealed in the hands of Alexander Goss to the amount of $50, or more."

"That he has not surrendered and produced the notes received by the trustee, Wyatt Austin, for the Cocheram and Boyington notes, sold to H. M. Houston."

"That he has not surrendered and produced the notes to the amount of about $1400, which his trustee, Wyatt Austin, received from Joseph Smith for the Fesperman tract of land, for which, the Cocheram and Boyington debt of $2,017, was given to Fesperman."

Upon these suggestions, the plaintiffs demanded an issue to be tried by a jury, but the County Court held that the plaintiffs had no right to make up an issue on the schedule, whereupon it was adjudged by the Court, that Redwine be permitted to swear to his new schedule and be discharged. From which judgment the plaintiffs prayed an appeal to the Superior Court.

In the Superior Court, his Honor, after examining the new schedule filed by the defendant, and the suggestions of fraud made by the plaintiffs, was of opinion that the plaintiffs had no right to tender such issues, or any of them, because the new schedule did not involve any allegation of fact, justify-

ing the new issues tendered. His Honor was of opinion, that if the amendments of the debtor's schedule involve any allegation of fact, upon which an issue could be raised, the creditor had a right to tender him such issue, but not to tender new issues outside, and irrespective of such allegations.

Within these limits, his Honor said the parties respectively should be allowed to tender, and must accept issues, under the direction of the Court.

Whereupon, his Honor ordered that the defendant be permitted to take the oath prescribed for insolvent debtors, and the plaintiffs appealed to the Supreme Court.

Osborne and *Jones*, for the plaintiffs.
Wilson and *Fowle*, for the defendant.

PEARSON, C. J. If we correctly apprehend the opinion of his Honor, it is in substance, this: where a debtor files a schedule and an issue of fraud or concealment, in respect to one item, or subject matter set out, is found against him, and he, thereupon, files an amended schedule, the creditor in his suggestion of fraud or concealment, for the purpose of another issue, is confined to the amended schedule, and is not at liberty to take exceptions to any item or subject matter, set out in the original schedule, other than that in respect to which the fraud or concealment was found.

We concur in the opinion; and believe this to be the proper construction of the statute; for if the creditor is at liberty to take the original schedule by piece meal, and make up issues of fraud upon one item after another, the debtor might be subjected to a longer imprisonment than the statute seems to contemplate; and to avoid this consequence, all exception must be considered as waived except as to the items or subjects in regard to which issues are made up at the outset. This is in strict analogy to the rule, that upon a *sci. fa.* to revive a dormant judgment, no cause can be shown, which would have been a matter of defense to the original action, and upon a *sci. fa.* suggesting a further breach on the conditions of a bond, upon

which judgment has been rendered, no matter can be suggested, in respect to which, a breach could have been assigned in the original proceeding; the principle, in all such cases, being, that "good matter must be taken advantage of in apt time," and an omission to do so, is considered as a waiver, to prevent protracted litigation.

But although we agree with his Honor as to the construction of the statute, we differ with him as to its application to the case now under consideration. Here, too, owing to the very succinct manner in which the statement of the case is made, and to the voluminous documents sent as explanatory thereof, this Court has had great difficulty, and been subjected to much trouble in finding out the point which the case intended to present.

The jury find fraud and concealment in respect to two notes of considerable amount, called in the verdict the "Georgia notes," upon John M. Cocheram and Thomas Boyington—one for $2,343, due on the 1st January, 1858, with interest from the 1st of October, 1856; the other for $2,017,40, due on the 1st of January, 1859, with interest from 1st of October, 1856.

The *original schedule* states that these two notes, with other notes, and certain articles of personal property, had been conveyed, by deed, dated 16th of August, 1857, to Wyatt Austin in trust, to secure, among others, a debt due to one A. Goss, for $3,500, to which said Austin is surety, drawn in July, 1855; that Austin sold the note for $2,343, to one Fesperman, and the note for $2,017,40 to one Houston, and agreed to satisfy the debt of $3,500 due to Goss, and account for the balance of the trust fund; but, in fact, Austin had not paid the debt due to Goss, and Redwine himself had made large payments thereon, and "took up the old note" by giving his note for the balance, viz., $800 or $900, and thereupon the schedule sets out "*a claim* against Wyatt Austin for the surplus in his hands, after satisfying the trust."

The amended schedule gives an entire different version of this transaction; for it discloses this fact, "although the deed

in trust (to Austin) represents the debt, due to Goss, to be $3,500, yet, in fact, the said Redwine owed the said Goss no such amount, but only about $272." It further sets out that Austin sold the twenty-three-hundred-and-forty-three dollar note to Fesperman, at an under value, but does not state what he received therefor, and that he sold the twenty hundred and seventeen dollar note to Houston for $700, cash, $500 in notes, and $630 in a note, due from Redwine to Dewing, Thayer & Co., and that Redwine, being dissatisfied with his management of the fund, called upon him for an account, and he promised to make certain payments upon the judgments, which had been obtained against Redwine, but "about the middle of April, 1857, said Austin absconded from the county, without ever accounting to him for any of the effects conveyed, &c."

That this is not a full and fair disclosure, is almost so apparent upon its face, as to have justified the Court in so ruling, without submitting issues to the jury; but, most certainly, the creditors ought to have been permitted to test its truth and fairness, by the issues which were tendered in respect to it, and which, as it seems to us, were not "outside and irrespective" of the allegation of fraud before made, but, were directly relevant and tended to show that the new schedule was not a full and fair disclosure, in this: that it did not show what had become of the large amount paid by Redwine to Goss on the feigned debt, or of the funds received from Fesperman, or of the $700 cash, and $500 in notes, received of Houston, except by the naked averment of Redwine, that Austin had "absconded without accounting with him for any part thereof;" and surely, after the admission, that the debt of $3,500 to Goss was feigned, except as to a small amount, and inserted in the deed of trust by covin between Redwine and Austin, with an intent to enable Redwine to defraud his creditors, they ought not to have been required to take his statement that Austin had paid over to him no part of the fund, as true, and should have been allowed to tender any issue or issues calculated to eviscerate the truth, and if the facts warrant it, to frame an issue, so as to raise the question,

whether a debtor, who had wilfully and fraudulently, put his effects in the hands of an accomplice, with an intent that he should abscond and take them beyond the reach of the law, with the further intent, afterwards, to join him and share in the spoils, has not excluded himself from the benefit of the laws passed for the relief of insolvent debtors. Why require a full and fair disclosure, if the property cannot be restored and put within the reach of the law? Under this state of facts, how can the debtor take the oath which the act prescribes? There is error.

PER CURIAM, Judgment reversed.

JOHN SWANN *v.* CALVIN S. BROWN.

Where the keeper of a livery stable permitted the owner of certain horses to go into the stable, at a late hour of the night, and take them out, in consequence of which, a horse belonging to the plaintiff made his escape and was lost, either by passing out with the other horses, or afterwards, a part of the door being left open, it was *Held* that the owner of the stable was liable for such loss.

THIS was an action on the CASE for negligence, in keeping the plaintiff's horse in the defendant's livery stable, whereby he was lost; tried before BAILEY, J., at Spring Term, 1858, of Rowan Superior Court.

The defendant kept a livery stable in the town of Salisbury, and agreed with the plaintiff to keep his horse at seven dollars per month. The defendant also kept other horses, belonging to a stage-coach, which were under the management of a driver. *Mr. Chunn* stated that he, as agent of the defendant, had the superintendence of the stable; that plaintiff's horse and the stage-horses were put in the stable at night; that the plaintiff's horse was put in a stall by himself with a halter around his neck, with the other end fastened to some part of wood-work of the stable; that the rope was large and strong;

that the stable had a folding door, with upper and lower shutters, which were fastened inside; that on the next morning he went to the stable; that the plaintiff's horse had broken his rope and was gone, and that the stage-horses, the stage and the driver, were also gone; that he found the horse near the railroad, on which he had been killed by the engine's running over him; that a part of the rope was around his neck, and the other part was in the stall where he had been fastened; that he found the lower part of the door closed and fastened, as he had left it the night before, but the upper part was open. There was no evidence as to the height of the lower part of the door.

It was insisted by the plaintiff's counsel, that the stable door was left open by the stage-driver when he took out his horses, and that after he left, the plaintiff's horse made his escape, and that this was negligence.

The Court charged the jury, that if this was so, the defendant would be responsible; but if the plaintiff's horse was in his stall and fastened with a halter, in the manner mentioned ed by the witness, and while the stage-driver was in the act of taking his horses out, the plaintiff's horse broke his halter and passed out at the door at the same time the driver was taking his out, he would not be responsible. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Osborne and *Jones*, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. The delivery by the plaintiff of his horse to be kept by the defendant in his livery stable, created a bailment, which, being mutually beneficial to the parties, bound the bailee, according to the general rule, to take ordinary care of the property. "Ordinary care" is that degree of care, which, under the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own; and the case will be varied according to the nature of the thing bailed, the purpose for which it was bailed, and the particular cir-

cumstances under which it was bailed;" *Brock* v. *King*, 3 Jones' Rep. 45; *Heathcock* v. *Pennington*, 11 Ire. Rep. 640; *Couch* v. *Jones*, 5 Jones' Rep. 402. It is admitted by the counsel, on both sides, that this is the proper rule, and they differ only in the application of it to the circumstances of the present case. The want of ordinary care, which the plaintiff imputes to the defendant, consisted in the fact, that the upper part of the stable door was left open, whereby, as he alleges, the horse was enabled to escape. There was no direct evidence at what time of the night, or in what particular manner the horse got out of the stable. As it was proved, however, that during the night in question, certain stage-horses, which were kept there, were taken out, and the upper part of the door was found open next morning, it was a fair inference that the horse of the plaintiff made his escape in consequence of those acts, and he had a right to the instruction of the Court, as to whether that was not negligence in the defendant. It was the opinion of his Honor, and in that opinion we concur, that, supposing the stage-driver had taken out his horses and left the door open, it was such negligence as made the owner of the stable responsible. Why? Because, if he permitted other horses to be kept in the same stable, with a common door, with that of the plaintiff, and to be taken out during the night, it was his duty to have had an agent or servant there, to see that the door was properly closed, so as to prevent other horses from getting out and escaping. It seems to us, that the same reason applies, with precisely the same force, whether the plaintiff's horse got out at the time when the stage horses were carried out, or afterwards. If the defendant trusted to the stage-driver to take out his horses, and to see that none others should get out, then the driver, who was, *quoad hoc*, the servant of the defendant, was guilty of neglect, either in permitting the plaintiff's horse to go out with his, or in leaving the door open, by means of which he escaped afterwards; and for that neglect the defendant was responsible. There was certainly a *prima facie* case of a want of ordinary care in keeping the plaintiff's horse, which required an expla-

nation from the defendant, and we cannot find the explanation, in any circumstance, which was proved at the trial. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

JOHN J. CROSS AND WIFE *v.* JOHN M. LONG.

A receipt, not under seal, given by the obligee of a bond contemporaneously, with its execution, setting forth that such bond was given for a third person's account, and if the latter was not collected, the bond was to be returned, was *Held* not to be evidence that the bond was delivered as an escrow, and did not amount to a defeasance.

ACTION of DEBT, tried before MANLY, Judge, at the last Fall Term of Cabarrus Superior Court.

The action is debt on a single bill, under seal, for $180,00, dated January 17th, 1853, and payable one day after date, which was given by the defendant to the feme plaintiff, when sole: Pleas, that the bond was delivered as an escrow; and that it was delivered an a condition, which had not been performed. In support of the issue, the defendant offered in evidence a written instrument, given to him by the feme, of which the following is a copy: "Received of J. M. Long a note for one hundred and eighty dollars, for D. F. Long's account; and if J. M. Long does not succeed in getting the amount of said note from D. F. Long, the note is to be returned to J. M. Long. January 17th, 1853. "Signed," "Mary M. Henderson." This evidence was objected to on the part of the plaintiff, but it was received by the Court; and the jury was thereupon instructed, that as the plaintiffs had given no evidence, that the defendant had collected any funds from D. F. Long, the defendant was entitled to a verdict, which was rendered, and from the judgment the plaintiffs appealed.

R. Barringer, for the plaintiffs.

Jones and *Wilson*, for the defendant.

RUFFIN, J. The bond was delivered to the party herself, and, therefore, could not be an escrow. Nor was the instrument executed by her a defeasance, as it was not under seal. It was, therefore, only a collateral agreement in writing, but still in parol; and consequently, it could not control the absolute terms of the bond, so as to introduce a condition, as a part of it; *Walters* v. *Walters*, 11 Ire. 145. Indeed, this instrument does not purport to speak as a condition, on which the bond was to be void; but is a collateral promise, merely, from the obligee in a certain event, to return or deliver up the bond, or note, as it is called. It was, therefore, improperly received in evidence, and also improperly construed.

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

SALLIE GRIFFIN *v.* GEORGE W. HINSON *et al.*

A judgment by default upon a specialty, for the want of a plea, entered by the clerk in Court, upon his calculation of interest, was *Held* to be an office judgment, and that the Court possessed the power to correct a mistake in the clerk's calculation of interest, at any time, upon motion.

MOTION to correct a judgment, heard before SHEPHERD, J., at the last Superior Court of Pasquotank.

The suit in which the judgment in question was entered, had been returned to the County Court of Pasquotank, at the trial term of which Court, the defendants' pleas were withdrawn, and a judgment final by default was taken; whereupon the defendants appealed to the Superior Court.

In the Superior Court, the cause being reached for trial, the Judge directed the clerk to make the calculation of interest, and to enter up judgment according to his calculation, which he did. Upon notice given, the plaintiff's counsel moved, at the Fall Term, 1858, to amend the record as to the amount of the judgment, alleging that the calculation of in-

terest was erroneous, being for too small a sum, the Court declined to allow the correction, for the want of power, being of opinion that the judgment was a regular one, and not a mere office judgment. From this judgment, the plaintiff appealed to the Supreme Court.

Pool, for the plaintiff.
Hines, for the defendants.

BATTLE, J. The transcript of the record of the suit, in which the judgment was entered, which the plaintiff seeks to have amended, shows that the action was debt upon a specialty; that the pleas, which had been entered, were withdrawn in the County Court, where the suit had been commenced, and that the clerk entered up a judgment by default, according to specialty filed, for $1273, with interest from the 15th March, 1855, and for costs; that upon an appeal to the Superior Court, there being no pleas, judgment of the Court was given, "that the plaintiff do recover against the defendants $1273 principal, and $26,48 interest, and for costs to be taxed by the clerk." This judgment was, of course, one by default for want of a plea, and was entered by the clerk, who calculated the interest due by law on the specialty, without a writ of enquiry, and included the amount in the final judgment, as he was authorised to do by 91 sec. of 31 ch. of Rev. Code. A judgment thus rendered, must be regarded as an office one, because the clerk is directed by the act, to which we have referred, to calculate the interest due on the specialty sued on, without a writ of enquiry, and the amount thus ascertained is to be included in the final judgment. There was no actual adjudication of the Court as to the amount of the interest, and if the clerk make a mistake in his calculation, the Court always possesses the power to correct a judgment at any time upon being satisfactorily informed of the existence of the error. The subject has been so often before this Court, and been so fully discussed, and the power of the Court to amend such judgments, has been so firmly settled, that we shall add noth-

ing more, except to refer to the cases of *Winslow* v. *Anderson*, 3 Dev. and Bat. Rep. 13; *Bender* v. *Askew*, 3 Dev. Rep. 149; *Williams* v. *Beasley*, 13 Ire. Rep. 112; *Powell* v. *Jopling*, 2 Jones' Rep. 400.

His Honor, in the Court below, admitted that if the judgment were an office one, he had the power to permit the amendment to be made, and his error consisted in supposing that it was a regular judgment entered up according to the course of the Court; the distinction between which and an office judgment, will be found to be clearly pointed out in the cases to which we have referred. The judgment of the Superior Court must be reversed, and this must be certified to that Court, in order that the amendment may be made, if the Court be satisfied that the alleged error exists.

PER CURIAM, Judgment reversed.

WILLIAM BOOKFIELD *v.* JONATHAN STANTON.

In an action to try the right of a person of color to his freedom, where the question was, whether the maternal grand-mother and mother had, or had not, for a long time been treated and regarded as free, it was *Held* that a bill of sale for the plaintiff, their descendant, was not material; but that an attachment levied upon the grand-mother was pertinent and proper evidence.

A presumption arises from the fact, of a person's being black, that he is a slave.

Where a person was born free, no length of illegal and usurped dominion over him, can make him a slave.

Where it was found that the maternal grand-mother and mother of the plaintiff had once been slaves, but for thirty years, and more, had been regarded and treated as free persons, it was *Held* to be proper for the Court to instruct the jury, that they ought to infer their emancipation in some mode prescribed by law.

TRESPASS *vi et armis* and false imprisonment, tried before HEATH, J., at the last Fall Term of Craven Superior Court.

The action was brought to try the right of the plaintiff to his freedom, and it was admitted that he was in the possession and under the control of the defendant, who claimed him as his slave; and it was admitted, further, that the plaintiff was black. The plaintiff introduced evidence to show, that for thirty years, and more, prior to his birth, his mother and his maternal grand-mother were known, recognised and admitted to be free persons of color, and had generally passed and acted as such; that they were generally known as the McKim negroes; that his mother, as a free person of color, removed from the county of Carteret to Hyde, and lived there as such. She was reputed there to be the wife of a slave, but lived to herself, and was controlled by no one. There was other testimony of this kind, which it was not deemed necessary to state.

The defendant introduced evidence, tending to show, that the mother and maternal grand-mother were claimed and treated as slaves. Among other things, he offered in evidence an attachment in behalf of one Elijah Cannady, against John McKim, issued against him as an inhabitant of another State, returnable to the County Court of Carteret, which was returned levied upon a negro woman, named Beck, and her children, Fan and Olly, at September Term, 1809. The record shows no further proceeding upon this attachment, but on the execution docket of that term, in the column of "sheriff's returns," is the following memorandum: "Owen Stanton paid the judgment and cost to the plaintiff, and the plaintiff paid me the cost." This evidence was objected to by the plaintiff, and ruled out by the Court. The defendant excepted. The defendant also offered in evidence a bill of sale for the plaintiff, to show that he had been regarded as a slave, which was rejected by the Court. Defendant again excepted.

The Court charged the jury:

First. That a presumption arose from the plaintiff's color, (being black,) that he was a slave, and it was a question of fact, for them to say, whether this presumption was met and overcome by the other evidence in the cause.

Secondly. That no length of illegal and usurped dominion

over the plaintiff, would make him a slave, if he was born free.

Thirdly. That if they found, from the evidence, that the maternal grand-mother and mother of the plaintiff, never were slaves, and that the plaintiff was born free, he was entitled to recover.

Fourthly. That if, from the evidence, they found the maternal grand-mother and the mother, were once slaves, but, for thirty years and more, had passed, were recognised, known and reputed to be free persons of color, they might, and ought to infer, that these persons had been emancipated and set free by some mode recognised by the law. To this charge, the defendant also excepted.

Verdict for the plaintiff. Judgment. Appeal by the defendant.

McRae and *Hubbard*, for plaintiff.
J. W. Bryan, *Donnell* and *Haughton*, for defendant.

BATTLE, J. The exception to the charge of his Honor in the Court below, is certainly without foundation. The instruction given to the jury, upon the effect of the testimony, was clear, explicit, and in accordance with repeated adjudications of this Court. See *Jarman* v. *Humphrey*, decided at the present term, ante 28, and the cases therein referred to.

The objection to the bill of sale for the plaintiff, offered by the defendant, to show that he had been regarded and treated as a slave, was properly sustained by the Court. The plaintiff had put his claim to freedom, upon the ground, that he was born free, and to prove that fact, he had offered testimony to show, that his mother and his maternal grand-mother had, for upwards of thirty years prior to his birth, "been known, recognised and admitted to be free persons of color, and had been generally reputed to be, and had passed and acted as such." If, then, the freedom of the plaintiff's mother were established at the time of his birth, the bill of sale for him, could not have the effect to prove him to be a slave, and on the contrary, if the mother was not free, it was not insist-

ed that the plaintiff could be so, and the bill of sale was totally immaterial; so that, in either event, it was irrelevant, and, therefore, properly excluded.

We regret that we cannot say the same of the attachment against McKim, which was issued in 1809, and levied by the sheriff of Carteret county, upon the plaintiff's grand-mother, which was offered by the defendant to show, that she was then regarded and treated as a slave. This evidence was offered, in connection with other circumstances, in reply to the testimony of the plaintiff, as to the reputation and treatment of his mother and grand-mother as free persons of color, and was relied upon by the defendant to rebut the presumption arising therefrom. It was an act done in the course of a judicial proceeding, within less than thirty years before the plaintiff's birth, tending to show that his grand-mother was not, at that time, regarded as a free person. It was not at all conclusive of that fact, and of itself, may have been very slight evidence of it, but it was a circumstance proper to be considered by the jury, in connection with other circumstances, tending to throw light upon the question then before them; and it was error in the Judge to withhold it from them. The judgment must be reversed, and *a venire de novo.*

PER CURIAM, Judgment reversed.

Doe on the demise of CHARLES HARDIN *v.* WM. BARRETT *et al*

An unregistered deed is color of title, under which, a possession for seven years, will bar the entry of the owner.

Whether reputation, or hearsay, from a dead person is admissible, to establish the time of the birth or marriage of a person. *Quere?*

ACTION of EJECTMENT, tried before SAUNDERS, J., at the last Superior Court of Moore county.

The premises were granted to Charles Shearing in 1787, and

he soon after died, leaving several children, of whom a daughter, Nancy, was one. She soon afterwards intermarried with one Hardin, and they had issue, the lessor of the plaintiff, and died in 1846. The present action was brought on 1st of June, 1854. The defendant relied on the statute of limitations; and in support of his defense, gave evidence that, for forty or fifty years before the death of Hardin and his wife, the premises were in the continued, actual possession of divers persons, claiming under deeds to them, which were read in evidence.

The plaintiff then called a witness who stated, that he did not know the age of Nancy Shearing at her marriage, but that he had heard his father, now dead, say that she married young; and that his father was related to the Shearings, but that he did not know how near. This evidence was objected to by the defendant, but admitted by the Court.

The defendants then gave further evidence, that at the death of Hardin and wife, defendant Barrett, was in possession of the premises, and had so continued ever since, and he offered in evidence, as color of title, a deed of bargain and sale to himself in fee, which had not been registered. The reading of this deed, to the jury, was objected to on the part of the plaintiff, because it was unregistered; but it was received, and a verdict taken for the plaintiff, subject to the opinion of the Court, whether the deed to the defendant was color of title or not.

The Court being afterwards of opinion that it was not color of title, gave judgment on the verdict, and the defendants appealed.

J. H. Bryan and *Strange*, for plaintiff.
Kelly and *Haughton*, for defendants.

RUFFIN, J. The Court is not aware of any case, or rule of evidence, on which reputation or hearsay from a dead person is admissible, to establish the time of the birth or marriage of a person, and is much inclined not to establish another exception to the law of evidence, which will let it in. In this case,

however, it is not material; because, in the first place, the father of the witness did not state Mrs. Shearing to have been an infant at her marriage, but only indefinitely, that she was young; and, in the next place, because the defendant did not show a possession, beginning prior to her marriage—the forty or fifty years going back only to 1806 or 1796, while her marriage was soon after the death of her father in 1787.

It is, perhaps, well that the case has come up on the other point, as it is one of consequence, which, it seems from this decision, is not deemed settled, and ought to be. The terms "colorable title," are introduced into our statute-book in the act of 1791, "for quieting ancient titles, and limiting the claim of the State." It is not there, or elsewhere defined, and, was, no doubt, used there in the same sense, in which the courts had applied it in the construction of the act of 1715; as the recitals in the preambles of the two acts are much the same. As it is thus left undefined by the Legislature, while it is of the utmost importance, as it concerns the quieting of possessions, and titles to land, the duty becomes more imperative to adhere to judicial determinations, that a particular document, or one of a particular kind, is, or is not color of title. Originally, it was a point on which there might be much diversity of opinion, and distinguished Judges have had difficulties on it. Hence, when a decision is once made, it is so much gained, and, for the sake of the certainty of the law, upon a subject so essential, its authority ought not afterwards to be questioned. In the case of *Campbell* v. *McArthur*, 2 Hawks' Rep. 33, it was held by this Court, that an unregistered deed was color of title. Chief Justice TAYLOR, gives no reason for it, saying, only, that it had been so held. In that assertion he was certainly correct; for at that time, and for some years before, that was the received law on the circuit. As far as this Court is advised, it has not been doubted since, up to this case. On the contrary, it has been assumed incidentally on several occasions as settled law; as in *Chastain* v. *Phillips*, 11 Ire. Rep. 255; not to mention others. Why should it not be? An unregistered deed, it is true, does not constitute a perfect title

and cannot be read without proof of its execution, as a registered one may. But it is not altogether inefficacious, but to some purposes it constitutes a title, though an imperfect one. The estate of a bargainee, in an unregistered deed, was subject to sale, under a *fieri facias*, before the act of 1812; *Price* v. *Sykes*, 1 Hawks' Rep. 87. If the bargainee die before registration, yet his wife is dowable of the land, upon a subsequent registration; and the deed of the husband, registered after his death, defeats her dower; *Norwood* v. *Morrow*, 4 Dev. and Bat. 442. Such a deed shows the nature of the possession, taken under it, to be adverse, just as much as if it were registered, and if the possesion be continued seven years, it affords evidence of its character, sufficiently notorious, to put the owner to his action. Then both, upon the force of the authorities, and their correctness, the Court holds that an unregistered deed is color of title, under which a possession for seven years, bars the entry of the owner.

PER CURIAM, Judgment reversed.

ANN PIERCE *v.* ANTHONY WANETT.

Where, there was an order to take the private examination of a feme covert, and the probate of the deed as to the husband, by a subscribing witness and a commission, and its return, certifying that they, the commissioners, had taken the privy examination, and that the wife had declared the deed was of her own free will and consent, and without any compulsion on the part of her husband, and an order of registration, all appearing to have been done on the first day of a court, it was *Held* that it would be taken that proof of the deed, as to the husband, occurred before the order and commission for examining the wife—especially as the commission recited that the deed had been proved; and that the probate and privy examination were sufficient.

This case is distinguished from *Burgess* v. *Wilson*, 2 Dev. Rep. 306. The case of *Joyner* v. *Faulcon*, 2 Ire. Eq. Rep. 386, cited and approved.

ACTION of EJECTMENT, tried before PERSON, J., at the Special Term (January, 1858,) of New-Hanover Superior Court.

The lessor of the plaintiff claimed title to an undivided sixth part of the premises against the defendant, by estoppel, as one of the heirs-at-law of Abraham Golding. She proved a demand of the defendant before suit. To establish her pedigree, she offered the depositions of Ann McDonald and others, taken in Baltimore, Maryland. They were objected to by the defendant as incompetent, upon the ground, that the commission, under which they were taken, had been issued in blank, by the clerk, in respect to the name of the commissioner, and had been filled up after it left this State. The Court allowed the deposition to be read, and the defendant excepted. These depositions proved, that Ann Pierce is one of the heirs-at-law of Abraham Golding.

The plaintiff also offered in evidence the deposition of Peter Pierce, which was taken in a former and different suit, between the same parties, about the same premises, this deposition was objected to by the defendant; and on being allowed by the Court, he again excepted. The plaintiff offered in evidence, a duly certified copy from the register's office, of a deed from James Marshall to Abraham Golding, dated the 4th of December, 1813. This deed was objected to, upon the ground, that it had never been proved, but the Court allowed it, and the defendant again excepted. Other deeds were offered to make out the title of the plaintiff's lessor, and proof was adduced, that Ann Pierce is the daughter of Peter Pierce and his wife Sarah, the latter of whom, was one of the heirs-at-law of Abraham Golding, and that both the parents of the said Ann, are now dead; but it is not deemed material to dwell more at length upon the evidences of the plaintiff's title, inasmuch as the case, before the Court, is made to turn upon the validity of the defendant's title.

The defendant offered in evidence a deed, purporting to be made by Peter Pierce and Sarah his wife, to Samuel Potter, which was objected to, upon the ground, that it had not been proven according to the requirements of our statutes, upon the subject of the deeds of married women. This objection was sustained by the Court, and the defendant excepted. The

deed purports to be witnessed by J. McColl and David Jones, and attached to, and upon, the back of the same, are the following certificates:

"State of North Carolina, New-Hanover County, } August Term, 1818.

"Ordered that John McColl and David Jones, be appointed to take the private examination of Sarah Pierce, wife of Peter Pierce, touching her free execution of a deed, executed by them to Samuel Potter, dated 21st of July, 1818.

A true copy from the minutes.

Witness,
THOMAS F. DAVIS, Cl'k."

"State of North Carolina, New-Hanover County:

"To John McColl and David Jones, Esquires, greeting: Whereas, Samuel Potter produced a deed of conveyance, made to him from Peter Pierce and Sarah his wife, of certain property of land, lying and being in the county of New-Hanover, and State of North Carolina, and procured the same to be proved in the County Court of Pleas and Quarter Sessions of our said county of New-Hanover, and it being represented to our said Court, that the said Sarah cannot travel to the said County Court of Pleas and Quarter Sessions of our said county of New-Hanover, to be privily examined as to her free consent in executing the said conveyance: Know ye! that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, or any two of you, full power and authority to take the private examination of the said Sarah, concerning her free consent in executing the said conveyance; and, therefore, we command you, or any two of you, that at such certain day and place as you shall think fit, you go to the said Sarah, if she cannot conveniently come to you, and privily, and apart from her husband, examine the said Sarah, whether she executed the said conveyance freely, and of her own accord, without fear or compulsion of the said Peter, her husband; and the examination being distinctly and plainly written on the said deed, or on some paper annexed thereto, and, when you have

so taken, the said examination, you are to send the same, closed up under the seals of you, or any two of you, together with this writ, unto our said County Court of Pleas and Quarter Sessions, to be held for the County of New-Hanover, on the 2nd monday of August, in the 42d year of Independence. Witness, Thomas F. Davis, clerk of our said Court, at office, this the 10th day of August, A. D. 1818."

On the back of the deed is the following certificate:

"State of North Carolina, Wilmington:

"We certify, that we examined Sarah Pierce, whose signature is to this instrument, separate and apart from her husband, Peter Pierce, and she declares that she had signed it of her own free will and consent, and without any compulsion on the part of her husband, in witness whereof we have set our hands and seals.

DAVID JONES, J. P. [*seal.*]
J. MACCOLL, J. P. [*seal.*]"

The certified copy of the order of the Court, at August Term, 1818, appointing John MacColl and David Jones, to take the private examination of Sarah Pierce, wife of Peter Pierce, is upon a piece of paper attached to the deed; and upon the back of this certified copy of the order of the Court, is the following probate and registration, to wit:

"North Carolina, New Hanover County. } County Court, August Term, 1818.

"The execution of this deed was proved by John MacColl, subscribing witness, and ordered for registration.

THOMAS F. DAVIS, Cl'k."

"Registered in the records of New-Hanover county. Book 2, page 249. WM. M. SMITH, Reg'r."

The certificate of the clerk of New-Hanover County. Court states that the following entry appears of the minutes of his office:

"State of North Carolina:

"At a Court of Pleas and Quarter Sessions, begun and held for the county of New-Hanover, at the court-house in Wil-

mington, on Monday, the 10th day of August, A. D. 1818, and in the 42nd year of Independence.

"The Court was opened with the usual proclamations.

"Present, the Worshipful,

" Edward St. George, Robert Henry.

" Robert Hendry.

"The following order was passed at this Term:

"Ordered that John MacColl and David Jones, be appointed to take the private examination of Sarah Pierce, wife of "Peter Pierce, respecting the execution of a deed, signed by "by them to Samuel Potter, dated 21st of July, 1818."

"A deed from Peter and Sarah Pierce to Samuel Potter, proved by J. MacColl."

Verdict and judgment for the plaintiff. Appeal by def't.

J. H. Bryan, for the plaintiff.

W. A. Wright, *E. G. Haywood*, *Fowle* and *London* for def't.

BATTLE, J. In his bill of exceptions, the defendant has assigned two errors, upon one, or both of which, he seeks to have the judgment reversed, and a new trial granted. The second alleged error is, in our opinion, well founded, and as it is fatal to the plaintiff's action, it is unnecessary for us to consider the first, at all.

When the case, between the same parties, and involving the question of title to the same lot of land, was before this Court at December Term, 1849, (see 10th Ire. Rep. p. 446,) it was said that, "with respect to the deed from Pierce and wife, the facts do not appear, with sufficient distinctness, to authorise the Court to form a satisfactory or positive opinion." It was intimated, however, that, as the case then stood, the deed in question, was ineffectual to pass the title of the wife, "for the want of a due acknowledgment and a privy examination;" but as the cause was decided on another ground, this point was not definitively passed upon. The facts in relation to the deed are now more fully stated, which enables us to decide the case upon its merits. The main objection to

the authenticity of the instrument, as the deed of the wife, is, that the order for taking her privy examination, was made before the deed was proved in Court, and therefore, there was no authority vested in the Court, at the time, to make the order; and in support of this objection, the leading case of *Burgess* v. *Wilson*, 2 Dev. Rep. 306, is relied upon.

The records of the County Court of New-Hanover, at August Term, 1818, exhibit the following entries: "Ordered that John McColl and David Jones, be appointed to take the private examination of Sarah Pierce, wife of Peter Pierce, respecting the execution of a deed, signed by them to Samuel Potter, dated 21st July, 1818."

"A deed from Peter and Sarah Pierce to Samuel Potter, proven by J. McColl."

A certified copy of the above recited order, for taking the private examination of the feme grantor was attached to the deed, and on the back of this, was the following certificate by the clerk, of the probate and order for registration: "The execution of this deed was proved by John McColl, subscribing witness, and ordered for registration." There was endorsed upon the deed, itself, a commission, in the prescribed form, issued by the clerk, and directed to John McColl and David Jones, Esquires, and commanding them to take the private examination of the wife, &c. This commission contained a recital among others, that the grantee had procured the deed to be proved in the County Court; and also, that it was represented to the Court, that the feme could not travel to the Court. Following this, there was an endorsement upon the deed of the certificates of the justices, under their hands and seals, that they had taken the privy examination of the wife, upon which she declared, that she had signed the deed "of her own free will and consent, and without any compulsion on the part of her husband." All this appears to have been done at the same term of the Court, and on the same day of the term; for the date given, is that of the 10th of August, 1818, the day on which the commission was issued, and also the day on which the Court was opened and held. It is con-

tended that the deed was proved after the order was made, because the entry of the probate follows the entry of the order for the appointment of the justices to take the privy examination, on the minutes of the Court; and also, because it is endorsed on the back of the paper annexed to the deed, on which was written a certified copy of the order. We do not think that this is sufficient evidence of the fact, that the probate was made *after* the order, instead of *before* it, as the law required; on the contrary, we regard it as one continuing transaction, done at the same time, and to be supported upon the same principle that a certificate of a Judge of the Superior Court was held good in the case of *Joyner* v. *Faulcon*, 2 Ired. Eq. Reports 386. There, the certificate was as follows: "State of North Carolina, Halifax county. Fanny Clanton, the wife of Dr. John Clanton, was examined separate and apart from her husband, and privily by me, one of the Judges of the Superior Court of Law and Equity, in and for the State aforesaid, when she acknowledged, that she executed the within deed, freely and voluntarily, and not by the force or persuasion of her husband or any other person. Henry Wilkes, the subscribing witness, came before me, and made oath that John T. Clanton and Fanny Clanton, executed the within deed for the purposes therein contained. Let it be registered." The Court disposed of the objection, that the probate was taken after the privy examination, in a summary manner. "This objection (say they) we hold to be not founded in fact. The certificate states a single transaction. All therein mentioned occurred at the same time. And, therefore, it is immaterial what part of it is first mentioned in the certificate." So, we say in this case, that the order for the private examination, and the probate of the deed, were made at the same time, and formed a part of the same transaction; and it is immaterial in what order the entries appear upon the minutes of the Court. The case of *Burgess* v. *Wilson*, *ubi supra*, presents the essential difference that the records of the Court, showed that the order for appointing a justice for taking the privy examination of the wife was made on one day of the

term, and that the deed was proved on a *subsequent day* of that term, and that, therefore, the two acts could not have been parts of one and the same transaction. In further support of this view of the case, it may be remarked, that the commission issued by the clerk, under the order of the Court, and which bears date the first day of the term, recites the fact, that the deed had been proved, and we do not perceive any good reason why that fact may not be proved by the commission, as well as the essential fact, that the wife was unable to travel to the Court, to be there privately examined; *Skinner* v. *Fletcher*, 1 Ire. Rep. 313. Taking all the proceedings together, it appears that every thing, which the law requires to be done for the protection of married women, in the disposition of their lands, was observed in this case; to wit: the deed was duly proved in open Court by a subscribing witness; it was shown that the wife was unable to travel to the Court; an order was made, appointing two justices, to take her privy examination; a commission for that purpose was duly issued to them, and they returned a certificate, properly authenticated, that they had done so; an order was made for the registration of the deed, and it, together with the certificates, was duly registered. All this, except the act of registration, appears affirmatively to have been done at the same term of the County Court, and there is nothing to show that it was not done on the same day of the term. Indeed, from the circumstance, that only one date is given to any part of the proceedings, and that the first day of the term, we are to presume that all was done on that day, and done in the order of time required by the law to make the deed effectual for the purpose for which it was intended. Our conclusion is, that Samuel Potter, the grantee, under whom the defendant claims, acquired a good title from Pierce and his wife, Sarah, under the latter of whom, the lessor of the plaintiff claims. The judgment must, therefore, be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

BURTON CRAIGE *et al, Ex'rs., v.* AMANDA NEELY.

The judgment of either the County or Superior Court, upon the subject of legitimation is conclusive; so that the propriety of it cannot be called in question collaterally.

The Act of 1838, concerning the legitimating of children, did not repeal the former legislation on that subject. So, it was *Held* that a married man, notwithstanding such act, could have his issue legitimated, where the mother had left the State.

(*Note.*—The law is altered by the Revised Code.)

THIS was a motion before MANLY, J., at the last Fall Term of Rowan Superior Court, to strike the name of the defendant from the record as one of the caveators, upon the ground, that she was not of the next of kin, and, therefore, did not have any interest in the suit.

The only question in the case was, whether the former act was repealed by the act of 1838, on the subject of legitimating bastard children. And his Honor being of opinion that the said Amanda had not been legitimated, according to the requirements of the law, ordered that her name be stricken from the record. From which order, the defendant appealed.

Osborne and *Winston, Sr.*, for plaintiffs.
Badger, *Boyden* and *Fleming*, for defendant.

BATTLE, J. The question presented in this case, is, whether the defendant, who was born the natural daughter of the plaintiffs' alleged testator, was ever properly legitimated according to law; for, if she was, then, the order of the Court, by which her name was stricken from the record as a party defendant to the issue of *devisavit vel non*, was erroneous, and ought to be reversed.

The decree, by virtue of which the defendant claims, that she was made legitimate to her reputed father, Solomon Hall, was rendered by the Superior Court of law, for the county of Rowan, at the Spring Term, 1842, many years before the Revised Code went into effect, and the question of the validity

of that decree depends on the 8th section of the 12th chapter of the Revised Statutes, and the act of 1838, chap. 4. The section of the chapter of the Revised Statutes above referred to, enacts, "The putative father of any illegitimate child, or children, may apply, by petition in writing, in either the county or superior court of the county in which such father may reside, praying that the said child, or children, be declared legitimate, and if it shall appear to the said court, from the oath of said petitioner, and such other evidence as the court may require, that the petitioner hath intermarried with the mother of the said child or children, or that the mother is dead, or married to another, or lives out of the State, and that such petitioner is reputed the father of said child, or children, the said court may thereupon declare and pronounce the said child, or children, legitimated accordingly." The 9th section of the act declares what shall be the effect of the legitimation, and the 10th directs the decree to be recorded. It is manifest that the act makes no distinction between married and single men, but requires that the petitioner, whether married or single, be reputed to be the father of the child or children, whose legitimation is sought. As the petitioner, in the present case was, in fact, a married man at the birth of his illegitimate child, it is contended that the decree, for her legitimation was void, by the force and effect of the act of 1838, chap. 4, which is entitled "An act to amend an act of the Revised Statutes, chapter 12, entitled Bastard Children," and which provides as follows: "The putative father of any illegitimate child or children, may apply by petition in writing, either in the county or superior court, of the county in which such father may reside, praying that such child or children, be declared legitimate. If it shall appear to the court that such petitioner is reputed the father of such child or children, the said court may, thereupon, declare and pronounce the said child or children, legitimated accordingly: *Provided*, that nothing herein contained shall be so construed as to extend such legitimation further than is provided in the 9th section of the above recited act: *Provided further*, that no

bastard child or children, whose putative father was married at the time of his, her, or their birth, shall come within the provisions of this act."

The counsel for the plaintiffs contend, that the effect of this act was to supersede entirely the 8th section of the 12th chapter of the Revised Statutes, and thereby impliedly to repeal it; and they then infer, that the decree in favor of the legitimation of the defendant, obtained by her reputed father, who was a married man at the time of her birth, was null and void.

The counsel for the defendant contend, on the contrary, that the latter was not a repeal of the former, because they were not necessarily inconsistent, and that so far from intending a repeal, the latter act *professes* to amend the former, and that the last *proviso* to the act of 1838, is expressly confined to "*this act.*" They contend further, that supposing that the former act was repealed, as to its 8th section, yet, the decree of legitimation, having been made by a court having jurisdiction of the subject, and one whose judgment, on that subject, cannot be revised, is not liable to be impeached by evidence, that the petitioner was a married man at the time of the birth of his illegitimate child.

After much reflection, we have come to the conclusion that the case is with the defendant, upon both the grounds taken in the argument of her counsel. The act of 1838, so far from professing to repeal any part of the act contained in the Revised Statutes, declares, by its title, a purpose to amend it; and the *proviso*, which is supposed to have the effect of superseding the 8th section, closes by declaring that the cases, upon which it is to operate, must "come within the provisions of this act;" that is, the act of 1838. If there be any case, then, upon which the latter act can operate, which is not included in the former, the two acts are not inconsistent, and effect may given to both. The former act provides for four cases, in which a putative father may legitimate his bastard child; to wit, where he has married the mother, *or* where she is dead; *or* where she lives out of the State, *or* where she has married another man. But if the mother were living in

the State, unmarried to him, or any other man, then he could not legitimate his child, by her, under the former act, yet, he could do so under the latter, provided he was not a married man at the time when his illegitimate child was born. That instance alone, without seeking to enquire whether any other could be stated, is sufficient to show that the two acts are not so inconsistent as to prevent their standing together, and from the peculiar phraseology of the latter act, we are not at liberty to construe it to be an implied repeal of the 8th section of the former, unless necessity compels us to do so by the utter inability to give any other operation to the latter.

But, if we are mistaken in this, we are confident in the opinion, that the decree of legitimation in this case, cannot be impeached by proof, that the putative father was a married man when his child was born. Upon this point, we think that the case of *Sampson* v. *Burgwyn*, 3 Dev. and Bat. Rep. 28, to which we were referred by the defendant's counsel, is a direct and decisive authority. That was the case of the emancipation of a slave by the order of the County Court. The law conferred upon that court the power to emancipate slaves only upon the performance, by them, of meritorious services. The plaintiff claimed his freedom, and in support of his claim, produced a record of the County Court, in which it was stated that "upon the petition" (of the master) "it is ordered," (that the slave) "he emancipated and set free from slavery." No meritorious services were mentioned in the order, and it was shown that none could dave been performed, as the plaintiff was at that time, only about two years old. The Court held that the silence of the record, as to the meritorious services, made no difference, and that it could not "be impeached by presumption or evidence, that the plaintiff had not or could not perform them. The acts of a court on a subject within its jurisdiction, are presumed to be right; and that presumption cannot be contradicted, when the court is one of exclusive jurisdiction, whose judgments are not subject to revision." So, in the case before us, either the county or superior court had a jurisdiction over the subject of the legitimation of bas-

tard children, so far exclusive, that its judgments were not subject to revision. The act of the Superior Court of Rowan, in making the decree for the legitimation of the defendant, upon the petition of her putative father, must be presumed to have been right, and that presumption cannot now be contradicted.

The order made in the Court below, must be reversed, and this opinion must be certified, to the end, that the Court may proceed in the cause according to law.

PER CURIAM, Order reversed.

Doe on the demise of SILAS HOBBS *et al. v.* FREEMAN OUTLAW.

Where the instructions given by the Court, could not, in any degree, prejudice the cause of the exceptant, even if erroneous, it is no ground for a *venire de novo.*

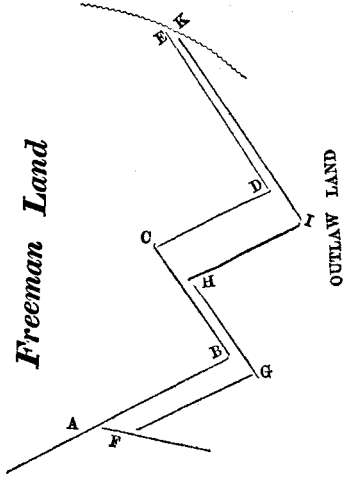
The fact that a particular line was run by commissioners appointed to divide a tract of land among tenants in common, under an order in an *ex parte* proceeding, is evidence against them, and all claiming under them, to prove that that is the true line of such tract; being the act of the parties themselves.

It is competent to prove that a line run in a particular way, will disturb and conflict with ancient and well established boundaries of other tracts, in order to repel the conclusion that it is the true boundary of the land in question.

ACTION of EJECTMENT, tried before SHEPHERD, J., at the last Superior Court of Bertie.

The land in dispute between the parties, is that included in the diagram A, B, C, D, E, K, I, H, G, F, the plaintiff contending that the lines designated by the letters F, G, H, I, K, were the true lines of his tract, and the defendant insisting on those marked by A, B, C, D, E; and one of the chief questions was, whether the beginning corner of the Freeman tract, claimed by plaintiff, was at I, or at a "pine-stump" at E, for if at I, then according to the courses and distances the land

in dispute would belong to the plaintiff; but if at the pine-stump, (E) then, according to the courses and distances, it would not belong to the defendant, whose deed called for the lines of the Freeman tract.



Among various other facts adduced by the plaintiff to establish the line, as he claimed it to be, he offered the proceedings of commissioners, who, in 1825, divided the lands of Joshua Rayner (under whom the defendant claimed title,) among his heirs-at-law. He showed that these commissioners were all dead. This testimony was objected to, but received by by the Court as the declarations of deceased persons. It appeared from these proceedings, that they recognised and reported I, H, as the Freeman line. Defendant excepted. There were other facts adduced by the plaintiff, to show that I H was the

true line of his tract, which are not pertinent to the questions raised.

The defendant offered several witnesses, whose testimony tended to show that the line A, B, C, D, E, were the true boundaries of the Freeman land, and he insisted that this was made manifest by beginning at the pine-stump, and reversing the lines from the order in which they were originally run.

The plaintiff offered to prove, that if the survey began at the pine-stump and was run in a reversed order, as insisted upon by the defendant, it would pass through the fields and improvements of adjoining proprietors, which had been for many years quietly enjoyed, whereas, by beginning at I, and running in the proper order of the calls, no such conflict would occur. This evidence was objected to by the defendant, but the Court held it admissible. Defendant excepted. Among other positions, (not excepted to,) the Court charged, "that it was allowable in some cases, to reverse a line in running the courses of a boundary of a tract of land, but this could only be done, where the means of identification were thereby rendered more certain than the calls of the deed."

The defendant excepted to this part of his Honor's charge, because it was not supported by a state of facts, to which it was applicable.

Verdict and judgment for the plaintiff. Appeal by the defendant.

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

BATTLE, J. The first objection, which appears in the defendant's bill of exceptions is, that the record of the proceedings in the *ex parte* suit, for the partition of the land of Joshua Rayner, among his heirs-at-law, was admitted, on the part of the plaintiff, to show that the line I, H, was one of the dividing lines between the Freeman land, claimed by the plaintiff, and the Rayner land, part of which was claimed by the defendant. This evidence was received by the Court as the

declarations of the commissioners, who were proved to be now dead, as to o question of boundary. The evidence was clearly admissible as the declarations and acts of the heirs-at-law of Rayner, under and of whom the defendant claimed, but it may be doubted whether it was properly admitted upon the reason assigned for it; because the commissioners may not have known, or professed to have known, any thing about the dividing line; and may have acted, and probably did act, solely upon the information of those, whose land they were dividing. As the record was admissible upon a ground quite as strong as that upon which it was admitted, the defendant has no just cause to complain of it.

The question about reversing the lines of the deed, under which the plaintiff claimed, did not arise for any practical purpose, and, therefore, no objection can be founded upon it. The real contest between the parties was, whether the beginning corner of the plaintiff's land was at I, as contended for by him, or was at the pine-stump, as insisted on by the defendant. If it were the latter, then the *locus in quo* would not be within the plaintiff's boundaries, and it is manifest, that such would be the result whether, the lines were run by the courses and distances in a direct or a reverse order. If the former, then it was conceded that the defendant's cleared field was included within the plaintiff's lines. The evidence of the respective parties, in relation to these points, was fairly submitted by his Honor to the jury, and we cannot discover any error in his charge.

The testimony introduced to show how the lines would run from each of the proposed starting points, to wit, the letter I and the pine-stump, as delineated on the plat, was clearly proper for the purpose of locating the land claimed by the plaintiff, and the argument was a fair one, that if begun and run as contended for by the plaintiff, the lines would not interfere with the established boundaries of other adjacent tracts, but that it would be otherwise if commenced and run as insisted on by the defendant.

The defendant having been unable to sustain any of his objections to the judgment, it must be affirmed.

PER CURIAM, Judgment affirmed.

H. D. BELL *v.* WILLIAM J. MORRISETT.

In an action for the breach of a warranty of soundness, where the allegation was, that the slave labored under a chronic disease, of which he died within a few months after the sale, it was *Held* that the declarations of the slave as to his health and condition, made two months before the sale, and at longer periods, and that similar declarations made several weeks after the sale, were competent.

A witness, who is not a physician, cannot be asked whether, from his appearance, he believed a slave in good health.

ACTION of ASSUMPSIT, tried before DICK, J., at the last Term of Camden Superior Court.

The action is assumpsit, on a parol warranty of the soundness of a slave sold to the plaintiff. Upon the trial, on general issue, the plaintiff alleged that at the sale, the slave was laboring under a chronic disease, which resulted in his death six months afterwards; and in order to establish that allegation, the plaintiff, amongst other evidence, offered to prove the declarations of the slave as to his health and condition, which were made two months before the sale, and at longer periods, and also similar declarations made several weeks after the sale. This evidence was objected to by the defendant, but admitted by the Court.

The defendant offered a witness, who testified, that a month before the sale the slave appeared to be well, and said he was then in good health. The defendant then asked the witness, if, from his appearance, he did not think, he was in good health. The question was objected to, on the ground, that the witness was not a physician, and could not give his opin-

ion as to the state of the slave's health, and the Court ruled it out.

A verdict was given for the plaintiff, and from which judgment, the defendant appealed.

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

RUFFIN, J. Evidence of the nature of that given on the part of the plaintiff, is natural evidence on the question of the health of the person declaring his symptoms and sufferings; and they are admissible from necessity; *Roulhac* v. *White*, 9 Ire. Rep. 63. Of course, they are only evidence of the condition of the person at the time they are made. The objection taken here, is, that these declarations refer to periods too remote from the sale. But they may be, for that reason, only the stronger, or better evidence to the point, to which they were directed, that is, the soundness or unsoundness at the time of the warranty. That will depend much on the nature of the disease. The particular disease in this case, is not mentioned, but only that it was a chronic disease, which finally proved fatal. Now, the longer back such an affection may be continuously traced, the more convincing will it be of the existence of the disease at the sale, especially when, soon after the sale, it exhibited itself manifestly again.

The Court concurs, too, that the question put to the defendant's witness, ought to have been ruled out. The witness had already testified to the appearance of the slave, that is, given the jury the benefit of his eye-sight as to the state of the health of the slave; and it was not competent for him to give his inferences from the appearance of the negro. His opinion was worth nothing, because, for the want of skill and science, he was not competent to form an opinion, entitled to any consideration in law; *Lush* v. *McDaniel*, 13 Ire. 485, is authority on both points.

PER CURIAM, Judgment affirmed.

BOND AND WILLIS *v.* JAMES B. HILTON.

In an action by two joint owners of a vessel against a captain for negligence and delay in making a voyage, it was *Held* that upon the death of one of them, the right to carry on the action survived to the other plaintiff, and that it was a misjoinder to bring in the executor of the deceased partner.

It was *Held* further, that as the misjoinder appeared on the record, it was error to order a nonsuit, but that the objection should be taken by demurrer, writ of error, or motion in arrest of judgment.

THIS was an action on the case, tried before DICK, Judge, at the Spring Term, 1858, of Washington Superior Court.

The declaration alleged that the defendant, who was a part owner, contracted with the other part owners, viz., the plaintiffs, Bond & Willis, to take charge of a vessel and cargo, as captain, and make a voyage to the West Indies and back, but that the defendant managed and conducted the affairs of the ship, and made the voyage so negligently, and with so much delay, as greatly to injure the plaintiffs.

The suit was originally instituted by Thomas Bond and E. H. Willis, but during its pendency Bond died, and at Fall Term, 1854, his executor was made a party plaintiff. On the trial of the suit below, the defendant's counsel objected, that the action could not be maintained by the executor of Bond. The Court reserved this question and submitted the facts to the jury, who found for the plaintiffs.

His Honor, afterwards, upon the point reserved, being of opinion with the defendant, ordered the verdict to be set aside, and a nonsuit entered, from which the plaintiffs appealed.

Winston, Jr., and *H. A. Gilliam*, for plaintiffs.
Hines and *Smith*, for defendant.

PEARSON, C. J. Assuming that Willis and Bond had a joint cause of action against the defendant for the injury to the vessel and cargo, and that the suit was properly instituted by them jointly, it is clear, that by the death of Bond, according to the common law, Willis was entitled to the entire right of action by the *jus accrescendi*, and the suit would be con-

tinued in his name. It follows, that the effect of making the executor of Bond a party plaintiff, was to create a *misjoinder*, which is a fatal defect, unless the law is changed by statute.

The Court is of opinion that the case stands as at common law, and does not come within the operation of any of the statutes.

By the Revised Statutes, chapter. 43, sec. 2, it is enacted: "In all *estates*, real or personal, the part or share, of any tenant dying, shall not descend, or go, to the surviving tenant, or tenants, but shall descend, or be vested in the heirs, executors or administrators, of the tenant so dying, in the same manner as *estates* held by tenancy in common, &c." The question is, does the word *estates*, as used in the statute, include a joint chose in action for a tort.

"Estate" is derived from *status*, and in its most general sense, means position or standing in respect to the things and concerns of this world. In this sense, it *includes choses in action; Webb* v. *Bowler*, 5 Jones' Rep. 362; *Pippin* v. *Ellison*, 12 Ire. Rep. 61; *Hurdle* v. *Outlaw*, 2 Jones' Eq. 76. But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. Thus, we say, the *estate* is divested and put to a mere *right* by a disseisin or discontinuance; and so, in Equity, where the trust is by agreement of the parties, we say the *cestui qui trust* has the *estate*, but where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere *right*; *Taylor* v. *Dawson*, 3 Jones Eq. 91; *Nelson* v. *Hughes*, 2 Jones Eq. 33; *Thompson* v. *Thompson*, 2 Jones' Rep. 432.

It is evident, from a perusal of the statute, that the word *estates* is used in this latter sense. "The part or share of any *tenant* dying, shall not go to the surviving tenant or tenants, but shall go in the same manner as *estates held* by tenancy in common," are words strictly appropriate, when applied to "estates" used in this sense, but are out of place when a chose

in action is referred to. One is not a tenant of a chose in action, nor does he *hold* an estate therein. This we believe is the construction that has heretofore been put on the statute, and we have never before heard it contended that it embraced choses in action.

By Rev. Stat. ch. 2, sec. 1, it is enacted, "It shall be lawful for the heirs, executors or administrators, to carry on every suit after the death of either plaintiff or defendant, and every such suit may be proceeded on by application of the heirs, executors, or administrators, of either party." This statute was, obviously, intended to prevent the *abatement* of a suit by the death of the plaintiff or defendant, and, of course, has no application except to cases where an abatement would otherwise take place.

The enactments, Rev. Stat. ch. 31, secs. 89, 90, 91, are expressly confined to cases where two or more persons are *liable* under joint "obligations, assumptions or agreements," and have no application to persons who are *entitled* to a cause of action jointly. Our conclusion is, that the *jus accrescendi* remains as at common law, and we concur with his Honor in respect to the *misjoinder*, but we differ with him as to the mode in which it must be taken advantage of. The rule is, where the defect appears upon the face of the record, it must be taken advantage of by demurrer, or motion in arrest of judgment, or writ of error. Where it does not so appear, and is shown upon the trial, by a variance between the *allegata* and *probata*, it is a ground of nonsuit; 1 Ch. Plea. "Parties." In this case, there was no variance, for the allegation is an injury to the plaintiffs, Willis and the testator of the other plaintiff. This was supported by the proof, and the defect was caused by making the executor a party plaintiff. This defect was apparent on the record, consequently, it was error to enter judgment of nonsuit. The judgment in the Court below is reversed, and this Court, being required to give such judgment, as on an inspection of the whole record, ought, in law, to be rendered thereon, Rev. Stat. ch. 33, sec. 6, directs the

judgment to be arrested. Neither party will recover cost.

PER CURIAM, Judgment arrested.

Doe on the demise of JANE WARD *et al v.* STEPHEN WILLIS.

Land lying between the high and low water lines of the tides of the ocean, or a navigable stream, is not subject to private appropriation, under the Acts authorising the entry and grant of lands by the State.

THIS was an action of EJECTMENT, tried before HEATH, J., at the last Superior Court of Carteret.

Verdict and judgment for the plaintiff.

The only facts necessary to the understanding of this case, will be found in the opinion of the Court.

Hubbard and *J. W. Bryan*, for plaintiffs.
Haughton, for defendant.

RUFFIN, J. The charter of the town of Beaufort, by the act of 1854, expressly extends the boundaries of the town to low water mark on Core Sound, and vests the land between Front street and the sound, including that between high and low water marks, in the commissioners of the town, with authority to lay it off into lots and convey them in fee simple. The lessor of the plaintiff claims, therefore, under an explicit legislative grant, and has a good title, unless the land had been divested out of the State by a prior valid grant. The question depends, then, on the sufficiency of the patent to the defendant of February 18th, 1853. It is stated that the premises are a part of the shore of the core sound, a navigable arm of the sea, in which there is a regular ebb and flow of the tide daily, and consists of the land between the high and low water lines. Such land may be granted by the sovereign. It is fully established, affirmatively, in England; *Constable's* case, 5 Rep. 106; and there are several modern cases to the

same purpose. Indeed, the plaintiff's title depends on the correctness of that position. The enquiry is, therefore, reduced to the point whether, in our law, a patent, founded on an entry, in the ordinary way, is a legal and sufficient grant, so as to give the defendant the better title. The Court is of opinion that it is not. The acts of 1715 and 1777, in regulating entries and surveys, on which to found a grant, provided that land, lying on any navigable water, should be surveyed, so that the water should form one side of the survey, whether the water was the sea or a bay, creek or river. In *Tatum* v. *Sawyer*, 2 Hawks' 226, Judge HENDERSON intimated that those provisions could not be considered as prohibiting the entry of land covered by navigable waters, but said, nevertheless, that it was not subject to entry, because, being necessary for public purposes, as common highways, it was to be presumed not to have been within the intention. It happened, however, that in the revisal of 1836, those parts of the previous acts were omitted, and, therefore, the Court felt bound to hold, in *Hartfield* v. *Grimstead*, 7 Ire. 139, that entries of land in Currituck sound were good, after it ceased to have a tide, or be navigable by reason of the closing of the inlet, or, rather of such parts of the sound as were frequently not covered by water. When the omissions of the Revisal were discovered, in 1846, the Legislature, by an act of that year, c. 36, revived the provisions omitted, by enacting that entries of land lying on any navigable water, should be surveyed in such manner, that the water should form one side of the survey, and the land be laid off back from the water, and proceeded further to enact, that it should not be lawful to enter land covered by any navigable sound, river, or creek. That was the law in force at the time the defendant's entry was made and his grant obtained. It removed the doubt expressed in *Tatum* v. *Sawyer*, by a positive prohibition of entries of land covered by any navigable waters, and it directs land, on such waters, to be laid off back from the water, so that the water should form one side of the tract. The only point, then, in this case is, whether, within the proper construction of the act, this is

land covered by a navigable water, or is it land laid off from the water. In putting a construction on those terms, we may be aided by looking to the common law on this subject, and by considering the purpose of imposing this restraint on the right of private entry, by the statute. In England, it is not generally necessary to go back to a grant from the Crown, in order to show title to land in a subject; for lands are all occupied there, and have been occupied so long, that, if in theory, they once belonged to the sovereign, they are assumed, in fact, to belong now to a subject. But to that general rule, lands lying between the high and low tides are an exception; and to such lands a grant must be shown at this day, or a presumption, which supposes a grant. The reason is that the sovereign, by prerogative, for the benefit of all his subjects, has the dominion of all navigable waters, within his dominions, and by consequence, the right to the soil covered by them. That is not confined to such portion of the soil as is always covered by the water, but comprehends also the shores or such land as is between the lines of the ordinary ebb and reflux of the tide. So it is laid down in the treatise *De Jure Maris*, 12, attributed to Lord HALE; also in *Bulstrode* v. *Hall*, 1 Sid. 149, and in the *Attorney General* v. *Parmeter*, 10 Price, 378. And in Wollrych on Waters, 438, it is said, that "this sovereignty of the soil is to be acknowledged beyond the main ocean; for the arms of the sea and tidal rivers, are not the less parcels of the maritime empire, because they are more confined; and hence the shore, or territory, between what is called high and low water mark, must not be considered as less covered by the water, because it is periodically affected by a reflow." It seems, thus, to be clear, that whatever soil is at any time covered by a navigable water in its natural state is deemed to be in the same state as if it were in the bed of the water; in other words, that it is all one, whether it be under the channel or be the margin between the high and low water lines. The same public purposes require that, here, as in England, the State should reserve lands in that situation from private appropriation; and although it may please the

Legilature to dispose of them by special grant for the promotion of trade and the growth of a commercial town, accessible to vessels, it rationally accounts for the restriction upon the common mode of granting other public land and enables us to discover the extent of the restriction imposed, and understand the terms in which it is imposed. Thus considered, it seems to the Court, plainly, that up to high water mark, the shore is land covered by water, and consequently is not subject to entry.

PER CURIAM, Judgment affirmed.

WM. C. BLOUNT, *et al Exr. v.* JOHN HARVEY.

For words, strictly of *covenant*, to be construed into the *grant* of an easement in land, without any context to force them from their ordinary signification, is against the *science of the law*, and the *policy of the country*.

ACTION on the CASE, tried before ELLIS, Judge, at the Fall Term, 1857, of Greene Superior Court.

The action was brought by Benjamin S. Edwards, who died during the pending of the suit, and his executors, the plaintiffs were made parties. The declaration was for the obstruction of an easement in a mill, whereby the plaintiff's testator was entitled, as he alledged, to grind corn, and to saw, and pick cotton, toll free. The plaintiff's testator and his brother, James G. Edwards, were tenants in common of the mill, and mill seat in question, and the former having agreed to sell his interest to the latter, a deed was executed by both, bearing date 30th of December, 1842, in which the moiety of the said Benjamin, for the consideration of $250, is regularly conveyed to the said James G., his heirs and assigns; then come the additions out of which the question in this case arises: "And it is hereby *covenanted and agreed* by and between the said parties, as follows, to-wit: that the said James G. Edwards,

his heirs and assigns, shall, at no time hereafter, be liable to any action, suit, claim, or demand, for damages which may arise from the overflowing of any part of the lands of the said Benjamin S. Edwards which are not contained in this indenture, which may be occasioned by the erection of the mill-dam of the said mill; and the said James G. Edwards doth, for himself and heirs, covenant and agree to, and with the said Benjamin S. Edwards and his heirs, that he, the said Benjamin S. Edwards, for his family, shall and may have the privilege of grinding, sawing, and picking cotton, at the afore-said Fort Run Mill, toll-free, for his family use; and further, that if he, the said Benjamin S., shall, at any time hereafter, settle either of his sons at the Bridge Place, belonging to the said Benjamin, that such one of his sons as may be there settled, shall have and enjoy the privilege of sawing, grinding, and picking cotton, for himself and his family, at the said Fort Run Mill, free from toll; but this privilege is intended to extend no further than to such son during his life, and for his own family use; and the said Benjamin S. Edwards doth, for himself and his heirs, covenant and agree, to and with the said James G. Edwards, his heirs, and assigns, that he, the said Benjamin S. Edwards, is seized of a good, sure and indefeasible estate, in fee simple, and moiety of said mill, and mill-pond, and that he hath good right, and perfect title, to convey said moiety to him, the said James G. Edwards, his heirs and assigns; that he will warrant and forever defend all and singular, the premises hereby conveyed to him, the said James G. Edwards, his heirs and assigns, and that he will, at any and all times hereafter, when thereunto required by the said James G. Edwards, his heirs and assigns, make, do and execute all such other and further acts, deeds and conveyances for the better and more perfect assurance of the premises, to the said James G. Edwards, his heirs and assigns, as may be required of him." Signed, sealed and delivered by both parties.

James G. Edwards died intestate, and his lands descended to his children, who, with their mother, petitioned for a sale

for partition, which was ordered by the Court of Equity of Greene County, and the land and mill aforesaid were sold, under a decree of the Court, to the defendant, John H. Harvey, who refused to permit the said Benjamin S. Edwards to use and exercise any privilege of sawing, grinding or picking cotton, after he bought it, and it was for such refusal this suit is brought.

The defendant contended that this was a mere personal covenant, and was not an easement attaching to the *corpus* of the land, but his Honor being of a different opinion, so charged the jury, who found for the plaintiffs, and after judgment, the defendant appealed.

Rodman and *J. W. Bryan*, for plaintiffs.
Donnell, for defendant.

PEARSON, C. J. Benjamin Edwards and James Edwards being tenants in common of a mill, Benjamin, for valuable consideration, conveyed his moiety to James, in fee. The deed is executed by both, and contains this clause: "And the said James doth for himself and his heirs covenant and agree to and with the said Benjamin and his heirs, that he, the said Benjamin, and his family, shall and may have the privilege of grinding, sawing and picking cotton at the mill, toll-free, for his family use; and farther, that if Benjamin shall, at any time hereafter, settle either one of his sons at the bridge place, that such one of his sons as may be there settled, shall have and enjoy the privilege of grinding, sawing and picking cotton for himself and his family, free from toll, but this privilege is intended to extend no further than to such son, during his life, and for his own family use."

The right of action is put on the ground that the legal effect of this clause is *a grant of the easement* or privilege of grinding, toll-free, and not a *covenant*, whether merely personal or one running with the land.

The words are strictly those of covenant, and a construction converting them into a grant, can only be justified if sup-

ported by some direct authority, or very clearly, by "the reason of the thing."

We have examined the cases cited on the argument, and do not consider any of them "in point." Besides the words "covenant and agree," the word "grant," or some synonymous term, is used in all the instruments which are construed to be grants, and in respect to leases for years, it may be remarked, that "an agreement to lease," and a "lease," differ very slightly, not only in the terms necessary to make them, but in legal effect, for a lease is a contract to permit one to occupy and take the profits of land for some stated time, and is perfected by entry; whereas, a *covenant* to permit one to grind at a mill, toll-free, and a *grant* of such an easement, differ very widely, both in legal effect and in respect to the persons and things to which it may extend.

The "reason of the thing," so far from supporting the construction contended for, as it seems to us, tends the other way; at all events, it does not preponderate so decidedly as to overcome the difficulty of converting mere words of covenant into a grant.

The rule "*ut res magis valeat quam pereat*" has no application. If an instrument cannot operate in the mode which, from its terms, the parties seem to have intended, under this rule, effect is given to it by allowing it to operate in some other mode; for instance, if a deed uses terms of "release only," and the relation of the parties does not admit of its operation as a release, effect will be given to it, as a deed of "bargain and sale," provided it express a valuable consideration which will create a use, and sets out the quantity of estate intended to be conveyed, together with a description of the premises. In our case, the deed will not *perish*, but will *avail* in the mode which, from its terms, the parties seem to have intended, i. e., a covenant.

The argument that to treat it as a grant will be most beneficial to the vendor, "cuts both ways," for of course it would be less so to the vendee; and would fetter his estate as a clog upon alienation. The parties were brothers, and while the pri-

vilege was to be exercised by members of the family, and amicable relations were kept up, it might do, but in the hands of a stranger, it would be impracticable. The idea that a stranger is to have a right to go to another man's mill, and use his machinery for grinding, sawing or picking cotton, is out of the question. No sensible man could be induced to buy on such terms. The argument is against the plaintiff in another aspect—that of public policy—as is said by Lord BROUGHAM, in *Keppel* v. *Bailey*, 2 Mylne & Keene 577. "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient to the science of the law and the public weal that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands a peculiar character which should follow them into all hands, however remote."

The remaining argument, which is the one most relied on, drawn from the covenant as to ponding back the water, and which, it is contended, must be allowed to operate as a grant of the easement, is alike inconclusive. The clause is as follows: "And it is hereby covenanted and agreed by and between the said parties, that the said James, his heirs, and assigns, shall, at no time hereafter, be liable to any action or demand for damages which may arise from the overflowing of any part of the lands of the said Benjamin, which are not contained in this indenture, which may be occasioned by the erection or raising of the mill-dam of the said mill." In respect to the easement of overflowing the land as the mill-pond then was and had been used, it was implied as an incident of the grant of the mill, and the covenant was superfluous. In respect to the supposed right to make the dam higher,

and overflow more land, *ad libitum*, two questions of doubtful construction are presented: Was it the intention to confer any such right? If so, was a covenant relied on to secure its enjoyment, or was a grant intended? One matter of doubtful construction can derive but little aid from another. The analogy, however, fails, in several respects. In the covenant as to overflowing the land, the word "assigns" is used, and it is likewise used in each of the three covenants, at the conclusion of the deed, i. e., of seisin, of quiet enjoyment, and for further assurance; but it is omitted in the covenant under consideration. It may be that the word has no legal effect upon the covenants where it is used, but it sometimes has a very important effect. See notes to SPENCER'S case, 1 Smith's leading cases 75, and the omission of it in one covenant shows that the parties considered it, or intended it, to be of a different nature from the covenants in which it is used.

The right to overflow more land, may have been considered necessary to the full enjoyment of the mill, and being connected with the property, ought to be of like duration in time; but the privilege of grinding, &c., toll-free, is a thing collateral, or constituted merely a part of the price; for, by reason of it, the vendor was able to take less for the mill; and being collateral, full compensation can be made in damages. This view is much strengthened by the fact that the privilege, in respect to the son, is expressly for life only, and is impliedly so in respect to the vendor, being restricted to the use of *his family*.

Upon the whole, there is nothing to convince us that the parties intended to do more than the terms used import, i. e., the one to make, and the other to accept a covenant, for the purpose of securing the enjoyment of the limited privilege stipulated for; and we are unwilling, by a strained construction, to produce a consequence "inconvenient to the science of the law and the public weal."

There is error; judgment reversed, and *venire de novo*. As the facts were not contested, it is to be regretted that the case was not put in a shape for final judgment.

PER CURIAM, Judgment reversed.

GEORGE W. JONES *v.* GEORGE McRAY.

In an assumpsit to recover from the defendant money, which he had, by gaming or other unlawful means obtained from the plaintiff's agent, such agent is not a competent witness without a release.

THIS was an action of ASSUMPSIT for money had and received, tried upon the issue, joined upon the plea of non assumpsit; at Alamance on the last circuit, before his Honor, Judge DICK.

On the trial it was alleged by the plaintiff, who resided in the State of Virginia, that he had sent one Killinger, as his agent, into this State, with horses to sell; that Killinger sold some of them, and had received cash for them to the amount of one thousand or twelve hundred dollars, when he met with the defendant, who, finding him intoxicated, got the money from him, either by winning it at cards, or in some other unlawful way. In order to prove these facts, the plaintiff, among other testimony, offered the deposition of his agent, Killinger, without having given him a release. This was objected to by the defendant, but admitted by the Court, and the plaintiff obtained a verdict. A motion for a new trial was made, upon the ground of the alleged improper admission of the deposition, which being overruled, and judgment given, the defendant appealed.

Graham, *McLean* and *Scott*, for the plaintiff.
T. Ruffin, Jr., for the defendant.

BATTLE, J. The only question presented is, whether the plaintiff's agent, Killinger, was a competent witness, to prove his case, without a release. The authorities on this subject are apparently conflicting, and it is difficult, if not impossible, to reconcile them. The general rule seems to be clear, that the *true test of the interest* of a witness is, that he will neither gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against

him in some other action. It must be a present, certain and vested interest, and not one that is uncertain, remote or contingent; and if the former, it matters not how small and minute the interest may be, for it is impossible to measure the influence which any given interest may exert. See 1 Greenl. on Ev. secs. 390, 391, and the cases there cited.

In applying the principle of the general rule, Mr. Greenleaf says, in sec. 393, that "where the event of the suit, if it is adverse to the party adducing the witness, will render the latter *liable* either to a third person, or to the party himself, whether the liability arises from an express or implied legal obligation to indemnify, or from an express or implied contract to pay money upon that contingency, the witness is in like manner incompetent." The author admits, however, that the cases on this branch of the rule are somewhat at variance with each other. In discussing the subject, he says, in section 394, "Thus, in an action against the principle for damage, occasioned by the neglect or *misconduct of his agent or servant*, the latter is not a competent witness for the defendant, without a release; for he is in general, liable over to his master or employer, in a subsequent action to refund the amount of damages which the latter may have paid. And though the record will not be evidence against the agent, to establish the fact of misconduct," &c., "yet it will always be admissible to show the amount of damages recovered against his employer." Again, in section 396, he says, "It may seem, at the first view, that where the *plaintiff calls his own servant* or agent to prove an injury to his property, while in the care and custody of the servant, there could be no objection to the competency of the witness to prove misconduct in the defendant, because, whatever might be the result of the action, the record would be no evidence against him in a subsequent action by the plaintiff; but still the witness is held inadmissible, upon the general principle already mentioned, (in section 393,) in cases where the master or principal is defendant, namely, that a verdict for the master would place the servant or agent in a state of security against any action which other-

wise the master might bring against him; to prevent which he is directly interested, to fix the liability on the defendant." This doctrine is illustrated by the case, among others, of *Moorish* v. *Foote*, 8 Taun. Rep. 454, (4 Eng. C. L. Rep. 164,) which was an action on the case against the defendant, who was the proprietor of a mail-coach, for negligence in driving the same against a wagon-horse belonging to the plaintiff, whereby the horse was killed. The plaintiff called his wagoner, and examined him without giving him a release, to prove the negligence of the defendant. The testimony was objected to, but admitted, and the plaintiff had a verdict, whereupon the defendant obtained a rule for setting aside the verdict, and having a nonsuit entered, the point having been reserved at the trial. The Court of Common Pleas made the rule absolute on the authority of the case of *Protheroe* v. *Elton*, decided by Lord KENYON, and reported in Peake's N. P Cas. 117. GIBBS, C. J., said: "The principle is this, witnesses are incompetent where they are directly interested in the event of the suit. It is perfectly clear that the witness in the present case was interested in the event of the suit; for if the verdict were to stand, he would be placed in a state of security." BURROW, J., added, "A distinction has been taken between witnesses for a plaintiff and witnesses for a defendant; but it would introduce an extreme anomaly in the law if it made any difference in cases of this nature, whether a witness was called on one side or the other." In a note to section 396, Mr. Greenleaf cites several other cases to the same effect, and, among them, *Sherman* v. *Barnes* 1 M. & Rob. 69, in which he states, that the same point was so ruled by TINDAL, C. J., upon the authority of *Moorish* v. *Foote*, "though he seems to have thought otherwise upon principle, and perhaps upon better reason." The author closes his remarks as follows: "The only difference between the case where the master is plaintiff, and where he is defendant, is this—that in the latter case, he might claim off the servant both the damages and costs which he might be compelled to pay; but, in the former, he could claim only such damages as directly re-

sulted from the servant's misconduct, of which the costs of an unfounded suit of his own would not constitute a part."

In the case before us, no person can help seeing that the witness had a direct interest in fixing upon the defendant a liability which would place him in a state of security against an action of his employer for his palpable misconduct. If the plaintiff can get his money from the defendant, he cannot recover it from the witness, but if he fail in his suit against the former he may sue the witness, and recover the whole from him. He ought not, therefore, to have been examined until the plaintiff had executed to him a release. We may conclude by saying that if, upon strict principle, the witness was not incompetent, as some of the cases seem to suppose, yet we would unwillingly oppose the current of authorities which excludes a witness where, from the pressure of the circumstances under which he would be examined, he would be so strongly tempted to commit perjury. See, in further support of this doctrine, *Allen* v. *Lacy*, Dudley's (Ga.) Rep. 81 referred in 5 U. S. Dig. page 963, sec. 83, in which it was decided, that where an agent lost money of his principal, at gaming, in an action by the principal against the winner to recover it, the agent was not a competent witness for the plaintiff, without a release from him.

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

R. R. SEAWELL *v.* HENRY BUNCH.

A presumption of a deed arising from twenty years adverse possession, will not be rebutted by the fact of the heir's being under disability at the death of the ancestor, where such lapse of time had begun to run against the ancestor in his life-time.

THIS was an action of EJECTMENT, tried before ELLIS, J., at the last Spring Term of Wake Superior Court.

The Hon. Henry Seawell had possession of the land in question for more than twenty years, claiming it adversely to all other rights. At the expiration of sixteen years of this possession, Polly Nutt, who had before that, intermarried with Aquilla Hubbard, became the heir-at-law of one Robert Nutt, and succeeded as such to whatever right the said Robert had in the premises, but neither the said Aquilla, nor did his wife, make any entry, nor bring any suit for the land in question, before the twenty years adverse possession in Judge Seawell had elapsed, but afterwards, they made a deed of the land in question, to the defendant, who made an entry on the premises, for which this action is brought.

The defendant contended that Polly Hubbard, being under coverture, when she succeeded to these rights, the presumption arising from the lapse of time ceased to run as to her. His Honor being of a different opinion, so instructed the jury, who rendered a verdict for the plaintiff, and from a judgment thereon, the defendant appealed.

Moore and *K. P. Battle*, for the plaintiff.
Miller and *Rogers*, for the defendant.

Pearson, C. J. Where the title is out of the State, seven years adverse possession, under color of title, or twenty years adverse possession without color, makes a perfect title; in the former case, by force of the statute of limitations, and in the latter, upon the presumption of a deed by the original owner; *Smith* v. *Bryan*, Busbee's Rep. .180.

In our case, Henry Seawell, and the lessors of the plaintiff, who are his heirs, held adverse possession for more than twenty years. After such possession had continued for sixteen years, Robert Nutt, the original owner, died, leaving a sister Polly, who was the wife of Aquilla Hubbard, and under whom the defendant claims, one of his heirs at law. The question is, does the coverture of Mrs. Hubbard rebut the presumption of a deed from her ancestor, Robert Nutt, to Henry

Seawell, or, in other words, does it prevent the presumption of a deed from being made in respect to her?

No direct authority was cited on the argument; but from analogy, and from a consideration of the principle upon which such presumptions are made, this Court is of opinion, that the presumption did arise, notwithstanding her coverture.

In *Mebane* v. *Patrick*, 1 Jones' Rep. 23, it is held that a right of way was acquired by prescription, although the owner of the land became *non compos* before the twenty years had run, he being sane at the time it commenced, and for some years afterwards; so in *Pearsall* v. *Houston*, 3 Jones' Rep. 346, it is held that the presumption of payment arises after the expiration of ten years, where the debtor was able to pay for some years after the bond was due, although he became insolvent several years before the end of the ten years.

Presumptions of the kind we are considering, are made on the ground of public policy, in order to discourage litigation on stale demands and to quiet the possession of estates, and this policy would be in a great degree obstructed, if, after the presumption had commenced to arise, it was allowed to be stopped by some intervening circumstance other than an assertion of the right. Where, at the time a supposed right is invaded, the party is under disability, as in case of coverture, or infancy, it is but a proper indulgence, not to apply the principle of policy until the disability is removed; for it rests on the idea that the one party has exposed himself to the action of the other, which implies an ability to sue. But where the one party is exposed to an action at the commencement, and the other neglects to pursue his remedy, a subsequent disability cannot be allowed to prevent the principle from being carried out, for otherwise, in a large proportion of cases, it would fail to take effect, and the policy of the law would be defeated, either by design or accident; which concession cannot be reasonably claimed, at the expense of the public, by one who has himself been guilty of laches, or by those who claimed to have succeeded to his rights. In instance, suppose a feme sole, of full age, is evicted, and before

the expiration of twenty years she marries, is it reasonable that she should, by her own act, avoid the effect of her laches, and keep open the question of title, which public policy requires to be quieted? and suppose she dies, leaving an infant heir; must the title still be left open by an accumulation of disabilities? Or suppose, as in our case, the original owner neglects to sue for sixteen years, during all of which time another has possession of the land, cultivating it as his own, (a state of things which cannot well be accounted for otherwise than by presuming that the one had a deed from the other,) is it reasonable that the presumption which had begun to run, should be obstructed by the accident of his death, leaving an heir under coverture?

Our conclusion, both from analogy and from the "reason of the thing," is, that when the presumption has commenced, it is not stopped by a subsequent disability. There is no error.

PER CURIAM, Judgment affirmed.

JOSIAH R. WHITE *v.* WM. J. PERRY.

All the unappropriated swamp lands in this State were, by the Acts of 1825 and 1836, vested in "the Literary Board;" and the provision of *entering* and *taking possession* spoken of by the Act of 1850, applies only to such lands as may have been forfeited for non-registration of the grants by which they were held under the Act of 1836, or for the non-payment of taxes unde the Act of 1842.

ACTION of Trespass Q. C. F., tried before SHEPHERD, J., at the Fall Term, 1858, of Chowan Superior Court.

The case was tried on the general issue. The plaintiff claimed the premises under a grant from the State to himself, dated June 11th, 1855. The defendant claimed them under a deed made to him by the "President and Directors of the Literary Fund," dated November 18th, 1855; and between that day and the bringing of the suit, in March, 1856, he cut

some cypress trees on the land, and carried them away. The land covered by both deeds, is *swamp*—part of the Dismal Swamp, in Perquimons County, and had not been surveyed, nor taken into possession by the Literary Board. The Court, before the case had proceeded further, interposed and said that, although the land be swamp, the grant to the plaintiff was good, by force of the act of 1850, ch. 102, and he was entitled to recover.

Verdict and judgment accordingly, and the defendant appealed.

Pool, *Smith*, *W. A. Moore* and *Winston*, *Jr.*, for plaintiff.
Jordan and *Hines*, for defendant.

RUFFIN, J. The Court conceives that his Honor put an erroneous construction on the act of 1850, and that a comparison of the several acts on this subject will make it apparent.

