ANNOTATIONS INCLUDE 178 N. C.

NORTH CAROLINA REPORTS

VOL. 52

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1859

TO

AUGUST TERM, 1860

(INCLUSIVE)

BY

HAMILTON C. JONES

REPORTER

(Vol. VII)

Second Annotated Edition by

WALTER CLARK

REPRINTED FOR THE STATE BY
MITCHELL PRINTING COMPANY
RALEIGH, N. C.
1920

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

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

1 and 2 Martin Taylor & Conf	as	1	N. C.
1 Haywood	"	2	"
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7 " "	"	29	"
8 " "	"	30	"
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10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
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4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
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" Eq.	"	62	"

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

DURING THE PERIOD COMPRISED IN THIS VOLUME.

CHIEF JUSTICE:

RICHMOND M. PEARSON.

ASSOCIATE JUSTICES:

WILLIAM H. BATTLE.

MATHIAS E. MANLY.

JUDGES OF THE SUPERIOR COURTS:

*DAVID F. CALDWELL.
JOHN M. DICK.
R. M. SAUNDERS.
JOHN L. BAILEY.
ROBERT R. HEATH.
JESSE G. SHEPHERD.
†JAMES W. OSBORNE.
‡GEORGE HOWARD, JR.

ATTORNEY-GENERAL:

WILLIAM A. JENKINS.

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*Resigned.
†Appointed vice Caldwell resigned.
‡Appointed vice Manly promoted to Supreme Court.

CASES REPORTED

CASES CITED

A

B

C

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G

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPRINTS

BY THE ANNOTATOR

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, ch. 309, and subsequent statutes, now Revisal, 5361, which has been further amended by Laws 1917, chapters 201 andd 292.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Editions. One hundred and sixty-three volumes have been reprinted with annotations, these being all the volumes from 1 to 164, inclusive, excepting only volume 148.

The first 7 volumes of N. C. Reports were not official, but, as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws, 1871, ch. 112, and the duties were put on the Attorney-General who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $1,500, and a clerk at $600 per annum.

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the

amendments above referred to, being now Revisal, 5361, was passed to authorize the Secretary of State to reprint the volumes already out of print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme Court when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports these statements of cases (until a very recent date) were always made by the Reporters, and not by the judges, and the briefs were already omitted in our current volumes.

The Secretary of State at first tried the experiment of reprinting a few volumes without eliminating the unnecessary matter and without annotations, and without correcting the numerous typographical errors; but this proving unsatisfactory to the Profession, and the expense entirely too great, after consultation with the Governor and Attorney-General, the then Secretary of State requested the writer to annotate the volumes in order to make them more salable and to reduce the expense of the work (which was necessary) by condensing prolix statements and omitting briefs of counsel. This has been done ever since. The annotations have been made, for the most part, without any aid, as Shephard's Annotations (which besides, required to be checked for possible errors) were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse Index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 163 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these *Reprints* there was no Reporter to be paid, either by profits of sale as formerly, or by salary as now, the reprints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of

the Reports then stored in Uzzell's Bindery, with the result that many additional volumes were required to be reprinted, and others that had already been annotated and reprinted were reprinted a second time, the annotations, however, being brought down to date.

The current Reports are sold at $1.50, from which the commission of 12½ per cent for selling is deducted, i. e., about 19 cents, making the net return to the State $1.31 per volume, while, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his clerk. The next Legislature will doubtless raise the price of the current Reports, if not of the Reprints also.

In all the more recent volumes the statement of the cases has been made by the judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation in the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix statement or of the record, which was often used instead of a statement, and by the omission of the briefs. Even in using the original reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports were very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English judges were usually, if not always, delivered orally from the bench and the reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the judges, under the guise, it is true, of "declaring the law," it has been often changed from what was announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the Courts allowed to be quoted as precedents. In France and all other countries the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code applicable, without comment. In English-speaking countries, in which alone

the Reports of decisions are allowed to be cited, the number of the volumes of the Reports in 1890 were 8,000. These have now increased to 30,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris."; A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the Courts of the present day are more likely to be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary, and the profession and the Courts must inevitably be submerged beneath the flood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require three volumes a year. If the briefs and redundant statements were still inserted as in the earlier reports, it would require ten volumes per year, taxing the shelf room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all Courts to reduce the size of current Reports by the judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court. The General Assembly had already given a similar intimation by providing that "The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary." Rev., 1548.

RALEIGH, N. C., 1 August, 1920.

Walter Clark

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1859

JOHN BOND v. JOHN McBOYLE*

That a slave, belonging to the plaintiff, was seen working once at the defendant's sawmill, and two other times within half a mile of the mill, but not working, and not in the defendant's possession, was *Held* not to be any evidence to establish a contract of a hiring for a year.

ASSUMPSIT, tried before *Saunders, J., at* Spring Term, 1859, of WASHINGTON.

The plaintiff declared on a special contract for the hire of two slaves to the defendant for 1857, to which were added the common counts.

The defendant lived in the county of Washington, and owned a sawmill near Plymouth. One witness testified that previously to August, 1857, he was at the defendant's sawmill for a few minutes, and saw the slaves in question at work there, and that on two other occasions, during the same year, he saw these slaves in the town of Plymouth, but not in the employment or possession of the defendant; also, they (2) were the property of the plaintiff.

The defendant proved that he hired of the plaintiff on Jan., 1855, two negroes, for which he executed bond and took the same into possession; that the plaintiff represented the negroes as sound and fit for labor at a steam-mill; that about March he returned one of them as being unfit for the business; that although the plaintiff received the slave returned, and worked him upon his plantation for the remainder of the year, yet he made the defendant pay the whole amount of the bond.

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*Decided at last term, but no opinion was filed in consequence of the indisposition of Judge RUFFIN, to whom it was assigned.

The defendant's counsel asked the court to charge the jury that they might, if they were satisfied it was so intended by the parties, allow the defendant for the value of the labor of the negro returned to the plaintiff, as a set-off. His Honor refused to give such instruction, and defendant excepted.

The counsel for the defendant then asked his Honor to charge the jury that the proof would not authorize them to infer a hiring for the year, and they could only give a verdict for the value of the labor proved to have been rendered by the plaintiff's slaves.

To this his Honor inquired of the defendant's counsel, in an angry and imperious tone of voice, if it was common sense for a man to hire a slave for half an hour or a day to work at a steam-mill? He then charged the jury that, from the testimony before them, they might infer a hiring of the slaves for the year. The defendant's counsel again excepted.

Verdict for the plaintiff. Judgment. Appeal.

It was argued here that the hiring for the preceding year was some evidence that the hiring in this instance was for a year.

Hines for plaintiff.
Winston, Jr., and H. A. Gilliam for defendant.

PEARSON, C. J. Passing by the exception taken on the part of the defendant, that the interrogatory put by his Honor to the defendant's counsel in the presence of the jury, "in an angry and imperious
(3) tone of voice," was an expression of opinion on the question of fact, there is error in this: the allegation of hiring for the year was submitted to the jury without evidence. The fact that the plaintiff's two slaves were, on one occasion during the year, seen at work in the plaintiff's sawmill for a few moments, and the additional fact that during the same year the slaves were seen on two occasions in the town of Plymouth, which is about half a mile from the mill, the slaves not being in the employment or possession of the defendant, do not, in the opinion of this Court, furnish ground even for *a guess* that the defendant had hired them for the year. The slaves being at work on a certain day would tend to show a hiring, but whether the contract of hiring was by the day, or the week, or the month, or the year, would be purely a matter of conjecture.

The other fact, that for the preceding year the defendant had hired negroes of the plaintiff by the year, is irrelevant—on the principle illustrated by the instance, that the fact of a party's having exacted usury in one transaction is not admissable to show that he exacted usury in another and distinct dealing. But in our case, even the conjecture of

a like dealing is weakened by two circumstances: in the two former contracts the price of the negroes was secured by notes, in this a note was not given. Why? Again, in the preceding year one of the negroes was returned as unfit for service, and the defendant lost his labor, although he had to pay for it. This may have induced a different mode of dealing, and suggested to the defendant that it was safest to hire by the day, week, or month.

It was the plaintiff's misfortune or folly to go to trial without being prepared with proof to support his allegation of a hiring by the year, and his Honor ought to have instructed the jury to find in favor of the defendant for want of evidence, unless the plaintiff chose to submit to a nonsuit.

PER CURIAM. *Venire de novo.*

(4)

STATE ON THE RELATION OF FRANCIS NIXON v. D. F. BAGBY ET AL.

1. Where a note was payable to one as an agent, and he took a receipt from a constable, promising to collect it for the principal: *Held,* that the suit on the constable's bond was properly brought in the name of the principal as relator, and that the agent was a competent witness for the plaintiff.
2. Where negligence in failing to collect is the breach assigned in a suit on a constable's bond, no demand is necessary.
3. A delay of five months, during which an officer takes no step to make the money which he has undertaken to collect, was *Held* to be negligence.
4. Where there was an apparent necessity for an officer to proceed immediately to the collection of a debt, and he was instructed to do so, a delay of *sixteen days* was *Held* to be negligence.

DEBT on a constable's bond, tried before *Saunders, J.,* at Spring Term, 1859, of PERQUIMANS.

The following receipt was adduced in evidence, viz.:

"1856, August 6. Received of Francis Nixon, through the hands of Exum Stokes, one note vs. Thomas B. Long, for the sum of ninety-seven 53-100 dollars, with interest from 2 July, 1856, which I promise to collect or return, as an officer. "D. F. BAGBY, *Const.*"

Exum Stokes testified that he was agent for the plaintiff and others in the management of a steam sawmill, and that the note was payable to him as agent; that he did not then have, nor ever had had, any interest in the note; that in one of the settlements of the company this particular note fell to Nixon. At this point the witness was objected to by the

defendants upon the score of interest, but the Court decided that he was competent, and the defendant's counsel excepted.

Stokes further stated that he placed the note in the hands of the defendant at the time of the date of the receipt, and instructed him to proceed immediately to the collection thereof; that the note remained in the hands of the defendant sixteen days, and then T. B. Long left the town of Hertford, where he resided, and was absent a fortnight, when he returned and died within a few days thereafter. It was also in evidence that at the time of the date of this receipt T. B. Long was in the possession of $10,000 worth of property, most of which was in
(5) the town of Hertford, near which the defendant lived, and into which he very frequently came. It was also in proof that after Long's death, and before the issuing of the writ, the defendant declared he had not collected the debt, and that the same was still due. The writ issued 26 January, 1857.

It was insisted by the defendant's counsel that this did not amount to negligence so as to charge the defendant, but his Honor instructed the jury to the contrary, and a verdict being rendered in pursuance thereof, and a judgment given for the plaintiff, the defendant appealed on an exception to the instruction given the jury.

Johnson for plaintiff.
Jordan and Hines for defendants.

PEARSON, C. J. Stokes was a competent witness; for, although the note was payable to him, the beneficial interest belonged to Nixon, and the contract of the defendant, as evidenced by the receipt, was to collect the note for Nixon. The suit was, therefore, properly brought in his name as relator and for his benefit, and its decision could not, in any point of view, affect the interest of Stokes, or the record in the case be used as evidence for or against him.

No demand is necessary where the breach assigned is for negligence in failing to collect.

As the officer had special instructions "to proceed immediately," a delay of sixteen days amounted to negligence under the circumstances; and, besides, five months elapsed after the death of the debtor before the writ issued, during which time he took no steps. This, without explanation, amounts to negligence.

The question as to damages is settled by statute, Revised Code, chap. 78, sec. 3.

PER CURIAM. No error.

Cited: Lipscomb v. Cheek, 61 N. C., 334.

(6)

JAMES N. OVERTON, EXECUTOR, v. W. W. SAWYER.

The value of a bond or sealed note, given by delivery, as a *donatio causa mortis*, may be recovered at law, in an action of trover, by the personal representative of the donor.

TROVER, tried before *Manly, J.*, at the last Fall Term of CAMDEN.

The following facts were agreed on and submitted for the judgment of the court:

Jesse Eason, the plaintiff's testator, in his last illness, placed in the hands of the defendant a sealed note or bond for $600, on one Malachi Sawyer, with a special request that if he died it was to be divided between said Malachi and Josiah Eason. The said instrument was delivered to the defendant after the donor had made his will, and at the time of doing so he mentioned the fact that he had made his will, and the bond was not specially alluded to therein. It was without endorsement.

The plaintiff demanded the paper before bringing suit, and the defendant, at the instance of Eason and M. Sawyer, refused to give it up, whereupon this suit was brought.

His Honor, upon consideration of the case agreed, gave judgment for the plaintiff, and the defendant appealed.

W. A. Moore and Johnson for plaintiff.
Jordan and P. H. Winston, Jr., for defendant.

BATTLE, J. We are unable to distinguish this case, in principle, from those of *Fairly v. McLean*, 33 N. C., 158, and *Brickhouse v. Brickhouse, Ibid.*, 404. The principle is, that if negotiable securities be given, either absolutely or upon condition, by the person to whom they are payable, to another, without endorsement, the executor or administrator of the donor may recover their value in an action of trover at law. The only ground of distinction between those cases and the present, which has been, or can be, suggested is that the latter is the case of a *donatio causa mortis*, in which it is insisted that the law transfers the legal title to the donee immediately upon the death of the donor. (7) Why should that make a difference? A *donatio causa mortis* is not a legacy which requires the assent of the executor to vest the legal title in the donee, but it is a gift, made in contemplation of death, which, upon delivery, passes the legal title at once to the donee, upon condition to be void if the donor do not die. If the attempted donation be of something which cannot pass at law by delivery merely, it follows that the legal title still remains in the donor, and upon his death must devolve

upon his personal representative. Hence, we find it expressly stated that bills of exchange and promissory notes, *not payable to bearer,* are incapable of being the subjects of a *donatio causa mortis;* see 1 Wms. on Executors, 504, and the cases there cited. The note in the present case, it is true, is under seal, but it is an instrument which by our statute law is made negotiable by endorsement, like bills of exchange, and must, in this respect, be governed by the same rules. This conclusion is not at all opposed by the decision of Lord Hardwick in *Bailey v. Snelgrove,* 3 Atk., 214, that a bond for the payment of money may be the subject of a *donatio causa mortis.* That was a case in chancery, and it was held that the equitable interest in the bond passed to the donee, which does not militate at all with the position that the personal representative of the donor could, at law, recover the value of the bond in an action of trover.

PER CURIAM. Affirmed.

Overruled: Kiff v. Weaver, 94 N. C., 276.
Cited: Egerton v. Carr, 94 N. C., 651.

DEN ON DEMISE OF CALEB SAWYER AND OTHERS v. E. L. DOZIER.

A naked authority, to sell, conferred by will on an executor, who was also appointed guardian, both of which offices were renounced, and the power not exercised, was *Held* not to enlarge a life estate given to the ward into a fee, so as to enable him, or any other person, to convey a fee.

(8) EJECTMENT, tried before *Manly, J.,* at the last term of CAMDEN.

Both parties claimed under the will of Margaret Dozier, which was as follows, viz.:

"1st. To my grandson, Edmund D. Sawyer, I lend the use of all my lands during his life, and at his death to be equally divided amongst his children lawfully begotten in wedlock; but in case he should die without such child or children, then and in that case to fall and descend to my daughter, Elizabeth Nash, to her and her heirs forever. All the balance of my estate, of every kind and description whatsoever, I lend to my grandson, Edmund D. Sawyer, during his lifetime, and at his death to his children lawfully begotten in wedlock, and in case he should die without such children or child, then the balance of said estate not made use of by said Edmund D. Sawyer, by his guardian, to be equally

divided among all my heirs, etc. All my perishable estate of every sort, together with negro man, Isaac, and woman, Jinny, I wish my executor to sell to the best advantage, and purchase two or three negro boys for my grandson, Edmund D. Sawyer, and do whatever else he may think best, either in buying or selling, or hiring out, etc. I do hereby ordain Haywood S. Bell executor to this my last will and testament; moreover, I do hereby ordain, nominate, and appoint said Haywood S. Bell guardian to my grandson, Edmund D. Sawyer, with full and absolute power and authority to purchase, sell, or otherwise dispose of any property above lent or given, as to him may seem calculated to promote the interest of the same."

Haywood S. Bell declined both the offices of executor and guardian, and one William Sharmon was appointed guardian in his place. The latter was, by certain proceedings in the court of equity, removed from the guardianship, and Sawyer and Sharmon then came to a settlement; and it appearing that the guardian had expended some $417 more than the income of his ward's estate, the latter gave his note for the same, and executed to John Pool a deed of trust to secure the amount. The land was afterwards sold to the defendant Dozier, and a deed was made to him by Pool, the trustee, Sharmon, the *quondam* guard- (9) ian, and Sawyer, the ward.

Edmund D. Sawyer is dead, and the lessors of the plaintiff are his legitimate children, and made demand before suit brought.

The foregoing facts were presented in a case agreed, and submitted for the judgment of the court.

His Honor being of opinion with plaintiff on the case agreed, gave judgment accordingly, from which the defendant appealed.

Jordan for plaintiff.
Johnson for defendant.

PEARSON, C. J. By the will of Margaret Dozier, the land in controversy is given to Edmund D. Sawyer for life, remainder to his children in fee, and in the event of his death without a child him surviving, then over; and a power is given to Haywood S. Bell to sell the land, if in his opinion a sale would promote the interest of said Sawyer.

The power is *naked,* not coupled with any estate in Bell, and as he has not exercised it, we are at a loss to conceive of any ground to support the idea that the fact of conferring this power on him, to be exercised in his discretion for the benefit of the tenant for life, has the legal effect of enlarging the estate of the latter so as to give him or Sharmon, who for a time acted as his guardian, a right to convey the land in fee simple. Nor are we able to see how the fact that Bell is appointed by the will

of Mrs. Dozier the guardian of her grandson, the said Edmund D. Sawyer, has any bearing on the question.

Whether the testatrix attempted to appoint Bell guardian for her grandson because he was under age (how the fact was is not stated in the case agreed), or because she considered him to be of weak mind, is immaterial, for under no view of the subject could that give either the grandson or his *quondam* guardian, Sharmon, any right to convey more than a life estate. So the estate of the defendant determined upon
(10) the death of Sawyer, and the title was in the lessors of the plaintiff, who are his children, and took the remainder under the will.

PER CURIAM. Affirmed.

WILLIAM A. DUKE ADMR. DE BONIS NON OF ABNER ROBINSON, v. SAMUEL W. FEREBEE, EXECUTOR OF SAMUEL FEREBEE.

An action will not lie against an executor of an administrator for a demand against the estate of the latter's intestate; but administrator *de bonis non* must be taken in order to reach such estate.

ASSUMPSIT, tried before *Manly, J.*, at the last term of CURRITUCK.

Administration on the estate of Abner Robinson was granted in 1811, by the County Court of Currituck, to Samuel W. Forbes, and he having died in the same year, administration on his estate was granted to Samuel Ferebee. The latter (Samuel Ferebee) afterwards made a will, appointing the defendant his executor, and died. The latter having proved the will and qualified as executor, this suit was brought against him by the plaintiff, as administrator *de bonis non* of Robinson, for a balance due to the estate of Robinson from the estate of Forbes.

The foregoing facts were presented in a case agreed, and submitted for the judgment of the court. It was insisted by the defendant's counsel that this suit could not be sustained against the defendant, for that he could not represent the estate of Forbes, and that could only be reached through an administrator *de bonis non* on the estate.

His Honor overruled the objection, and gave judgment for the plaintiff. Defendant appealed.

W. A. Moore for plaintiff.
P. H. Winston, Jr., and Johnson for defendant.

(11) BATTLE, J. Several objections have been taken to the recovery of the plaintiff in the present case, one of which is so manifestly fatal to the action that it is unnecessary for us to notice any other.

If an executor or administrator die intestate before he has completed the settlement of the estate of his testator, or intestate, by paying the debts, and also by assenting to or paying the legacies, or making distribution, an administrator *de bonis non* of such testator or intestate must be appointed for the purpose of completing such settlement. It was upon that principle, and with that view, the administration *de bonis non* on the estate of the first intestate, Robinson, was taken out in the present case. If anything were due to that estate from the first administrator, Forbes, it might have been recovered, upon his death, from his administrator, Samuel Ferebee, provided administration *de bonis non* had been taken out and suit brought in proper time. When Samuel Ferebee died, his executor, Samuel W. Ferebee, did not become the representative of Forbes, and, of course, is not liable for the debts or obligations of his estate. See 2 Chitty's Blackstone, 422, 423. Administration *de bonis non* must be taken out on the estate of Forbes, for such administrator is the only person who can sue the present defendant, as the representative of Samuel Ferebee, for any assets or debt which he may have had or owed, at the time of *his death,* to the estate of his intestate, Forbes; and then such administrator *de bonis non* of Forbes will be the only person who can be sued on any debt or liability of Forbes to the estate of his intestate, Robinson, now represented by the present plaintiff.

The principles above enunciated will be found fully and clearly set forth in the cases of *Taylor v. Brooks,* 20 N. C., 273; *S. v. Johnson,* 30 N. C., 381 and 397; *S. v. Britton,* 33 N. C., 110.

The judgment in favor of the plaintiff, on the case agreed, must be set aside, and a judgment be entered for the defendant.

PER CURIAM. Reversed.

Cited: Strickland v. Murphy, post, 245; *Latta v. Russ,* 53 N. C., 113; *Badger v. Jones,* 66 N. C., 308.

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(12)

LEWIS CHAMBERLAIN v. HENRY J. ROBERTSON.

A count for a deceit in the sale of goods cannot be joined with one assumpsit on a warranty of soundness.

ASSUMPSIT, tried before *Manly, J.,* at the last Fall Term of WASHINGTON.

The plaintiff declared on two counts:

1. For a cheat in the exchange of watch chains.

2. For a false warranty of the defendant's chain to be gold.

The proof was that the defendant represented a chain which he had to be gold, and imposed it as such on the plaintiff, and thereby obtained from him two gold chains of a less size, worth $35.

The defendant represented his chain to be worth $50, but as it was inconveniently large and heavy, he said he was willing to take $35 for it.

There was also proof that the defendant's chain was of brass, washed with gold, and worth at the rate of 30 cents per pound, and that the defendant had knowledge of this.

The defendant contended that the action of assumpsit could not be maintained, but the court ruled otherwise, and the defendant's counsel excepted. In this Court it was further contended that the two counts were inconsistent.

The court below laid down the rule of damages to be the difference between the value of the chain as it was represented to be and the value as it was.

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

No counsel for plaintiff.
Hines and P. H. Winston, Jr., for defendant.

MANLY, J. The Court is of opinion the form of action adopted in this case is not the proper one.

Upon an examination of the authorities, it will be found the earlier mode of redress in such cases was the action upon the case in (13) *tort.* This was used to redress warranties broken and deceits, indiscriminately, and was the action resorted to when the pleader desired to count upon both a warranty and a deceit. About the close of the last century the practice arose of declaring an *assumpsit* upon warranties, in order to add what are called the money counts, which, in many cases, might prove of service. But no case can be found, it is believed, where, in that form of action, a count for a deceit was added.