In 1825, a literary fund was constituted for the support of common schools, consisting, among other things, "of all the vacant and unappropriated swamp lands in this State, and all the estates were vested in a corporation thereby created;" Rev. Stat. ch. 66. In 1836, Rev. Stat. ch. 67, the board was recognized under the name of the "President and Directors of the Literary Fund of North Carolina," and constituted of the Governor, and three members to be appointed by the Governor, with the advice of the Council of State; and, by the third section, all the swamp land in the State, not before entered or granted to individuals, was vested in the corporation, in trust, as a public fund for the establishment of common schools. The act then gives directions as to the mode of draining, improving and selling the land; and in the 10th section, it enacts, that all grants and deeds for swamp lands, before made, should be proved and registered in the county where the land lies, within twelve months, and that every one not so registered, should be void, and the land revert to the State. In 1842, in "an act concerning the swamp land," ch. 36, it was enacted that all such lands, before granted,

should revert to, and be vested in, the State, unless the grantee, his heirs or assigns should, within twelve months thereafter, pay to the Sheriff of the county in which the lands lie, all arrearages of taxes due on the lands; and, in the second section, it is further enacted, "that all the swamp lands to which the State is now entitled, or to which the State shall become hereafter entitled, under the provisions of this act, or otherwise, shall be and are vested in the President and Directors of the Literary Fund of North Carolina, in trust," &c. Then comes the act of 1850. It is entitled an act declaratory of the meaning of the 10th sec. of the 67th chapter of the Revised Statutes, and to amend an act "entitled" "an act concerning swamp lands, and for other purposes;" and in the first section, it declares that so much of the 10th section of the Revised Statutes, ch. 67, as makes grants and deeds for swamp lands void for want of registration in twelve months, and the lands revert to the State for that reason, shall be construed to be applicable only to the swamp lands which had been surveyed or taken possession of by the Literary Board; and it then proceeds to enact, further, that the first and second sections of the act of 1842, "shall be held and construed to be applicable to those swamp lands only which have been surveyed or taken possession of by the Board."

The construction placed upon the last act, in the Superior court, is, that it divested the Literary Board of all the swamp lands, except such as the Board had before entered into, or taken into possession. The opinion of the Court is to the contrary. The acts of 1825 and 1836 contain full grants of all the swamp lands that had not been before granted or entered. That constitutes the general and larger title of the Board, and, we think, is still in full force. The 10th section of the act of 1836, had a further provision—that all swamp lands, which had been before granted, should revert to the State, unless the patents should be registered within twelve months. Of those granted lands thus reverting, there is no express transfer to the Board, though no doubt it was so intended, and probably that would be the proper construction of the

whole act taken together, and in connection with the act of 1850. If it be so, it is manifest that would be a distinct grant of land in a peculiar condition—that of having been before granted and forfeited. In respect to that part of the act of 1836, the act of 1850, in its first section, has the provision that the 10th section confined, as we have seen, to reverted granted land, shall be applicable only to the swamp land which had been taken possession of by the Board. Now, it is manifest, that this provision does not relate to any swamp land but that specified in the 10th section of the act of 1836, namely, granted land reverting for the want of registration of the grants, because that provision is limited to a declaration of the meaning of the 10th section of the act of 1836, and embraces nothing else. Therefore, that part of the act of 1850, does not affect this case at all, since it does not appear that the premises were ever granted before.

As to the other branch of the case, which arises out of the act of 1842, that also refers, exclusively, in the first section, to land before granted, and enacts that, unless the present claimants shall, within twelve months, pay all arrearages of taxes due thereon, as listed or unlisted land, they also shall be forfeited and vested in the State; and then, in the second section, it transfers to the Board all the swamp land to which the State was then entitled, or might become entitled, *under the provisions of that act*, or otherwise. The first class, that is, lands to which the State was then entitled, might include the lands reverting since the act of 1836, under the 10th section of the law of that year. That is the natural construction, since there was no other lands on which the words could operate, as all the vacant swamps were before vested in the Board by the acts of 1825, and the general enactment in the 3rd section of the act of 1836. But suppose them to have a wider meaning—it is obvious that they must have been inserted out of abundant caution—and they cannot impair the prior general grant in the previous acts. Then the next clause merely adds to the estates of the Board, all the swamp lands that might be forfeited for non-payment of taxes, or that the State

might, in any way, acquire afterwards. Hence it follows, as in the preceeding case, that the second section of the act of 1850, in declaring that the first and second sections of the act of 1842, should apply only to those lands which the Board had surveyed and taken into possession, must mean "such lands," that is, the land which had reverted for the non-payment of taxes; and as to land in that situation, the Board is restricted to those parcels which it had taken into possession or surveyed.

The conclusion is, that the general grant of the swamp land is still in full force, and therefore that the grant to the plaintiff is invalid.

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

JAMES L. BALL *v.* WILLIAM FELTON.

Where a covenant was entered into between two partners, A and B, that B should take the goods and pay all the debts of the firm, and moreover, should repay whatever debts of the concern A might pay, and afterwards the administrator of B agreed with A, that if he would not file a bill against him, as administrator, to enjoin the payment of the assets to other debts than those of the firm, he would confess judgments for the partnership debts to a certain amount, and pay the same, which he failed to do, and threw the whole upon A, it was *Held* that A's remedy was not upon the covenant of the intestate, but upon the special promise, made by the administrator.

ACTION of ASSUMPSIT, tried before DICK, Judge, at the last Spring Term of Perquimons Superior Court.

The action is assumpsit, on a special promise, and was tried on the general issue. The case was: The plaintiff and Thos. B. Long, were partners in trade, and in November, 1855, the plaintiff sold his share to Long, and the latter covenanted that he would pay all the debts of the firm, and would repay to Ball all sums he, Ball, should be compelled to pay for, or on account of, the firm. Long died intestate in the autumn of

1856, and the defendant became his administrator, and soon afterwards the plaintiff informed the defendant, that he intended to file a bill in the court of equity, to enjoin the defendant from applying the assets of the intestate to any other purpose until the copartnership debts were paid; and the defendant, thereupon, requested the plaintiff not to file the bill, and promised the plaintiff, that if he would not do so, he would confess judgments for a part of the partnership debts to the amount of $2000, and pay the same, and the plaintiff assented thereto. In pursuance of the agreement, the plaintiff and the defendant, as administrator, confessed judgments to creditors of the firm, to the amount of $2000, and executions issued therefor; but the defendant refused to pay any part, alleging that he had no assets, and the plaintiff paid the whole, and brought this action. Thereon, the Court held that the plaintiff could not maintain the action by reason of his higher remedy on the covenant, and plaintiff was nonsuited and appealed.

Hines and *W. A. Moore*, for the plaintiff.
Jordan and *Pool*, for the defendant.

RUFFIN, J. The only point before the Court, is that on which his Honor gave his opinion on the trial. On that, we think clearly, there is error. An action on the covenant would have been against the defendant as administrator, and the damages would have been satisfied out of the assets of the estate. The present action is on the special promise by the defendant, and charges him personally or *de bonis propriis*. Thus the two actions are in different rights, and, therefore, one does not merge in the other. Judgment reversed, and a *venire de novo*.

PER CURIAM, Judgment reversed.

THE NEUSE RIVER NAVIGATION COMPANY *v.* THE COMMISSIONERS OF NEW-BERNE.

Where, to a writ of alternative mandamus, the defendant exhibited a bill in equity, alleging an equitable defence to the demands of the plaintiff, and praying for an injunction to restrain him from prosecuting the writ, and asked that *that* might be received as *a return* to the writ, it was *Held* not to be error in the Court to refuse the injunction, and to order the defendant to make return.

APPEAL from the Superior Court of Craven County, Judge HEATH presiding.

The plaintiff exhibited a petition for an alternative mandamus, reciting that, under the authority of certain acts of the General Assembly, the defendants had made a subscription to the capital stock of the Neuse River Navigation Company, and that certain assessments had been made on the stockholders, by virtue of which the defendants became bound to pay $50,000; that the same had been demanded, and the defendant had failed to pay, and praying that a writ of "alternative mandamus issue to the Commissioners of New-Berne, aforesaid, commanding them that, unless they show good cause to the contrary, whenever thereto required, they pay to your petitioner, the said Neuse River Navigation Company, the said assessments or instalments due on the said subscription to the capital stock of the said company, according to the provision of the said act; that upon their failure to show cause, they be absolutely and peremptorily commanded to pay the same."

Upon which petition an order was made, and a writ of mandamus, in the alternative, issued, directed to the defendants, commanding them "to issue, or cause to be issued, bonds to the aggregate amount of $50,000," or show cause to the contrary.

To which the Sheriff returned, that the writ had been duly served upon the defendants, whereupon the plaintiff's counsel moved that the defendant be required now to *make return* to

the said writ, or, on failure to do so, that a writ of peremptory mandamus do next issue.

Whereupon, the defendants moved the Court, instead of making any return to the said Court, that an injunction issue upon a bill, which they produced in open Court, to restrain the plaintiff from further prosecution of their said writ.

The Court, being of opinion that an injunction cannot issue to restrain a mandamus, refused the motion, and ordered the defendants to make return to the said writ of mandamus. From which order and judgment of the Court, the defendants prayed an appeal to the Supreme Court, which was granted.

Haughton and *McRae*, for the plaintiff.
Stevenson and *J. W. Bryan*, for the defendants.

PEARSON, C. J. Without deciding that an injunction cannot be issued to restrain a party from proceeding in an application for a mandamus, where mere private civil rights are involved, and where some matter exists which makes it against conscience to enforce the legal right, but being merely equitable in its nature, cannot be taken advantage of by setting it out as a part of *the return* to the mandamus, for we will not say that such an equity may not, under peculiar circumstances, exist, although an instance of it has not suggested itself to our minds, we concur with his Honor, that the fact that the defendant had exhibited a bill in equity against the plaintiff, praying, among other things, for an injunction to restrain further proceedings in the application for a mandamus, which injunction the Judge had refused to direct to be issued, cannot be taken as "a return," or as a cause or excuse for not making one, consequently, there is no error in the order "that the defendant make return to the writ of mandamus," from which order his Honor allowed the defendant to appeal. This we consider to be the only point presented. It is true, that the plaintiff moved that "the defendant be required, now, to make return, and, *on failure, that a writ of peremptory mandamus do next issue;* but there is no judgment that

such peremptory mandamus do next issue, and it would have been inconsistent with the permission to appeal from the order requiring a return, and which was vacated by the appeal; otherwise it may be that the defendant would have made as *a return* the several matters set out in the bill in equity, or excepted in the nature of a motion in arrest of judgment, for error of substance apparent on the face of the proceedings.

It may be well to call attention to the fact, that the prayer of the petition is, "that the Commissioners show cause why they shall not be required *to pay the amount of the assessments* to the petitioner," and on failure, that they be absolutely and peremptorily commanded "*to pay the same as aforesaid.*" *The writ* is, "these are therefore to command you, and each of you, as Commissioners, *to issue, or cause to be issued, bonds to the aggregate amount*," *&c.*" Whether the variance is waived, or is fatal, will be a question on the motive for a peremptory writ.

It was stated at the bar, that the object of the appeal was to try the question whether an "injunction could not be issued to restrain the mandamus," his Honor having refused it, being of opinion that there was no such jurisdiction in equity. This appeal does not present that question; for which reason we are not at liberty to decide it. The application for the injunction, being on the bill merely, was, of course, *ex parte*, and might have been made to any other judge, as well as to his Honor. If the defendant files the bill, and upon the coming in of the answer, a motion for an injunction upon the bill answer, and the *equity confessed* is refused, an appeal may be taken from such interlocutory order, and the question will be presented.

PER CURIAM, The order appealed from affirmed.

JOSIAH PENDER *v.* JAMES ROBBINS.

Where the master of a vessel, engaged chiefly in carrying naval stores between a port in North Carolina and the city of New York, took in charge a box of jewelry without including it in a bill of lading, and without any contract as to the price for carrying it, it was *Held* that he was only liable as an ordinary bailee, and not as a common carrier, and that having kept it in his cabin, locked up in his chest, and having been violently robbed of the property, with his own, in the night time, he was not guilty of negligence, and was not liable for the value of it.

Held further, that the nature of this bailment did not bind the defendant to a direct voyage from the one port to the other, so as to subject him for a deviation.

THIS was an ACTION ON THE CASE, tried before CALDWELL, J., at the last Spring Superior Court of Beaufort county.

The plaintiff declared in tort against the defendant, alleging that he undertook and promised to carry a certain box, containing watches, from the town of Washington, N. C., to New York, and to deliver them to Kingsly & Co., and that from negligence and the want of care, those articles had not been delivered as agreed, but had been lost.

One *Rouse* testified, that he went to Tarboro', and purchased some articles of jewelry from the plaintiff, and in the bill furnished him by the plainiiff, the watches in question were included; that they needed repairs, and it was agreed between him and the plaintiff, that Rouse should take them, provided they were repaired; that not having been sent to him, he sent to the plaintiff for them, and when they were brought, they had not yet been repaired; that he kept them in his shop at Greenville, where he lived, until the plaintiff came to the place, who directed him to send the watches to Kingsly & Co., at New York, who would repair them.

One *Hoyt* testified, that he received the box from Rouse, with a request to send it to Kingsly & Co., New York, and that he took it to the defendant, then master of a vessel trading to New York, chiefly in naval stores, who received it, and promised to deliver it to Kingsly & Co., New York; that the

defendant made the voyage and returned in the usual time, and told the witness, that he had not delivered the watches; that his business had led him to a place on East River, and that he had not been to New York at all; that he then offered to return the articles, but it was agreed that he should take the box and deliver it to Kingsly & Co. on his next voyage.

It appeared from the evidence, that on the night the vessel reached New York, being anchored in the river, she was boarded by robbers, and his chest violently taken out of the cabin where he (the master) was sleeping, and broken open and plundered of its contents; that the box of watches in question, was in the chest, and was taken out with his own property, and never recovered. There was no evidence that the defendant was to have any thing for carrying the watches, nor were they contained in any bill of lading given by the latter.

The defendant's counsel insisted that, according to the testimony of Rouse, the property in the watches was in him, and not in the plaintiff; secondly; that, Hoyt had made a new contract with defendant, before he started on his second voyage, and there was no evidence of negligence under it. Thirdly; that the deviation alleged, supposing there was not a second contract, would not, in law, subject the defendant to damages.

The Court charged the jury, that if they believed the witness Rouse, the property in the watches was in the plaintiff, and not in the said Rouse; that as to Hoyt's agency, it expired when he made the contract with the defendant in the first instance; and upon the third point, the Court charged that the defendant, in deviating in the voyage as deposed to, in violation of his contract, had rendered himself liable to the plaintiff for the loss of the watches, though they had been taken as deposed to. Defendant excepted.

The jury, under these instructions, found a verdict for the plaintiff, upon which the Court gave judgment, and the defendant appealed to this Court.

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

BATTLE, J. We agree with the counsel for the plaintiff, that the property in the watches was not transferred to Rouse, for the reason that the latter was not to have them until they should be repaired—and that was never done.

Upon the question of the responsibility of the defendant for the loss of the watches, our opinion is decidedly against the plaintiff. The defendant, though the master of a vessel, trading between the town of Washington, in this State, and the city of New York, did not contract with the plaintiff to carry his goods, as a common carrier. The articles were not included in any bill of lading, and it does not even appear that the defendant was to be paid any thing for carrying them. Being jewelry, it is admitted by the plaintiff's counsel, that the act of Congress of 1851, (see Brightly's Digest of the U. S. Laws, p. 834, sec. 50, 54,) prohibits him from charging him otherwise than as a bailee, guilty of negligence or misfeasance. Such being the case, the authorities to which he refers on the subject of deviation from the straight and shortest course of the voyage, have no application. See Abbott on Shipping 237, *Harrell* v. *Owens* 1 Dev. & Bat. Rep. 273. The defendant, as a bailee, with or without reward, cannot be supposed to have undertaken to carry the plaintiff's goods direct to New York, inconsistent with his duty as master to sail with his cargo to another port. The utmost extent of his engagement was to deliver them to the proper persons in New York, whenever he could go there, and such was evidently the understanding of the plaintiff's agent, Hoyt, before the goods were lost. That engagement bound him only to ordinary care in keeping the goods, even supposing him to have been a bailee for hire. Such care he did take of the watches, for he kept them locked up in a chest in his own cabin, and lost them at the same time, and in the same manner, that he lost some of his own goods by the violent action of nocturnal robbers. Unless he could be deemed a common carrier, which it is

admitted he could not, we cannot imagine how he could make out a more complete defence against the imputation of gross, or even ordinary neglect. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

JOSEPH H. BURNETT *v.* JOHN THOMPSON.

A call from the mouth of a swamp, *down a swash*, to the mouth of another swamp, was held to mean a straight line from one point to the other through the swash.

Where A has an estate for life in possession, in a term for 99 years, B has an estate in remainder for the residue of the term after the death of A, and A has the reversion after the expiration of the term, in an action of trespass, Q. C. F. against a stranger, for entering and cutting down trees and taking them off, it was *held* that, by means of the *per quod*, A might recover the entire value of the timber, and that B was not entitled to any part of such value, though he also could bring an action on the case and recover damages for the same act, as lessening the value of his expectancy.

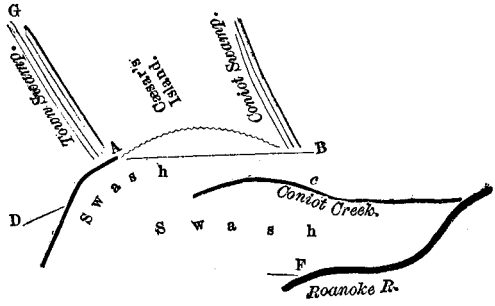
The act of 1824, by which the long terms for years, created by the Tuscarora Indians, are, for certain purposes, made real estate, has no effect upon the reversions expectant on those terms.

ACTION of trespass, Q. C. F., tried before SHEPHERD, J., at the last Fall Term of Washington Superior Court.

The action was brought for cutting cypress trees and making them into shingles. The plaintiff claimed the premises south of the line between Town Swamp, and Coniot Swamp, marked in the diagram as "Swash," and the defendant owns the lands to the north of it marked "Cæsar's Island."

The first question raised by the exceptions of the defendant was as to the boundary designated in his deed; the calls important to be noticed, are as follows: "thence to the run of Town Samp, (G,) thence down the Town Swamp to the Swash, A, thence down the Swash to Coniot Swamp, thence up the various courses of the said swamp, to the first station." The ques-

tion between the parties was, whether the line should be run straight from the mouth of Town Swamp, (A,) to the Coniot Swamp, or whether it should follow the course of some running water, called "Broad Water," through the Swash, which would lead to Coniot Creek, which creek the defendant insisted was reached by Coniot Swamp at C. The plaintiff



insisted that the mouth of Coniot Swamp was at B. It was conceded that if the mouth of Coniot Swamp was at B, and a straight line was run from A to B, the defendant would be a trespasser.

The Court charged the jury, "that they must determine where Coniot Swamp was, at the date of the call; that having determined this, "the course of running from Town Swamp would be to start from the Swash and then proceed in a straight line through to Coniot Swamp." The defendant excepted to this instruction.

All the lands on both sides were claimed under leases from the Tuscarora Indians. The plaintiff had a life estate in a lease of the lands which he claimed (the *locus in quo* being a part) for 99 years, which would expire in the year 1916, and a reversion after the expiration of the term. The residue of this lease between the plaintiff's death, and the end of the term,

belonged partly to the children of one Martin Ballard, and partly to one Barrington.

The Court assumed that the Act of Assembly of 1824, converting the estates or interests in the long leases made by the Tuscarora Indians into real estate, did not affect the reversion, and instructed the jury that if the plaintiff was entitled to recover at all, he was entitled to the full value of the timber cut and sawed up and made into shingles. Defendant's counsel again excepted. Verdict and judgment for the plaintiff. Appeal by the defendant.

Smith and *Wm. A. Moore*, for the plaintiff.
Winston, Jr., *Hines* and *H. A. Gilliam*, for the defendant.

PEARSON, C. J. The *special instructions* upon the question of boundary, and also in reference to the damages asked for by the defendant, are not set out, and, consequently, this Court is unable to say there was error in refusing to give them.

The general instruction "to run a straight line from Town Swamp, through the swash to Coniot Swamp," is, of course, to be understood to mean the shortest line through the Swash that would strike the swamp; and although this leaves the question of boundary still open, (inasmuch as the fact, whether Coniot Swamp extended to Coniot Creek, or stopped some distance before reaching it, at the point indicated on the map, was not put to the jury in such a manner as to make it appear, from the verdict, how it was found,) still the statement of the case does not show any error of which the defendant has a right to complain.

Assuming that the plaintiff's title covered the *locus in quo*, his Honor held he was entitled to recover the *full value of the trees* cut and taken off by the defendant.

The act of 1824, by which the long terms for years created by the Tuscarora Indians, are, for certain purposes, made real estate, is confined, in its operation, to "the terms" and to the persons by whom they are held; and has no operation or

effect upon the reversions which are expectant upon the term: so the matter may be simplified, and the question is this: A has an estate *pur autre vie* in possession, in a term for 99 years, B has an estate in remainder for the residue of the term, after the death of the *cestui que vie;* and A has an estate in reversion, after the expiration of the term, (the intermediate estate of B preventing a merger,) a stranger enters and cuts down cypress trees, makes them into shingles, and takes them off. Is A, in an action of trespass *quare clausum*, entitled to recover the full value of the trees?

If there be tenant for years or for life, and a stranger cuts down a tree, the particular tenant may bring trespass, and recover damages for breaking his close, treading down his grass, and the like. But the remainderman, or reversioner in fee, is *entitled to the tree*, and if it be converted, may bring trover and recover its value. The reason is, the tree constituted a part of the land, its severance was waste, which is an injury to the inheritance, consequently the party in whom is vested the first estate of inheritance, whether in fee simple or fee tail, (for it may last always,) is entitled to the tree, as well after it is severed, as before; his right of property not being lost by the wrongful acts of severance by which it is converted into a personal chattel.

Such remainderman or reversioner has his election either to bring trover for the value of the tree after it is cut, or an action on the case in the nature of waste, in which, besides the value of the tree considered as timber, he may recover damages for any injury to the inheritance which is consequent upon the destruction of the tree. *Williams* v. *Lanier*, Busbee 30. In the instance of a cypress tree, the damages over and above the value of the timber of the tree cut in a swash, may be only nominal. But take an ornamental shade tree for the instance, and the difference between its value as timber, and the additional injury to the inheritance by its destruction is great; indeed, it is so much as to call into application the preventive jurisdiction of equity against irreparable damage. If there be an intermediate estate in remainder for life or

years, the owner thereof may also bring an action on the case for the injury done to his estate, for, although it may never be enjoyed in possession, still its value may be affected by a destruction of something which constitutes a part of the land, and if disposed to sell, he would not be able to get as good a price for it. The remedy which is given to an intermediate tenant in remainder for life or years, by the introduction of of the action on the case in the nature of waste, is one of its advantages over "the action of waste which it has superseded," 2 Sanders Uses, 252 at note 7. For the sake of illustration, suppose, in such a case, a stranger enters and pulls down a house on the land, and carries away the materials; the tenant for life or years in possession may bring trespass, and recover damages for breaking his close, and for the injury done by depriving him of the use of the house during the continuation of his estate; the intermediate remainderman may bring case and recover damages for the depreciation in the value of his estate, caused by the destruction of the house, whereby his estate would sell for less, and the use of the land, should it come into possession, would be of less value for the want of the house; and the remainderman in fee may bring case and recover the value of the materials of the house, and also additional damages for the injury to the inheritance caused by its destruction, or he might bring trover and recover the value of the materials.

Assuming these positions of law, Mr. Winston argued that the plaintiff, although he was the owner of the first estate, and also of the remainder in fee, was not entitled to recover the *entire damage* caused by the wrongful act of the defendant, inasmuch as the intermediate remainderman was entitled to recover *some part of it*, however small it might be. The fallacy of the argument, as applied to our case, lies in not distinguishing between the entire damage resulting from the act, and the *full value of the trees*, considered merely as timber. The latter is not at all affected by the fact of their being an intermediate estate; for if the remainderman in fee is content to take the value of the trees as timber, whether

they be cypress or ornamental shade trees, or the mere value of the materials of the house, he is certainly entitled to the full value thereof, and could recover it in trover.

Another question is presented by the case, and we have considered of it, although it was not made on the argument. The plaintiff, as owner of the first estate, may maintain trespass for breaking his close, and as owner of the fee, he may maintain case or trover for the value of the timber. Is it necessary for him to bring two actions, or can he recover the value of the timber under a *per quod* in the action of trespass? The law seeks to avoid a multiplicity of suits, and we are of opinion that he may recover all the damage in the one action, by means of a *per quod;* because it all results from one wrongful act, and the commission of the tort in fact constituted the main part of the *res gestæ*. The *per quod* was invented to save the necessity of two actions. In *Scott* v. *Shepherd*, 2 Blackstone's Rep. 897, it is said, "every action of trespass, with a *per quod*, includes an action on the case." In trespass, damages for all ulterior injuries beyond the immediate injury, may be recovered under a *per quod*, Chitty's Plead. 442, and the most usual action for seduction is trespass, Q. C. F., with a *per quod;* so damages for the loss of hogs that escaped because a fence was let down, may be recovered in trespass, Q. C. F.; *Welch* v. *Piercy*, 7 Ire. Rep., 365, see Sedgwick on damages, 135, where the cases are collected. So damages for the loss of an eye, resulting from a cold contracted by exposure caused by tearing off the roof of a house, may be recovered in trespass, Q. C. F.; *Hatchell* v. *Kimbrough*, 4 Jones' Rep. 164.

In this discussion, we have put cypress trees on the same footing with shade and fruit trees, and buildings, in respect to the relative rights of particular tenants and remaindermen. It may be, there is a difference where the trees grow in a *swash*, which is fit for nothing but its timber, for in such case, unless the tenant is allowed to "work up" a reasonable number of the trees, he can have no benefit of his estate. A ten-

ant, by the courtesy or dower, is allowed to work mines that have been opened.

We will not enter upon this subject, as its consideration is not necessary for our decision, and it was not alluded to on the argument, and the facts are not stated in reference to it. It is suggested merely to prevent misapprehension and exclude a conclusion.

PER CURIAM, Judgment affirmed.

ROBERT J. HUNTER *et al v.* EDWARD P. ROUTLEGE *et al.*

An official bond given by a clerk, upon his entry into office, covers his whole official term, whether a new bond be given afterwards or not.

The forfeiture denounced by the 11th sec. of the 19th chap. of the Rev. Statutes, does not *per se* vacate the office of clerk, nor invalidate the acts of the officer, and until the same is judged of by the Court, upon a proceeding, all his official liabilities continue as before.

The bond of a clerk, required by the 11th section of the 28th chapter of the Revised Statutes, was only intended to secure the payment of tax fees on suits, fines, forfeitures, &c., while that required by the 7th section of the 19th chapter of the Rev. Statutes, was intended to secure the faithful payment of monies generally, to the persons entitled; and where money raised upon execution was paid into the office of a clerk, it was *Held* not to be recoverable upon a bond, given in pursuance of the former act, although it embraced a condition "to pay over to the person or persons entitled to receive the same, all other monies, which might come to his hands by virtue of his office."

ACTION of DEBT, tried before ELLIS, Judge, at the Fall Term, 1857, of Duplin Superior Court.

The following facts were submitted for the judgment of the Court, in a case agreed by the counsel of the respective parties. Routlege, one of the defendants, in August, 1853, was elected clerk of the Superior Court of Duplin, and at September term following, gave bond in the sum of four thousand dollars, with the following condition: "Now, if the said Ed-

ward P. Routlege, shall well and truly collect, account for, and pay over to the proper officers authorised to receive the same, all such sums of money as may, or shall be due, and collected for taxes, suits, fees, fines and forfeitures awarded, and shall collect, receive, and pay over to the persons entitled to receive the same, all other monies, which shall come into his hands by virtue of said office, then, &c. ;" to which bond, the other defendants were his sureties. At September Term, 1854, Routlege failed to renew his bond, but continued in the execution of his office. Just prior to September Term, 1855, he applied to the defendant, N. Hall, to become his surety in a new bond for the ensuing official year, which the latter refused, stating that neither he, nor the other defendants, T. Hall and Smith, considered themselves liable for him after September Term, 1854. At September Term, 1855, the said Routlege again failed to renew his bond, but continued to discharge the duties of his office until March Term, 1856, when he resigned and a successor was appointed.

At September Term, 1855, the relators recovered a judgment against Hooper and Holmes for $438, with interest and cost, upon which execution was duly issued and returned, "satisfied," and the money paid into the office a few days prior to March Term, 1856.

Shortly afterwards, a demand was made for the money of the defendant Routlege, who stated that he could not pay it, having misapplied it. The action was brought upon the bond of 1853, and the breach alleged, was the failure to pay the amount of the above mentioned judgment paid into his office.

It was agreed that if the Court should be of opinion that the plaintiff was entitled to recover upon this state of the facts, judgment should be entered for the debt and costs aforesaid, but if of a contrary opinion, he should order a nonsuit.

The Court being of opinion with the plaintiffs, gave judgment according to the agreement, from which the defendants appealed.

Allen, for the plaintiffs.

W. A. Wright, for the defendants.

BATTLE, J. The case agreed does not state what was the objection taken to the recovery of the relators upon the bond sued on, nor the ground upon which the objection, whatever it was, was overruled by his Honor. If it were that the defendants were not bound on the bond in question, which they executed in Sept., 1853, for any default in office, committed by the clerk after he had failedto renew his bonds in Sept., 1854, as required by law, the objection was not sustainable, and his Honor was right in deciding against it. The 11th section of the 19th chapter of the Revised Statutes, which requires that clerks of the County and Superior Courts shall annually renew the bonds, which by the 7th section of the same chapter, and the 11th section of the 28th chapter, they are required to give, declares only that by a failure to make such renewal, their offices shall be forfeited, and not that they shall be absolutely void. If, therefore, any clerk shall continue in the exercise of the duties of his office, notwithstanding his failure to renew his bonds and shall be guilty of any default therein, his sureties will undoubtedly be liable upon the bond already given, until the cause of forfeiture is acted upon by the Court, and he is, on account of it, ejected from the office, he is, to all intents and purposes, the clerk of the Court, and his sureties, upon any bond, which he may have given previous to any default, will be responsible for it while he continues in office during the term for which he was elected. Had he renewed his bond, as he ought to have done, they would have been accumulative, as has been often decided, and surely, the omission to renew them, cannot have the effect to discharge the sureties on the bond or bonds already given.

But there is another objection presented by the case, which is, in our opinion, fatal to the action. At the time when the principal defendant was elected, to wit, in 1853, the Revised Statutes were in force, and the case is to be governed by the enactments therein contained. The 28th chapter concerning "county revenue and county charges" in the 11th section, provides that "the clerk of each and every county and superior court of law, shall give bond with approved security to

the court whereof he is clerk, payable to the State of North Carolina, in the sum of four thousand dollars, conditioned for the due performance of the duties enjoined in this act." These duties will be found prescribed in the 6th, 9th and 10th sections of the act, and consist in receiving and paying over all tax fees on suits, fines, forfeitures, &c., and rendering an account annually, &c. The 7th section of the 19th chapter declares, that in addition to the bonds above mentioned, each and every clerk shall give a bond in the penal sum of ten thousand dollars, payable to the State, and "conditioned for the safe keeping of the records and the faithful discharge of their duties in office, which may be sued upon by the party injured, &c."

It is manifest, that the bond of $4000, was intended to secure the payment by the clerk to the proper officers entitled to receive the same, all tax fees, fines, &c., while the larger bond was designed as a security to the public for the safe keeping of the records, as well as to individuals for any money paid into office, to which they might be entitled. Such being the case, the question before us is, whether an individual can sue upon the bond which was not intended for his benefit, and thereby, to the extent of his recovery, lessen the security provided for the public officers of the county or State. The relators insist that they can do so, at least upon the present bond, for in addition to the condition for the payment to the proper officers of all such sums as were received by the clerk for taxes on suits, fees, &c., there is a general condition, that he "shall collect, receive and pay over to the persons entitled to receive the same, all other monies which shall come into his hands by virtue of his office." In support of their claims, they contend that whatever variance there may be in the penalty or condition of the bond, from the provisions prescribed by law, is cured by the act, 1842, chap. 61, (see Rev. Code, ch. 79, sec. 9). They insist, therefore, that the penalty of four thousand dollars, instead of ten thousand, and the condition about paying over taxes, fees, &c., instead of the safe keeping of the records, &c., make no difference. We think otherwise,

for two reasons, the first of which is, that it would impose upon the sureties of the clerk a liability, which, so far as we can see, they never intended to incur; and the second is, that it would take away from the public officers, for whose benefit the bond was required to be given, the security which was intended for them. It is not stated in the case agreed, that the bond for ten thousand dollars was not given, and as we are not to presume that the justices of the County Court, whose duty it was to take it, neglected that duty, we must suppose that it was given. What reason is there, then, for allowing the relators to recover on the present bond? But we are inclined to think that if it did appear that no other bond, than the present, was given, the neglect of the justices to perform their duty in taking the other bond, would not vary the case. The act of 1842, is a remedial act, and ought, therefore, to be construed favorably and literally, but we think it was never designed to go beyond the making good every official bond, *for the purpose for which it was intended.* To that extent it ought to receive the most liberal interpretation, so as to cure defects of every kind which ought to be cured. If we give it, by construction, a larger operation, we shall, in many cases, do injustice to the sureties, by extending their liability beyond what they engaged for, and they might well object, "*non haec in fœdera venimus.*" We might also injure those, for whose use the bonds were required to be given, by taking away from them, or at least, by lessening, the security which the law had provided for them.

The Revised Code requires only one bond to be given by the clerks of the county and superior courts, the penalty of which is fifteen thousand dollars, and the condition extensive enough to cover every possible default in office; so that the question, which we now decide, cannot be raised upon any clerk's bond, given since the first day of January, 1856. See Revised Code, ch. 19, sec. 8.

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

PER CURIAM, Judgment reversed.

MATTHEW WICKER *v.* KENNETH H. WORTHY.

Mere silence on the part of a sheriff as to the existence in his hands of a prior lien on the property he is selling, will not subject him to an action of deceit, but if he does or says any thing intended or calculated to mislead a purchaser, in this respect, he is liable.

Enquiring from the sheriff, and reliance on his information as to the nature of the liens and levies of execution in his hands on the property offered by him for sale, is certainly the exercise of reasonable caution and diligence, as this is a matter peculiarly within his knowledge.

ACTION on the case for a deceit, tried before DICK, J., at the last Fall Term of Chatham Superior Court.

The defendant, as the sheriff of Moore county, was present, conducting a sale of property under executions in his hands against one Bryant. About the commencement of the sale, a question arose among the bystanders, whether there was not some execution of prior lien, which had been levied on the land, and under which it was not advertised or offered for sale; whereupon Bryant stated that this had been the case, but that those liens had been discharged, and he called upon the defendant, as sheriff, to make a proclamation to that effect, and to state that the sale might proceed without danger to the purchasers; this the defendant declined doing; upon which Bryant said, he would do it. Before the sale began, the crier, one *Brown*, made a public declaration, addressed to the bystanders, to the effect "that arrangements had been made whereby good titles would be made for the property about to be sold." The defendant was in hearing of this proclamation and said nothing. Much property was sold before the land in question was put up. When it was offered, the crier and one Murchison, an uncle of the defendant, both made proclamation that there was no dispute about the title to this tract; this occurred in the presence and hearing of the defendant. Very shortly before the sale of the land in question was begun, the plaintiff and defendant were seen conversing privately, and just as they separated, the defendant stepped for-

ward and commenced bidding for the land, as the agent of the plaintiff. After bidding some time, he ceased, when the plaintiff took it up, in person, and ran up the price to $250, when it was knocked off to him at that price. This sale took place on 20th of December, 1853. At the next term of Moore County Court, which was in January, 1854, the defendant, as sheriff, returned an execution against Bryant, in favor of one Buie, levied on the same land, under which it was afterwards sold by him and conveyed to the purchaser, (Buie.) An action of ejectment was immediately brought by Buie against the plaintiff, which, after pending for some time, was compromised by the payment of $400 by the plaintiff. Bryant was indebted to the defendant—how much did not appear—and Murchison, above spoken of as the defendant's uncle, was deeply involved for Bryant, who has since failed. There was no evidence that the defendant said any thing in reply to the public declarations of Bryant, or of Murchison, or the crier, about the title of the land, or the discharge of the previous levies.

The Court charged the jury that if the defendant, by his conduct, had intentionally deceived the plaintiff, as to the existence of the levy on the land, he would be responsible to the plaintiff, unless the latter had shown a want of ordinary prudence in informing himself as to the state of the matter; and upon that point he charged that the plaintiff was bound to know of the judgments against Bryant, (including Buie's,) and that executions had issued thereon, but that after charging himself with such information, it was a due pursuit of inquiry to resort to the sheriff for further information, and to rely upon his truth and fairness in the transaction. The defendant's counsel excepted.

Verdict for the plaintiff. Judgment. Appeal.

Haughton, for the plaintiff.
Manly and *Phillips*, for the defendant.

PEARSON, C. J. Mere silence on the part of a sheriff, in

respect to the levy of an execution which he has in his hands, when property subject to its lien is exposed to sale in his presence, is not sufficient to make him liable in an action on the case for a deceit. But if he *says* or *does* any thing intended and calculated to create the impression that there is no lien, and that a purchaser from the defendant in the execution will get a good title, he will be liable to the action.

There was evidence in this case tending to prove the deceit which ought to have been left to the jury, i. e., the proclamations made by the crier and Marshison, when the tract of land was offered; the private conversation between the plaintiff and defendant, and the defendant's *bidding* for the plaintiff, and other circumstances, such as the fact that the defendant in the execution was indebted to the defendant, and that his uncle, Murchison, who had busied himself about the sale, was deeply involved on his account.

We also concur with his Honor upon the question of law. *Caveat emptor* is the rule in actions for deceit; but the fact of a levy or of the intention of the sheriff to insist upon the lien of the execution, or to forego it because of certain arrangements which the defendant in the execution had made, and upon which the sheriff was willing to rely, so as to permit a sale, are peculiarly within the knowledge of the sheriff, and even a very cautious man might reasonably rely upon his representations in regard to them. There is no error.

PER CURIAM, Judgment affirmed.

ELIZABETH GILLIAM, *Executrix*, *v.* PETER HENNEBERRY, *Adm'r.*

A co-obligor, who is a surety in a sealed note, who is not sued, is a competent witness to prove the execution of the instrument as to the principal, because his interest is as much on one side as on the other.

ACTION of DEBT on three bonds, tried before SHEPHERD, J., at the last Fall Term of Chowan Superior Court.

The plaintiff offered as a witness, *Henry A. Gilliam*, (as to whom a *noli prosequi* had been entered,) who was one of the co-obligors, to prove the execution of the bonds declared on, and was the surety for the defendant's intestate. The witness was objected to on the score of interest, but admitted by the Court. Defendant excepted.

Verdict and judgment for the plaintiff. Appeal by def't.

W. A. Moore, for the plaintiff.
Winston, Jr., for the defendant.

BATTLE, J. The true test of the interest of a witness is, that he will either gain or lose by the direct, legal operation, and effect of the judgment; or that the record will be evidence for, or against him, in some other action. It must be a present, certain and vested interest, and not one which is uncertain, remote or contingent. The interest must, of course, be on the side on which he is called, and must be such as can be asserted in some court of justice; 1 Greenl. on Ev. sec. 390; *Blum* v. *Stafford*, 4 Jones' Rep. 94. If the interest of a witness be *equally balanced*, so that he has as much interest on one side as on the other, he will be admissible.

Such was the interest of the witness, Henry A. Gilliam, in the case now before us. He was the surety to the sealed note sued on, and his interest was the same on both sides. If the plaintiff should recover from the defendant, whose intestate was the principal obligor, then, the witness would be discharged from liability on account of his suretyship. But if she should fail in her suit against the representative of the principal, she could recover the debt from the surety, and then he could recover the amount from such representative. As between the parties, then, he stood indifferent, and consequently, he could be examined by either. See *York* v. *Blott*, 5 Mauld and Sel. 71; 1 Greenl. on Ev. Sec. 399.

The other objections, made on the trial, have been abandon-

ed in the argument here, and it is unnecessary for us to notice them further than to say, they were manifestly unfounded.

PER CURIAM, Judgment affirmed.

MAXY SANDERLIN *v.* HENRY M. SHAW.

A landlord who had leased his land to a tenant for a year, for a part of the crop, was *Held* to be a competent witness to prove a trespass upon the land, and damages by the destruction of the crop.

In an action for the destruction of a growing crop of corn, it was *Held* competent to prove, upon the question of damages, what the price of the article would have been in its matured condition.

It was not error in the court to lay down the rule to be in an action of trespass, "the plaintiff was entitled to recover damages for the loss he had sustained, if that loss was connected immediately with the act of the defendant."

ACTION of trespass, Q. C. F., tried before SHEPHERD, J., at the last Fall Term of Pasquotank Superior Court.

The plaintiff offered, as a witness, one *Thomas J. Etheridge*, who, upon his preliminary examination, stated that he had no interest in this suit; that he had a suit now pending against the defendant for the same matter; that he had rented the *locus in quo* to the plaintiff, during the year 1854, and was to receive one-third of the crop for rent. The defendant objected to the admission of this witness, but the objection was overruled, for which, the defendant excepted.

This witness stated, that in 1854 he rented the field in question to the plaintiff, who had it in cultivation in corn in May of that year, when the land was covered with water, from the opening of a ditch leading into the field, which had been cut by the witness in August, 1853; that this ditch ran through an upper farm, which the witness sold to the defendant, Shaw, in 1853. On cross-examination he stated that the ditch commenced in the upper farm, (now Shaw's) where the land was

cleared, ran in a line with, and a few feet of, an old canal, until it, (the canal,) entered into the land of one Baxter; thence it ran in a direct course to the corner of the Carrell field, (the *locus in quo*;) thence into a ditch in that field. He said that it was a "three foot" ditch, and was not cut as a drain to the upper farm, but to obtain earth for making a dam to keep the back water off of his land, and was stopped up the day after it was finished, both inside and outside the Carrell field, by throwing logs and earth, and other things into it; that it was not opened again until the trespass complained of; that by this act the water was thrown upon the plaintiff's field, covering it over and drowning the growing crop. He stated further, that in August, 1853, he was living upon the upper farm, and sold it to Shaw in the November following.

William McLennon stated that he was in the employment of the defendant, and was sent by him, with his hands, to unstop the ditch in question in May, 1854, which he did by removing the obstructions on the outside of the plaintiff's field; that he then entered into the field and took out the logs and earth which had been placed there as an obstruction, and let the water through upon the plaintiff's field below, which was covered with it. This witness stated further that he had seen this obstruction in the ditch before Etheridge sold to Shaw.

The plaintiff then offered evidence, that there were sixty thousand corn hills in the field, and that the damage done was equal to one barrel in the thousand. Another witness stated that the loss was fifty barrels, and that corn was worth 77½ cents, at Norfolk and Elizabeth City, per bushel. One of these witnesses testified that the dam in the ditch was put there in 1853.

The defendant offered a deed from Thomas J. Etheridge to himself, dated November the 29th, 1853, for the upper farm. *Willoughby McBride* testified as to the situation of the two farms, and the former modes of draining them, and as to the natural flow of the water, which, from the view taken of the subject by the court, is not deemed material. He said he did not know when the dam in question was put into the ditch.

Dr. C. G. Marchant testified to the same purport as the foregoing witness. He also stated that he did not know when the ditch was dammed or obstructed with logs, &c., as Etheridge has described it. *Joseph B. Morgan*, and *B. M. Baxter*, both testified as to the same matters spoken of by the witness, McBride, and both concluded by saying that they did not know when the obstructions were placed in the ditch.

There was no evidence on either side that proved this field to have been overflowed previously to the trespass complained of.

There was no further evidence as to the ditch, whether it was intended to be used as a drain, or as to the time when it was obstructed—whether before or after the upper place was sold to the defendant.

The Court charged the jury, that the plaintiff being in possession of the land with a crop growing on it when the dam in the ditch was cut by the defendant's orders, he was entitled to recover damages for the loss he had sustained, if that loss was connected immediately with the act of the defendant; that if the ditch, at the time of the sale to Shaw, in 1853, was in the condition in which Etheridge had described it to be when he made and left it in the August before, nothing passed to Shaw but the incrdents connected with the land at the time of the sale to him, and he acquired no right thereby to enter upon a neighboring tract of land and remove obstructions thereon for the purpose of facilitating the drainage of his own land. The Court further charged the jury, that there was no evidence that the obstructions spoken of were placed in the ditch after the sale to Shaw.

The defendant's counsel then asked the Court to charge the jury that they ought not give damages according to the estimate of the witnesses touching the value of corn in 1854, but damages only for flooding the land, and the necessity of replanting the corn. To this the Court replied that the proper rule had been laid down on the subject, and declined to charge further. Defendant excepted for this and for error in

the instructions given to the jury. Verdict for the plaintiff. Judgment. Appeal by the defendant.

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

BATTLE, J. The first objection which appears in the defendant's bill of exceptions is, to the competency of the witness, Thomas J. Etheridge. He was landlord of the plaintiff, and, as such, was entitled to receive from him, as rent, one-third of the crop made on the land to which the injury was alleged to have been done. The objection is clearly untenable. This claim upon the plaintiff was only for a certain portion of the crop actually made by the plaintiff, whether much or little. He was not entitled to any part of the damages which the plaintiff might recover, and if he were injured by the act of the defendant whereby the part of the crop which he might otherwise have received was diminished, he could bring an action himself against the defendant, to recover damages adequate to his loss. It was, indeed, stated, that he he had brought such an action, which was then pending. He may have had an interest in the event of the question, but he had certainly none in the event of the suit, which alone can exclude a witness. The 63d chapter, section 1st, of the Revised Code, which gives to the landlord, who is to receive from his tenant a part of the crop, as rent, a *quasi* right of action against an officer, who removes it, does not vary the rule, because, although he may have a special action on the case against the officer who levies upon it and takes it away, yet he cannot maintain trespass, for he has neither the possession, nor the property. *Peebles* v. *Lassiter*, 11 Ired. Rep. 73.

There is nothing in the objection to the testimony as to the price of corn about the time of the injury, with a view to the amount of the damages. The price of the article at the markets of Norfolk and Elizabeth City, was proved for the express purpose of ascertaining its value in the county of Currituck, where the trespass was committed. As the injury was

committed upon a growing crop of corn, it was impossible to ascertain the extent of the damage resulting from it, without an inquiry into the value of that article in its matured condition. The testimony admitted for the purpose of ascertaining the damage,, being proper, the rule laid down by his Honor for fixing upon the amount, was undoubtedly correct. It was, that the plaintiff "was entitled to recover damages for the loss he had sustained, if that loss was connected immediately with the act of the defendant." We are at a loss to conceive what other rule, having the semblance of justice, could have been announced by his Honor; and so far from being opposed to, it is supported by, what was said by this Court in the recent case of *Hendrickson* v. *Anderson*, 5 Jones' Rep. 247, referred to by the defendant's counsel. See also *Dickenson* v. *Bogle*, 17 Pick. Rep. 78, cited for the plaintiff, in which it is said, that where an act complained of is admitted to have been done with force, and to constitute a proper ground for an action of trespass *vi et armis*, all the damage to the plaintiff, of which such injurious act was the efficient cause, and for which the plaintiff is entitled to recover, in any form, may be recovered in such action, although such damage did not occur until some time after the act was done.

There is not the slightest foundation for the objection that the Court erred in saying there was no evidence that the obstruction was placed in the ditch after the sale to the defendant. All the testimony which was given on that subject, was that the ditch was filled up *before* the sale to the defendant, and, consequently, he was guilty of the trespass complained of, by sending his overseer and his hands into the plaintiff's field and opening it, whereby he flooded the plaintiff's corn.

PER CURIAM, Judgment affirmed.

THOMAS DEANS *et al v.* JOHN JONES *et al.*

For an injury to the wife's land after coverture, she may join with her husband in an action of trespass, and both may join with other tenants in common, for the same injury to their joint property.
(Case distinguished from *Williams* v. *Lanier*, Busbee's Rep. 32.)

ACTION of TRESPASS, tried before SHEPHERD, J., at the last Fall Term of Chowan Superior Court.

The plaintiffs declared in trespass against the defendants for cutting down and carrying away several cypress trees. The plaintiffs, Thomas Deans, William D. Deans and Belinda Perry, were tenants in common of the premises, and the latter having intermarried with Turner Perry before the commission of the trespass complained of, the husband and wife joined with the other tenants in common in the action. The Court intimated an opinion that the wife was improperly joined, whereupon, plaintiffs submitted to a nonsuit, and appealed.

Smith, *W. A. Moore* and *Winston*, *Jr.*, for plaintiffs.
Jordan and *Hines*, for defendants.

BATTLE, J. The propositions of his Honor, in relation to the forms of action to be brought for a trespass to the wife's land during coverture, are, in the main, correct, but he was mistaken in supposing that the wife cannot, in any case, be joined with her husband in an action of trespass for such an injury. In 1 Chitty's Pleading, 85, it is said, that "in real actions for the recovery of the land of the wife, and in a writ of waste thereto, the wife must join. But where the action is merely for the recovery of damages to the land, or other real property of the wife during coverture, &c., the husband may sue alone, or the wife may be joined; her interest in the land being stated in the declaration." The same rules are laid down in Archbold's Civil Pleading, 40, and many authorities are referred to, both by him and Mr. Chitty, in support of

them. The counsel, for the defendants, rely upon the case of *Williams* v. *Lanier*, Busbee's Rep. 32, as maintaining a contrary doctrine, but upon examining the case, the counsel will find that it seems to be admitted, that there may be cases where, from necessity or convenience, the husband *may* join his wife with him in an action of trespass for an injury to her land. At the time of the marriage, as well as the time when the injury was committed and the suit brought, the wife was a tenant in common of the land with the other plaintiffs, who were her brothers. Mr. Chitty says, (see Chitty's Plead. 75,) that "tenants in common must, in general, sever in real actions; but in personal actions, as for a trespass or nuisance to their land, they may join, because, in these actions, though their estates are several, yet the damages survive to all, and it would be unreasonable when the damage is thus entire, to bring several actions for a single trespass." For this, he cites 2 Black. Rep. 1077; 5 Term Rep. 247; Yelv. Rep. 161; Cro. Jac. 231; 2 H. Black. Rep. 386; 5 Mod. 151. It would be manifestly so inconvenient not to permit the husband and wife to join in an action of trespass with the other tenants in common, and with all, so oppressive to the defendants to have several actions for the same injury, that the Court, from the necessity of the case, or at least from its great conveniency, must sustain a suit in the present form. The judgment of nonsuit must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

BAINS AYCOCK *v.* W. & W. R. ROAD CO.

Where it appeared that the train of a Rail Road was running at a greater than usual speed, upon a straight part of the road, in the day time, and that one of several cattle, that were feeding near, and crossing the road, was killed by the locomotive, it was *Held* to be negligence, that the speed of the train was not lessened, nor the usual mode of driving off stock by the blowing of a steam whistle resorted to.

Where, under a proceeding by a warrant, given by the 17th ch., sec. 7th, of the Rev. Code, upon an appeal to the Superior Court, a verdict was taken for the value of an animal killed on a railroad, it was *Held* that it was too late to take the objection in this Court, that the judgment of the justice of the peace was rendered without a valuation of the animal by freeholders.

Where, under a proceeding, given by chap. 17, sec. 7, of the Rev. Code, the warrant recited an injury by a railroad company, and commands that the body of a director, named, should be taken; after judgment against the company, and an appeal taken by it, it was *Held* untenable to say, that the suit was against the director and not against the corporation.

ACTION for negligence, brought originally before a justice of the peace of Wayne county, and came up by successive appeals to the Superior Court, where it was tried before HEATH, J., at the last Fall Term.

The warrant recited that the plaintiff complained against the railroad company for negligently running their cars over a cow and killing it. The command was to take the body of William K. Lane, a director of the said company. The justice of the peace, before whom it was returned, gave judgment for the value of the property, without the intervention of freeholders, against the said company, from which it appealed in both instances, and no judgment was taken against William K. Lane. The evidence was, that about 3 o'clock in the day, on which the alleged injury was committed, the plaintiff's cattle were feeding on each side of the railroad, and near to it; that some were crossing the road at the time the train came along; that the road was here straight, and cattle could be seen on it for half a mile; that the train was later than usual, and running at a greater than ordinary speed; that one of the cattle was on the track and was killed. It was further in evidence, that no whistle was blown to drive the cow in question from the road, which was the usual mode of driving off cattle. His Honor was of opinion that there was negligence on the part of the plaintiff's agents. Defendant excepted.

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

J. H. Bryan and *Dortch*, for plaintiff.
W. A. Wright and *B. F. Moore*, for defendants.

PEARSON, C. J. We concur with his Honor upon the question of negligence. It was proven that to "blow the whistle" is the usual mode of driving stock from the road. In this instance, one of the cattle was on the tract, and it was negligence not to use the ordinary means of getting it off.

Extra speed of itself, may not constitute negligence, but where cattle are *near the road, on each side, and some crossing*, a due regard for human life and property, requires that the speed should be reduced, so as to prepare for an emergency, and be able to stop, if necessary, until the danger is passed; the neglect of that necessary precaution in this instance, is probably attributable to the fact, that being "behind time," induced the determination to rush on and risk the consequences.

The objection taken in this Court, that it does not appear on the face of the proceeding, that the cow was valued by freeholders, is not tenable, because the verdict, in the Superior Court, fixed the amount of damages and cured the defect.

So the objection, that the warrant is "to take body of Lane, a director, &c.," is untenable, because the judgment was entered against the company, and the appeal was taken by it, showing that it was the defendant, and not Mr. Lane, which distinguishes this case from *Insurance Co.* v. *Hicks*, 3 Jones' Rep. 58.

PER CURIAM, Judgment affirmed.

STATE *v.* CHARLES LATHAM.

Proof that a writ was directed by the clerk to a sheriff of another county, and mailed in due time to reach him in the regular course of the mail, *was Held* to be sufficient evidence to authorise the entering of a judgment for an amercement, *nisi*, if there be no return of the process.

MOTION for an Amersement, *nisi*, against the sheriff of Washington county, heard before SHEPHERD, J., at the last Fall Term of Chowan Superior Court.

The Clerk of the Superior Court of Chowan swore that he issued a capias against one Jeremiah Jones, on the 13th of April, 1858, returnable to the Fall Term, ensuing, (which happened in October following,) which writ was directed to the sheriff of Washington county, at Plymouth, and not returned; and, thereupon, the solicitor moved for an amercement, *nisi*, against the said sheriff; but it not appearing that the said writ had ever come to the hands of the sheriff, the motion was refused. Whereupon the solicitor appealed.

Attorney General, for the State.
H. A. Gilliam and *Winston, Jr.*, for the defendant.

PEARSON, C. J. It is not expected or required that the clerks of the several courts should employ special messengers to carry writs and other process to all of the counties in the State in order to prove a delivery thereof to the sheriff. How many special messengers would it be necessary for the clerk of this Court to employ, to enable him to send out all the writs issuing from a single term within the time required by law? Of necessity, therefore, the courts must act upon a presumption of the regularity of the mails, and upon proof that a writ, directed to the sheriff of a county, was duly mailed, in time to reach him by the regular course of the mail; the Court must act on it, as *prima facie evidence*, that the writ came to his hands, so as to enter an amercement *nisi*, if there be no return. The officer is allowed to rebut the presumption, and to discharge himself, as upon a motion for a rule against him, by making affidavit, that the writ did not come to his hands.

This is a full reply to the suggestion that no one ought to be required to prove a negative. Certainly, he has no ground to complain, if permitted to do so, by his own oath. Such has been the uniform practice of this Court, and we had sup-

posed it was general on the circuits, until the present case was sent up.

There is error. Judgment reversed. This will be certified to the end that a *fine nisi* may be entered in the Court below.

PER CURIAM, Judgment reversed.

Doe on demise of FRANCES HOWARD *v.* SARAH HOWARD, *et. al.*

A male and female slave intermarried, with the consent of the owners, in the form usual among slaves; afterwards, the male slave was emancipated, and purchassed his wife; they then had born to them one child; the female slave was then emancipated, and, still living as man and wife, but without any further ceremony passsing between them, they had several other children; it *was Held* that neither the first nor the others of these children were legitimate; so as to take as tenants in common with legitimate children of the father by a second marriage.

ACTION of EJECTMENT, tried before CALDWELL, J., at the last Fall Term of Halifax Superior Court, upon the following case agreed.

Miles Howard, a free man of color, died intestate in 1857, seized in fee of the premises in dispute.

About the year 1818, he being then the slave of the late Thomas Burgess, Esquire, without other ceremony, took for his wife, by consent of his master, and a Mr. Burt, *Matilda*, a slave of the latter, and was immediately thereafter duly emancipated. *Miles* then bought his wife, *Matilda*, and by her had issue, the lessor Frances, when the said *Matilda* was duly emancipated. After this event, they had other issue, to-wit: the lessors, Robert, Eliza, Miles, Charles, Lucy, Ann, Thomas, when the said Matilda died.

In a few years afterwards, the said Miles took another wife, a free woman of color, and had issue, the defendants, Sarah, John, Nancy, and Andrew. The latter marriage was per-

formed with due ceremony, the former was celebrated in the manner usual among slaves, and the parties lived together ever afterwards as man and wife, and kept house together as such.

In 1836, the lessor, Frances, with other children, who died before the intestate, Miles, was emancipated as the children and slaves of the said Miles Howard, by an act of the Legislature.

The plaintiff's lessors claimed to be tenants in common with the defendants—which the defendants denied, and claim to be the only legitimate children, and sole heirs of their father. The Court, upon consideration of the case submitted, gave judgment in favor of the defendants; from which the lessors of the plaintiffs appealed.

B. F. Moore, for the plaintiffs.
Conigland, for the defendants.

Pearson, C. J. A slave, being property, has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liabilities incident thereto. He is amenable to the criminal law, and his person (to a certain extent) and his life, are protected. This, however, is not a concession to him of civil rights, but is in vindication of public justice, and for the prevention of public wrongs. Marriage is based upon contract; consequently the relation of "man and wife" cannot exist among slaves. It is excluded, both on account of their incapacity to contract, and of the paramount right of ownership in them, as property. This subject is discussed in *State* v. *Samuel*, 2 Dev. and Bat. 177, where it is held, that a slave is a competent witness for or against another slave, towards whom she sustained the relation of wife, in a certain sense of the term, on the ground that the relation was not that of "man and wife" in its legal sense, and did not embrace any of the civil rights incident to marriage.

In *Alvaney* v. *Powell*, 1 Jones' Eq. 35. It is held where a mother and children are emancipated, a child begotten and

born while the mother had no husband, was entitled to the same share of her estate, as the children who were begotten and born while she had a husband; on the ground "that in regard to slaves, even after they become free negroes, there is no necessity growing out of grave consideration of public policy, for the adoption of the stern rule of the common law. "A bastard shall be deemed *nullius filius;* to have no parents, and not even be considered the child of the mother who gave it birth; and in contemplation of law there is no difference between the case of slaves who enter into the qualified relations of "man and wife" by the express permission of their owners, and that of those who "take up" with each other, from a mere impulse of nature, in obedience to the command, "multiply and replenish the earth," for the law does not recognise either relation so as to give to it any effect in respect to civil consequences. On the other hand, there is in moral contemplation, and in the nature of man, a wide distinction between the cohabitation of slaves, as "man and wife," and an indiscriminate sexual intercourse; it is recognized among slaves, for as a general rule, they respect the exclusive rights of fellow slaves who are married. Such marriages are permitted and encouraged by owners, as well in consideration of the happiness of the slaves and their children, as because, in many ways, their interests, as masters, is thereby promoted. Hence a married couple is permitted to have a "cabin and a patch off to themselves," and where they belong to different persons, the man, at stated times, is allowed "to go to his wife's house." The relation is so far favored in the administration of the criminal law, as to allow to it the effect of drawing into application the rule, that when a person finds one in the act of adultery with his wife, and instantly kills him, it is but manslaughter, because of the legal provocation. This result, however, is not attributable to any civil right, growing out of the relation, but to the fact that, to a certain extent, it has its origin in nature; and a violation of the right which is peculiar to it, in that respect, excites the *furor brevis*, whether the relation was entered into with or without the

legal capacity, and the ceremonies and forms necessary to make a marriage valid for civil purposes. This is assumed to be the law in *State* v. *John*, 8 Ired Rep. 330, and has been so held upon the circuits.

Thus far the line is established by these three cases. We are now to run further, and fix another landmark. In *Alvaney* v. *Powell*, *supra*, the Court was not called on to decide whether the children, after being emancipated with their mother, were to be considered as legitimate, or illegitimate; the purpose of the case being answered by holding that they all stand on the same footing; because, in either view, they were entitled to succeed to their mother and to each other, both, according to our laws, and the laws of Canada. Nor are we now at liberty to decide it, because the facts of this case do not present it. Both parents were slaves when the relation was entered into. Afterwards, the father was emancipated, and bought the mother, and *held her as his slave*, at the birth of the lessor, Frances. This presents a question, in many respects, different from that of the *status* of a child born while both parents were slaves, and lived together as man and wife; for the relation of master and slave is wholly incompatible with even the qualified relation of husband and wife, as it is supposed to exist among slaves, and the idea that a husband may own his wife as property and sell her, if he chooses, or that a parent may own his children and sell or give them away as chattels, and that the wife or the children, are, nevertheless, entitled to any of the civil rights incident to those relations, involves, a legal absurdity. The relations are repugnant; and as that of master and slave is fixed and recognised by law, the other cannot exist; and it follows that the lessor, Frances, does not take as one of the heirs of her father.

The other lessors are in a condition still more unfortunate; for, while relieved from the incongruity, which is involved in the case of their sisters, by the fact, that their mother, at the time of their birth, was free, yet, that circumstance caused them to be unlawfully bogotten. Their parents, having become free persons, were guilty of a misdemeanor in living to-

gether as man and wife, without being married, as the law required; so that, there is nothing to save them from the imputation of being "bastards."

Our attention was called by *Mr. Moore* to *Girod* v. *Lewis*, 1 Cond. Louisiana Rep. 505, where it is held that, "a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contracts among free persons." No authority is cited, and no reason is given for the decision, except the suggestion that the marriage, being dormant during the slavery, is endowed with full energy from the moment of freedom. We are forced to the conclusion, that the idea of civil rights being merely *dormant* during slavery, is rather a fanciful conceit, (we say it with respect) than the ground of a sound argument. It may be, that in Louisiana, the marriage relation is greatly affected by the influence of religion, and the mystery of its supposed dormant rights, is attributable to its divine origin. If so, the case has no application, for, in our courts, marriage is treated as a mere civil institution.

To the suggestion, that as the qualified relation of husband and wife between slaves is *not unlawful*, and ought, in fact, to be encouraged, upon the ground of public policy, so far as it comports with a right of property, emancipation should be allowed to have the effect of curing any defect arising from the non-observance of the prescribed form and ceremonies, and the absence of a capacity to contract, as there is plenary proof of consent, which forms the essence of the marriage relation; the reply is:

The relation between slaves is essentially different from that of man and wife joined in lawful wedlock. The latter is indissoluble during the lives of the parties, and its violation is a high crime; but with slaves it may be dissolved at the pleasure of either party, or by a sale of one or both, dependant on the caprice or necessity of the owners. So the union is formed, and the consent given in reference to this state of

things, and no ground can be conceived of, upon which the fact of emancipation can, not only draw after it the qualified relation, but by a sort of magic, convert it into a relation of so different a nature. In our case, the emancipation of the father could not draw after it the prior relation, because the mother was not then free, and, in fact, afterwards became his slave. So the relation was not connected with the *status* of the parties in a way to follow as an incident. Suppose, after being free, the father had married another woman, could he have been convicted of bigamy, on the ground that a woman, who was his slave, was his wife? Or, after both were freed, would the penalty of the law have attached, if either had married a third person, living the other? Certainly not; because the averment of a prior, lawful marriage could not be supported, and yet, if the marriage followed the emancipation as an incident, it would present an instance of a marriage relation, which either is at liberty to dissolve at pleasure.

The parties after being freed, ought to have married according to law; it is the misfortune of their children that they neglected or refused to do so, for no court can avert the consequences.

PER CURIAM, Judgment affirmed.

PELEGE CAROON *v.* JOHN E. ROGERS.

The 12th section of the 68th chapter of the Rev. Code, requiring a certificate in case the parent or guardian of a female lives without the State, before a marriage license shall be issued, is not confined to the case of females under fifteen, but applies to all under twenty-one years of age.

The penalty of $1000, given in the 13th section of the 68th chapter of the Revised Code, cannot be recovered in the name of the father of the infant female, but must be sued for in the name of the State.

Where a judgment of nonsuit has been rendered in the Superior Court, upon the ground, that the facts did not justify a recovery, in which it appeared to this Court, there was error, but that there was error also in the record

proper of the plaintiff, in respect of parties, it was *Held* that the Court was not bound to look to the sufficiency of the whole record and pronounce judgment on it, for that it might be perfected by an amendment, before such judgment was necessary.

ACTION of DEBT for a penalty, tried before CALDWELL, J., at the last Fall Term of Halifax Surerior Court.

The plaintiff declared for the penalty of $1000, given by the 12th and 13th sections of 68th chapter of the Revised Code.

The evidence was, that Sarah Ann Caroon, daughter of the plaintiff, Pelege Caroon, lived with him in the State of Virginia; that she and one Benjamin Joyner came to Jackson, in this State, against the will and consent of her father, and, on the 13th of November, 1856, were married at that place, by a regularly ordained minister of the Gospel, under a license issued by the defendant, who was then the clerk of Northampton County Court.

There was evidence going to show that the defendent knew whence the parties came, but none as to the age of the said Sarah Ann. No certificate from the father was produced. The defendant offered evidence as to the age of Sarah Ann Caroon, but this was objected to by the plaintiff. The objection was overruled, and the evidence received. From this testimony, it appeared that Miss Caroon, at the time of her marriage, was between eighteen and twenty years of age.

The Court, upon this state of facts, intimated an opinion that the plaintiff could not recover. In submission to which, the plaintiff suffered a nonsuit, and appealed.

Smith and *Yeates*, for the plaintiff.
Conigland and *B. F. Moore*, for the defendant.

BATTLE, J. The 12th section of the 68th chapter of the Rev. Code enacts that, "In all cases where a license is applied for to marry a female whose parents or guardian reside without the State, the person applying shall produce to the clerk of the county court, or any other person legally authorised to grant license to marry, a certificate in writing, under the hand

of the parent or guardian of the said female, (as the case may be,) stating she has arrived to the full age of fifteen years, and if under that age, that she has leave to marry; which certificate shall be filed in the clerk's office in the county where the license was obtained." This section was taken from the 9th section of the 71st chapter of the Rev. Statutes, and that from the act of 1820, (chapter 1041, sec. 5, of the Rev. Code of 1820.) The original act of 1820 was entitled an "Act concerning the marriage of infant females." The 1st section made it an indictable offense in a man who should marry an infant female under fifteen years of age, without having previously obtained the consent thereto of her father in writing; and the three following sections made provision for the court in which the offence should be tried, and for the disposition of the infant female's estate consequent upon the conviction of the husband. The 5th section then enacted as follows: "That in all cases where a license is applied for to marry a female whose parents or guardian reside without the limits of this State, it shall be the duty of the person so applying, to produce to the clerk of the county court, or any other person legally authorised to grant a license to marry, a certificate in writing from under the hand of the parent or guardian of the said female, as the case may be, stating that she has arrived at the full age of fifteen years, and has leave to marry; which certificate shall be filed in the clerk's office in the county where the license was obtained." The 6th section imposed a penalty of a $1000 on any clerk who should issue a license contrary to the provisions of the act. The four first sections are contained, substantiatly, if not literally, in the 47th section of 34th chapter, and the 7th and 8th sections of 71st chapter of the Rev. Statutes; and the 5th and 6th sections are copied, *verbatim*, in the 9th and 10th sections of the latter chapter of the Rev. Statutes. The 12th section of the 68th chapter of the Revised Code is identical with the 5th section of the 1041st chapter of the Revised Code of 1820, and the 9th section of the 71st chapter of the Revised Statutes, in requiring a certificate in writing from the parent or guardian,

to be produced to the clerk who issues a license for the marriage of the female whose parents or guardian reside in another State, stating that she has arrived at the age of fifteen years; and it differs from them only in requiring it to be stated in the certificate, if the female be under fifteen years of age, that she has the consent of her parent or guardian. The act was manifestly intended to prohibit the marriage of persons running away from another State and coming into this State to be married where the written consent of the parent or guardian had not been previously obtained. That neither of the acts was intended to embrace the case of any other female than one under twenty-one years of age, is obvious from the use of the terms "parents or guardian," but that the original act of 1820, the Revised Statutes and the Revised Code, all were intended to apply to all females under the age of twenty-one years, although over fifteen, is expressed in language too plain to admit of a contrary construction. We may doubt the policy of putting females over fifteen and under twenty-one years of age, coming from other States, upon a different footing from those whose parents or guardian reside here, but where the Legislative will is clearly expressed in any matter within the limits of the constitution, we are bound to give effect to it.

The case comes before us upon an appeal by the plaintiff, from a judgment of nonsuit, submitted to in deference to the opinion of his Honor in the court below, upon a question set out in the bill of exceptions, and we think that the opinion expressed in relation to that question, was erroneous. But it appears to us that from the 48th section of the 35th chapter, and the 13th section of the 68th chapter of the Rev. Code, that the present action, brought in the name of the father, for the penalty given by the said 13th section, ought to have been brought in the name of the State. This objection has not been urged in this court. The question has suggested itself to us whether we are not bound to notice it as it appears upon what is called the record proper, in contradistinction to the bill of exceptions. If the plaintiff had obtained a verdict

and judgment in the court below, and had asked for its affirmance here, it would have been our duty to notice it, whether taken by counsel or not, because by the act under which this Court is constituted, the judges are required to "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." (See Rev. Code, ch. 33d, sec. 6th.) Under that provision, we would not feel ourselves at liberty to render a final judgment to which we could see, the plaintiff was not entitled. But, in the present case, the plaintiff does not, and cannot, ask for any final judgment. He only seeks to have a reversal of a judgment of nonsuit which was erroneous with reference to the particular objection made in the court below, and our decision either way would not be final with regard to the merits of the matter in contest, though it might have an important bearing upon the costs of the litigation, or the statute of limitations. He urges that if the objection had been taken in the court below, he might have asked for, and possibly, if not probably, have obtained leave to amend upon such terms as the court might think proper to prescribe, and that he might thereby prevent the effect of the statute of limitations, should it be pleaded against him. These are weighty considerations, and they lead us to the conclusion, that, in a case like this, we are not bound to notice, and indeed ought not to notice, any other objection than that which appears from the bill of exceptions to have been taken in the court below, and upon which the judgment of nonsuit was ordered. When the case goes back the parties will stand just as they did before the erroneous judgment was rendered.

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

PER CURIAM, Judgment reversed.

MUNGO T. PONTON *v.* WILMINGTON & WELDON R. ROAD CO.*

A master is not liable, in damages, to one servant, for injuries arising from the negligence of a fellow-servant, engaged in the same employment, provided, he (the master) has taken reasonable care to associate him with persons of ordinary skill and care.

ACTION ON THE CASE, tried before ELLIS, Judge, at the last Spring Term of Halifax Superior Court.

The action was brought for the negligence of one of the servants of the company in permitting a switch to be out of place, whereby a collision took place between two trains, which caused the injury and death of the plaintiff's slave. The injury took place at a place called Joyner's station. A freight train, in the night time, had passed from the main track upon the *turnout*, without readjusting the switches, in consequence of which, the next passenger train took the turnout and ran in upon the freight train. The slave in question, was a breakman, on the freight train, hired from the plaintiff for that service; he was at his proper place when the collision happened, and was crushed to death between the trains. The company had in their employment at Joyner's station a person, whose duty it was to adjust the switches.

The cause was put to the jury upon the facts of the case, and under the charge of the Court, the jury gave a verdict for the full value of the slave. The question of law, however, as to whether the defendant was liable at all, upon the facts of the case, was reserved by his Honor, with leave to set aside a verdict, if one should be given for the plaintiff, and enter a nonsuit, should his opinion be against the plaintiff.

On consideration of the question reserved, the Court ordered a nonsuit, from which the plaintiff appealed.

Conigland, for the plaintiff.
B. F. Moore, for the defendant.

*Judge Battle being a stockholder in this company, took no part in the decision of any of the cases, tried at this term, wherein it was a party.

RUFFIN, J. The question, in this case, is not new to the profession, though it is raised now, for the first time, in the courts of this State. It is, indeed, of recent occurrence any where, and owes its origin, or rather prevalence, probably, to the great number of servants needed and employed on the steamboats and railroads, which, have come so much into use in our times, and on which so many casualties or injuries from negligence happen. The leading case upon the subject, is that of *Priestly* v. *Fowler*, 3 Mees. and Wells. page 1; in which, after an *advisari*, the opinion of the Court of Exchequer was delivered by Lord ABINGER, C. B., who presented several strong reasons, founded on policy and social necessity, why a master ought not to be liable to one servant for damages arising from the negligence of a fellow servant engaged in the same employment. The point was again made in *Hutchison* v. *The York Rail Road Company*, 5 Exch. Rep. 343, when, after another *advisari*, Baron ALDERSON delivered the opinion of the Court, approving of *Priestly* v. *Fowler*, and laying down the same doctrine and applying it to persons in the same service on a railroad, with the qualification, that the employer must take due care not to expose the servant to unreasonable risks. He states the principle to be, that the servant, when he engages to serve, undertakes, as between him and his master, to run all the ordinary risks of the service, which includes the risk of the negligence of a fellow-servant, acting in the discharge of his duty as servant of the common master; but while the servant undertakes those risks, he has a right to require, that the master shall take reasonable care to protect him by associating him only with persons of ordinary skill and care. Lord ABINGER takes notice that there was no precedent for such an action, and urges this as an objection to it. The objection seems to be extremely strong, since, if it would lie, there must have been innumerable occasions for it in every day life, and there is one class of cases, in which it might have been often brought for damages arising from great loss and suffering, namely, that of sailors shipwrecked by the unskillfulness, or gross mismanagement of the captain; and yet

there is no instance of an action, for that, against the owner. Other cases seem to have settled the law in England, and in this country. We find concurring adjudications in every New England State, New York, South Carolina, Georgia, Alabama, and Louisiana, and there may be others, in different States, which we have not been so fortunate as to come across, while there is, as yet, but a single case in this country to the contrary, that of *Little Miami Rail Road Company* v. *Stephens*, 20 Ohio Rep. 415; and in that, the opinions of the Judges proceed upon opposing reasons. If the opinion of this court had been otherwise upon the point, as an original question, it would not have been possible to resist the authority of such an array of consistent decisions of able courts in both hemispheres, coming so rapidly after each other, with but a single adjudication against them.

Indeed, the counsel for the plaintiff admitted, that the rule was so thoroughly settled, that it could not be shaken, unless upon the distinction, that the injury complained of in this case, was to the person of a slave. The distinction was put upon the difference between a hired freeman and a slave; the former being competent to make what terms he chooses in his contract, and to leave the service, if dangerous, at his will, while the latter, by the hiring, becomes the property, temporarily of the hirer, with no will of his own, and is beyond the control of the owner. But the distinction does not seem sound. It might be, if the slave were the person to be benefitted, by the recovery. But the action is by the owner for his benefit, and, it is obvious, that it is in his power also, by stipulations in the contract, to provide for the responsibility of the bailee for exposing the slave to extraordinary risks, or for his liability to the owner for all losses arising from any cause. It is sufficient protection to his property, as owner, when it is put on the same footing with the protection to a freeman, as the Court thinks it ought to be. In the cases in the courts of the Southern States, already alluded to, the injury was generally to slaves, and both in those in which the decisions were for, or against the employers, such a distinction was disregarded,

or, rather, not noticed. It would be singular, "if the owner of a slave could recover for damage sustained by a slave, when upon the same state of facts, the slave, if he had been a freeman, could not have recovered. The case of *Jones* v. *Glass*, 13 Ire. Rep. 305, was relied on as a decision of this Court in favor of the action. But that was not the case of fellow servants, in the ordinary sense of the term. It is true, that the overseer and the slave were both serving the same person, but in very different capacities; the slave, there, not only worked with the overseer, but under him, as the superintendent and agent of the master, to control and punish the slave, and thus, in a peculiar degree, representing the master in his authority over the hired slave; and, therefore, upon the common principle of bailments, the master was responsible to the owner for the injury done to the slave by the overseer while in the service of the employer, as he would have been, had the injury resulted from the act of the hirer himself.

It results from the principles, thus established, that the present action cannot be maintained, as there was no want of ordinary care, on the part of the company, to provide a competent number of persons, fit, or supposed to be fit, to discharge the duties, by the neglect of which the injury arose. There was a man at the switch, or, rather, for it, who failed of due diligence, and caused the damage. But it does not appear, that he had ever failed of his duty before, or, if he had, that it ever came to the knowledge of the company or any of its officers who had the direction in that department, or had been suggested to them. The same is to be said of the engineers and conductors, in the selection of whom, and keeping them in the employment of the company, there does not appear to have been any blame. It may be remarked that, among the first cases on this point, in this country, was that of *Farwell* v. *Boston and Worcester R. R. Co.*, 4 Metcalf's Rep. 49, which arose from laches of the same sort that caused the damage here, the displacement of a switch, which threw

off the train, and the engineer, the plaintiff, was injured, but was not allowed to maintain an action against the employer.

PER CURIAM, Judgment affirmed.

JOHN DAVIS *v.* WILLIAM H. BOYD.

Where slaves had been bailed by a father-in-law living in Virginia, to his son-in-law living in this State, mere words of gift, afterwards used, in the absence of the slaves, were *Held* not to be sufficient to pass the property; delivery being essential to the validity of a gift.

Where slaves were put into the hands of a son-in-law by his father-in-law, under a written agreement that they were to be a loan, a subsequent written contract, under seal, in which the bailor *agrees and binds himself to surrender* all right and title, &c., and *binds himself to sign any paper-writing that may be necessary, to secure such title as will be valid agreeably to the laws of North Carolina*, was *Held* not to operate as a conveyance of a present interest, but only as an agreement to make title in future.

ACTION of DETINUE, tried before SAUNDERS, J., at the last Spring term of Granville Superior Court, for the detention of six slaves.

The defendant, on the day of February, 1848, married Susan, the daughter of the plaintiff, at her father's residence, in the county of Mechlenberg, in the State of Virginia. On the 23d of October, 1848, the following paper-writing was signed by the parties, respective, and left in the possession of the plaintiff, to wit:

"I lend to my daughter, Susan S. Boyd, the following negroes, Minerva, Lavinia, Betty and child Dilcy, subject to my control during my lifetime, or to give or loan by my will at my death.

Given under my hand, the 23d day of October, 1848.

(Signed,) JOHN DAVIS, Senr."

"I, William H. Boyd, receive and hold said negroes, upon the above condition. (Signed,) WM. H. BOYD."

It was admitted on the trial, that the slaves in question were the property of the plaintiff at the time of the marriage; also, that Mrs. Boyd died in Octobor, 1854, and that the plaintiff demanded the property in 1855.

The defendant produced and proved the following instrument, which he insisted is a conveyance of the slaves in question:

"MECKLENBURG, Va., November, 1854."

"This paper is to acknowledge that I hereby agree and bind myself to surrender to William H. Boyd, all right and title I hold to the following slaves, Henry, Minerva and children, Isaac, Betsy, Martha, and Bettie and daughter Dilcy, and in furtherance of this, (prompted by respect I have to said William H. Boyd,) I bind myself to sign any paper-writing that may be necessary to secure to the said William H. Boyd such title as will be valid—a good one—agreeable to the laws of North Carolina.

Given under my hand, (the day and date above written.)

JOHN DAVIS, Senr. [*Seal.*]

Witness, *John Davis, Jr.*

The defendant proved that, at the same time and place, he executed and delivered to the plaintiff the following instrument, viz.:

"MEKLENBURG, Va., November 14th, 1854.

"I, William H. Boyd, do hereby surrender all right, title and interest in a negro girl, Lavinia, and child, Granderson, she being considered a loan to my late wife by her father and mother.

Given under my hand and seal.

"W. H. BOYD. [*Seal.*]

Witness, *John Davis, Jr.*

The defendant also produced and proved the execution and delivery of a deed of gift from himself to Andrew J. Davis, a son the plaintiff, for one of the slaves, dated on the same day with these other two papers, attested by the plaintiff as a subscribing witness—mostly in his hand writing.

A. G. Boyd, a witness for the defendant, stated, in his deposition that he was present at the marriage; that immediately after that event, the plaintiff put into the possession of the defendant a set of chamber furniture, and a woman by the name of Minerva; that this property was delivered in Virginia, in the Fall of 1848, or early in 1849; that Davis also delivered to his son-in-law, in the State of Virginia, four other slaves, to-wit: a man, Henry, an old woman, Betty, a girl, Dilcy, and a girl, Lavinia, who were all brought into the State of North Carolina, and have all, since that time, been in the possession of the defendant, except Lavinia, who was returned to the plaintiff, and who has been in his possession for some fifteen months; that about February, 1855, he (witness,) visited the plaintiff, and in a conversation with him about the slaves now in controversy, he, (plaintiff,) said he had given his son-in-law, W. H. Boyd, the negroes, Minerva and children, the man Henry, Betty and Dilcy; that he had made him a good title, as he thought; and, in addition to that, he had made his will, and in that instrument had stated that this property was given to W. H. Boyd; that neither the woman, Betty, girl, Dilcy, Lavinia, or Minerva had any children when they were delivered to Boyd.

Bartlett Crowder: In his deposition, states that, in a conversation which he had with plaintiff about the marriage of his daughter; he told witness that he had given to his son-in-law, W. H. Boyd, five negroes, and amongst these he mentioned Lavinia, whom he said he had bought, with her mother, at the price of $1000. The witness says that this conversation took place in 1853.

T. King, a witness for the plaintiff, in his deposition states, that he heard the plaintiff say, in 1852 or 1853, that Mr. Boyd, with what he had given him, and what his father had given him, was accumulating very fast; that he had never heard of the plaintiff's giving the defendant any property, except the negroes, Betty, Minerva, Henry and Dilcy.

James Grady testified that Davis, the plaintiff, said to him that he had told his attorney in Va. that at the time when he exe-

cuted the writing, dated November 14th, 1854, he was sincere in it, as he ever was in any thing in his life, and then intended that Boyd should have the negroes, but that if the paper did not pass the title of the negroes, he did not wish him to have them, as circumstances had changed since he had executed the instrument. In that conversation he referred to the paper as a deed of gift. The witness also stated that in 1855, as the slave, Lavinia, was passing, the plaintiff remarked that Boyd had offered him $1500 for her, and he did not know why he wanted her, as he had given him a girl, named Minerva, worth two of her, but he supposed he wanted her because she was a good house-keeper.

The plaintiff then called witnesses who testified that in 1850, his daughter, Mrs. Boyd, told him that the *loan paper* had caused her a good deal of domestic trouble, and she wished he would give it up, and he replied, that if it would promote her peace he would give it up, but would not make title to the said slaves, unless her health improved; that if she outlived her husband, she would get them by his will; and handed her the paper; that on the 14th of November, 1844, when the papers of that date were executed, the defendant said to the plaintiff that it was the wish of his deceased wife that he should give the boy, Armstead, to plaintiff's youngest son, Andrew; to which plaintiff replied that he knew she so desired, and he intended to give the boy to Andrew, but that if it would be any gratification to him, (defendant,) he might make the gift himself. The plaintiff also introduced the depositions of two gentlemen of the legal profession in Virginia, to show that the instrument of the date of 14th of November, 1854, was, by the law of that State, wholly void.

The Court being of opinion that the instrument bearing date of the 14th of November, 1854, conveyed no title to the defendant, and that the evidence did not furnish a ground to infer a parol gift of the slaves in question, so instructed the jury.

The defendant's counsel excepted.

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

Graham and *Reade*, for the plaintiff.
Eaton and *Lanier*, for the defendant.

RUFFIN, J. Assuming that a parol gift of slaves may be made in Virginia, and that such a gift may be presumed there, when a parent, on the marriage of his daughter, delivered to her husband slaves, which he carries home and keeps, yet that presumption is conclusively rebutted in this case by the papers which the parties executed on the 23d of October, 1848, by which it is declared that the defendant held the negroes as a bailee by loan. Indeed, the parties acted on that idea in all the subsequent transactions between them, and in no part of them more than in the execution of the instrument of the 14th of November, 1854, which the defendant insists upon as a conveyance from the plaintiff to him. It was argued, however, for the defendant, that the giving up the instruments declaring the loan, destroyed their operation, and left the case as if they had never existed. But that cannot be, for, the fact that it was, at first, a lending cannot cease to exist, and the utmost the surrender can imply is, that there might have then been a gift. But to such an implication there are insuperable obstacles in other circumstances. In the first, such a new gift must gave been made either in Virginia or North Carolina, and it appears that in neither could a valid gift have been executed. The slaves were in North Carolina all the time, according to the testimony, and a conveyance of them was to operate on them in this State, and, therefore, according to the general principle, should be in conformity to the law of North Carolina, the *lex situs*, which could only be by writing. But supposing that otherwise, and that by a parol gift in Virginia the title might have passed, yet no such gift can be found upon any facts stated in this case; because there was no delivery, which is essential to a valid oral gift of a personal chattel at common law. Simply,

words of gift, without an actual transmutation of possession, will not answer. *Adams* v. *Hayes*, 2 Ired. Rep., 361. And there could have been no such transfer of possession, as the defendant already had the possession of the slaves in North Carolina. The declarations of the plaintiff to A. G. Boyd, that he had given the negroes to the defendant, and "had made him a good title to them, as he thought," are not, for those reasons, sufficient to establish such a gift; and, besides, they obviously refer to the writings of November, 1854. The same observations apply to the testimony of the other witnesses. So the instruction that a parol gift could not be inferred from the evidence, appears to the Court to be correct.

The question, then, is upon the instrument of November, 1854. A point was made at the bar, that, although it might not be a good deed in Virginia, by reason that the body of the writing did notrecognize the scroll as the seal of the maker, yet it might be a good deed here, where it was to have its effect. In the view taken of the construction of the instrument, it is not necessary to discuss that point; for, after much research and consideration, the Court is obliged to hold, that, supposing it to be under seal, it is not a conveyance, but a covenant. It is not easy, at all times, to give a character in that respect to all instruments, and it is frequently determined upon the supposed intention of the parties or the convenience of the one construction or the other. Thus, a covenant, in point of form, not to sue an obligor in a bond, where he is the sole obligor, is held to be a release. But that is evidently not on the words of the instrument, but upon the end in view, and to avoid circuity of action, and thus give to the instrument its most beneficial operation as to both parties; for, a similar contract with one of two obligors is held not to be a release, but a mere covenant, since the release of one would be the release of both, which was not intended. So, in respect to leases, many questions of the sort have arisen. And as a lease is but a contract for the possession of land and the possession of one who enters under another, ought to be sustained as a subsisting estate, if possible, the court leans, in cases of that kind,

to treat the instruments between the parties as vesting an estate and not as articles merely. Hence, when the word "grant," or "hold," or "have," or the like are used, the agreements have been supported as leases; and if there be a subsequent clause for the future execution of a formal lease, it will not change the character of the instrument, but the added clause is considered an engagement for further assurance, or to provide for a duly settled lease with the usual covenants for payment of rent, for repairs, and against waste, and the like. The Court would gladly apply that principle to this instrument, if there were words in any part of it to support it. But there are no terms in it purporting to pass a present interest, so as to found an argument, that the latter clause binding the plaintiff to execute afterwards such a paper as would secure a good title to the defendant according to the law of the State, is but an agreement for further assurance. For, in the beginning, the instrument does not profess to surrender, then, the title to the defendant, but the plaintiff agrees only to "surrender" the title, and to show more distinctly the nature of the instrument, the plaintiff "binds" himself to make the surrender. From this language it can only be inferred, whatever the future purpose of the plaintiff then was as to a benefaction to the defendant, that he did not, in that instrument convey the slaves, but only contracted to do so. There is nothing in the nature of the transaction to enable the Court to interpret the instrument, by any aid but its own language, and taking that throughout, it seems to the Court to be but an executory agreement.

PER CURIAM, Judgment affirmed.

Doe on the demise of ELIZABETH CAMPBELL *et al v.* DANIEL BAKER.

A bidder, at a sale of a clerk and master in equity, may assign his bid, and a deed to such assignee passes the title.

Campbell *v.* Baker.

A decree of sale, upon the petition of infants, by their next friend, is valid. Where a married woman and her children, to whom an estate had been conveyed, joined with the trustee in a petition for a sale of real estate for a reinvestment, the decree was, that the clerk and master should make the sale, whether or not the title of the trustee could thus be passed out of him, before the act of 1836, Rev. Code, ch. 32, sec. 23, at all events, it would thus pass by force of that enactment.

EJECTMENT, tried before SAUNDERS, J., at the Fall Term, 1858, of Cumberland Superior Court.

CASE AGREED.

The lessors of the plaintiff are the heirs of Peter J. Campbell, and James S. Campbell, and Elizabeth Campbell, widow of the said James. They claim title to the land by a deed from James S. Campbell, the former owner, to the said Peter J. Campbell, which was made on 17th of March, 1825, on the eve of a marriage, about to take place between the said James and the said Elizabeth, then Elizabeth Pilley. By this deed, the land in question, with other property, real and personal, is conveyed to the said Peter J. Campbell, in trust, for the sole and separate use of the said Elizabeth, and then in trust for the children of the marriage. The defendant admitted possession. To estop the defendant, the plaintiff exhibited the records of a petition in the Court of Equity of Cumberland county, by "James S. Campbell, Peter J. Campbell, trustee, Elizabeth Campbell, the wife of James Campbell, Anna Maria, Henry S., Delphia L., William Alivier, and Thomas James Campbell, children of the said James S. and Elizabeth Campbell, by their next friend, Thomas S. Campbell, setting out the said deed, and the seizin in trust, by the said Peter, and praying that the land in question, and some other property, might be sold for a reinvestment, also a decree of sale—a report of the clerk and master of a sale to James S. Campbell, and a decree that the clerk and master make title. A deed was also produced from the clerk and master to Daniel Baker, and from him to the defendants. The defendants then produced an assignment by James S. Campbell, of his

bid at the master's sale, to Daniel Baker, who paid the money bid into the office.

The plaintiffs produced no other evidence of the title of Peter J. Campbell.

It was admitted that the defendants were in possession when the suit was brought.

Upon this case agreed, his Honor being of opinion with the plaintiffs, gave judgment accordingly, from which the defendant appealed.

Banks, for the plaintiffs.
Fuller and *C. G. Wright*, for the defendant.

RUFFIN, J. The title derived by the defendant, under the sale and deed made by the clerk and master, was impeached in the argument on two grounds. The first is, that the purchase was made by James S. Campbell, and, by his order the deed was made to Baker. The objection is founded on the idea, that the master has a special authority to convey under the decree and the statute, and the decree is for a conveyance to the "purchaser" at the master's sale; and that, therefore, it must be to him alone. But the language of the acts, directing sheriffs to convey land sold under execution, is much the same, and it has been frequently decided, that a conveyance to another, by the direction of the purchaser, was sufficient to pass the land; *Smith* v. *Kelly*, 3 Murph. 507; *Testerman* v. *Poe*, 2 Dev. and Bat. 103. The Court thinks this case stands on the same reason with those. It is a question between the purchaser and the master and his bargainee; and, if the conveyance was improperly made, application to correct it, should be made by the purchaser to the court of equity, which made the order for the conveyance.

The second ground is, that the petition, for the sale of the land, was filed in the name of the infants, by their next friend, whereas, it ought to have been in the name of their guardian. If this objection were well founded, generally, it could not have any effect in this action, because these infants had not

the legal title to the land, but it was in their trustee, who was also a party to the petition. But the Court is of opinion that it could not, in any case, affect the title. We will not say that a sale, under a petition in the guardian's own name, would not be good. The act may, by force of its terms, sustain it, and, generally speaking, it seems unsafe to decree a sale of the land of infants, except on the application of the guardian, as a responsible person, under bonds for his fidelity. But, certainly, if the guardian does apply, it is most regular and proper that the petition should be in the name of the infants themselves, by him as guardian; because the title is in them, and the statute makes the decree and deed pass the title vested in the parties to the suit. Nor do we think that the sale is vitiated by the fact, that the petition is in the names of the infants by a next friend. In the first place, it is the course of the court of equity to sustain suits by infants by *prochein ami*, without regard to their guardianship, because he is under the control of the court, and, if he misdemeans himself in conducting the case, the court, being charged with the care of the infants, will remove him and appoint a fit person to protect the infants; and the statute, in authorising the court of equity to act on the application of the guardian, is not to be considered as ousting the prior jurisdiction of the court, or changing its usual course of proceeding. This is believed to have been constantly the understanding of the profession, and it would be mischievous, at this day, to hold otherwise, as many titles are derived under decrees upon petitions brought in the names of infants by their next friend, or their guardian. But, at all events, the regularity of the proceedings in the court of equity cannot be called in question here; but that court is the exclusive judge of its own course, and its determination conclusive as to every matter within its jurisdiction. That subject was, however, so fully considered in the case of *Williams* v. *Harrington*, 11 Ired. 616, as not to require further observation now. Upon the ground taken in the argument, therefore, the opinion of the Court is against the plaintiff.

There is another point, however, which is not so clear, and on which the Court has felt considerable difficulty. This is not a case of a sale of the land of tenants in common for partition, nor of infants seized of the land. The title was vested in a trustee for Mrs. Campbell during her life, and then for her children, the infants, who have now arrived at full age, and with the heirs of the trustee, are the lessors of the plaintiff. The purpose of the proceedings in Equity was to obtain a sale of the premises, with the avowed object of investing the proceeds in other real estate, and the bill was brought by the trustee, Mrs. Campbell and her children. Our doubt has been, whether the conveyance of the trustee himself was not necessary to pass his legal title, as the case is not literally within any of the acts of Assembly which direct the sales of land and authorise the master or a commissioner to convey, under the direction of the Court. It is not questioned, that the court of equity may change investments in trust for a married woman, or for infant *cestuis que trust*, and that it is proper the trustee should be a party to the cause; and it is not supposed that a court of law can question the decree as to its correctness upon the rights of the parties to it. But as a decree, properly, is *in personam*, and does not divest the legal title, a doubt arose, whether the title of the trustee could be passed but by his own deed. The question is not free of difficulty. But, after some hesitation, the Court holds that the deed of the master is sufficient. The ground on which we go, is, that the Court might have decreed that the trustee should convey, and his deed would have been sufficient; and that the act of 1836, Rev. Code, ch. 32, sec. 23, enacts that in all cases of a sale under a decree of a court of equity, where the master shall be authorised by a decree in the cause to convey, his deed shall be effectual to convey to the purchaser such title, interest and estate, as the party of record owning the same had therein; which seems to be broad enough to cover every case.

The judgment must therefore be reversed and judgment rendered for the defendant, on the case agreed.

PER CURIAM, Judgment reversed.

JOSEPH M. ALEXANDER *against* D. S. TORRENCE, *Exr. of James Caldwell.*

Where it was made to appear that by the law of Alabama, six years adverse possession of a slave, under a claim of right, conferred *a title* to such slave, it *was held* that an action for a breach of a warranty of title, contained in a bill of sale, would not lie in favor of a person who had thus held for more than six years in that State, although, the slave, having run away and gone into South Carolina, a court in that State had held that the title thus acquired was invalid against one that previously had title in that State.

ACTION for COVENANT for the warranty of title to a slave, tried before PERSON, J., at the Fall Term, 1857, of Mecklenburg Superior Court.

The slave, Caleb, the subject of this action, had originally belonged to one Benjamin Johnson, of Abbeville District, South Carolina, who made a deed of gift for him to his sister Anne, afterwards intermarried with John Burnet. On the death of Benjamin Johnston, his son, John Johnston, in 1837, sold the slave in question, to James Caldwell, who was passing through that State, and he carried him to Alabama, and sold him to the plaintiff, Alexander, by a deed containing a warranty of title. Twelve years afterwards, as the plaintiff was passing through South Carolina, the Slave, Caleb, ranaway and went into the possession of Burnet, the husband of Anne (formerly Johnson,) and suit was brought for him in that State, which was decided on the circuit in his, (plaintiff's,) favor, but upon an appeal to the Court of Appeals, it was decided that the possession for twelve years in Alabama, did not give title to the plaintiff, but that the right of property in the slave was in Burnet, *jure mariti.* Accordingly, a new trial was ordered, and when the cause next come up on the circuit,

the plaintiff took a nonsuit and brought this action against the defendant as executor of Caldwell.

The defendant contended, by the law of Alabama, an adverse possession of six years, under a claim of right, amounted to a good title; and produced evidence that such is the law of that State; but the Court held the contrary, and the defendant's counsel excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Thompson, *Graham* and *Osborne*, for plaintiff.
Boyden and *Fowle*, for defendant.

PEARSON, C. J. It is unnecessary to notice many of the exceptions set out in the statement of the case; because the Court is of opinion that the defendant is entitled to a *venire de novo* upon the merits.

To maintain the action, it was necessary for the plaintiff to prove an eviction by title paramount. There was sufficient evidence of an eviction; for the fact that the slave went into the possession of Burnet, who, upon demand, refused to give him up, and that the plaintiff brought an action of trover against him, and failed to recover, is as full proof of an eviction as if Burnet had sued the plaintiff for the slave and recovered; the actual and legal effect being precisely the same. This proposition assumes, that the plaintiff was well advised in submitting to a nonsuit after the new trial was granted by the Court of Appeals of South Carolina. It was evidently useless for the plaintiff to proceed further in the face of the opinion of the Court that he was not entitled to recover. Was the eviction by title paramount? In other words, does the evidence show a title in Burnet superior to the title of the plaintiff and of defendant's testator? Burnet's title rests upon a deed executed by one Benjamin Johnston, to Anne, the wife of Burnet, dated the 13th of June, 1831, and the question is, did the title of the slave vest in Mrs. Burnet by the force and legal effect of that deed? The parties resided in the State of South Caro-

lina. The slave was there, and the deed was executed there; it follows that the operation of the deed must be governed by the laws of that State. This Court is not presumed to know the law of another State or country, and where a question arises in regard to it, evidence thereof must be offered to the Court. The judicial decisions of the courts of a State or country, contained in reports, authorised by law, or received and recognized by the profession, furnish the most satisfactory evidence of the law. *Allen* v. *Pass*, 4 Dev. and Bat., Rep. 77. *Worrell* v. *Vinson*, 5 Jones' Rep. 91, *Hooper* v. *Moore*, *Ibid.* 130, Conflict of Laws, sec. 637-8, 1 Greenleaf's Ev. sec. 486.

In this case, the work is done to our hand; for in *Alexander* v. *Burnet*, 5 Richardson, R. 190, the principle of the law of South Carolina, in regard to the construction and legal effect of deeds of the kind under consideration, is not merely announced, but the application of it is made to this very deed, and in the opinion of the Court the title of the slave was vested by it in Mrs. Burnet and passed to Burnet, *jure mariti*, the slave having been in his possession. So, upon this point, we are relieved from all further labor, except that of deciding that it is governed by the law of South Carolina.

The plaintiff having thus shown title in Burnet, and a consequent defect of title in the defendant's testator, at the time he executed the covenant of warranty sued on, established a *prima facie* right to recover, and it remains to be seen whether what afterwards occurred had the effect of divesting the title out of Burnet and vesting it in the plaintiff; for, if he had title at the time of the eviction, he has no cause of action on the covenant, as Burnet's act would be that of a mere stranger without title. The scene is now shifted, and we pass from South Carolina into Alabama. The plaintiff bought the slave from the defendant's testator, and took the bill of sale and the covenant sued on, in the State of Alabama. The slave was there, and was kept in possession there, by the plaintiff, for more than six years, adversely and upon a claim of title. The question is, did the title of the slave vest in the plaintiff by the force and effect of this adverse possession? A

preliminary question is, are we to be governed in our decision by the law of Alabama or the law of South Carolina? But for the opinion of the court in *Alexander* v. *Burnet*, *supra*, we would say *it follows, as a matter of course,* that the legal effect of the acts done in Alabama, must be determined by the law of that State, in the same manner that the legal effect of the deed executed by Johnson, was determined by the law of South Carolina; and, notwithstanding that opinion, we are fully satisfied that such is the law, and the court of South Carolina misapprehended the point and fell into error by confounding it with the doctrine in regard to the statute of limitations. The plaintiff did not, in any manner or shape, invoke the aid of the statute of limitations of the State of South Carolina; on the contrary, he alleged that, having bought the slave in Alabama, and having held adverse possession of him there for more than six years, such possession had the legal effect of vesting the title in him according to the law of that State, as held by the courts there, in the construction of the statute of limitations of that State. We think it sufficient to ask, (and we do so with due respect,) what bearing had the statute of limitations of the State of South Carolina on that question?

If Alexander, by acts done in the State of Alabama, had acquired a title to the slave under the law of that State, the courts of all other countries were bound to respect it, and the fact that Burnet, who was the original owner, was a citizen of South Carolina, could not in any way affect the question, unless there had been a clause in the statute of Alabama saving the rights of non-resident owners. This brings us to the main question—did the title vest in the plaintiff by the force and effect of his adverse possession according to the laws of the State of Alabama? We have examined the statute. Six years is a bar to the action, and there is no saving of the rights of non-resident owners who are not under disabilities—infancy coverture, &c., and we find it settled by the decisions of the courts of that State, where the possession of personal property is held adversely for a period beyond that pre-

scribed by the laws of the State as a bar to an action, the title vests in the person holding such adverse possession, against the original owner, and all other persons. *Doyl* v. *Bouler*, 7 Ala. Rep, 246, *Goodman* v. *Munks*, 8 Porter's Ala. Rep. 85.

Judgment reversed, and a *venire de novo.*

PER CURIAM, Judgment reversed.

APPENDIX.

PRUE *v.* HIGHT.

HABEAS CORPUS.

A free infant of color, rightfully bound as an apprentice, remains subject to the jurisdiction of the County Court, wherein he was bound, until discharged in the mode provided, sec. 5, ch. 5, Revised Code.

A HABEAS CORPUS was returned before his Honor, Chief Justice PEARSON, who invited the other Judges to assist at the argument of the matter, and accordingly the case was heard in the room of the Supreme Court, by all the Judges, on 8th of January, 1859, and was as follows :

Alfred Prue, a free boy of color, an inhabitant of Franklin county, was bound by the County Court of that county, as an apprentice, to one Fuller, a resident of that county, who removed from the State in 1849, leaving the apprentice in charge of the defendant, Hight, also a citizen of Franklin county. Hight placed the apprentice with a son-in-law, who lived in Granville county, where, by the direction of Hight, he stayed as a servant until the close of the year 1857, when he deserted his home, and went at large, in Granville county, until March, 1858; being still a minor, he was brought to the County Court of Franklin, and by that Court bound to Hight, who took him in charge.

The petitioner, the apprentice aforesaid, deeming himself a an inhabitant of Granville county when he was bound to the defendant, Hight, and that the County Court of Franklin had not jurisdiction of the subject-matter, sued a writ of habeas corpus, and prayed to be discharged from the custody of the defendant.

The matter was argued by *Badger*, with whom was *Ed-*

wards, for the petitioner, and *B. F. Moore* and *Miller*, for the defendant. Upon the argument of the case, the Judges unanimously agreed, that the petitioner had been lawfully bound to the defendant by the County Court of Franklin. At the request of the Chief Justice, Judge Ruffin drew up an opinion, which was concurred in by Judge Battle, which is contained in the following letter addressed to the Chief Justice:

"RALEIGH, January 11th, 1859.

"Dear Sir:

"Agreeably to your request, I have considered the case of habeas corpus, which was before you on Saturday, and my conclusion is, that the applicant cannot be discharged.

The gentlemen of the bar put the case, I think, on its true point, namely, whether the County Court of Franklin had jurisdiction, so as to render the binding to the present master valid, and I am of opinion that Court had jurisdiction. It is unnecessary to embarrass oneself, in considering this question, by adverting to the law of settlement as to infants generally, or even as to those of color generally; because, as I conceive, the statutes have created a clear rule in respect to such an infant of color as this applicant, namely, one who was once rightfully bound by the court of a particular county. It is admitted that the original residence and settlement of this boy was in Franklin, and at the time he was first bound. That seems to me to fix the apprentice of color to that county, during his minority, except in the special case provided for, of a removal of the master and apprentice to another county by the consent of Franklin Court, and the assent thereto by the wardens and court of the new county, evidenced by a new binding in the latter county, to the same master. The act requires the person, to whom a free negro is bound, to give bond not to remove the apprentice out of the county, and for the production of him at the expiration of the term, and whenever the court may require in the meanwhile; with a proviso for a surrender to the court by the master and acceptance by the court, and the further proviso, just mentioned of a removal to another county. If the bond were one voluntarily given by the master, it might be argued that a removal of the apprentice would give an action on the bond

as the only remedy. But this bond is prescribed by the Legislature upon a principle of policy, and the provision of the statute, which requires it, is to be construed as establishing that policy and a rule of law to enforce it, just as much as if the statute declared and enacted them expressly. To what end, then, is the apprentice to be produced, when required by the court which bound him, but that he is to be subject to the control and disposition of that court. If so, then the master may not only be sued, for not producing him, when ordered, but the court may assert its control and power of disposition over the apprentice, in any way, necessary to render it effectual, by bringing in his body, whether found in that county or any other. That is not only a power of the binding court, but it is a duty which the wardens and court of a county, to which the master has removed, (which can only be a county adjoining the first,) may enforce on the first county by a refusal to bind anew, and a removal of the apprentice to his former settlement, according to the 13th section of 86 ch. Revised Code. Such a construction of the acts is the more required, since it is plain that the enactments proceed upon two ideas affecting public policy—the one, the peculiar exposure of this part of our population to oppression and wrong, in being carried to remote parts and made the subject of traffic, and the other, that they may be subjected, while amongst us, to the supervision of a strict police, so as to restrain their propensity to be idle and mischievous; and that can only be effected by permanently vesting the whole control of the free infant of color in the court which first legally takes charge of him. The power is, therefore, given for the twofold purpose of protection to the child of color from much wrong—even, possibly, of being enslaved in remote places, and in the wholesome exercise of a local police; and the jurisdiction once attached, it cannot be ousted by the unlawful act of the master or apprentice.

"I do not consider it material to enquire, whether the boy might properly be bound a second time, before cancelling the first indentures after notice to the first master. It would seem, indeed, after so long an abandonment of an apprentice by a master, who had removed from the State, the court must, of

necessity, reassume the charge and care of the infant. But, at all events, that is a question between the two masters, and cannot found a reason why the boy should not be the apprentice of either, so as to entitle him to the absolute discharge, which is claimed for him.

"He ought, I think, to be remanded to the custody of the defendant."

Most respectfully, your ob't. servant,

THOMAS RUFFIN.

I concur in the above opinion.

WM. H. BATTLE.

I concur in the conclusion of Judge Ruffin, for the reasons set out in the opinion, which he was kind enough to draw up at my request. It is considered by me, that the petitioner be remanded and put in possession of Herbert H. Hight, and that the said Hight recover of Jesse Person, the next friend of the petitioner, his costs to be taxed by the clerk of the Supreme Court, at Raleigh. Let execution issue therefor.

R. M. PEARSON, C. J.

DEATH OF CHIEF JUSTICE NASH.

The Chief Justice having died since the last term of the Court, the following proceedings were had:

"IN THE SUPREME COURT,
Monday, Jan. 3, 1859.

On the opening of the Court, the Attorney General rose and said:

May it please your Honors:

I beg leave to announce to the Court that a meeting of the members of the Bar, in attendance on the Supreme Court, was held this morning in the Court room, for the purpose of giving expression to the sense of the loss which the country has sustained, by the death of the late lamented and venerable Chief Justice Nash.

In obedience to the wishes of the meeting, it becomes my duty to present to the Court, the preamble and resolutions which were unanimously adopted. In presenting these resolutions, I shall not enter into any extended observations in regard to the character of the deceased, either public or private. He needs no eulogy. For nearly forty years he has been in the public service, and in whatever position he has been placed, he has performed the duties devolving upon him, with credit to himself and satisfaction to the public. A man of unsullied private character, he possessed in an eminent degree, those rare and intestimable qualities both of mind and heart, which must command the respect and esteem of all good men. Whilst we feel a deep and sincere sorrow, at being separated from such a man, yet we are, to some extent, consoled by the reflection, that he has left behind him an example, that will be a beacon light, a polar star to guide succeeding generations in the paths of duty and virtue. Believing, as I do, that each member of the Court will heartily concur in the sentiments expressed in the following resolutions, I beg leave to read them to the Court.

The Attorney General then presented and read the following:

At a meeting of the Bar and officers of the Supreme Court of North Carolina, held at the Court room, in the Capitol, on Monday the 3d day of January, 1859.

On motion of Mr. Badger, Hon. William A. Graham was called to the chair and Edmund B. Freeman appointed secretary.

On motion, the chairman appointed P. H. Winston, sen., W. N. H. Smith, R. S. Donnell, John Pool, John H. Bryan, William A. Jenkins and Hamilton C. Jones, a committee to consider and report resolutions expressive of the feelings of this meeting on the death of the late Chief Justice Nash.

Mr. Winston, from the committee, reported the following preamble and resolutions:

Frederick Nash, late Chief Justice of the Supreme Court of North Carolina, having died since the last term, the members of the bar, and officers of the Court, desire to express their sense of the loss which the country has sustained, in the death

of a magistrate so worthy of the high office, whose duties he performed with perfect integrity, and eminent usefulness and dignity; and also to give some outward evidence of sincere sorrow for their separation from a man, whose ardent, yet cheerful piety, at once gave strength and consistency to all his private virtues, and to his manners a pervading and attractive gentleness; which, joined to the more imposing qualities exhibited by him in his public employments, gained for him universal affection, esteem and admiration; therefore resolved,

1. That the members of this meeting will wear the usual badge of mourning during the present term of the Court.

2. That a copy of these resolutions be sent to the family of the deceased by the chairman of this meeting.

3. That the Attorney General be desired to present the proceedings of this meeting to the Judges of the Supreme Court, with a request that they be entered on the records of the Court.

The preamble and resolutions were seconded by Mr. Badger in a feeling and eloquent address, and after a few impressive remarks from the chairman, were unanimously adopted.

The meeting then adjourned.

W. A. GRAHAM, Chm'n.

E. B. FREEMAN, Sec'y.

Whereupon, Chief Justice Pearson, on behalf of the Court, replied:

Gentleman of the Bar:

The members of the Court are deeply impressed by the sad event to which your proceedings refer, and join in the sentiments to which you have given expression.

To very extensive legal learning, ripe scholarship, and an elegant and easy style, Judge Nash united a high sense of moral and religious duty, which gave to him a weight of character, that was calculated to command the confidence of the public for the decisions of any tribunal of which he was a member. His distinguishing characteristics were firmness and integrity.

His urbanity and uniform attention to all the courtesies of social life, endeared him to his associates; and in his death,

we feel that we have lost not only our Chief Justice, but a friend. He had lived the term allotted for human existence—three-score years and ten—he had filled the measure of his usefulness and honor. We were in some degree prepared, and whilst his demise suggests the most solemn considerations, the feeling of regret should not be as unmitigated, as when one is suddenly cut off in the prime of life.

The Court directs the proceedings of the Bar to be entered on the minutes.

Court adjourned until to-morrow morning, 10 o'clock.

E. B. FREEMAN, Cl'k.

The Hon. THOMAS RUFFIN, of Alamance, was appointed by the General Assembly to fill the vacancy occasioned by the death of Judge NASH.

Judge PEARSON was appointed by the Court, Chief Justice.

ROBERT R. HEATH, of Edenton, and JESSE G. SHEPHERD, of Fayettville, were appointed by the General Assembly, Judges of the Superior Courts, (having first received the appointment *ad interim*, by the Governor,) in the places of Judges PERSON and ELLIS, resigned.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1859.

DAVID GEORGE *v.* THOMAS M. SMITH *and others.*

To give a slave a pass to travel by a railroad, as an indulgence, does not amount to a breach of an agreement to work the slave only as a turpentine hand.

It does not amount to negligence in the hirer of a slave so as to subject him for an injury occasioned by the slave's falling from a railroad train, that the hirer gave him a pass to travel on the train, although he knew that the slave was addicted to getting drunk.

Wherever a Judge, trying a suit, is called upon to charge upon a distinct point of law, it is his duty to do so explicitly, and it is error to mix it up in his instructions, indistinctly, with other points of the case, or leave his views of the point to be gathered from inference.

ACTION ON THE CASE, for an injury to a slave hired by plaintiff to the defendant, tried before SAUNDERS, J., at the last Fall Term of Columbus Superior Court.

The plaintiff declared:

1st. Specially that he hired the slave, Edmund, as a tur-

pentine hand, and for that purpose only, and by the defendants' otherwise employing him, he was injured.

2ndly. For negligence, &c.

The evidence was, that the defendants were partners in the turpentine business; that one of them said to the plaintiff's agent, at the time of hiring, that he wished to hire negroes for the purpose of getting turpentine; that the agent replied, he understood that Edmund was a *number one* turpentine hand. The witness who deposed to the foregoing facts, stated that this was all that was said between the parties on the occasion of the hiring.

The clerk of the defendants stated that Smith, one of the defendants, instructed him that if Edmund applied for a pass, to go by the railroad to Wilmington, to give it to him; that a few days before the slave was injured, he did furnish the slave with such a pass. It was also in evidence, that Smith said the negro was very bad for liquor. The negro in question was found, about four miles from Wilmington, lying on, or near, the railroad track, greatly injured; having been hurt, as the attending physician thought, by the train. An empty bottle was found near the negro, which smelt of spirits, and he had the appearance of having been drunk.

The counsel for the defendants, asked the Court to instruct the jury, that the evidence did not support the first count, and that it was not a case of negligence. These instructions were declined by his Honor, and the defendants' counsel excepted.

The Court charged the jury, that to entitle the plaintiff to a verdict, they must be satisfied:

1st. That the defendants hired the negro as a turpentine hand, and for that purpose alone.

2ndly. That the pass was given by order of the defendants, for the negro to go to Wilmington by the railroad.

3rdly. That the negro was a drunkard, and that the defendants knew it.

4thly. That the negro went towards Wilmington by the railroad—got drunk, and in consequence of being drunk,

either fell, or was thrown from the cars, and was thus injured.

Defendants' counsel again excepted.

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

E. G. Haywood, for the plaintiff.
London, for the defendants.

PEARSON, C. J. There was no evidence to support the first count, and the defendants were entitled to the instruction asked for in respect to it. If we suppose there was evidence to justify the conclusion that the slave was hired *exclusively* for the turpentine business, and was to be put to no other sort of work, there is not the slightest evidence that the contract was violated in this particular. Surely, giving a slave a pass to go on the railroad to Wilmington, does not support the position that he was used or worked in any other way by the defendants. On the contrary, it was a *leave of absence* from work. The error in refusing to give the instruction is not cured by the manner in which the jury were charged. His Honor ought, either to have given it, or refused to do so directly, so as to make a point. The matter is mixed up, and the two counts confounded by the four positions, which are laid down, the first being relevant to the first count, and the last three to the second. The necessity of proving the allegation, that the slave was used or worked by the defendant in a manner not allowed by the terms of the contract, is not adverted to in the charge.

We also differ with his Honor upon the question of negligence, involved in the second count. To allow a slave to be carried as a passenger on a railroad, certainly does not amount to negligence, and the circumstance that the negro is addicted to getting drunk, does not make it so in the absence of proof, that he was drunk and helpless when he was allowed to get on the train, otherwise it would be necessary to confine negroes of that description; which would prove that they were not fit to be hired out. It is said in *Woodhouse* v. *McRae*, 5

Jones' Rep. 1, "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, or chain, him by night, to prevent him from fleeing across the line." This applies to our case; the only difference being that, here, the slave was addicted to getting drunk,—there, the danger to be apprehended, was the facility of escaping out of the State.

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

PER CURIAM, Judgment reversed.

THE STATE *v.* ASA J. WATERS.

A person is not liable under the 104th section of the 34th chapter of the Revised Code, for injuring stock within his own field which is enclosed and under cultivation.

INDICTMENT for an injury to stock, tried before SAUNDERS, Judge, at the Spring Term, 1859, of Washington Superior Court.

The defendant is indicted under the 104th section of the 34th chapter of the Revised Code, and the indictment charges that he "unlawfully, and on purpose, did injure one hog, the property of John H. Hampton; the said hog, then and there running at large in the range, contrary to the form of the statute, &c.

The proof was, that the defendant was in the possession of, and cultivating a corn-field which was under fence; that a hog, belonging to Hampton, was found in this field, upon which the defendant set his dog, and it was badly bit.

Before this, the hog had been running in the range. His Honor held, that upon these facts, the defendant was guilty under the statute, and so instructed the jury, who found a verdict for the State. Defendant's counsel excepted. Judgment and appeal to the Supreme Court.

Attorney General, for the State.
H. A. Gilliam, for the defendant.

BATTLE, J. The 104th section of the 34th chapter of the Revised Code, upon which the indictment in the present case is founded, enacts that "if any person shall unlawfully, and on purpose, kill, maim, or injure, any live stock running at large in the range, or in the field or pasture of the owner, whether done with the actual intent to injure the owner, or to drive the stock from the range, or any other unlawful intent, every such person, his counsellors, aiders and abettors, shall be deemed guilty of a misdemeaner." The proof is, that the hog to which the injury is alleged to have been done, was not, at the time of the injury, either running at large in any range, or in any field or pasture of the owner, but was in an inclosed field of the defendant, in which corn was then growing. The alleged offence was neither within the words or spirit of the act. It was manifestly not within the words, and we cannot well see how an injury, inflicted upon live stock in a situation entirely different from that prescribed in the act, can, by any reasonable construction, be brought within its spirit. The cases within the contemplation of the law were such as almost to forbid the supposition that the injuries were inflicted from any other than a malicious or unlawful motive. A man might, indeed, kill, maim, or otherwise injure, as best he could, a mad bull, or other animal, that was likely to endanger his life, or, perhaps, the life of any other person, whether such animal was at the time either in the range or in the field or pasture of the owner; for such killing, maiming, or injuring, would not be with an "unlawful intent." It is not easy to conceive of any other exception; but where the animal is in an inclosed field of the defendant, doing damage to his growing crop, the case is very different, for it then can hardly be supposed that the animal is killed, maimed, or injured, with intent to injure the owner, or with any other intent than the innocent one of saving his crop. The injury may be such, or inflicted under such circumstances, as to en-

title the owner of the stock to redress *civiliter*, either at common law, or under the 48th chapter of the Revised Code, concerning "Fences," but he cannot proceed by an indictment under the act upon which we are now commenting.

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

PER CURIAM, Judgment reversed.

B. H. SIMMONS *v.* J. W. HORTON.

Where the buyer, as well as the seller of a horse, had knowledge of a patent indication of disease, which, both as to its nature and origin, was misrepresented by the latter, it was *Held* that this amounted to some *evidence* on the question whether artifice had been used to withdraw the buyer's attention from the defect.

CASE, for DECEIT and FALSE WARRANTY in the sale of a horse, tried before SAUNDERS, J., at the last Term of the Superior Court of Bertie.

The plaintiff introduced a witness who testified that he went to the defendant, who had horses for sale at the hotel lot, in the town of Windsor, and as agent of the plaintiff, proposed to buy a horse; that the horse in question was shown to him, which he finally bought at $105, but during the pendency of the trade, he discovered that there was a knot upon one of the legs of the animal just above the hoof, to which he called the defendant's attention. The defendant said in reply to this, that it arose from a kick by another horse, and would be well in a few days, and that the horse was a good family horse. Upon concluding the purchase, the witness started home with the horse, and had not traveled more than a mile when he discovered that the horse was lame in the leg which had the knot upon it; and was lame every time he was driven afterwards; that plaintiff went a journey of about 70 miles

a few days after getting the horse, and brought him back quite lame, when it was discovered that the knot in question was what is called a *ring-bone*, and that the malady continued to increase until the horse became very lame and hopped badly.

The defendant then introduced a witness to show that the defect was a patent one. He swore that he went to the lot about half an hour after the bargain was made, when he discovered that the horse was quite lame; that he called the attention of plaintiff's agent to the knot on his leg, who said that defendant had told him it arose from a kick and would soon be well.

The Judge instructed the jury, that there was no evidence of a warranty, and he left it to them to say whether the defect complained of existed at the time of the sale, and if so, whether it was patent; that if the knot was obvious to an ordinary observer, the plaintiff could not complain of it, unless it was shown that the defendant used some artifice to divert the witness' attention from the indication and prevent him from making an examination and enquiry. The defendant excepted.

Verdict for the plaintiff. Judgment. Appeal.

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

PEARSON, C. J. It is fixed by the verdict that the statement of the defendant "as to the cause of the lameness was false, and was known by him to be so." This concludes the question as to the *scienter*, and the only point open is, was there any evidence in regard to it. The distinction between *any* evidence and *sufficient* evidence, has been frequently marked out, and need not again be elaborated. This Court is of opinion there was evidence proper to be submitted to the jury. The knot on the leg of the horse would necessarily attract the notice of any one, and it was a fair and natural inference that the owner had examined into and ascertained its nature and what caused it. Any ordinary man would do this immedi-

ately; consequently, it was not indispensible to prove how long the animal had been in the possession of the defendant, and as the knot was proved to be a *ring-bone*, and not the mere effect of a kick, the jury were at liberty to infer that the statement in respect to it, made by the defendant, was knowingly false. Indeed, as the defect was patent, the *scienter* would have been brought home to the plaintiff as well as the defendant, but for the fact, that the false statement of the latter, as to its cause was calculated to lull suspicion and prevent a thorough examination.

The question which was discussed by the counsel of the defendant, i. e.: If a vendor makes a statement in respect to property which he does not know to be true, and it turns out to be untrue, is liable in an action of deceit, does not arise. That point is cut off by the verdict. There is no error.

PER CURIAM, Judgment affirmed.

State on the relation of HIRAM P. HARRELL *v.* WILLIAM H. LEE.

Where a guardian hired out the slave of his ward at public vendue, proclaiming as conditions of the hiring, that the slave was not to go beyond the limits of the county, nor work in a stave-swamp, it was *Held* that the guardian, who had himself hired the slave through an agent, was bound by the restrictions thus proclaimed, and that the slave having been carried by him out of the county and put to work in a stave-swamp where he was accidentally killed in working at the business, the guardian was liable at the election of the ward, on his official bond for the loss.

Held further, that the receipt of the stipulated hire was not inconsistent with a claim for the loss.

Release of the cause of action considered.

(*Bell v. Bowen*, 1 Jones' Rep. 316, cited and approved.)

ACTION of DEBT on a guardian bond, tried before SAUNDERS, J., at the last Spring Term, of Bertie Superior Court.

The defendant was guardian for the plaintiff, and on the latter's coming of age, all the slaves, and the other effects, be-

longing, or arising to the plaintiff, which were in defendant's hands, were delivered to the plaintiff, except a negro man by the name of Drew, who had died during the last year of the guardianship, and the main question, in this case, is, whether the defendant is liable in a suit on his bond, to account for the loss of this slave. The facts, in relation to the slave Drew, are, that on the 1st of January, 1857, the defendant, as guardian, publicly hired him and other slaves of his ward for that year, and in doing so, had it distinctly announced that no one of them was to be carried out of Bertie county, or worked in a stave-swamp. Drew was put up under these restrictions and bid off by the defendant, through an agent, for $131. The slave in question was valuable, and would have hired for $150 without restrictions. The defendant, on the 2nd of January, sent the said slave to his stave-swamp, in Martin county, where he was killed, about the middle of February, by the falling of a limb from a timber tree which he was cutting.

On the occasion above mentioned, when the slaves, &c., were handed over, $131 was accounted for and received by the ward as the hire of Drew for the year 1857. On that occasion, also, the plaintiff signed and delivered to the defendant the following sealed instrument of writing, viz: "Received, Sept. 26th, 1857, of Mr. Wm. H. Lee, my guardian, the sum of $2,853 67, the amount of money, in bonds, due me from the said William H. Lee, guardian, in full settlement with him, so far as relates to the sum herein aforementioned. Also, received of him negroes, Ephraim, George, Patience, Eveline, Judy, Charles and Rose, and I hereby release for myself, my heirs, executors, and administrators, all claim and demand in relation to the same, money and negroes aforementioned by name, either in law or equity," which the defendant insisted on as a bar to this recovery.

The defendant proved that before the hiring of Drew, as aforesaid, the plaintiff had consented that the defendant should hire Drew and work him without restrictions. It was also proved that after plaintiff came of age, he insisted that the

defendant should account for the hire of Drew at the price of an unrestricted hand.

The Court left the value of the slave to be estimated by the jury, who gave a verdict for $1011, expressing that $1000 was the value of the slave, and $11 for addition to the hire as an unrestricted hand. The Court reserved the question as to the plaintiff's right in law to recover on these facts, with leave to enter such a judgment, as he thought the law authorised, for a breach of the bond, and afterwards being of opinion with the plaintiff, gave judgment according to the verdict, and the defendant appealed.

Winston, Jr., and *Hines*, for the plaintiff.
Barnes, for the defendant.

PEARSON, C. J. It is settled: if a third person had hired the slave, and either carried him out of the county, or worked him in a stave-swamp, in violation of the terms of the bailment, he would have been liable under the circumstances of our case; *Bell* v. *Bowen*, 1 Jones' Rep. 316. We have this question: The defendant violated the express terms of hiring in both particulars; is he exempt from the liability that would have attached to a third person by reason of the fact of his being the plaintiff's guardian?

It will strike every one at the first blush, that according to the common notion of justice, as he was relied on to protect the interest of his ward, and to that end had offered the slave for hire, expressly subject to the terms above stated, and had bid him off at the hiring, and claimed his services as a hirer, the guardian cannot be entitled to greater indulgence than would have been extended to a third person. There is no principle of law which opposes this common notion of justice: on the contrary, the law asserts and enforces it as an incident to the relation of guardian and ward. It is the duty of a guardian to hire out the slaves at public vendue, and he has no right to become the hirer—not simply on the ground that he cannot hire of himself, but for the purpose of prevent-

ing fraud, and to take away the temptation to which he might be exposed of using means to stifle bidding, and detract from the value of such slaves as he might wish to hire for himself. It would not effect the purpose to treat a hiring to himself as a mere nullity, and charge him with the value as if the slaves had not been hired, whereby he would evade the duty of hiring them out, but the purpose is effected by giving to the ward an election, to be exercised within a reasonable time, (*Hawkins* v. *Simmons*, 6 Ire. Eq. 16,) either to treat the hiring as void and charge him with the value, or to treat it as a valid contract, and hold him liable according to the terms thereof, as a third person would have been. So that, he may lose by, but shall not take advantage of his own default, under the maxim: "no man shall take benefit by his own wrong."

In our case, the plaintiff seeks to hold the defendant liable according to the terms of the hiring. Is there any thing to prevent the application of the principle?

1st. We think the facts establish a breach of the conditions of the guardian bond in failing to take proper care of the slave. By the restricted terms of the hiring, he fixed the degree of care, which, in his opinion, his duty, as guardian, required him to impose on third persons, and cannot be heard, to say, that he diminished the amount of hires by restrictions which were unnecessary. It follows that an action can be maintained on the bond, and the plaintiff is not put to his special action on the case.

2. The release relied on is no bar to the action. It is worded cautiously, and is confined to the money paid over, and "the negroes aforementioned by name." The slave in question is not named, and the purpose evidently was, to leave open the matter of controversy as to him.

3. The receipt of $131, the amount at which the slave was bid off, did not affect the plaintiff's right to recover for his loss, because the right to receive that amount was entirely consistent with the right to hold the defendant also liable for his loss; consequently, there could be no reason why he was not at liberty to receive what the defendant admitted he was

entitled to, and bring suit for that about which there was a difference of opinion. How it would have been, had the plaintiff received a larger sum, i. e., the amount for which the slave would have hired if there had been no restriction, we are not called on to say. That might have been inconsistent with the right to hold the defendant liable for the loss by reason of the restrictions.

4. The fact that the plaintiff had agreed before the hiring, that the defendant might hire this slave and work him without any restrictions, did not defeat the action; for the reason that the agreement, being made while the plaintiff was under age, was voidable on account of his infancy, without reference to the relation of guardian and ward; and as the defendant did not accede to the proposition, which plaintiff afterwards made, to accept the amount that the slave would have hired for, without restrictions, it passes for nothing, and he can take no benefit from it.

In fixing the amount of damages an error was committed. The plaintiff having received the amount of a restricted hiring, in claiming damages for the loss by reason thereof, had no right to what the slave would have hired for without restrictions. Fortunately, the verdict is so entered that the two amounts can be severed. The judgment is reversed as to the eleven dollars, and affirmed as to the $1000, and the costs of the Court below.

PER CURIAM, Judgment affirmed.

STATE *v.* ASA JACOBS.

Upon a question, whether a person is a *free negro*, it is competent for one, who says he is the owner and manager of slaves, and has been for twelve years, that he has given much attention to the effects of the intermixture of the races, and believes he can distinguish between the descendants of the negro and white person and negro and Indian, and whether a person has more or less African blood in him, to testify as an *expert*.

State *v.* Jacobs.

INDICTMENT against the defendant, as a free negro, for carrying fire-arms, against the form of the act of Assembly, tried before HEATH, J., Brunswick Superior Court.

The State introduced one Pritchett, who swore that he knew the defendant, and had known him as long as he had known any one; that he had never seen any of defendant's ancestors, and knew nothing of them from reputation. Thereupon, the solicitor with a view of showing that witness was qualified to speak as an expert, inquired of him what business and occupation he followed, and what knowledge and observation he had, if any, of the effect of the intermixture of negro or African blood with that of other races. The counsel for the defendant objected, that, as the witness did not profess to have any knowledge of the defendant's ancestry by actual knowledge or reputation, he could not be permitted to testify as to whether the defendant was a free negro or not. The Court held that the witness might be permitted to answer the question propounded, in order that it might be seen whether he was qualified to testify as an expert.

The witness then stated that he was a planter, an owner and manager of slaves, and had been for more than twelve years, that he had paid much attention to and had had much observation of the effects of the intermixture of negro or African blood with the white and Indian races, and that from such attention and observation, he was well satisfied that he could distinguish between the descendants of a negro and a white person, and the descendants of a negro and Indian; and further, that he could therefrom, also say whether a person was full African or negro, or had more or less than half negro or African blood in him, and whether the cross or intermixture was white or Indian blood.

The witness was admitted to testify, and stated his opinion to be that the defendant was what is called a mulatto—that is, half African and half white. The defendant's counsel excepted to the admission of this evidence, and upon defendant's conviction, appealed to this Court.

Attorney General and *K. P. Battle*, for the State.
Baker, for the defendant.

BATTLE, J. The sole question presented on the record is, whether the witness *Pritchett* was competent to testify as an expert, that the defendant was a descendant of an African ancestor. An expert, in the strict sense of the word, is defined to be "a person instructed by experience." But more generally speaking, the term includes "all men of science;" as it was used by Lord MANSFIELD, in *Folkes* v. *Chadd*, 3 Doug. Rep. 157, "or persons conversant with the subject matter, on questions of science, skill, trade and others of the like kind;" Best's principles of Evidence, sec. 346; 1 Greenf. on Evidence, in note to sec. 440. The rule on this subject is stated by Mr. Smith in his note to *Carter* v. *Boehm*, 1 Smith's Lead. Cas. 286; "On the one hand it appears to be admitted, that the opinion of witnesses, possesssing peculiar skill, is admissible whenever the subject matter of enquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, where it so far partakes of the nature of science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; while, on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it." In support of the principles thus announced, it has been decided that seal-engravers may be called to give their opinion upon an impression, whether it was made from an original seal, or from another impression; *Folkes* v. *Chadd*, Doug. Rep. *ubi supra*. So, the opinion of an artist in painting, is evidence of the genuineness of a picture, Ibid. It has been said that the genuineness of a post-mark may be proved by the opinion of one who has been in the habit of receiving letters with that mark; *Abbey* v. *Hill*, 5 Bing. 299. A ship-builder may give his opinion as to the sea-worthiness of a ship, on facts stated

by others; *Thornton* v. *The Royal Exch. Ass. Co.* 1 Peake's Rep. 25. Merchants and bankers, who are daily engaged in handling the notes of particular banks, and have thus become thoroughly acquainted with their whole appearance, may prove whether a particular note is genuine or counterfeit; *State* v. *Harris*, 5 Ire. Rep. 287. Persons accustomed to observe the habits of a certain kind of fish, have been permitted to give in evidence their opinions as to the ability of the fish to overcome certain obstructions in the rivers, which they were accustomed to ascend; *Cottrill* v. *Myrick*, 3 Fairf. Rep. 222. Many other instances of the application of the principle might be given, but those to which we have referred, are sufficient to show that it is extensive enough to embrace the case now before us. The effect of the intermixture of the blood of different races of people, is surely a matter of science, and may be learned by observation and study. Nor does it require a distinguished comparative anatomist to detect the admixture of the African or Indian with the pure blood of the white race. Any person of ordinary intelligence, who, for a sufficient length of time, will devote his attention to the subject, will be able to discover, with almost unerring certainty, the adulteration of the Caucasian with the Negro or Indian blood. This is incidentally implied in the following extract from the work of Nott & Gliddon on the "Types of Mankind," which will be found on page 260. "Mr. Lyell, in common with tourists less eminent, but, on this subject, not less misinformed, has some where stated that the negroes in America are undergoing a manifest improvement in their physical type. He has no doubt, that they will, in time, show a developement in skull and intellect quite equal to the whites. This unscientific assertion is disproved by the cranial measurements of Dr. Morton." After admitting some physical improvement on account of the increased comforts with which the negroes are here supplied, the authors add, one or two generations of domestic culture, effect all the improvement of which negro-organism is susceptible. We possess thousands of the second, and many more of negro families of the eighth

or tenth generation in the United States, and (where unadulterated with white blood) they are identical in physical and intellectual characters. No one in this country pretends to distinguish the native son of a negro from his great grandchild, (except through occasional and ever apparent admixture of white or Indian blood) while it requires the keen and experienced eye of such a comparative anatomist as Agassis to detect structural peculiarities in our few African born slaves. The improvements among Americanised negroes noticed by Mr. Lyell, in his progress from South to North, are solely due to those ultra ecclesiastical amalgamations, which, in their illegitimate consequences, have deteriorated the white element, in direct proportion that they are said to have improved the black." It is here clearly implied that even a common observer may discover, from the outward appearance, the intermixture of the white and black races, and on that account it may perhaps be said, that to be able to do so, is not a matter of science or skill. It may well be admitted, that simply to be able to detect the presence of African blood by the color, or other physical qualities of the person, is not a matter of science, but it will by no means follow that a qualification to ascertain the extent of the negro blood is not so. On the contrary, we believe that it would often require an eye rendered keen, by observation and practice, to detect, with any approach to certainty, the existence of any thing less than one-fourth of African blood in a subject. A free negro, so far as he is noticed as such, in our law, is defined (Rev. Code, ch. 107, sec. 79,) to be one who is "descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person." He may, therefore, be a person who, as we said in the *State* v. *Chavers*, 5 Jones' Rep. 11, has only a sixteenth part of African blood in his veins. The ability to discover the infusion of so small a quantity of negro blood in one, claiming the privilege of a white man, must be a matter of science, and, therefore, admitting of the testimony of an expert; and we think that the

witness, Pritchett, proved, in the present case, that he possessed the necessary qualification, to testify as such.

PER CURIAM, Judgment affirmed.

JOHN B. QUINCE, *Adm'r de bonis non v.* N. N. NIXON.

Where a widow who, with an only daughter was the next of kin, administered on her husband's estate, and as a part thereof, held a certain slave for six years, and then, on the occasion of a second marriage, conveyed in her individual name such slave to a trustee in trust for herself and her daughter, it *was held* that such conveyance was conclusive to show that she ceased to hold the property as administratrix—that this act was a full administration as to it, and that after her death, an *administrator de bonis non* on her husband's estate, took nothing in said slave.

ACTION of TROVER, tried before HEATH, J., at the last Spring Term of New-Hanover Superior Court.

The action was brought for the conversion of a slave named Jim. It was in evidence that John N. Brown died intestate in the spring of 1831, possessed of a negro girl named Katy; that he left, him surviving, his widow Emma Brown and an infant daughter about two years old, who, afterwards in 1847 or 8, and before she came of age, intermarried with the plaintiff; that at the death of John Brown, the slave Katy remained in the possession of his widow, who in June, 1831, administered on his estate, and in December following filed an inventory, in which Katy was returned as part of the estate; that the slave Katy continued in the possession of Mrs. Brown until the year 1837, when she was married to one Isham Peterson, who took possession of the said slave, and (as he testified) afterwards held her in right of his wife, and as her property. Some few years after the marriage of Peterson with Mrs. Brown, Katy gave birth to the boy Jim, who continued in the possession of Peterson until the year, 1854, when he mortgaged him to one Savage, who afterwards

sold him under the authority of the mortgage, to one Du Pre, and in September, 1856, he was sold by the Sheriff under execution against the said Du Pre to the defendant Nixon. Mrs. Peterson died in 1850, and in December, 1856, the plaintiff administered *de bonis non* on the estate of John N. Brown, and after demanding Jim of the defendant, brought this action in 1857.

It was further in evidence, that in contemplation of the marriage about to take place between her and Peterson in 1837, Mrs. Brown conveyed the slave Katy to a trustee, one Hill, by a deed, in which she was joined by the said Peterson, and by the said trustee. This deed recites the marriage about to take place, and that the purpose was to secure certain slaves, Katy among them, to Mrs. Brown and her daughter, Athalia, and conveys the same to the said trustee upon trust that, during the minority of the daughter, the trustee is to permit the said Emma, the mother, "to receive the profits of the said slaves, and the same to use at her sole will and pleasure," and that the same shall not be "under the control or at the disposal of the said Isham Peterson, or be in any manner liable for his debts," and after the marriage, or arrival at full age of the daughter, the deed provides that certain of the slaves conveyed, not including Katy, shall be assigned and set over to the said daughter, and in the event of the daughter's dying, that then the said trustee shall hold the said property in trust for Mrs. Peterson with a power in her to dispose of them by will.

The plaintiff's counsel moved the court to instruct the jury that the legal effect and operation of the deed of marriage settlement, was to convey, not the legal title of the slave Katy, but only Mrs. Brown's equitable interest in her as one of the distributees of her first husband, and that she having taken possession of the slave as administratrix, it was not competent for her nor her husband, Peterson, after their marriage, by any act or declaration of theirs, to change the character of that possession. And if it were not so, yet, under the circumstances of the case, the other distributee of Brown being a young child, at his death, and continuing a minor at her marriage,

in 1857 or 8, and there being no evidence that she had ever had a guardian, no presumption of a settlement and distribution of Brown's estate could arise, and that Mrs. Brown, and after her marriage, her husband, Peterson, must be taken to have held possession of Katy and Jim in her right of administratrix, and that consequently, the legal title was in the plaintiff.

His Honor declined giving these instructions, but charged the jury that if Mrs. Brown ever held her interest in Jim for one moment as next of kin, the plaintiff was not entitled to recover; and to that end they might consider that only one return of administratrix was shown; that she had held the mother for about six years prior to the marriage, and had conveyed her on the occasion of the marriage (Jim being born afterwards) by an absolute bill of sale in her individual name. And he further charged that if she conveyed the mother in her individual name, and not as administratrix, and she then had title as administratrix, such title would pass at law, though she held as administratrix, and that the plaintiff could not recover. Plaintiff's counsel excepted. Verdict and judgment for the defendant. Appeal by the plaintiff.

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

Pearson, C. J. This Court concurs in the conclusion of his Honor, that the plaintiff was not entitled to recover.

The plaintiff acquired no title as administrator *de bonis non*, for the reason that Mrs. Peterson, who was administratrix of her former husband, Brown, had completed the administration in respect to Katy, the mother of the slave in controversy: so, that at her death, there was nothing left to be administered. The deed to Hill divested her title, and in any point of view, was an administration of the property conveyed by it. The purpose seems to have been to make a division between her daughter and herself, and to secure her one part for her separate use. Whether the deed was effectual for the purpose of

making a division, is a question that cannot be raised in this Court. It certainly was effectual to divest her title as administratrix, and amounted to "an assent" or delivery to herself, and daughter as distributees, and had the same legal effect as the assent of an executor, according to the reasoning in *Hailes* v. *Ingram*, 6 Ired. Eq. 477.

This ground is yielded in the learned argument filed by Mr. *Haywood*, and he falls back on the position that the action can be maintained in the plaintiff's *own right* on the authority of *Cotton* v. *Davis*, 3 Jones' Rep. 355. There are two objections—either of which makes this position untenable.

1st. Supposing the legal effect of the deed to Hill was an assent or delivery by the administratrix to herself and daughter, as distributees, according to the division made thereby, the right to repudiate that division, and claim in opposition to it, was a *chose in action* of the daughter, which the plaintiff, who is her husband, cannot assert in an action to which she is not a party.

2ndly. Such assent or delivery vested the title in the mother and daughter, as tenants in common, and, supposing the plaintiff to have the two-thirds of the daughter, and the defendant, claiming under Peterson, to have the one-third of the mother, and to be tenants in common, it is settled that trover will not lie by one tenant in common, against a co-tenant, unless the property is destroyed, either actually, or constructively, as where it is carried to parts unknown, or its identity is destroyed. There is no error.

PER CURIAM. Judgment affirmed.

SOLOMON W. MORSE *v.* JAMES M. NIXON.

Where it was proved that a hog had killed one chicken and attempted to kill another, and being found seventy-five yards from where the defendant's chickens usually ran, was destroyed by him, it was *Held* to be error to leave it to the jury, whether the hog was of a predatory character and had the reputation of "a chicken eating hog," and to instruct them, that if such was the fact, any one had a right to destroy it as a public nuisance.

ACTION, trespass *vi et armis* for killing a hog, the property of the plaintiff, tried before HEATH, J., at the last Spring Term of New-Hanover Superior Court.

The defendant relied on the plea of "justification," and proved a special killing by the hog of a chicken and another attempt to do so, in order to establish that the hog in question, had the reputation of "a chicken eating hog.". This evidence was objected to, but admitted by his Honor. The plaintiff excepted.

There was evidence, also, that the hog, when killed, was about seventy-five yards from the public road, near the fence of the defendant, where his chickens were in the habit of running. There was no evidence that the plaintiff knew of his hog's ever having killed a chicken; neither was there evidence that the hog, at the time it was killed, was in the act of doing any deed that would injure the defendant, or his property.

His Honor charged the jury, that if they believed the hog was of a predatory character, and had the character of a chicken eating hog, then, they would find for the defendant, as any man had a right to abate a public nuisance, and it mattered not whether the plaintiff knew of the habit of the hog or not. Plaintiff excepted.

Verdict for the defendant. Judgment. Appeal.

Baker, for the plaintiff.

W. A. Wright, for the defendant.

PEARSON, C. J. We do not concur in the opinion of his Honor as to the right of killing hogs that are in the habit of eating chickens. The position that such a hog is a public nuisance, and may be killed by *any one*, is not supported on principle or authority, and if recognised, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved, for its exercise would stir up the most angry passions, and necessarily result in personal collisions. This Court is of opinion that the owner of the chicken —much less a stranger could not justify killing the hog, although it afterwards comes upon his premises; admitting that a hog that has once killed a chicken, will kill all it comes across, and which it can catch. The range of the animal is limited, its depredations will not extend to the premises of more than one or two individuals, (of whom its owner is apt to be the greatest sufferer): So that there is nothing to support the idea of its being a common nuisance. If the owner of the chicken brings an action for damages, he is required to prove a *scienter*, so as to put the owner of the hog in the wrong for not keeping it up, and it would be strange if a party is at liberty to take the law into his own hands, and redress his supposed grievances, by an extra-judicial remedy, under circumstances, which do not entitle him to a civil action.

It may be the killing will be justified, by proving that the danger was imminent—making it necessary "then and there" to kill the hog in order to save the life of the chicken, or prevent great bodily harm; but we are inclined to the opinion, that even under these circumstances, it is not justifiable to kill the hog. It should be impounded or driven away, and notice given to the owner, so that he may put it up—at all events, this course is dictated by the moral duty of good neighborship.

His Honor, we presume, was misled by a *dictum* in *Dodson* v. *Mock*, 4 Dev. and Bat. Rep. 146. It was held, in that case, "that although the dog had stolen the egg and caught the sheep, and had the other bad habits stated by the witnesses, the defendant was not justified in killing him." This ruling was approved of, and Judge GASTON, as a prelude to a

playful estimation of the several offences, which "had given the dog a bad name," remarks: "It is not denied that a dog may be of such a ferocious disposition, or predatory habits, as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person." No authority is cited for this dictum. It is certainly erroneous in assuming that any person other than one specially incommoded or aggrieved, may abate a common nuisance; 3 Black. Com. 5, and we imagine that dogs of the kind referred to, that behave so badly as to become outlaws, have rarely existed, except "mad dogs." In *Parrott* v. *Hartsfield*, 4 Dev. and Bat. 110, a dog was discovered about sunrise in an enclosed pasture in the act of killing sheep, two were dead and four dangerously wounded. The defendant, the owner of the sheep, went with his gun, the dog escaped, but about two hours afterwards, returned, and was near the pasture fence when the defendant shot and killed it. It was held that these facts made out a justification, on the ground, that the killing was not to punish past wrongs, but to prevent a wrong that was impending, and the same eminent Judge concludes his opinion with the remark, "It hath always been taken for the law, (and universal usage is high evidence of the law) that a sheep-stealing dog, found lurking about, or roaming over a man's premises, where sheep are kept, incurs the penalty of death." The leading case is, *Wadhurst* v. *Damme*, Croke James 45, "Trespass for killing a dog—plea, the defendant was seized in fee of a warren; the dog was divers times there killing conies, and the defendant finding him there, running at conies killed him." By all the Court "the justification is good, because it being alleged that the dog used to be there killing conies, it is a good cause for killing him in salvation of the conies; for having used to hunt the warren, he cannot otherwise be restrained." *Yelverton* doubted, "because it is not alleged that the master was *sciens* of that quality, or had warning given him."

POPHAM, "The common use of England is to kill *dogs and cats* in all warrens, as well as any vermin; which shows that

the law hath been always taken to be that they may well kill them; so, the justification is good." It will be observed that Judge Gaston's *dicta* are enlargements upon this of POPHAM, which is confined to *dogs* and *cats* and *vermin* found in warrens. But taking the law to be, that the owner of sheep is justified in killing a dog that has killed some of them, and is lurking about apparently for the purpose of killing others, it does not support the general proposition laid down by his Honor, even in its application to *dogs*, and there is a marked distinction between a *hog* and a *dog;* the one is roving in his habits and no fence can stop it—it is of no use, if constantly confined, and its service is rather for amusement than profit to man. The other roves but little; is easily restrained by fences; confinement does not destroy its usefulness, but is necessary in order to fatten and make it fit for food, and it is one of the most valuable of domesticated animals. So that "putting it up" is the means usually and readily resorted to when a bad habit is acquired.

It is provoking to see an *old sow* trying to catch young chickens and snapping up one every now and then, in spite of the noises and energetic remonstrances of the hen, but it is not reason, and therefore not the law, that so valuable an animal may be destroyed to save the life of an unfledged chicken; at all events, the danger must be imminent and the necessity be fully made out. In our case, the "defendant proved a special killing by the hog of a chicken and another attempt to do so," and afterwards "the hog, being near the fence of the defendant, where his chickens were in the habit af running, but not in the act of doing any deed that would injure the defendant or his property, was killed by him," the owner having no *scien*s of this quality of the hog, and having no warning thereof given to him. Upon this evidence, his Honor ought to have instructed the jury, that the plea of "justification" was not sustained, and it was error to lay down the general proposition, that the hog had become a public nuisance, which any man had a right to abate by killing. *Venire de novo.*

PER CURIAM, Judgment reversed.

WILLIS P. MOORE *v.* BENJAMIN ROGERS.

Where a party, having the money of a father in his hands for a fair and honest purpose, paid it to his son, fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the father and the assistant, the former allowed the latter's bill for the money thus applied, does not amount to such a ratification as to subject the father.

To subject a party for a tort by force of the maxim *omnis ratihabitio*, &c., it must appear that the act ratified, was of a nature to benefit the party sanctioning it.

CASE, tried before HEATH, J., at the last Term of Columbus Superior Court

The plaintiff declared in two counts, one at common law, and the other under the statute for removing a debtor.

It was in evidence that the plaintiff resided in the county of Robeson, and that D. W. Rogers, a son of the defendant, was also a resident in that county, and indebted to the plaintiff in the sum of $——, and that while so indebted, he went to Wilmington and was there arrested upon a charge of forgery; that the defendant, upon being informed that D. W. Rogers was confined in jail upon this charge, and also on several debts, the writs having been served while he was in jail, sent one Calvin J. Rogers to Wilmington to obtain his son's release from jail, and executed to him a power of attorney for the purpose, and directed him, if he succeeded in getting his son out of jail, to bring him to him; that when he started on this trip, the defendant furnished him with some money with which he was to settle the debts on which the said D. W. had been arrested; that he (the witness) accordingly went to Wilmington and compromised and settled the debts for which D. W. Rogers was in custody; that he did not see Daniel until he was out of jail; that they bought tickets at the depot at the Wilmington and Manchester Rail-road office for Whitesville, which is the station at which persons going to Lumberton, in Robeson county, leave the road; that while they were in the cars between Wilmington and Whitesville, he told

Daniel what instructions he had received from his father in relation to his bringing him back, to which Daniel said he could not bear to see his father, and could not go back; that it was arranged between himself and Daniel that the latter should go to some point in South Carolina, and wait for his trunk, which the witness was to send; that, not having spent all the money that the defendant furnished to him, he let the said Daniel have the remainder, $125, as he said he only had $5; that Daniel at first had insisted on going back to Lumberton, but witness told him he had been advised by counsel in Wilmington that he had better not go to Lumberton; that at Whitesville the witness left the train and went on to Lumberton, leaving Daniel on board, intending to go beyond the limits of the State, and had not been seen or heard of in the State since that time. This witness further swore that when he returned to the defendant without his son, he complained that his instructions had not been followed, and seemed a good deal distressed; that in a settlement which he had with the defendant some time after the transaction spoken of, he had an item for the $125 which he had given to Daniel, which was allowed by the defendant without objection.

His Honor instructed the jury that if the defendant did nothing more than, in the settlement with Calvin J. Rogers, to pay or allow the said sum of $125, which Calvin had given to Daniel W. Rogers, then, if Calvin did aid and assist the debtor to leave the State with intent to defraud his creditors, the defendant was not liable for such acts of Calvin.

Plaintiff excepted to the charge. There was a verdict for the defendant. Judgment in his favor and appeal by the plaintiff.

Kelly, for the plaintiff.
Graham, *J. H. Bryan*, and *Strange*, for the defendant.

BATTLE, J. When this case was before the Court at December Term, 1855, (see 3 Jones' Rep. 90,) the main question considered and decided was, whether the debtor could be re-

garded as having been *removed* from the county of Robeson, within the meaning of the statute. The suit was then against Calvin J. Rogers as well as the present defendant, but after the new trial, which was then granted, a *nolle prosequi* was entered as to *Calvin J. Rogers*, and he was used as a witness for the purpose of endeavoring to show the liability of the present defendant. The question now is, whether the facts stated by him, prove, or tend to prove, that the defendant, in any manner, aided or assisted the debtor (who was his son) to remove from the county of his residence and leave the State. Upon that question we concur with his Honor in the Court below, in thinking that they did not. Whatever aid and assistance was given to the debtor was by the witness alone, for it is manifest that what he did, was not within the scope of his instructions, as agent of the defendant, in procuring the release of his son from the jail in Wilmington. The only thing done by the defendant, which has the least semblance of aiding and assisting the debtor to flee from the State, was the allowance of the item of $125, charged by Calvin J. Rogers, for the money furnished by him to the debtor, out of the sum with which he had been entrusted by the defendant, to settle the debts for which the debtor was detained in prison. To make the defendant liable for this, would be stretching the maxim *omnis ratihabitio retro trahitur et mandato equiparatur*, beyond its legitimate effect. The extent of this maxim, when applied to torts, is thus stated by Lord Coke: "He that receiveth a trespasser, and agreeth to a trespass after it is done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subseqent amounteth to a commandment; for in that, *omnis ratihabitio retro trahitur et mandato equiparatur*, 4 Inst. 317; Broom's Legal Maxims 383, (50 Law Lib. 241). In the present case, whatever wrong was done by Calvin J. Rogers, in assisting the debtor to leave the State, was not done for the use or benefit of the defendant, and his subsequent ratification, (if it can be so considered) of the payment of the money by Calvin to his son, cannot

make him a *tort-feasor* by relation. The judgment of the Court below was right, and must be affirmed.

PER CURIAM, Judgment affirmed.

WILLIAM A. ROGERS *v.* BENJAMIN ROGERS.

Where a father promised the creditor of his son, that if he would go to a distant place and become the bail of his son, who was in a close prison upon a criminal charge, so as to release him from his imprisonment, he would pay the debt which the son owed him, it was *Held*, that, notwithstanding the performance of the service, yet, as the debt against the son was still in force, it was a contract within the statute of frauds, and therefore void.

Where a father promised one, that if he would go to the assistance of his son, who was in prison on a criminal charge, he would pay him for his expenses and services, and would pay him for having gone to his son's assistance previously, it was *Held* doubtful whether, as the two services together formed the consideration of the promise, as to the former services, it was within the statute, but that certainly, no recovery could be had without a previous demand.

ACTION of ASSUMPSIT, tried before HEATH, J., at the last Spring Term of Columbus Superior Court.

The plaintiff declared on a special contract in two counts:

1st. Upon a promise of the defendant, that if the plaintiff would go to Wilmington and become the bail of the defendant's son, one Daniel W. Rogers, who was imprisoned there upon a criminal charge, the plaintiff should lose nothing by what he had done, or should do, thereafter, for the defendant's said son.

2ndly. Upon a promise of defendant, that if plaintiff would go to Wilmington, and become the bail of the defendant's son, the defendant would pay to the plaintiff all the debts which his said son owed him.

It was in evidence, that in the month of February, 1854, Daniel W. Rogers, the son of the defendant, was imprisoned in the jail of New-Hanover county upon a charge

of forgery, and that the plaintiff, at the request and on behalf of the said D. W. Rogers, left his home in Robeson county and went to Wilmington, and after remaining there a day or two, at the request of D. W. Rogers, proceeded to the residence of the defendant in Wake county; that in passing through Raleigh he met with one Buffalow, who expressed a willingness to become the bail of D. W. Rogers, if the defendant would give him a bond of indemity; that a bond was prepared accordingly, which plaintiff took with him to defendant's house, where, in conversation about the matter, plaintiff expressed a fear that he should lose a considerable sum which D. W. Rogers owed him; to which the defendant replied, that *if the plaintiff would go to Wilmington with Buffalow, and become the bail of his son, he should lose nothing by what he had done, or might do for him;* that on the next morning there was another conversation, in which the plaintiff requested the defendant to put his promise in writing, to which the defendant replied, that it was unnecessary, for his word was his bond; and he then called upon the witness to take notice; that "if the plaintiff would go to Wilmington with Buffalow and become the bail of his son Daniel, he should lose nothing by what he had done, or might do for him, and that all the debts which Daniel owed him should be paid;" that soon afterwards, the plaintiff and Buffalow went to Wilmington and became the bail of the said Daniel Rogers, in the criminal case, but there having been certain writs against him for debt in the meantime put into the hands of the sheriff, he was still detained in prison; that soon afterwards the defendant sent an agent, who, acting under a power of attorney, made by plaintiff, had the debts compromised and settled, so that the said Daniel was discharged without giving any further bail; that the said Daniel immediately left the State, and has not since that time returned to it.

It was further in evidence that some months afterwards the plaintiff went to Wake county, and demanded from defendant payment of the amounts owed him by D. W. Rogers, to which defendant replied, he believed his son would pay his

debts, and that it was time enough for plaintiff to talk about his paying, when Daniel failed to pay; to this plaintiff rejoined, that he had not looked to D. W. Rogers for the debts due him since the defendant promised to pay the amount, and added, *that if he had not relied on that promise, he would have done as others had done;* that the defendant then said, if he was not already bound, he should not be; that some short time afterwards, defendant asked the witness, what plaintiff meant by this expression in relation to the course he would have pursued; to which the witness replied, he supposed plaintiff meant that he would have brought suit as others did; to this defendant rejoined, he supposed that was his meaning. The debt of D. W. Rogers to the plaintiff was then proved, and it was further proved, that defendant's agent had paid plaintiff forty or fifty dollars on account of his expenses and services in going to Wilmington.

The Court, in reply to a call for instructions, charged the jury, that according to the evidence, the plaintiff was not entitled to recover for the debt owed by D. W. Rogers to him as demanded in the second count of the declaration. His Honor further charged, that for his services and expenses in going to Wilmington after being requested so to do, he was entitled to recover, but for the services previously rendered, and the expenses incurred at the request of D. W. Rogers, the defendant was not liable. His Honor also adverted to the evidence going to show that forty or fifty dollars had been paid plaintiff on account of services and expenses on the trip to Wilmington, and instructed them, that if they believed that was a fair compensation for such services and expenses, the defendant would be entitled to their verdict. The plaintiff's counsel excepted to these instructions. The jury found for the defendant, and from a judgment in his favor, plaintiff appealed to this Court.

Moore and *Kelly*, for the plaintiff.
Graham, *J. H. Bryan* and *Strange*, for the defendant.

BATTLE, J. That part of the promise of the defendant, by which he undertook to pay the debts of his son was clearly within the statute of frauds, and his Honor was right in holding that the plaintiff could not recover the amount of them, because the promise was not evidenced in writing. The son remained a debtor to the plaintiff, as much after the defendant's promise was made, as he was before, and the promise could have no other effect than to make the defendant answerable for the debts of his son. We are entirely unable to distinguish the case from that of *Britton* v. *Thrailkill*, 5 Jones' Rep. 329, which has been so recently decided in this Court, as to make it unnecessary to refer to any other. That case, like the present, was a suit upon a promise by a father to pay the debts of his son. It appeared upon the trial, that the son was making preparation to leave the State, and the defendant, his father, was desirous to facilitate and hasten his departure. The plaintiff, having debts against the son, was about to take out a bail-warrant against him, when the father promised that if the plaintiff would not do so, but would permit his so to leave the State, he would pay all the debts which his son owed him.— The plaintiff did forbear, and upon the father's failing to perform his promise, the suit was brought to enforce it. A recovery was resisted upon the ground that the promise, not being in writing, was within the statute of frauds. This Court held the objection to be good, saying that the "promise sued on, was, in so many words, a promise to pay the debt of another, which was superadded to the original promise, which remained in full force."

There are many cases in which parol promises, if executed, would, *incidentally* have discharged the debts of another person, and which have yet been decided not to have come within the operation of the statute. These will be found arranged and commented upon in the work referred to by the plaintiff's counsel. See 2 Parsons on Contracts, part 2nd, chap. 4, p. 284. The principles upon which some of these cases have been held to be excepted out of the statute, are so refined as to be almost unfit for practical use. They have so narrowed

the grounds upon which the statute was intended to be based, as to destroy, to some extent, its beneficial effect. But, whether they are to be adhered to or not, we believe that no case has, as yet, gone the length of holding that a parol promise to pay the debt of another, is binding, where the debt remains in full force against the original debtor, notwithstanding the promise. In such a case, no ingenuity of construction can make the promise any thing else than one to be answerable for the debt of another, which is directly and plainly within both the words and intent of the statute.

The other part of the defendant's promise, by which he engaged to pay the plaintiff's expenses in going from the defendant's residence to Wilmington, and such as he might incur in releasing his son from jail, and then returning to his own home in Robeson county, was clearly binding upon the defendant, and his agent accordingly paid them. The expenses of the plaintiff, in his trip to Wilmington were incurred at the request of the defendant's son, and it is contended for the defendant that his promise to pay them stands upon the same footing with that to pay the debts of his son. On the other hand, it is insisted for the plaintiff, that all the expenses of both trips to Wilmington, formed one entire consideration for the defendant's promise, just as if he had agreed to pay a certain sum of money of the same amount with the entire expenses incurred by the plaintiff in his efforts to liberate the defendant's son. It is unnecessary for us to decide which view is correct, for supposing that the plaintiff could recover for the expenses sustained by him antecedent to the defendant's promise, we think that he ought to have given the defendant notice of such claim, and the amount, so that he might have had an opportunity of paying it, in order to avoid the trouble and expense of a law suit. Indeed the defendant's agent did pay the plaintiff forty or fifty dollars on account of his expenses and services in going to Wilmington, and it may be, for all that we can see, that the expenses of both trips were covered by that amount. At all events, we are of opinion that the defendant ought to have had notice, before he was sued, what sum, if any,

beyond the amount paid, was claimed an account of the expenses of the first trip.

PER CURIAM, The judgment must be affirmed.

GEORGE W. LITTLE, *County Trustee, v.* PURDIE RICHARDSON, *Administrator, et al.*

No demand is necessary to be made of a clerk for money which he has received officially, and is bound to pay over.

The act of limitations as to official bonds, Rev. Stat. ch. 65, sec. 8, bars the action for fines and forfeitures after six years, from the end of three months when he is bound to pay over, and not from the time when demand was made.

THIS was an action of DEBT, tried before HEATH, J., at the last Spring Term of Anson Superior Court.

The plaintiff declared on the following official bond, made by A. B. Smith, the defendant's intestate, upon his qualification as clerk of Anson Superior Court.

"Know all men by these presents, that we, Alexander B. Smith, &c., are held and firmly bound unto the State of North Carolina, in the sum of four thousand dollars, to which payment, well and truly to be made, and done, we bind ourselves, our heirs and assigns, jointly and severally, firmly, by these presents. Sealed with our seals, and dated this 25th day of September, *Anno Domini*, 1847.

"The condition of the above obligation is such, that whereas, the above bound Alexander B. Smith, hath been elected clerk of the superior court of law of Anson county: Now, therefore, if he shall well and truly and faithfully pay over and account to the county trustee of Anson county, and due return make, according to law, of all tax-fees, forfeitures and amercements, which may come into his hands by virtue of his office as clerk aforesaid, at the times prescribed by law, then this obligation shall be void and no effect, otherwise remain in

full force." Signed, &c., by the clerk and his several sureties, the other defendants in this case.

After oyer had, the pleas of the defendants were entered, viz.—conditions performed and not broken—statute of limitations barring suits on official bonds after six years from the time the cause of action accrued.

The evidence showed, that on the 10th of September, 1850, after the resignation of A. B. Smith, Nathan Beverly was duly appointed his successor upon giving bond and surety. The writ was issued on the 2nd of September, 1857. The default occurred more than six years prior to suit brought, but no demand was made until two or three days before the suit was brought.

The plaintiff insisted :

1. That the statute of limitations barring suits on official bonds, did not apply in this case.

2. That if it did, it commenced running only on demand. The Court charged the jury against the plaintiff on both these points. Plaintiff excepted.

The jury found that the conditions of the bond had been broken and assessed damages to ——, but that the said breaches had occurred more than six years prior to the bringing of this suit. Judgment and appeal by plaintiff.

Ashe, for the plaintiff.
R. H. Battle, for the defendants.

Battle, J. The bond, for the breach of which this action was brought, was given in the year 1847, and the clerk, who was the principal therein, resigned and went out of office in September, 1850. The case must depend, therefore, upon the provisions of the Revised Statutes, which were not superseded by the Revised Code until the first day of January, 1856.

By the 8th section of the 65th chapter of the Revised Statutes, it is enacted that "all suits on the bonds of sheriffs, constables, clerks of the superior courts of law, clerks and masters in equity, and clerks of the courts of pleas and quarter

sessions, shall be commenced and prosecuted within six years after the right of action shall have accrued and not afterwards, saving, nevertheless, the rights of infants, *femes covert*, and persons *non compos mentis*, so that they sue within three years after their disabilities are removed." The suit in the present case was not commenced until the year 1857, more than six years after the right had accrued, unless, as the plaintiff's counsel contends, such right of action did not accrue until a demand was made, which was only a few days before the writ was issued. The question, then, is, was a demand necessary before the plaintiff, as county trustee, had a right to commence his suit upon the bond of the defendant, Richardson's intestate, for his default in not paying over the money in his hands, to which the plaintiff was entitled. This, we think, is answered by the case of the *State to the use of Moore County* v. *McIntosh*, 9 Ire. Rep. 307. It was there held that no demand was necessary to be made of a sheriff, for public money, which it was his duty to pay over. The principle applies equally to a clerk, who has officially received money for which he is accountable. But the plaintiff's counsel objects, that no particular time is fixed, at which he is to pay over fines, forfeitures and amercements, and that, therefore, he was in no default until he had refused, or neglected to pay upon a demand. The answer to this objection is that, though the condition of the clerk's bond, in the present case, stipulates for the paying over, and accounting for, to the county trustee, fines, forfeitures and amercements as well as tax-fees, yet it seems from the 8th section of the 28th chapter of the Revised Statutes, that it was the duty of the sheriff, and not of the clerk, to collect and account for the former, while to the clerk is assigned, by the 6th section of the same chapter, the duty of receiving and paying over within three months after the receipt thereof, the tax-fees on suits. There was a time fixed then, for a payment by the clerk of the only public moneys which he was to receive and pay the county trustee, and of course, he made a default at the moment when he failed to perform his duty in that particular. This default gave to the

county trustee a right of action upon the clerk's bond, which is barred by not having been commenced and prosecuted within six years.

PER CURIAM, Judgment affirmed.

STATE *v.* WILLIAM PATRICK.

That a person "was generally reputed to be free, and had acted and passed as a free man," can be adduced in a trial to operate *against* him, as well as when such evidence operates in his favor.

THIS was an INDICTMENT against the defendant, as a free negro, for carrying fire arms, tried before SAUNDERS, J., at the last Spring Term of Brunswick Superior Court.

In order to show that the defendant was a free negro, the solicitor for the State, asked a witness whether the defendant passed as and was reputed in the neighborhood in which he lived, to be a free negro. The witness answered in the affirmative. On the question being propounded, the defendant's counsel objected, and on the admission of the evidence, he excepted. To a question of the solicitor, the witness stated he had the appearance, and looked like a negro. This was also objected to, but admitted by the Court, and the defendant's counsel again excepted. Verdict, guilty. Judgment and appeal.

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

BATTLE, J. It is clearly settled that it is evidence in favor of a negro, in a suit for his freedom, that he is generally reputed to be free, and has always acted and passed as a free man. See *Jarman* v. *Humphrey*, ante 28, and *Brookfield* v. *Stanton*, ante 156. If such evidence be admissible to establish the fact of a negro's being free, when it is to operate in his favor,

it seems to us, that it must equally be so when it is to operate against him.

That a man's color may be proved to show that he is a negro, is a proposition too plain to admit of a doubt. *State* v. *Chavers*, 5 Jones' Rep. 11.

PER CURIAM, Judgment affirmed.

STATE v. JOHN B. SIMMONS.

Where, upon the trial of a capital case, the scrolls containing the names of the special *venire* had on them the surnames of the persons, written in full but the christian names were only indicated by initial letters, no objection being made on this account when the scrolls were placed in the hat to be drawn, it was *Held* that this formed no ground of challenge to a juror.

INDICTMENT for MURDER, tried before HEATH, J., at the last Spring Term of Brunswick Superior Court.

A special *venire* was asked for and directed to be issued, under which one hundred jurors were summoned. As each juror came to the book he was challenged by the defendant for cause, and in each case the cause assigned was, that the juror was not indifferent between the State and the prisoner, for that he had formed and expressed the opinion that the prisoner was guilty. By the consent of parties, the Court was permitted to act as trier. Several of the jurors, on being sworn, stated that they had formed and expressed the opinion that the defendant was guilty, but on further examination, they said that this was from rumor only, and that they could listen to the evidence and give the defendant a fair trial, notwithstanding the expression of such opinion. The juror was found indifferent by the Court, and tendered to the prisoner, who peremptorily challenged him. This ruling was excepted to by the counsel for the prisoner.