These principles seemed to be established by the case of *Williams v. Allison,* 2 East, 446, and the case in our own Reports of *Lassister v. Ward,* 33 N. C., 443.

The history of the form of action for false warranties and deceits led the court below into error. When the form was changed from *tort* to *assumpsit,* for cases of false warranty, it was supposed the latter form might also be applied to cases of deceit arising out of *contracts* between the parties; that in such cases it was at the option of the pleader to use *assumpsit* or case at will, and he was not *restricted* to *case* except for deceits unconnected with any contract between the parties (as for

falsely representing a person to be worthy of credit). The language of the elementary writer, Mr. Chitty, whose work has been consulted, is not inconsistent with this view; 1 Chitty's Plead., 139. But no precedent or case being found of such extended use of the action of *assumpsit,* it would seem to be inconsistent with established rules of pleading, and therefore illegal. It will follow, the two counts, as in the declaration before us, cannot be joined.

No error is perceived in the rule of damages laid down by the judge below; but as the action has been misconceived, there must be a *venire de novo.*

PER CURIAM. Error.

Cited: Land Co. v. Beatty, 69 N. C., 333; *Ashe v. Gray,* 90 N. C. 140.

(14)

B. F. FESSENDEN v. E. W. JONES, GUARDIAN.

A guardian who calls in a physician to the slave of his ward is liable for the bill, although the physician may know, at the time, that the slave is the property of the ward.

ASSUMPSIT, tried before *Manly, J.,* at the last term of WASHINGTON.

The action was commenced by a warrant, returnable before a justice of the peace, and brought to the Superior Court by appeal.

The plaintiff, who was a physician, declared for medicines and medical services rendered to a slave, the property of a ward of the defendant. The proof was that the plaintiff was called to attend the slave in question by persons having authority from the defendant, and that the plaintiff looked to the defendant for payment when the medicines were furnished and the services rendered.

The defendant contended that, as it was known to the plaintiff to whom the slave belonged, the charge should have been made against the ward, and the action brought against him. But the court thought otherwise, and charged the jury upon the facts proved that the plaintiff was entitled to recover. Defendant's counsel excepted.

Verdict and judgment for plaintiff. Appeal by the defendant.

H. A. Gilliam for plaintiff.
P. H. Winston, Jr., for defendant.

MANLY, J. The single question presented in this case is, whether a guardian who calls in a physician to the slave of his ward can rightfully

be charged with and made responsible for the medicines and services rendered.

The Court is clearly of opinion he may be. The credit in such case is not only in point of fact given to the guardian, but ought to have been so given. The guardian is charged with the duty of controlling and managing the person and property of the ward, and judging of
(15) the expenditures which may be needful for either, and he alone is informed of the condition of the ward's resources. Hence, the contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow a departure from the above rule would, in the first place, have the effect to encourage in the youth of the country appeals from the judgments of their guardians, and, in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he had no means to judge, and, therefore, uncertain and precarious.

The foregoing principles are sustained, it is believed, by *Britt v. Cook,* 34 N. C., 67; *Hussey v. Roundtree,* 44 N. C., 110, and *Freeman v. Bridgers,* 49 N. C., 1.

In the latter case it is said that this rule has been established by previous adjudications of the Court: "Where there is a guardian, the replication for *necessaries* does not avoid the plea of *infancy,* because the fact of there being a guardian, whose duty it is to furnish all necessaries for the support of the ward, shows that it was not necessary for the infant to contract."

Where there is a parent or guardian, the infant cannot contract, even for necessaries. Persons must take care (save in certain excepted cases) to contract with the guardian, and, contracting with him, it seems to be a principle of common justice they should be permitted to resort to him, primarily, for the fulfillment of the contract. To turn persons dealing with the guardian in relation to the ward's estate over to the ward would render it necessary in every case for such persons, in order to guard themselves against loss, to enter into an account with the guardian as to the amount of the ward's estate—the income and expenditures, and the necessity for the expenditure then contemplated. Such requirements, applied to the ordinary transactions of life, and especially to such a one as is the subject of this suit, are manifestly absurd.

It will be seen from the foregoing considerations a guardian
(16) is not in the condition of an ordinary agent or factor, and therefore the same legal relations, in all respects, do not subsist between them and those whom they respectively represent. The former represents one who has no legal capacity to contract for himself; the latter, one fully able to contract and bind were he present. The former is substituted by the law, and stands *in loco parentis.* The latter is the appointee of

his principal, and that principal can, at any moment, abrogate or modify his powers.

This want of analogies between the two, in the sources and limits of their powers, makes it obvious there can be no complete analogy between them as to liabilities or exemptions.

PER CURIAM. No error.

Cited: Tyson v. Walston, 83 N. C., 96; *Le Roy v. Jacobosky,* 136 N. C., 450.

Dist.: Parker v. Davis, 53 N. C., 462.

RIDDICK HURDLE v. LEWIS H. RICHARDSON.

On a bond, payable twelve months after date, expressed to be for the hire of a slave for a year, the plaintiff is entitled to recover, notwithstanding the fact that the plaintiff got possession of the slave and detained him against the wishes of the hirer before the year was out.

DEBT, tried before *Manly, J.,* at the last term of PERQUIMANS; begun by a warranty of a justice of the peace, and brought up by successive appeals.

The action was brought on the following bond:

Twelve months after date we, or either of us, promise to pay to Riddick Hurdle, or order, ninety-five dollars, for value received, as witness our hands and seal, for the hire of a boy, Wesley, for the year 1858, and comply with the usual terms of clothing.

January 1, 1858.

LEWIS H. RICHARDSON. (SEAL.)
THOMAS R. SIMPSON. (SEAL.)

The said slave, Wesley, served the defendant until the middle (17) of December, 1858, when he ran away, and his services were lost to him for the remainder of the year. On 24 December the slave was apprehended as a runaway at the request of the defendant, and while the persons having him in charge were taking him to Richardson, the plaintiff demanded him of the captors and took him into possession. On the same day the plaintiff, without the consent of the defendant, gave Wesley a permit, in writing, to pass and repass and to procure work in the counties of Gates, Chowan, and Perquimans, until the 1st of January ensuing.

The foregoing facts were agreed on by the counsel of the respective parties, and submitted for the judgment of the court, who gave judgment that the plaintiff was entitled to recover the amount of the bond and interest, from which the defendant appealed.

Jordan for plaintiff.
W. A. Moore for defendant.

MANLY, J. There is no error in the judgment of the court below. The words "for the hire of a boy, Wesley, for the year 1858," incorporated into the bond, do not import a condition precedent or a convenant for the service of the slave, but is simply a reference to a transaction (viz., the hire of a slave), which formed the *consideration* of the bond. It is the form commonly adopted for securing the money for the annual hire of slaves throughout our country, and it has never been construed to involve a condition or a covenant, dependent upon which the money is promised. The construction thus given is not affected, as we think, by the fact that the day of payment is fixed at the close of the term of service. There are obvious reasons for this postponement, discoverable in the contents of the paper, without holding the *service* a *condition* precedent, upon which depended the money payment.

According to this construction of the bond, it will follow, in obedience to well established principles, that the entire sum of money secured should be recovered, subject to no deduction for a partial failure of
(18) consideration. The bond not being void for any reason, it is wholly recoverable in a court of law, and if the defendant have substantial cause of complaint, he must seek his remedy through a cross-action.

The case before us is distinguishable from that of *Niblett v. Herring,* 49 N. C., 262, to which our attention has been called. This latter case was an action of *assumpsit,* arising out of a contract for the service of a slave for a year, and it appeared that when the service was about half performed the plaintiff took the slave away from the defendant against his will. It was held in that case that the contract for service was entire and executory, and an action for the promised compensation, or for a *quantum meruit,* could not be maintained, because of the entirety of the contract upon which the promise was based, its nonperformance, and the absence of all legal excuse for the failure. In the case before us the contract forming the consideration of the bond (viz., the tradition of the slave, with a right of dominion over him) being executed, and a bond taken for the money, we cannot go behind the bond and enquire whether the obligee has not done something to interfere with the obligor's rights and thus impair the value of the consideration. A bond without any

consideration, or with an inadequate consideration, is good in a court of law. Nothing in respect to consideration is inquirable into except immoral or illegal taint.

We think the ruling in *Niblett v. Herring* may be justified under the authorities cited by the Court. The distinctions taken in such cases are often quite subtile, and not always characterized by very manifest differences; but upon the facts of that case it would seem clear there could be no recovery upon the special promise, and that the law would not raise an *assumpsit* to pay any less amount upon the *quantum meruit* count.

PER CURIAM. Affirmed.

Cited: Odom v. Bryan, 53 N. C., 213

(19)

CALEB SIKES v. JOHN B. QUICK.

Notice that a surety has paid the debt of his principal is not required to be given before bringing suit for the money paid.

ASSUMPSIT, tried before *Manly, J.,* at the last Fall Term of PASQUOTANK.

The action was for money paid by the plaintiff as the surety of the defendant, and the only question was whether the action could be sustained without showing that the plaintiff had given the defendant notice previously to the commencement of the suit.

By consent, a verdict was taken for the plaintiff, subject to the opinion of the court upon the point stated, with leave to set it aside and enter a nonsuit in case the opinion should be against the plaintiff.

Subsequently the court ordered a nonsuit, and the plaintiff appealed to the Supreme Court.

Jordan for plaintiff.
Johnson for defendant.

MANLY, J. The objection made to the recovery in this case, in the court below, was the want of notice to the principal before bringing the action.

This objection is not tenable. The general rule seems to be that where one person, being under an obligation to do so, pays money with another was primarily liable to pay, an action accrues immediately for money

paid. The principal debtor is bound to keep in mind his liabilities, and at the proper time to interpose between his surety and creditor for the protection of the former, and if he fails to do so, and the surety be required to pay, it is not necessary to the completion of his legal rights of complaint that he should hunt up his principal and make a demand.

We are not aware that this point has at any time been raised in our courts, but similar actions are very numerous, and the absence from every case of any such point is, of itself, high evidence of what the law
(20) is. In actions by a surety against his principal, notice to principal before suit is nowhere recognized as an element of the plaintiff's case. The cases are collated in the American Ed. 1 Smith's Leading Cases, 228, and in *Oldin v. Greenleaf,* 3 N. H., 271.

On the trial below the court (in the absence of direct authority) was led into error from a supposed analogy between the relations of the parties and that which exists between cosureties. Such are the relations between cosureties that if one *pay* and make himself the creditor of the others, he ought, in common justice, to notify them of this change of relation before he sues for contribution; but such is not the case as between principal and surety.

PER CURIAM. Nonsuit set aside and judgment for plaintiff upon the verdict.

Cited: Norfleet v. Cromwell, 64 N. C., 11.

STATE v. HENRY BARNES.

On a motion to quash a bill of indictment on the ground that the witness on whose evidence it was found by the grand jury was not sworn in the court, the decision of the judge below, upon the *facts*, was *Held* to be conclusive, and not the subject of an appeal.

MOTION to quash bill of indictment, heard before *Manly, J.,* at the last term of HERTFORD.

The motion was made upon the calling of the case and before a plea was entered by the defendant. The ground of the motion was that it did not appear any evidence was before the grand jury upon which it was found.

The evidence relied on by the State consisted of the name of a witness endorsed on the bill by the solicitor, under which were the printed words:

"The witness marked thus —— sworn and sent" subscribed be-
(21) low which was the name of the clerk of the court. There was

no *mark*, either at the name of the witness nor at the space left for that purpose in the printed formula.

The court being of opinion that there was no sufficient evidence before him that the witness had been sworn on the bill, sustained the motion and ordered the bill to be quashed; from which judgment the solicitor appealed.

Attorney-General for the State.
D. A. Barnes for defendant.

BATTLE, J. It is settled that if a bill of indictment be found without evidence, or upon illegal evidence, as upon the testimony of a witness not sworn in court, the defendant may take advantage of it by a plea in abatement, or upon a motion to quash the bill; *S. v. Cain*, 8 N. C., 352. But it is not a ground for arresting the judgment after a verdict upon a plea in bar; *S. v. Roberts*, 19 N. C., 540. Here the objection was brought forward in proper time and manner, and the only question is whether his Honor, in the court below, erred in ordering the bill to be quashed under the circumstances disclosed in the statement of the case. The Attorney-General contends that he did, upon the ground that the bill must be presumed to have been found upon legal evidence; that the burden of showing the contrary was upon the defendant, and that he failed to produce any evidence at all in support of his motion. Unfortunately for this position, it does not appear that it was taken in the court below. There it seems to have been admitted by the solicitor for the State that he was bound to show that the witnesses upon whose testimony the bill was found were sworn in court before they were sent to the grand jury. He accordingly relied upon what was endorsed upon the bill of indictment as sufficient to establish the fact. That endorsement was no part of the record and if it had been in other respects full and complete, it could not, of itself, have been received as evidence of the fact that the witnesses were sworn. It could (22) have been used only for the purpose of aiding the memory of the clerk if he had been called to testify as to the fact. *S. v. Roberts, ubi supra.* But, in truth, the endorsement was left incomplete, and could afford no aid whatever to the recollection of the clerk, unless to indicate to him that the witnesses had not been sworn. So far, then, as appears from the case stated, we should concur with his Honor in his finding of the fact, if we were at liberty to review his decision. But we are of opinion that, as the motion to quash was predicated upon a question of *fact*, which had to be passed upon in the court below, the decision of that court upon it is final and conclusive, and is not the subject of review upon an appeal to this Court.

The record does not show any error in any question of law, and as we have not the power to inquire whether there be any error in any question of fact, the judgment must be.

PER CURIAM. Affirmed.

Cited: S. v. Harwood, 60 N. C., 231; *S. v. Horton,* 63 N. C., 596; *S. v. Harrison,* 104 N. C., 732.

JOHN O. ASKEW v. WRIGHT O. WYNNE.

The use of a landing on a navigable stream, by the public for twenty years, as a matter of right, will afford the ground for a presumption that it had been dedicated by the owner to the public.

TRESPASS *quare clausum fregit,* tried before *Manly, J.,* at the last term of HERTFORD.

The act complained of was the putting of certain barrels of tar upon a landing embraced in a grant to David O. Askew, dated 16 December, 1833, which land had been conveyed by proper assurances to the plaintiff. It appeared that the plaintiff and his ancestor David occupied the land for a long time, claiming it as their own, and down to the time of bringing this action. The grant of 1833 was a
(23) substitute, by virtue of an act of Assembly, for a previous one, alleged to have been destroyed by the burning of the records of Hertford County.

It appeared further that the public road led to and passed by the landing; that it was on a navigable stream, and that sea-going vessels resorted to it; that the landing, as well as the road, had been used by the public, as a matter of right, for more than thirty years. The writ issued in March, 1859.

The plaintiff's counsel contended that the time which had elapsed since the year 1833 was not sufficient to create the presumption of a dedication to the public, and that the taking out a grant in 1833 precluded the inquiry from being extended beyond that time.

But his Honor was of opinion that the use of the landing for the length of time stated by the witnesses was a sufficient ground for them to presume a dedication to the public, and so instructed the jury, who rendered a verdict for the defendant, and the plaintiff appealed.

No counsel for plaintiff.

P. H. Winston, Jr., and D. A. Barnes for defendant.

BATTLE, J. The defense relied upon was clearly established by the proof that the *locus in quo* had been used as a public landing for more than twenty years after 1833, before the commencement of the action. It was, therefore, unnecessary to inquire whether such use had existed prior to the grant issued in 1833 to David O. Askew, under whom the plaintiff claimed. The owner of land may dedicate it to the use of the public as a highway, or street, or square, by an immediate act, which will operate not as a *grant* (for the want of a grantee), but as an *estoppel in pais*. Thus, if the owner lay out upon his land the plan of a town or village, with the usual streets and squares, and then sell the lots, the streets and squares will be at once presumed to be dedicated to the use of the public, because it would be a fraud upon the purchasers of the lots, as well as upon the public, if he were permitted to resume his right of private property. *Rives v. Dudley*, 56 N. C., at p. 136. See, also, the notes to *Dovaston v.* (24) *Payne*, in the American Ed. 2 Smith's Leading Cases, 90. Where there is no immediate dedication of his land to the public, to be presumed from the act of the owner, yet, if he acquiesce in the use of a portion of it by all persons as a highway, public landing, and the like, for twenty years or more, the law will, from such acquiescence, raise a presumption of a dedication of that portion to the use of the public, and he will be forever afterwards prohibited from so treating it as his private property as to prevent the public from the enjoyment of the easement. *Woolard v. McCullock*, 23 N. C., 432; *S. v. Marble*, 26 N. C., 318; *S. v. Hunter*, 27 N. C., 369; *S. v. Cardwell*, 44 N. C., 245. There was, therefore, in the ruling of his Honor.

PER CURIAM. No error.

STATE v. HENRY M. LONG.

1. Where there are three counts in a bill of indictment, and testimony was offered with respect to one only, a verdict, though general, will be presumed to have been given on that count to which the testimony was applicable.

2. Where a negro, having a jug, was seen going, in the night-time, into the house of one who kept spirituous liquor for sale, and after a delay of ten minutes returned with his jug containing liquor, it was certainly not erroneous in a judge to instruct the jury they might infer that the liquor was purchased of the owner of the house.

INDICTMENT for trading with a slave, tried before *Caldwell, J.*, at the last term of COLUMBUS.

The indictment contained three counts. The first charged that the defendant "did unlawfully sell to Luke, a negro slave, one gill of spirituous liquor," the said slave not having a permission to buy, etc.

The second count, which is the more material one, from the
(25) view taken of the case by this Court, was as follows:

"And the jurors aforesaid, upon their oath aforesaid, do further present, that Henry M. Long, late of the county aforesaid, on the day and year aforesaid, in the night-time of the same day, between the hours of sunset and sunrise, at and in the county aforesaid, unlawfully did trade with Luke, a negro slave, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

The third count charges that the defendant "did unlawfully deliver to Luke, a negro slave, one gill of spirituous liquor," without the slave having a written permission.

Nathaniel Soles, a witness for the State, testified that he was at the house of the defendant on a certain night, about 8 or 9 o'clock; that he heard a noise like a tap on the door; that the defendant opened it, and he saw a negro at the door, but who it was he did not know; that he knew a slave named Luke, the property of James Beach, but whether it was Luke or not, he could not say; that after the negro came to the door, the defendant went out, and shortly afterwards came back into the house with a jug that would hold a quart or more, which he filled with liquor out of a barrel, and carried it out; that after a while the defendant came back without the jug.

Daniel P. Beach testified that he was the son of James Beach, the owner of Luke, that he went to watch whether the defendant traded with the said slave; that early in the night he saw Luke go towards the house of the defendant with a jug, which held between two and three quarts; that he (witness) was about 25 yards from the house; that the negro remained some ten minutes, and returned with the jug, which then had liquor in it. The witness stated that he did not know whether the jug had liquor in it when the slave went toward the defendant's house or not. It was insisted by the defendant's counsel that there was no evidence before the jury that the trading spoken of by the two witnesses was one and the same transaction.

(26) The court charged that there was evidence to submit to them that it was the same transaction, of the weight of which they were the proper judges; that they had the right to convict on circumstantial evidence, and that men had been hanged on that kind of evidence.

The jury retired and remained out till next day, when they reported that they could not agree. Thereupon, the court recapitulated the

evidence, and then said there were three kinds of presumptions as laid down by a greater master of the law—a violent presumption, that weigheth much; a probable presumption, that weigheth but little; and a slight presumption, that weigheth not at all; and he put a case of violent presumption, to wit, where a man was seen rushing out of a room with a bloody sword in his hand, and on going into it another was found weltering in his blood; it was a strong presumption that he who came out with a bloody sword was the perpetrator, and the court left it to the jury to compare the two cases. Defendant's counsel excepted.

Verdict for the State, judgment, and appeal.

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

BATTLE, J. Though there were three counts in the bill of indictment, the testimony was offered with reference to the second only, and therefore the verdict, though general, must be presumed to have been given on that alone. Such would be the case where there were two counts in a civil action; as, for instance, in the action of *assumpsit,* and we do not see why the same rule should not apply to two or more counts in an indictment. *Jones v. Cooke,* 14 N. C., 112; *Morehead v. Brown,* 51 N. C., 368.

The only inquiry, then, is whether his Honor in the court below erred in his charge to the jury in reference to the testimony given on the second count. The counsel for the defendant contends that he did, for he insists that the testimony of neither of the two witnesses, Soles or Beach, was, alone, sufficient for the conviction of his client, and that to make a case of guilt it must appear that both testified (27) to the same transaction, and of that, he insists, there was no evidence. The cases cited by the counsel show clearly that nothing is to be considered evidence to be left to the jury tending to prove a fact which merely raises a conjecture of that fact. We approve of those cases and feel bound by their authority, but we do not think they apply to the case now before us. The charge of the judge was not confined to the tendency of the testimony to show the identity of the transactions spoken of by the two witnesses. Even as to that there was some evidence, however slight it might be, and his Honor had no right to withdraw it from the consideration of the jury. Each witness stated that there was a negro man, a jug which would hold a quart or more, and that the negro went to the defendant's house early in the night. So far, there was some correspondence in their testimony, and though

it may have fallen far short of raising a violent presumption of identity, which weigheth much, it was more than that slight presumption which weigheth not at all. But his Honor went further in his remarks upon the effect of the evidence, and, as we understand it, left it to the jury to decide whether the testimony of Beach alone was not sufficient to justify the conviction of the defendant. It was to that testimony that the illustration of a violent presumption, which he gave, was not applicable; and it seemed to strike the jury, as it has struck us, as being very forcible to show the defendant's guilt. If a negro be seen going to a house in the night with a jug, and, after staying there only ten minutes, returns with liquor in the vessel, we think a jury may very reasonably infer that the liquor was purchased of the owner of the house, and this inference is rendered almost a certainty when it is shown by other evidence that the owner had liquor for sale. We think that there is.

PER CURIAM. No error.

Cited: Wilson v. Tatum, 53 N. C., 302; *S. v. Baker,* 63 N. C., 281; *S. v. Leak,* 80 N. C., 405; *S. v. Thompson,* 95 N. C., 600; *S. v. Stroud, ib.,* 632; *S. v. Cross,* 101 N. C., 789; *S. c.,* 106 N. C., 651; *S. v. Toole, ib.,* 741, 744; *S. v. Brackville, ib.,* 710; *S. v. Gilchrist,* 113 N. C., 676; *S. v. May,* 132 N. C., 1021; *S. v. Gregory,* 153 N. C., 647.

(28)

JOHN G. POWELL & CO. v. ROBERT INMAN.

A note given to one in failing circumstances, in order to cheat his creditors by giving to the maker a plausible pretext for claiming his property, is void in the hands of one to whom it was endorsed for collection, after becoming due.

DEBT on a sealed note, tried before *Heath, J.,* at Spring Term, 1859, of COLUMBUS.

The defendant pleaded "General issue, no assignment, and illegal consideration."

The note in question bore date 29 January, 1857, and was for the payment of $370 on 1 March, ensuing. It was endorsed by Jesse Inman, the payee, to the plaintiffs, on 18 March, 1857, for the purpose of enabling them to collect it, as agents.