Several of the names of the panel jurors were placed in the hat to be drawn, the *surnames were written in full*, but the chris-

tian names represented by their initials. No objection was made as these were placed in the hat, but when the names were drawn out, these persons were objected to by the prisoner, because their given names were not expressed in full. The Court overruled the objection, and the jurors being tendered, were challenged peremptorily. The prisoner's counsel excepted. The defendant also excepted that the act of Assembly, reducing the number of challenges from thirty five to twenty-three, was unconstitutional.

There was a verdict for the State. Judgment and appeal by the defendant.

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

BATTLE, J. Two of the objections made by the prisoner on his trial, and set forth by him in his bill of exceptions, have been properly abandoned by his counsel in the argument before us, and we shall not give them any further notice. The only objection upon which the counsel now relies is thus stated, "several of the names of the jurors were placed in the hat to be drawn, the surnames written in full, and the christian names represented by the initials: no objection was made to this, as the names were placed in the hat. When these names were drawn from the hat, to be tendered to the prisoner, his counsel objected that the christian names were not written in full, and therefore these persons could not be permitted to serve on the jury. The Court overruled the objection, and the defendant excepted." We are unable to perceive any force in the objection. The prisoner was not, by our law, entitled to a copy of the panel of the jurors summoned. He had no right to have the names of the jurors shown to him, or read to him, until they were called into the Court for the purpose of being drawn and tendered. He could then see the jurors themselves, and could not be mistaken as to their identity. Had he demanded, or requested, that the christian names should be called in full, instead of their initial

letters, the Court would, no doubt, have so ordered. But in the absence of any such demand or request, his objection to the initials could not avail him, because it did not appear that he was deceived as to the persons, or was at all prejudiced by the names not being written in full. The cases in England, where exceptions, taken in apt time to jurors, on account of variance in names, were sustained, were determined upon the effect of statutes which have no application to a case like the present. See Joy on Juroıs (40 Law Lib. 102–178.) The objection was therefore properly overruled, and as we do not discover any error in the record, it mnst be so certified to the Court below, to the end that the sentence of the law may be pronounced upon the prisoner.

PER CURIAM, Judgment affirmed.

JAMES S. BRIDGERS, *Adm'r.*, *v.* DANIEL C. McNEIL.

Where a sub-agent received from the general government a pension, under an agreement with the pensioner, that one half of it was to be paid to the agent's principal, at Washington City, and before any demand or objection on the part of the pensioner, one half was accordingly paid to such agent, it was *Held* that no action would lie for its recovery from the sub-agent.

ACTION of ASSUMPSIT for money had and received, tried before HEATH, J., at the last Fall Term of Robeson Superior Court.

The jury, by the consent of parties, was permitted to pass upon the damages, subject to the opinion of the Court, whether the verdict should not be set aside and a nonsuit awarded. The damages so assessed were $490.

The facts of the case, as proved by the witnesses, were as follows: The plaintiff showed, that he was administrator of one John Hammand. *Mr. Huske*, the pension agent of the United States Government, for North Carolina, proved that, in 1853, he received from the proper department of the Gov-

ernment, and was authorised to pay over to the said John Hammond $986, and that he paid the same to the defendant on Hammond's power of attorney, he being then alive. A demand and refusal was also proved by the plaintiff.

The defendant proved that he had paid the plaintiff's intestate one half of the sum, less 10 per cent on the amount. The defendant also proved by one *McCollum*, that some time previously to the allowing the pension, he heard a conversation between the defendant and the intestate, Hammond, upon the subject. The defendant told Hammond that he was entitled to a pension, and that he (defendant) was connected with a pension-agent at Washington City, who would or could have it allowed, but that this agent would not move in the premises, unless he should receive one half for his services; that he, defendant, would charge 10 per cent on the other half for *his* services, and that no charge would be made against him, (Hammond) in the event of a failure to get the pension. After some protestation against the exorbitancy of the terms, Hammond agreed to them, saying, "half a loaf was better than no bread." The pension, by the exertions of the Washington agent, was allowed by the department, and deposited with the pension agent at Fayetteville, in this Sate, and the whole drawn out as above stated. One half of this sum was forthwith handed over to the Washington agent, and the other half, minus the 10 per cent, was paid to Hammond. After this, a demand was made by Hammond for the other half, and on refusal, this suit was instituted. No claim was set up in this action for the 10 per cent received by the defendant.

His Honor, on consideration of the matter reserved, ordered the verdict to be set aside, and a nonsuit entered; from which judgment, the plaintiff appealed.

Leitch, for the plaintiff.
Banks, for the defendant.

BATTLE, J. Had the action been brought against the agent

in Washington City, it might have been sustained upon the authority of the case of *Powell* v. *Jennings*, 3 Jones' Rep. 537. But as the defendant paid over the amount, now sought to be recovered, to the Washington City agent, with the assent, if not at the request of the plaintiff's intestate, it cannot now be recovered from the defendant in an action for money had and received. This case is very analogous to the deposit of money with a stake-holder, on an illegal wager, which cannot be recovered from the stake-holder, by the loser, if, at his request, or by his consent, it has been paid over to the winner. But if it had been demanded of the stake-holder, before he paid it to the winner, the loser might recover it back. See *Wood* v. *Wood*, 3 Murph. Rep. 172, and *Forest* v. *Hart*, Ibid, 458, and the cases there cited. We do not discover any error in the judgment and it must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN F. LEE, *et al*, *v.* ABRAHAM SHANKLE, *et al.*

A private act of the Legislature is in the nature of an assurance at common law, and must depend upon the consent of persons *in esse* whose property is to be affected by it.

A private act of the Legislature declaring a bastard to be legitimated, and to be the heir and next of kin of a particular person, by implication excludes the idea of his being the lawful heir or next of kin of any other person.

THIS was a petition for the reprobate of a will, heard before HEATH, J., at the last Term of Anson Superior Court.

The petition sets forth that the petitioners, John F. Lee, Elizabeth Kendall, wife of David Kendall, Luke M. Lee, Richard A. Lee, Mary F. Lee, and Pinckney Lee, are the children of George P. Lee, who was the son of John Lee, the father also of the testatrix, Winney Lee, and that their father was the brother of the said Winney; that the will of the said

Winney was admitted to probate at the ——— term of the county court of Anson, and that they, being next of kin, and heirs at law, had no notice of the proceedings; and that George P. Lee died prior to the death of Winney Lee.

The defendants admit that the petitioners had no notice of the probate of the will in question, and insist, in their answer, that they had no right to such notice, because their father, George P. Lee, was illegitimate, having been born out of wedlock, and that his children could have no interest in the estate of the decedent, Winney.

The petitioners admit the fact that George P. Lee was born out of wedlock and was illegitimate; but they insist that he was legitimated by a private act of the Legislature of North Carolina, passed at its session of 1828, which is as follows:

"An act to alter the name of George Pinckney Coppedge, an illegitimate son of John Lee, of Anson county, and to legitimate him."

"*Be it enacted, &c*, That from and after the passage of this act, George Pinckney Coppedge, an illegitimate son of John Lee, of Anson county, shall be known and called by the name of George Pinckney Lee, and by that name may sue and be sued, plead and be impleaded, and receive and take property by descent or distribution.

"*And be it further enacted*, That the said George Pinckney Coppedge be, and he is hereby declared legitimate, and capable in law to take and inherit property as heir of the aforesaid John Lee, in as full and ample a manner as if he had been born in lawful wedlock; any law to the contrary, notwithstanding.

There was no evidence at whose instance this private act was passed.

It was insisted on behalf of the petitioners, that this act not only made George P. Lee the heir and next of kin to his father, John Lee, but also to Winney Lee, who was the legitimate daughter of the said John Lee.

A motion is made to dismiss the petition on the ground

that, whatever effect the private act may have had in making the father of the petitioners legitimate as to John Lee, it neither purports to make them legitimate, nor him so, as to any other person than the said John; that, therefore, the petitioners had no interest in the estate of Winney Lee, as they must claim through their father, G. P. Lee.

The Court was of opinion that the objection was well taken, and the petition was ordered to be dismissed. From which judgment, the petitioners appealed.

R. H. Battle, for the petitioners.
Ashe, for the defendants.

BATTLE, J. This case comes directly within the principles decided by this Court in the cases of *Drake* v. *Drake*, 4 Dev. Rep. 110, and *Perry* v. *Newsom*, 1 Ired. Eq. Rep. 28, and must be governed by them. These principles are, that private acts of the Legislature are in the nature of assurances at the common law, and that, therefore, their operation is meant to depend on the consent of those persons who are in *esse*, and whose estates are the subjects of the acts. Hence, where no person is mentioned in an act of legitimation of a bastard as his father, and there is no declaration as to whom he shall be legitimate, the act will be entirely inoperative in giving him a capacity to take property by descent, or by succession *ab intestato*. But if he be declared to be the son of a particular person, he may take from him, and from him only, as the heir or next of kin. Upon the authority of these decisions, we should hold that George P. Lee, the father of the plaintiffs, might have taken property by descent or distribution, from his father, John Lee, under the first section of the private act in question. The second section gave him no greater capacity, but on the contrary, by declaring to whom he should be rendered legitimate and made an heir, it, by strong implication, excludes him from being a lawful heir to, or taking property, either real or personal, from any other person. The judg-

ment of the Court below was, therefore, right, and must be affirmed.

PER CURIAM, Judgment affirmed.

MARY TAYLOR *v.* ALONZO T. JERKINS.

A sale of the franchise of a corporation, under the 10th section of the 26th chapter of the Revised Code, must be predicated on a bid for the entire sum demanded in the execution, with costs, and the only competition allowed by said act, is, as to who will take the income for the shortest length of time, *paying the whole debt and costs*, demanded in the execution.

Where, therefore, the bid was for a small fraction of the debt, though for a term far short of the limit of the franchise, it was *Held* that the sheriff had no power to convey the franchise to the bidder.

ACTION of ASSUMPSIT, tried before HEATH, J., at the Fall Term, 1858, of Craven Superior Court.

The action was brought by the plaintiff, to recover certain tolls for the transportation of produce on the Neuse River, alleging that she had bought the franchise and right of receiving toll, that had theretofore belonged to the Neuse River Navigation Company, and the only question considered by this Court, was, whether she had so purchased the right of the corporation. Upon that point, the plaintiff showed the recovery of a judgment, for $1616, in favor of R. N. Taylor, and a writ of *fieri facias*, commanding the sheriff, that of the goods ands chattels, lands and tenements of the Neuse River Navigation Company, he cause to be made, &c. On which writ, was endorsed as a return of the said writ, by the sheriff, as follows: "Levied, this April 29th, 1856, on the Neuse River Navigation Company's right and franchise, in and on the river Neuse, locks and dams, and all appurtenances thereunto belonging, or in any wise appertaining to the said company," and further, was endorsed thereon as follows, "Sold for $10." The plaintiff then offered in evidence, a deed from

Norman Jackson, the sheriff of Craven county, professing to "grant, bargain, sell, alien, set over and confirm to the said Mary Taylor, her executors, &c., all the said estate, right, claim and franchise of the said Neuse River Navigation Company before mentioned, as levied on and sold, with every privilege and appurtenance, to have and to hold the same, to the said Mary Taylor, &c., for and during, and until the full end and term of eighty-nine years." The extent of the franchise, as it appeared from the charter, is perpetual.

R. N. Taylor, a witness for the plaintiff, stated that he attended the sheriff's sale of the franchise in question, and as the agent for his mother, bid it off for $10, to have it for eighty-nine years, and that was the lowest bid, as to time, for which the franchise would be taken.

Among various other objections to the plaintiff's right to recover, the following is only deemed to be material: "5th. That the plaintiff never purchased the franchise of the Neuse River Navigation Company, or bid the same off by herself or agent; that she never satisfied the execution, or took the said franchise for the shortest period of time to receive such tolls and fare as the said company would, by law, be entitled to demand, and was not the highest bidder for the same."

The Court being of opinion that the plaintiff was not entitled to recover, ordered a nonsuit, from which she appealed.

Haughton, *McRae* and *E. G. Haywood*, for plaintiff.
Badger, *J. W. Bryan*, *Stephenson*, *Donnell* and *Greene*, for defendant.

BATTLE, J. Upon the trial, the right of the plaintiff to recover was resisted, upon many grounds, one of which, is so clearly fatal to the action, that we have deemed it unnecessary, if not improper, to consider any other. The 5th of the defendant's grounds of objection is thus stated: "That the plaintiff never purchased the franchise of the Neuse River Navigation Company, or bid the same off by herself or agent;

that she never satisfied the execution, or took the said franchise for the shortest period of time, and to receive such tolls and fare, as the said company would, by law, be entitled to demand, and was not the highest bidder for the same." In order to understand the force of this objection, it is necessary to premise, that prior to the enactment of the Revised Code, the franchise of a corporation, such as that of a railroad or navigation company, could not be levied upon and sold under a writ of *fieri facias*, or any other writ of execution, known either to our common, or statute law. In the celebrated case of *State* v. *Rives*, 5 Ire. Rep. 306, the Court say. "We agree that the franchise itself (that is of the Portsmouth and Roanoke Rail Road Company) cannot be sold. It is intangible and vested in an artificial being of a particular organization, suited, in the view of the Legislature, to the most proper and beneficial use of the franchise; and therefore it cannot be assigned to a person, natural or artificial, to which the Legislature has not committed its exercise and emolument." After stating that though the franchise of the corporation could not be taken and sold under execution, any vested property it might have in any thing tangible, either personal or real, might be so seized and sold, however useful, or even indispensable it may be to the enjoyment of the franchise, the Court add: "It may be very unfortunate, and cause much loss, in a pecuniary sense, to arrest the exercise of a franchise, by depriving its proprietor of an estate, or thing needful to its exercise, when of the two, the franchise, or the tangible thing, the former is much the more valuable. We regret, sincerely, that it has hitherto escaped the attention of these companies and of the Legislature, that some act was necessary, in order that such sales, when unavoidable, might be made with the least loss to the debtors, and the greatest advantage to the creditors, and purchasers, by providing for keeping the franchise with the estate. Or, if it so please the Legislature, an act might provide for putting the road into the hands of a receiver and subjecting the income to the cred-

itors, instead of the estate in the land, stripped of the franchise."

The intimation thus thrown out from such high authority, no doubt induced the Legislature, in enacting the Revised Code, to provide for the sale of the franchise of a railroad or other corporation, under a writ of *fieri facias*, issuing on a judgment or decree against it. This is done by the ninth and several subsequent sections of the 26th chapter of the Revised Code, concerning "Corporations." The ninth section declares that the franchise of the corporation "with all the rights and privileges thereof, so far as the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold under the rules regulating real estate." By the tenth section, which is the one upon which the question in the case arises, it is enacted as follows: "In the sale of the franchise of any corporation, the person who shall satisfy the execution, with all costs thereon, or who shall agree to take such franchise, for the shortest period of time, and to receive during that time all such fare and toll as the said corporation would by law be entitled to demand, shall be considered as the highest bidder." The plaintiff claims to be the purchaser of the franchise of the Neuse River Navigation Company, at an execution sale of the same upon a bid far below the amount of the execution and costs, and the question is, can she be considered as the highest bidder within the meaning of the above recited section of the act. The plaintiff's counsel contend that she can, and they insist that a fair construction of the section is, that the officer who conducts the sale, must offer the franchise until he gets the highest bid which any person present is willing to make, and that he is then to offer the franchise to any person who is willing to take it for the shortest time at that price. In other words, his auction is to be a singular compound of the English and the Dutch; beginning with the former and ending with the latter. There are two fatal objections to this construction. One is, that it loses sight altogether of the requirement to pay and satisfy the execution and costs. The second is, that until the execution and

costs are satisfied, the sheriff or other officer will, whenever the bid is for a period of the franchise short of the whole duration, have to go on selling it out by piece-meal, until the whole is disposed of. Such a mode of selling, certainly, was never in the contemplation of the Legislature. It cannot be denied that the language of the section is somewhat obscure, and this obscurity is caused by the attempt of the writer to make it concise; but by attending to the object which he had in view, we can discover, with unerring certainty, the meaning of the provision. A prominent purpose was, undoubtedly, to have the execution and the costs thereon satisfied by the sale of the franchise. To accomplish this purpose, the section distinctly designates two persons, either of whom, may, according to the circumstances, be the highest bidder, and therefore, the purchaser. The first is the person who, if there be no other bidder, will take the corporate franchise for the whole period of its existence upon the terms of paying off the execution and costs. But if any other person will, upon the same terms of paying the execution and costs, take the franchise for a shorter period, then he shall be considered to be the highest bidder, and therefore the purchaser. The section consists of only one sentence, and that is manifestly eliptical. If expressed without the elipsis, the sentence will read thus: In the sale of the franchise of any corporation, the person who shall satisfy the execution, with all costs thereon, shall be considered the highest bidder: Or the person who, upon paying such execution and costs, shall agree to take such franchise for the shortest period of time, and to receive during the time all such fare and tolls as the said corporation would by law be entitled to demand, shall be considered the highest bidder. Thus expressed, the object of the Legislature is obvious, and its meaning clear beyond a doubt. Neither the judgment creditor, nor any other person can become a purchaser under the execution, unless he satisfied it, together with all the costs thereon; but by paying the execution and costs, he may become the purchaser unless some person will over-bid him by agreeing to take the franchise upon making the same payment

for a shorter period, and he who will take it for the shortest period, shall, in the language of the act "be considered as the highest bidder." If this construction of the section be correct, (and about that we have no doubt) the plaintiff was not a purchaser of the franchise which she claims, and consequently her action fails. She was therefore, properly nonsuited, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

DAVID J. SOUTHERLAND *et al v.* ROBERT D. JONES *and wife.*

In an action of WASTE, where the title of the plaintiff to the place wasted, is set forth as *a devise of a remainder in fee*, and the proof was, that he was entitled to *a reversion in fee by descent*, subject to a power of sale, it was *Held* that the variance was fatal.

THIS was an action of WASTE, tried before HEATH, J., at the last Spring Term of Duplin Superior Court.

The writ in this case was as follows:

"State of North Carolina. To the sheriff of Duplin county —Greeting: You are hereby commanded to take the bodies of Robert D. Jones and Mary Jane Jones, his wife, if to be found in your bailiwick, tenants of the following described tract of land, situate in the county of Duplin, viz., beginning at, &c., (describing it by metes and bounds) and them safely keep, so that you have them, &c., then and there to answer David J. Southerland and his wife, Caroline, (and others, naming them) in whom the right of the aforesaid lands, of which the aforesaid Robert D. Jones and wife, Mary Jane, are tenants for life, by virtue of a certain devise to said Mary Jane, remainder in fee to the said Caroline, &c., contained in the last will and testament of Thomas Sheppard, of a plea wherefore, seeing, that the said Robert D. Jones and wife, Mary Jane, have *committed waste* of the aforesaid lands and tenements,

the said David J. Southerland and wife, &c., shall not have judgment, as well for the damages for the said *waste*, so committed, as the recovery of the lands and tenements so wasted, according to the force and effect of the statute, wherein it is provided that in all cases of waste, an action shall lie at the instance of him, in whom the right is, against all persons committing the same, as well tenants for term of life, as tenants for term of years, as guardian. Witness, &c." The declaration was in conformity with the writ.

The plaintiffs gave in evidence, the will of Thomas Sheppard, and claimed title to a remainder in fee, under it. The clause relied on, as constituting their title, is as follows: "My will and desire is, at the death of my wife, all my lands be sold, and the money arising from such sale, be divided among all my children now living." The plaintiffs are the children and husbands of the female children mentioned in the above clause.

It was insisted that this evidence did not support the declaration, and it was objected to by defendants' counsel, and a nonsuit moved for. The Court, by consent of the parties, reserved the question of law, with the power of setting aside the verdict and entering a nonsuit, should the Court be against the plaintiffs on the point reserved. Under the further evidence and instruction of the Court, the jury assessed damages for waste done, in two several places, on said land, which are described in the verdict.

Afterwards, the Court being of opinion against the plaintiffs, set aside the verdict, and ordered a nonsuit. From which plaintiffs appealed.

W. A. Wright, for plaintiffs.
London and *Houston*, for defendants.

BATTLE, J. In one clause of his will, Thomas Sheppard devised the land, upon which the waste was alleged to have been committed, to his wife, for life, and in a subsequent clause he adds, "My will is, at the death of my wife, all my land be sold, and the money arising from such sale, be divided among all

my children now living." The plaintiffs, who are the children and the husbands of some of the femes, claim in their writ, that they are tenants in fee in remainder as devisees, under the clause of the will, above referred to. His Honor, in the Court below, was of a different opinion, and we agree with him, that the plaintiffs did not take by devise, but by descent. The land, itself, is not given to the plaintiffs, but, at the death of the devisor's widow is directed to be sold, and the proceeds to be divided among his children. During the life of the widow, the land is clearly not disposed of by the will, but descends to the devisor's heirs in fee, subject to the power of sale at the widow's death.

The question, then, remains whether the misdescription of the title of the plaintiffs, in the action of waste, is fatal to their right of recovery. Upon that question we concur with his Honor, as we find that his opinion is well sustained by authority.

The action of waste has become nearly obsolete, both in England and in this State, and is almost entirely superseded by the action on the case in the nature of waste. The reason of this is, that the latter form of action is much more convenient, and applicable to a much greater number of circumstances than the former, as is shown in the recent case of *Dupre* v. *Dupre*, 4 Jones' Rep. 387, and by the authorities therein referred to. The old writ of waste, may, however, still be used, as it is certainly in force in this State; *Brown* v. *Blick*, 3 Murph. Rep. 511; 1 Rev. Stat. ch. 119; Revised Code, ch. 116. When brought, it must be governed by the rules established for it in England, whence we obtained it.

In Serjeant Williams' note 2, to 2 Saund. Rep. 235, it is distinctly stated that "The declaration in waste must show how the plaintiff is entitled to the inheritance;" in illustration of which, he gives several instances. If it be necessary to state the plaintiffs' title correctly, it follows, that it must be proved as laid. In the present case, the title of the plaintiffs is set forth in their declaration, as a devise of a remainder in fee, while their proof shows it to be the descent of a

reversion in fee, subject to a power of sale. The variance is fatal.

PER CURIAM. Judgment affirmed.

TAYLOR, DICKSON, GRAVES & CO. *v.* KELLY, NEWKIRK & CO.

Where a sheriff, having an execution in his hands, without the privity of the plaintiff, receives *judgments on sundry persons* in satisfaction, but makes no entry on the execution, nor return thereof, it was *Held* not to be a satisfaction of the writ.

APPEAL from the County Court of Duplin on a RULE upon the plaintiffs to show cause why an execution, issued by the County Court of Duplin, and returnable to October term of that Court, should not be set aside, heard before HEATH, J.

The defendants offered in evidence a receipt, of which the following is a copy: "Received of L. A. Merriman four hundred and forty-nine dollars 25-100, in full of an execution in my hands for collection, in favor of Kelly, Newkirk and Co. *v.* Thomas E. Shepherd and O. R. Hallingsworth, in Duplin County Court, returnable to October term, 1857.

Signed, JOHN D. ABERNATHY, Sh'ff."

October 23d, 1857.

The defendants proved by Merriman that he settled the execution in favor of the present defendant as described in the above receipt, by paying to the sheriff two hundred dollars in money, and the balance in judgments against sundry persons; that the sheriff stated at the time of the settlement that he had the execution in favor of the present plaintiffs against the present defendants, and it was understood between him and the present defendants, that the execution against the latter was to be satisfied by his collecting the execution against Shepherd and Hallingsworth. It further appeared that this settlement took place during court week, while the executions were in the sheriff's hands, in October, 1857. The sheriff did not

return the execution. His Honor, upon hearing the cause, allowed a satisfaction of the judgment to be entered to the amount of two hundred dollars, being the amount of the money received by the sheriff, and disallowed the balance, being the judgments received by the sheriff in the settlement. From which order the defendants prayed an appeal, which is allowed.

London and *Houston*, for the plaintiffs.
W. A. Wright, for the defendants.

BATTLE, J. We are of opinion that the defendants have no just cause of complaint against the judgment which was rendered in the Court below. Had the sheriff returned the exetion in favor of the plaintiffs with an entry "of satisfied" endorsed thereon, the plaintiffs would have been bound by it.—Or had money been paid to and received by the sheriff in satisfaction of the execution, it would have been discharged, whether the fact of payment were endorsed or not, and the plaintiffs would not have been authorized to take out an *alias; Murrell* v. *Roberts*, 11 Ired. Rep. 424; *Hammett* v. *Wyman*, 9 Mass. Rep. 138. But as the sheriff did not receive from the defendants payment in money, and made no entry of satisfaction on the execution in favor of the plaintiffs, the question arises, were they bound by the act of the sheriff in taking "judgments against sundry persons" in lieu of money? We are decidedly of opinion that they were not. These judgments were not articles which the sheriff had the power to sell under plaintiffs', execution. *Pool* v. *Glover*, 2 Ired. Rep. 129, and it could not therefore be deemed to have been satisfied by them.

As the plaintiffs have not appealed from the order directing satisfaction to the amount of two hundred dollars to be entered on their judgment, we cannot, and do not decide, whether the order was rightfully made or not. The judgment from which the defendants appealed, was, as we have shown, proper and must be affirmed.

PER CURIAM, Judgment affirmed.

JED. H. LINDSAY, *Trustee, v.* JOSEPH D. McCULLOCH.

A contract between parties cannot be implied in opposition to direct evidence, that the defendant did not get the property from the plaintiff, and does not hold it under him, but adversely, upon a claim of right in himself derived from another person.

ASSUMPSIT, tried before CALDWELL, J., at the last Term of Guilford Superior Court.

The action is assumpsit for $175, the price of a horse sold and delivered by the plaintiff to the defendant, with a count on a *quantum valebat.* On the general issue pleaded, the evidence was: that in 1856, the firm of Rankin & McLean, of Greensborough, put into the possession of one Hath, as their agent, two horses, three mules, a wagon and gear, and a lot of tobacco, for the purpose of being taken off for sale, with instructions to make the sales and apply the proceeds to the payment of a certain debt which they owed in Fayetteville, and the surplus to the payment of any other note of theirs, which had become due. Hath sold all but two of the mules, and he exchanged those for the horse in question, about the middle of January, 1857. On the 27th of January, 1857, Rankin & McLean failed and made a general assignment to the plaintiff, for the benefit of their creditors to an amount much exceeding the value of all their effects. The deed included specifically the several articles delivered to Hath for sale, and, if sold by said Hath, is assigned the proceeds of those sales, and also, contained a clause conveying and assigning all their effects, debts and securities. Rankin & McLean were indebted to the defendant in a bond for $277 76, with interest from April 2nd, 1854, and, on hearing of their assignment, the defendant, with a view to saving his debt, went from Greensborough in search of Hath and met him in Randolph county, and, after informing Hath of the failure and assignment of Rankin & McLean, it was agreed between them that the defendant should purchase the horse at the price of $175, payable in ninety days, and that he should give a note therefor

payable to Rankin & McLean. Before the note was given, or the horse delivered, Hath informed the defendant of the authority he had to apply the proceeds of the property in his hands to the debts of Rankin & McLean, and it was then agreed between them, that, instead of giving his note for the price, the defendant should credit the amount on the bond he held, and give Hath a receipt therefor. That being done, Hath delivered the horse to the defendant, and in a day or two afterwards, delivered the defendant's receipt to the plaintiff. Some short time afterwards, the plaintiff demanded of the defendant that he should deliver to him the horse, or pay him the price, but the defendant refused to do either, alleging his purchase from Hath in part payment of the debt which Rankin & McLean owed him, and this suit was then brought, March 27th, 1857.

On the part of the defendant, it was insisted that upon these facts the action would not lie. But the presiding Judge held the contrary, and under his instructions, the jury found a verdict for the sum of $175, and the interest thereon, and the defendant appealed.

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

RUFFIN, J. The Court is of opinion with the defendant.—There was no special agreement but that between the defendant and Hath, as the agent of Rankin & McLean; and on that the plaintiff cannot recover, because he disaffirms it, and also because, by it the defendant was not to pay money for the horse, but to allow Rankin & McLean a credit on their bond. That contract being thus put out of the way, there is no contract to be implied between these parties from any thing that appears in the case, assuming the property of the horse to be in the plaintiff. If the defendant had converted the horse by a sale, and received the price, the owner might have assumpsit for money had and received. For convenience and the promotion of exact justice, it has, for a long time, been

held that the *tort* may be waived, and an action sustained upon the implied promise to pay the owner the price received for his property. But beyond that, the courts cannot proceed, without subverting the very foundations on which the distinctions between actions rest. The law cannot infer a promise to pay the value of property, as upon a sale and delivery to the defendant in the teeth of express proof that he denied the property to be in the plaintiff, and took it by force. It is argued, indeed, that from the possession and use of things belonging to another, a promise may be implied to pay for them, the owner electing not to sue in tort, and to suppose a sale.— But, if that can be true in any case, it is certainly not, when it appears affirmatively, not only that the defendant did not contract with the plaintiff, but that he purchased from another person, and that he took the possession under the purchase, and claimed to use the thing as his own, by force of that express contract. There is no precedent in this State of such a use of the action of assumpsit, nor are we aware of any English adjudication to sustain it. There is a case in which the master was allowed to recover in this form of action for the services of his apprentice, against a person who had seduced him, and promised to give him wages. That case has been said to carry the doctrine to the utmost extreme, and it seems to us, that it did. But, possibly, it may be sustained upon the idea that, as his services belonged to the master, the latter might treat the service of the apprentice, while in the employment of the seducer, as work and labor done by the master through his servant. So, in *Hill* v. *Perrott*, 3 Taunt. 274, the defendant fraudulently took an insolvent person to the plaintiff, and by false representations induced the plaintiff to sell goods to the insolvent, and the goods went immediately into the possession of the defendant, and it was held that assumpsit would lie. But that can only be supported on the idea that, by reason of the gross fraud, the Court took the contract to have been with the defendant in reality. But from those cases, thus turning on peculiar circumstances, no general principle is to be deduced, that the distinction between ac-

tions is abrogated so far as personal property is concerned, and that those founded on tort and contract, are concurrent remedies. A contract between parties cannot be implied in opposition to direct evidence that the defendant did not get the property from the plaintiff, and does not hold it under him, but upon a claim of right in himself, derived from another person. Presumptions must yield to positive proof to the contrary.

A case in Tennessee, that of *Alsbrook* v. *Hathaway*, 4 Sneed's Rep. 454, was cited for the plaintiff, and it must be admitted to be full and direct to the point. The facts are not stated in the report, but the doctrine is distinctly held by the majority of the Court, that every conversion of goods will support assumpsit, or debt, for the value, as well as trover.— To that doctrine, this Court cannot assent, and the dissenting opinion of Judge McKinney refutes it by a short, and unanswerable argument, as it seems to us.

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

JOSEPH W. WYNNE, *by his next friend, v.* CHARLES LATHAM.

Indebitatus assumpsit will not lie for the hire of slaves, where it is clear, from the facts, that the defendant derived his possession and title from another person than the plaintiff, under whom he claimed the slaves adversely to the plaintiff and all the world.

The case of *Lindsay* v. *McCulloch*, (ante 326,) cited and approved.

Action of assumpsit, tried before Saunders, J., at the last Term of Washington Superior Court.

Samuel Simmons was the guardian of the plaintiff, an infant, and, on 1st of January, 1856, he offered a number of slaves for hire for the year 1856, to the highest bidder, the hirer to give bond and sureties for the hire. Simmons bid off

two of the slaves and took them into his service, and on 21st of February, he conveyed them for the residue of the year, and all his other property, by a general deed of assignment to the defendants, upon trust, for the satisfaction of his creditors, and the defendants took the slaves into their possession and worked them for the purposes of the trust, to the end of the year 1856.

In July, 1856, Simmons was removed from his guardianship, and the gentleman, who instituted this suit, as the next friend of the plaintiff, was appointed in his stead. Before the action was brought he gave notice to the defendants, that he should hold them responsible for the hire from the date of the deed of trust, to the end of the year, and upon their refusing to pay, the writ was sued out on 20th of May, 1857. The declaration was upon an indebitatus assumpsit for the hires, for the period mentioned, and upon non-assumpsit pleaded, the foregoing facts were agreed on, and a verdict taken for the plaintiff for $303, subject to be set aside and a nonsuit entered, if, in the opinion of the Court, the action would not lie. The Court ordered a nonsuit, and the plaintiff appealed.

E. W. Jones, for the plaintiff.
Garrett, *Hines* and *H. A. Gilliam*, for the defendants.

RUFFIN, J. The judgment must be affirmed. Without enquiring whether Simmons, as hirer, or guardian, could, or could not convey the slaves, so as to vest the right in his alienee for the residue of the year, and upon the hypothesis that he could not, still the Court is of opinion that the plaintiff cannot maintain assumpsit against the defendants for the hire during that period. That action will only lie on a contract, express or implied, and the contract here, is supposed to be one of the latter kind. But the law cannot imply a contract between these parties, when it is clear, from the facts stated, that the defendants derived their possession and title from another person, under whom they claimed the slaves adversely to the plaintiff and all the world. The point is the

the same as that decided in *Lindsay* v. *McCulloch*, at this term (ante 326); and supposing the plaintiff might have maintained trover or detinue, yet, he cannot maintain debt or assumpsit.

PER CURIAM, Judgment affirmed.

JANETTE McALISTER *v.* CORNELIA W. HOLTON.

Where A, supposing he had only a life-interest in a female slave and her two children, but in fact owned the entire property in the slaves, made a deed to his brother B, reciting that he owned such life-interest, and had procured it from B, and added, "which right and title I relinquish to him," the said B, "and her two children, Valentine and Caroline also," it was *Held* that only a life-estate, in the slaves, passed by such deed.

ACTION of DETINUE, for slaves, tried before HEATH, J., at the last Spring Term of Richmond Superior Court.

The declaration was for the detention of six slaves, the increase of a woman named Nicey. The following

CASE AGREED,

was submitted for the judgment of the Court:

On the 2nd of November, 1813, John McAlister conveyed to Sarah McAlister, his sister, by deed of gift, as follows:

"State of North Carolina, Richmond:

"Know all men by these presents, that, I, John McAlister, of the aforesaid county, for and in consideration of the love and affection, which I have for my sister, Sarah McAlister, do give unto her a certain negro girl, slave, named Nicey, during my said sister's natural life, and in case she has a lawful issue of her body, I give the said negro girl and her increase to her, and her heirs, and in case she, my said sister, dies without a lawful issue as aforesaid, she is to enjoy the said negro during her natural life as aforesaid, and at her death, to return to my own children as their right, to be

equally divided betwixt the whole living of my first children, John Alexander and Janette McAlister."

On the 1st of August, 1829, Sarah McAlister, by deed, bearing that date, conveyed as follows to the said John McAlister, viz:

"I, Sarah McAlister, having a life-time right from my brother, John McAlister, for a certain negro woman, named Nicey, which right and title I relinquish to him, the said John, his heirs and assigns, and her two children, Valentine and Caroline also; for value received. Given under my hand and seal, &c."

On the 20th of September, 1844, the slaves, aforesaid, still being in the possession of Sarah McAlister, the said John McAlister, by deed, bearing that date, conveyed to his daughter, Sarah Ann McAlister, as follows:

"Know all men by these presents, that I, John McAlister of the county of Richmond, and State of North Carolina, from the full and perfect love, which I have for my youngest daughter, Sarah Ann McAlister, and the further consideration of seventy-five cents, to me in hand paid, by her mother, before the ensigning and sealing of these presents, do, by these presents, give unto the said Sarah Ann McAlister, her heirs and assigns for ever, a certain negro girl, named Caroline, between the age of ten and twenty, with her increase, to her, the said Sarah Ann McAlister, and the heirs of her own body, and in case the said Sarah Ann McAlister shall die before she shall have an heir of her own body, then, it is my wish and desire, that my grand-child, Cornelia Wallace McAlister, shall have and possess the aforesaid negro girl, Caroline, and her children, as though she had never been given as aforesaid to my said daughter," with a limitation over, on the death of the said Cornelia without issue.

On the 17th of January, 1859, Sarah McAlister, the sister of the original donor, John, conveyed her reversionary interest in the slaves in question, who are Caroline, the daughter of Nicey, and her five children, to the plaintiff, Janette, who was her niece; and the only question arising upon this con-

veyance, (which is the main question in the case) is, whether there was any reversion in the said Sarah to convey, or whether, by the deed of 1829, she and her increase passed, in full and entire property to John McAlister.

Upon this state of facts, his Honor, JUDGE HEATH, gave judgment for the plaintiff, and the defendant appealed to this Court.

Banks, for the plaintiff.
Winston, Sen., for the defendant.

PEARSON, C. J. Assuming that the recital of the fact, that the title of the bargainor was derived from John McAlister, is a sufficient reference to the deed of 1813, to constitute it a part of the deed of 1829, for the purpose of construction, according to *Ritter* v. *Barrett*, 4 Dev. and Bat. 133, and assuming also, that the legal effect of the deed of 1813, was to vest in Sarah McAlister, the absolute estate, and not an estate for life only, as is admitted on both sides, it would be a matter of regret, if the legal effect of the deed of 1829, is to pass to John McAlister, the absolute estate; for it is manifest, that at the time Sarah McAlister executed the deed, she supposed she was entitled only to a life-estate. That was all she was paid for, and all she thought she was selling, and if more passed, she has not been paid for it, and John McAlister got more than he bargained for.

After giving to the very interesting and ingenious argument of Mr. Winston, full consideration, the Court is of opinion that the legal effect of the deed of 1829, is to pass only an estate for the life of Sarah McAlister. The substance is, "I am entitled to a life-estate, under the deed of 1813, executed to me by John McAlister, *which* right and title, I hereby convey to him for value received." "Which," as a relative pronoun, refers to the *life-time* estate, and restricts the operation of the deed to it. Had general terms been used, e. g. "I sell the negroes" or "all my estate" or "all my right and title," there is no doubt that the absolute estate would have

passed, although she supposed she had a life-estate only, and intended to sell no more than she thought she had a right to sell. Thus the use of a simple term, with a single eye to the object in view, has saved to her the benefit of the fact that, without knowing it, she was, in truth, the absolute owner of the slaves.

It was said in the argument that to sell an estate for one's own life, leaving the ulterior interest undisposed of, when, of course, the price must be very small, is so contrary to the ordinary course of dealing, that the Court ought to be slow to admit such a construction. True! but the force of the suggestion is met, and made to recoil, if, in point of fact, the vendor believes he has only an estate for his own life; for then, supposing the slaves to consist of a woman and two young children, it is reasonable for the tenant for life to be willing to sell for a low price, and get rid of the charge. That such was the belief of the vendor in our case, is set forth in the very first clause of the deed.

Yielding the question as to the woman, Mr. Winston insisted that a different construction should be made in respect to the children. The distinction is not tenable. The disposition of the children is made by the words "*and* her two children also." Two conjunctions are used. The word "also" is added to express the meaning more distinctly, that the children are to pass as well as the mother, and in like manner. There is no error.

PER CURIAM, Judgment affirmed.

Den on the demise of FRED'K BRYAN *et ux et al v.* SARAH MANNING.

Where a petition to sell lands, at the instance of a guardian, alleges that the debt is that of the ancestor for which the heir is liable, and the land is described by calling for co-terminous tracts, and the court adjudges, upon the evidence of a competent witness, that the matters alleged in the petition

are true, and an order of sale is predicated thereon, it was *Held* that this was enough to support a sale.

Where the guardian, one of several joint owners of a tract of land, petitioned for the sale of the whole of it, without noticing the existence of another tenant in common, it was *Held* that a purchaser obtained title for the part of the petitioner, but that the sale was void as to the other moiety.

Where a declaration in ejectment contains but one count, and that is upon the joint demise of two persons, of whom only one has title, it was *Held* that it could not be sustained.

ACTION of EJECTMENT, tried before ELLIS, J., at the Spring Term, 1858, of Martin Superior Court.

Hillary Whitehurst, at his death in 1836, was the owner of the land in controversy, and the lessors of the plaintiffs are his children and heirs-at-law, suing within three years after their arrival at full age. One Thomas Howell, at October Term, 1836, of Martin County Court, administered on the estate of the said Hillary, and also, became the guardian of the feme plaintiff, Mary, his daughter. John H. Whitehurst, the other lessor of the plaintiff was not then born, but was born within nine months after the death of his father, and before the institution of the proceedings to sell the land. These proceedings were a petition at January Term, 1837, of which the following is a copy: "The petition of Thomas Howell humbly complaining, showeth unto your worships, that at the last term of your worshipful court, administration on the estate of Hillary Whitehurst was committed to your petitioner, as also the guardianship of Mary E. Whitehurst, infant child and heir-at-law of said Hillary. Your petitioner further shows to your worships, that the debts due from the estate of the said Hillary, greatly exceed the personal assets which have come, or by possibility can come, to his hands as administrator. Your petitioner further shows unto your worships that the said Hillary died seized and possessed of a tract of land lying in the county of Martin aforesaid, adjoining the lands of John Philpot, Thomas Howell, and the heirs of Kenneth Hyman, which has descended to the said Mary E., one of the heirs-at-law of the said Hillary. Your petitioner further shows to your worships that, in as much as the lands which have descended, as

aforesaid, must, in process of time, be sold for the settlement and payment of debts of the said Hillary, to satisfy judgments against said Mary E., as heir-at-law of said Hillary, and for cash, and as the interests of his ward will be advanced by a sale of such lands upon a credit of six months, your petitioner prays your worships that he be permitted to sell said lands upon a credit of six months, in conformity to the act of Assembly in such case made and provided; and that your worships will make such other and further order in the premises as to your worships may seem right and fit, and to justice may appertain, and your petitioner, &c."

At the same term, was entered on the record of the court this entry: "Ordered by the court, that the prayer of the above petition be granted, and that, as the facts set forth in the petition are true, as appears by the oath of E. G. Hammond, the guardian have leave to sell the lands mentioned and described in said petition."

The following is found also of record in the County Court: "In pursuance of an order of the Court of Pleas and quarter Sessions of Martin county, I have sold the lands of Hillary Whitehurst, upon a credit of six months, and Sarah Manning became the highest bidder at the price of $660, for which I have taken her note at six months, the credit upon which the land was sold. Williamston, April 12, 1837."

The defendant, Mrs. Manning, produced also a deed from the commissioner Howell, for all the land described in the petition.

It was contended by the plaintiff's counsel that this whole proceeding is void, and that no title passed to the purchaser, or that at any rate, only a moiety, to wit, the right of Bryan and wife.

It was insisted by the defendant that she had title to the whole, but that at any rate, she has title to a moiety—that of Bryan and wife, and that as they have been improperly inserted as lessors, and there is no separate count on the demise of John H. Whitehurst, the plaintiff cannot recover all. The above facts are stated in a case agreed, and submitted for the

judgment of the Court, who gave the same for the plaintiff, whereupon the defendant appealed.

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

PEARSON, C. J. The petition and other proceedings, under which the land was sold, are extremely meagre, but enough is set forth to support the sale according to the adjudications of this Court; *Coffield* v. *McLean*, 4 Jones' Rep. 15; *Spruill* v. *Davenport*, 3 Jones' Rep. 42; *Pendleton* v. *Trueblood*, ib. 96. The petition alleges the existence of debts of the ancestor for which the estate of the ward is liable, and describes the land with as much certainty as is done in *Pendleton v. Trueblood*, and the Court adjudges, upon the testimony of a competent witness, that the matters alleged in the petition are true, and orders a sale of the land mentioned and described in the petition.

There is, however, a fatal objection to the plaintiff's right to recover in the present action. The sale made by the commissioner, passed only the title of Mary E. Whitehurst. John H. Whitehurst, one of the heirs, was not a party to the proceeding. No application was made in his name or in his behalf, for an order to sell the land, so that his moiety of the land was not sold, and did not pass by the deed of the commissioner. Indeed, as the proceedings do not notice the existence of this heir, or purport to make any disposition in respect to his moiety, we had some difficulty as to how far the Court had power to order a sale, which would only pass the title of the other. We are satisfied, however, that the Court has the power, otherwise, the land of an infant heir could not be sold where there is an adult co-heir. So, that although the exercise of the power in this case may have been ill-advised, and although the purchaser may have a right to complain, (for no doubt she thought she was buying the whole tract) still the sale is not *void*, because the Court had the power, and the fact that the purchaser did not get title to one moiety, is no

reason why she should not be allowed to assert her title to the other.

We have, then this point: The declaration has but one count. That is on the demise of Bryan and wife, and John H. Whitehurst. One of the lessors, Bryan and wife, had no title; can the action be maintained?

It is settled that it cannot. The title of the lessors must be truly stated in the declaration, and must be proved as alleged. A joint demise in the name of two, is not supported by proof of title in one, as to a moiety. *Hoyle* v. *Stowe*, 2 Dev. Rep. p. 320. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

DANIEL O'LEARY *v.* JOHN M. HARRISON, *Executor.*

The 5th section of the 78th chapter of the Revised Code, gives a summary remedy against public officers only to those entitled to the money, so that a new clerk cannot proceed under it against a former clerk, for not paying office money over to him as his successor.

An order made in the Superior Court for an out-going clerk to deliver documents, records, papers, and money to the new clerk, under the 14th section, 19th chapter Revised Code, cannot be enforced by motion for judgment in the County Court. The remedy is by an attachment in the Court making the order, and by a regular suit for the penalty of $1000, given by the act.

Whether a Court would proceed by an attachment for a contempt against an executor for the non-performance of a Court rule by his testator—*quere?*

APPEAL from the County Court of Craven, to the Superior Court, on notice to the defendant as executor of William S. Blackledge, and motion for a rule that he show cause, &c., heard before MANLY, J.

The notice was as follows: "You are hereby notified that at the June sessions of the Court of Pleas and Quarter Ses-

sions of Craven county, 1858, I shall move the said Court for a judgment against you for the moneys due the Superior Court clerk's office of Craven county, from the said William S. Blackledge, the former clerk of said county, which the said Blackledge has failed to account for." On the resignation of Mr. Blackledge, the plaintiff was appointed clerk in his stead, and there was an order made for the former to deliver to the latter all the "records, dockets, papers and effects of every description;" which had not been done so far as the money due to parties, and for fees to officers, was concerned.

On motion of the defendant's counsel the proceeding was dismissed, and the plaintiff appealed to the Superior Court. The record of that Court states: "On motion of the plaintiff's attorney, George Green, Esq., for a rule against J. M. F. Harrison, Executor of William S. Blackledge, to pay into Court the amount of monies due the office of the Superior Court of Craven county, from William S. Blackledge, deceased, to wit, $3650. It is the judgment of the Court that the defendant render an account of said monies, amount $3650, and to pay them into office or show cause."

From the judgment of the Superior Court, the defendant prayed an appeal to this Court.

Green, for the plaintiff.
Haughton and *Donnell*, for the defendant.

BATTLE, J. The proceeding in this case is founded upon provisions of the 14th section of the 19th chapter of the Revised Code. That act provides that "upon the going out of office, for whatever reason, of any clerk of the superior or county court, he shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers and money, belonging to the office. And the Judge appointing any clerk to a vacancy in the clerkship of the superior court, may give to such person an order for the delivery to him, by the person having the custody thereof, of the

records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. And in case any clerk going out of office as aforesaid, or other person having possession of such records, documents, papers and money as aforesaid, shall fail to transfer and deliver them, as herein directed, he shall forfeit and pay to the State one thousand dollars, which shall be sued for by the prosecuting officer of that court." The proceeding was commenced in the County Court, in the form of a motion, for a judgment against the defendant, as the executor of Mr. Blackledge, the former clerk of the Superior Court of Craven county. As such, it was based upon the 5th section of the 78th chapter of the Revised Code, which enacts as follows: "Whenever a sheriff, coroner, constable, clerk, or clerk and master, shall have collected or received any money, by virtue or under color of his office, and on demand shall fail to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in any court having competent jurisdiction, against such officer and his sureties, and the court shall try the same, and render judgment at the term when the motion shall be made. *Provided*, ten days notice, in writing, shall have been previously given." When the motion for judgment was made in the County Court, it was resisted by the defendant, and upon motion of his counsel, the proceeding was dismissed, and the plaintiff appealed to the Superior Court, where it was treated as a rule against the defendant, to compel him to pay into the office of the clerk of the Superior Court a certain sum of money, alleged to be due to that office from his testator. The rule was made absolute and a judgment given, from which the defendant has appealed to this Court. We are unable to discover on the record, any order for an amendment of the proceedings, or any agreement of the parties that it should be changed, and we must, therefore, consider it in the light in which it was commenced. Thus considered, it is clear, that it cannot be sustained.

The 5th section of the 78th chapter of the Revised Code, gives the summary remedy, therein specified, to the persons

entitled, and to them only, for moneys collected or received by clerks and other public officers. The moneys collected or received by the defendant's testator, by virtue, or under color of his office, as clerk, did not belong to his successor, and he could be entitled to receive them only under the order of the Superior Court, whose officers, both he and his predecessor were. If the order of the Court were violated, his remedy was to have it enforced by means of an attachment for a contempt, or, perhaps by calling on the prosecuting officer of the Court, to institute an action for the penalty of one thousand dollars, given by the act, for the failure to perform the order. Whether the Court would proceed by attachment against the personal representative of a defaulting ex-clerk, it is unnecessary for us to decide in the present case. We are clearly satisfied that the mode of proceeding, adopted by the present plaintiff, cannot avail him, and we are equally well satisfied, that he cannot be made liable, either alone or with his sureties, on his official bond, for moneys belonging to others, which never came into his hands.

The judgment of the Court below must be reversed, and the plaintiff's motion be refused.

PER CURIAM, Judgment reversed.

RILEY MURRAY *et. al. v.* CALVIN C. DAVIS, *et. al.*

The allegation of a contract made with *five*, who are plaintiffs, is not supported by proof of a contract made with *three*, and the variance is a ground of non-suit. [*Bond* v. *Hilton*, 6 Jones' Rep. 180, cited and approved.]

ACTION of ASSUMPSIT, tried before SHEPHERD, J., at the last Spring Term of Beaufort Superior Court.

The plaintiffs declared on a parol warranty of the soundness of a schooner called the "Caroline," on a sale of her to them by the defendants. Three of the plaintiffs went on

board of the vessel, and made some propositions to two of the defendants, then in possession of her, in the course of which negotiations, a witness said he heard the two defendants present, say the vessel was good. The three plaintiffs above mentioned, did not make known, then, or at any time, as far as appeared, that they were negotiating for others as well as themselves. A bill of sale for the vessel was executed by the defendants to all the five plaintiffs, including the three who were present when the quality of the vessel was spoken of.— There was no evidence to connect the two absent plaintiffs, with the alleged parol warrânty of soundness, but it was insisted by the plaintiffs, that the subsequent introduction of their names into the bill of sale, was evidence that the contract of warranty was made with all five of them.

There was no warranty of soundness in the bill of sale, and the defendants urged that against the plaintiffs right to recover. His Honor, however, ruled for the plaintiffs in this particular, and told the jury that if a parol warranty of soundness was made out independently of the bill of sale, a breach of it could be recovered upon in this action.

It was further objected by the defendants that there was no proof of any communication between the defendants and two of the plaintiffs as to the soundness of the vessel, and no evidence that they entered into any such contract as that declared on. To this the plaintiffs replied, that the introduction of the five plaintiff's names into the bill of sale, was evidence that the contract relied on, was made with these five plaintiffs, and called on the Court so to instruct the jury. But the Court refused so to instruct, and charged the jury that the bill of sale not having any warranty of soundness in it, was no evidence of a parol warranty. Exception by plaintiffs.— Verdict for the defendants, and judgment. Appeal by plaintiffs.

Warren, for the plaintiffs.
McRae and *Donnell*, for the defendants.

PEARSON, C. J. The general rule is, parol evidence is inadmissible to add to, alter, or explain a written instrument. But it is not necessary for us to decide whether this case comes within the application of the rule according to *Smith* v. *Williams*, 1 Car. L. Repos. 363, and *Pender* v. *Fobes*, 1 Dev. and Bat. 250, or forms an exception under the doctrine of *Twidy* v. *Sanderson*, 9 Ired. Rep. 5; *Manning* v. *Jones*, Bus. Rep. 368, because his Honor, in the Court below, decided the point in favor of the plaintiff, who is the appellant.

Upon the other question, we concur with his Honor. The allegation of a contract made with five, who are plaintiffs, is not supported by proof of a contract made with three of them, and the variance is fatal as a ground of non-suit. A misjoinder of plaintiffs in an action *ex contractu*, is a fatal error, 1 Chitty on Pleading. "Parties." Such was the common law, and it is not changed by statute. *Bond* v. *Hilton*, ante 180.

PER CURIAM, Judgment affirmed.

ELIJAH B. HILLIARD *v.* WILMINGTON & WELDON RAIL ROAD COMPANY.

Where the distance on a rail-road, over which a commodity was carried, was very short, and the consignee lived sixteen miles from the road, and no agent was present to receive it on its arrival, it was *Held* that the depositing of the commodity in the company's ware-house at the point of delivery, exonerated it from the liabilities of a common carrier, and that it was thenceforth only bound as a ware-house-man.

The necessity of notice, under ordinary circumstances, to terminate the character of a common carrier, and attach that of a ware-house-man, as applied to rail-roads, and the nature and extent of such notice discussed, but not decided.

ACTION ON THE CASE, tried before CALDWELL, J., at the Fall Term, 1858, of Nash Superior Court.

The plaintiff delivered to the agent of the defendant at their

station, at Weldon, some bacon, to be carried on the road to the station at Battleboro'. It was carried in due time, and, on its arrival, it was taken from the cars and stored in the company's ware-house and locked up, and during the night following, seven pieces of it were stolen from the ware-house, of the value of $25,90. The plaintiff resided sixteen miles from the road.

The action is case against the defendant as a common carrier, and was tried upon the foregoing facts as a case agreed.

The Court decided for the plaintiff, and the defendant appealed.

Miller, for the plaintiff.
Moore and Dortch, for the defendant.

RUFFIN, J. It is plain that the new, and important class of carriers, rail-roads, have a peculiarity, which renders some of the rules of law, respecting the obligations of common carriers, touching the delivery of the goods carried, inapplicable. They have the power and duty of carrying on their roads, and the *contract* is to carry on the road, and, therefore, it cannot be understood that they are to deliver the goods at any place off the road. No doubt the responsibility, as carrier, begins with the receipt of the things at the station, unless the transportation be delayed by the order of the owner. They must be carried safely to the designated station, and there unloaded and delivered to the person entitled to them, if he apply. Until unlading and delivering, or something that is tantamount to it, the duty as common carrier continues. But it often happens, either from the distant residence of the consignee, or the period of arrival, or other causes, that the goods cannot be immediately taken away, or actually delivered. They ought not to be left in the car, on the road, as that might greatly incommode the road and call for the demand of a larger freight, and, also, endanger the goods. The convenience and interest of the company, and the owner, alike require that the cars should be secured in a station-house, or

the goods should be unloaded and deposited in a ware-house for protection from depredation and weather. The latter is almost, if not entirely, the course in this State, and is necessarily so at stations in the country, or in villages, where large station-houses cannot be afforded for the loaded cars. Then, what ought to be the responsibility of the company after the goods are unladed and stored in the ware-house? Or does the liability, as common carrier, continue after the ware-housing? Naturally, a contract to carry goods from one point of a rail-road to another point, on the same road, is fulfilled by the transportation of them to the point of destination, and having them there in a state ready to be delivered. If a particular time were fixed, it would certainly be so. But in the nature of things, a stipulation of that kind is not to be expected, and is never made. As the arrival is uncertain, the mere transportation to the place ought not to terminate the carrier's responsibility, but the company must show, further, either an actual delivery, or that, from the absence of the owner, or for a want of opportunity to deliver from some other cause, the delivery could not be made then, and, that, therefore, instead thereof, the goods were duly taken care of by being deposited in a secure ware-house of the company at the station. Considering the unlading upon arrival, and, in the absence of the consignee, the depositing in the ware-house as parts of the transportation, the Court sees no reason, why, ordinarily, the liability, as carrier, should not terminate with the transit of the goods. After the goods are placed in the ware-house, the owner's interest is protected by another responsibility of the company which arises—that of a ware-house-man, bound to take ordinary care of the goods. The Court considers the company bound to that degree of care, though no distinct compensation is to be made for the storing; because the ware-housing being connected with the transportation, as a part of one business, the freight is a consideration which extends to the subsequent care of the goods for a reasonable time, and excludes the company from the exemptions belonging to gratuitous bailees. Why should the liability of a carrier be extended

further? The goods are actually in store, and were placed there for the mutual convenience of the parties. If the ware-house were not connected with the road, the law would hold the ware-house-man responsible only for not taking ordinary care, and it is not perceived that the connection requires a different rule.

There are but few adjudications, as yet, in this country on this subject; but we believe our opinion accords with them generally, and especially with those which seem to have been best considered. There is, however, a difference among them on the point, whether the company, in order to terminate its responsibility, as carrier, must give notice of the arrival of the goods. It seems to us that may depend on circumstances, and, in some degree on usage. If the place for delivery be a town of much business, and the consignee reside in, or near it, and the company's servants, in order to improve the business of the road, and prevent the accumulation of goods in store, be in the habit of giving notice, that may make a different case from one, where the residence of the consignee is at such a distance, or in such a situation as to preclude any early regular communication by mail or otherwise. The Court, however, does not propose to lay down any definite rule on the question, for it is one on which other able Judges have differed, and on which, we, therefore, prefer feeling our way until the necessity of the decision, in some case, may require a direct determination. There is no such necessity in this case, for, upon so short a transit, it cannot be supposed that either party contemplated that any notice, other than that derived from the known regular running of the freight trains, should be given of the arrival of the goods at a country station, when the plaintiff resided in the country sixteen miles from the road. Notice would doubtless be pre-requisite to charge for storing after a reasonable time. But without notice, the company, after the goods were in store, would be responsible, as ware-house-men, to the plaintiff for want of ordinary care, and from the known course of unlading the goods and putting them in store for persons at a distance, it is re-

sponsible, no further in this case, though no notice was given.

It was further argued, at the bar, that the plaintiff was entitled to recover, for the want of ordinary care, in trusting to the lock on the ware-house, without a guard. But the declaration is not framed with a view to that question, but to the liability of the defendant as a common carrier, and, therefore, that point does not arise. Judgment reversed, and judgment for the defendant.

PER CURIAM, Judgment reversed.

HENRY STOUT *v.* CHARLES H. HARPER.

The purchaser of cotton, put up in bales, is not bound to suppose that they are fraudulently packed with sand, and other weighty substances included, and no degree of diligence is required of him in inquiring into such a thing.—The rule *caveat emptor*, does not apply when a fraud of this kind has been practiced.

ACTION ON THE CASE for a DECEIT, tried before CALDWELL, J., at the last term of Alamance Superior Court.

The plaintiff produced evidence tending to show that the defendant, who resided in Greene county, in March, 1857, sent seven bales of cotton to the railroad station at Goldsboro', for the plaintiff, which there weighed between thirty-nine hundred and four thousand pounds; that the defendant, soon thereafter, came to the station and enquired as to the weight of the cotton, and on being told, said that it had not held out with the weight at his plantation; that the cotton was dispatched from Goldsboro' for the plaintiff, directed to Graham on the North Carolina Rail Road, and in June or July of the same year, was carried to the Cane Creek Factory in Alamance county; that at Graham, the bales were seen to be bursted, the cotton to be of inferior quality, and mixed with sand; that on being taken to the factory, it was put through a process called "willowing," and from the seven bales there

was cleaned 1579 lbs. of sand; that the cotton, in consequence of the sand and soil mixed with it, was not worth more than five or six cents per pound. The witnesses all concurred in stating that from the time of the arrival of the cotton at Graham, its quality and the intermixture of sand, was obviously to be seen upon examination. The defendant produced a witness to show that the plaintiff told him, in March, 1857, that he had bought as much cotton as he wanted, and had given only twelve cents per pound for it. In reply to some remark of witness, as to the lowness of the price, plaintiff said that he did not buy it as a first rate article—that it was of the last picking.

Defendant also called a witness who stated that he was the overseer of the defendant, and that he overlooked the picking from the field, of a part of the seven bales sent to Goldsboro,' and the ginning and packing of the whole of it; that he put more than half the cotton in the press himself; that it did not have any mixture of sand in it, to his knowledge; nor had he any reason to believe that the defendant had any such knowledge. He further stated, that after the cotton had been ginned and packed, it was piled up in the gin-yard, and covered with plank to protect it from the weather; that after this, in the month of March, 1857, he saw the plaintiff and defendant near the cotton so situated.

Another witness testified, that he was a neighbor of the defendant; that it was not usual, in that part of the country, to pick out cotton as late as February,—that he saw defendant's cotton field in February, 1857, and thought it was as good as a lot of his own, picked out in that month, which he sold in June succeeding, for 13¼ cents per pound in Wilmington. The defendant contended that by ordinary diligence, the plaintiff could have seen the sand in the cotton.

His Honor instructed the jury that if the plaintiff, by ordinary diligence could have discovered the sand in the cotton, and failed to exercise such diligence, he could not recover, for in such cases he was not allowed to say that he was deceived. No special instructions were prayed.

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

Norwood and *W. J. Long*, for the plaintiff.
Graham, for the defendant.

BATTLE, J. The only question presented by the bill of exceptions, is whether the plaintiff exercised ordinary diligence by means of which he might have discovered the damaged condition of the seven bales of cotton, which he purchased of the defendant. This question is admitted to be one of law to be decided by the Court, but if it be submitted to the jury and they find a correct verdict, the error in submitting it to them will be cured. See *Hathaway* v. *Hinton*, 1 Jones' Rep. 242, and the cases therein referred to.

It is a well established rule that the purchaser of an article cannot sustain an action for a deceit, if, by the exercise of ordinary prudence, he could have ascertained the defect complained of. This is clearly shown by the authorities cited by the defendant's counsel. *Fagan* v. *Newsom*, 1 Dev. Rep. 20; *Fields* v. *Rouse*, 3 Jones' Rep. 72; *Fulenwider* v. *Poston*, ibid 528; 2 Stark Ev. 262.

The rule will not apply where the seller uses any improper means to prevent the buyer from making inquiry; 2 Kent's Com. 487; *Simmons* v. *Horton*, ante 278, decided at this term.

The counsel for the defendant contends that the rule applies to the present case, because it was proved that when the plaintiff bought the cotton, he was near it and might easily have examined it, and found out what was its quality and condition. To this the plaintiff's counsel replies, that the defendant had used means to prevent such examination by having the cotton packed in bales, and piled up and covered with plank.

We do not believe that the cotton bales were piled up and covered for such improper purpose, but solely for the purpose stated by the witness, of protecting it from the weather. We are, nevertheless of opinion, that as the cotton was packed in

bales and piled up as described, the plaintiff could not, from any inspection of the exterior of the bales, have discovered the sand which was mixed with the cotton, and there was nothing to excite his suspicion that any such fraud had been practiced. Cases of this kind of deceit are so rare, that we think buyers may, without any imputation of negligence, trust to the honesty of the sellers. The mode of examining bales of cotton for the purpose of ascertaining the quality of the article by ripping them open with a knife, as suggested by the defendant's counsel, may be very proper, and the buyer who neglects it cannot, perhaps, be heard to complain that the cotton was not of so good a quality as, from the representations of the seller, he had been led to suppose. But, to cut open a bag of cotton for the avowed purpose of seeing whether it was not filled, in part, with sand or stones, is a very different matter. To most planters, it would be considered and treated as a direct insult, and would probably be resented on the spot in such a manner, as to lead to a breach of the peace.

Our conclusion is, that this is not a proper case for the application of the celebrated maxim of *caveat emptor*, and that the plaintiff is entitled to have the judgment of the Superior Court affirmed.

PER CURIAM, Judgment affirmed.

E. G. HARDING *v.* EDWARD CHAPPELL.

A constable, who has taken a claim to collect as an agent, is not responsible for the act of the justice trying the warrant, in taking a notoriously insolvent person as stay to the execution, it not appearing that he was present when the surety was taken, or had any intimation, or ground to believe, that such person would be offered.

ACTION of DEBT on the official bond of a constable, tried before CALDWELL, J., at the last Fall Term of Wake Superior Court.

The cause was submitted upon the following case agreed: The plaintiff placed in the hands of the defendant, Chappell, a constable of Wake county, a bond for $75, on a person in his county, for collection, taking from him a receipt therefor, and the officer duly obtained a judgment against the obligor, whereupon, he, the obligor, prayed, and was allowed ten days to give surety for the stay of execution. The judgment was left by the officer in the hands of the justice of the peace, and within the ten days, the obligor tendered, as surety to the stay, one William N. Shauck, who was notoriously insolvent, but he was accepted by the justice of the peace. It is agreed that the obligor, in the bond, was solvent at the time of the rendition of the judgment, but became insolvent before the stay was out. It is further agreed, that Shauck, the surety for the stay was, at the time he was taken, notoriously insolvent, and has been so ever since.

It was agreed that if, upon this state of facts, in the opinion of the Court, the plaintiff was entitled to recover, the plaintiff should have judgment for the amount of the penalty, to be discharged by the payment of $75, with interest from October 10th, 1854; otherwise, he should give judgment of nonsuit against the plaintiff.

His Honor, being of opinion with the defendant upon the case agreed, ordered a nonsuit, from which the plaintiff appealed.

K. P. Battle, for the plaintiff.
E. G. Haywood, for the defendant.

PEARSON, C. J. If a warrant or execution is put into the hands of an officer, it may be inferred that he is expected to act only as an officer, but where a bond, or an account, or other evidence of a debt, is put in his hands *for collection*, as a matter of course, he becomes a collecting agent; so, we have no doubt that in this case, Chappell was the collecting agent of Harding; but we do not think that his failing to ap-

pear before the justice, and object to the person offered as surety for the stay, amounted to negligence.

It is not presumed that a justice of the peace will take, as surety, for the stay, "one who is notoriously insolvent." The debtor is allowed ten days to give the security. There is no provision of the statute, which requires the justice to give the plaintiff, or his agent, notice of the "time and place," when he can object to the sufficiency of the stay; consequently, he cannot be expected to attend, and there is no ground upon which an agent can be charged with neglect for failing to do so, in the absence of proof, that he had any intimation, or reason to believe, that insufficient surety would be offered; in which case, probably it would be his duty, under ordinary circumstances, to apprise the justice of the facts, and make known his objection; *Governor* v. *Davidson*, 3 Dev. Rep. 361. But that, certainly, is not his duty when he has no notice, and the surety taken is notoriously insolvent, which amounted, in itself, to notice to the justice, that objection was made to him as surety. There is no error.

PER CURIAM, Judgment affirmed.

HENRY P. WHITEHURST *v.* FAYETTEVILLE MUTUAL INSURANCE COMPANY.

Where specific descriptions of the property are required by the terms of an insurance office which are referred to, and incorporated as part of the conditions of the policy of insurance, it was *Held* that the suppression of an immaterial fact, does not invalidate the policy.

The failure of the insured to repair a defect in the property, arising *after* the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of the plaintiff's right to recover on the policy.

Losses arising from *bona fide* efforts to extinguish fire, such as wetting and soiling of goods and losses by theft, consequent on their removal, are fairly within the contract to insure against fire.

ACTION of COVENANT on three several policies of insurance against fire, tried before MANLY, J., at a Special Term, (January, 1859,) of Craven Superior Court.

The policies declared on, were admitted by the defendants. It was therein covenanted, that the company should, on certain terms, mutually insure the property of each of its members against fire. A part of the covenant in each was, that a true description should be given of the property insured in an application filed, and that such description should become a part of the policy. The policies were effected upon "goods and merchandise" contained in a building in the town of New-Berne, and in the plaintiff's application for insurance, a part of the description of the building is as follows: "36 x 25.—One chimney. No fire-places. One stove. Pipe enters chimney from second floor—ashes and pipe properly secured." It was proved that the store-house described in the application containing the goods, took fire during the time stipulated for insurance, but was not entirely consumed. It was extinguished in about half an hour after it commenced burning. This was effected by throwing large quantities of water upon the burning store-house, both inside and outside of the building, part of which fell upon the insured goods and wetted and soiled them very materially. It was proved that the building was in great danger of being entirely destroyed by the fire, and in order to rescue it, many of the inhabitants of the town assembled around, and used the means stated, for its preservation, and that these means were proper and necessary for that purpose. It was proved, also, that during the progress of the flames, great tumult and disorder prevailed—that the goods were removed out of the house—some into the streets, and some into adjacent buildings, with great haste and precipitation, during which period, they were wetted and damaged as stated, and some of them stolen and not recovered. It was also proved that the plaintiff and his wife were present at the fire, and made every exertion in the removal and preservation of the goods. None of the goods of any value were destroyed by being burned. What remained of the goods, after the fire,

were taken back into the store-house and kept for sale by the plaintiff.

The defendant proved that previously to the year, 1848, there had been a stove-pipe inserted into the chimney mentioned in the plaintiff's application which was removed, leaving a hole in the chimney about five or six inches in diameter, and that upon the removal of the pipe, this hole was closed in the following manner: the outer circumference thereof was enlarged and a piece of sheet iron cut to fit tightly therein, and sunk into the brick-work of the chimney about one inch and a half; that the iron was pointed upon the edges to hold mortar; that the hole in the inside was filled with mortar, the iron plate then laid and embedded therein, and then the front or outside space filled also with mortar, to the extent of an inch and a half. There was evidence that this work was done by an experienced and skillful mason, and that the hole when thus closed, was as perfectly secure as if it had been done with brick and mortar, or any other material, and that the chimney when thus repaired, was as secure as if no hole had been made therein. This hole was not mentioned in the application filed. It was further in evidence, that after the tumult had subsided, the iron was discovered to be displaced. There was evidence that the fire first took place in the room where the hole in the chimney was; while other testimony went to show that it took place in another part of the building. There was no evidence that there had been any fire in the stove or fire-place attached to the chimney. The Court charged the jury "that if the plaintiff, in his said application, misrepresented the premises in any material particular, or failed to disclose any fact which would increase the risk of the defendants, and which, if made known, would have tended to prevent them from undertaking the risk, the policies would be void, and the plaintiff would not be entitled to recover; that it was not unconditionally necessary for the plaintiff to disclose the manner in which the opening for the stove pipe had been closed, if it had been secured safely, i. e. as well as brick and mortar would have secured it. The Court further charg-

ed the jury, that if, after the issuing the policies, sued on, there was made any change or alteration in the premises or in any part thereof, which tended to increase the risk, and the plaintiff failed to communicate the same to the defendant, the plaintiff would not be entitled to recover. The Court further charged the jury that if there was any defect in any part of the premises arising from accident or other cause after the issuing of the policies which the plaintiff knew of, or ought to have known of, which defect or imperfection the plaintiff failed to repair, and the fire took place from his gross negligence, the plaintiff would not be entitled to recover; but such negligence must be extreme and reckless. The Court further charged the jury, upon the question of damages, that if it was necessary to throw water on the fire to extinguish it, and the goods in the store were thereby wet and soiled, the damage thus done was covered by the policies, and the plaintiff was entitled to recover for the same, and that if the store-house was in imminent danger of being burnt, and the goods were removed therefrom for the purpose of preventing their destruction by the fire, and in so doing, and in consequence of such removal, the goods were injured or soiled and a portion of them stolen, the plaintiff would be entitled to recover damages to the extent of the loss which he thereby sustained. The defendant excepted.

Verdict for the plaintiff. Judgment. Appeal.

Greene, for the plaintiff.
J. W. Bryan and *Haughton*, for the defendants.

PEARSON, C. J. 1st. It is to be assumed from the verdict, that the *hole* which had several years before, been made in the chimney for the stove-pipe, "had been secured safely, i. e. as well as brick and mortar would have secured it." The fact that the hole had been made, was, therefore, immaterial, and the plaintiff was not required to disclose it. 2nd. We concur with his Honor in the opinion that the insured does not forfeit the benefit of the policy by failing to repair any defect arising *after* the policy issued, unless he is guilty of gross

neglect in respect thereto. But we can see no evidence upon which the question was presented. The fact, that after the fire was extinguished, "the piece of sheet-iron" was discovered to be displaced, certainly did not establish negligence, in the absence of proof that it had been displaced *before* the fire. Indeed, the probability is, if conjecture may be resorted to, that it was knocked out during the tumult and confusion caused by the efforts to extinguish the fire, and remove the goods.

3rd. We also concur in the view taken as to the measure of damages. Throwing the water and removing the goods, were acts done for the purpose of saving them, and the injury caused by the goods being thereby wet and soiled, certainly constituted a part of the damage, and we think the value of the goods that were stolen, falls under the same principle, being a loss incident to the attempt to save them. For whose benefit was the attempt made? For that of the defendant; and as the goods that were saved were allowed in mitigation of the damages, the objection that the portion of them that were lost ought not to be paid for, is made with an ill grace. Had the plaintiff and his wife, instead of exerting themselves in removing the goods, and putting them back, as soon as the danger was over, stood listlessly by and permitted them to be burnt up, they would have been obnoxious to the charge of gross negligence. Underwriters are liable when the fire is the act of an incendiary and, *a fortiori*, are they liable for the depredations of thieves who avail themselves of the exposure which is unavoidable on such occasions, and which is incident to the attempt to save the goods for their benefit.

Mr. *Bryan* cited no authority for the position that a member of a *mutual* insurance company had not the same rights under his policy that a third person has against an independent underwriter. We can see no principle upon which to base the distinction.

PER CURIAM. Judgment affirmed.

JOHN C. SLOCUMB *v.* JOHN C. WASHINGTON *et al.*

Where slaves were hired out at high prices as rail-road hands for the purpose of grading the tract, it was *Held* to be relevant to the question of ordinary care, to enquire, whether, by reason that the work is to be done along an extended line, at no particular point of which there is a long detention, any better provision for lodging is usually provided by contractors of ordinary prudence than temporary buildings, and whether the one, in which the defendants' slaves were placed, was as good as those ordinarily provided for that purpose.

Where slaves, hired to work on a rail-road track within a certain limit, were carried beyond that limit, to a place where they were ordinarily well lodged and provided for, but wantonly deserted the defendants' service in a snow-storm, by which they were frost-bitten and injured, it was *Held* that the hirer was liable for nominal damages, but not for injuries arising from the exposure.

ACTION ON THE CASE, tried before SHEPHERD, J., at the last Superior Court of Wayne.

The declaration contained two counts:

1st. That the defendants had committed a breach of the terms of hiring of three slaves owned by the plaintiff.

2nd. For a want of proper care in keeping and providing for the slaves.

The slaves in question had been been hired in 1856, to the defendants as rail-road contractors, at eighty cents a day, and there was a stipulation that they should not be worked below Bear Creek. The defendants carried them to work below Bear Creek, and while there, in January, 1857, there came on a heavy fall of snow. The slaves were out in this storm, and returned to their master frost-bitten and otherwise injured. The defendants offered one *Chapin*, who swore that after the hiring, the plaintiff agreed that the slaves might go below Bear Creek. One *Cox* testified, that he built the shanty for the hands to stay in below Bear Creek; that the building was of green pine poles, and about thirty-five feet in length, and eighteen feet in width; that it had no chimney, but in the centre two logs were laid parallel, and the space between filled up

with earth, on which was made a fire for warming the hands; that holes were left at the crest of this cabin for the escape of smoke; that loose plank were laid down on poles for the slaves to sleep on; there was an opening for a door, but no shutter, and the cracks of the walls were only stopped about two or three feet from the ground; that twenty or more hands were put into the cabin to sleep; that there was plenty of wood and lightwood at hand; that the slaves that remained in the cabin were not any way injured by the storm.

It was also in evidence, that on application to Mr. Parrott, the manager, he refused to give the plaintiff's slaves permission to leave the shanty, and that they left of their own accord, without the sanction of the defendant or any agent of his.

The defendant then offered to show, that the nature of the rail-road work kept the hands but a short time at any one place; that the shanty assigned to the hands, at this place, was as good as those usually erected for the business; which was rejected by the Court, who remarked, that he was of opinion that there was a want of proper care, as shown by the evidence of the defendant himself, and that the proposed evidence was immaterial. Defendants excepted.

His Honor charged the jury, that if the contract was that the hands were not to be carried below Bear Creek, and the same had not been modified as stated by Chapin, and they had been carried below that point, and kept there until the snow, the plaintiff should recover for all the damages which naturally flowed from the wrongful act of the defendants; but that if Chapin's evidence was to be believed, the plaintiff was not entitled to recover on the first count. That on the second count, if the jury believed the testimony of Cox, the defendants had evinced a want of ordinary care, and that plaintiff was entitled, at least, to nominal damages; that if the slaves had left the defendants' service from suffering and necessity, and while on their way, were exposed to the hardship of the weather, the plaintiff was entitled to recover substantial damages, that is, such as naturally flowed from the wrongful acts of the defendants. The defendants excepted.

Verdict for the plaintiff. Judgment and appeal by defendants.

Dortch, *Strong* and *Husted*, for plaintiff.
J. W. Bryan and *McRae*, for defendants.

RUFFIN, J. The verdict is entered on both counts, hence, if there be error as to either, the judgment must be reversed. The Court is of opinion, however, that there is error in both. As to the first: upon the supposition that the jury did not believe the witness to the plaintiff's license to carry the slaves below Bear Creek, he would be entitled to nominal damages for the breach of the contract, by the mere fact of carrying them there. But he would be entitled to no more, unless upon evidence that he sustained greater damage in an injury to the slaves, by reason that they were carried beyond the point stipulated. Here, there was no such evidence, unless it be, in the fact, that the defendants did not there take that due care of them, which is the gravamen of the second count, and for which they would be responsible, without reference to the place, at which there was a want of ordinary care. From the amount of damages, however, it is probably to be inferred that they were assessed upon the second count, which charges the defendants, as bailees for hire, with a want of due care of the negroes, whereby they became frost-bitten.

It is plain, from the state of facts, as assumed in the instructions, that the slaves became frost-bitten, not while in the service of the defendants, but on their journey to their master's, in another county, and at a considerable distance, undertaken and performed without the directions of the defendants, and against the orders of their manager. It cannot be admitted, on that state of facts, with the supposition, in addition, that due provision had not been made for their health and comfort at the place of their employment, that the defendants would be liable for a damage arising wholly after they left their serviee, from a long exposure in inclement weather; since, although the slaves might not be obliged to remain

with the defendants, they might have sought shelter elsewhere, and it was their own act and fault thus to expose themselves. That would certainly be the rule in respect to a free servant for hire, and no reasons are distinctly seen for a contrary rule as to slaves, who have the same natural reason and instinct to self-preservation and escape from bodily sufferings and dangers. But without regard to that, the Court is of opinion that there was no such want of ordinary care of the slaves as authorised them to leave the situation in which the defendants had placed them, and, wilfully deserting their service, undertake such a journey in such severe weather. The defendants were bound to ordinary care, that is, such care as prudent men generally, under the same circumstances, and engaged in the same business, take of their own slaves. Hence, it became material, in this case, to show what was the degree of care generally practiced by the persons, engaged in making rail-road embankments and excavations, in respect to the lodging of their own slaves employed in the work. For, certainly, one who hires himself or his slave to serve in a particular employment, must be supposed to understand the usages and ordinary risks in that employment, and to contract in reference to them. These slaves were hired as rail-road hands at high wages, for mere laborers, and, therefore, it was relevant to the question of ordinary care to enquire whether, by reason that the work is to be done along an extended line, at no particular point of which there is long detention, any better provision for lodging is usually erected by the contractors of ordinary prudence than temporary buildings for shelter and lodging, and whether that erected by the defendants was such, or as good as, are ordinarily provided for that purpose. The evidence to those points, was, therefore, improperly rejected; and, supposing it to have been received, it would have established the defense. Take the common case of a man who hires himself as a wagoner, to drive the employer's wagon to markets, through the year. We know that, universally, they sleep in the open air, or lodge in the wagon in bad weather—lying by at such periods as are too inclement for travelling.

Surely, if the wagoner should catch cold, or become frost-bitten on a long trip, it would be deemed but a natural incident to the business in which he engaged, and no one would think of his having an action against his employer, because he did not furnish money to get better lodging. Still less, would the employer be held responsible for the chilblains brought on by the wanton and foolish exposure of the servant to excessive and unusual frosts. If, therefore, the provision made by these defendants, for their hands, was that which is ordinarily made by prudent men, in their business, and has been found by experience to be sufficient for protection from suffering and disease, it was all they contracted to make, as far as can be implied by law, from their character as bailees for hire; and that, in this case, it was practically sufficient, is established by the fact, that about twenty other slaves remained at the spot, sustaining, from the storm, no harm of any sort, as would doubtless have been the case with these slaves, had they not undertaken to breast it, rather than remain in their quarters and keep themselves warm with the abundant supply of fuel at hand.

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

Den on the demise of JAMES CARAWAY *v.* R. A. CHANCY, *et. al*

Where a creek is called for in a deed, as the *terminus* of a line, and there is no diverging course, and no particular object on the creek called for, it must be reached by the shortest direct route.

Whether the running and marking of a line variant from that answering the calls of a mesne conveyance can at all control it; *Quere?* But, certainly, nothing short of a running and marking contemporaneous with such deed, can be allowed to have that effect. Admissions of the parties that a particular line was the true one between the tracts, and acts of ownership up to it by the claimants on both sides of it, do not tend to prove such contemporaneous running and marking.

ACTION of EJECTMENT, tried before DICK, J., at the last Spring Term of Beaufort Superior Court.

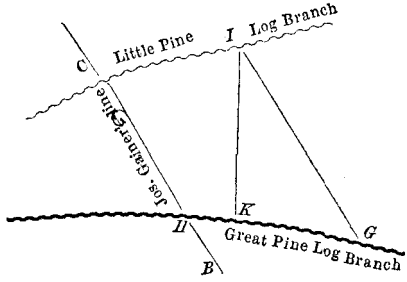
The principal question in controversy, was the location of a deed from William Missell to Joseph Gainer, dated 28th of May, 1793, the calls of which, are as follows: "Beginning at a pine on the Little Pine Log, and running a straight course to the Great Pine Log; thence down the said Pine Log Branch to Joseph Gainers line, &c." It was agreed that the letter I, in the annexed plat, was the beginning of the deed, and that the line I K, is the nearest straight course to the Great Pine Log Branch. The plaintiff contended that I K was the first line of the deed

The defendant contended that I G was the true line, and introduced one *James F. Latham*, a surveyor, who proved that at G there was a marked pine, and that along the line I G, there were marked trees that appeared to have been marked twenty or thirty years ago.

One *Robert Gurganus* testified that about thirty years ago, he was present at the running of the dividing line between Jonathan Caraway, under whom the plaintiff claims, and Joseph Gainer; that they run the line I G; that there were no marks along the line; that the parties set up a stake, and agreed to mark it at some future time, they were running to hit a marked pine, and came within a few feet of it; that he saw the marked pine at G on that day, and it was agreed between the parties, then present, that it was the corner of the Missell deed; that it had been shown to the witness as such corner by the father of the plaintiff about ten years before that time.

Other witnesses testified that both Jonathan Caraway and the Plaintiff had repeatedly acknowledged that I G was the true line between them and Gainer, and that G was a corner of the Missell deed; that the father of James Caraway and James Caraway had worked up to the line I G on the east, and that Joseph Gainer had done the same on the west side of it more than thirty years ago, and that his widow had cut wood up to I G after the death of Joseph Gainer, and that

others of the heirs of Joseph Gainer, had cut fire-wood and made tar-kilns west of I G, but close up to it on the part now contended for by the plaintiff's lessor.



The plaintiff's counsel requested the Court to instruct the jury that there was no evidence that the line I G was run or marked as a line of the deed at the time it was made, or that the point G was established and marked as a corner, at that time; that there being no call for any marked line or corner in the deed, in law, the line must run from I to K.

On this point, his Honor instructed the jury that the law required the line to go along I K, unless the defendants had satisfied the jury that the line was actually run between I and G at the time of making the deed, and that the defendants had offered evidence on that point, but that the jury must be satisfied that it was actually run at the time of the making of the deed, and then they would go to the line actually run.—Plaintiff excepted.

Verdict for the defendant. Judgment and appeal by plaintiff.

Shaw and *Donnell*, for the plaintiff.

No counsel appeared for the defendant in this Court.

RUFFIN, J. The description in the deed from Missell to Gainer, is not complex, calling for several objects which, upon the evidence would carry the lines to different points, but it is simple and turns out to be consistent in all its parts. It "begins at a pine on the Little Pine Log, and runs thence, a straight course to the Great Pine Log; thence down the said Pine Log to Joseph Gainer's line; thence along his line to the Little Pine Log, thence up Little Pine Log to the first station." It is admitted that the beginning pine stands at I, in the plat, and it appears by the plat that the line B, H, C, is the line of Joseph Garner mentioned in the foregoing description. It is to be observed in the first place, that there is neither course nor distance given in the deed, nor any tree called for, as a line or as a corner, except the pine at the beginning.— The question in the case then, is, how the first line is to go; to Big Pine Log Creek, certainly, as a natural boundary which is called for, and it must go there by the most direct and shortest line, since there is no diverging course given, nor any particular object on the creek as the corner. That is the construction of law on the calls for the first line, and it is found by mensuration, that I K represents the line answering to that construction. It might, perhaps, be varied, if there were other calls in the deed for the subsequent lines, which would show that it was not really the terminus of the first line. But there is no part of the description as to the other lines, which can conflict with the construction establishing I K. Upon the face of the deed, therefore, that line is the true one, and it was so laid down in the instructions to the jury. But his Honor held that it might be varied from the call, if another, I G, for example, was actually run at the time of making the deed, and that such line, then actually run, is the boundary in law. The position involves two question as applied to this case. The one is, whether it be true, in law, that the running or even marking a line different from that answering the calls of the deed, can control the calls of mesne conveyances; which has been gravely questioned more than once; *Wynne* v. *Alexander*, 7 Ire. Rep. 237. But this case

does not require that point to be decided; for another question obviously presents itself here; which is: whether there was evidence on which it ought to have been left to the jury to find that the line I G "was actually run at the time of making the deed." Cases have gone the length of saying that marked trees corresponding in age, though not called for, may control course and distance or the like, in a patent. Supposing that rule may be applicable to mesne conveyances also, it cannot with respect to them, extend further than it does to grants from the State. The running and marking then, must be contemporaneous with the execution of the conveyance, and that is ascertained by the yearly *annular laminæ* of the tree, thus raising the presumption that the survey and marking were for the particular tract conveyed, or intended to be conveyed. Of such a *running*, as it is called, nothing less than the contemporaneous marking has been deemed sufficient, or competent evidence. Here the pine at I was marked and is established; but there was not a mark on the line from I to G, until a survey about 1829, while the deed was made in 1793. It is true, the pine at G, was marked before 1829, but when, or for what purpose, is not stated at all. Here, that deficiency of evidence was supplied by other evidence, that persons, under whom the parties claim had agreed, or admitted that the pine at G was the corner of the tract conveyed by Missell, and had respectively performed acts of ownership up to the line I G, as the line between them. Upon the question of boundary, that is not evidence of itself, for such admissions and acts cannot change the identity of the thing described and conveyed in the deed, as that would be to change the description by parol and acts *in pais*. It may be proof in aid of marks, that the conveyance was founded on a particular survey and marking. Beyond that, it seems most dangerous to carry the exception to the general rule of law, that a deed speaks for itself and by itself, when there is no ambiguity, but a consistency in the description given in it. There are here, no vestiges of a survey and marking, from which a jury could possibly infer, that the line was "run" for this sale,

and that the parties adopted that running in the attempt to describe the land in the deed. It was, therefore, erroneous, to submit the point to the jury, and there must be a *venire de novo*.

PER CURIAM, Judgment reversed.

STATE *v.* JOHN STARLING.

Every one is presumed to be of sound mind, until the contrary is proved.

On questions of sanity the rule as to reasonable doubt does not apply, but it is for him, that alleges insanity, to prove it as other material allegations are proved.

INDICTMENT for the murder of one Sally Cotton, tried before SHEPHERD, J., at the last Spring Term of Lenoir Superior Court.

The prisoner's counsel admitted the killing, and put the defense on the ground of *delirium* or temporary derangement, produced by long continued drunkenness. The prisoner went to the house of the deceased in October last, armed with a rifle, called her to the door, and as soon as she appeared, discharged the gun and killed her. The Court charged the jury as follows: "These facts being proved, the law adjudges it to be murder. The counsel have requested me to charge you that, in case of a reasonable doubt in your minds, respecting the guilt of the prisoner, you ought to acquit him. I admit the rule to be true, but I dissent altogether from the prisoner's counsel in respect to its application here. If the question before you was, whether the prisoner did the act, it would apply; and if there were a question, whether the deceased came to her death by reason of the wound, which the prisoner gave, it would apply; but where he admits the killing, or it is proved, every matter of mitigation or excuse must come from him. He is not required to show the matter of excuse

beyond a reasonable doubt, but must offer such testimony as will satisfy you that his defense is established. He must prove his case as you would require the proof of any fact, about which parties are at issue. Reasonable doubt, in the humanity of our law, is exercised for a prisoner's sake, that he may be acquitted if his case will allow it. It is never applied for his condemnation." Prisoner's counsel excepted.

Verdict for the State, finding the defendant guilty of murder. Sentence and appeal.

Attorney General, for the State.
J. W. Bryan and *Strong*, for the defendant.

PEARSON, C. J. Every one is presumed to be of sound mind until the contrary is proven; Best on Presumptions, 57 and 170. This rule is necessary for the due administration of the law, as well in the criminal as on the civil side of the docket, and there is no reason for relaxing it.

His Honor made the application of the doctrine as to "a reasonable doubt" to the question involved in the case, correctly, with much clearness and force of statement. We will not enter into a discussion, because the matter is settled, and there is no consideration for treating it in any aspect as an open question; *State* v. *Johnson*, 3 Jones' Rep. 266; *State* v. *Craton*, 6 Ire. Rep. 164. There is no error. This opinion must be certified to the Superior Court, to the end, that further proceedings may be had according to law.

PER CURIAM, Judgment affirmed.

JOHN M. MOREHEAD *v.* JOHN L. BROWN *et al.*

Where there are two counts in a declaration, and evidence given on both, and a general charge by the Court on the facts applying to each count, a general verdict on both counts, is not erroneous.

In a question of diligence and ordinary care, in the storing and keeping of cotton, it is competent to prove the custom of the place where the contract was made, as to the manner of storing and keeping that article there.

Where a Judge, in the progress of a trial, erroneously decided against the reception of evidence as to a certain fact, but afterwards, in giving instructions to the jury, told them to consider the fact as proved, and to give the party, offering it, the full benefit of it, in making up their verdict, it was *Held* not to be a ground for disturbing the verdict

Where a bailee, to store and keep cotton, for hire, permitted it to remain with the roping off, the bagging torn, the cotton loose and the under bales in the mud and water, so as to become stained, and much of it destroyed, it was *Held* to be a want of ordinary care, which made the defendants liable for damage to the commodity.

ACTION of ASSUMPSIT, as bailees, tried before CALDWELL, J., at the Spring Term, 1859, of Guilford Superior Court.

The plaintiff declared on two counts, one against the defendants as bailees, to keep a quantity of cotton in store, for hire, at a fixed price, and the other, upon a special contract to cover the cotton, so as to protect it from the weather.

There was no dispute as to the fact, that the defendants had agreed, for hire, to keep the plaintiff's cotton in an enclosed lot in the town of Charlotte. In March and April, 1854, the defendants received the greater portion of plaintiff's cotton, amounting to 350 bales, and placed it in an open lot, but it was not covered during the time it remained there.

The cotton was mostly from South Carolina, and was, much of it, in bad order when delivered to the defendants, for the want of roping, and the bags being torn and rotten. The summer, it was proved, was a very wet one, in consequence thereof, the cotton was much wetted. That next to the ground had been placed on poles, laid at intervals on brick bats, but as the ground became soft, from the continued moisture, the poles sank under the ground, and the lower bales were wetted and stained, much of it became rotten, and was unfit for any use whatever. It was in evidence, that the cotton was injured to the extent of 50 or 60 per cent. There was evidence also, that the defendants agreed to receive the plaintiff's cotton and to keep it covered.

The defendants proved that the plaintiff, for several months in the spring, had limited them to the price of 75 cents per hundred for hauling the cotton to Leaksville; that the price was lower than the wagoners were willing to take, and in consequence thereof, the cotton was delayed in the hands of the defendants, and that it was not until the plaintiff offered one dollar for the service, that it was sent on, which was in the summer and fall ensuing. The defendants offered evidence, going to show, that there was a custom in the town of Charlotte, at the time this commodity had been received there, to store it without covering; this evidence was objected to and ruled out, there being no evidence that plaintiff had knowledge of any such custom. Afterwards, the Judge, in charging the jury, told them, that on consideration, he had come to the conclusion, that the evidence offered by the defendants, as to the custom of storing cotton in the town of Charlotte, was proper for their consideration, and that they were to take it as if the fact had been proved, as alleged by the defendants, and act upon it accordingly. The defendants excepted to the exclusion of the testimony offered.

His Honor charged the jury, that it was for them to say, whether the special contract had been proved as alleged, and if so, to give the plaintiff damages for the injury they believed had ensued from the fact of the cotton being left so long uncovered. He also charged them, that the defendants were guilty of negligence in permitting the cotton to sink down into the water and mud, and to remain in that condition without removing it themselves, or informing the plaintiff of it. Defendants' counsel again excepted.

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

Fowle and *Morehead*, for the plaintiff.
McLean and *Gorrell*, for the defendants.

BATTLE, J. If there be two distinct counts in a declaration, and the plaintiff offer evidence on one of them, only, and

not on the other, and the Court instructs the jury on both, a general verdict on both will be erroneous, for the manifest reason, that it does not appear that the verdict was not given, in part at least, upon the count on which there was no evidence. But if, in such a case, the Court charge the jury only on the count on which the evidence was given, the general verdict will be taken to have been rendered on that count only, and will not, therefore, be erroneous; *Jones* v. *Cook*, 3 Dev. Rep. 112. In the case now before us, there was evidence given, tending to support both counts of the declaration, which prevents the general verdict from being wrong, unless his Honor committed an error in admitting or rejecting testimony, or in his instructions, in relation to one, or both of the counts.

The counsel for the defendants contend that he did err in rejecting the testimony offered by them to prove that it was the custom, in the town of Charlotte, to store cotton bales without covering them, and that the error was not cured by his telling the jury, after the arguments were closed, that they might regard the testimony as having been admitted, and might take it into consideration in making up their verdict. The question then, is, was the testimony admissible, and if it were, was the error, committed by his Honor in rejecting it, corrected by the course which he pursued afterwards in relation to it.

We are decidedly of opinion that the proof of the usage was admissible, as is abundantly shown by the authorities referred to by the defendants' counsel. Story on Bailments, 9, 10, 256; *Moore* v. *Eason*, 11 Ired. Rep. 568. The case of *Winder* v. *Blake*, 4 Jones' Rep. 332, cited by the counsel for the plaintiff, is not in opposition to this doctrine. Although no special custom can be recognised as having grown up in this country, the effect of which is to supersede the common law, yet a custom or usage relating to the trade or business of a particular place, where a contract is entered into, may be shown, for the purpose of annexing incidents to, and explaining the meaning of terms used in such contract; *Moore* v. *Eason ubi supra*; *Hutton* v. *Warren*, 1 Mees. and Wels. 466.

From this it appears, that his Honor erred in rejecting the testimony offered to prove the usage of the town of Charlotte, in relation to the manner of storing cotton bales; and the question remains whether, upon becoming satisfied of his error, he took means, which were effectual for removing it. Upon reflection, and after some hesitation, we are satisfied that he did; and that the defendants have no just cause to complain of the result. The ground upon which the counsel for the defendants contend that the error was not cured, is, that the course pursued by his Honor deprived them of their rights to address an argument to the jury upon the effect of the testimony, whereby a different verdict might possibly have been produced. The reply is, that the counsel did not ask permission to address the jury upon the effect of the testimony, after his Honor had informed them that they might consider it as being before them. Had such permission been asked, even at that late stage of the trial, we have no reason to suppose that it would have been refused. Another reply is, that it is now settled, that even in the trial of a capital case, it is not error in a Judge to permit witnesses, who have been previously examined, to be recalled and re-examined, under certain circumstances, after the jury had retired to consider of their verdict; *State* v. *Silver*, 3 Dev. Rep. 332; *State* v. *Rash*, 12 Ire. Rep. 382; *State* v. *Weaver*, 13 Ire. Rep. 491; *State* v. *Noblett*, 2 Jones' Rep. 418. In none of those cases does it appear that the counsel for the prisoner addressed the jury after the witnesses had been re-examined; yet, we can plainly see that the exercise of a right to do so, would have been as valuable to them, in those trials, as it was in the case now under consideration.

Upon the whole, there is nothing shown in the errors assigned by the defendants, in their bill of exceptions, by which we can discover that they were injured. It is stated, that there was testimony introduced by the plaintiff, tending to prove that the defendants had agreed to put the cotton bales under cover; and that, so far as we can see, was fairly submitted to the jury. So, there was abundant testimony to show

that the defendants, as common bailees, for hire, had not taken the same care of the cotton as a person of ordinary prudence would have done. There is not the slightest doubt that it was their duty, when the cotton bales, owing to the wet season, sank into the mud and water, to have had them taken up and put in a drier place. For the neglect to do this, they were responsible as bailees independent of any contract to have the cotton covered over.

Not being able to discover any error of law in relation to either of the counts, the judgment, upon the verdict, must be affirmed.

PER CURIAM, Judgment affirmed.

JOHN HOWARD, *to the use of* A. G. BRADY *v.* ABRAM STUTTS.

The admissions of an agent, while he has the business in hand, are competent against the principal.

Whether an officer, who has a judgment and execution in his hand, and who made default in the collection, so as to subject him to an action, is at liberty to pay the amount to the creditor and, treating the matter as a purchase, have the debt collected for his own use,—*quere?*

ACTION of DEBT on a former judgment, tried before HEATH, J., at the last Spring Term of Moore Superior Court.

This was a suit commenced by warrant, and carried by appeal to the Superior Court. It appeared that in 1846, the plaintiff, placed in the hands of one John Dunlap, a deputy sheriff, a bond for $10 47½ for collection, and the officer caused a warrant to be issued on the same against the defendant, and returned the same, executed by him, upon which a judgment was obtained for the amount of the bond and an execution taken thereon; that upon the paper containing the judgment and execution was endorsed, in the hand writing of Dunlap, a credit for $4 56, dated July, 1848; that in June, 1854, an-

other warrant was issued in the name of the plaintiff to revive the said former judgment, which was also executed by the said Dunlap as deputy sheriff, the claim being yet in his hands. A judgment was then rendered according to the former judgment, neglecting, or overlooking the credit of $4 56 endorsed on the former judgment, and executions issued thereon, but it did not appear what was done with them; that thereafter, A. G. Brady, who now seeks to collect the debt in the name of of the plaintiff, obtained it from Dunlap the deputy; that in March, 1856, the present warrant was issued at the instance of Brady to renew his former judgment, purchased as aforesaid, upon which a judgment was rendered allowing the endorsed credit of 1848, from which the defendant appealed. The plaintiff having proved his former judgment, closed his case.

The defendant introduced one Ritter, a deputy sheriff, who executed this warrant. He proved that before returning the warrant, he notified the plaintiff, Howard, of the time and place, and plaintiff told him he had no claim against the defendant; that he had received his money, or had been paid his debt, or words to that effect. The defendant then offered in evidence the receipt or credit in the hand writing of Dunlap, the officer, for $4 56, as a payment of so much of the debt. This was objected to by plaintiff's counsel, and excluded by the Court. It was then offered as an admission by Dunlap as plaintiff's agent, which was rejected, the Court remarking, that in view of the present state of the proceedings, the admission of the plaintiff, if he had been present making the same, would be incompetent, and the credit could not be allowed unless with the plaintiff's consent. The defendant then introduced a witness, and offered to prove that Dunlap, the deputy sheriff, who had the debt in his hands, and while he so had it, admitted he had received some other amount of money from the defendant in payment thereof, and that he gave the defendant a receipt therefor, to be applied in payment or part payment of this debt, but defendant lost it, and that he, Dunlap, then had it among his papers. This evidence was ob-

jected to, and rejected by the Court. Defendant again excepted.

The plaintiff then offered to examine Dunlap, which was objected to by defendant. He then tendered Dunlap to defendant to be examined by him, which he declined to do.—The Court charged the jury, that they could not look behind the judgment now declared on, and allow the credit endorsed on the former judgment; that they should consider the evidence offered by the defendant to prove the payment of the debt; if, from the testimony of Ritter, they were satisfied the plaintiff received payment of this debt from the defendant, then they should render a verdict for the defendant; but if from the testimony they were satisfied plaintiff received his money from Dunlap, or any other person than the defendant, such advancement of the money would operate as a purchase of the debt by the person advancing the money, and not as a payment of the debt, and the plaintiff would be entitled to their verdict. Defendant excepted. Verdict for plaintiff.—Judgment. Appeal.

McDonald, for the plaintiff.
Kelly, for the defendant.

PEARSON, C. J. We concur with his Honor in the opinion, that no payment made prior to 1854, the date of the judgment now sued on, was admissible. That judgment concluded up to the time of its rendition, and the defendant lost the benefit of any payment previously made, under the rule "good matter must be pleaded in apt time, due form, and proper order." But, as we understand the case, the admissions of Dunlap, which the defendant offered to prove, had reference to a payment made after the judgment in 1854, and so, did not come within the principle. This is to be inferred from the connection in which the point is stated, and particularly from the fact that the plaintiff offered to allow Dunlap to be examined in regard to this alleged payment. Viewed in this light, it was error to reject the evidence. The admissions of an agent,

while he has the business in hand, are competent against the principal; a receipt is merely an admission reduced to writing.

His Honor was of opinion that an officer who has held a judgment in hand for several years, so as to be liable to an action for a neglect of duty, is at liberty to pay the amount to the creditor, and, treating the matter as a purchase, have the debt collected for his own benefit. Whether it be not against public policy to allow an officer, who has taken judgment and has, or ought to have sued out an execution, to evade, in this manner, the effect of his neglect of duty, is a consideration into which we will not enter, and is alluded to simply to say we express no opinion in regard to it. *Venire de novo.*

PER CURIAM, Judgment reversed.

HENRY T. WILSON *v.* MARTIN SHULKIN.

Where a ferryman received an unusual number of horses and mules, which were mostly unconfined, and which he believed to be *skittish*, upon his ferry boat, which was not provided with guards, and which had a spike five inches long sticking perpendicular in the gunwale, with which a horse was killed, it was *Held* to be gross negligence, and that he was liable for the loss, notwithstanding an agreement with the owner of the beasts, that he would risk the danger from the excess of numbers.

Whether a common carrier can make a valid agreement with a customer, by which his common law liability be diminished—*Quere?*

ACTION ON THE CASE against the defendant as a common carrier, tried before PERSON, J., at a special Term of New Hanover Superior Court, (January, 1858.)

The defendant was the owner of a public ferry, near Wilmington, across the Cape Fear and Brunswick rivers, (Eagle's Island being between them) and took tolls for transporting men, horses, &c. The plaintiff had certain horses and mules carried over the ferry, and in the passage, one of the horses

was thrown partly out of the flat, and falling upon an iron spike or pin several inches long, which was fixed in the side of the flat (at the place where an oar-pin usually is,) was penetrated by it in the lower part of the belly, so that it died of the wound shortly afterwards.

One *Rouse* swore that when the plaintiff came to the Brunswick ferry, having a considerable number of mules and horses, the ferryman said he should have to take a part of them at a time, that they looked skittish, and if all of them were taken at once, some of them would likely be injured. The plaintiff insisted on taking all of them at once, and said, "if the flat will hold them I will take the risk." The ferryman said, "I will risk the flat if you will risk the horses and mules." Two horses were first led in by a servant of the plaintiff, and held in the forward part of the flat; the mules, being loose, were driven in after them, and two other horses were held by another servant of the plaintiff in the after part of the flat. The flat was open and had no guards, or other barriers, to keep the animals on it. No oars were used, but the flat was pulled over the river by means of a hawser, stretched from bank to bank. The iron spike or bolt mentioned, was about five inches long, and stood perpendicularly in the gunwale of the boat, about opposite to where the first horses were placed, one of which was that killed. There were two persons acting as ferrymen. After getting within twenty or thirty yards of the shore, the mules became frightened, made a rush forward and crowded the two horses in front, so that one of them fell with a hind leg out of the boat, across the gunwale and upon the iron spike or pin. The ferrymen both became alarmed and jumped over-board, one from the bow, and the other from the stern of the boat. Before this, the mules had made a start, and the front ferryman, with a piece of plank which he used for pulling the boat, had, with the assistance of the plaintiff's servant, kept them back. Neither of the plaintiff's servants jumped over-board or left the flat until it reached the shore.

The plaintiff's counsel contended—

1st. That a common carrier could not limit his liability by

reason of what was said by the plaintiff, about taking the risk.

2ndly. That even if he could, yet the ferryman was guilty of gross negligence, and on that account liable.

The defendant contended that the plaintiff's agreeing to take the risk, so limited the ferryman's liability, in law, as to make him responsible for gross negligence only, and that the evidence did not make out such a case.

Upon the first point the Court charged as the defendant contended.

Upon the second point, his Honor told the jury, if they should find that the ferryman took all the mules into an open flat without guards, or other barriers, when he thought it likely that some of them would be injured, they being skittish, and most of them not confined in any way, and that an iron spike or bolt, was sticking upright in the gunwale as described by the witnesses, and that both of the ferrymen jumped over-board when it was not necessary for their safety to do so, (for the law did not require they should run the risk of their lives or great bodily harm by staying) instead of standing their ground, and endeavoring to prevent accidents, in law, it constituted a case of gross negligence, and they should find for the plaintiff. Defendant's counsel excepted.

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

London and *Strange*, for the plaintiff.
Baker, for the defendant.

BATTLE, J. Upon the first question which was presented at the trial, and which his Honor decided in favor of the defendant, it is unnecessary for us to express any opinion. The inquiry, (if the case required that we should go into it) whether any circumstances would authorise the owner of a ferry to stipulate for a restriction of his liability, as a common carrier, with any person who might come to be transported, would be not less interesting than important. It is easy to see that the

allowance of such an authority might, and probably would be made the means of great imposition upon travellers. On the other hand, there might be many cases, of which the one before us is a striking instance, in which it would seem to be hard not to permit a relaxation of the stern rule of the common law. The elaborate arguments of the counsel have presented in a strong light the difficulties which surround the subject, and prudence, as well as duty, requires that we shall not venture upon a decision until a case shall come before us which imperatively demands it.

From our declining to express any opinion upon the first question, it will be seen that we concur with his Honor upon the second, which is decisive of the case.

Supposing, that under the circumstances in which he was placed, the defendant had a right to enter into an agreement with the plaintiff for restricting his common law liability, it is conceded that he still remained responsible for gross negligence, and the question remains, was he guilty of that? After much reflection, we are of opinion that he was. We cannot well conceive of any good reason why a ferry-boat, used for the transportation of live stock, which is carried across the stream by means of a hawser, should have an iron spike, pin, or bolt, five inches long, standing perpendicularly on the gunwale. It is said that it was an oar-pin, but the case states, expressly, that no oars were used, and as there were no guards to the boat, and nothing else to prevent the horses or mules from being injured by the pin, it ought either to have been taken away, or so covered, as to destroy its dangerousness. We do not lay much stress upon the fact that the ferrymen jumped overboard, as it does not distinctly appear whether that was before or after the horse was killed. Our decision is put distinctly upon the ground that it was gross negligence in the defendant to have a boat, in which horses and mules were to be transported, with an iron spike five inches long, so located that there was a reasonable probability of one or more of the animals being injured by it.

PER CURIAM, Judgment affirmed.

STATE *to the use of* AARON FORNELL AND WIFE *v.* JOHN KOONCE *Administrator.*

It was not the intention of the Legislature in the statute, Revised Code, chapter 54, section 6, to make it a breach of the clerk's official bond, to omit entering the names of the justices present in court, appointing a guardian, either on the docket, or on the bond, or both; but that in these particulars the act is merely *directory.*

ACTION of DEBT upon the official bond of a clerk, tried before SHEPHERD, J., at the last Term of Jones Superior Court.

The breach of the bond, assigned by the plaintiffs, was, that the defendant's intestate, one Hammond, was the clerk of the county court of Jones, and that at June Term, 1842, of that court, one Caleb Hewett, was appointed guardian of the relators, and that said clerk omitted to record on the docket of the court, and on the bond taken from the guardian, the names of the justices of the peace present, when the said appointment was made.

On the trial, the transcript of the record of Jones County Court, for June Term, 1842, was produced, and by that, it appeared that the names of the justices, present in court when the guardian was appointed, were entered on the docket. It appeared that they were not inserted on the guardian bond.

His Honor charged the jury upon several points, to which exceptions were made; but as both the charge and the exceptions become immaterial, from the view taken of the case in this Court, it is deemed needless to state them.

Verdict for the defendant. Judgment and appeal by plaintiffs.

McRae and *Green*, for the plaintiffs.
Haughton and *J. W. Bryan*, for the defendant.

PEARSON, C. J. Without entering into a consideration of the three points made by his Honor in the Court below, it is sufficient to say that, upon a mere general view of the subject,

we concur in the result at which he arrived—that the plaintiff was not entitled to recover. This Court is of opinion that the bond of the clerk does not cover the matter assigned as a breach. That position, we think, is sustained by the authority of *Jones* v. *Biggs*, 1 Jones' Rep. 364, and the reasoning upon which it is founded. Common sense must be invoked to aid in the construction of statutes, and courts should be careful not to be led, by sticking to the letter, into consequences that are against reason, and such as could not have been intended by the makers of the law. The clerk is required to make a record of, and enter at large on the docket, the names of the justices who are present at the granting of a guardianship; and he is also required to make the same entry on the guardian bond. The purpose of this requirement is to furnish an easy means of proving who of the justices were on the bench, in the event that they have been guilty of such negligence, in respect to the *sureties* taken on the bond, as to be liable to the action of the infant, according to the provisions of the statute. If this was the only mode of proof by which the liability of the justices could be fixed, there would be some reason for supposing that the clerk ought to make himself liable by not furnishing it. But it being simply a cumulative means of proof, the inference, that it was the intention to subject the clerk to liability for the whole amount of the estate of the infant, is against reason; particularly, where, as in our case, the names of the justices are recorded and entered at large on the docket, so as to furnish the proof as to their identity, sufficient to charge them, provided, they have subjected themselves to liability; for it then amounts to this: the clerk is liable for simply omitting to enter the names of the justices on the guardian bond, although the same matter appears at large on the docket, whereby the entry on the bond becomes mere surplusage! And this too, by way of implication. As is said in *Jones* v. *Biggs supra*, "If so great a change in regard to the liabilities of clerks had been contemplated, it is natural to have expected to find the law under the head of "clerks," accompanied with a requisition that, the penalty of their bonds should be in-

creased," and it is also natural to have expected that this heavy liability should be imposed in express terms, like that of the justices, who are guilty of negligence in respect to the sureties taken, and that the clerk should be allowed a fee for making the entry upon his docket, and also upon the bond.

After a full consideration of the subject, we are satisfied that the statute is merely "directory," and that it was not the intention of the Legislature to make an omission of the clerk, either in one, or both of these particulars, a breach of his official bond. There is no error.

PER CURIAM, Judgment affirmed.

STATE v. ERASTUS HOGUE.

The character of the deceased, as a general rule, is not involved in the issue of murder, and is, therefore, inadmissible.

Where it appeared that the prisoner had prepared a deadly weapon, with an intention to use it, in case he got into a fight with the deceased, and went to a particular place for the purpose of meeting with the deceased, and of having a conflict with him, it was *Held* to be murder, and not man-slaughter.

INDICTMENT for MURDER, tried before DICK, J., at the last Spring Term of Wake Superior Court.

The defendant was indicted for the murder of one Sherwood H. Parrish.

The latter was employed at Winton's Hotel, in the city of Raleigh, and the prisoner had been a boarder there. On the evening of the day in question, the deceased was in the room where the supper table was set, and after the usual signal the door was opened, and the boarders commenced entering; the deceased stood beside the door, in the inside, with a stick under his arm, and a pistol in his right hand, and as Hogue was about to enter, Parrish presented himself in his way and immediately popped the cap before him; whether the pistol

was in the direction of his person or not, was left doubtful by the testimony. The prisoner seized the pistol, wrenched it from the hand of the deceased, and immediately commenced stabbing him. He gave him several stabs, and then pushed him upon a side table and gave him several more while in that position, of which he immediately fell dead. There was evidence of a previous quarrel about dinner time, and subsequently, various threats from the prisoner, to the effect, that he would enter the supper room and eat his supper there, and if Parrish opposed him, he would slay him. There was evidence, that he procured the knife with which the homicide was done, for the express purpose of using it in that way; that Parrish had that day demanded of Hogue his bill, and told him he could board no longer there; that he asked Winton, the tavern keeper to let him go in to supper, which he declined. Hogue begged him to let him go in, and offered him a large price if he would do so, but on the landlord's still persisting in the refusal, he declared *vehemently* that he would go in at all hazzards, or, any how. Some of the witnesses swore that Winton did not refuse him expressly, but as he turned off, said in reply to the prisoner's declaration, that he would go in to supper, "well." There was evidence tending to show, that the defendant bought the knife in question, for the express purpose of using it in a fight with Parrish, and that he, in various instances, declared that, if Parrish attempted to prevent his entering the supper room, he would kill him. One witness said he saw the prisoner, about a half minute before the bell rang for supper, open his knife, and put it, open, up his coat sleeve. One other said, that immediately after the transaction the prisoner came into Cook's shop, where he was, and said "he had killed the damned rascal;" that Cook asked him what he had in his hand, the prisoner showed him a knife and said, he "went to old Karrer's and bought it for him," and said, "don't you see the blood on it." There was much other testimony not material to be stated. All the testimony was submitted to the jury, with instructions, not ex-

cepted to by the prisoner's counsel, and a verdict of *guilty of murder*, was thereupon found.

The only part of the charge of the Judge below, requiring a particular notice, is the following: "That if they found, from the evidence, that the prisoner had prepared a deadly weapon, with intention to use it, in case he got into a fight with the deceased, and went into the dining room for the purpose of meeting with the deceased, and with the expectation of having a conflict with him, it would be a case of manslaughter."

In the course of the trial, the defendant's counsel asked a witness, what was the general character of the deceased, which on objection, was pronounced inadmissible, whereupon the defendant's counsel excepted; and that is the material part of the case in this Court. The defendant appealed.

Attorney General, for the State.
Miller, *Moore* and *R. G. Lewis*, for the defendant.

PEARSON, C. J. It is a general rule, that on a trial for homicide, evidence of the character and habits of the party killed, as to temper and violence, is not admissible. The State is not allowed to prove that he was a quiet, orderly citizen, nor is the prisoner allowed to prove that he was a violent and outbreaking man. The rule is based upon the ground that character is not involved in the issue, and consequently, evidence in regard to it, is immaterial. And there is this further consideration: such evidence is not only immaterial and irrelevant, as having no legitimate bearing upon the matter under investigation, but is calculated to mislead, by exciting the prejudices of the jury. For instance, if one kills, either on express malice, or malice implied, there being no justification, excuse or mitigation, the fact, that the party killed was a good or bad man, is immaterial. It is murder to kill on malice, no matter what sort of a man he is, and yet a jury would be more inclined to convict, if he was a good man, than if he was a bad one; and there is no telling the extent to which the prejudices of a jury may be excited, and how far they could be

misled by evidence of this kind. It is therefore important to the due administration of the criminal law, that this well settled rule of evidence should not be relaxed.

There may be exceptions to the rule. *State* v. *Tackett*, 1 Hawks 211, is admitted to be one; but we are not at liberty to enter into an investigation for the purpose of defining the principle on which exceptions may be allowed, or of fixing the limits; for the case now before us certainly comes within the operation of the general rule, and it is sufficient to refer to *Bottoms* v. *Kent*, 3 Jones Rep. 154; *State* v. *Barfield*, 8 Ired. Rep. 344, to show that the general rule is settled, both in civil and criminal proceedings.

The deceased committed a violent assault upon the prisoner as he entered the room. This was legal provocation, and if the case stopped there, the killing would be manslaughter, and the character of the deceased as a quiet, or violent man would be immaterial; but the case did not stop there, for the jury, under instructions of which the prisoner has no right to complain, find that he killed "of his malice aforethought,"—that he had formed the deadly purpose—prepared the weapon, and sought that particular time and place to do the deed. So the character of the deceased was immaterial. It is surely murder to kill with malice, express or *aforethought*, no matter how violent or wicked the deceased may be.

His Honor laid down one proposition which we think too favorable to the prisoner, and it is referred to, lest it may mislead. It assumes that the prisoner "had prepared a deadly weapon with an intention to use it in case he got into a fight with the deceased, and went into the dining room for the purpose of meeting with the deceased, and with an expectation of having a conflict with him," and the killing is held to be manslaughter. Killing under these circumstances, would be murder, because of the preconceived malice, although the deceased made the first assault. *State* v. *Martin*, 2 Ire. Rep. 101.

This opinion will be certified that further proceedings may be had according to law.

PER CURIAM, Judgment affirmed.

OBED HUSSEY *v.* HENRY K. BURGWYN.

The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to, or recognition of the account or any debt whatever.

In order that one item's being in date, shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings, kept by one with the knowledge and concurrence of the other.

This was an ACTION OF ASSUMPSIT, tried before DICK, J., at the Spring Term, 1859, of Northampton Superior Court.

The plaintiff produced in evidence an account for articles furnished the defendant, which it was alleged, had been sold and delivered to him at different times between the 20th May, 1851, and the 20th June, 1856, and used upon his farm. The action was commenced on the 16th of January, 1858, and all the articles sued for are charged more than three years before the suit was brought, except two; one, on the 28th of May, 1855, for $15 00, and the other, on the 20th of June, 1856, for $13 50.

The plaintiff proved by a deposition taken in the cause, the sale and delivery to the defendant of all the articles stated in the account, amounting to $943 45, upon orders of the defendant, which were filed with the deposition and made part of it.

The defendant relied on the statute of limitations.

A new promise and acknowledgement of a subsisting debt, was relied on to repel the bar created by the statute. Upon this point, the evidence was, that on the 2nd of June, 1855, a draft for $450 was received from the defendant by the plaintiff, and was paid at maturity. This draft was credited on the account declared on, as follows: "1856, June 2nd. By John Burgwyn's draft on H. K. Burgwyn, payable at Farmers' Bank of Virginia, at Petersburg, on 5th of September, 1855, $450." The defendant, by letter of 17th of June, 1856, ordered articles from the plaintiff, charged at $13,50. There

was no evidence that the account declared on, had ever been submitted to the defendant previously to the draft of $450, but the defendant's written orders for all the articles charged, except a small amount, were filed and proved, and there was no evidence of any other dealings between the parties.

His Honor being of opinion that the statute was not repelled as to the items bearing date more than three years before the beginning of the suit, so instructed the jury, and they gave a verdict for the two items not barred, with interest, amounting to $38, and no more. The plaintiff's counsel excepted to the charge of his Honor, and on judgment being rendered, appealed.

Conigland, for the plaintiff.
Barnes, for the defendant.

BATTLE, J. The evidence relied on by the plaintiff, to take his case out of the operation of the statute of limitations, was, in our opinion, entirely insufficient for that purpose. The plaintiff's counsel contends strenuously, that the remittance of the draft by the defendant was in part payment of his account, which implied a promise to pay the balance of it; *Smith* v. *Leeper*, 10 Ire. Rep. 86. Unfortunately for the argument, there is not the slightest testimony to show whether the draft was sent as a full, or only a partial payment of what the defendant owed the plaintiff. If the letter, in which the remittance was enclosed, had been exhibited on the trial, it might have removed the difficulty; but, in its absence, we cannot presume that a part, and not a full payment was intended.

The counsel then insists that the statute of limitations did not apply at all, because, as he alleges, the account was a continuing one from its commencement until its close, with a credit given for the proceeds of the draft. The decisive answer to this is, that there must be mutual accounts between the parties, or an account of the mutual dealings kept by one, only, with the knowledge and concurrence of the other, to make an item within time have the effect of preventing the

application of the statute; *Green* v. *Caldcleugh*, 1 Dev. and Bat. Rep. 320. Here, there were no mutual accounts kept by the parties, and there was no proof that the defendant entrusted the plaintiff to keep such an one.

The rule which appears from *McNaughton* v. *Norris*, 1 Hay. Rep. 216, and some others of the earlier cases, to have prevailed in this State, to wit, that the statute of limitations runs only from the date of the last item, when an account has been running on from its first commencement, has been long since exploded. See *Green* v *Caldcleugh ubi supra*, and *Waldo* v. *Jolly*, 4 Jones' Rep. 173.

PER CURIAM, Judgment affirmed.

THOMAS C. HUSSEY *v.* BAT. WEATHERSBY.

A bill of sale of a slave which contains a warranty of soundness, and which is inoperative to convey the title, for the want of a subscribing witness, may, nevertheless, be read as evidence of the warranty, provided the actual sale and delivery be proven *dehors*.

ACTION of COVENANT tried before DICK, J., at the last Spring Term of Edgecombe Superior Court.

The plaintiff declared on the following instrument under seal:

"TARBOROUGH, May 23, 1859.

"Received of Thomas C. Hussey, fourteen hundred dollars, in full of a negro man Mingo, supposed to be twenty-five years of age, which negro I warrant to be sound in mind and body, and also warrant the right and title against any, and all persons, to the said Thomas C. Hussey; in witness whereof, I have hereunto subscribed my name, the day and date first above written."

The allegation of a breach was that the slave, Mingo, was unsound in body at the time of the sale, having the consump-

tion, of which he died within two years afterwards. There was evidence going to sustain the plaintiff's allegation, which was left to the jury under proper instructions from the Court, and they responded in a verdict for the plaintiff.

The only point in the case, arose upon the admissibility of the bill of sale as evidence of the covenant. Not having a subscribing witness, and not having been registered, the defendant objected to its reception by the Court; to obviate this, the plaintiff offered evidence of an actual sale and delivery, *dehors* the writing, and then offered it to prove the warranty of soundness. The Court ruled in favor of the admissibility of the paper for the purpose, and the defendant excepted. Appeal by the defendant.

Moore and *Conigland*, for the plaintiff.
No counsel appeared for the defendant in this Court.

Battle, J. We are unable to distinguish this case from that of *Maxwell* v. *Miller*, 11 Ired. Rep. 272. There, the action was for the warranty of the soundness of a slave contained in a bill of sale given by the defendant, to which his wife was the only subscribing witness. It was objected that she could not be a witness, and that the bill of sale did not pass the title for the want of an attesting witness, and for that reason the warranty, which was alleged to be an incident of the sale, was of no validity. The Court held that "admitting the position, that as between the parties, the title did not pass by the bill of sale, for the want of an attesting witness to be tenable, still the warranty is distinct from that part of the bill of sale which purports to pass the title, and that is no reason why there should be an attesting witness to a covenant or contract of warranty of the soundness of a negro, nor necessity for its registration. And if a warranty be a mere incident of a sale, the title in this case, might have passed by an actual delivery without a bill of sale, and so there was no ground for the objection." The Court go on to say further, "that the doctrine of a warranty, as applied to real estate, has no sort of application

to the warranty of soundness of a chattel. Such a contract may be entirely distinct from, and unconnected with a sale, and will support an action, provided there be a sufficient consideration, although there is no sale to which it may be incident."

This distinguishes the present from the case of *Gwynn* v. *Setzer*, 3 Jones' Rep. 382, in which it was decided that in an action of deceit for the sale of a slave the plaintiff must prove the sale, and if the contract of sale be evidenced by an attested writing, that must be produced and proved by the subscribing witness, unless its absence be duly accounted for.

PER CURIAM, Judgment affirmed.

STATE *v.* JESSE HART.

This Court cannot notice a bill of exceptions made by the counsel on one side of the question, without the sanction of the Judge who presided at the trial.

Where a person voluntarily gave an unlawful vote, it was *Held* that the unlawful purpose *prima facie* attached to the act, and that the opinions of others who believed the vote lawful, did not amount to a justification or excuse.

Held further, that the opinions of the judges of the election to that effect, not sought by the voter, nor delivered formally, on a full statement of the facts, and not influencing his mind, could not take away the criminality of the act.

INDICTMENT for illegal voting, tried before DICK, J., at last Superior Court of Pitt.

It was admitted that the defendant lived in the county of Greene and voted in the election of Governor in August last in Pitt. The defendant introduced one *Wiggins*, who testified that he was one of the inspectors of the election at the precinct in question; that the defendant presented his vote in the usual manner at the window, and it was received and deposited in the box with the other votes for governor; that he asked no

questions of the inspectors as to his right to vote, nor did the inspectors ask him any questions; that he himself was acquainted with the defendant, and knew that he lived in Greene, but he was of opinion that he had a right to vote in this election in Pitt county; that he expressed that opinion to other inspectors, who concurred with him, but he did not know that the defendant heard this expression of opinion, and did not think he did.

The counsel for the defendant, asked his Honor to charge the jury, that if they believed the fact of the defendant's residence in another county was well known to the inspectors, and the defendant was well aware of this knowledge, and that the inspectors discussed the question, though not in his presence, and decided his right to vote, this would rebut the presumption of fraud, although the defendant did not state the facts to the inspectors and ask their counsel. The Court declined giving such instructions, and the defendant excepted.

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

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

RUFFIN, J. Besides the bill of exceptions, signed by the Judge who presided at the trial, there is, appended to the transcript, a paper, purporting to be exceptions, signed by the counsel for the defendant, and therein alleged to have been taken by them on the trial. The Court can take no notice of them on this proceeding, because they have not the sanction of the Judge; which, alone, can certify to this Court the proceedings on the trial, including the evidence given, the instructions prayed for, and those refused, or given. It would lead to endless contradiction and confusion if the parties, or counsel could, independently of the Judge, frame cases to suit themselves. Hence, the statute provides that exceptions shall constitute part of the record, and requires them to be signed by the Judge. In this case, the point, happens,

however, not to be material, as the points appearing by the statement of the counsel to have been raised by them, are substantially the same as those to which his Honor affixed his hand.

It is clear that the defendant was not entitled to vote for Governor in the county of Greene, as he resided in Pitt. For, by the amended Constitution, Article 2, ch. 1, the Governor is to be chosen at the times and places for the election of members of the General Assembly, and by the persons "qualified to vote for the members of the House of Commons," and by the 8th section of the Constitution, one is entitled to vote for members of the House of Commons only for the county in which he resides at the day of election.

Upon the points of evidence and the instructions given to the jury, the case is substantially the same as *Boyett's* case, 10 Ire. Rep. 336, and must be governed by it. The defendant voluntarily gave an illegal vote, and, necessarily, the unlawful purpose attaches *prima facie* to the act. It is neither a justification, nor excuse for such an act, that other persons advised the party that it was lawful, and much less, that other persons thought and believed it to be lawful. Here, the judges of the election, it seems, were under the erroneous impression that the defendant had a right to vote for Governor, notwithstanding his residence in another county. It is going far enough to say, that, if the point had been made before the judges, and a full statement of facts laid before them, their formal decision in his favor would protect the defendant, as the determination of a tribunal, constituted by the law, to give a judgment on that question. But it is impossible to attribute to the opinion of the persons, who happened to be the judges, an influence on the mind of the defendant, which would take away the criminality of an unlawful act, when that opinion was not only not officially declared, but was in no way communicated to the defendant. He acted on his own mistaken, or wilfully erroneous judgment, and must abide the consequences. Such a rule is an indispensable

guard to the purity of the ballot box, upon which the value and stability of our political institutions chiefly depend.

There is no error in the record.

PER CURIAM, Judgment affirmed.

STATE *v.* JAMES N. FLOYD.

If two engage in a fight mutually and suddenly, and one kills with a deadly weapon, it is but man-slaughter, and ordinarily, it is not material which makes the first assault.

It is error in a Judge, in a trial for murder, to make a hypothesis omitting the leading fact which goes to the exculpation of the accused.

It seems, that when it is necessary for the accused to account for the fact that he began a sudden mutual affray with the use of a deadly weapon, in order to repel the inference of malice arising from that fact, he may show that his adversary was a powerful, violent and dangerous man. (*State* v. *Hogue*, 6 Jones' Rep. 381, commented on.)

INDICTMENT for MURDER, tried before BAILEY, J., at the last Spring Term of Mecklenburg Superior Court.

The defendant was indicted for the murder of one Richard Martin in Gaston county, and the case was removed to Mecklenburg.

One *David McCullough*, for the State, testified that he came to the blacksmith shop of the deceased about dusk, on the evening of the 17th of December, 1858; that a few minutes afterwards, the prisoner came to the shop, and remained talking with the witness and the deceased, apparently friendly; that the prisoner said to the deceased he wanted something to eat, upon which the latter pointed to a piece of meat hanging up in the shop, and told the prisoner to cut some of the meat, at the same time handing him a knife with which he did cut off a piece of the meat, and broiled upon the coals of the hearth of the shop; that the deceased then went to a box and took out of it two biscuits, one of which he gave to the witness, and the other to the prisoner; that about half an hour

afterwards, the deceased asked the prisoner for his knife, to which he said he did not have it, and the deceased replied that he had given it to him to cut the meat, and he had not returned it; that the prisoner denied again that he had it, and an angry quarrel ensued, which continued for about half an hour, when the deceased said to the prisoner, "Floyd you must be a damned rascal, for you have got my knife and wont give it to me"; that but little more was said for about five minutes, when the deceased remarked, "d——n the knife, I don't care any thing for it, no how;" that nothing was said for about five minutes more, when the witness and the prisoner started to go home, the witness getting into his buggy, and the prisoner on his horse; that when the witness had got about fifty yards from the shop, and the prisoner about seventy or seventy-five, the deceased, came out of the shop and approaching the witness, said, "I'll give McCullough a dram, but I wont give Floyd any;" that this was said in a mild, friendly tone, and the witness reigned up his horse and stopped; that the prisoner turned his horse across the road; that the deceased handed him a small glass bottle, from which he took a drink and handed it back to him; that the deceased then went up to the prisoner, with the bottle in his right hand, and extended it towards the prisoner as he had done to him; that the prisoner immediately got off of his horse, and a fight ensued between him and the prisoner; that before the witness could reach the parties, and while as yet about ten steps from them, he saw the deceased fall on his back, and in a few moments died; that the prisoner then went to a fence, on the side of the road, where he remained with his hands on it for about a minute, then mounted his horse and rode off; that this took place about 10 o'clock at night; that he heard nothing said from the time the deceased gave him the dram till the prisoner went off after the deceased fell; that it was a bright moon-light night; that the witness, deceased and the prisoner, had each taken a dram in the shop, just before the two latter ate the meat and biscuits.

The body of the deceased was found about one hour after-

wards in the position described by the witness, McCullough, upon which there were six wounds, three on the top of the right shoulder, from which blood was running next morning; another on the right side extending into the stomach, a fifth one on the outside of the thigh which was deep; and a sixth a little to the right of the centre of the body, ranging from the right to the left, passing through the lungs and quite through the body; a large bowie knife, belonging to the prisoner, was found near the body of the deceased covered with blood, nearly up to the hilt.

One *Costner* stated that, about two hours by the sun, he saw the prisoner at the store of one Neagle, about half a mile from the blacksmith shop; that as witness was about starting home the prisoner told him not to leave, that he, prisoner, might need friends that evening; that shortly afterwards, he repeated the same expression, at the same time he pulled a bowie knife from his bosom, which was proved to be the same found at the scene of the homicide; that the witness asked him if he would sell the knife, to which he said no, that he expected to have a use for it that evening. On cross examination, this witness said that he expected to have a difficulty *there* with a relation of his own by the name of Floyd, and that it was in reference to him that the prisoner spoke of needing friends, and having a use for the knife.

One *Neagle* swore that the prisoner showed him the bowie knife at the store, about sun-set, and said he had bought it in Yorkville, and had given ten dollars for it.

The defendant introduced a witness, a nephew of his, who lived with him in York district, S. C., who swore that on the morning after the homicide, he saw a wound on the prisoner's forehead, about the eye-brow, which appeared to be about an inch and a half long, and that he had two or three wounds on the top of his head, and that his right thumb was either broken or disjointed; it was proved by other testimony that there was much blood at the place where the homicide occurred, and a stone was found about five feet from the body of the deceased weighing two pounds and three quarters, upon which there

was blood and hair, and something like skin; also, that the bowie knife, when found, had two gaps in it, which were not in it on the evening before, when seen by Costner and Neagle.

The deceased was a free negro.

The defendant's counsel offered testimony to prove the temper and disposition of the deceased for violence, which was ruled out by the Court, and they excepted. It was proved by the sheriff of Gaston, that he asked the prisoner while in jail how he got the wound over his eye; to which he replied, "I reckon I did it with my own knife; or I did it with my own knife; they say I had a fight with Dick Martin and killed him, but I know nothing about that."

The prisoner was taken at his residence in York district, South Carolina.

The Court explained to the jury the difference between murder, manslaughter, and excusable homicide, and charged, that if the deceased made an assault on the prisoner, either by using a stone, bottle, or in any other way, or attempted to pull him from his horse, and they immediately got into a mutual combat, and during the fight the deceased was slain by the prisoner, although with a deadly weapon, his offence would not be murder, but manslaughter only.

That if the prisoner was assaulted by the deceased, and they engaged in a sudden affray, and the prisoner was so sorely pressed or placed in such a situation that his life was in danger, or he was about to receive a great bodily harm, and under these circumstances he killed, the law would excuse, but that the law would excuse no one for killing another, unless there was an absolute necessity for so doing to save his own life from destruction, or to prevent great bodily harm.

That if they should be satisfied that the deceased approached the prisoner in the manner stated by the witness, and that he made no assault whatever upon the prisoner, and the prisoner dismounted and slew him with the bowie knife, giving the several wounds as described by the witnesses, then the offence would be murder, although the deceased had used offensive language in the shop, and uttered the words as he ap-

proached McCullough with the bottle. Defendant's counsel excepted.

The jury found the defendant guilty of murder. Judgment was rendered and defendant appealed.

Attorney General, for the State,
Thompson and *Osborne*, for the defendant.

PEARSON, C. J. The prisoner is entitled to a *venire de novo*, for the reason that, neither of the three positions, given in charge to the jury, hits the case made by the evidence.

If two engage in a fight upon a sudden quarrel, and one kills with a deadly weapon, it is but manslaughter, *State* v. *Curry*, 1 Jones' Rep. 280. In this case, there is no suggestion of preconceived malice. The fact, that the prisoner had about his person a deadly weapon, is accounted for by the proof that he had armed himself for a different purpose. The quarrel with the deceased was sudden, and the prisoner had got on his horse, and was going off until stopped by the deceased.— They then engaged in a fight; how, or on what cause, is not proven, but they engage in a fight, and the prisoner kills with a deadly weapon. So, upon the principle above stated, it is but manslaughter.

His Honor put the case to the jury in three aspects:

1. "If the deceased *made the assault* upon the prisoner with a stone or the bottle, or in any other way, or attempted to pull him from his horse, and they got into a fight, &c., it was manslaughter. This does not hit the case, for the evidence does not show who made the first assault, and upon the principle above stated, that was not material, provided it was a sudden quarrel, and the parties engaged in a fight, and the prisoner, under the excitement of the fight, resorted to the use of his knife. So, the the effect of this position is destroyed by the condition precedent, i. e. that the deceased made the assault.

2. "If the prisoner was assaulted by the deceased, and they engaged in a sudden fight, and the prisoner being sorely

pressed, &c., it was killing in self defence. This does not hit; for there was no evidence that the prisoner was "sorely pressed."

3. If the deceased approached the prisoner in the manner stated by the witness, and made no assault, and the prisoner dismounted and *slew him with the bowie-knife*, it was murder. This does not hit the case made by the evidence, for it omits the all important fact, *that after the prisoner got off of his horse, they engaged in a fight.* This is acting the play of Hamlet with the character of Hamlet omitted. The gist and very essence of the matter, was that the parties had engaged in a fight, and this fact was distinctly proven. So, of course, it was error to put any hypothesis to the jury omitting the fact.

From the statement of the case, sent to us, it cannot be a case of murder. How it happened that the parties got into the fight, is unaccountable, and neither the Court nor the jury, are allowed to make conjectures. But perhaps, upon a second trial, the facts may be more fully disclosed; and it may be that the deceased pushed the bottle into the face of the prisoner, and thus caused the fight; or, it may be that the prisoner, without any such grievous provocation, got off of his horse, and *commenced the fight with his bowie knife*, so as to bring the case under that of *Maugridge*, Kel. 128; Foster's Crown Law 295; and in that event, it may be, that the prisoner should be allowed to prove that the deceased was a very powerful man, greatly an over match for him in an ordinary fight, and one, whose *general character*, was that of a violent and dangerous man, who was in the habit of using deadly weapons, for the purpose of accounting for the fact of commencing with a bowie knife, and thereby repelling the inference of malice, which the law would otherwise make. In that aspect of the case, provided the deceased urged the prisoner into the fight it may be, such evidence would be admissible, as an exception to the general rule laid down in *State* v. *Hogue*, at this term, (ante 381,) for it would seem, the known character of the deceased, as a violent and dangerous man, would then

be material, and be involved in the issue. One cannot be expected to encounter a lion as he would a lamb.

As the case is presented to us, the evidence in respect to the violence of the deceased, was properly rejected; for it was immaterial whether he was violent or quiet in his temper as the parties engaged in a fight, and it did not appear that the prisoner made the onset with his bowie knife. There must be a *venire de novo*..

PER CURIAM. Judgment reversed.

MARIA KEITH *v.* KENDRICK GOODWIN.

Where a witness was ruled by the Court to be incompetent, and such ruling was not appealed from, or reversed, it was *Held* that his fees could not be taxed against the adverse party—whether the ruling out of the witness was erroneous or not.

It seems that the statute pardon, which is an incident to the benefit of clergy, does not take effect until the party is burned in the hand and *delivered.*

But if the record, by default of the Court, omit to show such execution of the sentence, the party should be permitted to show it by a witness.

TRESPASS for ASSAULT and BATTERY, tried before HEATH, J., at the last Spring Term of New-Hanover Superior Court.

The plaintiff offered one William N. Keith as a witness, whose evidence was material, but he was objected to by the defendant as being incompetent, because he had been convicted of manslaughter in Wake Superior Court, and the record of the proceedings in that court was produced. The plaintiff replied, that the record showed that the sentence of the Court had been executed, and that restored his competency. His Honor, on inspection of the record, adjudged that it did not appear from that record, that the judgment of the Court had been executed, and, therefore, that he was not restored.

The plaintiff then offered to show, by a witness in Court,

that the sentence had been executed. The Court declined receiving this proof, and the witness, Keith, was excluded.

The plaintiff had a verdict. But on a motion, that the fees of William N. Keith, as a witness, should not be allowed against the defendant, but should be taxed against the plaintiff, his Honor held that, being adjudged on the trial to be incompetent, his fees could not be taxed against the defendant. From which judgment the plaintiff appealed.

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

PEARSON, C. J. It would seem that the statute pardon, which is an incident to "the benefit of clergy," does not take effect until the party is burned in the hand and delivered out of prison, and in *Burridge's case*, 3 Peere Williams, 489, it is held "where by the delay or doubt of the Court, a prisoner, convicted of manslaughter, has no opportunity of demanding his clergy, or if he has demanded it, and the Court should make no record of it, this, on its being pleaded and *shown specially*, shall not turn to the prejudice of the prisoner, because it is the default of the Court." According to this authority, it being the default of the Court, that the fact, that the sentence had been executed, was not set out in the record, the plaintiff ought to have been allowed to prove it by a witness.

But we are not at liberty to decide the point by reason of the manner in which it comes up. The appeal is taken from the order in respect to the taxation of the witness, William N. Keith. There is no error in that, provided his Honor was right in ruling, on the trial, that the witness was incompetent. That ruling was not appealed from—stands unreversed, and, as between the parties, must be taken as conclusive. In making the order, the presiding Judge did but carry out his opinion in respect to the competency of the witness, and that opinion, a party is not at liberty to impeach in a collateral way. There is no error.

PER CURIAM, Judgment affirmed.

WILLIAM CARR *v.* CORNELIUS WOODLEFF.

Where the judgment, entered by a single magistrate, is susceptible of two constructions, that is, whether it was intended as a judgment in the defendant's favor on the merits, or, simply, for the costs as in case of a nonsuit, it is proper to hear evidence in explanation.

Where the entry by a justice of the peace, trying a warrant on a former judgment was "dismissed at the plaintiff's cost," and in explanation, he swore that on the trial before him, the judgment, sued on, was produced and considered by him—that he was of opinion that the same was vacated by the entry of an appeal on it—that for that reason, he made the entry, and that he intended it to be final between the parties, it was *Held* that the Judge below was right in instructing the jury, if the evidence was believed, it showed that the judgment was on the merits and conclusive.

ACTION of DEBT upon a former judgment, brought from before a single justice by appeal, and tried before CALDWELL, J., at Granville on the last circuit. Plea, former judgment.

The plaintiff produced in evidence a judgment, entered on a warrant, in favor of the plaintiff against the defendant, dated 22nd November, 1845; below this, was entered an appeal in regular form. There was evidence, that this appeal had been withdrawn at the instance, and by direction of the defendant.

The defendant then produced a warrant, issued on a former judgment, in behalf of the plaintiff against the present defendant, dated 2nd April, 1847, and an entry, dated 11th May, 1847, as follows: "Dismissed at the cost of the plaintiff," signed by J. M. Stone, a justice of the peace for Granville county. Stone swore that the judgment, now sued on, was produced before him, by plaintiff's agent, on the trial of the warrant on 11th May; that there was no evidence before him of the appeal's being withdrawn; that he considered of the matter, and was of opinion that the appeal vacated the judgment in question, and for that reason, he gave the judgment he did between the parties, and that he intended it to be final.

The plaintiff produced evidence, that the appeal taken on the first judgment, the one sued on, was withdrawn by the direction of the defendant.

His Honor instructed the jury, that if they believed the evidence of Stone, it proved there had been a judgment on the merits of this demand in favor of the defendant, which barred the present action. Plaintiff excepted.

Verdict for defendant. Judgment. Appeal.

Miller and *Moore*, for the plaintiff.
Graham, for the defendant.

PEARSON, C. J. In *Bond* v. *McNider*, 3 Ired. Rep. 440, the entry was, "dismissed at *defendant's* cost," and it was held this did not support the plea of former judgment, and could not be taken as the act of the Court; because, upon a trial, either by verdict, or upon the admission of the parties, the Court had no authority to enter such a judgment. If the Court dismissed the suit, the defendants were entitled to recover costs, and could not be made to pay costs; so, the entry could be no more than an "agreement of the parties;" and, under the plea of "accord and satisfaction," the question was open as a matter of fact for the jury, whether the agreement had reference to that particular action, or was intended as an accord of the cause of action, which was satisfied by the payment of the costs of the suit then pending. To the same effect, is *Carter* v. *Wilson*, 2 Dev. and Bat. 276. In our case the entry is, dismissed at the cost of the *plaintiff*. This may be taken as the act of the justice of the peace, and *prima facie* it is so, because upon the trial, if he was of opinion that the evidence, offered, did not prove the allegation of the plaintiff, i. e., the existence of a former judgment, which was the foundation of the suit, he had authority, and it was his duty, to enter judgment in favor of the defendant, and the entry in question, although not expressed in formal and technical terms, was, in substance, a judgment that the defendant go without day and *recover his* costs. This distingushes it from *Bond* v. *McNider*, and *Carter* v. *Wilson*, where the defendant was to *pay* costs; which was inconsistent with the fact, that the judgment was in his favor. But a plaintiff may take a non-

suit, or discontinue the suit, at any time before the verdict is announced, when the case is pending in a county or superior court, or before the justice makes known his opinion where the case is pending before a single justice, and, thereupon the court, or justice, gives judgment in favor of the defendant for costs, which does not affect the cause of action, and leaves it open for another suit.

As this proceeding was before a single justice, and the entry was susceptible of two constructions, and might be a judgment in the defendant's favor on the merits, or simply for the costs, as in case of a nonsuit, and much allowance is made for the want of formality in the entries made by justices, it was proper to hear evidence in explanation, so as to to see whether it was a judgment affecting the cause of action, and concluding the plaintiff in respect to it, or was merely a judgment affecting the costs in the nature of a nonsuit; and we entirely concur with his Honor, that if the testimony of Stone was believed, which was a matter for the jury, the legal effect of the entry was to show a judgment upon the merits; for the justice heard the evidence in support of the plaintiff's allegation of a former judgment, and having considered the same, was of opinion that the allegation was not proved, and gave his judgment accordingly. There is no error.

PER CURIAM, Judgment affirmed.

JOHN H. IDDING *v.* JOHN HIATT.

The entry of "compromised," in a suit, does not, *ex vi termini*, import that it was settled and decided on its merits, but is open to extrinsic proof, as to what was the full agreement of the parties in relation thereto.

THIS was an action of TRESPASS, tried before CALDWELL, J., at the last Spring Term of Guilford Superior Court.

The plaintiff declared in trespass against the defendant, for killing his hogs. The defendant relied upon the plea of form-

er judgment for the same cause of action, and offered in evidence, the record of a suit between the same parties for killing the same hogs, which had been commenced before a justice of the peace, under the 48th chapter of the Revised Code, and was carried by appeal to the Superior Court of Guilford, in which the following entry was made on the trial docket of Spring Term, 1857: "Compromised, each party pay their own cost." On the minute docket of the same term is this entry:

"John H. Idding, *v.* John Hiatt. } Nolle Prosequi."

His Honor instructed the jury that the records established the existence of a former judgment, and that the plaintiff was not entitled to recover.

The plaintiff's counsel excepted.

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

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

BATTLE, J. We differ from his Honor as to the effect of the entry in the former suit, between the same parties, for the same cause of action. The terms "compromised, each party pay their own cost," may import either of two things: that the subject matter of controversy between them was compromised and settled; or, that only the particular suit was compromised, and it is open to testimony on each side to show what was the intention of the parties. Another entry upon another part of the record in the same suit of "Nolle Prosequi," would seem to indicate that no final judgment upon the merits was intended, but as the whole record must be taken together, the question of intention is left in doubt, and must be determined by extrinsic proof. It is very clear that there was no regular adjudication of the Court upon the merits of the controversy, because, as to them, we cannot see what was the judgment, and also, because the Court

would have given costs to the prevailing party under the 75th section of the 31st chapter of the Revised Code. It was, in truth, an agreement of the parties entered of record, but entered in such vague terms, as to make it necessary to call for testimony *dehors* the record, to show what the entire agreement was. In the case of *Carter* v. *Wilson*, 2 Dev. and Bat. Rep. 276, it was held that an entry in a suit "by consent of parties, it is ordered by the Court, that this cause be dismissed, and that the defendant do pay to the plaintiff his costs by him in this behalf expended," was not a judgment at all upon the merits for or against either party, nor was it *prima facie* evidence of an accord and satisfaction, but was, simply, an agreement of some sort between the parties, which either was at liberty to explain by extrinsic proof, in order to show what was the full agreement between them. So, in *Bond* v. *McNider*, 3 Ired. Rep. 440, it was decided that an entry in a suit "dismissed at the costs of the defendant," was not a judgment upon the merits, so as to bar another action for the same cause; that it was, simply, a judgment of discontinuance, where the Court erred in ordering the defendant to pay the costs, or where such order was made by consent of the parties.

The principle deducible from these cases, is decisive of the present. The term "compromised," which the defendant's counsel relies on, as distinguishing it from them, cannot make any difference. That term unexplained, may, as we have already said, mean that the parties had finally adjusted the cause upon the merits, by which adjustment each party would be bound, or that they had agreed the particular suit should be stopped and dismissed from the docket, upon the terms of each party's paying his own costs. The result of the present suit must depend upon the evidence as to what was the full agreement of the parties.

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

JOAB B. COX *et al ex'rs v.* WHITE D. HUMPHREY.

Where a father gave to his children by parol, certain slaves, acquired by his marriage with their mother, and was present at a division of the slaves among them, upon which occasion one, who had a more valuable share, *paid money* to others, who had a less valuable one, it was *Held* that the transaction was still a bailment, and not a *sale and delivery* as to any of the children, and that after the father's death, his executors could recover the slaves.

ACTION of TROVER, tried before HEATH, J., at the last Fall Term of Sampson Superior Court.

The action was brought by the executors of Moses Cox, in behalf of legatees, for the conversion, after his death, of a woman named Sylvia, and her four children. This woman was the daughter of a woman named Mourning, who, together with other slaves, had been conveyed in 1817, by a deed from Joab Blackburn to the wife of Moses Cox. He, (Moses Cox,) had owned these slaves for many years, and in 1851, there was a division of all the slaves, which Blackburn had conveyed to Mrs. Cox, among the children of Moses Cox, he and the said children all being present, and in that division, Sylvia and her children, then born, were allotted to one Ellis, who had married the daughter of Moses Cox, who paid some money to others of the children, and gave his note for some more to make their lots equal, but what these sums amounted was to, not remembered by the witnesses. One *Benton*, who had married another daughter of Moses Cox, testified, for the defendent, that he was at the division, and that Moses Cox told him he intended to get Mr. Winslow, a lawyer, to draw a release of his title to the slaves; that about a month after the division, Ellis, with the consent of Moses, took possession of Sylvia and her children, and carried them to Onslow county, where he resided.

In May, 1855, Ellis conveyed the slaves in question, to one Ward, in trust, to secure certain debts, but still remained in possession of them until March 1857, when he, and Ward, the trustee, jointly conveyed them to the defendant, for the con-

sideration of $2,600; and the latter took them into his possession. In the May following, Moses Cox died, having made his last will and testament, wherein the plaintiffs were appointed the executors, and the slaves in question given to other persons. The probate of this will, the qualification of the executors, and a demand by them for the slaves in question before the bringing of this suit, and the refusal of the defendant to surrender them, were all properly proved.

Mr. Winslow, an attorney of the court, testified that Moses Cox had conversed with him about the negroes, which Blackburn had conveyed to his wife, and said they ought to go to his children, and he wished papers drawn to that effect, but that the witness never drew such instruments; that in 1851, or 1852, he received from Moses Cox the following paper-writing, viz: "Know all men whom it may concern, that I, the said Moses Cox, has an interest in some personal and real estate that was given by deeds and verbally to my deceased wife, Betsy Ann Cox, by her deceased grand-father, Joab Blackburn, of the State and county aforesaid. Now, as things may be fairly understood by me, the undersigned, I relinquish all my claim, title, interest in real and personal estate, that is in my possession, both personal and real estate, and all that are out of my possession, to the lawful representatives of my deceased wife, Betsy Ann Cox, as witness my hand and seal, this 6th day of November, 1851.

Signed. Moses Cox, [*seal.*]"

"N. B. This instrument I wish to be given to my son, Joab B. Cox, or some one of my sons. M. C."

The defendant offered to prove the signature of the paper to be that of Moses Cox, but it being unregistered, and without any subscribing witness, his Honor refused to receive it in evidence, or to let the signature be proved. He also refused to make an order for its registration. For this ruling, the defendant's counsel excepted.

Ward testified, that he came to Sampson in 1856, to enquire about the title to these slaves, when he was informed by Joab Cox, one of the plaintiffs, that Ellis' title was good;

that there had been a division of the slaves in 1851, and there was a written statement of the division which he had seen, and which he believed was in the possession of Uz W. Cox, the other plaintiff.

It was also in evidence, (which was not objected to) that Ellis had said, that Moses Cox once offered to give him a release for the slaves, but he was fool enough not to take it, and that he never would be such a fool again.

His Honor charged the jury, that the evidence, if believed, showed the ordinary case of a parol gift of slaves which, in law, constituted a bailment; that there was no evidence of the bailment having determined, and the possession become adverse three years before the commencement of the action, and if they should find that there had been a conversion of the slaves, the plaintiffs were entitled to a verdict. Defendant again excepted.

Verdict for the plaintiffs. Judgment and appeal.

Fowle, for the plaintiffs.
Badger, for the defendant.

PEARSON, C. J. Was there a gift, or a sale and delivery of the slaves? That is the question. A father says to his children, "These slaves came by your deceased mother, take them and divide them among yourselves." Accordingly, a division among the children is forthwith made in the presence of the father, and for equality of partition, one of the children pays certain amounts of money to the others: but for the act of 1806, which requires gifts of slaves to be in writing, attested by a subscribing witness, it would never have entered into the head of any man to conceive that this amounted to any thing more than *a gift* by a father to his children; and in spite of the statute, ingenuity itself is unable to suggest a plausible ground, in support of the position, that it was *a sale and delivery.*

Did the father intend to sell? Did he receive a valuable consideration? The child who was taxed with some amount for equality, had the most valuable share, and the amounts

paid to the other children was by way of compensation (as distingushed from a price paid) to make the division equal. Before the division, it was certainly a mere gift. Can the fact, that the children happened to make a division, according to which, one, whose share was the most valuable, paid money to the others, to make the value equal, convert the original act of the father into a sale and delivery by him? The children who received money, as well as a share of the slaves, certainly were not *purchasers*. Can it be a gift as to them, and a sale and delivery in respect to the one who received the most valuable share?

It was said, "if the transfer of the slaves be void, this child will be money out of pocket." That is true; but he may recover it back from the other children, because of a total failure of consideration between him and them, and it, in no wise affects the father, to whom the fact, whether there was, or was not a division, and the manner thereof, was wholly indifferent. The truth is, the act of 1806, bears hard upon the defendant, who has honestly paid a fair price for the slaves in controversy, and the effort made to take this case out of its operation, and the disposition, on the part of the Court, to do so, if possible, proves the truth of the saying that, "hard cases are the quicksands of the law."

To the comments upon the policy of the act of 1806, made by the counsel of the defendant, it may be proper to reply; although in this, and in many other instances, a father is enabled, by revoking a parol gift of slaves, to defeat the claims of honest creditors, and defraud purchasers, for value, from their children and *sons-in-law*, where the necessary caution in respect to an examination into the title has not been observed, still it is a wise choice between two evils; for no man can imagine the extent of the mischief, in respect to *perjury* and *fraud*, and the *uncertainty of title* in regard to this most valuable species of property, which is protected by the act.

The exception, as to the deed of November 1851, was not relied on. There is no error.

PER CURIAM, Judgment affirmed.

JAMES M. BURTON *v.* WILLIAM B. MARCH.

Where it was not proved that any theft had been committed at all, it was *Held* not to be evidence to be left to a jury, that the party charged, was in a room alone with one asleep on a bed, in the day time, with money loosely in his vest pocket.

Where the instruction prayed for by counsel is substantially given, though not in the prescribed words of the request, there is no ground to except.

It is competent, in an action for slander, for the plaintiff to prove that after the time when the theft was alleged to have been committed, the defendant continued upon friendly terms with him.

Good character can be given in evidence, by the plaintiff, in an action of slander, as well to repel the evidence given to sustain the plea of justification, as to enhance the amount of damages; and that, whether the facts in issue are by the evidence left doubtful or not.

ACTION for SLANDER, tried before BAILEY, J., at the last Spring Term, 1859, of Rowan Superior Court. Pleas—Not guilty, and justification.

The plaintiff declared in five counts:

1st. That defendant had maliciously said of the plaintiff that he stole his, defendant's, watch.

2nd. That he stole defendant's money.

3rd. That he stole sixty dollars.

4th. The charge was of stealing twenty dollars.

5th. Of stealing generally.

The proof was, that defendant said he, plaintiff, stole sixty-five dollars of his money. The Court charged that this proof sustained the second count but not the third.

One witness, upon the plea of justification, testified that he went with the plaintiff to Mocksville, riding with him in a buggy; that in a store, at that place, witness, in presence of the plaintiff, handed the defendant sixty-five dollars to be carried to the bank at Salisbury; that March went into the counting room of the store, and went to sleep; that he, witness, and another person present, went up stairs for some shoes, and when he came back, the defendant was still asleep on the bed, and the plaintiff was in a hurry to start away, and did hurry the witness off; that after they had travelled

some mile or two, plaintiff said he would not be surprised if that money was stolen from March before night; witness asked him why he thought so; to which he replied that he had stuck the money loosely in his vest pocket and gone to sleep on the bed; besides, that he was careless and had his watch stolen from him.

Another witness stated that he kept the store spoken of by the preceding witness; that whilst March was on the bed, asleep, he saw the plaintiff standing near, and over him, leaning with his hands each side of him, and speaking in an ordinary low tone of voice, as if trying to wake him.

The Court charged the jury that there was no evidence that the plaintiff stole the $65. Defendant excepted. There was evidence tending to sustain the plea of justification as to the first and fifth counts, and the defendant's counsel asked the Court to instruct the jury, that if they were satisfied, from the evidence, that the plaintiff had stolen the watch, or money in the several instances alleged by him, and to which he offered his proof, they should find for the defendant on his plea of justification as to the fifth count, and if they assessed damages on the other counts, it should be for the damages which they would assess for the character of a thief. On this point, the Court charged the jury that if the defendant, by his proofs, had satisfied them that the plaintiff did steal the watch, or the moneys, in the instances alleged by him, they could not give him damages on the first and fifth counts; that as the defendant had not sustained his justification as to the charge of stealing the defendant's money, they were bound to find a verdict for some amount, if they believed the evidence, but what amount, was a question for them; that if the plaintiff was a man of good character, and above reproach in all respects, they were allowed by law to give exemplary damages, but if he was not a man of good character, they would not give so much. Defendant's counsel excepted for the Court's refusal to charge as requested.

3rd. The plaintiff offered evidence to show, that before the speaking of the words spoken, the defendant was on friendly

and intimate terms with him. Objected to on the part of the defendant, but admitted by the Court. Exception.

4th. The Court permitted the plaintiff to prove his good character, both before and after the speaking of the words.— The defendant's counsel asked the Court to instruct the jury that if the testimony as to the defendant's justification were believed, the plaintiff's good character would avail him nothing; that it was only where there was a doubt left by the testimony as to felonious acts of the plaintiff, that such evidence was available.

The Court instructed the jury that the defendant's good character should avail him on the question of damages. The defendant's counsel excepted, because the Court omitted to charge the jury as to the effect of character on the question of the plaintiff's guilt or innocence of the felonies imputed by the words.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Boyden and *McLean*, for the plaintiff.
Fowle and *Clement*, for the defendant.

BATTLE, J. The facts set forth in the defendant's bill of exceptions, are not stated with sufficient perspicuity to enable us to be sure that we correctly understand the exceptions which he intended to make. So far as we can comprehend them, we will endeavor to notice them in the order in which they are presented.

1. The first exception is that the Court instructed the jury that there was no evidence that the plaintiff had stolen the sum of sixty-five dollars mentioned by some of the witnesses. The instruction was undoubtedly correct; for the obvious reason, that there was not the slightest testimony that that money had been stolen at all. If that fact had been proven, then the testimony relied on by the defendant for that purpose, would have had some tendency to fix the theft upon the plain-

tiff, but in the absence of such proof, it could not, possibly have any effect at all.

2. The instruction prayed for that, if the defendant had sustained his plea of justification on the first and fifth counts, though he had failed to sustain it on the others, yet the jury could assess for the plaintiff only such damages as were proper for one having the character of a thief, was, we think substantially given. The Court told the jury that if the plaintiff was a man of good character, and above reproach in all respects, they were allowed by the law to give exemplary damages; but if he were not a man of good character, they would not give him so much. This was, in effect, telling the jury that if the defendant had succeeded in proving that the plaintiff was a thief, whereby his character was made bad, he was not entitled to the same measure of damages, as he would be, if his character were above reproach.

3. The third exception is clearly untenable. The fact upon which it was based, is very obscurely stated, but it must be understood that the testimony offered by the plaintiff to show that the defendant continued on friendly terms and intimate relations with him, was after the time when the theft was alleged to have been committed. It would be absurd to suppose that the testimony had reference to the time subsequent to that when the defendant made the charges. Thus understood, the evidence was clearly admissible, to show that the defendant did not then believe that the plaintiff was guilty of what he afterwards imputed to him, as we can hardly suppose that he would have continued to associate on friendly terms with one whom he suspected to be a thief.

4. The fourth and last exception is also unfounded. When called upon to defend himself against the charge made against him, by the attempt of the defendant to support his plea of justification, the plaintiff is clearly entitled to avail himself of any kind of testimony which would be competent for his defense on a criminal prosecution for the same alleged offense. Among the facts which he may thus prove, is his good character, which he has a right to have submitted to, and consid-

ered by the jury, whether the case be upon the other testimony, a doubtful one, or not. *State* v. *Henry*, 5 Jones' Rep. 65. In the case of *Kincade* v. *Bradshaw*, 3 Hawks' Rep. 63, and again in *Barfield* v. *Britt*, 2 Jones' Rep. 41, it was held that to establish a justification in an action of slander, the same cogency of proof is not necessary as would be required if the plaintiff were on his trial upon a criminal charge for the offense imputed to him by the words. If, then, less proof be required to fix the charge upon him under the defendant's plea of justification than would be necessary on a criminal prosecution, surely, the plaintiff ought not to be deprived of the right to use any kind of testimony in the one case, which would be undoubtedly admissible for him in the other.

We have thus examined all the alleged errors assigned by the defendant, and as we find that none of them can be sustained, we must direct the judgment to be affirmed.

PER CURIAM, Judgment affirmed.

JAMES PAGE *v.* MICHAEL LUTHER.

Since the enactment of the Revised Code, selling spirituous liquor to a slave, without a permission in writing, is contrary to law, even though the spirits be for the use of the master, and the slave was really directed to go for it.

ACTION ON THE CASE, tried before CALDWELL, J., at the last Term of Randolph Superior Court.

The case arose upon a warrant from a justice of the peace, for the penalty of $100, given by the statute, Revised Code, chapter 34, section 92, for unlawfully trading with a slave. There was, upon the evidence, a verdict for the plaintiff, and the defendant then moved in arrest of judgment; which being refused, and, judgment given on the verdict, the defendant appealed. In this Court, the motion in arrest, was again insisted on. The warrant, alleges the complaint of James

Page, that "Michael Luther, on &c., in &c, did sell, and deliver one quart of spirituous liquor, to a certain slave named Pleasant, the property of George Spencer, without permission in writing from the said Spencer, or from any other person, having the management of the said slave; whereby and by force of the statute entitled "Crimes and Punishments," the the said Luther forfeited the sum of $100, to any person suing ing for the same," with the usual mandate to take the body, &c., "to answer the said complaint, and show cause, if any he hath, why the said Page shall not recover from the said Luther, the said sum of $100, which the said Luther has forfeited, as aforesaid, by selling and delivering, &c., contrary to the statute aforesaid."

W. J. Long and *Gorrell*, for the plaintiff.
J. T. Morehead, for the defendant.

RUFFIN, J. The only reason urged for arresting the judgment is, that the warrant does not aver that the liquor was not *for* the owner or manager, as well as that it was sold to the slave without the written permission of the master or manager; because, it is said, it cannot be supposed the Legislature meant to deprive an owner of a slave of a convenient use of him, as is the case, if the owner cannot, on an emergency send his slave, by oral command, for such an article for the owner's use. The objection is open to several answers. In the first place, the averment that the sale and delivery was to the slave, imports that it was not to, or for, the master; at least, so far as this, that, if the fact had been so, it was open to the party on trial, by evidence, to show that the sale and delivery was for the master, and, by consequence not to the slave. But, in the next place, if such evidence had been given, the defense must have failed, under the law, as it stands in the Code of 1854, which admits of no such exception to the general prohibition of trading with slaves for spirituous liquors, as that contained in the previous statutes; Revised Statutes, chap. 34, sec. 75, namely, authorising such sale and delivery

for the owner. That provision was found to open the door to so many evasions and abuses, that in the late Code it was omitted, and the enactment left to stand, generally, that it should be unlawful to sell liquor to a slave, on any consideration whatever, without the permission, in writing, of the owner or manager. So that, now, such a permission, in writing, is the indispensable pre-requisite to excuse such trading with a slave for himself, and the averment in the negative on that point, therefore, completes the description of the offense as it stands in the statute.

PER CURIAM, Judgment affirmed.

JANE C. KNOX *v.* NORTH CAROLINA RAIL ROAD CO.

Where the hirer of a slave agreed with the owner, that he should work all the time under the eye of a white overseer, and the contract was violated by putting the slave to work with other slaves without a white overseer to direct or control them, during which time, the slave was killed by a blow from an unexplained source, *it was Held* that it devolved upon the defendant to show that it resulted from a remote and unforeseen cause, otherwise, the hirer was responsible for the value.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the last Term of Rowan Superior Court.

The action was brought to recover for an injury done to Alfred, a slave, hired to the defendant upon a special contract. The evidence was that the plaintiff had a life estate in the slave in question, and as such hired him to the defendant for the year, 1855, and that it was agreed "that Alfred was to work upon the railroad under the eye of a white overseer all the time—under John Rhodes who was one of the overseers upon the said road." It was in evidence that Alfred and other slaves were placed upon the road under John Rhodes, and that he divided the hands into several companies—the slave Alfred, and five others, were placed on the road in Davidson, as a waggoner, to haul sills along the road, and that no white

overseer was with them to superintend and control them; that Rhodes went on the business of the road to Charlotte, forty-five miles distant; that he had been absent from the company where Alfred was, four or five days, when this slave received an injury on the head which killed him in some eight or ten days; that when Rhodes heard of the hurt to the slave he came immediately to the place where Alfred was, and found him lying in a shantee with the appearance of having received a blow on the side of the head which fractured his skull; that Rhodes put these five slaves to work by themselves without an overseer, because they were the most trusty slaves on the road. Rhodes testified that the nature of the business in which he was engaged, required that he should divide the hands in his charge into companies, and that he was first with one company, and then with another as the business required, that frequently he was away from the company in which Alfred worked, several days together. It was several days after Alfred was hurt before medical aid was rendered him.

The Court charged the jury, that there was a violation of the contract on the part of the defendant, in not having a white overseer with Alfred while he was at work upon the railroad, and that the plaintiff was entitled to recover; but, as it did not appear that the blow was given, and the slave's death occurred, in consequence of the overseer's absence, or how the injury happened, the plaintiff was only entitled to nominal damages. Plaintiff excepted.

Fleming, and *Clement*, for the plaintiff.
Boyden and *Jones*, for the defendant.

PEARSON, C. J. His Honor assuming that there was a violation of the contract on the part of the defendant, held that the burden of proving the cause of the death of the slave was on the plaintiff, and that in the absence of such proof, she was entitled only to nominal damages.

This Court is of opinion that it was for the defendant to prove how the slave was killed, for the reason that the violation of

the contract, put the defendant in the wrong, and it then became matter of *exculpation*, by way of mitigating damages, to show that the injury was the result of accident, and could, in no degree, be attributable to the fact of the violation of the contract; for instance, that the slave had been killed by a stroke of lightning, or the falling of a tree in a sudden storm, or died of sickness. Clearly the burden of proving matter, which is only allowed in mitigation, must be on the defendant.

The principle is this, when a contract of bailment is violated, and the property is damaged, *prima facie* it is an injury for which the bailee is liable, because, in the absence of proof as to how the matter occurred, there is no telling whether it would, or would not have happened, but for a breach of the contract, and the bailee being in the wrong, it is for him to relieve himself from blame, in respect to the actual loss, by proving that it happened in such a way as to show that it could, in no wise, be attributed to the fact of the breach of the contract, or be considered as a consequence thereof, but was an accident unlooked for and unforeseen, and such as could not have reasonably been presumed to have been in contemplation of the parties when the contract was made, so as to show that the loss was *damnum absque injuria*.