The defendant offered to prove that Jesse Inman was pecuniarily embarrassed; that executions were in the hands of officers; that it

was agreed between the maker of the note and the payee that the former should set up a fraudulent claim to all the personal property of the payee, and for the purpose of giving color to the transaction the note in question was made; that it was never intended to be paid, but was to be given up by the said Jesse, who was to remain in possession of the said personal property. The plaintiff's counsel objected to the reception of this testimony, and it was ruled out by the court. Defendant's counsel excepted.

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

Strange for plaintiffs.
Leitch for defendant.

BATTLE, J. The endorsement by the payee of the note sued on after it was due, for the purpose of enabling the plaintiffs to collect it as his agents, did not confer upon them any greater right, as against the maker, than the payee himself had. If, as against the payee, the note was liable to the objection of having been given upon an illegal consideration, he certainly could not be allowed to obviate the (29) difficulty by assigning it to an agent to collect for him. The law denouncing a contract founded in fraud would be untrue to itself if it allowed itself to be defeated by so simple and obvious a contrivance.

We must, therefore, treat the present suit as if it were brought in the name of the payee, Jesse Inman, instead of his endorsees and agents, the plaintiffs. So treating it, we are clearly of opinion that the testimony which was offered for the purpose of showing that the note was executed with the fraudulent intent to cheat the creditors of the payee, by giving to the maker a plausible pretext for claiming all his property, ought to have been received, because, if true, it furnished a complete defense against the action.

No principle is better established than that a contract the consideration of which is the doing of an act, either *malum in se* or *malum prohibitum,* is void, and no action at law can be sustained upon it. *Sharp v. Farmer,* 20 N. C., 255; *Blythe v. Lovingood,* 24 N. C., 20; *Ramsay v. Woodard,* 48 N. C., 508; *Ingram v. Ingram,* 49 N. C., 188. Here the consideration upon which the bond was given was manifestly illegal, its object being the purpose of hindering and defeating the creditors of the payee, and out of such an illegal contract no action can accrue to him. *Ex dolo malo non oritur actio.* It can hardly be necessary to remark that the fact of the note being under seal cannot prevent the legality of the consideration upon which it was founded from being inquired into. A seal may prevent the inquiry whether

the instrument was given without any consideration, but not whether the consideration was contrary to the policy of the law, and, therefore, illegal and void. See *Garner v. Qualls,* 49 N. C., 223. Our opinion being that there was error in rejecting the testimony to which we have adverted, the judgment in the court below must be reversed, and a *venire de novo* awarded.

PER CURIAM. Error.

Cited: Melvin v. Easley, post., 372; *Powell v. Inman,* 53 N. C., 437.

(30)

CALVIN WOOLEY, ADMR., v. ALEXANDER ROBINSON.

1. Where a plaintiff obtained a verdict, and is entitled to a judgment thereon, under the statute, Rev. Code, ch. 31, sec. 75, he is entitled to full costs, unless otherwise directed by statute, which are to be taxed by the clerk.
2. The taxation of costs by the clerk is subject to the supervision and control of the court, and objections to the taxation of witnesses on account of the excessive number or impertinence, or because not tendered, will receive the consideration of the court upon a rule obtained for the purpose, but they do not affect the form of character of the judgment itself.
3. Where a party is apprehensive that the clerk will err in the taxation of costs, he should move the court for special directions to the officer as to taxing the costs.
4. Where several articles are sought to be recovered in a declaration containing a single count, a portion of which plaintiff succeeds in recovering, and as to the residue fails, the witnesses examined solely as to the articles not recovered are not necessarily to be excluded from the bill of costs, but may be taxed subject to exceptions for excess in number or irrelevancy.

MOTION as to the taxation of costs, heard before *Shepherd, J.,* at a Special Term, 1859, of MONTGOMERY.

The question in this case arose in an action in detinue, which was tried at this term, wherein the plaintiff, as the administrator of Sarah Robinson, sought to recover from the defendant "five slaves," "six parlor chairs," and "one bed and furniture." The defendant claimed the slaves as a gift from plaintiff's intestate, and adduced in evidence a deed of gift, which the plaintiff attacked on the ground that his intestate was *non compos mentis.* Nine witnesses were offered and examined by the plaintiff, and a larger number by the defendant. Two of the nine were examined by the plaintiff as to all the property sued for, the other seven only as to the five slaves. The jury found that the

defendant detained the parlor chairs and the bed and furniture, but did not detain the slaves.

Upon this finding, the court gave judgment that the plaintiff recover the said chairs and the bed and furniture and all his costs, to be taxed by the clerk, from which the defendant appealed. (31)

Ashe for plaintiff.
Kelly for defendant.

MANLY, J. The judgment of the court below is in the precise language of the statute. It was enacted (Rev. Code, ch. 31, sec. 75) that "in all actions whatsoever the party in whose favor judgment shall be given, or, in case of nonsuit, dismission, discontinuance, or stay of judgment, the defendant shall be entitled to full costs, unless where it is or may be otherwise directed by statute." As there was a verdict and judgment below for the plaintiff, it follows that there should also be a judgment in his favor for full costs, to be taxed by the clerk. Where a party is entitled to a judgment for costs, he is, under our statute, entitled to all his costs, or full costs.

This Court, in interpreting the Revised Statute, ch. 31, sec. 79, which is, in substance, the same as the above section of The Code, settled the law as above stated. *Costin v. Baxter,* 29 N. C., 111. While the law is thus plainly written, however, it often happens that difficulties arise as to what are a party's full costs. By section 74 of the Revised Code, ch. 31, it is provided, "at the court where the cause shall be finally determined the party recovering judgment shall file in the clerk's office the witness tickets, the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party: *Provided,* that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact." And it has also been long held to be a practical duty with the court to direct witnesses not to be taxed, or strike them out from the bill of costs, and leave them to be paid by the successful party who summoned them, not only where there has been more than the requisite number to a fact, but also where it appears that any have been immaterial or not tendered. Under the general order, therefore, for the taxation of costs in this case, if the defendant apprehended there might be errors on the part of the clerk to his prejudice in respect to certain witnesses, this apprehension (32) might have been brought before the court upon a rule and special directions obtained, if a proper case had been made out. Whether upon a scrutiny of the testimony, made in this way, it may not have become the duty of the court to exclude witnesses from the taxed bill of costs, we have no means of determining. The fact *per se* stated on the record

did not, in our opinion, require of the court the exclusion demanded. Where several articles are sought to be recovered in a declaration containing only a single count, a portion of which plaintiff succeeds in recovering, and as to the residue fails, the witnesses examined on the parts only as to which the plaintiff failed are not, *ipso facto*, to be excluded from his bill of costs, but may be taxed subject to exceptions for excess of number or impertinence as above stated.

We think the judgment of the Superior Court was right.

PER CURIAM. Affirmed.

Cited: Loftis v. Baxter, 66 N. C., 342; *Vestal v. Sloan,* 83 N. C., 557; *Horton v. Horne,* 99 N. C., 221; *Cook v. Patterson,* 103 N. C., 129 *Whitford v. New Bern,* 111 N. C., 272; *Beckwith ex parte,* 124 N. C., 115; *Hobbs v. R. R.,* 151 N. C., 136; *Cotton Mills v. Hosiery Mills,* 154 N. C., 466; *Chadwick v. Ins. Co.,* 158 N. C., 381.

CANDACE LUCAS v. GILBERT R. NICHOLS.

1. Where one, threatened with a suit for slander, gave a sum of money to another to indemnify him against loss by such a suit, and to that end took from such party, a bond in a penalty, conditioned to save him harmless, it was *Held,* such bond and arrangement were not competent as an admission of defendant's guilt.
2. Words which impute to a female, a wanton and lascivious disposition only are not actionable.
3. Words of doubtful import, one sense of which may, however, be considered slanderous, were properly left to the jury to determine in what sense they were meant.
4. Words spoken after an action brought cannot be brought in to the aid of doubtful or ambiguous words, so as to give them the character of slander.

SLANDER, tried before *Caldwell, J.,* at the last Fall Term of (33) MONTGOMERY.

The plaintiff was a single woman. The words alleged in the declaration were that "he," the defendant, "would give anyone $25 that would get her (the plaintiff) a young one." The words were spoken in October, 1856.

Further, it was alleged, and stated by two witnesses, that the day after Christmas, 1856, the defendant said of the plaintiff, "she had got a new sweetheart, Wesley Dean's Pete; it used to be Ben Lucas and sometimes Jake Calicoat"; that all three of these persons, Pete, Ben,

and Jake, were slaves, belonging to persons of the surnames attributed to them, and lived in the neighborhood of the plaintiff.

Another witness testified that in June, 1857, after suit brought, he was asked by the defendant whether he thought the plaintiff would injure him, and on receiving an equivocal reply, he said "he would do her some," for he had been told she had two or three black children.

There was much contradictory testimony as to whether the defendant had used the language ascribed to him by the plaintiff as being used in December, 1856.

The plaintiff offered to prove that before suit was brought the defendant paid two persons by the name of Haltom and Northcott $200, and they executed bond in the penal sum of $1,000 to indemnify the defendant against any judgment the plaintiff might recover against him. This was offered to confirm the plaintiff's witnesses as to the speaking of the words in December, 1856, and as an admission that he was guilty of speaking the words. This testimony was objected to by the defendant and rejected by the court. Plaintiff excepted.

The court instructed the jury that the words spoken in October were not actionable. Plaintiff excepted.

That as to the words spoken the day after Christmas, 1856, it was left to the jury to decide whether they were spoken or not, and, if so, whether it was the intention of the defendant, in the use of the language, to charge the plaintiff with having had sexual intercourse with the the said slaves, or either of them; that if such was the meaning the plaintiff would be entitled to their verdict. Plaintiff again (34) excepted.

That as to the words spoken after suit brought, the jury ought to regard them in aggravation of the damages, if they should find that the defendant intended to impeach the plaintiff's chastity in relation to either of the slaves; but they were not the foundation of the action, and could not be heard to explain the testimony antecedent to the bringing of the suit. Plaintiff again excepted.

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

J. H. Bryan and Kelly for plaintiff.
Ashe for defendant.

MANLY, J. The evidence offered by the plaintiff on the trial of this cause and rejected by the court was properly rejected.

The bond taken by the defendant to indemnify himself against an adverse result of the suit was offered as pertinent to prove the plaintiff's case—the speaking of the words. If pertinent at all, it must be an admission of guilt, and we do not think such an interpretation can be

fairly put upon it. While it has been held of late, and especially by the American courts, that admissions of a certain class, made upon a negotiation for a compromise, are competent, mere propositions upon such a negotiation to pay for one's peace have uniformly been excluded. Indeed, there seems to be a marked distinction between an admission of particular facts and an offer of a sum of money to buy peace. If a direct offer to the party complaining, to buy peace, be excluded, no good reason is perceived why a security taken from an indifferent person, as an indemnity, should not also be excluded. If the first be excluded as impertinent and of no weight, so ought also the last. In the case of *Baumgarner v. Mauney,* 32 N. C., 121, it is decided that the record of the removal of a cause from one county to another is not relevant (35) nor proper evidence to be submitted to a jury on the trial of a cause. The principle there settled seems to be the same with that involved in the point now before us—that an act done to secure one's self against the contingency of loss in an impending lawsuit is not, of itself, an admission of anything that ought to be received and weighed by the jury. Such acts might be calculated to prejudice a party, but could not shed any legitimate light upon the issues of a cause.

The only rule of evidence which seems to be in conflict with this general principle is the admissibility of a culprit's flight to prove his guilt. This act, however, is of a higher and different order of significance than such as we have been considering, and in the judgment of our courts has been apparently regarded as an exception to the rule.

We entirely concur with his Honor in the court below in the opinion which he expressed as to the character of the words spoken in October. They do not charge *incontinency,* and, therefore, are not actionable. Incontinency means want of restraint in regard to sexual indulgence, and imports, according to our statute definitive, *illicit* sexual intercourse. The worst interpretation that can be put upon the words is a charge of a wanton or lascivious disposition, and the words do not necessarily imply that.

With respect to the third exception, that is, the instructions of the judge as to the words spoken the day after Christmas, we are also of opinion there was no error. These words may have been intended to convey to the hearers a charge of incontinency. They are susceptible of that meaning, but that is not the only one which may be put upon them. In the mildest sense, it is true, they are grossly indecent and insulting, but may, nevertheless, signify something short of an actual surrender of her person to the embrace of any one of the slaves mentioned, viz., a grossly depraved and wanton inclination. And the imputation of such a temperament is not a charge of incontinence, as was settled in *Mc-*

Brayer v. Hill, 26 N. C., 136. The words used being ambiguous and capable of a double interpretation, it was proper for the judge to leave it to the jury to decide, under the circumstances, whether (36) it was intended thereby to charge the plaintiff with having had sexual connection with either of the slaves mentioned. *Woolworth v. Meadows,* 5 East, 463, is the leading case upon this point, and establishes the principle here stated, and has since been followed, we think, with uniformity.

The fourth and last exception presents the point whether certain words used by the defendant after the suit was commenced may be considered by the jury as an *explanation* of certain other words spoken before, and which constituted the foundation of the action. This exception is based upon the hypothesis that the words for which the action was brought were not, in themselves, or connected with the circumstances under which they were spoken, sufficiently pointed or significant to convey the idea of incontinence, and thus amount to a slanderous charge; but the words afterwards used gave them this point and significance. The fallacy of the point made in the exceptions seems to us manifest. Words to be actionable, must convey to the minds of hearers, at the time, some slanderous charge, and if unsusceptible of such a sense, or if not taken in that sense, then they cannot be helped or interpreted by subsequent words, or acts, so as to make the former words the foundation of a suit. This would be applying the doctrine of relation to cases not heretofore supposed to be within its range.

We think there was

PER CURIAM. No error.

Cited: Reaves v. Bowden, 97 N. C., 32; *S. v. Moody,* 98 N. C., 672; *McCall v. Sustair,* 157 N. C., 181; *S. v. Howard,* 169 N. C., 313.

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(37)

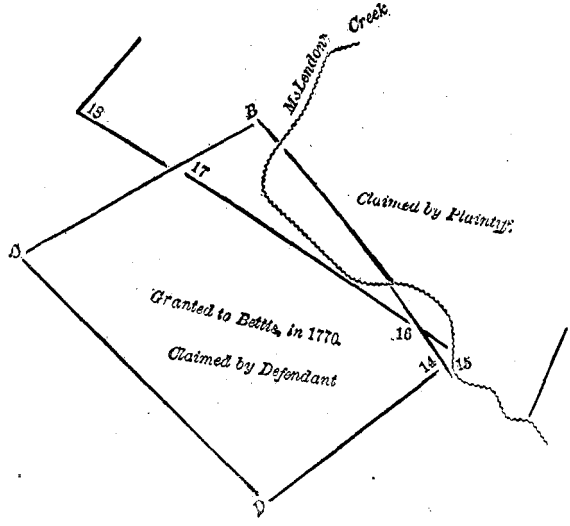
DOE ON THE DEMISE OF ISAAC CLEGG v. JOHN FIELDS.

1. The *opinion* of a surveyor as an expert is competent to show that certain marks on a tree, claimed as a corner, were corner or line marks; but is not admissible to show that it was the corner or a particular grant.

2. Where the only question in an action of ejectment was whether there was an outstanding title superior to that of the plaintiff, it was *Held* not to be material for the jury to consider whether the defendant's title connected with it or not.

EJECTMENT, tried before *Heath, J.,* at a Special Term (November), 1859, of MOORE.

The plaintiff made out a case which, it is admitted, entitled him, *prima facie,* to recover according to his lines as laid down in the annexed diagram, 14, 15, 18, etc. But the defendant claimed under a grant to



one Bettis, the land comprised in the quadrangle 14, B, C, D, dated in 1770, and older in date than plaintiff's claim, which only went back to 1803. The *locus in quo* is the triangle 17, B, 16, which is common (38) to the conveyances of both parties. There was no evidence that either of the parties, or their predecessors, ever had actual possession of this lappage until 1856, when the defendant cleared a field on it. The main question in this case was as to the location of the Bettis grant. Mr. Ray, by profession a surveyor, introduced by the defendant, testified that he had never had the corner tree pointed out to him, but going to the south side of McLendon's Creek, guided by the description in the grant, he found a tree marked as a corner, with pointers around and to it, and off from this an old marked line from 14 to B, and thence an old marked line from B to C; that he then did no further actual surveying, but platted the land according to the course and distance, and laid it down as represented in the diagram. He stated further that about ten years ago he went, as a surveyor, to the same tree; that the marks were then plainer, and the tree just such as that described in the grant. Upon this statement he expressed an opinion that the grant to Bettis covered the *locus in quo.* To this opinion the plaintiff's counsel objected, but the court admitted the answer of the witness in evidence.

The court charged the jury, in reference to the testimony of Ray, that his opinion, as that of a man of skill and science, was admitted for the purpose of showing that the marks upon the tree, claimed as a corner, were corner or line marks, but not admitted to show, as a question of science, that this was the corner or these the lines of Bettis's grant. The court informed the jury that they must determine for themselves whether this tree, claimed as a corner, and these lines, from 14 to B, and from B. to C., were, in fact, the corner and the lines of the Bettis grant, and whether the defendant had satisfied their minds that this grant was so located as to include the trespass; for that, as the lessor of the plaintiff had shown a *prima facie* case, the burden was on the defendant to show the location of this grant to entitle him to their verdict. Plaintiff's counsel excepted.

The counsel for the plaintiff argued, and asked the court to charge the jury, that the defendant, not having been in actual possession of the lappage until 1856, had shown no title to the *locus in quo*. (39)

The court refused to give this charge, but instructed the jury that it was immaterial whether the defendant had title or not, provided the Bettis grant had been located to their satisfaction; for that, if that grant was located by the defendant, then the possession of the *lappage* would be in those claiming under Bettis, as having the older title. Plaintiff's counsel again excepted.

Verdict and judgment for the defendant. Plaintiff appealed to this Court.

Person for plaintiff.
Kelly for defendant.

MANLY, J. The record of the trial below does not disclose any error of which the plaintiff can justly complain. The opinion which the surveyor was allowed to express as to the location of the Bettis grant would be erroneous if the jury had not been guarded from considering it for any improper purpose.

The court informed the jury that "the surveyor's *opinion*, as that of a man of skill and science, was admitted for the purpose of showing that the marks upon the tree claimed as a corner were corner or linemarks, but not admitted to show, as a question of science, that this was the corner or those the lines of the Bettis grant." The court informed the jury that "they must determine for themselves whether this tree, claimed as a corner, and the two lines, from 14 to B, and from B to C, were, in fact, the corner and the lines of the Bettis grant, and whether the defendant had satisfied their minds that this grant was so located as to include the trespass." Subject to this modification, the opinion was

left to the jury to be considered and weighed by them as other evidence, and for the purpose thus explained we think it was legitimate. The matter embraced in this exception has been so recently discussed and
(40) explained in this court, in *Stephens v. West,* 51 N. C., 49, that we deem it unnecessary to say more. It will be found by a reference to *that* case that the judicial officer who tried *this* below was careful to keep strictly within the limits there assigned to the *opinions* of a surveyor as an expert. That case, being entirely approved, covers the whole ground of the first exception.

With respect to the other, in reference to the instructions asked for and refused, it is obvious the court below was correct. It will be observed that if the Bettis grant were located so as to cover the land in dispute, there would be in those who claimed under him an older and, therefore, a superior outstanding title, and the plaintiff could not recover upon a plain principle governing this form of action. The jury had already been told that the plaintiff had made out a *prima facie* case, and was entitled to recover unless the grant to Bettis was located as the defendant contended. It was, therefore, not material whether the defendant had shown title in *himself.* Upon the hypothesis submitted, he had shown it out of the plaintiff, and that was sufficient to defeat the action. The plaintiff had already had the benefit of all proper instructions in his behalf, and the additional instructions asked for were without point, and properly refused.

PER CURIAM. No Error.

Cited: Thomas v. Hunsucker, 108 N. C., 723.

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(41)

DOE ON DEMISE OF A. S. McKAY v. SAMUEL GLOVER ET AL.

1. A note given for rent, reciting that the maker was the tenant of the payee, and had been for ten years, is evidence to qualify and explain the then possession, but it cannot run back and prove a tenancy for any length of time.
2. If plaintiff, in ejectment, shows title to any part of the land contained in the demise, which is in the defendant's possession, the jury may render a general verdict. Or they may, under the direction of the court, find specially so as to enable the parties to run their lines.
3. Where several defendants are sued in ejectment, and one of them shows color of title and seven years possession, distinct from the possession of the others, the defense of the one can in nowise avail the others.

EJECTMENT, tried before *Caldwell, J.,* at the last term of ROBESON.

The defendant insisted, against the right set up by the plaintiff,

that although he claimed the premises under a title commencing subsequent to that of the plaintiff's lessor, he was protected by a seven years possession under color of title. The color relied on was the will of Angus Gilchrist, conveying the land in question to his wife and two children, James and John; and the possession relied on was that of one Samuel Glover, who entered in 1842 upon the land, but it was doubtful as to the character and extent of his possession. There was evidence going to show that he went in under a contract to purchase 75 acres, which was laid off to him and marked, and that he claimed no further than to these marks from that time till 1852, when he gave John Gilchrist the following paper-writing:

On the first day of January next, I promise to pay John Gilchrist, or order, 25 cents for rent of land on which I entered as his tenant in the year 1842, and have cultivated as tenant since that time, this 24 February, 1852. SAMUEL GLOVER.

Witness: J. W. BRYAN.

The defendant offered this paper as evidence of their holding under Angus Gilchrist ever since 1842; but it was objected to as being only the declaration of the defendants Glover and Gilchrist, and, therefore, incompetent for any purpose; but his Honor held that it (42) was evidence to prove that in 1852, the date of the instrument, Glover held as the tenant of Gilchrist; but that it was not evidence of a tenancy running back to 1842, or for any length of time. Defendant's counsel excepted.

As to two of the defendants, Brown and McPhall, it did not appear when or under whom they entered or claimed, or at what time their possessions began, but it did appear that they were not in possession of any part of the 75 acres marked off to Glover.

The court charged the jury that the will of Gilchrist was color of title; that if it covered the 75 acres marked off to Glover, they should find a verdict in his favor.

The counsel for the defendants then moved the court to charge that if the jury should find a verdict in favor of Glover, they ought also to find in favor of the other defendants, Brown and McPhall. The court refused the instruction as asked, and told the jury that, according to the testimony, the possession of Brown and McPhall was not within the 75 acres laid off to Glover; that if they were satisfied that previously to 1852 Glover entered and held the 75 acres, under a contract of purchase, and that he claimed to the lines made to designate that tract and no further, the other defendants could take no benefit from his possession, and were not entitled on that account to their verdict. The defendants again excepted.

The jury found a general verdict for the plaintiff against all the defendants.

On a rule for a new trial in the court below it was objected that the verdict, being general, was wrong, for that the jury ought to have found specially. But the court overruled the objection, and gave judgment according to the verdict, from which the defendants appealed.

Strange and Person for plaintiff.