It was suggested, in the argument, that *Bell* v. *Bowen*, 1 Jones' Rep. 316, and *Ashe* v. *De Rosset*, 5 Jones' Rep. 278, seemed, in some measure, to conflict. But we apprehend, although there is, confessedly, some difficulty in making the application, the principle above stated, fully sustains the difference in the two cases, and the dictum of *Twidy* v. *Sanderson*, 9 Ire. Rep. 5. In the former, it was in the contemplation of the parties, when the contract was made, that the life of the slave would be in more danger if he was taken out of the county, and the bailee took the risk on himself, in the same manner that the law puts it on a bailee, who violates the terms of the contract; consequently, it made no difference how the slave lost his life, whether by sickness or the

falling of a tree, for all kinds of exposure were guarded against, and death from any cause, while the slave was out of the county, was considered not to be a loss too remote to be included in the damages. In the latter, the burning of the rice was considered not to be a consequence of an omission to beat it in its turn, which could reasonably be presumed to have been in the contemplation of the parties when the contract was made, but was a mere accident unlooked for and unforeseen, which could, in no sense, be attributed to the omission, and the damage was held, therefore, to be too remote.

Our case falls on the side of Bell and Bowen; for it is evident, that it was in contemplation of the parties that the life of the slave would be more exposed if he was left to work with others, without an overseer or with a black overseer, (who could not prevent fighting and other kinds of disorder) than "if he was under the eye of a white overseer all the time; and as the contract, in this respect, was violated by the defendant, and the slave lost his life, the damage is *prima facie* attributable to such violation, and matter of exculpation, as that he was killed by lightning, or the falling of a tree in a sudden storm, or from sickness, in respect to which, the presence of a *white overseer* could have had no effect, one way or the other, must be proved by the defendant; for being put in the wrong, he is liable to an action, and the plaintiff is entitled to recover the amount of his loss, unless the defendant can reduce it to nominal damages, by showing in mitigation, that the actual loss was a consequence so remote, as in no wise to be attributable to the absence of a white overseer. *Venire de novo.*

PER CURIAM, Judgment reversed.

A. M. BOGLE *et al v.* N. C. RAIL ROAD CO.

The remainderman of an estate in a slave, is not entitled to sue on a contract made by the tenant for life, with a hirer, for the protection of the slave's life, he being no privy thereto, and no part of the consideration having moved from him.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the last Term of Rowan Superior Court.

The plaintiff was the tenant in remainder of the slave, Alfred, in whom Mrs. Jane C. Knox had an estate for her life. The slave was killed under the circumstances detailed in the preceding case, (*Knox* v. *N C. Rail Road Co.*, ante 415,) and the plaintiff to recover for the injury done to his remainder, brought this action, and declared on the contract stated therein. The defendant's counsel contended that the remainderman had no interest in the contract made by the tenant for life, and could not recover thereon. His Honor was of that opinion, and the plaintiff took a nonsuit and appealed.

Fleming and *Clement*, for the plaintiffs.
Jones and *Boyden*, for the defendant.

PEARSON, C. J. Case is the proper action by one owning an estate in remainder in a chattel which is destroyed or permanently injured by the wrongful act of a third person, or of the particular tenant, or of one claiming under him.

Mrs. Knox had a right to hire the slave to the defendant, and as there is no allegation of neglect, the plaintiffs have no cause of action; for there is no wrongful act unless they are entitled to the benefit of the special stipulations in the contract of hiring. It is admitted that they are not parties to the contract, and no part of the consideration moved from them; but it is insisted that a tenant, for life, is a trustee, or *quasi* trustee for the remainderman, and by reason of this relation and the privity of estate, a contract made by the one, will enure to the benefit of the other.

Test this question in this way; suppose the tenant for life, dies before the expiration of the year, for which the slave was

hired, are the remaindermen bound to let the bailee have him for the rest of the year? or may they not forthwith take him into possession? treating the contract as of no force in respect to them? Certainly they can take the slave. If a tenant, for life, of land, make a lease for years and dies, the term for years is so utterly void, as not even to be capable of confirmation by the remainderman. It follows, that as the contract does not bind them, they can have no benefit under it for the want of mutuality, which is of the essence of all contracts.

The position that a tenant, for life, is a trustee, or *quasi* trustee for the remainderman, is not tenable. The estate is divided into two parts, but each holds the legal title of their respective parts in severalty for their own use, and there is no separation of the legal from the beneficial estate in respect to either part, and without this separation, so that one may hold the legal estate for the benefit of another, the idea of a trust is out of the question. It is true, that the possession of the particular tenant is *congeable* (as COKE terms it) with the estate in remainder; that is, their position is not that of adversaries. They are privies in estate—claim under the same conveyance, and neither is allowed to dispute the title of the other. Hence, it follows, that if one procures a stranger to execute a release of right, it operates "by way of extinguishment," and enures to the benefit of the other. But it is obvious, that this principle does not extend to a *contract* made by one in respect to his part, to which the other is not a party, and by which he is not bound, there being no confirmation; for the benefit of the contract may be enjoyed exclusively by the party making it without disputing the title of the other, which is in no wise involved, whereas, in the case of a release, the party who buys in the out-standing right, cannot enjoy the exclusive benefit of it without prejudice to his privy in estate, and to prevent this, the right is considered as extinguished, whereby the other incidentally gets the benefit of the release. Note the diversity. There is no error.

PER CURIAM, Judgment affirmed.

Doe on the demise of PATSEY ARCHER *and others v.* MERRITT HAITHCOCK.

Cohabitation, reputation, and a general recognition of a male and female as man and wife, are competent evidence to prove a marriage in all civil actions, except for crim. con., and where a marriage has been found by a jury on such evidence, it is sufficient, in law, to defeat all rights under a second marriage entered into during its existence—though the second marriage may have been formally solemnised and proved by direct evidence.

ACTION of EJECTMENT, tried before CALDWELL, J., at the last Term of Guilford Superior Court.

The only question arising in this case was upon the sufficiency of a deed from one *Avy Hood* to the defendant. It was conceded in the argument, that unless that deed was good, the plaintiffs were entitled to recover. The right to the estate being in the said Avy, she intermarried formally under license, and before witnesses, with one James Hood. She and Hood made a deed, as husband and wife, to the defendant, but the same never was authenticated as the act directs by the privy examination of the feme. She was proved to be dead, and the plaintiffs' lessors, her heirs-at-law. This appearing to the Court, by the exhibition of the imperfect deed, the plaintiffs insisted on their right to the premises.

The defendants, however, insisted that Avy Hood's deed was good, because the marriage between her and James Hood was null and void, he being at the time the same was solemnized married to another woman, one Grace Patterson, who was then alive; and to make out that case, it was in evidence that he had lived with Grace Patterson; that they had several children, and passed and were recognised as man and wife.

His Honor charged the jury, "that where a man and woman lived together, and passed and were recognised as man and wife, it was evidence, to submit to them, of a marriage," and also, if such marriage had taken place between James Hood and Grace Patterson, and she was alive at his marriage with Avy Johnson, the latter marriage was void, and her

deed, though made in the name of Avy Hood, and made as a married woman and signed by her pretended husband, and not registered, was, nevertheless, sufficient to pass her estate in the premises. Plaintiff excepted.

Verdict for the defendant. Judgment. Appeal by plaintiff.

Fowle and *Graham*, for the plaintiff.
Phillips, for the defendant.

PEARSON, C. J. We agree with his Honor in the position, that the case turned upon the validity of the marriage between Hood and Avy Johnson, and that depended upon the question, whether there had previously been a marriage between Hood and Grace Patterson.

It was in evidence, that Hood and Grace Patterson "had lived together several years and had several children, and passed, and were recognised as man and wife," and the jury, by their verdict, say they were satisfied that the said Hood and Grace Patterson had been married.

There was *direct* evidence of the solemnization of a marriage between Hood and Avy Johnson, and the question is, does this *direct evidence* of the one marriage exclude and render incompetent, or insufficient in law, the *circumstantial evidence* upon which the jury have found the former marriage?

It is held to be a general rule that reputation, cohabitation, and the declaration, and conduct of the parties, are competent evidence of a marriage between them, except in two cases, i. e., on an indictment for bigamy and in an action of "crim. con.;" 2 Greenf. Ev. sec. 762; *Burt* v. *Barlow*, 1 Doug. 170; *Morris* v. *Miller*, 4 Burr. Rep. 2057; *Wilkerson* v. *Payne*, 4 T. R. 458; *Weaver* v. *Cryer*, 1 Dev. Rep. 337. The reason given by Lord MANSFIELD, for making an exception in the action for "crim. con." is, that "it is penal in its nature and like a criminal proceeding." But in criminal proceedings, it is confined to an indictment for bigamy; and no particular reason is given for making that exception; it would seem that what is competent evidence in one case ought to be

in another, provided it satisfied the jury of the fact of the alleged marriages. But these two exceptions are fixed and, *stare decisis*. We are not, however, disposed to make another exception without a reason. Especially, as, in this State, there is no registry of marriages, and frequently, circumstantial evidence is the only mode of proving one.

Our attention was called to *Hassall's* case, 12 Eng. Com. L. Rep. 207. The prisoners were indicted for larceny; the female prisoner (as a single woman). Her defense was that she was the wife of the other prisoner and subject to his coertion. It was proved that on the occasion when the money was stolen, the prisoners spoke of, and treated each other, as husband and wife, but the witnesses, who were the prosecutor and constable, "had never seen them except on that particular transaction." GARROW B. held this evidence insufficient to establish a marriage, as it was quite evident the prisoners had assumed the relation of man and wife, as a pretext for an opportunity to commit larceny. He announces the general rule and the two exceptions, and, admitting that general reputation and a *continual* living together, and passing, and being recognised as man and wife, would be competent and sufficient in such a case, under the general rule, to make out a defense for the woman; he was of opinion, and we entirely agree with him, that passing themselves off in that way, on a single *occasion*, was no evidence of their being man and wife.

There it no error.

PER CURIAM, Judgment affirmed.

STATE *v.* ELIAS NEVILLE.

A statement made by a witness *in pais*, contradicting that made on the trial and brought in for the purpose of impeaching the integrity of such witness cannot be treated as substantive evidence of the facts involved in the issue.

State *v.* Neville.

An erroneous remark of the Judge upon the weight of evidence, that ought not to have been admitted at all, is not a ground for disturbing a verdict.

Where a judge virtually and substantially gives the instruction to the jury which a party is entitled to, it is not error for the Court to refuse, at another stage of the trial, to give the same instruction in a different form.

In a case of homicide, in order to entitle the accused to the benefit of the rule reducing a killing to manslaughter, on account of an assault upon his wife with intent to commit a rape, or for adultery, it must appear that he detected the act in its progress, and slew the wrongdoer on the spot; to slay one after such a wrong has transpired, upon subsequent information of the fact, is murder in law.

It is not error in the Court to reject testimony which was only proper to establish an incidental matter where it was not offered or pressed on the trial for that purpose, but as affecting the issue directly.

THIS was an indictment for the MURDER of one John Phillips, tried before DICK, J., at the last Spring Term of Halifax Superior Court.

Elizabeth Holt, the mother of the deceased by a former marriage, testified that the deceased made his home at her house; that he was from home on Sunday and Sunday night; that he returned about an hour by the sun; that her son Archie said something offensive to her and John slapped him for it; that Archie was sitting by the fire, crying, when the prisoner came to the house, having a gun; that he enquired what Archie was crying about, and was told by the boy, whereupon John said Archie should not run over his mother, to which the prisoner replied, "if you strike him again I will kill you, or I will shoot you"; that she told the prisoner John had not hurt Archie; that John said he had not hurt Archie, and added that the prisoner should not run over him in his mother's house; that she (witness) then went to the kitchen to get breakfast, leaving the prisoner in the house; that very shortly thereafter, she heard a gun fire, when she went to the house and found John shot in the left arm just above the elbow, and the prisoner walking off; that deceased bled from the wound very fast, and continued so to bleed until the evening of that day, when he died. She further stated that when John came home in the morning, he brought with him a jug of whiskey

which he said belonged to the prisoner; that when the prisoner came to the house, he was swearing very much. She said the prisoner was her brother's son.

Archie Holt testified that he was seventeen years old; that just before the prisoner came to his mother's house, the deceased had slapped him, and that he (witness) was crying when the prisoner came, and the latter, on being informed what had taken place, cursed the deceased, and told him if he struck the boy again, he would kill him; that they quarrelled, and the prisoner went out of the house; that John stood in the door and said he could not be run over at home; that the deceased had his hands in his pantaloon's pockets when the prisoner fired and shot him; that he had no knife or stick or weapon of any kind, and was not advancing, but standing in the door; that he, the witness, was sitting by the fire looking at the parties when the gun was discharged; that on the evening before the homicide, the witness, the deceased and the prisoner, were at the house of Thomas Neville, where the prisoner bought a jug of spirits, and requested the deceased to carry it to his (prisoner's) house; that the deceased started off with the jug about an hour before the witness and prisoner left the same place; that when they arrived at the prisoner's house, the deceased was there, and he and the deceased stayed all night there; that the deceased and prisoner drank together that night, and, about day light, went rabbit-hunting, the prisoner having his double barrelled gun with him; that the witness went home, and the deceased came home about an hour afterwards.

Elizabeth Holt, the daughter of the first witness, stated that she was the half sister of the deceased, and cousin of the prisoner; that she was fourteen years old; that she was at the kitchen when the prisoner, having his gun, came up; he asked her if she had a drink for him, to which she replied that her brother had some in the house; that he went off a short distance into the cotton patch, which was near the house, and called his hounds; that witness went into the house where her mother, her brother Archie and the deceased were; that the

prisoner, shortly afterwards, came to the door and enquired what Archie was crying about, and on being told that John had slapped him, he went into the house and told the deceased if he slapped him again, he would kill him; that deceased replied he had not hurt him, to which the prisoner repeated, that if the deceased struck Archie again, he would kill him; to which the deceased said "kill me then"; that her mother went out about that time, and the prisoner sat down for a moment on the door steps, but then rose and went out; that the deceased walked to the door and said he should not run over him at his own house; that she started to go out of the door to the kitchen, but when she got to the door, she saw the prisoner with his gun raised, and his finger on the trigger; that she jumped behind the stairs, and the gun went off instantly; that the deceased was standing with his back against the door-shutter which opened in the inside, and had his hands in his pockets; that the prisoner was some eight or ten steps from the door, and rather on the side of it. On cross examination, this witness was asked if she had not stated to Miss Margaret Porter, some eight or ten days after the homicide, that when the prisoner came up, he asked the deceased why he had treated him so badly, that the deceased asked him how, and the prisoner said, "trying to ravish my wife," to which the deceased replied, "I will not allow you to run over me," and got up and advanced upon the prisoner with a drawn knife, saying he would cut his guts out, and that the prisoner gave back and shot him. To this interrogatory, the witness answered, denying it in the most positive manner.

Several persons were examined to prove contradictory statements made by the several witnesses, Mrs. Holt and her daughter and son, but the following is only deemed necessary to be stated:

Margaret Porter stated that her mother is a sister to the prisoner; that the witness, and Elizabeth Holt, the younger, about eight or ten days after the homicide, were sitting up with the corpse of a miss Neville, and that Elizabeth told her "Elias, (the prisoner) came to her mother's house, and

asked John how he came to treat his wife so; John asked him how he had treated her." Elias said, "you attempted to ravish her." John said, "you cannot run over me here, if you can at your own house, and advanced towards the prisoner with a knife in his hand, and said he would cut his guts out; that the prisoner backed and shot him."

William Neville, a small boy, who said he was fourteen years old, a son of the prisoner, was next examined. He stated that the deceased came to his father's house with a jug of liquor, and that about an hour afterwards, his father came home, Archie Holt with him; that John and Archie stayed all night, and in the morning, John and his father went rabbit-hunting; that his mother sent him to look for his father as she feared he might be sick on the road side; that he met him coming home about two hours by the sun; that witness told his father something, and he turned and went towards the place where the killing took place. The prisoner's counsel stated the purport of this communication, which was, "that on the evening before, when the deceased came to the house of the prisoner, he saw him trying to ravish prisoner's wife; that he had her on the bed with her clothes up," and offered to prove by the witness that this communication was the truth. The Attorney General objected to the evidence and it was excluded.—Prisoner's counsel excepted.

There was testimony as to the character of Mrs. Holt and her children, and of Margaret Porter, all which was favorable.

The counsel for the prisoner requested the Court to instruct the jury as follows:

1st. That the burden of proof is on the State, to show, beyond a reasonable doubt, that the homicide was committed with malice, in order to make it murder; and every fact material for that purpose, must be established by testimony, of whose truth there is not a rational doubt.

2nd. If the jury are not satisfied beyond a reasonable doubt, of the truth of the statements made by the witnesses

for the State, as to the manner of the homicide, they ought not to convict the prisoner of murder.

3rd. The jury in their investigation, have a right to look to all the circumstances of the case, and to make such inferences as are probable from these circumstances.

4th. The jury have a right to look to the account of the affair given by the prisoner in his defense, and to compare the testimony with that account, and in this way to ascertain the probable truth or falsehood.

5th. That a jury when they come to sit in judgment upon the integrity of a witness, have a right to look, and ought to look to the relation in which the witness stands to the cause, and that it is a settled rule in law, in this State, that when near relations depose for near relations, their testimony is to be received with many grains of allowance; that when the witness is equally related to both parties, there is no inference in law as to the bias of the witness for either party in the cause.

The Court charged the jury, that it was the duty of the State to fully satisfy their minds, beyond a reasonable doubt, of the prisoner's guilt, before they could properly convict him of murder, and if they had a rational doubt, on any point, necessary to his conviction, the prisoner was entitled to the benefit of their doubts, and it would be their duty to acquit him of murder; that in the present case, the defense assumed that the prisoner killed the deceased, and the question for their consideration was, whether this was done upon legal provocation; that it was their duty to take into consideration all the evidence, both for the State and for the prisoner, and also the arguments of counsel on both sides. It was likewise their duty to pass on the credibility of each witness for the State, and for the defendant, and then to decide whether this was a case of murder or manslaughter.

The Court then remarked, that the prisoner's counsel had asked for special instructions, which he would then proceed to give them.

His Honor then read the first instruction prayed, and in-

formed the jury, that the Court adopted this proposition as a part of his charge; with this modification: that it was not always true, that the State must prove express malice before a jury would be authorised to convict of murder; that there were cases in which the law implied the malice; as where the slaying was with a deadly weapon without any legal provocation.

The Court proceeded then to read over the second, third and fifth instructions asked for by the prisoner's counsel, and informed them that the positions were correct, and he adopted them as a part of his charge to them.

As to the fourth instruction, his Honor refused to give it, upon the ground, there was no evidence that the prisoner ever made any statement as to how the killing took place. Prisoner's counsel excepted.

The Court further charged the jury, that if the evidence of Archie and Elizabeth Holt fully satisfied their minds, beyond a reasonable doubt, that the deceased was standing still in the door of his mother's house, with his hands in his pockets, and had no knife, or other weapon at the time he was shot by the prisoner, it was a case of murder.

The Court further told the jury, that they were to pass upon the credit of the two witnesses, Archie and Elizabeth Holt, and if they doubted the integrity of the witnesses, or the accuracy of their statements as to how the killing took place, the prisoner was entitled to the benefit of that doubt, and they should not convict him of murder.

The Court further stated to the jury, that the prisoner's counsel contended that the killing took place under legal provocation, and was therefore reduced from murder to manslaughter; that the State's witness, Elizabeth Holt, gave a true account of the transaction to the witness, Margaret Porter; that it was their province to pass upon the credibility and accuracy of all the witnesses that had been examined; that they would, in the first place, determine whether Elizabeth Holt ever made such a statement to Margaret Porter; and if they should find that she did, then, whether under all the

evidence, they thought it gave a true account of the transaction; and if they were of opinion that it did, then they should acquit the the prisoner of the murder, and find him guilty of manslaughter only. The Court remarked, however, in relation to the evidence of what a person said on a particular occasion, it was held by the books on evidence, to be the weakest kind of evidence, because the hearer might misunderstand the speaker, or might not have capacity to comprehend fully, or state truly, what was said. The defendant's counsel excepted to this commentary.

The jury found the defendant guilty of murder, and upon judgment being pronounced, he appealed.

Attorney General, for the State.
Miller, *Conigland* and *B. F. Moore*, for defendant.

RUFFIN, J. In the instructions given to the jury, the Court is unable to discover any error to the prejudice of the prisoner. It is manifest upon the evidence, the course taken by the defense, and the instructions prayed, that the fact of the homicide was not a point in controversy, but that it was as to the manner and circumstances attending it. For the prisoner, it was contended that the three witnesses, who represented themselves to have been present at the fact, had not, in their testimony truly stated the transaction, and, particularly that Elizabeth Holt had not; but that, on the contrary, the truth was as she had related the matter to Margaret Porter, and, therefore, it was but a case of manslaughter. It is proper to observe here, that the position is entirely untenable, although his Honor, inadvertently, no doubt, fell into it. For the only legitimate effect of the testimony of Porter, was to discredit that of Elizabeth Holt, and, if true, it did not constitute substantive evidence of the circumstances attending the killing; since, at best, it was but the narrative of Elizabeth Holt, not under oath, and could not legally establish any thing affirmatively. It was in reference to that point, in his instructions, his Honor made the remark, that such evidence—of what a

person had said, was considered the weakest kind of evidence; and, therefore, whether the remark be correct or incorrect, it cannot affect the question now before the Court.

The shape, then, which the defense took, imposed the burden on the prisoner of producing proof of such facts and circumstances as would mitigate the offense; otherwise the inference of the law is, that it is murder. There was no error, therefore, in assuming the killing to be established, and in so saying to the jury. Still it was open to the prisoner to urge before the jury, that there must have been other circumstances attending the homicide, which the witnesses for the State had not disclosed, but dishonestly kept back, and which, therefore, if disclosed, it might be inferred, would give a different complexion to the killing; such as the kindred, and friendly relations between the parties up to the morning of the fatal affray, and the improbability of the prisoner's being prompted to such a deed by the trivial circumstances that the deceased had given his younger brother a slight slap, for irreverent language to their mother, an aunt of the prisoner; and, in addition, and above all, that the most material witness for the State, as to the overt act, had stated to another person other facts attending the killing, which, if true, showed it to be an immediate and sufficient provocation to reduce the offense to manslaughter. All these considerations were, doubtless, urged before the jury, and seem to have been fairly left to them by the Court. In truth, the case turned upon the veracity and accuracy of the witnesses on the part of the prosecution; and the verdict can only be sustained by the credence which the jury gave to them. The jury having found the prisoner guilty on their evidence, there is no power in this Court to disturb the verdict.

With respect to the instruction prayed, that the jury had a right to look to the account of the affair given by the prisoner in his defense, and compare the testimony with it, and in that way probably ascertain the truth, there seems to have been some misapprehension both on the part of the Court and the counsel for the prisoner. In England, formerly, the accused,

not being entitled to counsel, conducted his own defense, and, in making it, as almost every unprofessional person would, he did not confine himself to the evidence at the trial, but, naturally gave his own version of the transaction. That was not evidence, in the proper sense of the term, of the facts stated by the accused, but still the statement might be, and often was, considered by the jury as suggestions affecting the credit of the witnesses, the weight to be given to the facts deposed to by them, the probability of the opposing tales and the proper inferences from the proofs. No such practice is known among us: though, if one choose to conduct his own defense, juries would probably pay the same regard to such suggestions and arguments as they formerly did. In place of such a mode of proceeding, defense by counsel universally prevails here, and the argument and suggestions by the counsel, both as to the matter of law and fact are heard by the jury, and always submitted by the Court to their consideration in forming their conclusions upon the subject in controversy. It was done in express terms in this case, and, therefore, while his Honor declined giving the fourth instructions prayed, on the ground, that the prisoner had not given any such account of the affair as was supposed in the instruction, he had, in effect and substance, given it before. For, after laying before the jury the position of the prisoner's counsel, that the killing took place under such circumstances of legal provocation as extenuated it from murder to manslaughter, the Judge told them it was their duty to take into consideration all the evidence, and also the arguments of counsel, both for the State and the prisoner. There was, therefore, no error in that part of the case.

The only remaining question is upon the rejection of the evidence of William Neville, the son of the prisoner. The prisoner offered to prove by him, that on the evening preceding the homicide, the deceased came to the prisoner's house, and had the prisoner's wife on the bed with her clothing up, and attempted to ravish her. To what end was the evidence offered?—Obviously, to establish a provocation for the killing—the idea

which pervaded the whole trial. For that purpose, it was not proper evidence, and ought to have been rejected. If admitted and believed, it could not have changed the character of the offense, but would, in the view of the law, aggravate it. As, upon an analogous question, somewhat akin to this, namely, a husband's killing an adulterer with his wife, the Court would hold that a husband finding a man violating or attempting to violate his wife, and killing him on the spot, might plead that *furor brevis* which so atrocious a wrong, both to the wife and the husband would naturally inspire; nay, if needful to prevent the accomplishment of the purpose, we think that he would be justified in slaying him; as the woman herself would be. But a due regard for human life, and the necessity of protecting it from unbridled wrath and vengeance, and a just respect for the peace of society, and the supremacy of the law, which constitute the well being of every community, restrain any further relaxation of the rule which forbids one man to take the life of another. With respect to the case of adultery, the law is found in the most ancient archives of the common law, and has been brought down to us in the same plain and precise terms by the ablest Judges, and the most eminent writers on the criminal law; and a court at this day has no more authority to interpolate new qualifications or exceptions into it, than power to make a statute. But the rule of the common law on this head, stands not alone on its authority. It is commended, as well, by its wisdom. Homicide is extenuated to manslaughter, not by the fact that it was perpetrated in a fury of high passion, but by such fury's being excited by a present provocation, which the law deems sufficient for the time, to deprive men in general of that power of reasoning and reflection, which ought to lead them to appeal for redress to the law, and instead thereof, prompts them to take it into their own hands. The wrong is thus infallibly known, and the wrongdoer is thus made instantly to expiate it with his blood. But where a husband only hears of the adultery of his wife, no matter how well authenticated the information may be, or how much credence he may give to the informer,

and kills either the wife or her paramour, he does it not upon present provocation, but for a past wrong—a grievous one indeed! but it is evident he kills for revenge. Let it be considered how it would be if the law were otherwise. How remote or recent must the offense be? How long or how far may the husband pursue the offender? If it happen that he be the deluded victim of an Iago, and after all, that he has a chaste wife, how is it to be then? These enquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and the certainty of encouraging proud—heady men to slay others for vengeance, instead of bringing them to trial and punishment by the law. It is obvious that these observations apply with equal force to an alleged rape, or an attempt to commit a rape on the wife at a past time; and this case furnishes a forcible illustration of the extreme hazard of extenuating the offense of taking the life of a fellow man, upon information. The wife of the prisoner made no complaint to him on his arrival at home, that the deceased had assaulted her or insulted her; but, on the contrary, the deceased was entertained by them both that night in friendship, and the prisoner and the deceased hunted together next morning by themselves—thus rendering the imputed act extremely improbable. Yet, it is assumed by the prisoner, that upon hearing from his son, who was just of an age to be a competent witness, that the deceased had misbehaved towards his mother, he might, without regard to the improbability of the accusation as known to himself, and without making any enquiry of his wife, proceed to the residence of the deceased and shoot him down, and that he would not be guilty of murder. Such a position is altogether inadmissible. The Court is therefore of opinion, that the evidence was not admissible for the purpose for which it was offered?

It was further argued that it ought to have been received for the purpose of sustaining the credit of Margaret Porter, and impeaching that of Elizabeth Holt. Although it did not relate to the matter on which the two witnesses were at points,

that is the narrative by Holt of the circumstances attending the killing, yet it must be admitted to have at least a remote relevancy to the credit of those persons, inasmuch as the probability that Elizabeth Holt made the statement to Porter deposed to by the latter, would be increased by showing that in point of fact, those circumstances really existed, of which the prisoner complained to the deceased during the altercation according to the alleged narrative of Holt to Porter.— But the Court is of opinion, nevertheless, that the prisoner is not entitled to a *venire de novo* on that ground. The evidence was not offered for that purpose. At least, nothing of the kind is to be collected from the bill of exceptions. Counsel are bound to state the evidence they propose to offer, and its purpose; else it is impossible that the Court, a stranger to the case, can see its relevancy, or properly restrict counsel in their remarks on it to influence the jury as to its effect; and when evidence is offered for the general purpose of affecting the degree of a homicide which is irrelevant to that point, and is for that reason rejected, there is no error in rejecting it generally, although it may be competent for a more restricted purpose, unless the party ask its reception for that purpose, and that only. For in no other way can a court know that the party desires it, or would be willing to rely on it, or that it should be given for that particular purpose. For example, in the case before us, it might well be doubted whether the prisoner would gain any advantage from the evidence, merely as affecting the credit of the two witnesses. While on the other hand, if believed, it might sustain, in the manner already mentioned, the credit of Porter in deposing to the declarations of Elizabeth Holt, yet, on the other, taken in connection with the age of the son, and the silence of the wife as to the alleged wrong to her, and also the silence of the witness himself to his father on his getting home, and during the night, and the friendly entertainment of the deceased by all the parties, it might have laid the ground of a serious suspicion that the whole story was the fabrication of afterthought, and that those two young persons were made the instruments for unjustly de-

stroying the credit and character of Elizabeth Holt. Of course, the Court will not be understood as making that imputation. It is alluded to for the purpose, only, of showing that it was not for the Court, at the trial, to receive the evidence for a restricted purpose, when it was not offered for such purpose, and when it is plain that the prisoner might rather give up the evidence restricted to that purpose, than risk its recoil. To allow him the benefit of it upon a motion for a *venire de novo*, would be but little short of inviting counsel, instead of getting a fair trial for the accused, to lay traps for the presiding Judge, and beguile him into them.

There is no error, and this must be certified to the Superior Court of Halifax.

PER CURIAM, Judgment affirmed.

CALTERN C. CANNON *v.* JOSEPH W. NOWELL *and wife.*

Heirs take by positive law where the ancestor dies intestate, and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties.

PETITION for partition of land, descended to the petitioner and his sister, Harriet, the feme defendant, tried before SAUNDERS, J., at the last Superior Court of Chowan.

By the petition, and a supplemental petition, and the answer and exhibits, the following case is made: In October, 1849, Joseph Cannon, the father of the plaintiff, conveyed to the plaintiff, in consideration of natural love, a tract of land, containing seventy-five acres, in fee simple. The deed contained the following clause: "Moreover, in consideration of this gift of land, the said Caltern C. Cannon is not to have, or be entitled to, any more of the land of his aforesaid father, unless the same should be given to him by deed, will, or other conveyance by his aforesaid father." In 1855, the father

conveyed to his daughter, the defendant Harriet, another tract of land, containing seventy-five acres, in fee simple, in consideration of natural love; and in 1857, he made a conveyance for another piece of land of ten acres, in fee, in consideration of natural love. In June, 1858, the father died intestate seized of a tract of land, containing two hundred and four acres, and leaving a widow and the two children, who are the parties to this suit, and another son, Stephen G. Cannon; and the latter afterwards died intestate and without issue. The petitioner submits to bring into hotchpot, both of the tracts conveyed to the plaintiff at their value when conveyed, and insists that the defendants shall, in like manner, bring into hotchpot the land conveyed to the defendant, Harriet; and subject thereto, it prays for partition of the land descended, so as to assign to the plaintiff and the defendants one moiety thereof in point of value. The defendants, on the other hand, insist that the plaintiff is excluded from taking any part of the descended land, by force of the recited clause in the deed of 1849. In the Superior Court, the partition was decreed according to the prayer of the petition, and commissioners appointed to make it, with directions to value the lands conveyed to the respective parties by the father, as advancements as of the dates of the conveyances, and to charge the value thereof, to the respective donees, as parts of his or her equal moiety of the whole. From that decree, the defendants appealed.

Winston, Jr., for the plaintiff.
Jordan and *Wm. A. Moore*, for the defendants.

RUFFIN, J. The opinion of the Court coincides with that of his Honor. Heirs take by positive law when the ancestor dies intestate, and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties. Suppose the father to have had no other child at his death but the plaintiff; being the sole heir, he must have taken the whole of the descended land *ex necessitate*. There

must, therefore, be a disposition to another, so as to break the descent, otherwise the land descends, and, of course, it descends according to law; that is, in this case, to the heirs in general, subject to the provision for bringing advancements into hotchpot. That was decreed in this case, and the decree must be affirmed with costs in this Court.

This opinion will be certified to the Superior Court, to the end that further proceedings may be had there for executing the decree.

PER CURIAM, Judgment affirmed.

WILLIAM D. EBORN, *Adm'r.*, *v.* JOSEPH WALDO *et al.*

In an action of Replevin, the Act, Rev. Code, chap. 98, sec. 3, directs that, where a slave, taken under the process, has been delivered to the plaintiff, and he fails to recover, either by being nonsuited, or by a verdict's being rendered against him, there shall be an enquiry of the value of the property and of the damages for detention, and it was *Held* to make no difference whether a nonsuit was ordered, because there was no caption, or because property, out of the defendant. was not proved.

ACTION of REPLEVIN, tried before DICK, J., at the Spring Term, 1859, of Martin Superior Court.

The action is Replevin on the statute, for a slave, which was delivered by the sheriff to the plaintiff. The defendants pleaded the general issue, and property in the defendants, and, on the trial, the plaintiff was nonsuited. The defendants then moved the Court to direct an enquiry of the value of the slave, and the damages sustained by them by the plaintiff's detention of the slave, but the Court refused and gave judgment against the plaintiff for the costs, and the defendants appealed.

Winston, Jr., and *Donnell*, for the plaintiff.
Rodman and *Jenkins*, for the defendants.

RUFFIN, J. The decision in the Superior Court would formerly have been right; *Pannell v. Hampton*, 10 Ire. Rep. 468. But this action was brought in June, 1857, and the Act of 1854, Rev. Code, ch. 98, sec. 3, altered the law entirely, and no doubt advisedly, to meet the difficulty which was felt in the case mentioned. It enacts that when the property shall have been delivered to the plaintiff, and he shall fail to recover by being nonsuited, or a verdict for the defendant, there shall be an enquiry of the value of the property and of the damages by his detention, and judgment on the plaintiff's bond, to be discharged by the surrender of the property and payment of the damages and costs. Thus a verdict against the plaintiff, and a nonsuit, are put on the same footing. Each is made conclusive, to the extent, at least, of the defendant's right to a return of the property and to damages for the detention during the pendency of the action in which the plaintiff failed. How far the right of property may be concluded when there is a nonsuit, is not a question in this case. But to the extent mentioned, the enactment is express and positive, and one is at a loss to conjecture why the enquiry was refused here. It has been suggested that it may have been because the nonsuit was on the ground, that the plaintiff failed on the defendants' plea of *non cepit*. It is not perceived how that could affect the question. Supposing the "general issue" to mean *non cepit*, and not considering how far the act may affect the forms of pleading in the action when brought on the statute, and, admitting the plea not to have been immaterial, but a proper plea here, still, the ground of the nonsuit does not appear, and it cannot be inferred that it was not upon the inability of the plaintiff to show the property out of the defendants. But, even if it were as suggested, it is still to be remembered that the act makes the nonsuit conclusive, to the extent mentioned, whatever may be the ground on which the plaintiff was nonsuited. Well it may be so, in most cases, at least, since, by a contrary construction, a defendant, who happened to be unable to give bond to perform the final judgment, would be deprived of his property, simply by

the bringing of a groundless action—never prosecuted, and be without redress, either in respect to a return, or to the loss of enjoyment. Hence, the law meant that any person, who uses this action, and gets possession under it, should be very sure of being able to maintain it at all events, as a means, and the only means of preventing very great abuses of process by which possession is taken from one person and given to another, without determining the right, in a case in which trover or detinue would have been the proper remedy at common law.

The judgment must, therefore, be reversed and a procedendo awarded, requiring the enquiry to be made as asked by the defendants.

PER CURIAM. Judgment reversed.

W. D. OSBORNE *v.* A. D. TOOMER and F. S. DAVIS.

The extreme sickness of the principal in an insolvent bond, and the the sickness of the surety, whereby they were both unable to attend the Court to which the bond was returnable, furnishes no reason why a judgment rendered against them on such failure, should be set aside as being void.

Clerks, during the term of court, can only make short minutes from which they must make out their more formal record out of term time, and they are at liberty to put all orders and judgments in proper form.

THIS was a RULE on the plaintiff to vacate a judgment, and set aside an execution thereon, heard before CALDWELL, J., at the last Fall Term of Guilford Superior Court.

The facts were, that the plaintiff recovered a judgment against Toomer, in the Superior Court of Guilford, on which he sued out a ca. sa., returnable to the term of that Court, held in the autumn of 1858. On being arrested, Toomer entered into bond in the usual form, for his appearance at the return of the writ, and Davis executed the bond as his sure-

ty. The ca. sa. and bond were duly returned on Tuesday of the term; the plaintiff's attorney had Toomer, called, and, upon his failing to appear, his default was recorded; but the gentleman of the bar who appeared for Toomer in the suit suggested that he had received information by letter that he was prevented by sickness from attending, and requested that no judgment should be entered on the bond, saying that he expected to be able to establish the fact, before the end of the term, and, thereupon the judgment was deferred, and the counsel for the plaintiff agreed, that if the fact should be established, he would not pray judgment at that term. On Friday following, the counsel for the plaintiff, after having Toomer again called, had his default entered, and nothing further being said of his sickness, he then moved the Court for judgment against the principal and the surety, and the Court ordered it accordingly, and then the attorney for the plaintiff remarked that he had drawn up the judgment formally, and he then delivered the paper to the clerk in open Court, and told him that it was the form of the judgment. The clerk made an entry in his minutes in these words: "W. D. Osborne and A. D. Toomer: the defendant in this case, A. D. Toomer, being solemnly called, fails to appear: judgment of the Court is rendered for the debt and costs." But finding the paper in January following, (the paper which had been given to him by the attorney, and which he had forgotten,) in making up the records of that term, he entered it in the record of that case as the judgment. The record, as thus made up, after stating that Toomer was called and failed to appear, purports to be a judgment against him and Frederick S. Davis, the surety in the bond for his appearance, for the sum of $1418 60, the penalty of said bond, to be discharged by the payment of $709.30 with interest on $589.82, from the 26th of October, 1857, until paid, and the costs of the suit; which accords with the debt, damages and costs set forth in the execution.

On the part of Davis, it was also established by uncontradicted affidavits, that during the whole of the term of Guilford Court, (which was the last week in October, 1858,) the

debtor, Toomer, was extremely ill in Chatham county, where he resided, and that he could not go, nor be carried to the Court, and that he died of that illness in the succeeding month of November, and died insolvent, and, indeed, without any property, and that, also, the surety, Davis, was so sick during the Court, that he was confined to his house in Chatham, and could not have attended the court without much danger.

The plaintiff sued out a *fieri facias* on the judgment in 1858, and the rule obtained, was to set aside the execution, and vacate the judgment.

The presiding Judge was of opinion that the judgment had not been taken according to the course of the courts, and therefore made the rule absolute.

The plaintiff prayed an appeal, which was granted; the Court at the same time, directing that the affidavits respecting the sickness of the parties, should be sent to this Court, as a part of the case.

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

Ruffin, J. His Honor was, probably, somewhat moved by the hardship of the case, on the other point, in forming his opinion on the point decided, and we might be inclined to follow his example, if it could be done without danger of a general mischief. The judgment was, certainly, regularly given; for the statute directs, in case of the debtor's failure to appear at the first term, that judgment shall be rendered instanter upon the bond returned, against the principal and sureties, to be discharged upon the payment of the debt and costs; and here the judgment was given by the Court after the debtor was duly called for the second time, and his default recorded. It is not what is called an office judgment only, but was that of the Judge himself; and, even if it were erroneous, it could not be corrected in this manner. But it was not erroneous, as it accords with the express words of the statute. Perhaps his Honor may have considered the subsequent more formal en-

try of the judgment by the clerk, in making up the record out of term time, irregular and improper. That, however, is hardly probable, as that is the universal course, and necessarily so. During term, the clerk can only make short minutes, and in making up the record, he is at liberty to put the orders and judgments into proper form, and supposing the clerk to commit a misprison in making up the record, that would be no ground for vacating the judgment, but, on the contrary, it would authorise the other side to ask a correction of the record, so as to make it consistent with, and support the actual decision made by the Court, of which, in this case, there cannot be a doubt. The Judge, in fact, gave the judgment on the bond, and in the state in which the case then was, the only one which he could have lawfully given. It may be reversed, if erroneous, but there is no power to vacate it.

There was no decision on the other point, and, therefore, it it is not, strictly speaking, brought up by the appeal; though apparently, his Honor intended it should be. The Court, has, however, considered it at the instance of the counsel, and, in order to satisfy the parties it is well to express the opinion that has been formed. However hard the case may be, the Court does not perceive any ground on which the surety can be relieved. The insolvency of the principal debtor furnishes none, nor his death, since the judgment. The extreme sickness of the principal at the time, would have excused his non-appearance, and entitled him and his surety to a continuance under the 10th section of the statute, if that had appeared to the Court. But that was not made to appear, and, therefore, the Court could not properly have continued it. That was the fault of the party; for, although the sickness might have excused the debtor for not appearing, and the surety for not bringing him in, yet it furnished no reason for not appearing by attorney, and showing by witnesses their inability to attend in person. They might, in that manner, have shown their right to a continuance, and having failed in that there is now, no help for them. In the nature of things, the personal appearance of the debtor, was known to be requisite, and that,

on his default, judgment must go against them, unless the default was duly accounted for, so as to prevent the judgment; and it is the misfortune of the parties, that they did not account for it in apt time.

The decision of the Superior Court is erroneous, and is reversed, and a *procedendo* must be awarded,—that the rule be discharged, and that the plaintiff may have execution on his judgment.

PER CURIAM, Judgment reversed.

State to the use of JOHN G. GULLEY, *Chairman of Common Schools, v.* JOHN H. DANIEL *et al.*

The Act of 1854, (Rev. Code, ch. 66,) on the subject of common schools, did not repeal the provisions of the acts of 1844 and 1848, prescribing the appointment of a chairman of the Board of Superintendents, and the tenure and extent of his office. It was *Held*, therefore, that, where a chairman gave his bond in January, 1855, and continued in office without any new appointment until April, 1857, (when a successor was appointed,) he and his sureties were liable on such bond for an unexpended balance of school money in his hands in 1857.

MOTION for judgment against the chairman of the board of superintendents of common schools and his sureties on his official bond, tried before CALDWELL, J., at the Fall Term, 1858, of Johnston Superior Court.

The defendant, Daniel, having been chairman of the board of superintendents of common schools, for the county of Johnston, the preceding year, without any new appointment in January, 1855, executed the bond upon which this motion is predicated, with the other defendants as his sureties, which is in the penal sum of $7000, and is admitted to be in proper form. There was then in his hands, as chairman, an unexpended balance of school money of $4628.

On the 3rd Monday in April, 1855, there was an unexpended balance of $4120,55.

On 4th January, 1856, there was an unexpended balance of $4051,01.

On the 3rd Monday of April, 1856, there was an unexpended balance of $3542,21.

And on the appointment of another chairman, 3rd Monday of April, 1857, there was in his hands an unexpended balance of $5483,65.

After the appointment of the board at November Term, 1854, of Johnston County Court, there was no other appointment of a board until February Term of that Court, in 1857, when another board was appointed, which organised on 3rd Monday in April, 1857, and appointed another chairman.

There was no action of the board, which was appointed in 1854, after the year 1855, and the defendant, Daniel, was not reappointed, but continued to receive and disburse the school moneys until 3rd Monday in April, 1857. These facts were agreed upon, and it was submitted to his Honor, whether the plaintiff was entitled to recover, who being of opinion thereon that plaintiff was entitled, gave judgment for $7000, the penalty of the bond, to be discharged on the payment of $5483,65, with costs, from which the defendants appealed.

Miller and *Cantwell*, for the plaintiff.
B. F. Moore, for the defendants.

BATTLE, J. We have no hesitation in declaring our concurrence in the opinion given by his Honor in the Court below, that the defendants were liable for the sum of $5483,65, which is the amount for which the principal defendant was in default in April, 1857. The question depends upon the proper construction of several acts of the General Assembly in relation to common schools.

By the second section of the act of 1844, ch. 36, it is made the duty of the county courts "at the term next preceding the 1st Monday of October, in each and every year," to appoint

not less than five nor more than ten superintendents of common schools, who shall hold their appointments for one year and until others are chosen, and by the next succeeding section, that the terms of their office shall commence on the first Monday of October; the day after which, they shall assemble at the clerk's office and elect one of their number chairman. After providing, in previous sections, for the payment of certain moneys into the hands of the chairman of the board of superintendents of common schools, and prescribing his duties in relation thereto, the 25th section directs the county court of each county to require the chairman, before he enters upon the duties of his office, to give bond with good and sufficient security in such sum as may be deemed reasonable and adequate, conditioned for the faithful application of the funds that may come to his hands and the discharge of all his duties; which bond shall be payable to the State of North Carolina, and shall be approved and received by a majority of the superintendents, and shall be filed by them with the clerk of the county court. The act of 1848, ch. 95, in section 1st, alters the time of the election of the superintendents to the term of the several county courts, held next preceding the first day of January, and makes their office commence on that day, to "continue for one year and until others shall have been appointed and entered upon their office." The second section directs that the superintendents shall meet on the first Thursday in January "and elect one of their number chairman, and also appoint three committee-men in and for each school district in their county, whose office shall likewise begin and end at the time and in the manner prescribed in the case of superintendents." It was under the provisions of the above recited acts of 1844 and 1848, that the defendant Daniel was appointed chairman of the board of superintendents of common schools for the county of Johnston, in January, 1855, and gave the bond upon which the present proceeding was instituted. As by express provision of the 2nd section of the act of 1848, ch. 95, his office was to continue for one year and until another should be appointed and enter upon his

office, it is manifest that he and his sureties continued to be liable, upon his bond, until his successor was elected in April, 1857, unless that liability was destroyed or removed by some other act of the General Assembly. The counsel for the defendants, contends that it was taken away by the act of 1854, which forms the 66th chapter of the Revised Code, and which, by force of the 121st chapter and 1st section of that Code, went into operation some time in the spring of 1855. The counsel argues, that when the last act took effect it repealed all the former statutes relating to the subject of common schools; that the office held by the principal defendant, Daniel, of chairman of the board of superintendents, was thereby vacated; that his bond was no longer of any validity, and that his sureties were discharged from any further liability upon it. We do not admit the force of the argument. On the contrary, we think the objections to it are unanswerable. If the Act of 1854, (which, with a few exceptions, was to go into operation prior to the time prescribed for the Revised Code,) were embraced, as to its repeal, in the second section of the 121st of the Revised Code above referred to, then the vacation of the office, held by the principal defendant, Daniel, was expressly prevented by the 7th section of the same chapter, which enacts as follows: "All persons who at the time, when the said repeal shall take effect, shall hold any office under any of the acts hereby repealed, shall continue to hold the same according to the tenure thereof, except those offices which may have been abolished, and those as to which a different provision shall have been made by the Revised Code." Now, it will be seen that the chairman of the board of superintendents of the common schools, is not abolished by the act of 1854, nor any change made in it, except as to the time when the superintendents and their chairman shall be elected and the term of their office begin. See Revised Code, ch. 66, sections 27, 28, and 29. If the act of 1854, were not embraced in the repealing section of the 121st chapter of the Revised Code mentioned above, but were left to operate, *proprio vigore*, an implied repeal of the former acts on the subject of common schools

then, as it has no repealing clause, it operated a repeal only so far as it was inconsistent with the former acts, and there is no incompatibility between the provisions of the acts of 1844, 1848 and 1854, in relation to the election of superintendents and their chairman, except as to the time of election and the commencement of their term of office. The tenure of their offices, to wit, for one year, and thereafter, until the appointment and entering into office of their successors, is the same in all the acts, and there is, therefore, nothing in the last act of 1854, to prevent the continuance in office of the chairman, elected under the former acts, until a successor was appointed under the latter; so *quacunque via data*, the principal defendant, Daniel, and his sureties, were bound for his official acts under the bond given on his election in January, 1855, until his successor was appointed and entered upon his office in April, 1857.

PER CURIAM, Judgment affirmed.

STATE *v.* JOHN HARRIS.

A license granted by a county court to a free person of color to carry a gun on his own land, does not protect him from the penalties of the act of Assembly, Rev. Code, ch. 107, sec. 66, for carrying such gun off of his own land.

INDICTMENT against the defendant, a free person of color for carrying fire-arms, tried before SHEPHERD, J., at the last Spring Term of Craven Superior Court.

It was admitted that the defendant is a free negro, and it was admitted on the part of the State that the defendant had a license from the County Court of Craven "to keep about his person, and to carry on his own land a shot-gun."

At the time the offense was alleged to have been committed, it was admitted that the defendant, in company with cer-

tain white persons, went a hunting, and carried his gun off of his own land. His Honor was of opinion, upon a case agreed, that the County Court had no power to limit the license, and therefore, that the defendant was not guilty. Judgment was rendered for the defendant, and the State appealed.

Attorney General, for the State.
J. W. Bryan and *Green*, for the defendant.

BATTLE, J. We differ from the opinion expressed by his Honor, that the county court could not limit the license which it is authorised by the 66th section of the 107th chapter of the Revised Code, to grant to a free negro, to enable him to carry a gun, &c., about his person, or keep it in his house. The authority to grant the greater privilege, must, we think, necessarily include the power to grant the less, provided the applicant be willing to accept it. In many cases, the county court might think it a very prudent precaution to limit the carrying of arms to the lands of the free negro, and we cannot discover any thing, either in the language or spirit of the act to prevent the restriction from being imposed. Indeed, the allowance of it will oftentimes operate in favor of the free negroes, who may thus be enabled to keep a gun, &c., for killing game on their own land, or for protecting their own premises, when they could not obtain a license extending to them greater privileges.

But if we were wrong in this, it might well be doubted whether the restricted license could be held to be a more extensive one than the County Court intended to grant. It would rather, as it seems to us, be void, as not coming within the authority conferred by the act upon the Court. We do not put our decision, however, upon this point, as we think the other decidedly against the defendant. This must be certified to the Court below, to the end that the judgment be reversed.

PER CURIAM, Judgment reversed.

JOHN MORRISON v. NEILL McNEILL.

The act of 1806, Rev. Code, chapter 50, sec. 7, was never intended to bring in one who holds adversely to the debtor, and compel him to make a declaration of his title, in order to found an issue on it, to try whether it is his property, or that of the debtor.

In order to bring a party within the scope of the act of 1806, it must appear that he is connected with, or holds under the title of the fraudulent alienee and in secret trust.

SCIRE FACIAS, suggesting a fraudulent trust in property, tried before HEATH, J., at the last Spring Term of Moore Superior Court.

In October, 1854, the plaintiff recovered judgment against Dugald McDugald, on a bond given in 1853 for $900, and, after making the affidavit required by the statute, the plaintiff, in March, 1855, sued out this *scire facias* against Neill McNeill, to charge him with the debt, by reason of property held by him under conveyances made to him by McDugald, with intent to defeat the creditors of McDugald, or of property or effects held by him, McNeill, upon secret trust for McDugald.

McNeill appeared and answered on oath, denying that he then, or at any time, held any property under a conveyance from McDugald, or any effects upon delivery from him, or otherwise upon any trust for him. The answer stated, among other things, that he, McNeill, in the year, 1854, purchased from Margaret McDugald, a certain negro woman and three children at the price of $2,400, paid in a certain mode stated.

Under the direction of the Court, an issue was made up whether the defendant Neill McNeill has the sum of $3000, or any other sum, as the proceeds of a slave named Nancy, and her three children, the property of Dugald McDugald, which he holds in secret trust, and for the use of the said Dugald McDugald; and the jury found affirmatively thereon, and judgment was rendered against McNeill for the amount of the judgment against McDugald, and the defendant, McNeill, appealed.

On the trial, evidence was given on the part of the plaintiff, that in 1844, McDugald was the owner of the slaves Nancy, &c., and that they remained in his possession up to the autumn of 1854, and that they were carried to South Carolina by one John McNeill, and left at the house of one Pegues, and that afterwards, but at what time, is not stated, the defendant, Neill McNeill, took the slaves and sold them.

The defendant then gave in evidence a bill of sale for Nancy and a child, from McDugald to one John McNeill, dated September 25th, 1845, expressed to be for the consideration of $500, and also, a bill of sale for the same negroes on the same consideration from the said John McNeill to Rebecca McDugald, infant daughter of Dugald, dated September 25th, 1845. He then produced the said Dugald McDugald as a witness, who deposed, that in September, 1845, he owed John McNeill a debt, and in payment thereof, he sold to him this family of negroes, and conveyed them by the bill of sale of that date; that it was an absolute sale, but that nevertheless, his understanding was, that if he would pay the money to McNeill, who was his wife's brother, he would reconvey the slaves to the witness; that two or three months afterwards, he paid NcNeill the money, and, at his instance, McNeill then made the bill of sale to his daughter, Rebecca, and that neither at that time, or at any time after 1842, did he owe a debt in the world, except that to McNeill; that his reason for having the conveyance made to his daughter, was that the negroes came by his wife, and he wished them secured to her daughter; and that Rebecca had lived with him ever since the deed, and the negroes were regarded and held as her property.

The defendant also produced the said John McNeill as a witness, and he deposed that, in 1845, Dugald McDugald owed him, as the administrator of his father, a debt of $265 or 365, he could not recollect which—for equality, in the division of the estate, and as McDugald had once failed, he required payment in money or negroes; and that McDugald then sold him that family of negroes in payment of his debt; that the sale was absolute, and he was not, in any way, bound

to reconvey the slaves. He did intend, however, that if McDugald should pay the amount allowed for the negroes, to convey them back, and he probably so mentioned to McDugald, but it formed no part of the consideration or contract, and he could convey back or not as he pleased; that, about three months afterwards, McDugald paid the price in money, and other property, and requested him to convey the slaves to his daughter, Rebecca, and he did so, dating the deed even with that made to himself, supposing that to be right. It was intended that the title of Rebecca should be absolute, and without any condition whatever, and that he did not know, that at that time, McDugald owed any debt.

For the purpose of showing that the deed from McDugald to McNeill, was fraudulent, the plaintiff gave in evidence a bond for about $100, which McDugald gave to one Tyson in 1846, and paid in 1848.

There was no evidence that McDugald contracted or owed any other debt from 1842 to 1853, at which latter time he gave the bond on which this judgment was rendered.

The counsel for the defendant insisted, that, if the jury believed D. McDugald was not indebted when he made the deed, in 1845, and that up to 1853, he had contracted but the one debt to Tyson, and paid that in 1848, his bill of sale to John McNeill, was not fraudulent as against his creditors, but was valid to convey the slaves; and that as the deed from McDugald to John McNeill, was absolute on its face, and was intended so to be, if the witnesses were believed, that also passed the slaves; and that, whether that deed were valid or not, yet the bill of sale from McNeill to Rebecca, being absolute in its terms, and there being no evidence of any intention that her title should not be absolute, would, with the possession by her under it, vest the title in her against the world.

His Honor instructed the jury that the case turned upon the validity of the deed from McDugald to John McNell. If that was intended as a security for the payment of money, and not as an absolute sale, then it passed no title. but the title would still be in McDugald; and if they should be of that

opinion upon the evidence, then they should find that the defendant had in his hands effects with which to satisfy the plaintiff's debt—that being the issue they were empanelled to try.

Person, *Strange* and *Haughton*, for the plaintiff.
Kelly and *Neill McKay*, for the defendant.

RUFFIN, J. The Court does not concur in the opinion held by his Honor, as to the point on which the controversy turns. We are not prepared to say that a purchaser for value from John McNeill, with the concurrence of McDugald, would not have a good title, although the deed between these persons was intended as a security for money, and that was not expressed in it, and so it could not be registered as a mortgage, which we suppose to be the ground of the position taken at the trial. If the purchaser would get the title, so would a donee, if the transaction were, in other respects, *bona fide;* for so far as McNeill was a trustee for McDugald, it was his duty to convey as ordered by his *cestui que trust.* But it is not deemed necessary to express an opinion on that point, either way, since the Court holds that in a proceeding of this kind, it is essential to charging the defendant, that the plaintiff should establish that the defendant holds under a fraudulent conveyance from the debtor in the judgment, or upon a delivery on a secret trust for him in particular. It cannot be that one who holds adversely to the debtor, can be brought in by a *scire facias*, to make a declaration of his title, in order to found an issue upon the question whether the property is in the holder, or in the debtor; or, that a debtor to the original defendant can be charged in that way with the payment of the judgment debt. The act of 1806 was passed for no such purpose. It is entitled "An Act to secure creditors against fraudulent and secret conveyances of property by insolvent debtors," and recites the mischiefs to be frauds committed by persons making conveyances upon some secret trust, or by persons concealing the property of insolvent debtors, so as to enable them to avoid, or delay the payment of their just

debts; and then it enacts, that, upon the affidavit prescribed, the plaintiff may have a *scire facias* against any person claiming any estate under an alleged fraudulent conveyance by the debtor, of his property to avoid or delay the payment of his debts, or against any person charged in the affidavit with concealing any money or other estate, for the use of the debtor, or for the purpose of enabling him to avoid or delay the payment of his debts, and that upon the appearance of the party served, he shall declare on oath, whether he holds, or is in possession of any money, goods or other estate under any conveyance made by the defendant upon any secret trust, or any secret delivery, to hold the same to the use of the defendant, or any other person, to enable him, the defendant, to avoid the payment of his just debts. It is then manifest upon the particular language, and the whole structure of the act, that the only case within its purview, is that of a secret trust between the debtor and the party brought in by *scire facias*, in respect to property claimed by the latter under a conveyance from the former, devised to defraud his creditors, or in respect to something deposited with him by the debtor, or some one for him, for the use and benefit of the debtor. The secret trust and fraud, are essential ingredients of the case for which the act provides a remedy. Supposing then, that in this case, the defendant, McNeill, were connected with the daughter Rebecca, still the fraudulent character of the conveyance to her would be material to the liability of this defendant; and as to the matter of fraud, the evidence was strong to sustain the case under the provisions of the act of 1840. But the defendant is not connected, either in the issue or the evidence, with the title of Rebecca, or indeed with Dugald McDugald, as claiming under a conveyance from either, upon a secret trust, or as holding upon any delivery, for the use of the debtor, or to enable him to avoid the payment of his debts. The party states in his answer, that he holds upon a purchase from one Margaret McDugald, at the price of $2.400, to be applied to the payment of certain debts of Dugald McDugald and herself, contracted in 1854, for which he was bound as surety, and that it

was all applied in that way, and on that statement the plaintiff asked for no issue, and one was not directed. So, that on the record and the evidence, there is nothing to connect the defendant with the debtor Dugald McDugald, showing that the former claimed the negroes under a fraudulent conveyance from the latter, or held the property, or the proceeds, upon trust to his use, which are the only grounds upon which he can be charged in this action.

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

THOMAS H. LANE *v.* ETHELDRED PHILLIPS.

It was *Held* to be a good ground for discharging an overseer that he assumed to control the slaves in his charge against the known wishes and positive commands of the owner.

Where an overseer acts so badly as to compel his employer to dismiss him before the time is out, for which he contracted to serve, he is not entitled to recover anything for the services rendered previous to such discharge.

Where an overseer was discharged for sufficient cause, and the employer offered to pay him *pro rata* for the time he had served, which he refused to take, it forms no reason why he should recover the same afterwards.

ACTION of ASSUMPSIT, tried before DICK, J., at the last Spring Term of Edgecombe Superior Court.

The declaration was upon a special contract for wages due the plaintiff as an overseer, and upon the common counts.

The plaintiff agreed to serve the defendant as an overseer on his farm in Edgecombe county, during the year 1856, and was to receive for his wages, for the year, $250. He continued in service, until some time in June, when he was discharged by the defendant. The defendant offered to pay the plaintiff *pro rata* wages, up to the time of his discharge. The plaintiff refused to receive the money, and at the end of the year brought suit for the entire sum. The cause of the plaintiff's discharge was, that he, the plaintiff, on a certain day, just before his discharge, directed several of the men slaves

to go to the farm of a neighbor and assist him about his wheat. While on their way they were seen by the defendant, who, on learning their business, ordered them back to their work, saying his crop was too much in the grass to allow it. The plaintiff commanded the slaves to go on as he had directed, and swore he would shoot them if they did not. The slaves did go on, and after they had been gone awhile, the defendant pursued and turned them back. After their return the plaintiff sent one or more of them to the neighbor, without the knowledge or consent of the owner.

The Judge charged the jury, that if they believed the evidence, the plaintiff was rightfully discharged, and could not recover on the special contract; but that he was entitled to recover upon the common count, for the services rendered prior to his discharge, provided such services had been valuable to the defendant. The defendant excepted to the latter instruction.

Verdict for the plaintiff. Judgment and appeal.

Dortch, for the plaintiff.
B. F. Moore, for the defendant.

BATTLE, J. We fully concur with his Honor in the opinion, that the conduct of the plaintiff was a justification to the defendant in dismissing him from his service. It cannot, for a moment, be admitted that an overseer has a right to control the slaves, under his charge, against the known wishes, much less the positive commands, of the owner. This is the first instance of such an assumption of authority, which has, so far as we are aware, come before the courts, and we approve the rebuke so promptly given to it by his Honor, in the Court below.

Upon the other question we differ with his Honor. Had the plaintiff wilfully and without excuse left the defendant's service, he would, undoubtedly, both according to the principles of the common law, and by force of our statute, have forfeited his wages; *White* v. *Brown*, 2 Jones' Rep. 443; Revised Code, ch. 80. Is it reasonable that he should be in

any better condition by acting so badly as to compel his employer to dismiss him? It would seem that upon principle, he ought not to be allowed to take advantage of his own wrong. We find that the authorities are to that effect. In, Smith on Master and Servant, 75, Law Lib. 104, (m. p. 113,) it is said that "where a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid *any wages* for that portion of time, during which he has served since the last periodcal payment of wages; that is to say, if a servant, whose wages are only due yearly, is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such discharge." See also 2 Kent's Com. 258—261 in the notes.

But it is contended by the plaintiff's counsel, that the defendant waived his right to take advantage of the forfeiture, by his offer to pay the plaintiff for the time he had served. That might be so, if the plaintiff had not refused to accept the sum tendered. The defendant was willing to buy his peace, and when the plaintiff declined to accept the terms, the parties were remitted to their original rights. The plaintiff himself so understood it, for he waited until the end of the year, and then sued upon the special contract for the whole year's salary. It would be very hard and unjust to permit the plaintiff, after failing to show his right to recover upon the special count, to mulct the defendant in the costs of the suit by a recovery on the common count. If he should be allowed, under any circumstances, to succeed in a claim for the services actually rendered, it ought not to be until after a distinct notice to the defendant, that he was willing to accept the sum which the latter had formerly tendered him. Upon that question, however, we neither give, nor intimate any opinion. For the error in the latter part of his Honor's charge, the judgment must be reversed, and a *venire de novo* awarded.

Per Curiam, Judgment reversed.

STATE *v.* ELI CARROLL.

Where one was in close custody for costs, and gave notice to the clerk, of his intention to take the oath of insolvency, and the clerk appeared and tendered an issue of fraud, whereupon the proceedings were sent to the Superior Court, in which the costs had accrued, it was *Held* that under the 59th chapter of the Revised Code, such issue was properly triable in that Court.

THIS was a proceeding, under the insolvent law, sent to the Superior Court, CALDWELL, J., presiding, from two justices of peace of Davidson county.

The defendant was convicted of trading with a slave, and sentenced by the Superior Court of Davidson county, to "one month's imprisonment, and then be discharged according to law." On petition to two justices, the defendant was brought before them to be discharged under the insolvent law. He showed that he had remained one month in close custody according to the sentence of the said Superior Court, and after the expiration of that time, he had given to the clerk of the said Court twenty days notice of his intention to take the benefit of the act. He proposed to swear that he had no visible property, &c. The clerk of the Superior Court, in behalf of the State, objected, suggesting fraud and tendered an issue. The defendant joined in the issue, and gave bond for his appearance at the next Superior Court of Davidson, to which Court the proceedings before the justices were returned.

His Honor was of opinion that the act made no provision for trying the issue in the Superior Court, and ordered the proceedings to be dismissed, from which *Mr. Solicitor Ruffin*, in behalf of the State, appealed.

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

PEARSON, C. J. By the Revised Statutes, ch. 58, and the Revised Code, ch. 59, the several statutes relating to insolvent debtors are embodied into one statute, so as to form a sys-

tem, and it is proper that its several sections should be so construed as to produce uniformity in the mode of proceeding in respect to the whole. This result, which would seem to be a necessary consequence of the consolidation, is manifestly contemplated in the 18th and 19th sections of the 59th chapter of the Revised Code, by which it is provided that no issue of fraud shall be made up and tried under the provisions of *this chapter*, unless the creditor shall suggest fraud in writing, on oath, specifying the particulars, &c.; and no *ca. sa.* shall issue unless the plaintiff shall make affidavit in writing, &c. Accordingly, in *Whitley* v. *Gaylord*, 3 Jones' Rep. 286, it is decided that on motion for judgment, on a bond to keep the prison bounds, if the defendant pleads matter of fact in *pais*, he is entitled to have the issue tried by a jury; and in *Purvis* v. *Robinson*, 4 Jones' Rep. 96, it is decided that upon the petition of a debtor, who is in *close custody*, for his discharge under the insolvent act, the creditor must suggest fraud in writing, on oath, and the issue must be tried by a jury. In that case, the petition was made to the County Court, but it might have been made, according to the provisions of the statute, to a Judge of the Superior or Supreme Court, or to any two justices of the peace of the county in which he was confined, and of course, the same proceedings been had. Consequently, that case is directly in point, and must govern this, although here, the petition happened to be made to two of the justices of the peace.

The judgment of the Court below, dismissing the proceeding, must be reversed, and this petition will be certified, and a writ of *procedendo* issue.

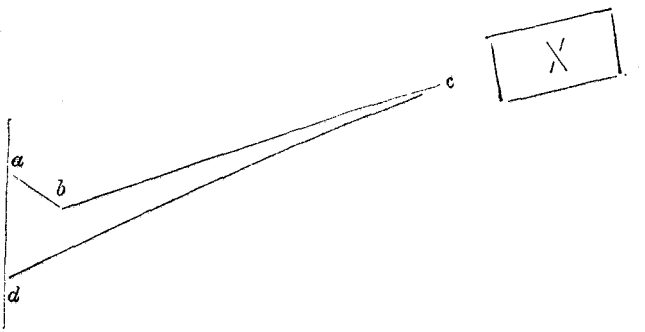
PER CURIAM, Judgment reversed.

JOHN B. HARRY *v.* WALTER C. GRAHAM.

A warrant to survey a tract of land, which is not vacant, is void for the want of power, and of course, cannot justify an entry and cutting switches for the purpose of making a survey.

Trespass vi et armis, and not *case*, is the proper remedy in such a case.

ACTION of TRESPASS *quare clausum fregit*, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1858, of Cleaveland Superior Court. Pleas, general issue and justification.



There was much controversy about the boundaries of various tracts, owned by the plaintiff and defendant; but only that part indicated in the annexed diagram, is deemed pertinent to the question made in this Court. The defendant justified under the following warrant of survey:

"State of North Carolina."

"William H. Cabiniss, entry officer for claims of vacant lands in the county of Cleaveland, to the surveyor of said county—greeting:

"You are hereby commanded to lay off and survey for W. C. Graham, one hundred acres of land, on the waters of Buffaloe creek, adjoining lands of Hugh Borders, James Rippy,

and his own. Entered 8th of January, 1855, in entry taker's book, for Cleaveland county. Observing the act of the General Assembly of North Carolina, made and provided for running out vacant land, two fair and correct plans of such survey you are to make out, to be transmitted together with this warrant to the secretary's office. Herein fail not. From under my hand and seal at office, this 12th day of January, 1855." Signed by the entry taker with a seal.

One *John R. Logan* testified that, being a surveyor, in obedience to the said warrant, he surveyed the land contained in the diagram a, b, c, d, and the defendant cut some switches, under his direction, to mark the line, temporarily, instead of marking trees, which might serve to mislead, as there were other lines in that neighborhood. The case assumes that the title to this narrow slip was in the plaintiff, who owned several large tracts adjoining each other at this place, and under instruction from his Honor, the jury found a verdict, as to that title, in favor of the plaintiff. It was contended by the defendant's counsel, that although the land was not vacant, he was protected under the entry taker's warrant, in going upon that land in order that it might be ascertained whether it was vacant, and that trespass could not be maintained for such an entry, but if there was any kind of action, which could be maintained, it could only be case for wrongfully and oppressively taking out the warrant. His Honor, by leave of the parties, reserved the question of law with leave to set the verdict aside and enter a nonsuit, in case he should be of opinion with the defendant on the point reserved.

On further consideration, the Court nonsuited the plaintiff, from which judgment he appealed.

Jones, for the plaintiff.
Guion, for the defendant.

PEARSON, C. J. In regard to the field at x, no question is made; the trespass in entering on the land and cutting switch-

es along the lines a, b, c, d, is justified under a warrant of survey; to which the plaintiff replies, "*de injuria absque tali causa*," treating the warrant of survey as a nullity. The case assumes that the land was not vacant, and the only question made is, as to the form of action.

Supposing the warrant of survey to be applicable to this particular piece of land; this Court is of opinion, that as the land was not vacant, the warrant was void and of no effect, and did not justify the entry; and consequently, that *trespass vi et armis quare clausum fregit* was the proper action; according to a well-settled distinction, i. e., where the process is void for the *want of power*, trespass *vi et armis* lies. Where the process is valid by reason of the power to issue it, then an action on the case must be brought for taking out, and acting under the the process without probable cause, or in a wrongful and oppressive manner; for instance, if an entry taker should issue a warrant to survey a tract of land lying in another county; or, if a justice of a peace should issue a warrant to arrest a party for an offense, committed in another county. These warrants would be void for the want of power, and the party, whose land is trespassed on, or whose body is arrested, would recover damages in trespass *vi et armis*.

So we think a warrant to survey a tract of land, which is not vacant, is void for the want of power, and of course, cannot justify an entry and the cutting of switches, for the purpose of making a survey. The act relative to "entries and grants," is expressly confined to "vacant and unappropriated land *belonging to the State*." The entry taker has no power to take an entry and issue a warrant of survey for land which belongs to individuals, and if he does so, his act is a nullity; so that a party, who makes an entry, acts upon his own responsibility and must see to it, that the land is vacant and belongs to the State, and is not private property. It was not the intention of the Legislature, by the act under consideration, to empower an entry taker to authorise one man to trespass upon the land of another; that would indeed be, a high exercise of the right of "eminent domain," and should be ex-

pressed in the most direct and unequivocal terms. So far from such being the case, the power of the entry taker is expressly confined to vacant and unappropriated land belonging to the State.

It is said, according to this construction, persons will, in many instances, be deterred from making entries, although in fact, the land may be vacant, and thus the State may lose revenue. That is so. Many small pieces of land will remain ungranted, because no one will "take the responsibility." If the land be in fact vacant, the warrant will protect the surveyor and his party in passing over the land of individuals in order to get to it, there being a right of way *ex necessitate* implied. But if the land be not in fact vacant, then the warrant is void for the want of power, and can have no force for the purpose of protection and justification. As a matter of expediency, it may be better to allow these little slips of land to be lost to the State by gradually falling into the adjoining tracts, than to cause the profitless litigation and the ill feeling that would be stirred up, by permitting private property to be interfered with, without some degree of responsibility on the individual who institutes the proceeding. It may be doubted whether the description in the warrant of survey, is applicable to the narrow slip of land, supposed by the defendant to be vacant, and to lie in the shape of a wedge between two grants to Collins. It is difficult to conceive how the description, "one hundred acres of land on the waters of Buffalo Creek, adjoining the land of Hugh Borders, James Rippy, and his own," (the defendant's) can be applicable to this little slip, and if the description in the warrant does not fit, then, of course, it could not authorise the survey. But we prefer to put our decision on the broad ground, that the warrant was void, because the entry taker had no power to issue it, as the land was not vacant. Judgment of nonsuit reversed, and judgment for the plaintiff, upon the verdict, upon the agreement in regard to the question as to the form of action.

PER CURIAM, Judgment reversed.

GEORGE MONTGOMERY *v.* WILMINGTON AND WELDON RAIL ROAD COMPANY.

Where a beast on a rail road would not be driven off from the track by a person trying to do so, and could not be scared off by the steam-whistle, the engineer striving with all his might to arrest the progress of the train before it reached it, but it was run over and killed; it was *Held* not to be negligence so as to subject the company.

Where the witnesses on one side of a controversy made out a case of culpable negligence, and the witnesses on the other side showed that the act complained of, was the result of inevitable accident after all the usual precautions had proved in vain, it was *Held* not to be error in the Judge to leave to the jury to decide the case according to the weight of evidence on the one side or the other.

ACTION on the CASE, tried before HEATH, J., at the Special Term, 1859, of New Hanover Superior Court.

The declaration was, that the defendants so negligently ran their trains on the railroad track, that six of the plaintiff's cattle were killed, and, subsequently, on the same day, another yearling was killed.

The plaintiff introduced a witness, one *Henry*, who swore that in August, 1854, being near the line of defendant's railroad, he heard their freight train approaching; that down the road he saw six or eight head of cattle on the railroad track; that they were near a bridge, about a quarter of a mile from the witness; that the train passed the witness, and continued with undiminished speed, so far as he saw, until it reached the cattle, and killed three of plaintiff's cows and three yearlings; that the embankment upon which the cattle were feeding, was from twelve to fifteen feet high, and that cattle could get down its sides but very slowly; that the road was straight at this point, and cattle could be seen on it for one mile ahead; that the cattle were killed about four oclock in the evening, the train going at ordinary speed. This witness further swore that on the same evening, about dusk, he was on the same embankment, endeavoring to drive from the track another yearling belonging to the plaintiff; that he heard the mail

train coming; that the yearling refused to quit the track on which the train was passing, and was run over; that the yearling could be seen on the track for one quarter of a mile ahead. This witness stated on cross-examination, that about the time when the train passed him towards the cattle first killed, the engineer commenced to blow the whistle of his locomotive, and continued to blow until the train reached them near the bridge; that the embankment was of sand, and cattle were in the habit of passing up and down its side; that the plaintiff's cattle were in the habit of feeding on the railroad, and that those killed, were on the track when he first saw them. He further stated, that in the evening so soon as he left the track on the approach of the mail train, the engineer commenced to blow the whistle, and so continued to blow until the train reached and killed the yearling.

The plaintiff then introduced one *Berry* who was an engineer and machinist, and had run a locomotive over defendant's road some eight years before; that the embankment referred to was six or eight feet high; that he thought the freight train could have been stopped in one fourth of a mile; that the whistle was used to drive stock from the road, and was ordinarily sufficient for that purpose; that cattle passed over the embankment without difficulty.

The defendant then introduced as a witness, one *James Knight*, who swore he was the engineer on the defendant's train, when the cattle first mentioned, were killed; that at, and prior thereto, he was at his station, on the locomotive, and was on the look out for obstructions, as carefully and assiduously as could possibly be done; that he first saw the cows and yearlings about one fourth of a mile off, and immediately commenced blowing the whistle as a signal to put on the breaks, also for the purpose of driving the cattle from the track, and he continued to blow 'till they were killed; he supposed the brakemen obeyed his signal as the speed of the train was sensibly diminished; that they were then on a descending grade; that his train was very heavily ladened, and consisted of fifteen cars, and that it was utterly impossible to stop

it before it reached the cattle; that the embankment was about five feet high, with an ordinary sand-slope, and that the cattle could easily pass up and down, and were in the habit of doing so; that it was dangerous to the trains and their hands to run over stock, and they always avoided it as much as possible; but, in this particular instance, he did all he could to avoid the catastrophe. That he had been in this business of running trains and engineering for twenty-five years; that he had heard the testimony of *Henry* in relation to the killing of the single yearling in the evening; that according to his experience and judgment in the business, the train, running at ordinary speed, could not have been stopped in one fourth of a mile. The witness said that from the time the train approached the stock first spoken of, he was at the proper place on the engine, some space behind the smoke-stack, but he could see the road on either side of the smoke-stack, though not so readily as if no smoke-stack had been there.

The defendant then introduced Gen. *Alexander McRae*, who, after qualifying himself as an expert, stated that neither the freight train, nor the mail train could have been stopped within the distance of a quarter of a mile from the point where the cattle were killed on the road, if running as described by the witness, *Henry;* that there was there a descending grade of thirty feet to the mile.

The counsel for plaintiff insisted that there was negligence in law; that if the jury believed the plaintiff owned the stock, and the same were killed in consequence of the negligence aforesaid, he was entitled to their verdict; and, further, that it was the duty of the company so to have their smoke-stack located, as not to obstruct the view of their engineer, and located, as the one in question was, it was negligence.

The Judge charged the jury that there was some conflict of testimony, as to the circumstances under which the stock were killed in the day time; that there was some evidence of negligence to go to them on the plaintiff's showing, and if they believed the witnesses in preference to those of the defendant, there was negligence, and if the destruction of the stock was

in consequence of it, then they would render the plaintiff a verdict.

If, however, they believed the witnesses for the defendant, as they had stated the circumstances, there was no negligence, and the defendant would be entitled to their verdict; and, further, that it was not negligence to run engines of ordinary construction, with smoke-stacks in the usual places. As to the killing of the yearling by the mail train, the Court charged the jury, that there was no negligence, and that if the train could not have been stopped within a quarter of a mile from where the animal was, and if the engineer, from the first time the beast was seen, made the usual efforts to stop the train and drive it off of the track, and it would not go off, there was not negligence so as to charge the defendant. Plaintiff excepted.

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

Baker, for the plaintiff.
W. A. Wright and *B. F. Moore*, for the defendant.

RUFFIN, J. With respect to the beast killed in the evening by the mail train, which would not be driven off the track by the plaintiff's witness, and could not be scared off by the whistle of the engine, which, it is stated, is usually sufficient for that purpose, there was, unquestionably, no culpable negligence on the part of the servants of the company.

As to the others, the Court thinks the case was properly put to the jury; his Honor, assuming the responsibility of instructing them, that, according to one statement of the facts, made by the witnesses for the plaintiff, there was, in law negligence, and that, according to another statement made by the witnesses for the defendant, there was no negligence, and leaving it to the jury to say, which of those statements was the true one. When the testimony of the first witness is heard by itself, one would be impressed that the killing was not only avoidable, but was wilful and wanton. But when it is

seen that, in truth, as is to be inferred from the verdict, the embankment was only five feet high instead of fifteen, with what is called a sand-slope, that is, a long and gradual one, down which the beasts could easily descend; that, as soon as the cattle were seen, the whistle was sounded to put down the breaks, and also that it was continually blown as an alarm to the cattle, (ordinarily effectual;) that there was a grade of thirty feet to the mile, at the point from which the cattle were seen, to that at which they were standing; and that there was a train of fifteen cars, heavily ladened, so that, although the speed, which was at the ordinary rate, was diminished by the breaks, yet, that the train could not possibly be stopped, the features of the case become entirely changed and the negligence is disproved. It was said however, that the cattle might have been seen at a distance, which would enable the engineer to stop the engine in time, had his vision not been impeded by the smoke-stack, which is placed on the front of the engine, and that it is, in law, negligence, to use an engine with a chimney so constructed as thus to interrupt the view. But the Court thinks his Honor gave the right answer to that, which was, that the defendant was justified in using an engine of the common construction, with the smoke-stack in the usual place. The truth is, that part of the engine is necessarily in front to produce the draft, requisite to keep up the heat from the fire made at the other end, and to carry off the smoke and cinders, and the draft is made in proportion to the height of the chimney; so that upon a different construction, the cars would be untenantable, and the engine would not operate to any purpose.

The case turned entirely upon the credit of the witnesses, and the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

WILLIAM J. McCONNELL *et al v.* WILLIAM A. CALDWELL.

Where a party, in the County Court, prayed an appeal, which was granted, and tendered his sureties, but one of them was prevented from signing by the fault of the clerk, and such surety was compelled by the state of the weather and bad health to leave the Court without executing the bond, it was *Held* to be good ground for a *certiorari*, without reference to the merits of the cause.

PETITION for a *certiorari*, heard before CALDWELL, J., at the last Spring Term of Guilford Superior Court.

A judgment was rendered in the County Court of Guilford in favor of William A. Caldwell, Cashier of the Bank of Cape Fear, against the petitioners, William J. McConnell, Peter Adams and Joab Hiatt, on Saturday of November Term, 1858, and the petitioners prayed an appeal to the Superior Court of that county, and tendered as their sureties for the appeal, Thomas J. Patrick and John Hiatt, who were accepted by the Court as sufficient, and the appeal allowed. John Hiatt, the surety offered, applied three several times to the clerk to execute the bond, but was told, on each occasion, that the bond had not been prepared. The said John was very unwell at the time, and the weather being very wet and disagreeable, on that account he left the Court and went home, about four o'clock in the evening, without signing the bond, and without the petitioners knowing that he had failed to sign it as he had promised. These facts abundantly appear from the petition, and from affidavits filed in the cause. The plaintiffs petitioned for a *certiorari*, alleging the above matters as their reason for not appealing, and alleging in their petition that they had good grounds of defense. The *certiorari* was ordered, and on being returned to the Superior Court, the plaintiff, in the suit in question, filed a counter affidavit, not contradicting the above facts, but impuning the petitioners defense to the suit, and denying that it was available in law. The Court ordered the proceeding to be dismissed, and gave judgment on the bond given on obtaining the *certiorari*, for the debt and costs. The petitioners, thereupon, appealed to this Court.

Morehead, for the petitioners.
McLean, for the defendant.

BATTLE, J. The writ of *certiorari* is an extraordinary remedy, and is said to be grantable at the discretion of the Court. The meaning of this is, that it is not a matter of right, like a writ of error or an appeal. It is very often used as a substitute for an appeal, and in so using it, the courts have exercised their discretion, in such a manner as, on the one hand, to prevent a party from being deprived of a just defense, and on the other, to prevent its being made a mere instrument of delay. Where a party has lost his appeal by the neglect of an officer of the law, the contrivance of the opposite party, or the improper conduct of the inferior court, the cause will be re-examined by the Superior Court upon a writ of *certiorari*, without reference to the merits of the case. This is put upon the ground that he has been deprived of a right, to wit, of an appeal, without his fault; *Chambers* v. *Smith*, 1 Hayw. Rep. 366; *Collins* v. *Nall*, 3 Dev. Rep. 224. Where a party has failed to make a defense in the inferior court, so that a judgment has been taken against him by default, there, he cannot have the judgment set aside, and be allowed to plead in the Superior Court by means of a *certiorari*, unless he can show two things; first, an excuse for his *laches* in not pleading; and, secondly, a good defense existing at the time when he ought to have pleaded; *Kelsey and Brigham* v. *Jarvis*, 8 Ire. Rep. 451; *Lunceford* v. *McPherson*, 3 Jones' Rep. 174. The present falls manifestly within the former class of cases. The plaintiffs, in the *certiorari*, after a judgment against them in the County Court, prayed an appeal, and without any fault on their part, were deprived of the benefit of it by the neglect of the clerk.

The circumstances of this case are almost identical with those of *Chambers* v. *Smith*, above referred to. There, the party, after praying an appeal, offered sufficient sureties, but the clerk, not being provided with an appeal bond, told him it would do as well at the next court, and at the next court

he applied, and was informed by the clerk, that it was too late. In the case now before us, after the appeal had been prayed and granted, one of the sureties, John Hiatt, was prevented from executing the appeal bond by reason of the clerk's not having it prepared when he called to sign it, and of his (the surety's) not being able to wait, on account of the state of the weather and the condition of his health. The bond was executed by the appellants and the other surety, during the term at which the appeal was taken, and by the surety, Hiatt, after the expiration of the term. The right of appeal was clearly lost without any fault of the appellants, and we think that they are entitled, under the writ of *certiorari*, to have their case re-examined in the Superior Court, without any reference to its merits.

The order dismissing the *certiorari*, must be reversed, and this must be certified to the Superior Court of law, for the county of Guilford, to the end that the parties may proceed in the cause.

PER CURIAM, Judgment reversed.

STATE *v.* OBADIAH CHRISTMAS.

Where heredetary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven, as existing in the prisoner, is no temporary malady; but that it is notorious, and of the same species with which other members of the family have been afflicted.

Where counsel call upon a Judge to give instructions, which the case requires, and he refuses to do so, it is error.