(43) *Kelly, Leitch and Wm. Mc.L. McKay for defendants.*

Pearson, C. J. In respect to the question of evidence, growing out of the instrument of writing executed by Glover in 1852, we concur with his Honor. The instrument was competent evidence of a tenancy at that time, but it could not be extended and act so as to cover past time back to 1842. Such declarations, whether written or verbal, are admitted on the principle of the *res gestæ,* as explanatory of the act of possession, and, of course, must be confined to the present, and cannot be extended either to past or future time; in respect to which such declarations are "naked," that is, unaccompanied by any act of which they make a part.

The instruction that if the jury should find in favor of Glover, they should also find in favor of the other defendants, Brown and McPhall, was refused, for the reason that, according to the testimony, their possession was not within the *seventy-five* acres laid off to Glover, and in respect to which it was supposed in the previous instruction the title of Gilchrist had ripened, and if the possession of Glover, prior to 1852, was confined to the 75 acres, a verdict for him in respect to that could not avail them. This, we think, supports his Honor's conclusion. But the point seems to be cut off by a general verdict against Glover as well as the other two defendants.

On the motion for a new trial defendants' counsel objected that the verdict, being general, was wrong, for that the jury ought to have found specially. It is well settled that if a plaintiff succeeds in showing title to any part of the land contained in the demise, of which the defendant is in possession, the jury may return a general verdict, although, as to the other part, the plaintiff failed to show title. The court may, in its discretion, direct the jury to find specially, so as to run the line between the plaintiff and defendant; but the usual course is not to complicate the inquiry, and to allow a general verdict if the plaintiff makes out his case as to any part of the land held by the defendant, and the plaintiff then takes out a writ of possession at his peril. There is

Per Curiam. No error.

Cited: Springs v. Schenck, 99 N. C., 556; *Janney v. Robbins,* 141 N. C., 407.

Distinguished: Cowles v. Ferguson, 90 N. C., 312.

(44)

DOE ON THE DEMISE OF THOMAS BAILEY ET AL. v. SAMUEL BAILEY.

1. Where the maker of a deed of gift handed it to one, with instructions to hold it till he called for it, and died without ever having called for it, it was *Held* that there was no delivery of the deed.
2. It was *Held* further, that this expression in the donor's will subsequently made, viz., "I give and bequeath to my son S., in addition to what I had given him by deed of gift," certain notes, etc., was not a sufficient reference to the deed above mentioned to incorporate it into the will and so pass the land.
3. *Held* further, that parol evidence was not admissible to show that this was the deed of gift referred to in the will; and,
4. Further, that an entry on the back of the deed of gift made by the draftsman, "Deed of gift of land," was not admissible for any purpose.

EJECTMENT, tried before *Caldwell, J.,* at the last Fall Term of ANSON.

The parties on both sides claimed under one John Bailey, and the lessors of the plaintiff and the defendant are heirs at law. In 1841 the said John executed two deeds of gift in favor of the defendant, bearing the same date, one for the land in question and the other for slaves and other property, and placed them in the hands of one Boggan, with instructions to hold them till he called for them. He never did call for them, and they remained in Boggan's possession until John Bailey's death. In 1844 said Bailey executed his last will and testament, in which is the following clause: "I give and bequeath to my son Samuel Bailey, in addition to what I have given him by deed of gift, the principal of the notes of hand which I now hold," etc.

The defendant offered to prove that on the back of the deed for the land there was an indorsement by the draftsman in these words, "Deed of gift for land." The testimony was objected to and rejected by the court. Defendant excepted.

The defendant contended that the deed of gift was sufficiently referred to in the will to make it a part thereof, and that if it was not, he proposed to prove by parol which deed was referred to by the will, insisting that it was a latent ambiguity. His Honor held the testimony inadmissible, and charged the jury that the land did not pass by the

(45) deed, because there was no evidence that it had been delivered; and that it did not pass by the will, because there was not a sufficient description to identify the deed and to bring it in as part of the will. The defendant again excepted. Under these instructions the jury found a verdict for the plaintiff, and the defendant appealed.

Ashe for plaintiff.
No counsel for defendant.

BATTLE, J. There was certainly no delivery of the deed in question. The donor never intended to part with his control over it. Mr. Boggan took it, and was to keep it, not for the donee, but for the donor himself; and there was, therefore, the want of an essential ingredient of a delivery, to wit, the putting it out of the possession of the donor without his retaining any power or authority to control it. *Baldwin v. Maltsby,* 27 N. C., 505; *Phillips v. Houston,* 50 N. C., 302.

As there was no delivery of the instrument to make it operate as a deed, another question arises, Was it so incorporated in the alleged donor's will as to make it operate as a devise of the land to the defendant? It is very clear that the clause of the will relied upon for that purpose cannot have that effect. There is no particular deed of gift described, or referred to, and therefore the uncertainty and ambiguity is patent upon the face of the will and cannot be aided by parol proof. *Chambers v. McDaniel,* 28 N. C., 226.

The testimony offered and rejected was manifestly irrelevant and incompetent. We are not certain that we know for what purpose it was offered; and we are very sure that we cannot perceive any purpose it could have answered. It formed no part of the instrument, and it could not prove, or tend to prove, a delivery; and we are surprised that it was offered at all.

PER CURIAM. No error.

Cited: Siler v. Dorsett, 108 N. C., 302; *Wetherington v. Williams,* 134 N. C., 281; *Watson v. Hinson,* 162 N. C., 80.

(46)

JOHN SCOGGIN v. JOHN H. DALRYMPLE.

The declaration of a deceased person is admissible to establish a corner tree which was not in view at the time of the declaration, but the position of which was so described by the declarant as to enable the witness, to whom he spoke, to find it.

TRESPASS q. c. f., tried before *Shepherd, J.*, at a Special Term (November), 1859, of MOORE.

In order to establish the boundary of a grant under which he claimed, the plaintiff introduced one Morris, who stated that he was the son of Peter Morris, a chain-carrier at the survey of the entry for the grant; that his father, who was dead when the witness testified, had pointed out to him a corner as the third corner, and told him that there were other corners which he (witness) could find in certain directions; that he made search and found marks, which he has since known, and that he pointed them out on the survey of the disputed land. The survey of the land was made partly by the information of Morris, and found to correspond mainly with his statement as to the first line and corner. The defendant's counsel objected to the declarations of Peter Morris, unless he showed the line or corner at the time; but the court admitted the whole statement, and the defendant excepted.

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

Person for plaintiff.
Kelly and Neill McKay for defendant.

MANLY, J. Traditionary evidence has long been received by the courts of North Carolina in questions of private boundaries, as well as public. This has been recognized by the judges as a departure from the rules of the common law, but, nevertheless, it has been adhered to without deviation. It is now settled that hearsay from a deceased person is competent in questions of boundary between private estates.

(47)

The necessity for such a departure from the common-law principle grew out of the inartificial manner in which the lands of the State were originally surveyed and marked, making it necessary, in order to fix the position of the respective parcels, to resort more frequently to tradition, and to give this kind of evidence greater efficiency by enlarging its limits. Whatever may have been the *reason,* this extended use of hearsay, according to the rule above laid down, is now firmly established.

The precise point, and the only one presented in the bill of exceptions, is whether the declaration of a deceased person is admissible to establish a corner tree, which is not in view at the time of the declaration,

but the position of which is described by the declarant, so that it is found by a witness.

We can perceive no reason why such testimony is not admissible. The hearsay becomes definite by the aid of the witness, who, following the directions given, finds the tree, and while it might be considered as of doubtful admissibility, disconnected from the evidence of the living witness, yet, aided by that, it seems to us clearly competent. We do not wish to be understood as laying down a rule that declarations of deceased persons as to corner or line trees not in view would be incompetent. That might depend upon whether their positions were so defined by the declarant as to make it practicable to identify them, or prove their location to the satisfaction of the court and jury. The point before us is whether the hearsay evidence offered, connected with the other testimony giving it definiteness, was properly left to the jury, and that only we undertake to decide.

The force of the proof would, of course, depend upon the identification of the tree found with the tree meant by the deceased, which was properly submitted as a matter of fact, we suppose, to the jury. Assuming it to be the tree meant, it was established to be a *corner* by *proof* equal to the case of the deceased, on the spot, placing his hand upon the tree and making the declaration; and more cogent than the declaration of the deceased showing a spot where (as he said) a corner tree
(48) had stood, or showing a stump upon which a marked tree once grew; and yet, these two latter cases, as well as the first, have been sanctioned by judgments of this Court. The case now before us is stronger than the last mentioned, for the reason that when witnesses are equally credible, a fact which is irrefragibly inferred from other facts established by separate witnesses is more credible than if one witness had sworn to it. The pertinency and force of these considerations will be seen when we advert to the ground of the objection to the evidence, viz., its want of definitiveness and significance. *Mendenhall v. Cassels,* 20 N. C., 43, was an attempt to show, by common reputation, that a parcel of land of 100 acres was embraced somewhere within four grants of 12,500 acres each. The Court said that was too indefinite to amount to any evidence of the fact, and excluded it. In that case there was no ancillary proof to give point or location to the hearsay.

Our conclusion is, it was not error in the judge to allow the entire declarations of the deceased person, connected with the other testimony in the cause, to go to the jury.

PER CURIAM. No error.

Cited: Westfelt v. Adams, 131 N. C., 383; *Lumber Co. v. Tripletts,* 151 N. C., 412.

(49)

STATE ON THE RELATION OF CHARLES HOLLOMAN ET AL. v. SAMUEL LANGDON ET AL.

Where the money was paid to the deputy of a clerk and master, after the term of office of his principal had expired, although he was still acting without being reappointed and without giving a new bond, it was *Held* that this was no breach of the official bond he had formerly given.

DEBT, tried before *Caldwell, J.*, at the last term of BRUNSWICK.

The plaintiff declared for the breach of the official bond of S. B. Everett, clerk and master in equity of Brunswick.

The bond declared on was executed on 26 October, 1847, at which time said Everett was appointed to the office. He never was reappointed, and never gave any other bond. It appears of record in the archives of the court of equity aforesaid that Everett resigned his office in 1853. In 1848 Samuel Langdon was appointed deputy to the said Everett, and acted as such during the whole time that Everett professed to act, viz., till 1853, at which time Langdon himself was appointed to the office of clerk and master of the said court. In 1852 the sum of $1,498.75 came to the hands of Samuel Langdon by virtue of a decree made in 1849 in the said court of equity, in behalf of the relators, for the sale of real estate. This money was never paid over to Everett, but was kept by Samuel Langdon, and was in his hands when he was appointed in 1853. He has never paid it to the relators of the plaintiff, or to any one else authorized to receive it. Everett died in ....., and S. B. Langdon was appointed executor. In 1847 an order was made for the said Langdon to pay the money to the relators, which, on demand, was not done. The foregoing facts were submitted as a case agreed, and the judgment of the court prayed thereon.

On consideration, the court decided that the plaintiff was not entitled to recover, from which judgment he appealed to this Court.

Person for plaintiff. (50)
E. G. Haywood and Strange for defendant.

PEARSON, C. J. As the term for which S. B. Everett was appointed clerk and master had expired before the money was paid to his deputy, there is no principle upon which an action can be maintained on his official bond; for, to make out a breach, it is necessary to prove that the money was received during the time covered by the bond. How far Mr. Everett may have subjected himself to the pains and penalties of the law for usurping the office, and acting without being reappointed and without executing the new bond which in case of reappointment he was required to execute, is a subject upon which we are not now at

liberty to enter. The case, *Chairman v. Daniel,* 51 N. C., 444, is put expressly on the ground that the appointment of those officers is for one year, *"and until a successor shall be appointed and enter upon the duties of the office,"* which distinguishes it from the case before us.

PER CURIAM. Affirmed.

THOMAS K. TORRANS v. EPHRAIM STRICKLIN.

1. A tenant from year to year who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises.
2. The abandonment of the premises by a tenant *non animo revertendi* remits the landlord to the possession, and he may defend it against all intrusion.

TRESPASS *quare clausum fregit,* tried before *Saunders, J.,* at the last Fall Term of DUPLIN.

The plaintiff, being the proprietor of the land in question, let it to the defendant on the following terms, viz., the defendant was to have the land to build and clear for two years, rent free, but after that he was to pay rent. He went into possession in 1848 and remained
(51) till March, 1855, when he left and went to a house of his own. In the month of April of that year the defendant returned to the premises and took some flooring out of the corn-crib and boards off of the smokehouse and carried them away. The defendant had built these houses and put in these planks, and had put on the boards. In doing so, whether these articles were fastened to the fabrics to which they belonged with nails was left uncertain by the testimony.

The court charged that, though the defendant had been a tenant from year to year, and as such was entitled to a notice to quit before he could have been turned out of possession by suit, yet, if he went out voluntarily, without insisting on such right, and the plaintiff took possession, and afterwards defendant returned and took away the plank and boards, he was a trespasser. Defendant excepted.

Under these instructions the jury found for the plaintiff, and after judgment the defendant appealed.

W. A. Wright and W. A. Allen for plaintiff.
No counsel for defendant.

MANLY, J. We are at a loss to perceive upon what point an exception to the trial below is intended to be put. One who surrenders a tenement which he has occupied as *a tenant from year to year,* and who goes back and removes the loose plank from a cabin commits a trespass unques-

tionably. The right of such a tenant to six months notice is not inalienable, and if he waive it and go out, and the landlord accept the surrender and go in, the right of the landlord to claim the rent surely ceases, and the correlative right of the tenant to exercise dominion in the premises must also cease. The tenant's abandonment *non animo revertendi* remits the landlord to the possession, and he may defend it against all intrusion, whether it occur one day or one year after abandonment, whether it be perpetrated by the tenant who has left or a stranger.

The legal rights of the parties are not changed by the fact that the house from which the planks or boards were taken was put (52) there by the defendant, upon the contract, stated in the case, or by the other fact that the planks were loosely laid upon the sills of the house and not nailed.

Upon the hypothesis put by his Honor, and affirmed by the finding of the jury, the defendant was out of possession and the plaintiff in, and the former had, therefore, no right to go upon the land without license.

With the principles here announced all parts of the charge are manifestly consistent.

PER CURIAM. No error.

STATE v. LAWRENCE DAVIS.

A free negro has a right to strike a white man to protect himself from great bodily harm or grievous oppression.

INDICTMENT for assault and battery, tried before *Saunders, J.*, at the last Fall Term of CRAVEN.

The battery was alleged to have been committed on one Edward Hart. The defendant was a free negro, residing within the limits of the town of New Bern, and the said Hart was, at the time of the transactions in question, a regularly appointed and qualified constable for the said town. Hart had received, and had in his hands, a notice directed to the defendant for him to show cause why he should not work on the streets as the penalty for not having paid his taxes. The notice was founded on the following ordinance of the town of New Bern:

"Ordered, that all free negroes who have not paid their taxes shall be made to work on the streets two days for each and every dollar of tax due the town by them, and if he refuses to do the same, upon due notice being given him, he shall pay a fine, at the discretion (53) of the mayor, not exceeding $10."

The officer, acting under the notice in his hands, arrested the defendant, and attempted to tie him, when the latter struck him.

Upon this state of facts the defendant's counsel contended that he was, in law, not guilty, and asked his Honor so to charge the jury, but he refused, and gave his opinion that, in law, he was guilty. Verdict and judgment for the State, and appeal by the defendant.

Attorney-General for the State.
McRae, Green and Hubbard for defendant.

PEARSON, C. J. The conviction of the defendant may involve the proposition that a free negro is not justified under any circumstances in striking a white man. To this we cannot yield our assent. Self-defense is a *natural* right, and although the social relation of this *third class* of our population, and a regard for its proper subordination, requires that the right should be restricted, yet nothing short of manifest public necessity can furnish a ground for taking it away absolutely; because a free negro, however lowly his condition, is in the "peace of the State," and to deprive him of this right would be to put him on the footing of an outlaw. So, while the law will not allow a free negro to return blow for blow, and engage in a fight with a white man, under ordinary circumstances, as one white man may do with another, or one free negro with another, he is not deprived, absolutely, of the right of self-defense, but a middle course is adopted, by which, in order to make out a justification for a battery on a white man, the free negro is required to allege and prove that it became necessary for him to strike in order to protect himself from great bodily harm or grievous oppression.

This conclusion is, we think, deducible from the adjudications of our courts, and considerations growing out of the abnormal state of society caused by the existence of free negroes in our midst, calling for a new application of the principles of the common law, the excellence
(54) of which consists in the fact that it is flexible and expands so as to embrace any new exigence or condition of society; so that, while on the principle of self-protection the paramount rights of the white population are secured, the rights of this inferior race are made to give place as far, but no farther, than is necessary for that purpose.

In *S. v. Jowers,* 33 N. C., 555, it is held that insolence from a free negro to a white man will excuse battery, in analogy to the principle which had been previously settled in respect to the insolence of a slave to a white man.

In *S. v. Cesar,* 31 N. C., 389, *Chief Justice Ruffin,* although he dissented in respect to its application to that case, concurred in the opinion that on a trial for homicide the rules applicable to white men were not applicable to the case of a slave killing a white man; that if

a slave receiving a slight blow should kill a white man with a deadly weapon, it would be murder, but if the blow was a severe one, inflicted under circumstances giving reasonable ground to apprehend great bodily harm, or if unusual circumstances of oppression occurred, there would be a legal provocation.

Without undertaking to decide that a free negro stands precisely on the same footing with a slave who strikes a white man other than his master or one having authority over him, we think it follows from the principles established by these cases that, although a free negro, upon receiving an ordinary blow, is not allowed to strike back and get into a fight with a white man, yet, if there be cruelty or unusual circumstances of oppression, a blow is excusable; because, in such a case, a resort to the natural right of self-protection is not inconsistent with that feeling of submission to white men which his lowly condition imposes and public policy requires should be exacted.

If in the case now under consideration the conviction of the defendant involves simply the proposition of law stated above, then we differ from his Honor in respect to its application. An officer of the town having a *notice to serve on the defendant,* without any authority whatever, *arrests him and attempts to tie him!* Is not this gross (55) oppression? For what purpose was he to be tied? What degree of cruelty might not the defendant reasonably apprehend after he should be entirely in the power of one who had set upon him in so high-handed and lawless a manner? Was he to submit tamely? Or was he not excusable in resorting to the natural right of self-defense?

Upon the facts stated, we think his Honor ought to have instructed the jury to find the defendant not guilty. There is error.

PER CURIAM. *Venire de novo.*

RICHARD C. WINDLEY, ADMINISTRATOR DE BONIS NON, v. JEREMIAH. GAYLORD.

1. There is nothing in the statute (Rev. Code, ch. 119, sec. 29) providing for a child born after the will of his parent was made, which forms an exception to the rule of law that an assent by an executor to the life-tenant is an assent to those in remainder.
2. The assent of an executor to a life-tenant, generally, leaves nothing that can vest in an administrator *de bonis non* of the testator.

TROVER for the conversion of slaves, tried before *Saunders, J.,* at the Fall Term, 1859, of BEAUFORT.

Drewry Lanier, by his will, made in 1843, gave all his property, real and personal, to his wife, Elizabeth, for her life, and at her death to his three daughters and to a child *in ventre sa mere* at the time the will was written. Afterwards, and before his death, which took place in 1843, his wife had two other children who were unprovided for, who are still living. His wife, Elizabeth, was appointed execu-
(56) trix, and having qualified and acted, she died in 1851, and the plaintiff was appointed administrator *de bonis non* of the testator Drewry.

The executrix, Elizabeth, took possession of the slaves in question as a part of the estate of the testator, and sold them to one John A. Gaylord in 1848, who sold and conveyed them to the defendant, and the two have had possession of them ever since. The writ issued in March, 1855. It was proved by the subscribing witness to the bill of sale from the executrix to Gaylord that she said, at the time of the sale, that she wanted to raise money to pay the debts of the testator.

It was contended on behalf of the defendant that the slaves were sold to Mrs. Lanier in the capacity of executrix, and that the full title passed by such a sale.

2. That she assented to the legacy to her for life, and that this was an asset to the legacies in remainder, so that there was no estate in these slaves that could vest in the administrator *de bonis non.*

3. That the defendant was protected by the statute of limitations.

The plaintiff contended that there was no evidence that Elizabeth Lanier sold in her capacity of executrix, or that there were any debts that made a sale necessary, and that such sale conveyed only her life estate, and that the statute of limitations did not begin to run until after the appointment of the administrator *de bonis non.*

His Honor left it to the jury to say whether or not Elizabeth Lanier sold as executrix, and the jury found that she did sell as executrix, and thereupon a verdict was entered for the defendant on the general issue.

Judgment for the defendant and appeal by the plaintiff.

W. B. Rodman for plaintiff.
Edward Warren for defendant.

BATTLE, J. The defense set up on the part of the defendant is full and complete in any aspect in which the case can be viewed. If
(57) the widow of the testator sold the slaves in question in her capacity of executrix, as it was found by the jury that she did, it is conceded that the purchaser acquired an absolute title. But the plaintiff contends that she sold as legatee, for that the finding of the jury that she sold otherwise is without evidence, and that, having sold as

legatee, the purchaser acquired only her life estate, leaving an interest in her as executrix, which, since her death, can be asserted by the plaintiff as administrator *de bonis non* of her testator. The counsel admits that in ordinary cases where the personal property is limited over after the death of the tenant for life, the assent of an executor or executrix to the life tenant would be an assent also to the ulterior legatee, and that in such case a sale of the absolute interest by the legatee for life could not, after the death of such legatee, be questioned by an administrator *de bonis non* of the testator, but only by the ulterior legatee himself. *Hailes v. Ingram,* 41 N. C., 477; *Quince v. Nixon,* 51 N. C., 289. He contends, however, that the rule is different where, by the provisions of the will, or the law, the executor has a duty to perform in relation to the property which requires that the title shall remain in him after the termination of the life estate, and for this he cites *Dunwodie v. Carrington,* 4 N. C., 355; *Allen v. Watson,* 5 N. C., 189. Those were cases where the duty was prescribed by the testator in his will. In the present case the counsel insists that the duty is imposed by the statute which makes provision for children born after the making of a will and unprovided for by their parents. See Rev. Code, ch. 119, sec. 29, *et seq.* We are clearly of opinion that no such effect can be given to the statute. It is true that section 30 requires that the petition, or bill, which it directs to be filed shall make the personal representative a party, but it also directs in section 37 that "the rights of such after-born children shall be a lien upon every part of the parent's estate until his several shares thereof shall be set apart." There is no necessity, then, for holding that an assent by an executor to a life estate shall not operate under the general rule, as an assent to the ulterior executory interests. In the (58) present case the argument is self destructive. If the statute for the purpose of preserving the rights of the after-born children prevented the assent of the executrix from passing the ulterior interest in the slaves, it must also, for the same reason, have operated to prevent the passing of the life estate, and then the sale by the widow, who was both executrix and tenant for life, must have been made in her capacity of executrix, which of course conveyed an absolute title to the purchaser under whom the defendant claimed.

PER CURIAM. Affirmed.

LEMON S. DUNN ET AL., EXRS. v. PEREGRINE P. CLEMENTS.

Where the obligee in a bond attempted to retrace part of the obligor's name, which had been blotted with ink and obscured, and in doing so misspelled it, but not so as to alter the sound (no fraud being imputable to the act), it was *Held* that the obligation was not thereby avoided.