INDICTMENT for MURDER, tried before CALDWELL, J., at the last Superior Court of Orange.

In making a jury, one was challenged by the State for cause, and being interrogated, answered that he had not formed and expressed the opinion that the prisoner was not guilty; whereupon the solicitor, for the State, requested that he might

be ordered to stand aside until the panel was perused, stating that he expected to allege further cause. The prisoner insisted that the juror should be tendered to him, but he was ordered by the Court to stand aside. The prisoner's counsel excepted.

One ground of defense set up by the prisoner was insanity, and for the purpose of showing that it was a malady hereditary, in his family, he offered to prove by a witness, that an uncle and brother were both insane. The State objected, and the evidence was rejected. The prisoner's counsel excepted.

The mother of the prisoner was introduced to prove insanity, and she testified that three weeks before the homicide, she was sent for by the prisoner's wife, and went to aid in taking care of him. She said she found him laboring under derangement of mind; that she remained with him for two weeks, and during that time, he often endeavored to throw himself into the fire; that he several times tried to strip himself naked; that he tried to shoot himself; that he would run as though some one was pursuing him, and exclaimed that some one was pursuing him. She stated that he was always weak of mind. She further stated, that while she was there, he occasionally went into the neighborhood and staid all night; that she left him eight days before the homicide, and he then appeared composed, and had been so a day or two. She also testified, that these fits recurred at periods for the last two years, and she did not trust him to manage her business, though he and his family lived on her land, where she worked slaves. A witness testified that her character was good.

Several witnesses were called by the State, who testified that they had known the prisoner for eleven, twelve, and thirteen years; some for a shorter time, and they concurred in the statement, that he was addicted to intoxication, but they all believed him to be of sound mind.

The Court in charging the jury, said, in relation to the mother's testimony, that when near relations were witnesses, as in the case of a mother deposing for her son, the law regarded such testimony with a jealous eye, and called on jurors to

weigh it with many grains of allowance. The prisoner's counsel again excepted. The jury retired and remained out several hours. They came to the Court-room at a late hour of the night, and made known that they could not agree upon a verdict, and asked for further instructions. Thereupon, the Court said to them, that if they differed in their understanding of the law as given them in the charge, the Court would re-charge them; but if they differed about the facts of the case, the Court could not aid them. One of the jurors responded, that their difference was about the question of insanity, and whether or not they should believe the prisoner's mother; whereupon, the Court repeated the charge above set out on that part of the case, and told the jury, they were to judge of her evidence for themselves.

The prisoner's counsel then requested the Court to charge the jury, that in passing on the mother's testimony, they had the right to consider her demeanor on the stand, the consistency of her statements, and the fact that she had proved a good character, and might be believed. The Court then said to the jury, that they were not bound to believe a witness, whose character was proved to be good, or disbelieve one whose character was assailed, but that they were the constituted judges of how far a witness was to be believed. Defendant again excepted.

To this statement, which is copied almost literally from the record sent to this Court, is appended the followed explanatory note: "It is perhaps due to the Court to say, that if the charge is not in response to the instructions prayed, it was because the counsel who prayed the instructions, and who spoke in a low tone of voice, was not understood by the Court.

The prisoner was found guilty of murder, and upon judgment being pronounced upon him, appealed.

Attorney General, for the State.
Miller and *B. F. Moore*, for the defendant.

PEARSON, C. J. No one can read the record in this case without receiving the impression, that the instructions given

by his Honor, do not put the prisoner's case to the jury, in as favorable a light, as through his counsel he requested, and had a right to request, of the Court.

After the jury returned and made known that the case turned upon the degree of credit, to which the testimony of the mother of the prisoner was entitled, his counsel requested the Court to instruct them that in passing on her testimony, they had the right to consider her demeanor on the stand, the consistency of her statements, and the fact that she had proved a good character. This, to say the least, was not given,—in effect, was refused, and we have the question: a proper instruction is prayed for and refused. There is error. The personal explanation which his Honor adds at the foot of the record, can have no bearing upon the legal rights of the prisoner.

We deem it unnecessary to notice the other parts of the charge which is excepted to, except to say the expression to "weigh with many grains of allowance," is a figure of speech, and seems to have been used in the sense of receiving with caution, or as his Honor says with a "jealous eye"; and not in the sense that some abatement or deduction was necessarily to be made.

The statement of the case is made up in a manner so unsatisfactory, that we are unwilling to express an opinion upon the admissibility of proof that an uncle and a brother of the prisoner were insane, which was offered to show an hereditary malady, as a circumstance tending to prove the allegation that the prisoner was himself insane. It is a lamentable fact, admitted by every one, that such maladies are hereditary; and it would seem that proof of the fact, that members of the family, so related as to have the same blood, are, or have been afflicted with a like malady, is admissible as a circumstance, which, aided by other circumstances and proofs, would go to shew the insanity of the prisoner, although, of course, evidence of such hereditary taint in the blood, would only be one link in the chain, and would not *per se*, establish the fact; but the question, as to the policy or expediency of admitting

such evidence in legal investigations, presents many and very great difficulties; it is wrong to exclude what may lead to truth, and yet such evidence would, in numberless cases, lead to falsehood, and screen the guilty in defiance of truth. On this account, we find it in some degree, an open question in the legal authorities. Thus far, the way seems to be clear; in order to render it admissible, the species of insanity alleged, and that which is offered to be proved in respect to the members of the family, must be of the same character; and the instances to be proven, must have been notorious, so as to be capable of being established by general reputation, and not left to depend upon particular facts and proof, about which witnesses may differ, and the consequence of which would be to run off into numberless and endless collateral issues; so that in trying the question as to the insanity of one, the supposed insanity of a half dozen would be drawn in.

In this case, the testimony of the prisoner's mother, in regard to his alleged insanity, is very vague and unsatisfactory, so far as it tends to shew the character and kind of insanity with which she supposed her son to be afflicted. Was it temporary in its nature like *mania a potu?* or fixed derangement? So is the evidence which was offered as to the uncle and brother. Was that notorious, or only supposed to exist by a few? Was it *mania a potu*, or of a permanent type; and of the like character, so as to tend to show an hereditary taint? On account of this vagueness, we forbear to express an opinion.

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

JOHN A. McARTHUR *v.* JOHN R. McLEOD *et al.*

Although notes and endorsements, as simple contracts require a consideration, it has long been held that they import a consideration *prima facie*, so as to throw the onus on ther side to shew the want of a consideration.

Where one signs a note in blank and delivers it to another to be filled up and

used by him, the party is bound to others, to whom it has come in the course of business, by the note as filled up, just as he would have been, if it had been in full before his signature.

Where a note is given for a real business transaction, although it may be expressed to be payable at a bank, it is nevertheless negotiable in the market generally. It is only restricted when it appears on the paper to be negotiable at a bank, and no where else.

(*Ray and Pearce* v. *Banks and others*, 6 Jones' Rep. 118, cited and approved.)

ASSUMPSIT, tried before HEATH, J., at the last Spring Term of Cumberland Superior Court.

The declaration was upon a promissory note for $500, against the maker, and the four other defendants as endorsers, negotiable and payable at the bank of Fayetteville, or at the branch bank of Cape Fear, payable to the defendant McKay. Plea, non-assumpsit. The defendants gave in evidence, that McLeod applied to McKay to endorse a note in blank for him, and that the latter did so on the condition, that it was to be for $500, and was not to be absolute, unless McLeod procured three other endorsers, and had the note discounted at one of the banks mentioned in it. McLeod agreed that he would use the note only in that way, and would procure the three endorsers, and also pay the note at maturity; and McKay then delivered the note in blank to McLeod. The note was afterwards filled up in the hand-writing of the last endorser, Johnson, and the endorsements were filled up by the plaintiff's attorney at the bar. The note was not offered for discount at either of the banks, and soon after maturity it was sued on by the plaintiff, as the endorsee of Johnson. The counsel for the defendants contended, that they were not liable, because it was apparent on the note, that it was to be used only at one of the banks to borrow money, and it had not been so used; and because, according to the agreement between McLeod and McKay, the note was to be so used only, and had not been, whereby McKay was not liable, and the defense enured to the benefit of the other endorsers; and because the plaintiff had shown no consideration between him

and the defendants, or any of them. The Court instructed the jury, nevertheless, that the plaintiff was entitled to recover; and after a verdict and judgment, the defendants appealed.

No counsel for the plaintiff in this Court.
Neil McKay, *W. McKay*, *Banks* and *Kelly*, for defendant.

RUFFIN, J. When the law made promissory notes negotiable, like the bills of exchange, it intended to impart to them a mercantile character, so as to make them answer many of the purposes of money in trade; and, therefore, the courts were obliged early to lay down rules to prevent frauds on the public, and to sustain that character. Hence, although notes, as simple contracts require a consideration, it has been long settled, that they import a consideration *prima facie* from the holder, so as to throw the *onus* on the other side to show the want of a consideration. It is necessarily, the same as to endorsements; and although in this case, there was no consideration between McLeod and McKay, and neither of them could recover from the other; yet, as soon as the note passed into another hand for value, and on the credit of the previous names, the consideration extended to all the parties. The same reasons require the rule, that when one signs a note in blank, and delivers it to another to be filled up and used by him, the party is bound by the note as filled up, just as he would have been, if it had been in full before his signature. It was his folly to put such blind faith in another, and the safety of third persons, who can know nothing of the secret agreement between the parties, requires such effect to be given to the paper. The conditions on which McKay endorsed the paper, were altogether between him and McLeod, and cannot affect others, to whom the paper comes in the course of business. Here, the defendants do not show, that the present holder got the note by improper means from McLeod, or any other party. The only remaining objection, arises out of the fact, that the note is upon its face negotiable at bank. But that is only to enable the holder to get it discounted at

bank, if he should wish it, as our bank charters prohibit most of the banks from discounting any paper not expressed to be negotiable there. It is not a restriction on its general negotiability, as has been more than once said by the Court, and was explained at large, at the last term, in *Ray and Pearce* v. *Banks and others*, 6 Jones' Rep. 118. It is only when it is apparent on the paper, not only that it is negotiable at a bank, but also that it is negotiable there only, and, therefore, is not thrown into the market, that the restriction applies.

PER CURIAM, Judgment affirmed.

STATE *v.* DICK FISHER.

Where confessions were extorted from a prisoner, but afterwards not being actuated by the influence that had elicited the former confessions, he made other confessions of his guilt, it was *Held* that these latter confessions were admissible against him.

INDICTMENT for the MURDER of Elijah Hassell, tried before SAUNDERS, J., at the last Spring Term of Washington Superior Court.

One *Johnson* was offered by the State to prove a conversation with the prisoner, which was objected to by the defendant's counsel, and one *Norman* was called by the prisoner to to prove what took place the day before the proposed confession, on the occasion of his arrest. *Norman* stated that on the morning of the 24th of February, the day after the homicide was committed, having arrested the prisoner, he ironed him and took him to the body of the deceased, where there were several persons present; that he was there accused of the murder, and was called upon to tell them where he had hid a gun which they alleged he had used in perpetrating the crime—that they were satisfied of the fact, and wanted him to tell where the gun was; that they immediately took him a

short distance off, and tied him up to a tree and told him they intended to whip him until he would agree to show them the gun—that they were not going to whip him to make him confess the murder; that they then struck him five or six licks with a whip on his bare back, when he agreed to show the gun, and they went, under his direction, and found the gun. While on the way to find the gun, the prisoner made a partial confession.

On going to the place, the witness said to the prisoner he did not see how he could have the boldness to shoot a white man, and asked how he came to do it; to which he replied, because he had taken away his wife—that he had kept her for some time, and he had warned them, and did not regret what he had done.

Notwithstanding this statement, the Court ruled that *Johnson's* testimony was admissible. He testified that on the day after the arrest, he was at the jail where the prisoner was confined, and called him to the window. Johnson said, "Dick, you have played hell now." To which the prisoner replied, "yes master Johnson, they have got me now, but I did'nt intend to kill Hassell; it was dark, and the shot went higher than I intended." Defendant excepted.

It was further in evidence by the State, that the prisoner had been duly married to the woman called his wife, and that they had lived the preceding year with the deceased; that the prisoner had been hired out for court-costs, and was living at the time with a near neighbor of the deceased; that the deceased had been at Plymouth on the 23d, and left for home late in the evening; that his body was found the next morning near his crib; that he had been shot, and had died of the wounds. The prisoner was a man of color, but had been duly and lawfully married to his wife. It was in proof that she was living with the deceased at his house, and that the prisoner had complained of this, and had desired her to come home.

The counsel for the prisoner admitted the killing, but con-

tended that it was a provocation for adultery carried on between his wife and the deceased.

The Court instructed the jury, that to reduce the case from murder to manslaughter, for the provocation of adultery, it was necessary to show that the parties were taken in the fact by the husband, and that he slew the adulterer at the moment, under the excitement produced by the discovery.

The defendant's counsel excepted to the ruling of the Court above set out, and to the instructions to the jury.

Verdict, finding the prisoner guilty of murder. Judgment and appeal.

Attorney General, for the State.
Garrett and *H. A. Gilliam* for the defendant.

BATTLE, J. The main, if not the only question in the cause, arises upon the objection of the prisoner to the testimony of the witness, Johnson, who was offered on the part the State, to prove his confessions. The declarations which he made to the officer, who arrested him, and who treated him in such a cruel and unlawful manner, were clearly incompetent, and it is insisted that the statement, which he made after he was put in jail, to the witness, Johnson, was not free and voluntary, because made under the impression that he had already committed himself by his previous confessions. There is much force in the objection as thus stated, and, at first view, it appears to be sustained by the manner in which the rule on this subject has been sometimes laid down. Thus, Mr. Starkie in his treatise on evidence, (edition of 1824, pt. 4, p. 49,) said that "where a confession has once been induced by such means, (that is by threats or promise) all subsequent admissions of the same, or like facts, must be rejected, for they may have resulted from the same influence." In a subsequent edition, (that of 1842, p. 36,) he somewhat modifies the rule, and says, "where a confession has once been induced by such means, all subsequent admissions of the same, or like facts must be rejected if they have resulted from the same influ-

ence." In the case of the *State* v. *Roberts*, 1 Dev. Rep. 259, the rule is laid down thus: "Where the prisoner has once been induced to confess by the impression of hope or fear, confessions subsequently made, are presumed to proceed from the same influence, until the contrary be shown by clear proof. And, while these presumptions remain unanswered, these latter confessions (though induced by no *immediate* threat or promise) are not admissible evidence." Mr. Joy in his work on the admissibility of confessions (40 Law Lib. p. 46) states the rule to be that "where a first confession is inadmissible, a confession subsequently made, is not admissible in evidence, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled." See also, *State* v. *Guild*, 5 Halsted's Rep. 163, 179, 181. The case of the *State* v. *Roberts*, 1 Dev. Rep. 259, referred to above, was one where the influence which induced the first confession, was supposed to continue, and, in consequence thereof, the second confession was rejected; while in the cases of the *State* v. *Gregory*, 5 Jones' Rep. 315; and *State* v. *Scates*, ibid, 420, the subsequent confessions were admitted, because the prisoner after having made the first, was warned against making the second. That "other circumstances," besides that of a proper warning, will be sufficient to render the subsequent confessions admissible, is shown by several adjudications. Thus in *Rex* v. *Richards*, 5 Car. and Payne, 318, (24 Eng. C. L. Rep. 584,) on an indictment for administering poison to the prosecutrix, prisoner's mistress, the latter said to the prisoner, a girl of about fifteen years old, that if the she did not tell all about it that night, the constable would be sent for next morning to take her to Stourbridge, meaning before the magistrates. The prisoner made a statement. Next morning the constable was sent for, and as he was taking the prisoner to the magistrates at Stourbridge, she, without any inducement having been held out by the constable, made a statement to him. The prisoner's counsel objected to this being

received in evidence, as the inducement held out by the prosecutrix, must be taken to have continued. But BOSANQUET, J., received it, and held, that as the inducement was, that if she confessed she would *not* be taken before the magistrates, and as the prisoner must have known when she made this statement, that the constable was taking her to the magistrates, the inducement was at an end. So in *Rex* v. *Howes*, 6 Car. and Payne, 404, (25 Eng. C. L. Rep.) the prisoner confessed to two constables, who apprehended him, and told him that "two others had *split* and he might as well; and that if he told all, he would be acquitted." The magistrate hearing the prisoner state, in presence of the constables, that they had held out this inducement, which the constables did not deny, told the prisoner that he need not say any thing, unless he pleased; that his confession would do him no good, and that he would be committed to take his trial. The prisoner's counsel objected to the admission of the confession made to the magistrate, as he did not seem to have gone to the full extent of telling the prisoner that his former confession would have no effect; and that the law would presume that the confession before the magistrate, was a continuation of the former confession extorted by the constables; that the statement made to the constables, acting upon his mind, he would naturally imagine that it was then too late to retract. In support of this, the counsel cited 2 Russ. on Cr. and Mis. 648, and *Sarah Nutes'* case. Lord DENMAN, C. J., received the evidence, saying, that it did not appear to him that this statement did result from the same influence as the first, or that that the cases cited, carried the principle any further.

In the case now before us, it is conceded that the second confession did not proceed from the same influence which induced, or rather, cruelly extorted the first. The prisoner had passed from the hands of the officer and his party who had bound him with irons and beaten him with whips, and was lodged in jail, where he was secure from further violence. The person who called him to the jail window, the day after his arrest, does not appear, from his language or manner, to

have been his enemy, and the prisoner, from the terms of his reply, seems to have considered him as a friend, and the statement, which he then made, was evidently dictated by a desire to extenuate, if not excuse his offense in the estimation of that friend. The only ground of objection to the confession as a free and voluntary one, must be, then, that which we have heretofore stated, to wit, that having already committed himself by a previous confession, it was too late to retract, and that further concealment was useless. That, as a distinct principle of objection, is not, so far as we are aware, supported by the authority of any adjudicated case, and is certainly opposed directly by *Rex* v. *Howes*, to which we have referred. Carried out to its full extent, it would exclude all confessions made subsequent to a previous one, for even in the case of a proper caution given, no person can say, with certainty, that the prisoner did not make the second confession, under the influence of the feeling, that the secret was out, and that it was useless for him to abstain from telling all about it. A strong analogy exists between the principle, now under consideration, and that decided in *State* v. *Patrick*, 3 Jones' Rep. 443. In that case, the witness, who had been a hirer of Patrick, (who was a slave) and was then the owner of his wife, took him to the place where the body of the deceased was lying, and upon measuring a track, near the body, with Patrick's boot, found it "to fit precisely." He then said to him, "you might as well tell all about it, for I am satisfied." He denied it, and the witness being a little angry, said to him, "if you belonged to me, I would make you tell." The witness repeated as many as half a dozen times, "you might as well tell all about it, for I am satisfied." The prisoner, after many denials, finally made the confession, which was offered in evidence. It was objected to as not having been a free and voluntary one, but it was received, and the propriety of its reception was adjudicated in this Court. It was said by us, that the confession was not extorted by fear, because the expression used by the witness, "if you belonged to me, I would make you tell," carried with it the assurance that the witness

would not inflict violence upon him. Though free from fear of violence, it is manifest that the prisoner may have thought that as the testimony against him was so strong, that the witness was "satisfied" of his guilt, "he might as well tell all about it." His confession was probably induced by that very supposition, yet, it was held to be properly admissible in evidence against him, upon the ground, that he had made his own calculations of the advantages to be derived from a confession, and that he must be bound by it. In the case now before us, the prisoner was not acting under the influence which extorted his first confession, and, in making the second, he seems to have made his own calculation of the advantage to be derived from it, and to have supposed that he was making the case more favorable to himself, by attributing the homicide to the accident of his having "shot higher than he intended."

It has been further argued, on behalf of the prisoner, that the second confession ought to be excluded upon the ground of public policy, for the purpose of discountenancing, and thus putting an end to such gross violation of law as the officer and his party, who made the arrest, were guilty of, in their treatment of the prisoner. We think the purposes of justice will be best accomplished by having the officer indicted and punished for his unlawful and tyrannical abuse of his official power.

The question which was raised by the prisoner's counsel, in the Court below, and decided by the Judge there, in relation to the adultery of the deceased with the prisoner's wife, was based upon a state of facts, not at all warranted by the testimony. If the prisoner killed the deceased at all, it was an act of assassination and not a killing upon provocation, and the Court ought to have instructed the the jury, that the testimony did not present any view in which the question of provocation could be raised. We will not, therefore, express any opinion upon what we consider a purely hypothetical case.

We have been unable to discover any error in the record, and it must be certified to the Superior Court of law, for the

county of Washington, to the end that sentence may be pronounced upon the prisoner.

PER CURIAM, Judgment affirmed.

THE STATE *v.* WILLIAM J. JOHNSTON.

Where the name of the owner of a slave was set forth in a bill of indictment against one for unlawfully trading with such slave, it was *Held* necessary to prove it as laid.

INDICTMENT for unlawfully trading with a slave, tried before DICK, J., at a special Term, (June, 1858,) of Northampton Superior Court. The indictment charged the defendant with unlawfully buying one peck of corn of a slave named Dick, the property of E. A. Jenkins. The proof, by one witness, was that the slave Dick belonged to an orphan girl named Urilla E. A. J. Jenkins; and, by another witness, that the owner's name was Rosa E. A. J. Jenkins. The counsel for the defendant, took exception to this variance, and asked his Honor to instruct the jury that defendant was entitled to a verdict.—His Honor declined giving this instruction, but informed them that the variance was immaterial.

Verdict for the State. Judgment and appeal.

Attorney General, for the State.
Conigland and *Hardy*, for the defendant.

BATTLE, J. It was decided in the case of the *State* v. *Robbins*, 9 Ired. Rep. 356, that in an indictment under the statute for trading with a slave, it is unnecessary to set forth the name of the owner. The question is now presented, whether if the name of the owner be stated, it is necessary to prove it as laid. We are clearly of opinion that it is.

The name of the owner is a part of the description of the

slave with whom the act of trading is alleged to have been committed. It may have been given to distinguish the slave from another of the same name, belonging to another person. If so, the proof must sustain the allegation, just as much as it would be necessary, in a case where the name of the owner was omitted, to prove that the trading was with a slave bearing the name stated in the indictment. It will readily be admitted that an indictment which charged the offense to have been committed with a slave named George, could not be sustained by proof that the defendant traded with a slave named Moses. The variance would be equally great if the slave were named as Moses the property of John Smith, and the proof was that the slave was named Moses, and that he was the property of Peter Smith. John Smith's *Moses* and Peter Smith's *Moses*, could no more be taken to be the same person than could George and Moses. If the difference between the name of the owner as charged, and as proved, were so small as not to alter the sound, it would be immaterial, and, therefore harmless, upon the doctrine of *idem sonans*, as we held in the *State* v. *Houser*, Busb. Rep. 410. In the case now before us, the utmost stretch of human ingenuity cannot make out that the name of E. A. Jenkins is the same either in sound, or in any other way with Urilla E. A. J. Jenkins, or Rosa E. A. J. Jenkins. The judgment must be reversed, and a *venire de novo*, awarded.

PER CURIAM, Judgment reversed.

JOHN THOMPSON *v.* JOSEPH H. BURNETT.

The applicant for a writ of error in this Court, given by the 33d chapter, 19th section of the Rev. Code, must give bond for the performance of the judgment in double the amount of the judgment formerly rendered, or where it has been partly performed, in double the amount of what may remain of such judgment unperformed, and where the whole recovery has been satisfied, then a bond for securing the costs.

MOTION for a writ of error upon a judgment of this Court, at the last term, in the case of *Burnett* v. *Thompson*.

Smith and *W. A. Moore*, for plaintiff.
Winston, Jr., *Hines* and *H. A. Gilliam*, for defendant.

RUFFIN, J. The party having assigned errors, is entitled to the writ; but not unconditionally. The statute of 1854, gives the writ in general terms with but one restriction, which is, that it shall be brought within two years after the judgment. Rev. Code, ch. 33, sec. 19. One is struck with some surprise to find, on reading that section, no provision for securing to the defendant in the writ, thus allowed, his debt or damages recovered by the judgment, in which the error is alleged.—But, upon referring to another part of the statute, Rev. Code, ch. 4, sec. 20, it is seen that the provision is made. As the law stood before, the provision for security was annexed to the grant of the power to the Superior Court, to issue writs of error to inferior courts, Rev. Stat. ch. 4, sec. 17. But, in re-enacting that section in the Rev. Code, that provision is omitted, and, instead of its being placed there, it is inserted as a separate section, Rev. Code, ch. 4, sec. 20, in the general terms, that every person who may bring a writ of error, shall execute bond with good security, payable to the adverse party, to abide by, perform and fulfil the judgment which shall be given thereon. It was put into that form obviously to include the case of writs of error in this Court, then, for the first time, authorised, and the terms are sufficiently broad for that purpose. Those parts of the two chapters are thus to be read together, and consequently, the present applicant must give the requisite bond.

It is only material to inquire whether the judgment has been satisfied in whole or in part, for the purpose of regulating the amount for which the bond is to be given, for the condition of the bond is the same in every case—for the performance of the judgment upon the writ of error, and if satisfaction has already been made of the first judgment, then

the judgment on the writ of error, will accord with the fact. No payment of any part of the damages or costs is alleged, in this case; therefore, the Court considers it safe to follow the ordinary rule respecting appeal bonds, and requires the bond to be made in double the amount of the recovery.

PER CURIAM, Ordered accordingly.

PASCHAL McCOY *v.* THE JUSTICES OF HARNETT.

The proper order in a mandamus, seeking payment from justices of the peace for work done, for the county, under a contract, which they were empowered to have made, and which was made by commissioners appointed by them, is *that they pay*, and not that they be required to lay taxes, &c.

The justices of a county are presumed to know the statute in relation to their county site, and the acts done in pursuance of the same.

Where one of the stipulations of a contract for making a public building, was that the work was to be done under the direction of a superintendent, and payments were to be made monthly on the production of his estimates and certificates, after the entire work was completed, approved and accepted, it was *Held* unnecessary to do more than to set forth in a petition for a mandamus, that the work had been done under such superintendent, and his estimates, &c., had been presented, but were disregarded by the justices appointing him, and payment refused on other grounds.

PETITION for a MANDAMUS, filed at the Fall Term, 1858.

The petition alleges that at the March Term, 1855, of the County Court of Harnett, the Justices thereof, a majority being present, made an order, and caused the same to be entered of record, appointing Neill McKay, Alexander D. McLean, Cornelius H. Cofield, Joseph T. Rearden, and Archibald S. McNeill, "commissioners to lay off the lots of the county town, designate the public squares, a place for the court-house and other public buildings, goal, &c."; that at the next term of the said court, being June term, 1855, the justices thereof, a majority being present, made an order, and caused the same

to be recorded, directing that the committee appointed at the last term, to lay off the lots for the county site of Harnett, be and they are hereby constituted a committee on building; that at the same sitting of the court, Alexander D. McLean was excused from serving upon the committee on public buildings, and Silas Douglas, George W. Pegram, Archibald Cameron, and Willie T. Rhodes, were added thereto; and an order was passed and recorded, as follows: "Ordered by the Court, that the committee on public buildings, be, and they there are hereby authorised to let out the building of a good fire-proof brick court-house and goal for the county of Harnett, according to the plan and direction, a majority of the said committee may adopt, having a due regard for the interest of the county; that the said Neill McKay, Cornelius H. Cofield, Joseph T. Rearden, Archibald S. McNeill, Silas Douglas, George W. Pegram, Archibald Cameron, and Willie T. Rhodes, acting for, and in behalf of the county of Harnett, by virtue of their appointment as commissioners, invited sealed proposals for the building of a good fire-proof brick goal upon the public square, within the limits of Toomer, the county town of Harnett; that the petitioner sent in a proposition which was accepted; that accordingly, in the month of August, 1855, the said commissioners contracted with the petitioner for building the said goal at the place designated, according to certain written *specifications*, which describe and establish with great particularity the kind of goal, the manner of building, and the material to used about the same; that the contract was duly signed by both parties, and is, together with the specifications, filed in the office of the County Court; that according to this contract, the petitioner on his part, engaged to furnish all the materials, to commence the work as soon as practicable, and to complete the same, on or before the first of November, at the price of $6.400; they (the commissioners,) reserving the right to modify the plan or arrangement of the work, the payment to be made in monthly instalments, as the building progressed agreeably with monthly estimates, to be made by the superintendent, of ma-

terials furnished and work done,—(the commissioners reserving ten per cent. of the said monthly estimates until completion, as a guaranty for faithful performance.) The petitioner further alleges, that soon thereafter, he commenced collecting materials, employed a number of hands, went to work, and in a substantial and workmanlike manner, at the place designated, and by the time specified, built and completed a good fire-proof brick goal, three stories high, including basement, containing six separate apartments for the prisoners, besides rooms for the goaler; which said goal, the petitioner avers was constructed under the supervision of the superintendent appointed by the commissioners, and corresponded with the specifications except in one small particular under the head of plumbing, where the deviation was made under the sanction of the superintendent and the commissioners, in consideration of which departure a deduction of $275, was made,—the ascertained cost of furnishing pipes. The petitioner further alleges, that on viewing and examining the goal after its completion, the commissioners approved and received the same, as being done according to contract, and furnished him with a certificate of the fact in writing, dated the 28th of November, 1856. The petitioner further alleges, that John McNeill, the Treasurer of public buildings for Harnett, was appointed by the commissioners, and acted as superintendent of the work; that from time to time, during its progress, he examined the same, and made monthly estimates thereon of materials and labor; that he retained these estimates in his own hands as the common depository of both parties, and is now dead, having departed this life in March, 1857, but that in his life-time he entirely approved of the said work, during its progress, and after its completion. The petitioner further shews, that at September Term, 1855, of Harnett County Court, the first instalment then falling due, the said commissioners made an application to the Court, a majority of the justices being present, for an appropriation to enable them to meet the payment, which they refused to make, and attempted to repudiate their liability altogether.

He further alleges, that at December Term following, application was made to the same Court, by the commissioners, for an appropriation to meet the estimates, then due, upon which they passed the following orders, and caused the same to be recorded: "Ordered by the court that the Treasurer of public buildings be authorised to borrow a sum not exceeding ten thousand dollars." Also, "Ordered, that the Treasurer of public buildings pay over to Mr. Paschal McCoy $2000;" which was accordingly paid, and a receipt given by the petitioner for the same. Subsequently, the petitioner alleges, when estimates were made by the superintendent in accordance with the contract, applications were made to the court for appropriations, which were, in every instance, refused. Being urged by the commissioners and superintendent to go on with the work, he did so, and though with great inconvenience to himself, he did complete it within the time specified. At September Term, 1856, a majority of the justices being present, he exhibited in open court, the *written approval* and *reception* by the commissioners, and made an explicit demand for the remainder due him, stating his account in writing, crediting them with the $2000 paid him, and the $275 relinquished by him in consequence of a modification of the contract, making a credit of $2.275, and claiming the balance of the $6.400, to wit, $4.125 with interest thereon from the 28th of November, 1856, when the building was received, and upon a vote being taken in the said court, his demand was rejected, and has ever since been refused by them.

The prayer of the petition is for an *alternative mandamus*, against the justices of the county, commanding them that unless they shew good cause to the contrary, when called on by the Court, they pay, or cause to be paid by the officers of the county, the said sum of $4.125, with interest from the 28th of November, 1856; that upon their failure to shew such cause, they be absolutely and peremptorily commanded by the Court to pay as aforesaid.

The petition was verified by the oath of the petitioner, and by authenticated copies of the orders and exhibits referred to

therein; and coming on to be heard it was adjudged, and ordered by the Court, that unless the defendants shall pay the sum of $4.125, with interest from 28th November, 1856, notices issue for them to show cause at the next term of the Court, why a writ of *mandamus* shall not issue against the justices of Harnett, as prayed for.

The writ of *mandamus* was issued in pursuance of the order, returnable to the Superior Court of Harnett, March Term, 1859, HEATH, J., presiding. Upon the return whereof, it was moved, in behalf of the defendants, to quash the proceedings, for the following reasons:

1st. No allegation that Toomer, the county site, had been located.

2nd. No allegation in petition that the persons who are alleged to have made the contract, were appointed or authorised by the County Court to make such contract.

3rd. No allegation that the justices of Harnett ever directed the persons aforesaid, or in any way authorised them to contract for the buildings at Toomer, and that the contract itself does not set forth where the buildings were to be erected.

4th. No allegation that the County Court ever saw or accepted the contract.

5th. No allegation that the amounts stated to be due to petitioner, were ever properly ascertained to be due by *estimates* made by the superintendent, and if made, that they were not *certified* by him as directed under the contract.

6th. No *notice* was given to the defendants of the application for the writ.

7th. The petitioner prays for, and the writ commands the justiees to pay, &c., whereas it should have been to levy a tax or otherwise, &c.

8th. That the *estimates*, if any, were not certified and submitted to the County Court, and no sufficient reason assigned for not so doing.

The defendants' exceptions are, *pro forma* over-ruled, and the defendants are ordered to make return during the present term of the Court, from which over-ruling and order, the

defendants prayed an appeal to the Supreme Court, which is allowed.

Neill McKay, *Buxton* and *Haughton*, for the plaintiff.
Strange, for the defendants.

PEARSON, C. J. The subject of *mandamus* has been so often before this Court, within the last few years, that the general principles, and the mode and manner of proceeding are now pretty well settled by authority.

In making the application to the case now before us, the only matter in regard to which we had the slightest hesitation, was the order requiring the justices to pay the money, or cause it to be paid by the officers of the county. The other grounds taken in support of the motion to quash, can be disposed of in a few words:

1st. A more distinct allegation, that the county site had been located at Toomer, than is set out in the petition was unnecessary. The justices of the county are presumed to know the statute in reference to the location of their county site, and the acts done in pursuance thereof.

2nd., 3rd and 4th. The orders of the county court which are set out in the petition, show that the contract was duly entered into by the duly authorised agents of the justices.

5th and 8th. The stipulation in reference to the monthly payments to be made to the petitioner, upon the estimates of the superintendent, was for the benefit of the petitioner, and the allegation that the entire work has been completed, approved and accepted, makes any further reference to the monthly estimates and payments than that contained in the petition, unnecessary.

6th. The purpose for requiring notice of the application, is to save the cost of unnecessary litigation, by giving the party an opportunity to do the act. If such notice is in any case necessary, according to our practice, considering the former proceedings that had taken place in the premises, it was entirely a matter of supererrogation in this instance. The de-

mand for the payment of a specified amount alleged to be due under the contract, which was made with all proper formality before the present proceeding commenced, gave the justices an opportunity to avoid litigation, if such had been their pleasure, and the writ being in the alternative, may be considered in the nature of a rule. *State* v. *Jones*, 1 Ired. Rep. 129; and, so far as objections to the writ are concerned, every purpose is answered according to our mode of practice by the motion to quash.

7th. Upon consideration, we are satisfied that the proper order is to pay the money, and not an order requiring the justices to lay taxes, &c., which was the substitute proposed.—*Tucker* v. *The Justices of Iredell*, 1 Jones' Rep. 451.

It was suggested that this will bear hard upon the justices individually; but the contract having been entered into in their behalf, in pursuance of power vested in them by law, this Court must presume, either that they have some sufficient return to make, so as to prevent the issuing of a peremptory writ, or else, that they have taken the necessary means and provided a fund to meet the claim, if it is a just one.

It is fortunate that the matter has at last been put in a condition to enable the justices to make a due return, so as to have a trial on *the merits*, and end the litigation.

There is no error. This opinion will be certified, and a procedendo issue.

PER CURIAM, Judgment affirmed.

WILLIAM H. SMITH *and wife v.* RICHMOND REID.

Where a person gets possession of the property of another, and claims it under an alleged title as his own, for any length of time, his possession is necessarily adverse to the rights of the true owner.

Where one was in the possession of the property of another, a feme, and alleged that he held as her bailee, he must establish the bailment by satisfactory proof, otherwise the usual and natural presumption, that he holds for

his own use, will prevail. His want of title will not justify the implication of a bailment.

Where a father gave certain slaves, by deed, to his daughter, who was an infant, and so remained until after her marriage, during part of which time he denied the efficacy of the deed, and claimed to hold them as his own, his saying at the same time, they were, or would be his daughter's, is no satisfactory evidence that he held as her bailee.

The rule, that one wrongfully holding the property of an infant, may be considered as the bailee of such infant, is for the latter's benefit, and for the furtherance of his remedy, and the *tort-feasor* has no right to set it up for own his benefit against the infant owner.

DETINUE, tried before BAILEY, J., at the last Superior Court of Rowan.

The action was brought for several slaves contained in a deed, dated 13th of May, 1820. Jesse Holmes, the father of the plaintiff, drew up and signed, and had attested the deed, which is follows:

"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 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 name Jack, aged two months, and the increase of the said 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 the heirs of her body, then, all my children shall be entitled to the gift after my death; and should I die before my daughter Nancy arrives at the age of twenty-one, then Moses Holmes to have possession of the said negroes until my daughter arrives at the age of twenty-one years, without paying any thing but her tax; and my said daughter, Nancy Holmes, to have, hold, occupy and possess the said negroes and their increase, to the proper use of the said Nancy Holmes and the heirs of her body as above, forever,

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 whatsover, shall and will warrant, and forever defend by these presents. In witness whereof, I have hereunto set my hand and seal, this 20th day of May, eighteen hundred and twenty.

Acknowledged.

Witness, JESSE HOLMES."

J. H. FREEEING,

LUCY FREELING.

At May Session, 1820, of Rowan County Court, is the certificate of the clerk, as follows:

"I do hereby certify that the within deed was duly acknowledged in open court by Jesse Holmes, recorded and ordered to be registered."

Nancy Holmes, the donee, then resided with her grandmother, Nancy Owen, about two miles and a half from the residence of her father, and continued so to reside until her grand-mother's death, 31st December, 1827. After this, she continued at the same place with her aunt, Sarah Mock, until she intermarried with John Airey in August, 1829. While with her grand-mother, she was fed and clothed by her. She was not twenty-one years old when she intermarried with Airey, and her state of coverture continued until his death intestate, in April, 1854. She intermarried with the present plaintiff, Smith, since the commencement of this suit. The slaves sued for, are the descendants of the woman Susana, mentioned in the deed. It was shown in evidence, that Susana and her issue, were kept by Jesse Holmes in his possession, and worked on his farm for his own use and benefit, from the date of the deed until his death; except such as he gave off to his daughter, the defendant's wife, and to some of his other children. After the marriage of Nancy to the former husband, Airey, Jesse Holmes gave by parol the slaves, Silla and Adeline, to his daughter, the defendant's wife; the former, some twenty odd years ago, and the latter, some ten or twelve years ago. After the death of Jesse Holmes, to wit, in

the spring of 1856, Jack, another descendant of Susana's, went into the possession of the defendant, and all the slaves sued for, were in his adverse possession, at and before the time of bringing this suit. It was proved that there was a demand and refusal before suit brought; that on the 17th of April, 1845, on the occasion of making his will, Jesse Holmes being in possession of the deed of gift, caused the following to be written on it, " this deed never was delivered to any person, and ain't to have effect," which writing he signed and had attested by two witnesses. There was no evidence of a delivery of the deed, except as above stated. *Sarah Mock*, a witness for the plaintiff, testified that on the first day of January, 1828, the day after Nancy's grand-mother died, Jesse Holmes asked the witness to walk out with him, and said, I want you to see to Nancy, and if you keep her until she gets married, I will give, or have given, her, all that I got by her mother; it is mine, old Mr. Owen gave it to his children and their heirs, and it is mine; I intend to hold it as long as I live as my property, and at my death, Nancy shall have what I got by her mother. *Basil Floyd*, heard Holmes say, Nancy should have Susana and her children, but called them his negroes, when speaking of them, and worked them on his farm. *Rachel Floyd*, testified to the same effect. *Nancy Parks*, heard Jesse Holmes say, that Nancy would get Suke and her children. *Anna Holmes* testified, that Jesse Holmes had possession of the negroes up to the marriage, calling them his own. After the marriage she heard him say, that she should not have them, because she had married Airey.

His Honor instructed the jury, that the execution of the deed of gift by Jesse Holmes, his acknowledgement of the same in Court, and having it recorded, together with the declarations as stated by *Basil Floyd*, *Mrs. Floyd*, and *Mrs. Parks*, were evidence of a bailment; and if the jury found there was a bailment, then, the declarations made to *Mrs. Mock*, in 1828, and the entry on the back of the deed, at the time of making his will, would not determine the bailment.

Plaintiff excepted. Verdict for the defendant. Judgment and appeal.

Fleming and *B. F. Moore*, for the plaintiff.
Fowle and *Boyden*, for the defendant.

RUFFIN, J. The effort in the defense was to show that the possession of Holmes was not adverse to his daughter at the time of her first marriage, so as thereby to place the title in her husband, Airey, against whom the statute of limitations would operate and give the title to the defendant under the subsequent gifts from Holmes, and on that ground, the case was decided at the trial against the plaintiff. That the possession of Holmes was *prima facie* adverse, cannot be disputed. If the title had been in him, in fact, for any period, however limited, a possession under it would be necessarily adverse, that is, on a claim of the property as his own, and held for his own use. But the rule is not restricted to that case; for a wrong-doer may also have an adverse possession, and every conversion imports that the party was claiming a right and acting upon it, and every possession is presumed to be for the benefit of the possessor, and on his right, until the contrary be shown. If, indeed, one comes into possession as bailee, taking the thing as the property of another, and holding for the other, that presumption is rebutted. But it is necessary that one alleging such bailment, should establish it by satisfactory proof; otherwise the natural and legal presumption must stand. In this case, it was held that the execution of the deed of gift, with the acknowledgement of it, together with the father's subsequent declarations, that his daughter "should have the slaves," or "would get" them, or "will get" them, notwithstanding simultaneous declarations by him, that "the negroes were his," and notwithstanding that on speaking of them, "he always called them his negroes," as deposed to by the same witnesses, were evidence of a bailment; and that such bailment was not determined by his declarations, that the negroes were his for his life or absolutely.

The first observation the case suggests is, that there is here no express bailment—none created by contract between the parties, made with that view. It was supposed on the trial, that a bailment might be implied from the circumstances mentioned by his Honor. For the furtherance of justice, and for the sake of the remedy, there are cases in which an infant may be allowed to treat a person entering upon his estate as a guardian or bailiff, and to call him to an account in that character. But that is plainly for the benefit of the infant, and to give him the largest redress against the tort-feasor, and it can never be turned against the infant to defeat any other action he might have; much less his right. For doubtless, the infant might, in such cases, have likewise ejectment and an action for mesne profits, or trover, if it would better suit his purpose. It is but the common principle that torts may be waived and actions *ex contractu* brought in many cases; a fiction, that, like others in the law, must never be allowed to work wrong. Therefore, one who has sold another's horse, and might be sued for money had and received, cannot object, for that reason, to the owner's bringing trover, in which, peradventure the recovery may be larger, because the horse might be worth more than the price got. Admitting, then, the plaintiff might have treated her father as holding under and for her, (though it is not clearly seen how she could,) yet, that does not authorise the father to say now, that he held in no other way, there being no bailment directly proved. The Court is not able, indeed, to see how the facts enumerated afford any evidence, that there was even an implied bailment. If there had been an express one, it is admitted that mere declarations of the bailee would not determine it. But here, the question was whether, in fact, there was a bailment.

Upon that enquiry, all the declarations of the person in possession, as well as his dealings with the property, are relevant and material evidence of the character of his holding, and one cannot help seeing that Holmes did, at all times, claim the right of property of some kind in the slaves, under which he held. From the framing of the deed it is probable

that, at one time, he considered that gave or reserved them to him for life. At another time, he may have supposed himself entitled to the absolute property, because the deed had not been delivered, and that is the more probable, seeing that he undertook to dispose of them amongst his other children. But throughout, he certainly claimed them as his, and asserted a right to them; and even the very declarations relied on by the defendant, imported that they were not then his daughter's, but that she should have them, or would get them, that is, he intended she should; for, at the same time he asserted that they were his own. If he thus claimed them, his possession was *prima facie* adverse, and was conclusively so, unless upon plain proof of a bailment, or by his direct admission—of neither of which is there any evidence. As the case stands, the plaintiff's title is clear, and she ought to have had a verdict.

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

MATTHEW WICKER *v.* KENNETH H. WORTHY.*

Mere silence on the part of a sheriff as to the existence in his hands of a prior lien on property sold in his presence, will not subject him to an action of deceit, but if he does or says any thing intended or calculated to mislead a purchaser, in this respect, he is liable.

Enquiring from the sheriff, and reliance on his information as to the nature of the liens and levies of executions in his hands, on property offered for sale in his presence, is certainly the exercise of reasonable caution and diligence, as this is a matter peculiarly within his knowledge.

ACTION on the CASE for a deceit, tried before DICK, J., at the last Fall Term of Chatham Superior Court.

The defendant, who was the sheriff of Moore county, was present at a sale of property, made by the agent of one Bry-

*This case was attempted to be reported at page 221, ante, but the Reporter so entirely misapprehended the case sent up, as to make it proper to report it again.

ant, the owner. About the commencement of the sale, a question arose among the bystanders, whether there was not some prior lien on it by virtue of an execution in the hands of the sheriff; whereupon, Bryant stated that this had been the case, but those liens had been discharged, and he called upon the defendant, as sheriff, to make a proclamation to that effect, and to state that the sale might proceed without danger to the purchasers; this the defendant declined doing; upon which Bryant said, he would do it. Before the sale began, the crier, one *Brown*, made a public declaration, addressed to the bystanders, to the effect "that arrangements had been made whereby good titles would be made for the property about to be sold." The defendant was in hearing of this proclamation and said nothing. Much property was sold before the land in question was put up. When it was offered, the crier and one Murchison, an uncle of the defendant, both made proclamation that there was no dispute about the title to this tract; this occurred in the presence and hearing of the defendant. Very shortly before the sale of the land in question was begun, the plaintiff and defendant were seen conversing privately, and just as they separated, the defendant stepped forward and commenced bidding for the land, as the agent of the plaintiff. After bidding some time, he ceased, when the plaintiff took it up, in person, and ran up the price to $250, when it was knocked off to him at that price. This sale took place on the 20th of December, 1853. At the next term of Moore County Court, which was in January, 1854, the defendant, as sheriff, returned an execution against Bryant, in favor of one Buie, levied on the same land, under which it was afterwards sold by him and conveyed to the purchaser, (Buie.) An action of ejectment was immediately brought by Buie, against the plaintiff, which, after pending for some time, was compromised by the payment of $400 by the plaintiff. Bryant was indebted to the defendant—how much did not appear—and Murchison, above spoken of as the defendant's uncle, was deeply involved for Bryant, who has since failed. There was no evidence that the defendant said

any thing in reply to the public declarations of Bryant, or of Murchison, or the crier, about the title of the land, or the discharge of the previous levies.

The Court charged the jury that if the defendant, by his conduct, had intentionally deceived the plaintiff, as to the existence of the levy on the land, he would be responsible to the plaintiff, unless the latter had shown a want of ordinary prudence in informing himself as to the state of the matter; and upon that point he charged that the plaintiff was bound to know of the judgments against Bryant, (including Buie's,) and that executions had issued thereon, but that after charging himself with such information, it was a due pursuit of inquiry to resort to the sheriff for further information, and to rely upon his truth and fairness in the transaction. The defendant's counsel excepted.

Verdict for the plaintiff. Judgment. Appeal.

Haughton, for the plaintiff.
Manly and *Phillips*, for the defendant.

Pearson, C. J. Mere silence on the part of a sheriff, in respect to the levy of an execution which he has in his hands, when property subject to its lien is exposed to sale in his presence, is not sufficient to make him liable in an action on the case for a deceit. But if he *says* or *does* any thing intended and calculated to create the impression that there is no lien, and that a purchaser from the defendant in the execution will get a good title, he will be liable to the action.

There was evidence in this case tending to prove the deceit which ought to have been left to the jury, i. e., the proclamations made by the crier and Murchison, when the tract of land was offered; the private conversation between the plaintiff and defendant, and the defendant's *bidding* for the plaintiff, and other circumstances, such as the fact that the defendant in the execution was indebted to the defendant, and that his uncle, Murchison, who had busied himself about the sale, was deeply involved on his account.

We also concur with his honor upon the question of law. *Caveat emptor* is the rule in actions for deceit; but the fact of a levy or of the intention of the sheriff to insist upon the lien of the execution, or to forego it because of certain arrangements which the defendant in the execution had made, and upon which the sheriff was willing to rely, so as to permit a sale, are peculiarly within the knowledge of the sheriff, and even a very cautious man might reasonably rely upon his representations in regard to them. There is no error.

PER CURIAM, Judgment affirmed.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1859.

STATE *v.* AVERY WEST.

Whether an instrument or weapon be a deadly one, is, at least generally speaking, for the decision of the Court.

An instrument, too, may be deadly or not according to the mode of using it, or the subject on which it is used.

The actual effects produced by the instrument may aid in determining its character, and in showing that the person using it ought to be aware of the danger of thus using it.

Hence, it was *Held* that an oaken staff, near three feet long, of the diameter of an inch and a half or two inches, with which three blows were stricken upon the head of a man while drunk and unawares, shattering the bones of the head, and rupturing the interior vessels of the brain, was a deadly weapon, and a killing the use of it in that way, was murder.

INDICTMENT for the MURDER of one Joseph Pope, tried before MANLY, J., at the Spring Term, 1859, of Burke Superior Court.

One *Henry Deal*, who was present at the transaction, testified that he was the owner of a distillery, in the county of

McDowell, about two miles from his residence; that on the first day of March, 1858, the deceased, with the prisoner and two others, Glass and Moss, were at the still-house, after night; that the party had been drinking, and were all excited with liquor, except the witness himself; that the deceased, Pope, was more intoxicatod than the others; that after night, Glass and Moss sat down to cards, playing on the head of a half bushel measure, and the prisoner and Pope were seated on a log, side by side before a fire which was made in front of the furnace of the still; that the prisoner and the deceased began to boast of their manhood, when the prisoner said to Pope,—"If I were to fight you, I would not fight you a fair fight"; to which the other said, he was not afraid of him, for that he had nothing but a knife or a pistol, and he was not afraid of them; that when this was said, the prisoner arose and stood at the corner of the fire, where there was a stick of oak, used as a poker for the still-fire; that the deceased still continued to sit on the log without seeming to notice the movements of the prisoner; that the deceased soon appeared to be quite drunk, his head hanging forward with his face downward; that he, Pope, said Glass was cheating Moss, and swindling him out of his money—that glass said he was not; to which the deceased replied with an oath, calling Glass a liar; that Glass then seized the half bushel measure, and both he and Moss rose to their feet; that at that moment the prisoner struck Pope with the oak stick two blows on the head; then struck Moss and knocked him down, and then turned and struck a third blow at Pope, who was by this time prostrate on the ground; and Glass put the half bushel measure down without using it; that the prisoner stamped, or attempted to stamp and kick the deceased, until he was prevented by Glass, and witness; that when the blows were given, the deceased was sitting on the log as described, without appearing to know what was going on.

The witness Deal, produced the stick which was examined by the Court, and was admitted by the prisoner's counsel to be that with which the wounds were inflicted. It was oak, of

ordinary hardness and solidity, a little short of three feet in length, and from one inch and a half to two inches in diameter. Deal further stated, that the body of the deceased appeared to be in an insensible state during the night, and nothing was done except to dispose of the body before the fire and to raise the head by putting under it a piece of wood with his hat upon it.

One *William Walker*, said he was passing the distillery on the night in question, and he went in, having heard of the occurrence, and found some persons, whom, he did not remember, trying to get the deceased up, but he was unable to sit, and when raised, would tumble down again; that prisoner said Pope had called Glass a d—d liar, and he had just as well have called him so; and he no sooner said it than he killed him; that if deceased died, he was willing to be hung for it; but did not think a jury would hang a man for killing such a dog.

Dr. Atkins testified that being called to the deceased, he reached him next morning; that he had just been removed to a bed in the corner of the distillery; that he found him dying, and advised his removal to some dwelling, where better attention could be given him. He made a partial examination that day, and found the scull broken from the temple round to the back of the head; the patient died that day, and on the next, he made another examination, and found the skull shattered, the sacks containing the brain broken, the internal artery ruptured, and the whole brain suffused with blood. He found a cut across the forehead in a curved shape, and the bone of the head underneath broken, and, also, a cut across the nose, and the bones of that organ crushed. He testified that the deceased died of these wounds, and that any one of them was sufficient to produce death.

The prisoner's counsel contended that the instrument wherewith the homicide was committed, must be proved by a witness to be deadly, and that the instrument was not deadly, and malice could not be implied, but must be expressed, that

there was no intention to kill, and such a purpose could not be inferred.

The Court, after explaining the grades of homicide in North Carolina, and defining the term, malice, and its two-fold application to the law upon that subject, proceeded to inform the jury, that in order to imply malice, and make a killing, without provocation murder, it was necessary the instrument used should be calculated to produce death, or some great bodily hurt; that the stick produced and identified, was subject to examination by the Court and jury, and supposing the blows to have been struck with the stick in the manner stated by the witness, Deal, while the deceased was in the attitude stated, they, (the blows) were manifestly calculated to produce grievous hurt, and therefore, the stick used in such way under such circumstances, was deadly. It followed, therefore, from general principles laid down, pertaining to the law of homicide, that if the killing was without provocation with the weapon in question, and the manner stated, the law would imply malice.

The Court further instructed the jury, that an intention to kill, was not necessarily involved in every case of criminal homicide, when a deadly weapon was used. If the blows were given, reckless of how they might result, in a manner actually endangering life by their violence and barbarity, and they turn out to be the cause of death, it is a case of homicide, the grade of which is to be determined by other circumstances. If without legal provocation, it is a case of murder.—Defendant excepted.

His Honor gave some other instructions not excepted to, and not deemed to be material to the question before this Court.

Verdict that the prisoner was guilty of murder. Judgment and appeal by the prisoner.

Attorney General, for the State.
Avery, *Edney* and *Gaither*, for the defendant.

RUFFIN, J. Whether an instrument or weapon be a deadly one, is, at least generally speaking, for the decision of the Court; because it is a matter of reason, that it is, or is not, likely to do great bodily harm, which determines its character in this respect; *State* v. *Craton*, 6 Ired. Rep. 164. Hence, it is clear that a gun, sword, large knife, or bar of iron, and any other heavy instrument, by a blow from which a grievous hurt would probably be inflicted, are deemed in law, deadly instruments. An instrument, too, may be deadly or not, according to the mode of using it, or the subject on which it is used. For example, in a fight between men, the fist or foot would not, generally, be regarded as endangering life or limb. But it is manifest, that a wilful blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice from the nature of the injury, likely to ensue. So, the actual effects produced by the instrument, may aid in determining its character in this respect, and in showing that the person using it, ought to be aware of the danger of thus using it. Here, as it seems to the Court, it must be apparent that the instrument as used, was likely to produce death, or, at the least, great bodily harm. It was an oaken staff, nearly three feet long, of the diameter of an inch and a half at one end, and two inches at the other. With it, three blows were inflicted, while the prisoner was standing over the deceased, and the latter was either sitting on a log with his head hanging down, too drunk to perceive his danger, or make an effort to escape it, or was down on the ground from the effects of the earlier blows, and each of them fractured the bones of the head; one, the skull on the side from the temple to the back of the head; another, the thick bones of the forehead; and the third crushed the bones of the nose. An instrument producing such effects, not accidentally on one occasion, but at each blow with it, is unquestionably a highly dangerous weapon, especially when used upon one in the posture and helpless condition of the deceased, and authorises the inference, that the prisoner must have understood the peril in which he was putting the deceased, and gave the

blows regardless of the consequences, just as much as if he had struck with a bar of iron. As the case appears, the offence is certainly murder, wantonly and cruelly perpetrated. There is no error.

PER CURIAM, Judgment affirmed.

STATE *v.* LAWRENCE BLACK.

It was held not to be error in the Court to admit evidence of the contents of a written instrument, upon the assurance of the counsel offering it, that he would subsequently show the destruction of such paper, which evidence was afterwards produced.

What the defendant said to the magistrate on the next day after the destruction of a paper, in his hands as a constable, and his reasons for not being able to return it, were *Held* not to be admissible.

INDICTMENT for a misdemeanor, tried before BAILEY, J., at the last Spring Term of Lincoln Superior Court.

The indictment charged that a certain warrant, against one Alexander Wilson, was duly issued by one David Bailey, a justice of the peace of the said county of Lincoln, charging the said Wilson with an assault and battery, was put into the hands of the defendant, who was a constable in said county, and that he unlawfully did fail and refuse to execute the same and to make due return according to the exigency of the said warrant, against the form of the statute, &c.

Bailey, the magistrate, was called, and the solicitor proposed to show the issuing of the warrant by him, but it was objected, that no notice had been given to the defendant to produce the instrument, but upon the assurance of the solicitor, that he would show its destruction, the evidence was admitted. Defendant's counsel excepted.

There was evidence, tending to show, that the warrant was destroyed in the presence of the defendant, and by his consent and connivance. The defendant then offered to show, that

he went the next day to the magistrate and made a statement going to exculpate himself from a wilful destruction of the precept. This was objected to by the State's counsel, and rejected by the Court. Defendant again excepted.

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

BATTLE, J. We are unable to discover any thing in the errors assigned by the defendant, in his bill of exceptions, to entitle him to a *venire de novo*. Whatever force there might have been in the objection to the admission of the testimony, relative to the issuing of the warrant, and its tenor before its destruction was proved, was entirely removed when such proof was given. We believe that it is not uncommon for a court to admit testimony, the competency of which, depends upon some other proof, when an assurance is given by the party that he will offer such preliminary proof, and when it is introduced, we cannot see how the opposite party can be prejudiced by the order in which the testimony was given. In the present case, the destruction of the State's warrant by the defendant, was the main allegation in the bill of indictment, and of course, it had to be proved in the progress of the trial, for the purpose of establishing his guilt. He could not, therefore, be, in any manner, prejudiced by the proof that the warrant was prepared and delivered to him by the magistrate ; for it could not hurt him, unless it was afterwards proved that he had destroyed it.

The second exception, founded upon the rejection of the testimony, offered by the defendant, to show that the day after the destruction of the warrant, he went to the magistrate and explained how it came to be destroyed, and that in consequence thereof, he could not make a due return, is also untenable. He could not thus make evidence for himself, to exculpate him from the charge of having destroyed the State's warrant; *State* v. *Tilley*, 3 Ire. Rep. 424; *State* v. *Neville*, (ante 424,) decided at the late term in Raleigh, and not yet

reported. Nor was it evidence of a return, or of an excuse for not making a return, as he had released the defendant in the warrant from arrest, and therefore, did not have him in custody, so as to be ready to make a due return before the magistrate.

As we do not find any error in either of the exceptions assigned, we must direct the judgment to be affirmed.

PER CURIAM, Judgment affirmed.

Doe on the demise of CORNELIUS COOPER *v.* SARAH GIBSON.

The title to the unsold Cherokee lands, in the county of Haywood was, by the act of 1835, vested in the justices of that county, and where their commissioner, whose duties and powers were limited, by the resolution of the Court appointing him, to *three months*, executed a deed for a portion of said lands, at the end of *three years*, it was *Held* to be inoperative and void.

EJECTMENT, tried before MANLY, J., at the last Term of Jackson Superior Court.

The General Assembly, at its session of 1835, by an act duly passed, made it the duty of the Governor to convey to the Justices of Haywood county, certain lands therein described, commonly called the Cherokee lands, remaining unsold within the limits of the county; they, the said justices, complying with certain terms therein required. With a further provision, that the said justices should dispose of said lands for the use and benefit of said county, and the mode of doing so.

On the 10th of January, 1837, his Excellency, Edward B. Dudley, the Governor of the State, by deed reciting this act of Assembly, and reciting also, that it had been made to appear to him by the certificate of the public Treasurer, that the conditions required by the act had been complied with, did "give and grant unto the said Justices of Haywood county in trust for the said county, any tracts of land, commonly called

Cherokee lands, remaining unsold within the limits of the said county."

At a County Court of Haywood county, held on 19th of October, 1836, a majority of the justices being present, several orders and resolutions were adopted relative to the sale and disposition of the lands granted by the said act, among others, was one appointing "a commissioner with power to dispose of said lands according to the act of Assembly on the subject of Cherokee lands," and further, as follows:

"*Resolved*, That the commissioner shall close all his business in three months from the date of his commission, and that his appointment shall cease at that time."

Another resolution of the Court at the same time provided as follows:

"*Resolved*, That at the expiration of three months, the commissioner shall pay over to the clerk of the county court, or county trustee, or to one appointed for that purpose, all money in his hands, received for said lands."

The Court then proceeded to appoint "Ninian Edmonston commissioner, to dispose of the Cherokee lands, who gave bond and security for his performance in office."

Mr. Edmonston proceeded to act under this authority, and having sold to Isaac Sellars, the land in question, gave him this certificate: "I certify, that agreeably to an act of the General Assembly of the State, entitled "An act prescribing the mode of surveying and selling the lands lately acquired by purchase from the Cherokee Indians," Isaac Sellars was the purchaser of section No. 19, in district 2, bounded as follows: (describing it,) containing sixty-two acres, represented by the above plat. Witness my hand, this 22d of December, 1836. (Signed) N. EDMONSTON, *Commissioner*."

On the 19th day of February, 1840, Ninian Edmonston and *John Killian*, reciting the act of 1835, and the grant of the Governor to the Justices of Haywood, and reciting "whereas, the justices of the said county, &c., did "at the October session, 1836, appoint Ninian Edmonston and *John Killian*, commissioners to sell and convey said lands," and

that they two did make public auction thereof, and that Isaac Sellars became the highest bidder for the land in question, and did pay the said purchase money, they as commissioners did make and deliver to the said Isaac Sellars, a deed in fee-simple, for the said land.

Sellars entered, and conveyed to the lessor of the plaintiff, and the question is whether the deed to him is sufficient to pass the land. His Honor intimated an opinion that it was not sufficient, whereupon, the plaintiff submitted to a nonsuit and appealed.

Shipp and *Merriman*, for the plaintiff.
Gaither, for the defendant.

PEARSON, C. J. We concur with his Honor in the conclusion that the plaintiff failed to show title in his lessor. The grant executed by the Governor, in pursuance of the act of Assembly, passed in 1835, vested the title of the land in the justices of the county of Haywood; and if we supposed that the deed of the commissioner, provided it had been executed within the *three months*, to which his authority was limited, would have had the effect, in law, to pass the title out of them, still, there is no ground upon which such effect can be given to a deed, executed by him *three years* after his authority and powers, as commissioner, had expired. So, his deed under which the plaintiff claims, was inoperative for the want of power. The title is still in the justices of the county of Haywood; and we may be at liberty to suggest that the defects of title of this, and other like cases, can only be cured by an act of the Legislature, providing some mode in which the title may be passed.

PER CURIAM, Judgment affirmed.

A. J. MURRAY *v.* R. A. EDMONSTON.

An acknowledgement of one, as a surety for the stay of an execution, taken by a magistrate in the absence of the judgment, entered on a separate piece of paper and signed by the proposed surety, is invalid, and no execution can be issued thereon against such signer.

APPEAL from a justice's judgment, tried before BAILEY, J., at the Fall Term, 1858, of Jackson Superior Court.

One Sellers made a note to the defendant for $51, which he endorsed to the plaintiff, and the action was by warrant on the endorsement, and it was tried in the Superior Court upon the pleas, "general issue and payment."

The evidence was that Murray, on receiving the note, placed it in the hands of Buchanan, a constable, for collection, and he warranted Sellers and got a judgment. The judgment was kept by the justice of the peace, and in a day or two afterwards, Sellers applied to the magistrate for a stay of execution. The application was made on Sunday, about two miles from the residence of the justice, at which latter place, the warrant and judgment were. The magistrate determined to grant the stay, and to that end, he then entered Parks' acknowledgment, in writing, on a small piece of paper, which was signed by Parks and attested by the justice, and by the latter, attached to the judgment a few days afterwards. After the expiration of the stay, Buchanan, the constable, took out a fi. fa. against sellers and Parks, and sold a horse belonging to Parks, for the debt. Parks afterwards brought trover against Buchanan, and recovered the value of the horse, on the ground that the stay was a nullity as to him, and then this suit was brought.

The only question made at the trial, was whether the stay of execution granted at the time, and in the manner stated, was valid or invalid as against Parks. The presiding Judge held it to be a nullity, and a verdict and judgment being rendered accordingly, the defendant appealed.

J. W. Woodfin, for the plaintiff.
Merriman, for the defendant.

RUFFIN, J. The defence was, that the endorser was discharged by the payment of the note by the maker, or by one coming in his place. Now, the supposed payment was not voluntary, but was exacted from Parks as alleged by him, on illegal and void process; and on that ground he recovered the value of the horse; so that, in fact, the debt has not yet been received by the plaintiff. Still, if the money were properly raised on the execution, and ought not to have been recovered by Parks, but kept by the plaintiff, or his officer, in satisfacfaction of the debt, it would amount to payment, and discharge the defendant as endorser. It is to be noted here, that the defendant did not make the point, that the recovery was improperly made against Buchanan, since the writ of execution was a justification as to him as constable, though the plaintiff, Murray, or the magistrate, might have been liable. Possibly the point was waived, because Buchanan, as collecting agent, was chargable with the responsibilities, in such a case, of the judgment creditor or his attorney. But be that as it may, the question was not raised, and the case was distinctly put by both parties on the single point, whether the proceeding was sufficient, in law, to charge Parks, as surety for the stay of execution. On that, the opinion of this Court concurs with that of his Honor.

It has been the constant course of justices to enter the acknowledgement of persons as sureties for appeals or for staying executions, on the warrant and judgment. With respect to the latter, the words of the statute are, "the acknowledgement of the surety entered by the justice, and signed by the surety, shall be sufficient to bind him;" and then the act directs that any justice may issue execution against the principal and surety. It is thus seen, that nothing is to be left to parol; but the acknowledgement is to be in writing, and signed by the party; and that acknowledgement is to be "entered" by the justice. Where and when entered? Plainly, the entry

is to be made at the time of the acknowledgement and signature, and, as plainly, it must be on the same paper with the judgment, or, at least, on one annexed to it at the time of the entry; so as to prevent the substitution of one judgment for another. The engagement of the surety is not in the form of a contract, drawn out at length, but is a simple acknowledgement that he is surety to stay that judgment, and signed by him; which is construed in reference to the law authorising the proceeding, and in reference to the particular judgment mentioned and annexed. Such a construction is required, as well for the protection of the surety from imposition as to the amount of his liability, as, for the security of the creditor, and to enable him to see, at once, when, and against whom he may have execution. Hence, as was remarked in *Rickmon* v. *Williams*, 10 Ire. Rep. 126, it is obvious that the provision is in the nature of a statute of frauds and perjuries, and, therefore, no latitude is allowable in applying the act, which would expose either party to imposition. That all the proceedings are to be on the same paper is an idea which pervades all the the other parts of the act relative to the engagement of sureties for an appeal, or stay of execution. Thus, an appeal or stay of execution is subsequently provided for, when the party may be absent at the trial, or if present, may not be prepared to give security. In such cases the plaintiff may have execution immediately; but it is enacted, that, on the application of the other party to give security, the justice, if the judgment and papers be not in his hands, shall cause them "to be returned to him, *to the end*, that such stay may be *entered*, or such appeal be allowed;" which plainly implies that the stay is to be entered on the judgment itself, and signed thereon by the surety. It follows that the surety cannot be bound in any other way, so as to authorise an execution against him as upon a judgment.

As that is decisive of the case, the judgment is affirmed, without adverting to the other point as to the time, being on Sunday.

PER CURIAM, Judgment affirmed.

C. GRIGG *and* J. G. WILLIAMSON, *Executors v.* WILLIAM WILLIAMS, *et. al.*

Where two persons subscribed a will as witnesses, in the presence of the testator, after he had signed it, and then the name of one of the witnesses was inserted as executor, whereupon a third person was procured, who, on the acknowledgement of the testator, subscribed it as a witness, (such interlineation in no degree affecting the dispositions of the will,) it was *Held* that this did not impair its validity.

DEVISAVIT VEL NON, tried before BAILEY, J., at the Special Term, July, 1859, of Buncombe Superior Court.

The issue was to try the validity of the alleged will of William Wellman.

It was in evidence, that the decedent requested E. J. Grigg, one of the subscribing witnesses to write it; that he wrote it according to instructions given him by the former; that the decedent then signed the paper, and requested E. J. Grigg and J. G. Williamson, to witness it, which they both did in his presence; that after they had subscribed the paper as witnesses, the decedent requested Mr. Williamson to act as one of his executors, (C. Grigg having been alone named in the script as executor); that Williamson agreed to do so, and thereupon the other witness, E. J. Grigg, inserted Williamson's name in the presence of the alleged testator as one of the executors. It being suggested by Mr. Williamson that he could not act as executor and prove the will as a witness, one Moses Wright was sent for a few days afterwards, and then, in the decedent's presence, and at his request, subscribed the script as a witness, J. G. Williamson being also present, and having erased his name as a witness, E. J. Grigg not then being present. It was admitted that this did not alter the provisions of the will.

It was insisted that the paper writing was not duly executed, because E. J. Grigg had subscribed as a witness before the name of Williamson was inserted as one of the executors. His Honor held that this did not render the will invalid. Defendants excepted.

Verdict in favor of the will. Judgment for the propounders. The caveators appealed.

Gaither, for the propounders.
Hoke, for the caveators.

BATTLE, J. We concur with his Honor in the opinion that the subscription of the paper writing by E. J. Grigg, as a witness, before the insertion of the name of J. G. Williamson, as one of the executors, did not, under the circumstances, prevent it from being proved as the last will and testament of the alleged testator. The witness, and the testator, were both present, and the execution of the paper was *in fieri*, when the name of the additional executor was inserted at the instance of the testator, and with the knowledge and concurrence of the witness. It would have been an idle ceremony for them to have then traced their names over again, or have written them anew. It appears from the paper writing itself, that the addition of another executor, did not make any material alteration in its devises or bequests. In the case of *Bateman* v. *Mariner*, 1 Murph. Rep. 148, the testator signed his will, and it was attested, in his presence, by one witness. He then inserted the date and the words "my dearly beloved," and had it attested in his presence, by another witness. The testator then acknowledged the execution of the will before both witnesses, and it was held to be a valid execution of it. There is no error.

PER CURIAM, Judgment affirmed.

Doe on the demise of ELIZABETH McLANE *v.* RICHARD MOORE.

Where an estate was limited to one for life, remainder to a *feme*, who took husband during the existence of the life estate, it was *Held* that the latter was not barred by the lapse, during the continuance of such coverture, of more than seven years of adverse possession, she having brought suit within the time allowed after discoverture.

Where a constable levied an attachment on real estate, and the same after judgment of condemnation by a justice having jurisdiction of the amount, was returned to Court, where *an order of sale was made*, it was *Held* that an irregularity as to the form of the process in respect to the day of its return was cured, and that advertisement was to be presumed, upon the principle *omnia præsumuntur*, &c.

ACTION of EJECTMENT, tried before MANLY, J., at the Spring Term, 1859, of Polk Superior Court.

The plaintiff deduced title:

1. Through a grant from Willis Scroggins:

2. Legal proceedings by attachment against Scroggins, and sale of the land with a sheriff's deed to John Hughes.

3. The will of John Hughes, devising the premises to his wife for life, remainder to the lessor of the plaintiff.

The proceedings in attachment were as follows, that is to say:

1st. An affidavit by John Hughes, dated 12th of September, 1799, alleging that Willis Scroggins is indebted to him in six pounds three shillings and sixpence, and that he has good reason to believe that the said Scroggins hath absconded.—Signed by the affiant, and witnessed by "Samuel Young, J. P."

2nd. A bond with sureties payable to Willis Scroggins in twelve pounds seven shillings, conditioned "that John Hughes prosecute his suit agreeable to law, in case of an attachment against said Scroggins," dated 12th September, 1799.

3rd. An attachment in the following words:

"State of North Carolina, Rutherford county.

Whereas, John Hughes personally appeared before me, Samuel Young, Esq., one of the justices of said county, and

made oath that Willis Scroggins hath removed, or so absconded that the ordinary process of law cannot be served on him, and that he is justly indebted to him in six pounds three shillings and sixpence, and detaineth payment, this is therefore, to require you to attach so much of the goods and chattels, lands and tenements of the said Willis Scroggins, pleviable by security, sufficient to satisfy the said debt and cost, and make return how you have executed this writ. Given under my hand, this 12th of September, 1799.

(Signed,) SAMUEL YOUNG, [*Seal.*]

On which was endorsed as follows:

"John Hughes, } Attachment.
vs.
Willis Scroggins. } 12th of September.

Levied on one hundred acres of land on Green River, joining James Redings above, and Miller below—no personal property to be found.

Cost 5s. JAMES SCOTT, D. Sh'ff."

The plaintiff proves his account to six pounds 3-6, and 5s. cost. Judgment before me, this 1st day of October, 1799.

SAMUEL YOUNG, J. P."

4th. The following writ:

State of North Carolina.

To the Sheriff of Rutherford county—greeting:

Whereas, James Scott, as constable, returned into court a judgment at the instance of John Hughes, against Willis Scroggins, for the sum of six pounds three shillings and sixpence and cost, taken before Samuel Young, Esq., in the following manner, viz: 12th September, 1799. Levied upon 100 acres of land on Green River, joining James Redings above and Miller below; no personal property to be found, and the same being made returnable to court for orders of sale, ordered, therefore, that you, the said sheriff, do sell the said lands, or so much thereof, as shall be of sufficient (value) to satisfy the said debt with cost, and make due return thereof, to our next court, how you have executed this order.

Witness, R. T. Lewis, clerk of our said court, at office, the second monday in October, 1799. R. T. Lewis, cl'k

On which last paper is endorsed as follows:

"John Hughes, } Order of sale to January, 1800.
vs.
Willis Scroggins. } 10th of January, 1800, sold at public auction, the land within, agreeable to the order, to John Hughes, the plaintiff, for three pounds. No money paid.

James Scott, D. Sh'ff.

The foregoing were original papers, filed in the office of the clerk of the Superior Court, of Polk county.

The following is duly certified from the minutes of the county court of Rutherford:

"State of North Carolina.

County Court of Pleas and Quarter Sessions begun and held for the county of Rutherford, at the court-house in Rutherfordton, on the second monday in October, being the 14th of said month, in the year of our Lord, 1799.

Present—Stephen Willis,
Charles Wilkins,
Charles Lewis,
D. Dickey, } Esquires.

After the usual proclamation being made, the court was opened accordingly, at which time the following record, ss:

James Scott, as constable, returned into court a judgment at the instance of John Hughes against Willis Scroggins, for the sum of £6. 3, 6, and 5s cost, before Samuel Young, Esq., in the following manner, viz: 12th September. Levied upon 100 acres of land on Green River, joining James Redings above, and Miller below—no personal property to be found, by James Scott, D. Sh'ff.

Ordered, therefore, that the same be sold, or so much thereof, as shall be of value sufficient to satisfy the said debt with costs, agreeable to an act of assembly, &c."

And the following is duly certified by the clerk of the county court of Rutherford, as being taken from the "*Execution Docket.*"

"January 4th, 1800.

John Hughes, *vs.* Willis Scroggins.	order for sale	Judg't £6, 3, 6.	January 10th, 1800, sold at public auction, the land within, agreeable to this order, to John Hughes, for three pounds. J. SCOTT."

The question was, whether these proceedings, thus certified, were sufficient to uphold the sheriff's deed, founded on the said sale. The Court pronounced in favor of the sufficiency of the evidence furnished, with an understanding that the exception might be further considered of by the Court, and if allowed, the plaintiff should submit to a non-suit.

The trial then proceeded. The defendant showed a deed from Richard Lewis and James Early, to Ransom Barnes, dated 19th September, 1818; then a deed from Barnes to Greenberry Griffin, dated 14th September, 1820; then, a deed from Griffin to John Moore, the father of the defendant, in 1828.

And it was proved that Barnes took possession in 1818, and he and those claiming under him, had occupied the land ever since.

In reply to this proof, the plaintiff showed that she became covert in 1802, and continued so, until 1856, one year before the suit was brought, and that her mother, the tenant for life, under the will of John Hughes, died in 1840. The Court was of opinion with the plaintiff upon the question of the statute of limitations, and, on instructions to that effect, the jury found a verdict for the plaintiff. Afterwards, on consideration of the exception to the proceeding by attachment, being of opinion with the defendant, according to the agreement at the trial, the verdict was set aside, and a nonsuit entered. The plaintiff appealed to this Court.

Shipp, for the plaintiff.
Dickson, for the defendant.

PEARSON, C. J. We agree with his Honor in respect of the effect of the coverture of the feme lessor, but we differ with him in respect to the proceedings in attachment. The fact,

that upon the return of the judgment and proceedings before the justice, the county court gave judgment, i. e. made an "order of sale," cures all mere irregularity, and supplies a ground of presumption that every thing was *rightly done*, unless such presumption is rebutted by something appearing in the face of the proceedings sufficient to show that the case had never been properly constituted before a tribunal having competent jurisdiction; so as to make the proceedings "null and of no effect." *Skinner* v. *Moore*, 2 Dev. and Bat. Rep. 138; 10 Peters' 469; 7 Cranch 420; *Clark* v. *Quinn*, 5 Ired. Rep. 175.

This case was properly constituted in the County Court by the return of the levy, and of the judgment given by the justice of the peace for £6. 3. 6., which was within his jurisdiction. The omission of the magistrate to set out in the process a day of return, was a mere irregularity, cured by the fact that it was returned in the time required by law; and the fact that due advertisement had been made, falls under the rule, *omnia præsumuntur rite esse acta.* The judgment of nonsuit must be reversed, and according to the agreement at the trial, judgment must be rendered for the plaintiff.

PER CURIAM, Judgment reversed.

Doe ex dem M. FREEMAN *et al v.* A. J. LOFTIS *et. al.*

The act of 1803, for running the boundary line between this State and South Carolina was intended to confirm, and did confirm the first grants by either State within the disputed territory, and all territory must be considered disputed, for which the respective States had opened land-offices and issued grants.

Twenty-one years continued possession of land, the title of which, is passed from the State, begun by A as purchaser from B, and held throughout by him (A) as the owner, creates the presumption of a conveyance to him, A, from any and all persons.

There is no presumption, in law, that one bearing the name of the son of a

person seized of land, is the heir, or one of the heirs of a particular ancestor, but the question of identity is one of fact, to be determined by the jury upon the concomitant circumstances, such as the identity of name—residence of the claimant, and that of the other members of the family.

ACTION of EJECTMENT, tried before MANLY, J., at the last Spring Term of Henderson Superior Court.

The premises lie in Henderson county, and the declaration contains a count on the demise of Meredith Freeman, and one on the demises of several persons, who are the heirs of Jacob Phillips.

On the trial, the plaintiff gave in evidence a grant for the premises, containing 500 acres, from the State of South Carolina to William Reade, bearing date 2nd April, 1798, and purporting that the premises were in South Carolina, and a conveyance from Reade to Jacob Phillips, bearing date the 3rd of June, 1799. And the plaintiff further gave evidence, that said Phillips entered under his deed and remained in possession ten years, and then Moses Smith entered and continued in possession twenty-one years, claiming the premises as his own absolutely, under a purchase from Phillips. That Smith then went off and left the place vacant, and that he had a son by the name of Joseph. And the plaintiff further gave in evidence a deed from one Joseph Smith, of Alabama, to Meredith Freeman, one of the lessors of the plaintiff, bearing date December 17th, 1851, and in consideration of $50, conveying all the right and title of the said Joseph, the bargainor, of and in the premises in fee simple with special warranty.

Thereupon, the Court instructed the jury, that there was no statute in this State, confirming the grants of South Carolina, for lands in North Carolina, and, therefore, the grant to Reade was inoperative, and that the possession of Smith could not be connected with the prior possession of Phillips, so as to divest the title out of the State and vest it in Phillips; and furthermore, that there was no presumption in law from the name, merely, that Joseph Smith, who made the deed to Freeman, was the Joseph, who was the son of Moses Smith; but that the question of identity was one of fact, to be determined

by the jury, from the identity of name and other circumstances. The plaintiff excepted to the instructions, suffered a nonsuit, and appealed.

Shipp, for the plaintiffs.
Hoke and *Dixon*, for the defendants.

RUFFIN, J. It may be remarked on the first point, that one of the early acts, that of 1803, for running the line between this State and South Carolina, and appointing commissioners for that purpose, has a proviso, that the extension of the line shall not affect the title of any person to lands entered in either of the States. It would rather seem, that those words are sufficient in themselves to confirm titles to lands, that fell into this State, upon the fixing the boundary. But that construction is rendered more probably correct by subsequent acts of the Legislature. For, in 1804, an act in amendment of that of 1803, was passed, that the Governor might treat with the authorities of South Carolina and Georgia, for settling our boundaries, with a proviso, however, that nothing therein should affect any part of the act of 1803. Then comes an act in 1806, which recites, that there were doubts, whether the act of 1804, did not make the proviso of the act of 1803, extend to Georgia as well as South Carolina, and that it could answer no valuable purpose, so far as it respects Georgia, and might be an impediment to a settlement of boundary with her, and then enacts, that it shall not be construed to extend to Georgia. Accordingly when the commissioners of Georgia and of this State met, in June, 1807, the former declared that their powers were not competent to confirm entries and grants under North Carolina, which should turn out, on running the line, to be within Georgia, but that they were impressed with the justice of confirming some of them, and would recommend them to the liberality of their Government, not doubting the Legislature would confirm such of them in a satisfactory manner; and the final agreement afterwards between Georgia and North Carolina, is silent as to the confirmation of

grants. All this may be seen in the several acts, which are to be found in the second volume of the Revisal of 1819, and upon the adjustment of the boundary with South Carolina in 1815, it is simply established as run, marked and described in the agreement of the commissioners, and the plat annexed, and nothing is therein said of the confirmation of grants, either generally or of certain grants in particular; though, as before seen, it was intended that they should be confirmed. The inference seems to be very strong, that the general words of the act of 1803, were intended to confirm, and did confirm, the first grants by either State within the disputed territory; and that for that purpose, all the territory was to be considered as disputed, for which the respective States had opened land-offices and issued grants, as it was well known that no such offices had been opened, as to any territory, remote from the contested line. The difference, to either State, was of no consequence, being only the purchase-money for vacant lands, which at the time was very low, and made so for the purpose of inducing persons to take them up and settle them, so as to bring them into cultivation and make them subject to taxation, a purpose effected almost as well by taking a grant from one State as the other. At all events, there could be no sufficient motive for annulling them, and thereby defeating the settlement of the boundary, and working a prejudice to persons, who had taken titles upon the public faith of one of the parties. It was certainly understood, in this State, at the time of settling the boundary with South Carolina, that there was a mutual confirmation of grants; and no instance is known of a grant by South Carolina being held void, except where it would have been so held, if issued by North Carolina, that is, where the same land was covered by a prior patent from this State. The Court considers, therefore, that the act of 1803, gives validity to the grant to Reade.

But that is not, really, material to the title in this case. For although by virtue of the grant and Reade's conveyance to Phillips, the title became vested in Phillips, yet, it is clear, that it is not now in him or his heirs. The subsequent contin-

ued possession of Smith for twenty-one years, claiming to hold the premises, as his own, under a purchase from Phillips, raise a plenary presumption of a conveyance from Phillips, to him. If such a presumption is proper, in any case, it is in this. Smith's possession began as that of purchaser, and was continued throughout as owner, and a presumption of a conveyance from any, and all persons, arises, which is necessary to vest the title in him. It is, therefore, immaterial, whether the united possessions of Phillips and Smith were sufficient to divest the title out of the State, or whether the grant to Reade had that effect; for, admitting the title to have been in Phillips, he has it not now; because, by presumption from lapse of time and possession, it is in Smith.