ACTION OF DEBT ordered out of the Supreme Court, in aid of a suit in equity between the same parties pending there, tried before *Shepherd, J.*, at the last Fall Term of MARTIN.

The action was upon a bond for $100, which had been given by the defendant to the plaintiffs' testator, and signed by him thus: *Peregrine P. Clements.* It appeared, from inspecting the paper, that ink had fallen upon the paper at the name, and that in attempting to wipe it off the latter part of the surname had been nearly obliterated, and that an attempt had been made to restore it; that in doing so the letters "gran" had been traced over the blotted space instead of "grine," so as to make the name "Peregran" instead of "Peregrine." This alteration was proved not to be the handwriting of the defendant.

The court held that if the alteration described was made by
(59) the obligee, or by those who represented him, it would avoid the bond. For this plaintiffs' counsel excepted.

The plaintiffs' counsel asked the court to charge the jury that they ought to presume the alteration to have been made by a stranger rather than the obligee, and that there was no evidence that it was made by the obligee.

The court declined giving the instruction asked for, but charged that there was no evidence that the alteration had been made by a stranger, nor was there any presumption of law or fact to be given to them; that, on the other hand, there was evidence against the obligee from his ownership and custody of the bond; that the burden was on the plaintiffs to account for the alteration, as the paper was in their possession, and that they had offered no evidence to explain it. The plaintiffs' counsel again excepted.

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

W. B. Rodman for plaintiffs.
P. H. Winston, Jr., for defendant.

MANLY, J. The instruction given by the court below as to the effect of the alteration is not without the warrant of some earlier decisions, but we think is not in accordance with the later cases and with the better reasoning on the subject.

The case before us seems to have been a clumsy attempt to restore the name of the obligor after it had been nearly obliterated by the spilling of ink. It is not, we think, a material alteration, and does not, therefore, without proof of a fraudulent intent, vitiate the instrument, although made by the obligee. It is clear that neither spilled ink nor a *successful* attempt at retracing would constitute an alteration to avoid the instrument. It must therefore, be the failure to retrace *correctly*. This failure consists in the change of a single letter, (*i*) to (*a*), and we are of opinion that does not so alter the sound as to make a different name. Pronouncing it with the ordinary accent, it will sound the same, whether it be written with *a, e,* or *i*. The name as changed, then, is not a material variance from the original. The change (60) does not alter the name to any other, neither does it vary the legal effects of the instrument nor the rights of the respective parties thereto. The instrument, therefore, is the same in substance, and there can be no good reason why it should be made void in the hands of the obligee. *R. R. v. Bacon,* 15 Pick., 239, was a case in which another payee was interpolated into a bill of exchange (the name being placed over the original payee and the latter left unobliterated). This was done by the holder without any fraudulent purpose, and it was held not to avoid the bill.

Wherever the alteration is a material one, a *presumption* of fraud arises, but it is, as we conceive, a rebuttable presumption; but where the alteration is not material, the instrument will not be affected thereby, unless it be shown the alteration was made with an intent to defraud. 2 Parsons Cont., 226 (notes); *Adams v. Frye,* 3 Metcalf, 103. *Blackwell v. Lane,* 20 N. C., 245, was where a person, with no fraudulent intent, had, without the direction or consent of two of the obligors, placed his name to a bond as an attesting witness. This was decided not to avoid the obligation as to the two; but whether it was on the ground that the alteration was immaterial or, if material, without fraudulent intent, does not distinctly appear.

The court below held the alteration stated upon the record to be such that if made by the obligee, or anyone who represented him, it would avoid the bond. In this, we think, there is error.

The other points in the case it is not necessary for us to notice. The disposition made of the principal one, upon which the others hang, disposes of them.

PER CURIAM. *Venire de novo.*

Cited: Norfleet v. Edwards, post, 457; *Darwin v. Rippey,* 63 N. C., 319; *Wilson v. Derr,* 69 N. C., 139; *Long v. Mason,* 84 N. C., 17; *Wicker v. Jones,* 159 N. C., 110, 116.

(61)

STATE v. FRANKLIN PUGH.

Although, according to the common law, a boy under the age of fourteen is not indictable for an ordinary assault and battery, yet, if the battery be of an aggravated kind, as if it be a maim, or be done with a deadly weapon, or be prompted by a brutal passion, as unbridled lust, the public justice will interfere and punish, if it appear that the accused was *doli capax*.

INDICTMENT for an assault and battery, tried before *Dick, J.*, at the last Fall Term of RANDOLPH.

The offense was alleged to have been committed on the body of one Elizabeth Foust. She testified that she and the defendant attended a public school as pupils; that one evening after school was dismissed she started to go home, leaving the defendant at the schoolhouse; that she had proceeded on her way about half a mile when she saw the defendant approaching her in a run; that he soon overtook her and forcibly and against her will threw her down upon the ground and held her down (she all the time struggling to get from him), and that he then and there had his will of her, and then let her up; and that as soon as she got home she complained to her mother and stepfather. She stated that she was then between 13 and 14 years old.

The defendant introduced a witness who proved that he was 13 years and 6 months old when the transaction was alleged to have taken place. It was admitted that the defendant was of ordinary capacity and well grown for his age.

The defendant's counsel made the following points, and asked the court to charge them as he laid them down:

1. That an infant under 14 years of age is not liable for a misdemeanor.

2. That the presumption of the law is in favor of the innocence of an infant under 14, and that the legal presumption can only be rebutted by strong and pregnant evidence of mischievous discretion.

3. That the evidence of malice ought to be strong and clear beyond all doubt and contradiction.

4. That the defendant must have a guilty knowledge that he (62) was doing wrong.

5. That the malice in its legal acceptation is not mere personal spite, but consists in a conscious violation of the law.

6. That it requires as much evidence to convict an infant under 14 of a misdemeanor as of a felony.

The court charged the jury that an infant thirteen and a half years old was liable to answer for a misdemeanor, if the jury believed that he had sufficient capacity to distinguish right from wrong; that it was incumbent on the State fully to establish the offense charged and that he

had capacity to know that he was doing wrong. The defendant's counsel excepted.

Verdict for the State. Judgment, and appeal by the defendant.

Attorney-General for the State.
W. L. Scott for defendant.

PEARSON, J. The wisdom of the common law is illustrated in the rule that for an ordinary assault and battery a boy under the age of 14 is not liable to indictment; in the nature of things, (63) "fist-fights," in which there will be some scratching and pulling of hair, will occasionally occur between school-boys and others, and it is better to leave such matters to the correction which the parent or schoolmaster may in their discretion inflict than give importance to it by bringing "Young America" into court like a man, with all the pomp and circumstance of a trial by the court and jury, which is to result in a fine, to be paid out of the pocket of "papa"!

But if the battery be of on aggravated kind, as in the case of maim, or the use of a deadly weapon, or if from numbers it amounts to a riot, or, especially, if it be not the result of a mere pugnacious propensity, but is prompted by a more brutal passion, such as unbridled lust, as in the case before us, the arm of public justice will interfere to vindicate the majesty of the law, and if the party be *doli capax,* he is subject to indictment and to be punished publicly, although under the age of 14 years; for, in such cases, malice, and wickedness supply the want of age; and although in a case like the present the offender cannot be punished capitally, because the law, in tenderness to human life, presumes an inability to consummate the particular crime, yet when the intent is manifest, he should be made an example of by the utmost punishment which the law allows, so that all others may know and fear the law.

If our conclusion required authority to support it, it is furnished by a case of precisely the same kind, where a boy under 14, although it was held he could not be convicted of rape or an assault with intent to commit rape, was convicted of an assault and battery. *King v. Elderslaw,* 14 E. C. L., 367.

PER CURIAM. No error.

Cited: S. v. Gray, 53 N. C., 173; *S. v. Sam,* 60 N. C., 296; *S. v. Yeargan,* 117 N. C., 708.

(64)

WILLIAM SMITHWICK v. TIMOTHY W. WARD ET AL.

1. On the trial of a civil action for assault and battery it is competent for the purpose of mitigating vindictive damages, to show that the defendant has been convicted and punished at the suit of the State for the same transaction.

2. It is not competent in such a suit to prove that the plaintiff is a turbulent man and of desperate disposition, nor that the defendant is a quiet man and of peaceful demeanor.

3. Where there is a common intent among several to beat an adversary, or where the parties are all present, aiding, abetting or encouraging, or have become principals by previously counseling the violence, a joint verdict against all is proper.

4. An instrument in writing, purporting to release to one of the parties to a suit for assault and battery all claim and demand on him in that suit, but not having a seal, cannot operate as a release.

5. A release to party to a suit, made during its pendency and after the issues are joined, cannot operate as a defense unless it be pleaded specially *since the last continuance.*

ACTION *for assault and battery,* tried before *Shepherd, J.,* at the last Fall Term of MARTIN.

The plaintiff obtained a verdict. Four exceptions were taken on the trial below and certified to this Court:

1. The defendants offered to prove, on the question of "vindictive damages," that they had been convicted of an assault and battery, and had been fined by the county court of Martin, which the court rejected as irrelevant.

2. The defendants offered to prove that the plaintiff is a man of turbulent and desperate disposition, and that they are men of quiet and peaceful demeanor, which the court rejected.

3. The defendants asked the court to charge that they might sever in the damages, giving damages against each according to the degree of his guilt, which the court declined, and instructed the jury that if they should find against more than one of the defendants, their verdict should be joint.

The defendants offered a paper, without a seal, as a release executed by the plaintiff to one L. L. Clements, who was sued and afterwards discharged, which said paper-writing is as follows:

"I hereby release L. L. Clements from all claim or demand on
(65) him in this suit (naming it), and direct a nonsuit as to him, upon his paying his part of the court costs." (Signed by the plaintiff.)

The costs were paid according to the stipulation, and the nonsuit entered. This instrument was given after the suit had been commenced and put at issue, but it was not pleaded since the last continuance.

The defendants insisted that this was a release, properly pleaded, and discharged all the defendants. The court held otherwise.

These exceptions being overruled, the plaintiff had judgment, and the defendants appealed to the Supreme Court.

W. B. Rodman and Warren for plaintiff.
P. H. Winston, Jr., for defendants.

MANLY, J. The exceptions taken on the trial below are stated in the record with distinctness, and we have duly considered them in this Court. The only one about which we have had any difficulty is the ruling by the court that the conviction and punishment, criminally, for the offense was irrelevant, and not proper to be considered in abatement of the demand for *vindictive* damages. The word "vindictive," here adopted, is in common professional and legislative use as a synonym of vindicatory or punitory, and in that sense we suppose it is used in the record. This element, in the estimate of damages, is allowed to punish the defendants for violating the laws, and by making them *smart* to deter others, as well as themselves, from similar violations.

The principle upon which society acts in punishing criminally is precisely the same. The public never is actuated by revenge, but solely by a motive of self-protection, and punishes to prevent a repetition of the offense by the culprit or its perpetration by others.

These considerations suggest the pertinency and propriety of the evidence offered. When the inquiry is made by the jury in a civil action, how much ought to be given for *smart money,* it is material and legitimate to know how much the defendant has been made to smart (66) already, that the jury may estimate how much more will be required to effect the object of the law. When the court is called upon in the exercise of criminal jurisdiction to fix a punishment, it is in like manner proper for it to know whether there has been a civil action, and what has been the result of it. Neither the court nor the jury will be bound, as we suppose, by the judgment of the other, but each will be at liberty to add to what has been done by the other such additional penalties as each, in its turn, may judge adequate and proper. *Gilreath v. Allen,* 32 N. C., 67.

Other elements in the measure of damages should not be affected at all by the amount of criminal punishment, thus, actual pecuniary

damages—damages for loss of time, for corporeal and mental suffering, for social degradation—ought to be given, irrespective of punishment criminally.

In considering this question we have felt some doubt whether vindicatory damages ought to be given to a party in a civil suit under any circumstances where the case appears to involve, indubitable, the same principle and object that a punishment by the public does; and it would seem, therefore, more proper to keep them distinct. But the practice of allowing this element of damages has been so long followed in our circuit courts, that we do not think proper to disturb it; and as the admission of the testimony proposed on the trial below will prevent all harsh operation of the rule, by obviating the danger of double punishment, we feel less reluctant to give it the sanction of the Court. We are of opinion the testimony ought to have been received for the purpose for which it was offered.

Upon the other points made by the exceptions we concur entirely with the court below. In the action for *assault and battery* the character of the plaintiff is not in issue. To be beaten does not, *per se,* operate any loss of character to the injured party. Such loss must result from his own misconduct, and hence damages are never given to compensate (67) for such loss. A man of aggressive character may be imposed upon by one of an opposite temperament, and therefore every case ought to stand upon its own peculiar facts, and be decided without reference to the antecedents of the parties. Authorities, if needed to support a position of this sort, will be found in Sedgwick, 555; 2 Greenl. Ev., secs. 267-8; *McKinzie v. Allen,* 3 Strobhart, 546; *Rhodes v. Branch,* 3 McCord, 66.

In the matter of the third exception our opinion is, the case does not disclose a state of facts upon which the instructions asked for would have been proper. It must have been a peculiar state of facts to warrant such instructions, as in a case of continued trespass, where some are guilty of a part only, and others of another part only. 2 Tidd's Practice, 895-6. But where there is a common intent to assault and beat, or where the parties are all present at the beating, as principals, either in the first or second degree, or are guilty as abettors by reason of counsel or encouragement given beforehand, each is guilty of the whole, and in such case joint damages would alone be proper. It does not appear that there was a state of facts to call for the instructions asked, and we suppose none such existed.

The fourth exception is also groundless. The instrument offered is not under seal, and therefore cannot operate as a release in any case. Moreover, it has not been brought before the court in a way to make it available if it were good; there is no plea under which it could be proper-

ly shown. Matter of defense, occurring after issues joined, must be pleaded specially, "since the last continuance," as a bar to the *further continuance* of the suit. Without a special plea since the last continuance, therefore, such matter of defense could not have been brought before the court.

As these latter points may be raised upon another trial of this case, we have thought it best to express an opinion upon their merits.

The refusal to admit the testimony offered to mitigate punitory (68) damages we think erroneus, and for that reason the judgment below must be reversed, and a *venire de novo*.

PER CURIAM.

Cited: Stirewalt v. Martin, 84 N. C., 5; *Sowers v. Sowers,* 87 N. C., 307; *Lamb v. Sloan,* 94 N. C., 534; *S. v. Parnell,* 97 N. C., 420; *Johnson v. Allen,* 100 N. C., 138; *Russ v. Harper,* 156 N. C., 450; *Saunders v. Gilbert,* ib., 476; *Williams v. Lumber Co.,* 176 N. C., 178.

STATE v. ELICK, A SLAVE.

Where a negro made an assault upon a white woman, with an intent to ravish her, and afterwards changed his purpose and desisted, it was *Held*, nevertheless, that he was guilty under the statute.

INDICTMENT for assault with intent to ravish, tried before *Dick, J.*, at the last Fall Term of DAVIDSON.

The defendant was a slave, belonging to one Delap, and the person alleged to have been assaulted was a young woman by the name of Susannah Pickett. She stated that she had been into the neighborhood on a visit, and returning home with two other females, the road she had to travel deflected from the other, and she proceeded alone, but just as they parted they saw some one on the road she had to take; that after having gone by herself about a quarter of a mile she heard some one approaching her from behind; she looked around and discovered that it was a negro in a fast walk; that she stepped to the side of the road to let him pass, but he came up behind her, seized her by the shoulders without saying a word and pulled her to the ground and pulled her clothes up to her knees; that she hallooed as loud as she could and struggled to get loose; that the negro tried to choke her, but she continued to cry out and resist,

until two persons who lived near, Mr. and Mrs. Hill, came to her relief; that when the fellow saw them coming, he got off of her and ran off into the woods.

Lazarus Hill and his wife stated that they heard a female voice crying very loud, "O Lord! O Lord!" that they both ran as fast as they could towards the point from which it seemed to come, and after going
(69) about a quarter of a mile they came within sight of the prisoner; that he had Susannah Pickett down on the ground, and was on her body; that when they got within about 75 yards of them the prisoner became aware of their approach, got off of her, and walked fast across the road, buttoning up his pantaloons, and soon disappeared in the woods, and the young woman came running up to them very much alarmed.

One George Hege swore that he and the prisoner were working together, when the latter told him he intended to ask Miss Pickett to have intercourse with him, and if she refused he would kill her, and then he would do as he pleased.

One Alexander Miller said that he met with the prisoner on one Sunday about a month before the occurrence in question; that Elick said: "Susannah Pickett is a very pretty girl." To which he replied in the affirmative. The negro said he "intended to ask her for some." Witness told him she would resent it; to which the negro replied he would knock her in the head, and then he would do as he pleased.

John Miller testified, substantially, as the last two witnesses.

There was much direct and circumstantial testimony as to identify a negro. Miss Pickett was not certain, but Hill was certain as to the prisoner's identity, and was fully confirmed by the circumstances and other collateral evidence. The character of the female was proved to be very good for truth and chastity.

The court charged the jury, among other things, that if they doubted as to the identity of the defendant, or whether any assault was made, or, if made, whether it was done with the felonious intent charged, they ought to acquit.

The defendant's counsel then asked the court to instruct the jury as follows: "If they, on consideration of the whole evidence in the case, shall not be satisfied that the prisoner assaulted the witness Susannah Pickett with the intent to have connection with her against her consent, and by violence, they should find for the prisoner."

The court declined repeating the charge in this particular.

(70) The counsel for the prisoner asked his Honor to instruct the jury as follows: "If they believe from the evidence that the prisoner intended to desist from the accomplishment of his purpose

to cohabit with the prosecutrix as soon as she resisted, then the offense does not come within the meaning of the act under which he is indicted, and he is entitled to an acquittal."

The court refused to give the charge, and the defendant's counsel excepted.

Verdict, guilty. Judgment. Appeal.

Attorney-General for the State.
Fowle for the defendant.

MANLY, J. The instruction asked for was properly refused. The terms in which the prayer is couched are ambiguous, but, taken in any sense, it ought not to have been granted. If the instructions asked for were predicated upon the assumption that it was not the purpose of the negro to force the young woman, but merely to solicit and have connection with her only in case she consented, then it was properly refused, for the reason that it had been twice already given in substance. If, however, the prayer for the instruction rested on the hypothesis that while the assault was made in the *beginning* with the intent to ravish, the prisoner afterwards, nevertheless, changed his purpose upon being resisted, and concluded not to do so, the instruction was properly refused, because it is utterly untrue as a proposition of law. It involves the absurdity of making the statute null and void. We have considered the case in connection with the facts reported by the Superior Court, and feel constrained to say we discover no mitigating circumstance in it. Besides the inference of intent on the part of the prisoner, which is to be drawn from the character of the young woman whom he assaulted, and from the respective social conditions of the parties, the whole evidence shows that he had predetermined to force her to his will; that he siezed her in prosecution of his purpose, and never ceased from his efforts to accomplish it until he was approached by overpowering force.

There is not a particle of evidence reported to put any other face upon this transaction. (71)

We have carefully examined the record in the case, and find no reason why judgment of death should not be pronounced and executed upon the prisoner, Elick.

PER CURIAM. No error.

HAYWOOD MUSGROVE v. WILLIAM J. KORNEGAY ET AL.

1. In all cases of *Habeas corpus* before any judge or court, where the contest is in respect to the custody of minor children, either party may appeal.
2. A father cannot bind his child an apprentice when under the age of 12 years, and even when past that age it can only be done by deed executed jointly by the father and child.
3. Where a child over 12 years of age has been illegally detained as an apprentice, under a deed made by the father alone, the proper order upon a *habeas corpus* is that the infant be discharged to go where he pleases. Where the infant is under the age of 12, the order is that he be restored to the father.

HABEAS CORPUS, returned before *Shepherd, J.*, and heard in open court, Fall Term, 1859, of WAYNE.

The bodies of Simon and Lucretia, colored children, were brought before his Honor upon the petition of the plaintiff, and the defendant showed as the cause for detaining them that the petitioner, who is the father of these children, had executed a deed to the defendant, purporting to bind them to him as apprentices. It appeared that the boy Simon was over 12 years old at the time of this transaction, and assented to the binding, and served the defendant three or four years, but did not sign the deed; that the girl, Lucretia was only three or four years of age at the time, and did not assent to the binding in any way.

His Honor adjudged the cause of detention to be sufficient, and ordered the infants, Simon and Lucretia, to be redelivered to the defend-
(72) ant. From which judgment the petitioner prayed an appeal to the Supreme Court, which was allowed.

In this court it was urged that there was no law authorizing an appeal in cases like this, and that it should be dismissed. It was also insisted that the cause alleged for the detention was sufficient.

Fowle and Strong for petitioner.
Person for defendant.

PEARSON, C. J. We are satisfied that the case is properly constituted in this Court by the appeal, under the provisions of the statute, Acts of 1858, ch. 53. The enacting clause uses general words: "In *all cases of habeas corpus,* before any judge or court, where a contest shall arise in respect to the custody of minor children," etc., "in such cases either party may appeal," etc. Admitting that in cases of ambiguity the generality of a statute may be restrained by the preamble, (*Blue v. McDuffie,* 44 N. C., 131), it has no such effect in this case, for although express reference is made to the particular instance of minor children

whose parents live in a state of separation, which probably suggested the expediency of the act, the remedy is provided in such and *other like* cases, which is explained to mean *all cases* where a contest shall arise in respect of the custody of minor children. Ours is a case of that kind. Has Kornegay a right to the custody of the boy? He puts his claim on the force of the deed executed by the boy's father; so the case depends on the legal effect of that deed; and the question is, Does it operate as a mere *executory agreement,* for a breach whereof damages may be recovered in an action of convenant? or, Does it operate as an *executed agreement,* to wit, a conveyance by which a right of property vested in Kornegay, so as to establish the relation of "master and apprentice" between him and the boy, whereby he is entitled to the boy's services, may inflict reasonable correction, and, in case the boy absconds, or is taken from him, may by process of law, have him restored to his custody?

At common law a man may bind himself by an agreement (73) that his child shall serve another a year or any number of years. So he may bind himself by an agreement that a stranger shall serve another, or that he will serve himself; and if the service be performed, he may recover the consideration; if not performed, he will be liable to an action for breach of contract. This is clear. *Hiatt v. Gilmer,* 28 N. C., 450. The testator of the defendant contracted with the plaintiff, a harness-maker, that his son should serve as an apprentice for five years, to learn the trade. The son served about two years, when the father took him away and sent him to school. The plaintiff sued and recovered damages for breach of contract.

Day v. Everett, 7 Mass., 145: An indenture was executed by the parties by which the plaintiff covenanted that his son would serve the defendant for six years, and the defendant convenanted to pay the plaintiff $50 at the end of the time. Action, convenant; breach, not paying the $50, the son having served out the term. Defendant demurred, and insisted that the covenant was void, as it did not pursue the statute of that State. *Held,* although the relation of "master and apprentice" was not established by the indenture, the covenants were good at common law, so as to entitle each party to an action for a breach.