Therefore, the only count on which the plaintiff could recover, is that on the demise of Freeman, on his title derived from Joseph Smith, supposing him to be the son and heir, or one of the heirs of Moses. On that point, it may be, the jury would have found for the plaintiff on the circumstances. But he distrusted that, and took a nonsuit on the ground, that the name *per se* was evidence in law, that Joseph Smith, the bargainor, and Joseph Smith, the son of Moses, was the same person. But on that point, the plaintiff is certainly mistaken. There is a possibility, and there may be a probability of the identity of the person in this case. But the possibility or probability is to be judged of by the jury from the name, the residence of the person, and of the other members of the family, the price paid for the land, compared with its value, and the facility with which the identity might be proved, if it existed, and other circumstances. But the law lays down no rule on the subject, and, as is evident in respect to so common a name, can lay down none.

The title being in no one of the lessors of the plaintiff, the judgment must be affirmed.

PER CURIAM, Judgment affirmed.

State on the relation of ABSALOM GARROW *v.* M. A. MAXWELL.

Where a constable, to relieve himself from liability for failing to collect a judgment in his hands, paid it off to the plaintiff, and then put it into the hands of another constable to be collected for himself, it was *Held* to be some evidence that he had purchased it.

Held further, that the former constable might well declare, as relator against the latter, on his bond, for failing to collect the money.

DEBT, tried before BAILEY, J., at the Fall Term, 1858, of Henderson Superior Court.

The declaration was upon the official bond of the defendant, as a constable. The relator, Garrow, had been a constable, and had in his hands for collection, a judgment in favor of Tollison and Tabor, against one W. W. Hutchison, for $21.53 and interest. This he paid over to Tollison and Tabor, and then went out of office. *Hutchison* testified that he had paid about four dollars of the judgment, and the remainder, (about $18,) he had not paid to any one; that he still owed that amount on that claim to some one. He further stated that Maxwell presented the judgment to him after Garrow went out of office, saying that he had received it to collect for Garrow; on the cross-examination of the defendant, he said that Garrow told him he claimed the money, because he had it to pay in his official capacity, but did not claim to have purchased it. It was further in evidence, that while Maxwell had the paper in his hands, he might have collected it off of Hutchison with ordinary diligence.

The defendant introduced the judgment in question, on which was endorsed, that it had been paid. The defendant contended that the suit was improperly brought upon the relation of Garrow; that there was no evidence that Garrow had purchased it from Tollison and Tabor, and that the relation should have been in their names, and asked the Court so to instruct the jury.

His Honor declined to give the instruction asked, but charged that if the plaintiff, Garrow, failed to collect the mo-

ney while the judgment was in his hands, and had paid it to Tollison and Tabor, because he had failed to collect it, and Maxwell had received it from him and agreed to collect it for him, Garrow, from Hutchison, the action was properly in the name of Garrow as relator, and if the defendant had failed to collect the money because he had not used due diligence, the plaintiff was entitled to recover. His Honor held there was some evidence that Garrow had purchased the claim from the original owners. Defendant excepted.

The plaintiff had a verdict, and on judgment in his behalf, the defendant appealed.

Jordan, for the plaintiff.

Merriman, for the defendant, insisted that the plaintiff could not recover for the following reasons, to wit: *First*—The *legal* owner of the judgment placed in the hands of the defendant, Maxwell, ought to be the relator, and not the present one, who has, *if any*, but an equitable interest. See *Gov.* v. *Deaver*, 3 Ired. 56; *State* v. *Lightfoot*, 2 Ired. 306; *Eason* v. *Dixon*, 2 Ired. 243; *State* and *Clayton* and *Lyle* v. *E. P. Miller*, et. al. 11 Ire. 235, and cases there cited. *Brittain* v. *Farmer*, 10 Ire. 45. *Secondly*. If one not owning the *legal* interest in the judgment could maintain this suit, even then, the present relator could not, for there is no evidence that he had any interest, *legal* or *equitable*. The evidence touching this point is, that the relator *claimed* the judgment, *because* he had had to pay it off on account of a breach of his official duty. This is surely no evidence of a purchase. The law, in a case like this, will not *imply* even an intent to purchase, for to do so, would be to aid that public officer who might neglect and refuse to discharge his official duty. The law will not aid him who neglects a due obedience of its provisions, and wilfully violates its commands. It would be against the policy of the law, thus, to encourage defaulting officers. If the present relator paid the judgment *officiously*, this, although it did not discharge the defendant in the judgment, did not confer on

him any rights. See *Null* v. *Moore*, 10 Ired. 324. In that case, the late Chief Justice NASH said: "That Wright, (a deputy sheriff, who, it was contended had officiously paid a judgment,) was a stranger to it. Neither would such a payment have conferred upon him any legal interest in it, or claim against the defendants for the money." But the plaintiff insists that the *contract* to *collect*, was made with the present relator. This cannot avail him, for the contract was to collect a judgment that *belonged* to Tollison and Tabor, and therefore, the contract was for them, and they ought to be the relators, and to this effect is the decision of this Court in the case of *Brittain* v. *Farmer*, cited above. The judgment belonged to Tollison and Tabor, and they alone could maintain this suit.

PEARSON, C. J. The testimony of Hutchison establishes the fact that the judgment was not satisfied, except as to the amount of four dollars, and explains the endorsement, so as to show that it was made as a memorial of the fact that the amount had been paid by Garrow to the plaintiffs in the judgment, and this testimony, together with the other circumstances, was evidence to justify the jury in coming to the conclusion that Garrow did not make the payment as a satisfaction, but did so for the purpose of relieving himself from liabilty, because of his neglect to collect, and with an intention to purchase the judgment, with a view to indemnify himself by causing the money to be made out of Hutchison, the original debtor.

According to the admissions of the defendant, Garrow put the judgment into his hands to be collected for his, (Garrow's) use, which he undertook to do, being notified of the fact that Garrow was entitled to the beneficial interest, because he had paid the amount, minus the four dollars to the plaintiffs. This distinguishes our case from *State* v. *Farmer*, 10 Ired. Rep. 45. In that case, Brittain, the relator, had no beneficial interest in the judgment, and acted as the agent of the plaintiffs in putting the claims in the hands of the officer for collection.

PER CURIAM, **Judgment affirmed.**

JOHN FORTUNE AND RICHARD FORTUNE *v.* FRANCIS M. HARRIS *et al.*

Where a horse loaned by plaintiff to defendant, was carried to defendant's house and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind, and the weather being wet, slipped and fell upon a stump, breaking its thigh, it was *Held* that these facts did not import such negligence as to render defendant liable for the loss of the property.

ACTION of TRESPASS on the case, tried before MANLY, J., at the last Spring Term of McDowell Superior Court.

It appeared in evidence, that the horse was loaned by plaintiffs to the wife of the defendant, Harris, at that time a young woman unmarried, but of full age, to ride to Rutherford on a visit to her relations.

The horse was blind in one eye when he was loaned, and when he was returned, about eight days afterwards, the other eye was weeping and partly closed up. The horse was returned by the young woman as she came back from the visit and before reaching her home; but as she was about to walk home, it was suggested by a member of the plaintiff's family that she might ride the horse home and bring him back next day; this was assented to by plaintiffs, and she rode the horse to her father's, a short distance, and he was there put into the common horse-lot surrounding the stables, where in passing around the lot, he appeared to have slipped and fallen upon a stump and broke his thigh; the lot had been used for many years as a horse lot, but was somewhat slanting, and it was wet weather.

There was no complaint made of the treatment of the horse, or of his appearance, when he was first brought back by the defendant, as she returned from her journey.

Upon the foregoing, as an assumed state of facts, the Court was of opinion there was not proof of such negligent use, or of such want of care, as to make defendant responsible for the accident.

The plaintiffs contended, that as the injury had occurred to

the animal while in the possession of the defendant, that a misuser of it was to be presumed; but the Court did not think so, especially in the face of the proofs. The plaintiffs, in deference to the opinion of the Court, submitted to a nonsuit and appealed.

Dixon, for the plaintiffs.
Avery, for the defendants.

PEARSON, C. J. It is not necessary for us to enquire, whether, if one borrows a horse, and it is injured so that it cannot be returned in as good condition as when received, the *onus* of proving how the injury occurred, is upon the bailor or bailee; for admitting that, as the bailment was for the benefit of the bailee alone, she was liable for slight neglect; and admitting also, that the onus of exculpation, by disproving any degree of neglect on her part, was on the defendant, we concur with his Honor, that upon the state of the facts, assumed, she was not guilty of even slight neglect, as the damage was the effect of a mere accident.

PER CURIAM, Judgment affirmed.

ROBERT McCALL *et al v.* ALTHEA GILLESPIE.

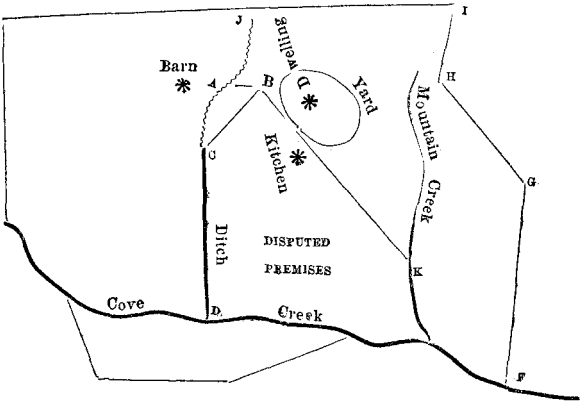
Where a testator, seized of a tract of land, with known metes and boundaries, showed by the whole scope of his will, that he intended to provide a home for his wife and one daughter, at one end of the tract, and for his other children, as a class, at the other end, but called for no particular boundary, except a dividing line, made up of several other lines, which, all together ran nearly, but not quite through the original tract, it was *Held* that to ascertain the interest of the wife and daughter, the outer boundaries of the old tract, were to be followed from where the dividing line intersected with one of them.

Where one of two cross fences was called for in a will, it was *Held* proper to resort to proofs dehors the will to determine which was intended.

Fortune *v.* Harris.

EJECTMENT, tried before MANLY, J., at the Spring Term, 1859, of McDowell Superior Court.

The object of the action was to recover the possession of a parcel of land, marked in the annexed diagram, as "disputed premises," lying partly on Mountain creek and partly on Cove creek, and being a portion of a larger tract of land, of which William Gillespie died seized and possessed.



The case turned upon the construction of a devise in the will of the said William Gillespie, and the proper boundaries of the land described therein. The devise is as follows:

"Item. To my dearly beloved wife, Judith Gillespie, I leave part of the plantation, beginning at the ford of the branch, this side of the barn, take the fence including the garden to the stone chimney, thence with the cross fence to the ditch or creek, thence with the creek to the beginning on a large white oak, including all the houses and improvements to her for life, and Althea Gillespie to have the same at her mother's death: The balance of the old tract that belongs to me, the rest of the legatees can divide to suit themselves."

There was evidence of a cross fence from B to K, and also of a cross fence from B to C, and from C along a ditch to Cove creek at D. There was also evidence, that at F, near

Cove creek, stood the "large white oak" mentioned in the will, as the "beginning corner."

A was admitted to be the ford of the branch, B the rock chimney—besides the ditch from C to D, which was proved, there was evidence that Mountain creek had been straightened by cutting or ditching.

The plaintiffs' counsel contended below—

1. That the description of the land, given to the widow for life, &c., was too vague and uncertain to be supported; that there were no *data* by which you could get away from the creek and include any land at all.

2. And if wrong in this; that the true running of the line of division was from A to B, thence to K, and so down the Mountain creek to Cove creek, and then down the latter to the beginning.

The Court was of opinion, that if the line, designated in the devise, ran from A to B, and thence down either of the cross fences to Cove creek, and then down the creek, and the jury should find the white oak at F, to be the terminus therein called for, it would be proper to go to it.

The Court was furthermore of opinion, that it was the purpose of the testator (to be plainly inferred from the language of the clause itself, as well as from other parts of the will) to divide this body of land into two parts, throwing a portion on one side of a line for the use of his wife and daughter, and leaving the residue to be divided among his other legatees, and he, therefore, instructed the jury, that after arriving at F, they might run around the outer boundaries on the east, so as to include the improvements. It was left to the jury to determine upon the proofs, which of the cross-fences was intended, and to which side the *disputed premises* belonged.

The jury found a verdict in favor of the defendant, and the Court having rendered a judgment accordingly, the plaintiffs appealed.

Gaither, for the plaintiffs.
Avery, for the defendant.

BATTLE, J. The terms of the devise, under which the defendant claims the land in controversy, are not, of themselves, so vague and uncertain, as to make it void upon the ground of its being a *patent* ambiguity. Whatever difficulty there may be in identifying and locating the part of the tract of land, which the divisor intended for his wife during her life, and then for his daughter, arises out of the parol proof, and is, therefore, a *latent*, and not a *patent* ambiguity. The true enquiry, then, is, whether there has been a sufficiency of that kind of proof to remove the ambiguity, by showing what are the boundaries of the land intended to be conveyed. Upon that question, our opinion is decidedly in favor of the defendant. The ford of the branch, the stone chimney, Cove creek, and a white oak at the beginning of the tract of land, as laid down on the plat, are all proved and admitted. Two cross-fences are shown, and there was sufficient testimony to be left to the jury, and to justify them in finding, that the one which led to the ditch, was the one called for in the will, and then to go down the ditch or creek, and then with the creek to the beginning, was only following out the direction therein plainly given. But it is here objected, that this description, as is shown by the plat, does not include any land, because there are no calls for either course or distance, or other way, by which the beginning at the ford can be reached. The reply is, that it is apparent, from a view of the whole will, that the testator intended to provide homes for his wife and each of his children, and that his wife and his daughter, Althea, should have a part of what he calls his "old tract," upon which he was then living. His description of the part, which he designed for them, is not complete, but it goes far enough to indicate, with sufficient certainty, that he intended them to have all of the land lying east of the ditch and north of the creek, (Cove creek) which ran to, or near the beginning white oak, indicated on the plat, as being at F. This will include "all the houses and improvements," and also the disputed premises, leaving the balance of the old tract to be divided among his other children, so as to suit themselves. This con-

struction will give effect to every part of the will, and no doubt will carry out the intention of the devisor, as either therein expressed, or therefrom reasonably to be inferred. The judgment of the Court below, having been rendered in accordance with this view, must be affirmed.

PER CURIAM, Judgment affirmed.

SETH HOTCHKISS AND WIFE *v.* ZEBULON THOMAS.

Where an estate in slaves was given by will, to one for life, with a limitation over to another, and the executor assented to the estate of the first taker, his assent to both gifts, in succession, will be implied, and the repudiation of the legacy by the first taker, was *Held* not to do away the effect of the executor's assent to the succeeding gift.

A limitation over of a chattel interest, after the expiration of a life-estate, is not, strictly, a remainder, but an interest *in futuro*, created by an executory devise of a distinct property, and the rule, that the assent to one, is an assent to the other, is not founded on the idea that the two interests constitute one estate, but because, it being the executor's duty to assent to both, it will be considered as having been made to both, necessarily, unless restricted to one alone.

It would seem where the taker of a life-estate in a chattel under a will, had no other title than that derived from the will, and the executor's assent, and he accepted the possession as a legatee, that he could not be allowed to set up a merely pretended title in opposition to the executor, and the ulterior donee.

TROVER, tried before BAILEY, J., at the last Fall Term of Macon Superior Court.

The action was brought for the conversion of a slave, named Adeline, and her six children, in the possession of, and and claimed by the defendant, and was tried on the general issue.

The case was, that John Davidson owned the slave Adeline and two others, and by his will gave all the said slaves to his wife Margaret, during her life, and at her death, gave a girl,

Clarissa, to his son James, another girl, Mary, to his daughter Catharine, and the third, Adeline, to his daughter Olivia, then the wife of Thomas Hotchkiss, who are the present plaintiffs. The testator died in September, 1845, and one H. L. Potts proved the will as executor, and immediately gave up to Mrs. Davidson all right he had in the slaves, as executor, and permitted her to take possession and exercise exclusive dominion over them as her own; but in respect to the slave Adeline, Mrs. Davidson declared that she claimed her as her own property under a former husband, and in opposition to the will of her last husband, Davidson. The widow, Margaret, on the 6th of January, 1846, sold the slave Adeline, to the defendant, Thomas, for the price of $500, and Potts assented to the sale, and, on the 10th of March, 1846, he covenanted with the defendant for the title and quiet possession of the slave forever. Mrs. Davidson died in August, 1857, and after demand and refusal, this suit was brought in February, 1858.

The counsel for the defendant, insisted that there was not an assent of the executor to the legacies to Mrs. Davidson, and the plaintiff, Olivia, so as to vest the title in them as legatees; because to constitute an assent of the executor, so as to pass his title, the legatee must accept the thing, and agree to hold as legatee; and, therefore, that if Mrs. Davidson claimed Adeline as her own, and to hold adversely to the executor, the assent of the executor to her having the property, which was in him, would not vest the slave in her against her consent, and, so, not vest the remainder in the plaintiffs; and the counsel prayed instructions accordingly.

The Court declined giving the instructions prayed, and, on the contrary, directed the jury that, if the executor gave up the negroes to Mrs. Davidson, surrendering all right to the legacy, which he had as executor, and permitting her as legatee, to use it as her own, that was such an assent, on the part of the executor, as would vest the slave in Mrs. Davidson for her life, and afterwards, in Mrs. Hotchkiss, absolutely, although Mrs. Davidson may have claimed the said Adeline in her own right, and against the will.

The Court further instructed the jury that, after having thus assented to the legacy, the executor had not the title to the slave, and that his concurrence in the sale to the defendant and covenant for the title, could not affect the rights of these parties.

Verdict for the plaintiff. Judgment and appeal.

N. W. Woodfin, and *Shipp*, for the plaintiff.
Gaither, for the defendant.

RUFFIN, J. Supposing Adeline to have been the property of Mrs. Davidson, independent of her husband, it might admit of some consideration, whether she could split up the operation of the executor's assent to the whole gift to her, so as to claim some of the slaves under the assent, and others against it. The Court does not, however, enter into the consideration of the point, as it is not necessary to the decision here, since it is expressly stated in the defendant's exception, that, although Mrs. Davidson claimed Adeline as her own by title paramount, yet the slave actually belonged to the testator, and, therefore, she derived the only title she had to her, through the will, and the assent of the executor. Now, a court would pause a long while before a legatee of a particular estate, whose only title is thus derived, and *that* a good title, and who by the assent of the executor gets possession, would be allowed to deny that title, and set up an adverse one, when the sole purpose of so doing, is tortiously to defeat a limitation over, after the expiration of the particular estate. It need not be denied, that, if there be no election in the case, or that doctrine be not applicable in a court of law to an ex-executor's assent, Mrs. Davidson might assert her own right to the slave, if she had it, and we suppose she might. But when she had no title, whatever, but that derived under the will, and could have got the possession in no other way, but as legatee, it would seem, both on principles of law and justice, that she could not accept the possession from the executor, and at the same time set up a title merely pretended in

opposition to the executor, or to an ulterior donee. But this case does not depend, even on the correctness of that position. For, it may be yielded, for the sake of the argument, if there had been no limitation over, and the reversion after Mrs. Davidson's life, had been left in the executor, that, as between her, and him, the repudiation of his assent to the legacy to her might leave the title in him, and make it necessary for him to retain or recover the slave, and hold her until Mrs. Davidson would accept her as legatee; and, therefore, that he would be barred of the title after so long an adverse possession by her vendee of the absolute property. But in this case, that conveyance is avoided entirely by the effect of the executor's assent on the interest limited over. The general rule is, that an assent to the particular estate amounts to an assent to a gift limited thereon, and under the operation of that rule, the title vested in remainder in the feme plaintiff. It is said, however, that the assent to the gift over, was ineffectual by reason of the dissent of Mrs. Davidson to take under the will, and the executor's assent, because the particular estate, and the remainder formed but one estate, and if the former did not vest, the latter could not. It is true, that form of expression is found in the books, and it is sometimes given as the reason why the assent to the particular estate is an assent to a remainder. But, in respect to gifts of personal chattels, the expression is inaccurate, for the two interests do not constitute *one estate* properly speaking; but, after a life estate, the limitation over is not by way of remainder, technically, but by way of executory devise of a distinct property, to arise in *futuro*; and hence the executor may, probably, by express terms, limit his assent to either interest, separately, and it will be good to that extent only. If, however, he does not expressly restrict his assent to the gift, to the first taker, the general inference is, that he means to assent to all the gifts in succession. But that is not because those gifts make up but one estate; on the contrary, it arises by fair inference, from his assent to the prior legatee of the specific chattel, that neither the present, nor the ulterior interest is needed for the payment

of debts, since, if it were, it would be wrong in him to assent to either legacy, inasmuch as they ought to be contributory *pro rata* to the debts, and such wrong is not to be presumed. It appears, then, that although the assent to the one legacy may thus be inferred from that of the other, the assent to each is in its nature distinct, as the legacies themselves are as to their vesting in right or possession. Hence, if it be admitted, that Mrs. Davidson did not take as legatee, yet, her refusal of the bounty of her husband, could not defeat his bounty to his daughter, nor defeat the assent of the executor to the gift to the daughter. The executor is not obliged to retain the whole title in himself because one of the legatees refuses to accept the legacy of a limited interest; but he may relieve himself of responsibility, and do justice to the ulterior legatee, by an immediate assent to that legacy, so as to vest it in right at once. By the gift, the donee has an inchoate right to the legacy, and the assent of the executor is only required as a renunciation of his right to apply part of the testator's effects to the payment of the debts, and the charges of administration.—When that is thus put out of the way, the gift becomes perfect under the will, and the executor never can resume the title or the possession; consequently, the concurrence of the executor in the sale to the defendant cannot affect the title vested in the feme plaintiff by the previous assent, and the plaintiffs have a right to recover, notwithstanding the defendant's possession; because they were married at the death of the testator, and because, this suit was brought almost immediately after their right to the possession accrued.

Per Curiam, Judgment affirmed.

C. C. JONES, *assignee*, *v.* L. D. HAGLER, *Executor.*

A discharge in bankruptcy of the principal debtor, in a bond or note, does not release the surety.

ACTION of DEBT, tried before MANLY, J., at the last Spring Term of Caldwell Superior Court.

The action is debt on a bond for $24, given by the defendant's intestate and another, the latter being the principal debtor. There were several issues, but the question, at the trial, turned entirely on one of them; which was joined on a special plea, that the principal had been duly discharged as a bankrupt in the district court of the United States, for &c. The Court held that not to be a bar to this action against the surety, and after a verdict for the plaintiff on the other issues, and judgment, the defendant appealed.

Avery, for the plaintiff.
Gaither, for the defendant.

RUFFIN, J. It would require the very strongest authority to induce the Court to hold, that a discharge, by act of law, of one of two joint and several debtors, worked also the discharge of the other—more especially when, as in this case, the very purpose of the latter in becoming bound, was to guarantee the debt against the insolvency or bankruptcy of the principal. But there is no occasion for resorting to that principle, since the bankrupt act of 1841, under which the discharge here was had, expressly provides, that the discharge of a principal shall not impair the liability of his surety.

PER CURIAM, Judgment affirmed.

JOHN C. BLAIR *v.* JOHN HORTON *et al.*

Where a person was arrested under a warrant from a justice of the peace, and there was a misrecital of the name in the mandatory part of the warrant, but it was recited correctly in the oath, it was *Held* in an action for a malicious prosecution, brought by the defendant in the warrant.

1st. That the discrepancy was cured by the correct recital in the first instance.

2nd. That it was competent for the justice, who issued it, to amend it upon the assurance that he intended to write the name correctly.

THIS was an action on the case, for a malicious prosecution, in suing out a warrant against the plaintiff, for an assault and battery upon the person of Clement Reid, one of the defendants, tried before BAILEY, J., at the last Fall Term of Caldwell Superior Court.

The warrant was issued by J. W. Councill, a justice of the peace for the county of Watauga. It is as follows, to wit:

"State of North Carolina, Watauga County.

"To any lawful officer of said county, to execute and return. Whereas, information has this day been made to me, one of the acting justices of the peace, in and for the county aforesaid, on the oath of Clement Reid, that John C. Blair, late of said county, on the 13th of December, 1852, did present and shoot at the body of the said Reid, with force and arms, against the peace and dignity of the State. You are, therefore, hereby commanded, in the name of the State, to arrest the body of the said *J. C. Balir*, if to be found in your county, and him have before me or some other justice of the peace for said county, to answer the aforesaid charge, and be further dealt with according to law; herein fail not. Given under my hand and seal, this 29th day of December, 1853."

Signed, J. W. COUNCILL, [*seal.*]

The plaintiff introduced the warrant, for the purpose of showing that he had been arrested under it, and that it had been dismissed by the justice, before whom the cause was tried. The defendant objected to the introduction of this paper-writing, purporting to be a warrant, for that it appeared

upon its face, that the oath was made by Reid, that one J. C. Blair, committed the battery upon him; whereas, the mandatory part of the warrant, commanded the officer to arrest J. C. Balir and not J. C. Blair, and that the action, in its present form, could not be maintained.

J. W. Councill, the justice who issued the warrant, was examined, and he stated that he intended to write the name J. C. Blair, where he, by mistake, wrote J. C. Balir. The plaintiff moved to amend the warrant so as to read J. C. Blair instead of J. C. Balir, this was objected to by the defendants. The Court told the justice of the peace, that he might amend the warrant so as to make it speak the truth, if he intended to write the name correctly. The justice then made the amendment so as to make it read J. C. Blair. The defendants excepted.

Under the instructions of the Court, the jury found a verdict for the plaintiff, and the defendants appealed to this Court.

Gaither and *Avery*, for the plaintiff.
Lenoir, for the defendants.

PEARSON, C. J. The discrepancy produced by the inadvertance of putting the letter "l" *after* the letter "a" instead of *before* it, was cured by the recital of the true name, "John C. Blair, in the oath, and the command to arrest the body of *the said* "J. C. Balir," showing that it was intended to be written "J. C. Blair." So, the matter was immaterial. But this Court is clearly of opinion, that the justice of the peace who issued the warrant, had the right to correct the mistake, with the sanction of his Honor. *Hoskins* v. *Young*, 2 Dev. and Bat. Rep. 527, cited on the argument, is not in point.—There, the warrant was altered in a material matter, i. e. inserting the name of a third party, by a justice of the peace who had not isued the warrant. There is no error.

PER CURIAM, Judgment affirmed.

JOHN DAVENPORT *v.* JONATHAN LYNCH, *et. al.*

A conspiracy to vex and harrass a person, by having him subjected to an inquisition of lunacy without any probable cause, is actionable.

Professional advice is only evidence to rebut the imputation of malice, and where that is expressly proved, it does not palliate at all.

THIS was an ACTION on the CASE, tried before MANLY, J., at the Spring Term, 1859, of Rutherford Superior Court.

The plaintiff declared:

1st. "The defendants maliciously sued out inquisitions of lunacy against the plaintiff."

2ndly. "For conspiring together, and suing out process to to have plaintiff declared a lunatic, with a view, and for the purpose of coercing him to make a different disposition of his property from that which he willed.

3rd. Or of acting on the public mind, and defeating the ultimate probate of his intended will.

The defendants were grand-children, and it appeared that they had conceived a strong dislike to William Davenport, who lived with the plaintiff, whose will was made the subject of comment in this suit.

William Davenport was a grand-son of the plaintiff, and and the defendants were also grand-children; and it appeared that the defendants were also hostile to their grand-father.

In 1852, the defendants took out writs of lunacy, and had their grand-father brought before the County Court of Rutherford.

Again, in 1857, they repeated the application, and had a second writ issued to bring him before the Court for inquisition, and it was made to appear that these applications were made with the view of harrassing the grand-father, the plaintiff, and of worrying him into a compliance with their views and purposes in relation to the disposition of his property.

Messrs. *Shipp* and *Logan*, attornies in the Court granting

these inquisitions, acted as counsel in behalf of the defendants, and were called by them as witnesses.

Mr. *Shipp* stated that he had advised the defendants against taking the step; he did not remember certainly, but supposed he might have encouraged the defendants to hope for success upon a hypothetical state of facts. What these facts were, or whether they were proved, the witness did not remember.

Mr. *Logan* stated, that he had advised the defendants they might succeed, upon a certain state of facts, but the facts as stated by them, were not stated on the hearing.

The plaintiff was proved to be a man of great old age, (being about ninety), but of remarkable clear mind and retentive memory, somewhat feeble from the natural imfirmaties of old age, but of perfect competency to transact business; he had employed his grand-son, William Davenport, as his general agent and active manager of business; it was proved that he had assisted actively, in preparing this cause for trial; the declarations of William Davenport as to the plaintiff's incapacity, were offered in evidence by the defendant, but rejected by the Court, and he excepted for that cause. Under instructions, not excepted to, it was left to the jury to say whether the plaintiff had been subjected to harrassing and expensive proceedings from a malicious design.

The defendants' counsel made a point, and contended below, that the proceedings instituted in relation to plaintiff's capacity, being merely *informations*, were not such as to subject them for a malicious prosecution: and, further, that consultations held with attornies, and the filing of petitions and preparation, made by them in the conduct of the cause rebutted the idea of malice, and the Judge was called on so to instruct the jury. But his Honor declined thus to charge, and told them "if there was a malicious combination between the defendants, to effect any of the objects mentioned in the plaintiff's declaration by instituting and prosecuting the suits in question, the defendants had subjected themselves to an action, and that the advice received from the attornies, did not justify them, if the jury believed they were actuated by express

malice." These instructions were excepted to by the defendants counsel.

Verdict for the plaintiff. Judgment and appeal.

Gaither, *Merriman*, *Shipp* and *Avery*, for the plaintiff.
Edney, for the defendants.

RUFFIN, J. Very clearly, the declarations of William Davenport, were not substantive evidence of the plaintiff's mental incapacity. They stood on the same ground with declarations made by any other person.

We think, upon the other parts of the case, that his Honor might well have left it to the jury to infer malice, and an evil motive throughout, from the want of probable cause—the utter groundlessness for the successive applications by the defendants for the proceedings in lunacy. But, we suppose, as the testimony is not given, that it was not necessary to submit the case in that point of view, to the jury; because the Court put the case on the ground of an express malicious and combined purpose in the defendants to pervert the proceedings in lunacy to effect the ends of unjustly harrassing the plaintiff, separating his grandson from him, and indirectly impeaching the validity of his will after death, instead of being *bona fide*, for the purpose of having due care taken of the person and property of one really incapable of managing his affairs. In such a case of real conspiracy to vex a person, who appears to be in no way a proper subject for such proceedings, the actors can in no degree be justified or excused by any professional advice; for such advice is only evidence to rebut the imputation of malice implied, and, therefore, does not palliate the wrong done upon an express and formal design to oppress, though done under color and pretense of such advice. It would be a reproach to the law, if such gross and repeated injuries, upon such unworthy motives, could not be redressed.

PER CURIAM, Judgment affirmed.

D. FRONEBARGER *v.* JAMES L. HENRY.

A bond made by one of the partners of a firm, for goods sold and delivered, may be evidence of the time for payment, or of the amount, (as any other statement of one of the partners would be,) but it certainly does not amount to plenary proof of the consideration so as, of itself, to entitle the plaintiff to recover for goods sold and delivered.

ACTION of DEBT, for goods sold and delivered to the defendant, and one Colton as partners, under the firm of Colton and Henry, and was tried before BAILEY, J., at the Special Term, July, 1859. Plea. *Nil debet.*

The plaintiff gave in evidence two notes, under seal, payable to the plaintiff, and executed in the name of the firm, by Colton, which had become due before the suit was brought. The defendant insisted, that the instruments being under seal, did not bind him, and were, therefore, not evidence of a sale and delivery of the goods. His Honor held that they were sufficient for that purpose, and there was a verdict and judgment for the plaintiff, and the defendant appealed.

Merriman, for the plaintiff.
N. W. Woodfin, for the defendant.

RUFFIN, J. It is settled that instruments, like these, do not merge the simple contract of the firm, in respect of the partner not executing them. Therefore, the defendant would be liable in *indebitatus* assumpsit, or debt for goods supplied to the firm, which formed the consideration of the two bonds given, if, in truth, they were given for that consideration. But it is not seen that the bonds can be evidence to that point, as against the firm or the defendant. The rule of the common law, that one partner cannot bind another by deed, by virtue of his authority as partner, merely, and that an instrument, like this, is the deed of the executing party alone, has been acted on so long and so frequently in this State, that it may be considered at rest here, and not open to qualification, notwith-

standing suggestions to the contrary, by respectable modern writers on mercantile instruments. If these had been promissory notes, they would have been within the scope of the partner's authority, and bound all the partners *prima facie*, *proprio vigore*, or as evidence of dealings of the firm on the common counts in assumpsit. But being under seal, they do not intrinsically bind the defendant, nor does the Court perceive on what ground they can constitute plenary evidence of a debt of the firm on any consideration. If there had been distinct substantive proof of a sale and delivery of goods to the firm, it may be, that those papers might be evidence of the amount of the bill, or the time of payment agreed for, or the like, as any other statement of one of the partners on those points. But they do not purport to express the consideration, on which they were given, and no rational inference can be deduced from the papers, by themselves, that they were given for goods sold, or for any other cause, in particular, affecting the firm. To allow them the operation claimed for them, would, in effect, make them conclusive on all the members of the firm, to the same extent, as if they had been bills or promissory notes, and, so, binding on all the partners, unless they showed they were given on a consideration that did not concern the firm. Whereas, it lies on the plaintiff, here, to show that the dealing was, in fact, with the firm, and these papers can, at most, be only evidence in aid of the points already mentioned. *Per se*, they certainly do not support the issue on the part of the plaintiff, and the judgment must be reversed, and a *venire de novo* awarded.

Per Curiam, Judgment reversed.

HENRY BARRETT *v.* JOSEPH ELLER.

An obligation to pay a sum of money, on a given day, "to be discharged in any good trade, to be delivered at any one of several places," imposes on the debtor the burden, if he would save the condition, of giving notice of the place where he will have the goods, and of having them there, on the day, duly set apart.

ASSUMPSIT, tried before BAILEY, J., at a Special Term, July, 1859, of Buncombe Superior Court.

The suit was brought on the following instrument: "By the 25th of December, 1858, I promise to pay Henry Barrett one hundred and fifty dollars, to be discharged in any good trade, to be delivered at any of my Flat Creek plantations, for value received, this 7th of August, 1855."

(Signed,) JOSEPH ELLER.

The pleas were non-assumpsit, set-off, and accord and satisfaction. On the trial, the defendant gave evidence that he had six plantations on Flat Creek, and that, at one of them, (on which he did not live, but which he was often at,) he had, on the 25th of December, 1858, corn and wheat, of greater value than $150, and, thereupon, he prayed the Court to instruct the jury, that, if they found he had thus the ability to deliver the corn and wheat, in discharge of the note, at the said plantation, the plaintiff could not recover, inasmuch as he had failed to show any demand, on the day, at any one of the defendant's plantations. The Court gave the instruction as prayed, and the jury found for the defendant, and from the judgment the plaintiff appealed.

Merriman, for the plaintiff.
N. W. Woodfin and *J. W. Woodfin*, for the defendant.

RUFFIN, J. If the facts would constitute a defense, it would be unavailing here, as there is no plea of readiness on the part of the defendant. But, in truth, if there had been that plea,

it would not have been a bar upon these facts. The instrument was treated at the trial, as if it were a contract to deliver specific articles of a certain value, at a particular day, at one of several places; and it was held, that having the articles at one of the places at the day, answered the plaintiff's demand, although the defendant gave him no notice of the kind of articles, or at which plantation they were, nor even set them apart for him. It is not necessary to pass on the correctness of the proposition, because the Court considers that the nature of the contract was entirely misapprehended. It is not a contract to deliver specific articles of any kind. On the contrary, the defendant's engagement is to pay the sum of one hundred and fifty dollars on a certain day, with a proviso that the debt, instead of being paid in money, might be discharged in any good trade, delivered at any one of several certain places. It is in the nature, therefore, of an obligation with a condition, and the burden is, consequently, thrown on the defendant of being the actor, so as to save him the benefit of the condition. The plaintiff has the defendant bound to pay the money, unless he shall make the payment in "trade" as specified, or offer to do it. It laid on the defendant, therefore, to give notice of the place, where he would have the goods, and to have them there, duly set apart for the plaintiff. Then the plaintiff could have taken them at any time, and they would have been at his risk; while, on the principle, ruled at the trial, the defendant keeps both his money and "trade" and the whole debt is lost to the plaintiff; a position too unjust to be law.

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

T. C. WINGATE *v.* E. SLUDER.

The Legislature can confer upon the commissioners of an incorporated town, authority to levy a tax upon the property of its citizens for the purpose of raising revenue, and make that authority over each subject of taxation unlimited.

The authority vested in the commissioners of the town of Asheville, is not taken away, nor abridged by the 111th chap. of the Revised Code.

ACTION of TRESPASS, tried before BAILEY, J., at the Special Term, July, 1859, of Buncombe Superior Court.

Bill of exceptions agreed on by counsel.

The plaintiff was the owner of a grocery in the town of Asheville, which said town was incorporated by an act of the General Assembly, passed in the year 1848, which was amended by another act passed at the session of 1850, both of which are sufficiently noticed and set out in the opinion of this Court. By virtue of the authority of these two acts, and to raise a revenue for the said town, the commissioners imposed a tax of fifty dollars on the plaintiff's grocery, which demand was placed in the hands of the defendant, who was the collecting officer for the said town. The plaintiff paid twenty-five dollars of the tax laid, but refused to pay any more, and the goods, levied on, were duly exposed to sale, to make the remainder of the tax. For this, the action was brought.

It was insisted by the plaintiff's counsel, that the commissioners had no right, or authority, to tax his grocery more than $25, his Honor was of a contrary opinion, and upon instructions to that effect, a verdict was found for the defendant, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.

Merriman, for the defendant.

BATTLE, J. By the second section of the act of 1850, chap. 321, entitled "An act to amend an act passed at the session of 1848, entitled an act to incorporate the town of Asheville,"

it is declared that it shall be competent for the commissioners of the said town, to increase the tax upon any of the subjects of taxation in the said act named, and to add to them any other property, or thing, that they may deem proper, in order to raise sufficient revenue for the purposes of the said town." Among the subjects of taxation, specified in the above recited act of 1848, ch. 236, sec. 4, are groceries, upon which, therefore, the commissioners of Asheville, are expressly authorised to increase the tax to any extent they may think necessary for raising sufficient revenue for the purposes of the town. If, then, the Legislature had power to confer upon the commissioners of the town the authority to levy a tax upon the property of its citizens at all, it was conferred upon them in the present case, and of the amount to be raised from each subject of taxation, they were the sole judges. That the Legislature can confer such authority upon the commissioners of a town, has long been conceded by universal acquiescence in its practical exercise. See *Taylor* v. *Commissioners of Newbern*, 2 Jones' Eq. 141.

The authority thus conferred by the act of 1850, is not taken away or abridged by the 111th chapter of the Revised Code, as the provisions of that chapter are, by the 23rd section, applied only to such incorporated towns, " when the same shall not be inconsisent with the provisions of special acts of incorporation, or special laws in respect thereto." The judgment for the defendant, upon the case agreed, was proper, and must be affirmed.

PER CURIAM, Judgment affirmed.

J. F. E. HARDY *v.* WILLIAM F. McKESSON.

Where the vendor and purchaser of a tract of land, entered into a covenant that the latter should pay a sum certain at a given day, and the seller make title *whenever* the money was paid, it was *Held* that the seller, in order to entitle himself to recover the purchase money, was bound to aver his *readiness* and *ability* to make title on the day set for payment of the money.

ACTION of DEBT, tried before BAILEY, J., at the Fall Term, 1858, of Buncombe Superior Court.

Plea, that the covenant declared on, contained mutual and dependent stipulations between the plaintiff and defendant, and the same had not been performed on the part of the plaintiff.

The following is the covenant declared on:

"This agreement, made and contracted this 16th day of September, A. D., 1857, between J. F. E. Hardy, of the county of Buncombe, and State of North Carolina, and W. F. McKesson, of the county of Burke, and State aforesaid:

WITNESSETH, that the said J. F. E. Hardy has sold to the said William F. McKesson, a tract of land in the county of Buncombe, on the north bank of Swannannoa river, including the house and improvements where the said J. F. E. Hardy now lives, and all the land adjoining thereto, owned by the said J. F. E. Hardy, supposed to contain between four and five hundred acres, for the sum of thirteen thousand dollars. And the said W. F. McKesson hereby binds himself, his heirs, executors and administrators, to pay to the said J. F. E. Hardy, his heirs, executors or administrators, on or before the first day of May, next, the said sum of thirteen thousand dollars. And the said J. F. E. Hardy hereby binds himself, his heirs, executors, and administrators, to make to the said W. F. McKesson, whenever the said sum of thirteen thousand dollars is paid, a good and sufficient title in fee simple, with general warranty, in which the metes and bounds of the said land shall be fully set out."

There was no controversy as to the execution of the bond, and by consent there was a verdict for the plaintiff, subject to

the opinion of the Court on the question of law made by the special plea; with leave to set aside the verdict, and enter a nonsuit, in case his Honor should be of opinion against the plaintiff. But the Court being of opinion with the plaintiff, upon the point reserved, gave judgment according to the verdict, from which the defendant appealed.

Merriman, for the plaintiff. If the covenants are mutual and dependent, the plaintiff cannot recover in this suit. But the covenants are not dependent. The payment of the purchase money is a condition precedent to the execution of the deed of conveyance which the plaintiff stipulates to make, *whenever* the purchase money should be paid. It becomes necessary, therefore, to construe the covenant set out in the pleadings, and the plaintiff insisted that the rule of construction which governs the case, is settled upon principle and precedent. The rule is, that if a day be appointed for the payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not not doing such other act before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent. See Rob. Prac. 60—61; Leigh's *Nisi Prius* 688, and authorities there cited. Apply this rule to our case: Here the defendant stipulates to pay on the 1st of May, 1858, *at all events*, and the fixing of the day, is a key to the intention of both plaintiff and defendant. The case of *Pordage* v. *Cole*, 1 Taun. 320, is in point. There the defendant purchased the lands, &c., of plaintiff, paid five pounds as an earnest at the time of the agreement, and stipulated to pay the purchase money *before midsummer*, 1668. It was held that the payment of the money was a condition precedent, and that the plaintiff might maintain a suit for the purchase money without making or tendering a deed of conveyance. To this effect, is the case of *Northrop* v. *Northrop*, 6 Con. 296; *Robb* v. *Montgomery*, 20 Johns. 15; *Wea-*

ver v. *Childress*, 3 Stew. 361; *Morris* v. *Sleiter*, 1 Denio. 59.

The intention of the parties, to be arrived at from the motive of the transaction, and to be gathered from the instrument itself, also, establishes the position of the plaintiff in this case. It is to be *presumed* that the defendant is in the possession of the land. *Weaver* v. *Childress*, 3 Stew. 361, and taking this in connection with the common practice of the great majority of persons in this State, which is to pay the purchase money before the execution of any deed of conveyance, it would seem that there can be no doubt as to the proper construction to give the instrument in question. The defendant says, that the word "*whenever*," means *eo instanti*.—It does not mean *at the very time*. The word is a compound word, and *ever* is a mere expletive, or is added to make the word *when* emphatic. Webster in defining the word *when*, gives its various meanings, and the fourth difinition he gives, is, "*after the time that*." As, "when the act is passed, the people will be satisfied," meaning, after the act is passed.—This, in view of the whole case, is the sense in which the word is used in the instrument. Both plaintiff and defendant signed the covenant, and the defendant has his remedy, and it is apparent that he intends to rely upon it.

J. W. Woodfin, for the defendant.

PEARSON, C. J. This case presents the question: can the plaintiff recover without averring a readiness on his part, to execute title? This depends upon the construction of the covenant; in regard to which, we entertain an opinion differing from that of his Honor. Where the covenants are dependent, and the acts are to be done *concurrently*, readiness on the part of the plaintiff must be averred in the declaration. If the covenants are independent, such averment need not be made. This rule of law is admitted, and the only difficulty grows out of its application.

In our case, the covenant bound the defendant to pay the sum of $13,000, on or before the first day of May, 1858,

and the plaintiff to make a good title "whenever" the money is paid. Now, it seems to us, that, according to the proper construction of this instrument, the defendant had a right to expect that "whenever," that is, "at any time when" he paid the money, the plaintiff, as a concurrent act, would execute title. Such is the literal meaning of the word "whenever," and the legal effect of the instrument is this: McKesson is not obliged to pay the money before the first day of May, although he may do so sooner, if he chooses, and call for a title. Hardy cannot require payment until that day; but on, or after, that time, it may be enforced, provided he executes a good title, or is ready and able to do so, "whenever" the money is paid; and the reason for fixing a day, in respect to the time of payment, was, to give McKesson an opportunity to raise the funds, it being assumed that Hardy would be ready and willing *at all times* to execute title whenever payment was made.

This construction made, according to the literal meaning of the terms used, is confirmed by a consideration of the nature of the transaction:—

The purpose for which Hardy retained the title was, simply, to secure the payment of the purchase-money. When that was done, there was no longer any reason for holding it, and the intention was that it should be passed, upon, and as, a concurrent act with the payment of the money. It would have been unreasonable to require McKesson to pay $13,000 without getting a title, and a construction which assumes that he intended to bind himself to do so, and rely upon an action against Hardy to recover damages for a breach of covenant, departs from the ordinary course of things, and shocks our common sense! Had this been the intention, McKesson would have executed a plain note of hand for the money, and taken a penal bond for the title.

It is, as a general rule, most consistent with justice, that the acts should be performed concurrently, so as to dispose of the whole matter at the same time. Hence, Courts of Law incline to the construction by which covenants are made de-

pendent, unless a contrary intention is expressed, as when the price is to be paid at a specified time, and the title is to be made at another; see *Clayton* v. *Blake*, 4 Ired. Rep. 497, where the subject is discussed; and a Court of Equity will never decree a specific performance by the payment of the purchase money, without requiring the execution of a good title as a concurring act. Judgment reversed, and judgment of nonsuit.

PER CURIAM, Judgment reversed.

JOHN W. WOODFIN *v.* THE ASHEVILLE MUTUAL INSURANCE COMPANY.

Where, by a policy of insurance, the life of a slave was insured for five years *absolutely*, without requiring the payment of the annual instalment, as a condition of the defendant's liability, it was *Held* that the insurance money, for a loss, was not forfeited by a failure to pay such instalment.

Where a party became a member of a mutual insurance company by taking out a policy, it was *Held* that he thereby assented to, and became bound by, the by-laws then in force, and one of these requiring that a particular account, on oath, of the circumstances of a loss should be given forthwith to the company, it was *Held* that no action could be sustained for such loss, without furnishing such account within a reasonable time—although this provision was not embodied in the policy.

ACTION of ASSUMPSIT, tried before BAILEY, J., at the Special Term, July, 1859, of Buncombe Superior Court.

The plaintiff declared upon a policy of insurance upon the life of a slave, named ——, which it was proved was dead. The main point of controversy below was, whether, as the plaintiff did not pay his annual instalment, as required by the charter and by-laws of the company, he had forfeited his right to recover the insurance money. The plaintiff, in reply, insisted that he had no notice that the instalment was due, or about to fall due. It was proved that it was the custom of the company to notify persons by a written notice, dropped

into the post office, shortly before an instalment became due, and it was proved by their secretary that he did, in fact, notify the plaintiff in that way, but whether he ever received the notice he could not say. The insurance was for five years, and the requirement as to the payment of instalments, is not inserted as a condition, on which the insurance is to continue.

In the 18th section of the by-laws of the company, (which were in force when the plaintiff took out his policy, and thus became a member,) is the following provision: "All persons insured by this company, having sustained losses by death or fire, shall forthwith give notice to the secretary of the company of such loss, and upon oath or affirmation, shall deliver a particular account of the circumstances therewith connected, together with proper vouchers of the amount of loss or damage sustained." It was admitted by the plaintiff, that he had not given a formal notice, nor stated the circumstances, on oath, connected with the loss, but it is admitted on the other side, that he gave the company informal notice as soon as the loss occurred. One question arising on this state of facts was, whether, without such notice, the suit could be sustained at all. These questions were submitted in the form of a case agreed upon, which his Honor decided against the plaintiff, from which he appealed.

N. W. Woodfin, for the plaintiff.
Merriman, for the defendant.

PEARSON, C. J. Upon the point, that the policy was forfeited by reason of a failure, on the part of the plaintiff, to pay the annual instalment, this Court is of opinion with the plaintiff, irrespective of the question of notice. The policy contains no condition, by which it is to be void, if such payment is not made, but insures the life of the slave for five years, *absolutely*, in this respect—leaving the annual payment of $12,24 to be enforced, not as a condition, but as a part of the consideration.

Upon the other point, i. e., the effect of the failure on the

part of the plaintiff, to give notice to the secretary of the company of the death of the slave, accompanied by "a particular account of the circumstances therewith connected, upon oath or affirmation," as required by the 18th section of the by-laws, this Court is of opinion against the plaintiff. It is true, the policy contains no such condition, but as this is a *mutual* insurance company, the plaintiff, as one of its members, accepted the policy, subject to the provisions expressed in the by-laws, and, in order to maintain an action, it was incumbent on him "forthwith," that is, in a reasonable time, to give the notice, and deliver a particular account, on oath, of the circumstances, as required.

This requisition is not a mere formal matter to enable the company to pay the amount of the insurance without suit, and thereby save cost, but is a matter of substance, in order that the company may, as soon after the loss as practicable, institute all proper enquiries as to the circumstances, so as to guard against fraud by false swearing and other means of imposition. It follows that this requirement must be strictly performed, and that an informal notice, without a statement on oath, will not answer the purpose, or entitle the party to maintain an action.

PER CURIAM, Judgment affirmed.

Den on the demise of NEHEMIAH BLACKSTOCK *v.* JEREMIAH COLE, *et. al.*

The fact that one enters into possession of a tract of land immediately after another leaves it, claiming a part thereof under a deed from that person, is *no evidence* that he holds another tract, not included in the deed, under the same person.

EJECTMENT, tried before BAILEY, J., at a Special Term, (July, 1859,) of Buncombe Superior Court.

The lessor of the plaintiff showed title to the land in controversy, by regular mesne conveyances from John Gray Blount, to whom it was granted by the State in the year 1796. The defendant offered in evidence, a grant for a part of the land conveyed to Blount, to one Jesse M. Roberts, dated in 1824, which embraced the land in question; also, a deed from Roberts to Wiley Hill, dated in 1829, which included all the lines of the said grant, except one, and in consequence of the omission of that one, the land in controversy was not conveyed from Roberts to Hill, but another portion was conveyed. The said Jesse M. Roberts, in 1831, took out a grant for another part of the land included in the Blount patent, which he conveyed to Wiley Hill by deed, dated in 1833. The defendant claimed title under Wiley Hill, and introduced evidence tending to show that Roberts, Hill, and himself, had been, together, in the adverse possession for more than twenty years.

It was in evidence that Roberts continued the possession of the land till 1829, and that Wiley Hill took possession immediately after Roberts left in that year.

It was contended for the plaintiff, that Wiley Hill, under whom the defendant claims, did not have color of title as to land not included in his deed, and that there was no evidence that he claimed under Roberts, who had a grant for it, and that without evidence to show that he held under Roberts, the right of the plaintiff's lessor was not tolled, and his Honor was called on so to instruct the jury, but he declined doing so, and left it to them to say how the fact was. Plaintiff's counsel excepted.

The defendant introduced one Moses Roberts, who swore, that finding the land in controversy vacant, he leased the same from the lessor of the plaintiff for two years, and took possession under his lease, that Mr. Cole, one of the persons under whom the defendant claimed, came to him and asked him why he had taken possession, stating that he, Cole, held under Hill, and that he would writ him if he did not leave. The witness replied that he held under a lease from Blackstock, and that he had made improvements. Cole agreed

if witness would leave, he would pay him for his improvements, and would *lift* his lease from Blackstock. There was evidence that Cole afterwards said he had bought Roberts' lease. It was contended that Cole, and all claiming under him, including the defendant, were estopped to deny plaintiff's title. His Honor Honor left it to the jury to say whether Cole went in as a purchaser of Moses Roberts' lease, or whether he simply meant that he would indemnify him against harm if he would leave the premises. Plaintiff again excepted.

There was a verdict for the defendant. Judgment and appeal.

N. W. Woodfin and *Merriman*, for the plrintiff.
J. W. Woodfin, for the defendant.

PEARSON, C. J. The lessor of the plaintiff having acquired the title from Blount, the first grantee, the plaintiff is entitled to recover, unless the right of entry was tolled by adverse possession.

The grant to Roberts embraces the land in controversy, but his deed to Hill does not, by reason of the omission of one line; so, Hill did not have color of title; and, in order to toll the entry, it was necessary to prove an uninterrupted adverse possession for twenty years, and to do so, it was necessary to connect the possession of Hill with that of Roberts. This could only be done by proving that Hill claimed under Roberts, and derived the possession from him. The question is: was there any evidence of that fact? We think there was not, and his Honor erred in allowing the jury to find it without evidence. As the deed from Roberts to Hill did not cover the land in controversy, it could not have the effect of connecting the possession in respect to that part of the tract. So, the only matter that can be suggested, as making a connection, is the circumstance that he took a deed from Roberts for the other part of the tract, and went into possession of the part in controversy "immediately after Roberts left." But, *non constat*, that he did so, claiming under him. On the contrary, as the deed

did not cover it, the inference would seem to be that he did so *independently*, and on his own account, so as to hold adversely against Roberts, as well as all other persons. For this error, the judgment will be reversed, and a *venire de novo* awarded.

It is unnecessary to enter into the question made, as to the estoppel. Indeed, it is cut off by the verdict, provided his Honor submitted the matter to the jury upon all of the evidence, and did not restrict the enquiry to the testimony of the witness, Roberts.

PER CURIAM, Judgment reversed.

SAMUEL S. SMITH *v.* THOMAS S. DEAVER.

Where it was proved that a forgery had been committed in a note, and that at the same time, and in the same ink, and by the same hand, an interlineation had been made in a warrant, and it was proved and admitted on a trial against B for forgery, that either A or B had committed the forgery, it was *Held* that the oath of B, denying that the interlineation made in the warrant, was in his hand writing, was material to the issue, and that if he swore falsely in that respect, it was perjury.

ACTION on the CASE, for a malicious prosecution, tried before MANLY, J., at the Spring Term, 1859, of Madison Superior Court.

The declaration was for maliciously suing out a warrant to arrest the plaintiff for perjury, alleged to have been committed on the trial of H. B. Deaver, on a charge for forgery.

The forgery consisted in changing the date of a promisory note from 1838 to 1839, intending thereby to avoid the effect of a receipt which the maker held against it.

The warrant which had been issued on this note, was interlined with the words, "*to the use of Samuel Smith*," and there was proof on the trial for forgery, reproduced on this *trial*, tending to show that the interlineation in the *war-*

rant, and the forged part of the *note*, were done by the same hand, and by the same shade of ink. Smith, the plaintiff, swore on the trial for forgery, that the interlineation *was not in his hand writing.* Proof was introduced to show that it was in his hand writing. It was also alleged, and there was proof to that point, that the interlineation and forgery were done by the defendant, H. B. Deaver, and it was admitted on the trial and argument of the cause, that one or the other of the parties, (Smith or H. B. Deaver,) had committed the crime.

The introduction of proof as to the oath taken and its falsity, was objected to on the ground that the false statement was not pertinent or material to the issue on the trial for forgery, but the evidence was admitted, and the plaintiff's counsel excepted. Other proofs were introduced to show that one or the other of these parties had committed the forgery, or that they had done it jointly, and that the plaintiff had sworn falsely in the particular stated.

The plaintiff's counsel contended that the oath taken was true. 2. If untrue, Deaver was guilty of forgery, and the oath was immaterial, and in either case, the defendant had not probable cause.

The Court instructed the jury, that if Smith the plaintiff, committed the forgery, and on the trial of Deaver for the offence, swore that the interlineation was not done by him (Smith,) intending thereby to weaken the force of the proofs against himself as the perpetrator of the crime, and the oath thus taken, should be found by the jury to be false and corrupt, it would be material, and would amount to the crime of perjury; and, in that case, the plaintiff could not recover in the action for malicious prosecution. Defendant excepted.

The Court was of opinion, that if Deaver committed the offence, or if he committed it jointly with Smith, Smith's oath was not material to the *issue*, and, in either case, there would be a want of *probable cause*, and the plaintiff might recover.

The jury found a verdict for the defendant. Judgment and appeal by the plaintiff.

Edney, for the plaintiff.
Gaither, for the defendant.

BATTLE, J. When this case was before the Court at August Term, 1857, it was stated, that on the trial of the defendant, H. B. Deaver, for forgery, in altering a certain *note*, the plaintiff, who was a witness, was asked whether he had not made an alteration in a *warrant* which had been issued on the note, to which he replied that he had not done so. For this, the defendants had taken out a warrant against him for perjury, which, upon being returned before a justice, was dismissed, and he thereupon sued him for a malicious prosecution. This Court held upon that simple statement, that the answer to the question put to the plaintiff, as a witness, on the trial of H. B. Deaver, was immaterial to the issue, and if his answer to it was false, it could not be perjury in law, and the defendant might be guilty of a malicious prosecution, by taking out a warrant against him for it.

The bill of exceptions in the present case, presents the facts in a very different light. It is stated that it was admitted that either H. B. Deaver or the plaintiff was guilty of the forgery in the alteration of the *note:* that, testimony was given tending to prove that the alteration, both in the *note* and the *warrant*, was in the same hand-writing, and in the same shade of ink. On the trial for the malicious prosecution, it was material for the defendant to show, if he could, that the plaintiff made the alteration in the warrant, because, if the jury should believe that the alteration in the *warrant* and *note* were in the same hand writing, it would show that he and not H. B. Deaver, had been guilty of forging the note. The testimony was, therefore, material and competent, and, if the plaintiff's answer to the question were false, and he did make the alteration in the *warrant*, it followed that he was guilty of the perjury charged against him, and of course the defendant could not be guilty of the charge of prosecuting him for it, without a probable cause.

The instructions given by his Honor to the jury, were as fa-

vorable to the plaintiff as he had any right to require, and we do not discover any error in them, and as there was none in the reception of the testimony offered, to show that the plaintiff's answer to the question put to him, on the trial of H. B. Deaver, for forgery, was false, the judgment against him must be affirmed.

PER CURIAM, Judgment affirmed.

R. L. WILSON *v.* FRANCIS OSWALT.

A constable, who sold goods under execution, and cried them off to one, to whom he gave time for payment, but retained possession of them, cannot recover on a count for goods sold and delivered.

In an action, by a constable, against one for failing to comply with the terms of an execution-sale, by paying for the goods bid off, where some of the executions were valid and others not so, but goods enough had been sold to satisfy all of them, it was *Held* to be error to instruct the jury, that if any one of the executions were good, it would sustain the sale of all the goods.

THIS was an action of ASSUMPSIT, tried before PERSON, J., at Fall Term, 1857, of Iredell Superior Court.

The declaration contained two counts:

1st. For the price of the goods sold and delivered to the defendant by the plaintiff.

2nd. On a special promise to pay for the goods sold.

In support of the first count, the plaintiff proved by one *Wasson*, that the goods were sold as the property of Andrew Kerr, at public auction, and that the defendant bid them off, and that they were delivered to him.

In support of the second count, the plaintiff proved by Wasson, that he was a constable, and sold the goods at public auction, and that the defendant became the purchaser at the sum of $——, and they were delivered, but that the defendant, not having the money, promised to pay the plaintiff the amount

of his bids on a certain day thereafter, and that on the day agreed on, he did not pay.

G. W. Kerr, a witness for the plaintiff, on his cross-examination, stated that the property had never been in the possession of the defendant.

The plaintiff introduced several judgments and executions against G. W. Kerr, Andrew Kerr and others, with the levies of the property sold, endorsed thereon by the plaintiff, as constable, as the property of Andrew Kerr, under which the sale was made.

The defendant's counsel asked his Honor to charge the jury, that there was no evidence of a levy. This was refused, and the defendant excepted.

It appeared that some of the judgments, and the executions on them, were irregular, but property enough, consisting of many articles, was sold to satisfy all of them. His Honor charged the jury that, in this case, if any one of the executions was regular and good, it was sufficient. The defendant's counsel again excepted.

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

Jones, for the plaintiff.

No counsel appeal for the defendant in this Court.

BATTLE, J. It is manifest from the facts, stated in the bill of exceptions, that the plaintiff cannot sustain his count for goods sold and delivered. He was a constable, and purported to sell as such. One of his witnesses testified, that the goods were sold and delivered, and another stated that, though sold, they were never in the defendant's possession, and yet, no instruction seems to have been asked or given to the jury, as to which of these, apparently, contradictory statements, made by the plaintiff's own witnesses, was to be taken as true. The discrepancy can only be reconciled by reference to another part of the testimony of the first witness. The goods were sold for cash, and the defendant was not prepared to pay

the sum which he bid, but agreed to do so on a subsequent day; and it is fairly to be inferred, that the plaintiff refused to permit him to take the goods away until he should have paid for them, which he never did.

The action then, must be maintained, if it can be maintained at all, upon the second count, which is for goods sold to defendant, and for a violation of his contract in not taking and paying for them. There was plenary proof of a levy, as it appeared that the plaintiff was an officer, with executions in his hands, upon which he had endorsed, levies upon goods of one of the defendants in the execution, and had the goods in his possession. What better evidence of a levy he could have given, we are at a loss to conceive.

The plaintiff, then, had clearly an authority to sell the goods, unless the judgments and executions, under which he had seized them, were absolutely void. It is assumed in the bill of exceptions, that some of them were so, but his Honor held that if a single execution were valid, it would sustain the sale of all the goods. In that we think he erred. He was no doubt misled by not adverting to the distinction between the case of an arrest, in which an officer would be justified, if he had but one good writ in his hands, even though he had acted under a void process, or where he had sold a single article cle under several executions, when some of them were void, and the case, like the present, where he sold several articles. In the latter case, he would have no authority to sell more of the goods than would be sufficient to satisfy the valid executions in his hands; for as soon as he had raised an amount sufficient for that purpose, his power would be at an end. The precise amount of the sales, in the case before us, is not stated in the bill of exceptions, but the objection assumes that it was more than was necessary to pay off the valid executions in the hands of the plaintiff, and his Honor's instruction is predicated upon that assumpsion. For their error, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

JAMES CALLOWAY, *Adm'r.*, *v.* NANCY BRYAN.

The statute expressly makes it a felony for the offending party to marry after a divorce, "his or her former wife or husband being alive," and such marriage is null and void.

It was *Held*, therefore, that the administrator of a husband, who had married a woman so offending, could not recover of her, property, given to her during the existence of such unlawful marriage.

ACTION of REPLEVIN for a slave, tried before MANLY, J., at the Fall Term, 1858, of Wilkes Superior Court.

The following facts were agreed on, and submitted for the decision of the Court.

In 1831, the defendant intermarried with one Chapman Duncan, and lived and cohabited with him until 1835, when a petition was filed by him against her, and a divorce *a vinculo matrimonii* obtained, and the marriage declared null and void, she being the offending party. In 1842, the said Chapman being, then, and still living, the rites of matrimony were solemnised between the defendant and the plaintiff's intestate, John J. Bryan, and they continued to live together as man and wife, and were regarded as such by the community in which they lived, and particularly by Delphia Bryan, the mother of the plaintiff's intestate, until his death in January, 1857. J. J. Bryan and the defendant lived near Mrs. Delphia Bryan, and they cultivated her land and superintended her business. On the 20th of January, 1854, Mrs. Delphia Bryan made the following deed of gift: "I, Delphia Bryan, of the county of Wilkes, and State of North Carolina, for and in consideration of the love and respect I have for my daughter-in-law, Nancy Bryan, and for services rendered me and my family, have this day given to the said Nancy and her bodily heir, or heirs, a certain negro boy, named York, aged about three years; the said boy to descend to her heirs after the death of said Nancy and my son, John J. Bryan. And I hereby constitute and appoint my son, Larkin Bryan, the

trustee, to see this deed of gift carried into effect. This 20th of June, 1854."

Signed, DELPHIA BRYAN, [*seal.*]

Test,

B. P. MARTIN."

And the same was duly proved and registered. J. J. Bryan and Nancy Bryan took possession of York, and held him under the above deed, until the death of the former.

The plaintiff, James Calloway, became the administrator of John J. Bryan, at February County Court of Wilkes, and shortly thereafter demanded the possession of the said slave from the defendant, and upon refusal, brought this suit. The question was submitted with an agreement, that in case the Court should be of opinion with her, a judgment should be rendered for a certain amount of damages in favor of the defendant, (the slave having been taken out of her possession and delivered to the plaintiff,) but to be discharged by the delivery of the slave to her; or in case the opinion of the Court should be in favor of the plaintiff, then a judgment should be rendered against the defendant for a penny and the costs.

His Honor gave judgment for the defendant, from which the plaintiff appealed.

Mitchell, for the plaintiff.

Boyden and *Barber*, for the defendant.

RUFFIN, J. The point presented in this case is precisely the first that was ruled in *Williams* v. *Oates*, 5 Ire. Rep. 535. It was discussed very fully for plaintiff, and the Court has, therefore, carefully reconsidered it; but without any change of opinion. The statute expressly makes it a felony for the offending party to marry after a divorce, and a felony constituted by a second marriage, "his or her former wife or husband being alive." So that, the inference is irresistible, that the first marriage is continued, after a divorce, as an impediment to another marriage by that party. In other words, the decree for the divorce does not, and cannot, confer a ca-

pacity on the party, in fault, to contract a second marriage. The policy of the provision is obvious, being to shut out all temptation to a married person, who is not satisfied with an existing marriage, and wishes to form another, to offend, so as to bring about a divorce on that account, and thus put it in his or her power to effect the purpose, he or she had in view. It may work a hardship in a particular case, and even expose such a party to the danger of committing adultery; but that particular evil is of no signification, when compared with the general mischief of allowing all persons, by acts of impurity of their own, to free themselves from the ties of marriage, and acquire the capacity of forming a connection more agreeable. Such a license would sap the foundations of the most important domestic relation, on which the harmony, respectability and welfare of families, and the public virtue mainly depend. The Court, therefore, unanimously affirms the reasoning and resolution of *Williams* v. *Oates*, and holds that this marriage was void, and that no civil rights accrued to either party under it.

A distinction was taken between that case and this, that there, the woman, whose second marriage was illegal, claimed to affirm it, and gain rights of property under it; whereas, here, the wife is the one to disaffirm her second marriage. But the distinction makes no difference, because that which is void in law, concludes no one. Accordingly, it was held in *Irby* v. *Wilson*, 1 Dev. and Bat. Eq. 568, upon a bill by the husband's next of kin against his administrator, and supposed widow, that the defendants might set up the nullity of the marriage as a bar to any share of property, alleged to have belonged to the wife at the marriage, and to have vested in the husband, upon his marriage with a woman, whose first husband was still living. And in *Gathings* v. *Williams*, 5 Ire. Rep. 489, the general doctrine is laid down, that a marriage, during the subsistence of a prior marriage, is absolutely void, and that no civil rights of any kind arise out it.

PER CURIAM, Judgment affirmed.

State on the relation of JOHN F. GRIER *v.* M. F. HILL, *et. al.*

Where a constable's official bond was signed by four persons as obligors, but a blank for the constable's name, in the condition, was left unfilled, so that it did not appear from the bond who was the constable, it was *Held* that such omission rendered the condition insensible and void, and the bond absolute, so that no one, as relator, could declare on it.

Held further, that such omission was not cured by the 9th section of the 78th chapter of the Revised Code.

THIS was an ACTION of DEBT, tried before his Honor, Judge HEATH, at a Special Term, (June, 1859,) of Ashe Superior Court.

The action was brought for the breach of a bond given by the defendants to the State of North Carolina, in the following words, to wit:

"State of North Carolina, Ashe County.

"Know all men by these presents, that we, Martin Hill, Osborne Edwards, Joseph Richardson, and J. H. Doughton, are held and firmly bound unto the State of North Carolina, in the sum of four thousand dollars, current money, for the which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this the 28th day of February, 1854. The condition of the above obligation is such, that whereas the above bounden, , is the day of the date hereof elected to act as constable, for the county aforesaid. Now, if the said , well and truly execute and faithfully discharge his duty in said office, according to law, and diligently endeavor to collect all claims which may be put into his hands for collection, and faithfully pay over all sums recovered thereon, either with, or without suit, to the persons to whom the same may be due, then the above obligation to be void, otherwise, to remain in full force and effect."

Signed by the above named obligors.

The breach of the bond declared on by the plaintiff, was a failure by the defendant, Hill, as constable, to collect a debt

placed in his hands for collection, by the relator in May, 1854. It was admitted that the defendant Hill was duly elected and admitted into office, as a constable for the year, 1854, and it was admitted that he received and failed to collect the debt in question, which was collectable. But it was contended on behalf of the defendants that they were not bound by said bond for his faithful discharge of his duty in said office, and this was the only point made in the case. The plaintiff, tiff, in order to cure the alleged defect in the condition of the bond arising from the omission of the name of the constable, offered in evidence the record of the County Court, at February Term, 1854, upon which it was entered, that "Martin H. Hill, having been elected as constable for Elk Creek District, entered into bond as such, in the sum of four thousand dollars, with S. O. Edwards, Joseph Richardson, and J. H. Doughton, as his sureties." The reading of said record for the purpose above stated, was objected to by the defendant, but was permitted by the Court.

It was then agreed that a verdict might be entered for the plaintiff, subject to the opinion of the Court, whether upon the whole case the plaintiff was entitled to recover; with permission, if the Court should be of opinion against the plaintiff, to set aside the verdict and enter a nonsuit; otherwise, judgment to be entered upon the verdict.

And the Court, upon consideration, being of opinion in favor of the plaintiff, refused to set aside the verdict and enter a nonsuit, but ordered a judgment to be entered on the verdict, and the defendants appealed.

Neal, for plaintiff.
Lenoir and *Crumpler*, for defendants.

BATTLE, J. The condition of the bond upon which the suit is brought, at the instance of the relator, is so uncertain, that it cannot, by any reasonable intendment, be made sensible and valid. There are four obligors in the bond, and it does not appear from the condition, which of them had been elected consta-

ble, for the faithful discharge of whose office the bond was given. That is an omission which no construction can supply, which makes a difference between the present, and the case of *Foster* v. *Frost*, 4 Dev, Rep. 424, upon which the plaintiff's counsel relies. In that case, by the rejection of some figures as surplusage, the condition was made sensible. Here, there is nothing to be rejected, and there is *nothing* in the instrument, itself, to show us what is to be supplied. In that respect, it is like a blank left for the name of a devisee or legatee, which cannot be supplied by construction. The similarity extends further; for the names cannot be supplied by any extraneous proof. Neither a will, nor a deed, will admit of parol, or other proof, *dehors*, the instrument, to supply so material a part as the name of a devisee or legatee in a will, or a party to a deed. The condition of the obligation being insensible, it is void, and the consequence is, that the bond is an absolute one, payable to the State without any condition. Whether the Attorney General could sue on it in behalf of the State, and recover the whole amount, it is unnecessary for us to decide. It is certain, that, treated as an absolute bond to the State, no private individual can sue on it, as a relator, for as such, it does not appear that he has any interest in it.

But it is said that the defect in the condition is remedied by the 9th section of the 78th chapter of the Revised Code. By reference to that section it will be seen that was intended to cure all irregularities in the taking of any official bond, and in the conferring of the office, and also, to provide that "any variance in the penalty or condition of the instrument from the provisions prescribed by law," shall not invalidate the bond or condition. It is manifest, at a glance, that the defect in the instrument now before us, is not that the bond was improperly taken, or the office irregularly conferred, nor that there is any variance, either in its penalty or condition, from the provisions prescribed by law, but is a fatal omission of the name of the person who had been elected constable, whereby the whole condition is rendered senseless, and, therefore, necessarily void. It cannot be helped by any intendment, or

construction, because there is nothing in any part of the instrument to show us what ought to be intended, and there is nothing upon which any construction can operate.

The judgment must be reversed, and a judgment of nonsuit entered.

PER CURIAM, Judgment reversed.

C. E. SEHORN *v.* HENRY WILLIAMS.

The statute allowing the clerk to pass upon depositions, only applies to the depositions of competent witnesses; where, therefore, he passed upon and allowed one to be read which was taken out of the county, under a commission without a seal, it was *Held* that such action of his, might well be disregarded by the Court trying the cause.

A challenge to the juror, *propter affectum*, involves a question of law, as well as of fact; and though by consent, the Judge be allowed to take the place of "triers," yet may his decision on the question of law be reviewed in this Court.

It is good cause of challenge to a person tendered as a juror in a civil case, that he is the son-in-law of one who is the surety for the prosecution of the suit, and where the relation is admitted or found, it is purely a question of law.

THIS was an action on the CASE for a DECEIT and FALSE WARRANTY, tried before HEATH, J., at the Special Term, (June, 1859,) of Ashe Superior Court.

There were but two questions made for the Supreme Court:

First. The defendant, after exhausting all his peremptory challeges, proposed to challenge Peter McNeal, who was the son-in-law of one Caleb Phillips, the surety of C. E. Sehorn, the plaintiff, for the prosecution of this suit. His Honor refused to allow this challenge, and this juror sat upon the trial. The defendant excepted.

Second. The defendant also offered to read the deposition of one *Swearingen*, taken out of the county, as to the character of John W. Sehorn, who was one of the principal witness-

es for the plaintiff, as to the terms of the contract, and to the alleged deceit. The plaintiff objected to the reading of this deposition, for the want of a seal to the commission. As proof of the regularity of the deposition, the defendant offered the following endorsement of the clerk of the Court, made upon the deposition at a preceding term of the Court:

"Examined, found to be regular, and ordered to be read.

H. CALLOWAY, Clerk, S. C."

There was no order empowering the clerk to pass upon the deposition. The defendant insisted that the passing upon the deposition by the clerk was presumed to be regular, and precluded the plaintiff, upon the trial, from making the objection. The Court was of a different opinion, and rejected the deposition, which was admitted to be material. Defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Crumpler, for the plaintiff.
Neal and *Boyden*, for the defendant.

RUFFIN, J. The statute which authorises the clerk to pass on depositions, and makes those allowed by him legal evidence, only applies to depositions of competent witnesses. Objections, therefore, remain open on the score of incompetency; and that is fatal to the deposition in this case. It was taken out of the county under a commission, not under seal, while the statute in that case requires a seal. The commissioner, who took it, had, therefore, no authority to take it, or administer an oath to the witness; and consequently, the oath was extrajudicial, and the witness could not be convicted of perjury. Hence, the deposition was properly rejected.

The objection to the juror, is no doubt for favor; and on the part of the plaintiff, it was argued that the decision of his Honor is conclusive, because the parties substituted him for triers, and the finding the triers, being on matter of fact, cannot be enquired into upon an appeal. But the proposition,

that a challenge *propter affectum* involves matter of fact alone is not correct. The point was very much considered in *Benton's* case, 2 Dev. and Bat. 196, and it was there found, that the Judge was bound to instruct the triers, as he would a jury, upon matter of law, whereby, supposing the facts to be ascertained, the juror offered, though not standing in such a relation to the parties as to constitute a cause of principal challenge, is yet held in law, not to stand indifferent, because of some other connexion with a party, or with some person interested in the suit or question. And it was held, upon these authorities, that if the Court erred in such instructions to the triers, the decision was the subject of review here. The only question, therefore, in this case is, whether the decision here was upon the matter of fact or of law, as establishing the juror's indifference, and if the latter, whether it be erroneous or not. It is perfectly clear, upon his Honor's statement, that there was no dispute as to any fact. It is stated, and, therefore, taken as found, that one Phillips, was the surety of the plaintiff for the prosecution of the suit, and that the juror was the son-in-law of Phillips. Yet, the Court refused to allow the defendant's challenge, and the juror served.— That could only be because those facts did not establish in law, that the juror was not indifferent. The decision was, therefore, upon the point of law exclusively. On it, the opinion of the Court, is opposed to his Honor's. It is true, the surety for the prosecution is not a party to the issues to be tried, so that he cannot interpose in the trial, nor after judgment have it superseded or reversed. Yet, his bond is part of the record, and judgment may be entered upon it *instanter*, without notice, so that he has a direct interest in the decision and the record. He cannot be a witness or a juror in the case, because of his interest; and by consequence, his son-in-law, is substantially subject to the same objection of a want of indifference, as if he, the surety, were a party to the suit. No authority is found directly in point. But there are many cases in which the courts have gone great lengths in respect to interests and relations more or less remote, which evince a lau-

dable solicitude, that every man's case shall be tried by an impartial jury. It is not thought necessary, nor deemed safe to attempt to lay down a precise rule on the degree of kindred, for instance, or other fact, out of which an interest in the judgment might be more or less certain or contingent, considerable or minute, as determining the competency or incompetency of a juror. It is sufficient, that in the case before us, there must be a grave inference of partiality, which might probably affect the verdict found. It is assumed, of course, that the juror knew how Phillips stood to the cause; for if he had not known it before, he must have learned it, pending the challenge to him.

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

JOHN CASEY *v.* JESSE WILLIAMS.

A note sued on, as being guaranteed, ought to be present on the trial, unless its absence is legally accounted for; and the fact, that it had been sued on in the court of another State, forms no exception to the rule, unless it appeared that, according to the course of such court, it could not have been withdrawn from the archives of the court.

It was *Held* further, that if such note could have been withdrawn and produced on the trial, its nonproduction was fatal to a recovery.

ASSUMPSIT, tried before BAILEY, J., at the Special Term, July, 1859, of Buncombe Superior Court.

The plaintiff declared in assumpsit upon a contract of guaranty.

The defendant passed a note to the plaintiff, executed by one Ransom Thompson, payable to John M. Kinsey, and endorsed by the latter to Samuel McCarson, and by him endorsed to the defendant, Jesse Williams. The defendant agreed if the note was not good, and the plaintiff could not collect it, he would make it good, and pay the plaintiff the amount thereof. The note was not produced on the trial, but in lieu

thereof, the plaintiff offered the record of a trial in a court in Tennessee, to show that the said note had been sued upon in that State, and the plaintiff's counsel insisted that this was the best *evidence* of the note. The Court ruled that the transcript was not evidence of itself of the existence of the note, and a nonsuit was ordered. The plaintiff appealed.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin, for the defendant.

BATTLE, J. We are clearly of opinion that the note which was guaranteed by the defendant to the plaintiff, ought to have been produced on the trial, or its absence properly accounted for. That is admitted to be the general rule, and there is no principle upon which this case can be taken out of it. The record of the suit in Tennessee is no evidence of the existence and contents of the note as against the present defendant, because he was no party to it. But it is contended that the note is filed among the records of the suit in Tennessee, and that the plaintiff will be without remedy, unless he can prove the note by the production of the transcript of the record of that suit. The obvious reply is, that it does not appear that he could not obtain the note itself under an order of the Court, allowing him to withdraw it upon leaving a copy, according to a well established practice in this State. If such a course were shown to be against the practice of the courts in Tennessee, then our courts would admit secondary evidence of the making and contents of the note. The deposition of the clerk of the court in Tennessee, among the records of which the note is filed, might be taken, and he could annex to it a copy of the note, which together with other testimony to identify it, &c., would prove all that would be established by the production of the note itself. For the want of such proof, to account for the absence of the note, and to show its existence and contents, the judgment of nonsuit was proper, and must be affirmed.

PER CURIAM, Judgment affirmed.

GIDEON H. BRYAN *v.* WILLIAM A. BROOKS.

Where a defendant gave a bond under the insolvent act, and while he is at large by virtue thereof, he is not entitled to his discharge on account of the fact that the ca. sa. is voidable; nor can he move, under such circumstances, to quash the proceedings on that account.

APPEAL from an ORDER in the Superior Court of Ashe, made by his Honor, Judge HEATH, committing the defendant to custody, under proceedings in insolvensy.

The defendant had been arrested on a *capias ad satisfaciendum*, at the instance of the plaintiff, issued by a single justice on a judgment rendered by another magistrate, and had given bond pursuant to the provisions of the Revised Code, chap. 59, sec. 6, for his appearance at the next court, and having made his appearance, the plaintiff moved that the defendant be imprisoned, he not having given any notice of his intention to take the oath of insolvency. The defendant opposed the motion, and moved for his discharge upon the ground that the judgment, upon which the *ca. sa.* issued, had been standing without any execution issuing thereon, for more than a year and a day. It was held by his Honor, in the Superior Court, (to which the case came by appeal,) that the execution could not be successfully attacked in this collateral way—that the execution justified the proceedings until regularly set aside, which could not be done in this mode. The defendant was thereupon ordered into custody, from which judgment he appealed to the Supreme Court.

Crumpler, for the plaintiff.
Neal, for the defendant.

BATTLE, J. An execution which issues on a dormant judgment, is not void, but only voidable; *Oxley* v. *Mizle*, 3 Murph. Rep. 250; *Brown* v. *Long*, 1 Ired. Eq. 190. When the defendant in the present case was arrested on the execution which had been issued on the justice's judgment more than a year and a

day after it had been rendered, and had given a bond with the view of taking the benefit of the act for the relief of insolvent debtors, he might have been relieved from arrest upon a writ of *habeas corpus*; or, perhaps, upon placing himself again in actual custody, he might have moved the county court to quash the proceedings, and discharge him. *Dobbin* v. *Gaster*, 4 Ired. Rep. 71. But while he remained at liberty, by virtue of the bond which he had given for his appearance at the county court, he could not be heard to make objections to the regularity of the execution under which he had been taken. That execution, together with the bond, was in the nature of process to compel an appearance to answer at the next term of the county Court; *Winslow* v. *Anderson*, 4 Dev. and Bat. Rep. 9; *Cohoon* v. *Morris*, 1 Jones' Rep. 218. If the defendant had taken the proper steps to avail himself of the benefit of the insolvent act, the plaintiff could not have objected that the execution under which he was arrested, was irregular, and he ought not to be allowed to make the objection while he was availing himself of the liberty which his giving bond had afforded him. His Honor, in the Court below, was, therefore, right in overruling the defendant's objection, and ordering him to be imprisoned until he should comply with the requisitions of the act, of the benefits of which he was seeking to avail himself.

PER CURIAM, Judgment affirmed.

J. D. HOLLAND *v.* GEORGE MOSTELLER.

It is not usuury for the endorsee of a note, to take a new note from the maker at the end of six months, payable immediately, including the accrued interest.

DEBT on a bond for $100, tried before BAILEY, J., at the last Spring Term of Catawba Superior Court. Plea—usury.

The evidence was, that the defendant gave several notes to other persons, which come by endorsement to the plaintiff, and that when they had been due six months, the plaintiff and defendant came to a settlement, computing the interest for that time, and adding it to the principal, and for the aggregate amount, the defendant gave the bond, sued on, payable immediately.

His Honor instructed the jury, that this was not usury, to which defendant excepted.

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

Bynum, for the plaintiff.
Avery, for the defendant.

RUFFIN, J. It is certainly not usurious to take a bond or note on a settlement, for a balance or amount due, including interest up to that time; so as to make the whole bear interest afterwards; for there is no agreement for compound interest, and in fact, no compound interest, as such, received. It was said, indeed, by Chief Justice ABBOTT, to be settled, that where a party advances money to another on account, he may charge interest, and at the end of each year, make a rest, adding the principal and interest together, so as to make both capital; *Eaton* v. *Bell*, 5 Barn. and Ald. 34; and he cites, with approbation, Lord ELDON's decision in *Ex parte Bevan*, 9 Ves. 223, that where, upon such an account, the parties agreed at the end of six months to settle the account, and that the balance of account, including the intermediate

interest, should carry interest, it was good, such rest not having been originally agreed for, and it thus not appearing that the loan was made in contemplation of compound interest for fractions of a year. That is much stronger than the present case, for there was never a loan of money here, but the transaction was an isolated one, and the plaintiff was entitled to recover and collect the whole sum due, as well for interest as principal on the notes purchased by him; but instead of demanding payment, took a new security for the debt, bearing the legal rate of interest thereafter. It is no more usury than taking a note for an open account, which did not bear interest, or upon a general settlement of notes and accounts *bona fide*, made at a shorter interest of one year from the commencement of the account, or the last settlement.

PER CURIAM, Judgment affirmed.

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