Cuming v. Hill, 5 Eng. Com. Law, 229: A father, by indenture, convenanted that his son, who was 17 years of age, would serve the plaintiff as an apprentice for seven years. The son served until he was 21 and then quitted the service. Convenant against the father; breach, the son did not serve out the term. *Held,* although it was lawful for the son to quit, the father was amenable in damages. *Baily, J.*: "The father here binds himself that the son shall serve seven years. It is no answer in an action against the father for him to say it was in the option of the

son whether he would serve or not. I may bind myself that A. B. shall do an act, although it is in his option whether he will do it or not."

These cases established the position that a father may bind himself by an agreement that his child shall serve another; and also (74) recognizes the distinction between the executory agreement and one executed so as to create the relation of master and apprentice, and confer the rights incident thereto. In *Hiatt v. Gilmer* it is not intimated that the plaintiff was entitled to have the custody of the son of the defendant's testator restored to him by a *habeas corpus.* In *Day v. Everett* the distinction is expressly referred to, and it is said the only remedy was by action for breach of contract, the parties not being entitled to the remedies given by law in case of "master and apprentice." The same distinction is taken in *Phillips v. Murphy,* 49 N. C., 45. A free negro executed a deed by which he "gave, granted, bargained and sold to one Nixon his services as a servant for five years, and the full and entire control of his person and labor during that time." The Court say: "The legal effect of the deed was not to make the free negro a slave, and vest in Nixon a title to him as *property,* but simply to give a right to his services for five years, upon an *executory agreement;* and although the parties supposed that Nixon was acquiring under the deed some right more tangible than a *chose in action,* yet such was not the case."

A father is entitled to the services of his child until he arrives at the age of 21. He has a right of property in the services; may enforce them by reasonable correction, and if the child absconds, or is taken away, may recover the custody by *habeas corpus,* which has superseded the writ of *Homine replegiendo,* anciently used to recover a villian-ward in knight service, or child; see Fitzherbert's *Natura Brevium,* 67. This interest was, however, *personal* to the father, and he could not assign it to a third person, except when the child, being old enough to understand the nature of a contract, which was held to be twelve years, gave his assent thereto by *executing the deed with his father. King v. Inhabitants of Arnesby,* 5 E. C. L., 385. It is there held: "A father has, at the common law, no authority to bind his infant son apprentice without his assent, and an indenture executed by the father and master, but not by the son also, does not create an apprenticeship." *Baily,* (75) *J.,* says: "An infant can only bind himself by deed, and although the son had served some years, that being a matter *in pais,* did not bind him. In the case of a *parish* apprentice there is a special power given by statute, 5 Eliz., ch. 4, to parish officers to bind the apprentice until he comes of age. There he is bound without his assent; but a father has, at common law, no such right." *Best, J.,* says: "There

is no sufficient authority for saying that a father, at the common law, can bind his infant son apprentice without his assent, testified by the execution of the indenture."

The same principle which prevents a father from assigning his interest applies to the master of an apprentice bound by the county court under our statute. *Futrell v. Vann,* 30 N. C., 402. It is a *personal* trust, created in the one case by nature and in the other by the act of law, and cannot be transferred to a third person without the assent of the child in respect to the father, and of the county court in respect to the master. A deed executed by a child of tender years, too young to be capable of understanding the nature of a contract, is void, and will be so found upon the plea *non est factum;* but the deed of an infant having mental capacity is only voidable under the special plea of "infancy." There are two acts which an infant cannot avoid—marriage, because of the nature of the subject, and a deed of apprenticeship, if he be over the age of 12 years; because the power to execute the deed is necessary to provide the means of support, and it is presumed to be for the benefit of the infant, and it concerns the Commonwealth that infants should be kept employed so as to acquire habits of industry and become skillful in arts and trades. McPherson on Infants, 41 Law Lib., 479. "The act of binding himself as apprentice, being an act manifestly for the benefit of an infant, is one which he is competent to perform." For this is cited Burns' Justice, Art. "Apprentice." If the father of an infant be dead, he may, at the age of 12 years, at common law, execute the deed alone. (This subject is now under the control of the county court. Rev. Code, ch. 5). If the father be (76) living, it is necessary that both should execute the deed, so that the interest of the father may be relinquished. In this mode the relation of master and apprentice is established, and the effect of the deed is to vest in the master a property in the infant.

In our case, as the infant did not execute the deed, Kornegay acquired no property under it, and did not become entitled to the custody of the infant. His only remedy is by an action on the covenant for damages. It follows that Kornegay failed to show any lawful authority or right to detain the body of the infant in his custody; and as the infant is over 12 years of age, we find it settled that the proper order is to discharge the infant and permit him to go where he pleases.

Order below reversed. This order will be entered, and judgment against Kornegay for costs. *King v. Greenhill,* 31 E. Com. Law, 159; McPherson on Infants, 156.

In respect to the child Lucretia, who is under the age of 12 years, we find, by the same authorities, that the proper order is to restore

her to the custody of the father; for although he may be liable under his covenant to be sued for damages, still his interest as father is not divested by it.

Order below reversed. This order will be entered, and judgment against Kornegay for costs.

PER CURIAM. Reversed.

Cited: Winchester v. Reid, 53 N. C., 379; *In re Cain,* 60 N. C., 528; *S. v. Miller,* 97 N. C., 454; *Brown v. Rainor,* 108 N. C., 205; *Newsome v. Bunch,* 144 N. C., 17; *In re Parker, ib.,* 174; *In re Jones,* 153 N. C., 316.

(77)

HENRY JARMAN v. JOSEPH J. ELLIS, ET AL.

Where the members of a firm gave a bond, individually, for a debt of the firm, and property was delivered by them and accepted as a payment thereof, it was *Held* that the bond was thereby discharged, and that it was not in the power of one of the obligors, by agreement with the obligee, to withdraw the payment, and thus again put the bond in force.

DEBT on a bond, tried before *Saunders, J.,* at the last Fall Term of ONSLOW.

The plaintiff offered in evidence the following bond:

One day after date we promise to pay Henry Jarman, or order, the sum of $300, for value received.

Witness our hands and seals, 19 January, 1855.

J. J. ELLIS. [SEAL]
G. J. WARD. [SEAL]
DAVID MARSHALL. [SEAL]

Defendants then offered evidence that they were partners, and that the bond was executed for a partnership debt, to wit, for the hire of negroes during the year 1854.

Defendants then offered one Koonce, who testified that about the middle or last of January, 1855, these defendants sold to the plaintiff two mules, for what price he did not recollect, but it was agreed by the parties that the mules were to go towards the payment of the bond of $300. He (witness) thought the mules worth $250 or $300.

In reply, plaintiff showed in evidence a credit on the note of $50, of date 23 January, 1855. They further showed the following receipt, signed by J. J. Ellis, one of the defendants:

Received, 1 February, 1855, of Henry Jarman, $240 in full for two mules, one black and one bay. J. J. ELLIS.

It was contended by the plaintiff that the subsequent receipt of $240 by one of the defendants, who was one of the partners, was a waiver of the former agreement at the time of the sale of the mules, and was an admission by the firm of a payment for the mules to that amount, and that he was entitled to recover the balance of the note after (78) deducting the $50, which had been credited.

The court charged the jury that the agreement, as testified to by Koonce, of the parties at the time of the sale of the mules was that they were to go towards the payment of the bond *to their full value,* and that the subsequent receipt of $240 for the mules would not set aside this agreement, as this receipt was by one of the members of the firm; but defendants were entitled to a credit as a payment to the value of the mules. Plaintiff excepted to this charge.

Verdict for plaintiff, deducting the value of the mules as a payment of $290. Judgment, and appeal by plaintiff.

McRae for plaintiff.
Green for defendants.

PEARSON, C. J. From the case as stated by his Honor we are unable to see whether the dealing in respect to the mules was an *executory contract to sell* or an *executed contract of sale,* whereby the mules were delivered and accepted in payment *pro tanto* of the bond sued on. This distinction is illustrated in *Rhodes v. Chesson,* 44 N. C., 336. If the mules were delivered on a contract of sale, the bond was satisfied *pro tanto,* and, being defunct, it was not in the power of one of the members of the firm to bring it into force again as a bond of the individual obligors; for, although it was executed as a security for a debt of the firm, still it did not stand as a mere open debt of the firm, or a charge of an amount on one side, subject to a discharge by the entry of a credit on the other, which was under the control and direction of a member of the firm, so as to give him the right to revoke or countermand the order first made for its application; but it was *the deed* of the individuals who composed the firm, by which they were bound in a manner higher than either member had authority to bind the others in respect to matters growing out of the business of the firm. Consequently, if this deed was once discharged, it was not in the power of one of the members of the firm to give it, a second time, force and effect as a deed of the individual obligors, although it may be he would have had authority as a member of the firm to change the original (79)

application of the price of the mules so as to revive a simple contract debt of the firm for the hire of the slaves, if the bond sued on had not been executed.

Where no error appears on the face of the record, the judgment must be affirmed.

PER CURIAM. No error.

TIMOTHY WARD v. J. N. BELL.

An issue in bastardy is not a "criminal prosecution," or a "plea of the State," so as to subject a defaulting witness to the fine of $80 prescribed in Rev. Code, ch. 31, sec. 60.

SCIRE FACIAS against a defaulting witness, tried upon the plea of *nul tiel record* before *Shepherd, J.*, at the last Fall Term of PITT.

The plaintiff, Ward, was charged under the statute as the father of a bastard child, in Pitt County Court, and made up an issue to try the paternity. The defendant, Bell, was summoned as a witness for him, and failed to answer, whereupon he was fined $80, *nisi,* and upon this the plaintiff sued out a *scire facias.* The only question that arose in the court below was as to the nature of proceedings in bastardy: whether it was a criminal suit or plea of the State, so as to subject a defaulting witness to the penalty of $80 prescribed in such cases, or only a civil suit, wherein the witness is only liable to the lighter fine of $40. Upon this the court was of opinion with the defendant, and from this ruling the plaintiff appealed.

P. H. Winston, Jr., and Edward Warren for plaintiff.
Shaw and Fowle for defendant.

(80) BATTLE, J. The only question presented in this case is whether the issue made up to try the paternity of a bastard child, under sec. 4, ch. 12, Rev. Code, is a "criminal prosecution or plea of the State," so as to subject a witness summoned to attend the trial thereof, and failing to do so, to a forfeiture of $80, as prescribed in ch. 31, sec. 60, Rev. Code, or is it a "civil suit," so as to subject him to the lighter forfeiture of $40, as provided in the same chapter and section.

The counsel for the plaintiff admits that such an issue is not a criminal prosecution, but contends that it is a plea of the State, and not a "civil suit," or a "civil case." The counsel insists that there is a well

settled distinction between a criminal prosecution and a plea of the State; for which he has referred us to Hale's Pleas of the Crown, p. 1 of the *Premium;* Jacob's Law Dictionary; Tit. Pleas of the Crown; 3 Bl. Com., 40. Without inquiring what the alleged distinction is, and whether it is well founded, we consider that it is settled in this State by judicial authority that an issue in bastardy is in every respect a civil suit, case, or proceeding.

The first case in which a question arose as to the nature of proceedings in bastardy was *S. v. Carson,* 19 N. C., 370, where it was said that "There is some difference of construction by the courts in cases of *orders* of justices in bastardy and *convictions* of justices under penal statutes and for petty offenses. *Orders* of justices in bastardy cases are police regulations, having for their object solely an indemnity of the county from money liabilities. They do not partake of the nature of criminal proceedings. Therefore, every intendment will be made to support the order of justices in bastardy. 3 T. Rep., 496; 3 East, 58." The question arose again in *S. v. Pate,* 44 N. C., 244, in which the distinction between a criminal and a civil suit is pointed out, and it was decided that an issue in bastardy was a civil suit, so as to entitle the State to challenge four jurors peremptorily, under Revised Statutes, ch. 31, sec. 37, which gave to "each party in all civil suits" such right. (See, also, Rev. Code, ch. 31, sec. 35.) In *S. v. Brown,* 46 N. C., (81) 129, it was said that it was not the object of the statute upon the subject of bastardy "to punish the father of a bastard child for having begotten it, but the purpose was solely to prevent its support and maintenance from becoming a county charge. The proceedings under the act are not, therefore, criminal in their nature, but are mere police regulations, adopted for the purpose above indicated." The last case upon this subject which has come before the Court is that of the *S. v. Thompson,* 48 N. C., 365. In that case it was held that the recognizance for his appearance, entered into by defendant and his sureties in a bastardy proceeding, was in the nature of a bail bond in a civil action, and that the defendant had a right, after having been called out, to surrender himself in discharge of his bail at any time before a final judgment against him on the *scire facias.*

These cases show clearly that the proceedings against the reputed father of a bastard child, instituted under our statute to subject him to its maintenance, are civil and not criminal in their nature, and that they have been so regarded both in their direct and collateral consequences. If they are so considered in relation to the sureties or bail for the appearance of the putative father, and to the jurors who may

sit on his trial, we cannot imagine any good reason why they should be taken to be otherwise in relation to the witnesses whom he may have summoned to attend that trial.

PER CURIAM. Affirmed.

Cited: Clements v. Durham, post, 100; *S. v. Edwards,* 110 N. C., 512; *S. v. Ballard,* 122 N. C., 1030; *S. v. Liles,* 134 N. C., 737; *S. v. Addington,* 143 N. C., 687.

(82)

T. R. CHERRY v. E. B. HOOPER.

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him the full consideration, and the husband afterwards absconded, it was *Held* that the dentist was not liable, as garnishee, to a creditor for the value of the teeth.

APPEAL from *Manly, J.,* Special Term (July), 1859, of PITT.

The facts of this case are sufficiently set forth in the opinion of the Court.

Donnell and Edward Warren for plaintiff.
No counsel for defendant.

BATTLE, J. This was a proceeding by an original attachment, in which the defendant was summoned as a garnishee, and in his garnishment stated that in part payment for a rockaway which he had purchased from the absconding debtor he was to "furnish a set of artificial teeth" for his wife, and that he had always been, and was then ready, so to do. Upon this, the plaintiff moved the court to have a jury impaneled to assess the value of the artificial teeth, as being specific articles within the meaning of Rev. Code, ch. 7, sec. 11. This motion was refused, and the plaintiff thereupon moved for a judgment against the defendant, as garnishee, which being also refused, he appealed.

Section 11 of the attachment law above referred to is in the following words: "When a garnishee shall, on oath, confess that he has in his hands any property of the defendant of a specific nature, or is indebted to such defendant by any security or assumption for the delivery of any specific article (except as is hereinafter excepted), then the court shall immediately order a jury to be impaneled and sworn, to inquire of the value of such specific property, and the verdict of the jury shall subject such garnishee to the payment of the valuation, or so much thereof as

shall be sufficient to satisfy the debt or damages and cost of the plaintiff: *Provided,* that if such garnishee shall also state in his answer that such specific property was left or deposited in his possession (83) by the defendant as a bailment, or that he has tendered such specific articles agreeable to contract, and that they were refused by the defendant, and that he then was, and always had been, ready to deliver the same; or that he had such specific articles at the time and place specified in the covenant or agreement, ready to be delivered, and is still ready to deliver the same; and such statement shall be admitted by the plaintiff, or found by the jury, then and in such case the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property."

The question which is raised upon the defendant's garnishment, considered with reference to the provisions of this section, is whether the artificial teeth which the defendant contracted to furnish for the debtor's wife are liable to be levied upon and sold under execution for her husband's debts. We say this is the question; because it is manifest, from the *proviso* to the section, that the garnishee would be at liberty to deliver the artificial teeth to the sheriff in discharge of his contract if they are specific articles within the intent of the statute, and the sheriff is expressly directed to proceed with them as if the attachment had been originally levied upon them. Can, then, such articles intended for a wife be seized and sold under execution for her husband's debts? We answer unhesitatingly, No! It might just as well be contended that a cork leg, or a bottle of medicine—cod-liver oil, for instance—provided by a husband for his wife could be levied upon and sold under similar circumstances. Such articles must be considered in the same light as the necessary apparel of the wife, of which the creditor of the husband has no right to deprive her.

There is another view in which, as it seems to us, the garnishee cannot be made liable in this proceeding. The main part of the consideration of his engagement to furnish the artificial teeth is his science and skill as a surgeon dentist in preparing the mouth for the operation and fitting the teeth to the gums. The articles are to be prepared for a particular mouth, and may not fit any other, and may not, (84) therefore, be of any appreciable value. Such a case was never contemplated by the Legislature, and does not come within the meaning and intent of the act.

His Honor in the court below was right in refusing the plaintiff's motion, and his judgment must be

PER CURIAM. Affirmed.

JOSEPH L. BALLARD v. FELIX WALLER.

1. A chose in action cannot be included by commissioners in their allotment of an insolvent debtor's provision, under the statute, Rev. Code, ch. 45, sec. 89.

2. It cannot be held a fraud for an insolvent debtor to omit to include in his schedule property which has been assigned to him by commissioners under the statute, Rev. Code, ch. 45, sec. 89, although the property be such as cannot be legally assigned.

3. The proper way to review the action of commissioners upon a question of an improper allotment under the statute, Rev. Code, ch. 45, sec. 89, is by a *recordari* in the nature of a writ of false judgment.

APPEAL from *Manly, J.*, at a Special Term (July), 1859, of PITT.

The facts of the case are as follows: Ballard, the plaintiff in this action, obtained a judgment against the defendant, Waller, before a justice for $39.19, principal debt and interest, and 40 cents costs. Upon this judgment a *ca. sa.* issued, and the defendant gave bond for his appearance at the next term of the court of pleas and quarter sessions for Pitt County, with the intent to take the oath for the relief of insolvent debtors. The defendant, Waller, filed his schedule, whereupon the plaintiff suggested a fraud in the concealment of a certain

(85) judgment in favor of the defendant against one Bailey for $11, or thereabouts, which was still unsatisfied. Upon this, an issue of fraud was made up, and the jury found for the defendant, and, from the judgment of the court upon this finding, the plaintiff appealed to the Superior Court. In that court the defendant offered in evidence a report of the freeholders appointed to allot his provision under the statute, Rev. Code, ch. 45, sec. 89, from which it appeared that the judgment in question had been assigned to him as a part of such provision. This report was filed in the clerk's office, and it was shown that the commissioners were appointed by the proper authority. The plaintiff contended that the assignment did not pass the said judgment so as to exempt it from Waller's creditors; that the choses in action were not within the provisions of the statute on that subject, and that the assignment, having been made after the issuing of the *ca. sa.*, was ineffectual against it.

The court was of a contrary opinion, and so instructed the jury. The jury found for the defendant, who was thereupon adjudged entitled to take the oath of insolvent debtors. From which judgment the plaintiff appealed to this Court.

W. B. Rodman for plaintiff.
Edward Warren for defendant.

BALLARD *v.* WALLER.

PEARSON, C. J. This Court is of opinion that under the provisions of the statute, Rev. Code, ch. 45, sec. 89, the freeholders appointed to lay off and assign the property to which a debtor may be entitled are not authorized to include a chose in action—a judgment, for instance—due to the debtor.

"In addition to the foregoing *articles,* there shall be exempt from *execution* the following *property:* one cow and calf, 10 bushels of corn, 50 pounds of bacon, farming tools for one to labor, one bed, etc., for every two members of the family, and such *other property* as the freeholders may deem necessary for the *comfort* and *support* of the debtor's family. Such *other property* not to exceed in *value* $50 at *cash valuation.*"

These words all refer expressly to articles of property which are (86) liable to be sold under execution, and can in no sense be made to include a chose in action. The enumeration of particular articles, one cow and calf, etc., concluding with the words, "and such other property," by an established rule of construction restricts it to other property of the *like kind.*

In *Dean v. King,* 35 N. C., 20, it is said: "The great purpose of these statutes is to prevent a housekeeper and his family from being deprived of the immediate means of subsistence, by exempting from execution such things as the Legislature deemed requisite to the supply of the pressing wants of food, clothing, and such bedding as would enable them to subsist together." After some hesitation, the Court thought "a mare might pass as of a like kind with the farming tools necessary for one laborer." A judgment for $11 is not of like kind with anything enumerated, and differs from all in this: it is not liable to be sold under execution.

This construction is confirmed by the words of the oath of a debtor taken under a *ca. sa.,* "except what is contained in my schedule, and what is exempt by law from *sale under execution.*" Rev. Code, ch. 59, sec. 3.

It is also confirmed by contrasting the words with those in reference to the widow's allowance, Rev. Code, ch. 118, sec. 21: "If there be no crop, stock, or provisions on hand, or not sufficient, the commissioners, besides the aforesaid specific articles, may allot any articles of personal property (slaves excepted), and any *debt* or *debts* known to be due to the intestate; and such allotment shall vest in the widow a right to collect in an action in her own name the debts allotted to her." However liberally disposed the courts may be towards poor debtors, there is no authority for adding these words to the statute providing an allowance for them.

This Court, however, concurs in the conclusion that "the jury ought to find the issue in favor of the defendant," on the ground that it involved the allegation of a *fraudulent concealment* of the debt of $11, evidenced by the judgment, and all imputation of fraud in regard to it was rebutted by the fact that it was included in the allotment (87) made by the freeholders and filed among the records of the county court office, as required by the statute. It would be strange if an error, committed by the freeholders, in reference to the construction of the statute should be allowed to result in a conviction of the debtor of a fraud, and thereby subject him to be imprisoned "until he make a full and fair disclosure," which, in the Superior Court, would be an imprisonment without bail or mainprise for the term of six months.

The legality of the allotment in a question about articles of property may be tried in an action of trover, for instance, as in *Dean v. King, supra;* but in order to review the action of the freeholders in a question like the present, we suppose the creditor should obtain a *recordari* in the nature of a writ of false judgment, which would present the matter of law, for it is not necessary that the allotment should be confirmed by the county court; so, there is no appeal, and errors of any inferior tribunal are corrected by the writ referred to.

PER CURIAM. No error.

Cited: Frost v. Naylor, 68 N. C., 326; *Hartman v. Spiers,* 94 N. C., 153.

W. W. VASS v. J. W. CONRAD.

A request by the endorser of a promissory note, *before it was barred* by the statute of limitations, that the endorsee would collect it or release him soon, is not an acknowledgment from which a new promise can be implied, so as to repell the bar.

ASSUMPSIT, tried before *Shepherd, J.,* at the last Fall Term of WAKE.

The case was submitted for the judgment of the court upon the following *case agreed:* James M. Towles executed a bond, payable to the defendant one day after date, for $900, and the defendant endorsed the same, for value received, to the plaintiff on 15 December, 1854. The writ was issued on 16 September, 1858, and the defendant (88) relies on the plea of the statute of limitations. To rebut the operation of the statute, the plaintiff introduced a letter from the defendant to the plaintiff, dated 26 September, 1857, which is as follows:

"Sir:—I wrote some two or three months ago to J. M. Towles, and told him you would push on your note if he did not pay, but that I hoped it would not be necessary. I want you to collect it, or release me as endorser, soon; but I don't want you to let him know that I have written to you on this subject. Write me soon, and let me know if he can't pay it. I will be away for two weeks."

It is admitted that this letter refers to the note sued on.

No suit was brought to the term of the court of pleas and quarter sessions for Wake County, held on the third Monday of November; but the plaintiff issued a writ on the ..... day of January, returnable to February Term, 1858, against Towles and the defendant Conrad, which, being returned not executed as to Conrad, an *alias* was issued to May Term, 1858, at which time a *nol. pros.* was entered as to Towles.

It is admitted that Conrad was in Tennessee during the time these writs were in the hands of the sheriff.

It is admitted that Towles was possessed of a large real and personal estate until 6 May, 1858, when he assigned the same to a trustee for the payment of his debts, and is now insolvent. If the court should be of opinion for the plaintiff, judgment is to be rendered in his favor for $.....; whereof $..... is principal money, and costs; otherwise, judgment is to be rendered for the defendant. His Honor being of opinion with the defendant, gave judgment accordingly, from which plaintiff appealed.

S. F. Phillips for plaintiff.
D. G. Fowle and B. F. Moore for defendant.

BATTLE, J. There is no rule of law more clearly and firmly established by the adjudications of this State than the one that, to repel the bar of the plea of the statute of limitations in the action of *assumpsit,* there must be an express promise to pay the debt, or (89) a distinct acknowledgment of it as an existing debt from which a promise to pay may be implied. It is equally well settled "that a promise to pay cannot be inferred simply from an admission that the debt had been contracted, and was originally just; or from the further admission that it had not been paid, if, at the same time, the defendant denied his liability, and did not in some way indicate his intention or willingness to pay. It is immaterial on what ground the defendant denies his liability or places his refusal to pay, whether it be because, as he says, the debt was never due, or because he had paid it, or because he insisted on a legal protection from the payment. In either case, the refusal to pay repels the idea of a promise to pay; and there must be

such a promise, either expressed or implied, to prevent the bar of the statute." *McGlensey v. Fleming,* 20 N. C., 263; *Wolfe v. Fleming,* 23 N. C., 290; *Smith v. Leeper,* 32 N. C., 86. From the cases of *Danforth v. Culver,* 11 John. Rep., 146, and *Johnson v. Beardslee,* 15 *ibid.,* 3, cited by the plaintiff's counsel, the same rules seem to prevail in the State of New York. In the application of these rules to the facts of this case we are of opinion that no promise to pay the debt sued on can be implied from the terms in which the defendant acknowledged it in his letter to the plaintiff. The time of limitations on his contract of endorsement had not then expired, and he could not, in truth, say otherwise than that he was then bound; but it would be a very strained and unwarrantable construction of his language to imply from it a promise to remain liable for the debt longer than he was already. On the contrary, he urged upon the plaintiff to collect the note from the maker, or to release him "soon," thereby plainly intimating a wish to put an end to his liability as endorser. It is impossible to say that he intended to assume any new responsibility, or in any manner to extend the old.

(90) Such language cannot be held to be an express promise to pay the debt, nor can there be fairly inferred from it an implied promise to pay at any moment beyond the time limited by law. We, therefore, agree with his Honor in the court below, that the bar of the statute was not repelled.

PER CURIAM. Affirmed.

Cited: Gilmer v. McMurray, post, 480; *Wells v. Hill,* 118 N. C., 908.

ZEDEKIAH EDWARDS v. WILLIAM J. BRANCH.

An order, made by the wardens of the poor of a county, that a particular sum should be allowed and placed in the hands of A., payable *semi annually* for the benefit of a pauper, was *Held* repealable within the time of the first half-year, although A. had proceeded under such order to purchase provisions for the whole year, and that he was only entitled to one half-yearly installment.

MOTION for a peremptory *mandamus,* tried before *Shepherd, J.,* at the last Fall Term of FRANKLIN.

A petition was filed in the Superior Court for an alternative *mandamus,* which accordingly issued, and the defendant having been served therewith, made return to the same, and the cause coming on, upon the

pleadings and proofs, it appeared that on 8 December, 1856, an application was made to William Branch and others, wardens of the poor for Franklin County, for a provision for one Lucy Adcock, a pauper, resident in said county, when the following order was made:

"Dec. 8, 1856, the case of Lucy Adcock was considered, and the sum of $75 was allowed and placed in the hands of Zedekiah Edwards, payable semiannually, and an order directed to issue for the same."

Afterwards, another order issued on 9 March, 1857, as follows:

"On motion, the case of Lucy Adcock was considered, and the order directed to issue in her favor, 8 December, 1856, was rescinded."

Evidence was then offered that on 8 December, 1856, the (91) wardens agreed with Edwards, the petitioner, that he should furnish his sister, Lucy Adcock, with provisions, and they would pay the allowance to him of $75, one-half in June; and accordingly he made a purchase for her, and the wardens paid him for one-half the year, but refused to pay after the order was rescinded, of which notice was given to Edwards, but not until he had bought provisions for the year.

The petitioner further offered evidence that he had bought provisions for Lucy Adcock during the year, all at one time, and he insisted that his undertaking was a contract which he had a right to enforce against the wardens of the poor for the whole year, 1857, or until December.

It was agreed that the court might try all the questions, whether of law or fact, without submitting issues to a jury, and the court having heard and considered the whole case, refused the peremptory *mandamus*, being of opinion that the allowance of $75 was a mere charity, which might be revoked at any time by the wardens, and gave judgment for the defendants; whereupon the petitioner prayed for and obtained an appeal to the Supreme Court.

W. P. Solomon for plaintiff.
J. J. Davis and W. F. Green for defendant.

MANLY, J. The administration of the fund provided by the public authorities for the support of the poor is committed, in North Carolina, to a court of wardens. By reference to the chapter of the Revised Code upon the subject, it will be perceived that the court is invested with a large discretion in the application of the fund. Thus, the objects of the public bounty, the periods of enjoyment, the several amounts to be allotted, the manner of their application, whether by means of public institutions or directly to the needy in their respective homes, are all matters left to the discretion of the wardens, and with the exercise of

this discretion no court has a right to interfere. The wardens are authorized to appoint a secretary and treasurer; they are re-
(92) quired to keep a record of proceedings and accounts of receipts and disbursements, and to publish the same annually, and are triennially subject to be deposed by the appointing power. These are the only safeguards the law has thought proper to provide for the effective and equitable distribution of the public charity; and the courts are not allowed to interpose by way of *mandamus* in aid of these checks, and by dictation secure what may be supposed a more equitable and efficient application. We think, therefore, the court of wardens, after the passage of the order of 8 December, 1856, had a right to repeal it at any time without giving legal cause of complaint to the pauper; subject, nevertheless, to the rights of third parties with whom contracts may have been made under the order in question.

The point, then, upon which this petition turns, is whether there was any unfulfilled contract on the part of the wardens with the petitioner, Edwards, in relation to the support of Lucy Adcock. Under the order of December, 1856, it seems from the facts transmitted to the Court that an agreement was made between the wardens and the petitioner, *"that he should furnish his sister, Lucy Adcock, with provisions, and the wardens would pay the allowance of $75 to him, one-half in June."* The wardens paid $37.50 for the first half-year, but in the meantime, having repealed the order, they refused to pay for the other half-year; and the question is whether the words of the agreement constitute a contract between the wardens and the petitioner for the entire year's provision. We think no such agreement is to be inferred from the words. It is, in substance, a promise merely to pay at the end of six months $37.50 for provisions furnished to the woman in the meantime, and does not amount to a pledge of its continuance beyond that term. It seems to have been the purpose of wardens to prevent a wasteful consumption of the means set apart for the woman's use, and hence they stipulate that the provisions shall be paid for semiannually, and, by consequence, as we think, furnished in semiannual instalments. The purchase of the whole year's provisions by Edwards, and furnishing them at once,
(93) was a misinterpretation of the engagement and a misconception of the obligations and rights. The order of the court of wardens is for a semiannual allowance to Lucy Adcock of $37.50. This the wardens could repeal at any time, in the exercise of their discretion. But any contract made with petitioner Edwards for laying out and applying this amount could not be set aside or repealed, but might be enforced by the writ of *mandamus*. The extent of the contract between them, as we interpret it, is to make to Edwards half-yearly payments

of $37.50 for provisions furnished for the sister. As there is no stipulation for its continuance through any particular period of time, it is a contract which either might discontinue at his option at the end of the half-year.

The contract thus interpreted has been fulfilled by the wardens, and, therefore, the writ of *mandamus* is refused. It is a writ extensively and stringently remedial, and ought not to be resorted to in light, trivial, or dubious cases.

Motion for a peremptory *mandamus* overruled, with costs against the petitioner.

PER CURIAM. Affirmed.

GASTON E. BROWN v. MARION BROOKS AND ALBERT GEAN.

1. Receipts for money, which contain no evidence of a contract between the parties, are liable to be explained or altered by oral testimony, but *aliter* where they are relied on as evidence of a contract.

2. Where the vendor of a slave executed a paper-writing acknowledging the receipt of a certain sum, expressed to be in part payment of the price, and binding himself, under a penalty, to deliver the slave (then a runaway) by a certain day, it was *Held* that this was no evidence of an executed contract by which the property vested in the vendee.

REPLEVIN for a slave, tried before *Caldwell, J.*, at the last Spring Term of CHATHAM.

The plaintiff, in making his title to the slave, gave in evidence a paper-writing, delivered by the defendant Brooks to bargainors (94) of the plaintiff, in the following words:

"Received from Jollie, Hanks & Holt $300, in part payment for a negro man by name of Ned, which negro has run away, and I hereby bind myself to deliver said negro by September court to the said Jollie, Hanks & Holt, or forfeit to the said firm the sum of $50. Test, W. Hanks. Signed by Marion Brooks."

The defendant insisted that the said paper-writing was a mere receipt, and that it was competent for them to show that it did not contain the real contract entered into between the parties. For that purpose they offered to prove declarations made by Jollie, one of the parties thereto, subsequently to its execution, that said paper-writing was not intended to convey the title to Ned, but was merely an executory contract of sale, defeasible by the nondelivery of said slave, and the fulfillment of which was secured by a penalty of $50; that said Brooks had not kept his contract, and therefore he, Jollie, did not claim Ned, who, at the time of

the declaration, was still a runaway, but intended to sue Brooks for the money that had been paid upon the price, as well as for the $50 forfeiture.

The court was of opinion that the paper-writing was more than a mere receipt; that it contained a contract to convey the title in said slave, and rejected the evidence offered by the defendants. The defendants excepted and submitted to a verdict. Rule of *venire de novo* discharged, and appeal by the defendants.

S. F. Phillips for plaintiff.
J. H. Haughton for defendants.

MANLY, J. Simple receipts for money which contain no evidence of a contract between the parties are liable to be explained or altered by oral testimony, but it is not so with regard to the written evidence (95) of a contract, whether executed or executory.

Therefore, in the Superior Court the judge properly rejected the testimony offered to explain the legal effect of the instrument under date of 15 August, 1855. We are of opinion, however, that the sense of that paper was misinterpreted by his Honor, and that it does not, as was supposed, convey a title to the slave. This is a question of law, which must be decided upon a consideration of the language of the instrument alone. By a reference to that it will be perceived that $300 was received, not in full, but in *part* payment for the slave, and it then sets out that he is a runaway, and binds the signer, under a penalty, to deliver him by a certain time. There seems to have been something left for both parties to do, the one to make complete payment (or a satisfactory substitute), the other to make the delivery of the slave. Jollie, Hanks & Holt did not intend, and, as we suppose, were not liable to pay until the slave was delivered, and there was no obligation on the part of Brooks to deliver until the other party had announced his readiness to make satisfaction for the price. There could not have been, therefore, that transmutation of property necessary to support the action; for, upon such transmutation, *eo instanti* correlative rights spring up: on the one side, property in the thing; on the other, property in the price—rights which we have shown the parties to this paper could not have contemplated.

We conclude, therefore, that the instrument *per se* is evidence only of a contract, executory in its nature, and not executed, and that upon it alone, *proprio vigore*, no right of property in the slave can be legally asserted.

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

Cited: Wade v. Carter, 76 N. C., 173; *Overby v. B. and L. Assn.,* 81 N. C., 62; *Isler v. Murphy,* 83 N. C., 219; *Williams v. R. R.,* 93 N. C., 45.

(96)

FERDINAND F. LONG v. SHEPHERD R. SPRUILL.

1. Where one contracted for a lot of corn to be delivered on a certain day, and in payment therefor delivered, without endorsement, a note on a third person, then in good credit, but in realty insolvent, and who became notoriously so before the day fixed for the sale, it was *Held* that the loss fell upon the purchaser of the note, in the absence of proof that the seller knew of the insolvency of the maker.
2. Where plaintiff bought and paid for a lot of corn, to be delivered on a day certain, but failed to apply for it at that time, and the bargainor afterwards resold it, it was *Held* that he might recover, upon a count for money had and received, the price received on such resale, although the corn remained in bulk with other corn, and was never set apart or identified as the property of the plaintiff.

ASSUMPSIT, tried before *Ellis, J.,* at Spring Term, 1858, of MARTIN.

The plaintiff declared that he had purchased of defendant a quantity of corn in December, 1855, which defendant agreed to deliver to plaintiff at defendant's landing on Roanoke River by the last of February, 1856; that he had paid defendant $1,529.83, and that defendant had failed and refused to deliver said corn, to plaintiff's damage, etc. He also declared upon a count for money had and received for plaintiff's use, and in the common counts in *assumpsit.* Plaintiff produced in evidence an agreement, signed by defendant, as follows:

Received of F. F. Long $1,529.83, for 437 barrels of corn, to be delivered by the last of February, 1856, to him or order, at my landing, in merchantable order. December 3, 1855. S. R. SPRUILL.

It was proved that plaintiff never sent any boat to defendant's landing, or made any demand for the corn, during February, 1856, nor until 13 March, when he did make such demand, and sent a boat to receive the corn, when defendant refused to deliver it. It was also proved that during the whole of February, 1856, defendant had at his barn, about one and a half miles from the landing, more than 437 barrels of corn, and that he afterwards sold the same. It was also (97) proved that plaintiff gave to defendant, in payment for the corn purchased of him, a note of Samuel S. Simmons for $1,469, dated ....., due one day after date, payable to the plaintiff, and not en-

dorsed by him. Said Simmons was in good credit at the time of the purchase, and generally believed to be perfectly solvent; he failed and made an assignment in trust for certain of his creditors on 22 February, 1856, and, as it afterwards appeared, was insolvent at the time of the purchase, and since 22 February has continued notoriously so. The defendant endorsed the note to one Collen E. Spruill without value, and for the purpose of enabling said Collen to bring suit on it, to the use of plaintiff, in Martin County Court. He brought suit to January Term, 1856, and recovered judgment, but neither the note nor judgment has ever been paid, either in whole or in part. At the trial defendant offered to surrender the note and assign the judgment to plaintiff. It further appeared that the value of the corn and the amount of the note were equal. Plaintiff contended that he was entitled to recover either on the special contract or on the count for money had and received. Defendant contended that he could not recover on the special contract, because he had not applied for the corn according to the terms of the contract, nor on the other counts. The court being of opinion with the plaintiff, so instructed the jury, who found for plaintiff. Judgment. Appeal by defendant.

H. A. Gilliam, E. W. Jones, and Donnell for plaintiff.
P. H. Winston, Jr., and W. B. Rodman for defendant.

PEARSON, C. J. The note of Simmons is the bone of contention. Which of the two must bear the loss by reason of his insolvency? The defendant received the note in payment for the corn, and had become the owner of it; consequently, the loss falls on him, as in *Willard v. Perkins,* 44 N. C., 258, the loss of the rosin, which was burnt, fell on Williams; for although he did not take it into possession, yet he
(98) ought to have done so, and it became so far his property as to be then at his risk. Suppose the corn had been delivered to the plaintiff at the time of the sale, the loss of the note would then certainly have been on the defendant; he could not have maintained an action for the price of the corn; that had been paid; nor for money had and received in respect of the note; it was genuine. So he got what he bargained for; and herein it differs from the cases where that action has been sustained, the note received being counterfeit or forged; nor for a deceit, because there is no proof of fraud or a *scienter.* So the question is, As the plaintiff did not call for the corn "by the last of February," was it in the power of the defendant to avail himself of that circumstance, and, by refusing to deliver it when it was afterward called for, shift the loss from himself upon the plaintiff? We concur with his Honor that he could not.

Admit that the count for "money had and received" in respect of the note cannot be sustained, for it was not in fact *money,* and the agreement of the parties to treat it as such was only for the purposes of the trade, and extended no further; admit, also, that in strict law the count on the special contract cannot be sustained, as the plaintiff was in default by not calling for the corn "by the last of February," although, by the by, there is room to contend that these words do not fix a *day certain,* but leave the time open, so that the plaintiff might call for it during the latter part of February or within a reasonable time thereafter, and the 13 March was a reasonable time, under the circumstances, as the article to be delivered was corn, which, at that season of the year, was housed and not particularly liable to be destroyed, or very inconvenient to keep; still the count for "money had and received" can be sustained on the proof that the defendant had afterwards *sold the corn.* Whose corn was it? The plaintiff had bought and paid for it, and certainly did not forfeit his right to it by neglecting to call for it at the precise time stipulated. The defendant was at liberty to charge storage for keeping it, and it was then at the plaintiff's risk; so that, had it been destroyed, the loss would have been his, as is held in (99) *Willard v. Perkins, supra;* but, nevertheless, the plaintiff had a right to the corn, and, as the defendant sold it, the plaintiff had his election to sue him in a special action on the case for the conversion or in *assumpsit* for the price received.

The objection that the corn was never set apart and identified as the property of the plaintiff, although, at first blush, plausible, is fallacious in this: it was not incumbent on the defendant to measure up and set apart for the plaintiff 437 barrels of the corn. In his absence, it would have been trouble for nothing. Still, the plaintiff having paid the price, had a right to 437 barrels of corn in the barn at and after the last of February, and the defendant in selling all the corn in the barn of necessity sold that to which the plaintiff had a right, and thereby subjected himself to the action for "money had and received," which is based on the principle *de bono et equo,* and the defendant surely could not keep all of the money with a good conscience. Test it in this way: Suppose the plaintiff, instead of the note of Simmons, had paid the price in actual money, would it have occurred to the defendant, or any one else possessing ordinary moral perception, that he could sell the corn or keep the whole of the price, so as to be paid twice for the same corn?

If the defendant, instead of selling, had used the corn, he would have been liable to a special action on the case.

In *Waldo v. Belcher,* 33 N. C., 609, the corn was destroyed *before* the day when it was to have been delivered, which distinguishes it from *Willard v. Perkins* and from this case. Had Spruill sold the corn

before the last of February, upon the authority of *Waldo v. Belcher,* the plaintiff could have maintained an action on the special contract; and as he sold it *after* the day, upon the authority of *Willard v. Perkins,* he can maintain an action for the price received on the resale.

PER CURIAM. No error.

(100)

STATE UPON THE RELATION OF SUSAN ANN CLEMENTS v. B. L. DURHAM'S ADMINISTRATORS.

Proceedings in bastardy cannot be instituted against the personal representative of the putative father in order to subject his estate to the maintenance of the child.

THIS was a proceeding in bastardy, before *Dick, J.,* at the last Fall Term of ORANGE.

The action was commenced in the county court upon notice to the defendants, who are the administrators of the putative father, to show cause why they should not be charged with the maintenance of a bastard child. It was proved that at the time of the examination of the mother, defendants' intestate, the person charged with being the father was dead. This cause being shown, the court ordered the defendants, as administrators of B. L. Durham, deceased, to be charged with the maintenance of the child. From this order the defendants appealed.

No counsel for the plaintiff.
S. F. Phillips for defendants.

BATTLE, J. The proceedings against the putative father of a bastard child, for the purpose of compelling him to maintain such a child, are founded altogether upon our statute law, and must in every respect be regulated by it. This law is now contained in the first seven sections of chapter 12, Revised Code. The proceedings which it authorizes are not in the nature of a criminal prosecution, but are police regulations, having for their object indemnity for the county against the burden of maintaining the bastard child. They do not lose their character of being civil proceedings, even when an issue is made up, under section 4 of the act to try the question of the paternity of the child. See *Ward v. Bell, ante,* 79, where all the prior cases on the subject are referred to. Being, then, civil, in contradistinction to criminal proceedings, it is contended they may be commenced and prosecuted (101) against the personal representative of the reputed father after

his death; and it is said that the first chapter of the Revised Code authorizes it in the following words of the first section: "No action, suit, bill in equity, or information in the nature of a bill in equity, or other proceedings of whatever nature, brought to recover or obtain money, property or damages, or to have relief of any kind whatever, whether the same be at law or in equity, except suits for penalties and for damages merely vindictive, shall abate by reason of the death of either party," etc. It is manifest that proceedings in bastardy cannot properly be called an action, suit, or other proceeding to recover or obtain money, property, or damages, but are, as we have said before, only police regulations, adopted for the purpose of relieving the public from the support of bastard children, by imposing it upon the putative fathers of such children. Viewed in that light, they cannot come within the rule laid down in *Butner v. Keehln,* 51 N. C., 60, where it is held that wherever an action could have been *revived* against an executor or administrator, it may be *originally commenced* against him. If, then, the proceedings in bastardy against the personal representatives of the reputed father, can not be sustained under the first chapter of the Revised Code, it is very certain they can derive no aid from chapter 12 of that Code. There every provision is predicated upon the supposition that the reputed father himself is alone the person against whom the proceedings are to be had. *He* is to be taken, and *he* is to enter into recognizance for his appearance upon pain, in case of failure, of being committed to prison. It is upon *him* that the order of filiation is to be made, and *he* is required to give a bond for the indemnity of the county. No execution can be issued against *his* property until he has failed to pay the necessary maintenance ordered by the court for the child, and notice has been served upon him ten days before the county court from which such final process is to issue. In all this not a word is said about the executor or administrator of the reputed father; and the mode of proceeding prescribed by the act seems to be entirely (102) inapplicable to any person but the reputed father himself, hence, we conclude that no proceedings can be properly constituted in the county court unless the *reputed father himself* has entered into a recognizance for his appearance there, or has been taken upon a *capias* or attachment.

The order made in the Superior Court must, therefore, be reversed and the proceedings dismissed.

PER CURIAM. Reversed.

Q. T. PURSELL v. JOHN D. LONG.

1. A misdescription of a place, in one small particular, in a notice to take deposition, will not be fatal if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified.

2. What was said by defendant to one who was sent by him, not as an agent to contract, but merely as a messenger to call in the plaintiff, that defendant might close a bargain then being negotiated between them, is not competent evidence of the contract entered into by the parties.

CASE for deceit and false warranty in the sale of tobacco, tried before *Dick, J.*, at the last Fall Term of ROCKINGHAM.

The plaintiff declared in two counts: first, a deceit, and, secondly, for a false warranty in the sale of 100 boxes of manufactured tobacco. The tobacco was delivered in August, 1857, and to prove that it was rotten in the fall and winter of that year, plaintiff proposed to read the deposition of one W. J. Totten of Georgia. The notice was to take the depositions of L. T. Watkins, N. Cobb, and others, in the office of W. T. Holderness, No. 132 Broad Street, Columbus, Georgia, by W. T. Holderness, a commissioner and notary public, on 15 March, 1859. The deposition was taken, as declared in the caption, by William T.
(103) Holderness, commissioner and notary public, on 15 March, 1859, at his office, No. 128 Broad Street, Columbus, Georgia. The defendant objected to the reading of this deposition, as he did not appear, and no one for him, at the taking thereof. The court admitted the deposition to be read.

The plaintiff introduced a witness, Dugger, who testified that in June, 1857, he was with the plaintiff at defendant's tobacco factory, when and where the plaintiff proposed to buy 100 boxes of tobacco from defendant, and proposed to give for 100 boxes of a certain quality of tobacco, the cheapest and lowest quality, 20 cents per pound, if defendant would give him six months credit and warrant the said tobacco to be sound and to keep; that defendant asked 22 or 22½ cents for the tobacco, and said that he had never warranted any tobacco, and would not warrant any he should ever sell. Whereupon the plaintiff said that would end the matter; that he would not buy tobacco unless it was warranted; that witness and plaintiff then started away; that one Rice, as they were going off, came out of the factory where they were, and said that defendant had agreed to accept his offer; that he and plaintiff went back into the factory, when plaintiff said to defendant, "I suppose you have agreed to accept my terms?" to which defendant replied he had; the plaintiff and defendant then went into defendant's office, and he heard nothing more.

James, a witness for the defendant, testified that he was present in June, 1857, when plaintiff and the witness Dugger called at the defendant's tobacco factory in Caswell; that they talked about different sorts of tobacco, and different prices; that plaintiff said he wanted a low quality of tobacco; that defendant showed plaintiff a low quality of lug tobacco, which he had put up and branded, "J. Scott, Yanceyville, N. C."; that plaintiff said he wanted 100 boxes of tobacco answering this description, and would take that much if defendant would take 20 cents per pound, warrant it to keep, and give him six months credit; that defendant said he had never warranted any tobacco, and (104) never would, and that he must have 22½ cents for it; that plaintiff started off, he and the defendant differing about the price; that witness Rice went out after plaintiff; that plaintiff and Rice came back to the factory together, but that the witness Dugger did not return to the factory; that when plaintiff and Rice came back to the defendant in the factory door, defendant said to plaintiff, "I have agreed to take your offer of 20 cents for 100 boxes of the J. Scott tobacco; that the parties then agreed on the six months credit and the price, 20 cents, nothing being said about a warranty. The tobacco was put up in the month of July, 1857, and defendant was to give plaintiff notice when the tobacco was ready; that he (witness) superintended the putting it up, and that it was sound, and put up in good order; that defendant gave notice, and plaintiff came about the middle of August, 1857, examined the tobacco by having several boxes opened, and asked the witness Rice and the defendant if they thought it would keep, to which they replied they thought it would; whereupon the plaintiff was satisfied, and gave his note, and the hundred boxes of tobacco were sent to the Haw River depot by the defendant.

The defendant introduced the witness Rice, the superintendent of his tobacco factory, who testified that after defendant had started from the factory in June, 1858, he followed the plaintiff and the witness Dugger, and said to plaintiff that defendant had agreed to take the 20 cents, or to accept his offer for the J. Scott tobacco, but did not recollect which mode of expression he used. But he recollected that as he returned to the factory plaintiff gave him instructions as to how he wanted the tobacco put up; that witness Dugger remained in the buggy, holding the horse, and did not come back into the factory with him and plaintiff; that as soon as he came into the factory he went into another room to his business, and did not hear what passed between the parties.

The defendant then offered to prove by the witness Rice the instructions he gave him when he went out to tell plaintiff to come back, and these instructions were given in the following conversation: The said witness Rice, as plaintiff went off, asked defendant what (105)

plaintiff had offered him for the J. Scott tobacco; the defendant said 20 cents; that witness said to defendant that they had already picked a large quantity of this tobacco; that he thought the defendant had better take the 20 cents for 100 boxes of said tobacco; whereupon defendant told him to follow plaintiff and say to him that he would take 20 cents for 100 boxes of that kind of tobacco; and this was the only knowledge or instructions the witness Rice had when he went out after plaintiff. But this evidence was objected to by the plaintiff, and excluded by the court. Exception by defendant.

Verdict for plaintiff. Appeal by defendant.

Morehead for plaintiff.
Hill for defendant.

BATTLE, J. We concur in the opinion given by his Honor in the court below upon both the questions presented by the defendant in his bill of exceptions. The deposition of Mr. Totten was properly admitted. The place at which the defendant was notified it would be taken was indicated by several marks, in only one of which, and that not likely to mislead, was there a mistake. In a town not larger than Columbus, Georgia, the office of a particular gentleman who is a commissioner and notary public may be easily found, though it is described as being 132 on a certain street, when it is in fact at No. 128 on that street. Had it been proved that the commissioner had two offices, and that the defendant was thereby misled, the deposition ought to have been rejected. In *Taylor v. Alston,* 2 N. C., 381, where the notice was that the deposition was to be taken at Halifax Courthouse, Virginia, *it was proved by a witness* that the house of Manning, where it was taken, stood 80 yards distant from the courthouse. In the other case relied on, *English v. Camp,* 2 N. C., 358, the deposition was clearly inadmissible,
(106) because it did not appear that it was taken at any particular place in the county specified in the notice. Had the proper place been mentioned, and the name of the county only admitted, the deposition might have been received, where there were other circumstances to identify the county and prevent a mistake as to the place. *Owens v. Kinsey,* 51 N. C., 38. A case more nearly resembling the present than either of those referred to by the defendant's counsel is that of *Elmore v. Mills,* 2 N. C., 359. There the notice was to take depositions at the house of *John Archelands Elmore,* and the depositions appeared to have been taken at the house of *John Elmore;* and yet they were allowed to be read, the court holding that the presumption was that the names were those of the same person. It cannot be doubted that the depositions would have been rejected if it had been proved that John Archelands

Elmore and John Elmore were different persons. In cases of much more importance than the reception or rejection of depositions it has been often decided that the misdescription of a person or thing in one particular will not be fatal if the person or thing be sufficiently identified in other particulars in which there is less probability of a mistake. For instances of such harmless misdescription, both in deeds and wills, see *Miller v. Cherry,* 56 N. C., 24; *Lowe v. Carter,* 55 N. C., 383; *Joiner v. Joiner, ibid.,* 68.

The other question is also clearly against the defendant. The witness Rice was manifestly not the agent of the defendant to enter into a contract with the plaintiff for the sale of the J. Scott tobacco, but was merely a messenger sent out by the defendant to recall the plaintiff, in order that he (the defendant) might close a contract with him. The testimony offered to show what the defendant said to that witness in the absence of the plaintiff was, therefore, inadmissible, and properly rejected.

PER CURIAM. No error.

(107)

COMMISSIONERS OF TRENTON v. JAMES McDANIEL.

1. Where an act of Assembly appointed commissioners to purchase land and lay it off into lots, with convenient streets, and provided that when so laid off it was, by force of that act, "constituted and erected a town," and the land was laid off accordingly, with ascertained limits, and these boundaries were asknowledged by the inhabitants for sixty years, and the place recognized as a *town* by several subsequent acts of Assembly, it was *Held,* it was a town incorporated with defined limits and boundaries.

2. Where the election of commissioners of an incorporated town was vested in the free male citizens thereof, it was *Held* that mere failure, for a long time, to elect commissioners did not destroy the right; but it continued as long as there were free male citizens enough to fill vacancies.

3. Persons entering into office under color of an election, although irregular, are thereby constituted officers *de facto,* and their official acts have full force until they are removed by a writ of *quo warranto.*

TRESPASS, tried before *Saunders, J.,* at the last Fall Term of JONES.

The plaintiffs declared for a seizure of a hog, and offered evidence of the incorporation of the town of Trenton as is hereinafter set out.

First, they gave in evidence an act, passed in 1784, entitled "An act for establishing a town in the county of Jones, upon the lands of Thomas Webber and others." The first section of this act recites that "Whereas it is represented to the General Assembly that a town on the lands of Thomas Webber, Louis Bryan, etc., etc., on the south side of

Trent River, in Jones County, where the courthouse now stands, would tend to the promotion of commerce, and the inhabitants of said county be greatly benefited thereby:

"II. *Be it, therefore, enacted by the General Assembly of the State of North Carolina,* and it is hereby enacted by the authority of the same, that the directors or trustees hereafter appointed, or a majority of them, shall, as soon as may be after the passing of this act, agree with and purchase from the said Thomas Webber, Louis Bryan, etc., etc., 100 acres of land for the purpose aforesaid; and after having so agreed for the said land, shall, as soon as may be, lay off 40 acres in half-acre lots, exclusive of streets, with convenient streets, lanes and alleys, and
(108) 60 acres for town commons, which lots, so laid off according to the directions of this act, are hereby constituted and erected a town, and shall be called by the name of Trenton.

The third and fourth sections of this act proceed to appoint directors and trustees for the purchasing of the land, and laying it off according to the direction of the second section; they also prescribe the manner in which the lots shall be disposed of and the terms of the sale. The fifth section is as follows: "And for continuing the succession of the directors until the said town shall be incorporated, be it further enacted by the authority aforesaid, that in case of the death, refusal to act, or removal out of the county of any of the said directors, the surviving directors, or a majority of them, shall assemble and are hereby empowered, from time to time, by instrument of writing under their respective hands and seals, to nominate some other person, being a freeholder of the said town, in the place of him so dying, refusing to act, or removing out of the county, which director so nominated and appointed shall from thenceforth have the same power and authority in all things, in the matters herein contained, as if he had been expressly named and appointed in and by this act."

They next introduced an act of Assembly, passed in 1803, entitled "An act to amend an act for establishing the town of Trenton, in Jones County." This act, after reciting that the commissioners are not fully authorized to lay a town tax to defray the necessary contingencies of said town, proceeds to invest them with full power to impose such tax, and to apply the money for the benefit of the town.

The next act, in order of time, introduced by the plaintiffs is the one passed in 1810, entitled "An act for the better regulation for the town of Trenton, in Jones County," and it recites that "Whereas the commissioners, trustees, and directors appointed in the year 1784 for establishing a town in Jones County are all dead or removed, and have failed to appoint successors for the regulation of the said town of Trenton:
(109) "*Be it enacted by the General Assembly of the State of North*

Carolina, and it is hereby enacted by the authority of the same, that William H. Conner, John McDaniel, Adonijah Perry, Henry Bryan, and Thomas Simmons be and the same are hereby appointed commissioners for the town of Trenton, in the county of Jones, who are hereby vested with the same powers and authorities for the regulation of the said town of Trenton as those who have heretofore been appointed by law."

The plaintiffs further produced in evidence a certified copy of an act of Assembly, passed in 1813, entitled "An act for the better regulation of the town of Trenton, in Jones County, and for other purposes":

"*Be it enacted by the General Assembly of the State of North Carolina,* and it is hereby enacted by the authority of the same, that an act passed in the year 1810, entitled 'An act for the better regulation of the town of Trenton, in Jones County, and for other purposes,' be and the same is hereby repealed and made void." The second section of this act proceeds to appoint commissioners, and constitutes them a body politic with all the powers incident thereto. The fourth section enacts: "That if any of the said commissioners hereby appointed shall die, remove out of the county, or refuse to act, it shall be lawful for the rest, or a majority of those remaining, to appoint one or more (as the case may be) to fill such vacancy, who shall be vested with all the powers and authorities of those already appointed by this act, any law to the contrary notwithstanding."

The plaintiffs further produced in evidence a certified copy of an act of Assembly, passed in 1825, entitled "An act to amend an act to incorporate the town of Trenton, in Jones County":

"*Be it enacted by the General Assembly of the State of North Carolina,* and is hereby enacted by the authority of the same, that the free male inhabitants of the said town shall meet at the courthouse on the first Saturday in April next, and on the same day annually there- (110) after, and shall elect three commissioners, who shall be freeholders in said town, which election shall be held by three freeholders, under the same rules and regulations as other elections.

"2d. *And be it further enacted,* that the said commissioners shall have power and authority to pass such by-laws and regulations for the government of said town as shall not be inconsistent with the Constitution and laws of the State.

"3d. *And be it further enacted,* that all laws and clauses of laws coming within the purview and meaning of this act be repealed."

The plaintiffs offered evidence that under the last-mentioned act the citizens of Trenton had, from time to time, elected commissioners, who had acted as such, as late as 1843 or 1844, since which time no election was held, until April, 1857.

It was admitted that the election of 4 April, 1857, which was the first Saturday of April, was held after a notice had been put up at the courthouse some eight days before said election, but it was not shown, or admitted, by whom or under what authority the said notice was posted, or whether the same was required. And it also appears that all the citizens of Trenton, except two, voted at said election, and that the commissioners elected on 4 April, 1857, acted in that capacity from that time until the bringing of this suit. It was admitted that plaintiffs in this suit received the highest number of votes at said election, and that the said election was held by John Hyman, J. P., and William F. Huggins and Charles Gerock, inspectors; but it did not appear how they were appointed, and it was admitted they were not appointed by the county court. The plaintiffs then offered in evidence a town ordinance, in the following words:

"At a meeting of the commissioners of the town of Trenton, 27 May, 1857, for the regulation of said town, it is ordered and decreed, that whereas hogs being permitted to run at large and range in the (111) streets of said town has become a nuisance and disagreeable to the good citizens thereof: now, to prevent the said nuisance, it is resolved by the board of commissioners that all hogs so permitted to run at large in said town, after due notice being given by public advertisement at the courthouse, shall be taken up by the town sergeant and secured in a pen or lot, and kept confined at the expense of the owner of said hog or hogs; and if the same is not taken away in the space of three days, then the town sergeant is directed to sell them at public vendue, to the highest bidder, and after paying all charges and expenses, with all costs that may accrue on the proceedings, the residue of sale to be paid to the commissioners, to be disposed of by them either by returning it to the owner or applying it for the town. And it is further decreed that for every hog so taken up the owner shall pay the town sergeant the sum of 25 cents."

It was admitted that the hog in question, the property of the defendant, crossed the line of said town (as the same has been known and used) and was found in the streets, and was impounded into the custody of the "town sergeant," out of whose custody, and without whose consent, the hog was taken by the defendant.

Defendant offered no evidence.

It was contended for the defendant:

1. That there was no act of incorporation of the town of Trenton with defined limits and boundaries.

2. That the long nonusage of the right to elect commissioners worked a prohibition of the right.

3. That the said election was void, because no due notice had been given thereof, and because said election did not appear to have been properly held.

And it was agreed that if, on the foregoing facts, the court should be of opinion that the plaintiffs were entitled to recover, that judgment should be rendered for them for sixpence and costs, and if not, then judgment should be rendered for defendant.

The court being of opinion with plaintiffs, judgment was (112) rendered accordingly, from which the defendant appealed to this court.

Hubbard and J. H. Haughton for plaintiffs.
Green, Stevenson, and J. W. Bryan for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that neither of the objections taken on the part of the defendant are tenable.

1. The several acts of the Legislature set out as a part of the case, connected with the fact "that the place" has been inhabited as a town, and has been laid off into lots and streets with known lines, among others the line which was crossed by the hog of the defendant, for upward of sixty years, show that is is incorporated with "defined limits and boundaries."

The act of 1784 empowers certain persons, as trustees and directors, to purchase 100 acres, and to lay off 40 acres in half-acre lots, with convenient streets, lanes and alleys, "which lots so laid off according to the directions of this act are hereby constituted and erected a town, and shall be called by the name of 'Trenton.'" The question is, Was the 40 acres so laid off? That is conclusively established by the facts above set forth, and the additional fact that in 1803, 1810, 1813, and 1825 the existence of the "town of Trenton" is assumed and recognized by acts of the Legislature, passed for its better regulation.

2. When a number of persons are made a corporation, with power in its members to fill vacancies for the purpose of continuing its succession, and this duty is neglected so that the corporators cease to exist, as if they all be dead or removed, the corporation can no longer have an existence, and an act of the Legislature is then necessary to call it into life again, as was done by the act of 1813, which appoints another set of commissioners, with power in its members to fill vacancies.

In order to prevent a recurrence of a like necessity in future, the act of 1825 amends the prior acts, and among other things provides that instead of vacancies in the body of the commissioners being filled by its members, the commissioners shall be annually elected by the free male inhabitants of the town, which provision has the (113)

legal effect of preventing the corporation from ceasing to have an existence as long as there are free male inhabitants of the town enough to hold an election; on the same principle that a corporation, when vacancies are to be filled by its members, has an existence so long as there are members enough to fill vacancies; for it only becomes defunct when there are no members of the corporation and no mode of supplying their places.

3. Let it be admitted that the election of the plaintiffs as commissioners was irregular, and that they may be removed from office by a writ of *quo warranto,* still they went into office after an election, which cannot be treated as a mere nullity, but is color of title, so as to constitute them officers *de facto,* and the law will not allow their authority to be impeached in a collateral way; because, to do so would tend to produce disorder and collision among citizens of the country, and encourage every one to attempt the redress of his supposed wrongs by force and with a high hand, as was done by the defendant in this instance.

The doctrine that an officer *de facto* is one who enters under color of an election or appointment, although irregular, and is not a mere *usurper,* is so clearly and fully explained in *Burton v. Patton,* 47 N. C., 124, and *Burke v. Elliott,* 26 N. C., 355, as to render any remark unnecessary. I will only add a reference to *Scadding v. Lorant,* 5 Eng. & Eq., 16. In answer to a question proposed to them, the judges were unanimously of opinion "that the vestrymen *de facto* were as competent to join in making a rate as the vestrymen *de jure,*" and the Lord Chancellor remarked: "The opinion of the judges as to vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons charged with very important duties, and whose title to perform those duties, or to exercise the powers necessary for their performance, the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended upon the propriety of the election of the (114) persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence."

PER CURIAM. Affirmed.

Cited: R. R. v. Thompson, post, 389; *R. R. v. Johnston,* 70 N. C., 350; *Norfleet v. Staton,* 73 N. C., 550; *Van Amringe v. Taylor,* 108 N. C., 200; *Wood v. Staton,* 174 N. C., 253; *Rogers v. Powell, ib.,* 389; *Markham v. Simpson,* 175 N. C., 139.

STATE v. HENRY TILLETSON.

Where a prisoner was put upon trial for larceny, and the term expired before the jury could agree upon their verdict, and they left their room and dispersed without agreeing, and the defendant was suffered to go at large, it was *Held* that the solicitor might, without leave of the court, cause a *capias* to issue against defendant, and cause him again to be put on trial.

MOTION to quash an indictment for larceny, heard before *Dick J.*, at the last Fall Term of GRANVILLE.

The defendant in this case was indicted in the county court, and on being put upon his trial there, the jury failed to agree upon a verdict, and at the hour of 12 o'clock at night, on Saturday of the term, the court announced that the term had expired, and left the bench without discharging the jury, and the jury left their room and dispersed without agreeing on a verdict. The prisoner was not recognized to appear at the next term, but was suffered to go at liberty. Afterwards the solicitor caused another *capias* to be issued against the defendant for the same offense, commanding him to answer at the next term. The defendant appeared at said next term and filed his affidavit, setting out the above state of facts, whereupon the court ordered the proceedings to be quashed and the defendant discharged. From this judgment the solicitor took an appeal to the Superior Court, where the judgment of the county court was affirmed, and the State appealed to this (115) Court.

Attorney-General for the State.
M. V. Lanier for defendant .

MANLY, J. The points presented to this Court by the appeal of the solicitor for the State are, first, whether, when the jury fails to return a verdict in a *case of larceny,* in consequence of the expiration of the term, the accused may be put upon his trial again; and if he may, secondly, whether the prosecuting officer can, without special leave of the court, cause a *capias* to be issued.

It seems now to be settled law that in cases of misdemeanor, the court has a discretion to withdraw a juror and order a *venire de novo,* when it appears necessary to the ends of justice. This was affirmed in *S. v. Morrison,* 20 N. C., 113, and also in *S. v. Weaver,* 35 N. C., 203. This latter case was an indictment for receiving stolen goods, which the statute puts upon the same footing with larceny in all respects, except in

classification. It is, therefore, as we conceive, an authority for the exercise of the power by the court in a case of larceny.

The indulgence of such a power in capital felonies underwent much discussion in *In re Spier,* 12 N. C., 491, and *S. v. Ephraim,* 19 N. C., 162; and by the courts' action in those cases the power is denied in felonies of that class, except in cases of supreme and inevitable necessity. In the first of these cases the *expiration of the term* was held not to be such a case of necessity. These cases may be considered as settling the law in respect to the class of felonies of which they treat, but the restricted range of judicial power, as established in them, has never been applied to offenses of inferior grades whether felonies or misdemeanors, and we think it is not applicable. The power, nevertheless, is not an arbitrary one, but should be resorted to only where it seems to the court, in the exercise of a sound legal discretion, to be necessary.

We have dwelt more on this power of the court to direct a mis-
(116) trial because we consider it settles the point made in the case before us. For, if the solicitor may *nolle pros.* at will, and issue a *capias* unless restrained, and bring the defendant up for trial again (which is admitted to be legal), and if the court may, in the exercise of its discretion, direct a mistrial and order a *venire de novo,* much more, it seems to us, will a new jury be proper where there has been a mistrial, caused by operation of law, by an event which comes like an interposition of Providence—which neither party has contrived to bring about, and which neither has had the power to hasten or retard.

The objection to the exercise of this power on the part of the courts is that it might lead to the wilful oppression of the citizen. No such objection can apply when the power is not called into action at the will of the court, but is a preëxistent rule of law, for the intervention of which one party is no more responsible than the other.

The only doubt is whether it be not such a prevention of trial as would justify a *venire de novo* in any grade of offense; whether it be not one of those inevitable events, springing from the short and definite limits of our sessions, which ought to have been classed with such accidents as the death or violent sickness of a judge or juror, the sudden and violent sickness of a witness, and the insanity of the prisoner, all of which present cases for a mistrial and a *venire de novo,* even in capital cases.

If the court would have had the right to anticipate the moment when the term closed and its powers ceased, and call in and discharge the jury, and thereupon hold the defendant subject to a future trial, it will follow that he may, with equal right, be held for trial when there has been a discharge by law—a legal dissolution. The failure of the judge to act

has placed the culprit in no worse situation; on the contrary, the course pursued was the most favorable one for the attainment of his rights. He has been allowed every moment of the term to get a verdict in, and of this he cannot justly complain.

The second point of objection made to the proceedings below (117) is as to the power of the solicitor for the State, without special leave, to cause a *capias* to be issued. We are of opinion this power exists. The defendant being subject to be tried again, the process by which alone it could be effected followed in the ordinary course of proceeding. There was no legal discretion in the judge to refuse it, and therefore leave was not necessary to give it validity.

Authority for this will be found in *S. v. Thompson,* 10 N. C., 413.

The judgment of the court below quashing the *capias* and proceedings is reversed, and the solicitor for the State is allowed to put defendant upon his trial again.

PER CURIAM. Reversed.

Cited: S. v. Swepson, 79 N. C., 641; *S. v. Bass,* 82 N. C., 573; *S. v. Taylor,* 89 N. C., 543.

PETER G. EVANS v. THOMAS ANDREWS.

1. Attachments for debt, issued without bond and affidavit taken and returned, according to the statute, cannot be dismissed on motion, but the objection must be by plea in abatement. It is different with regard to attachments for damages.

2. A motion to quash an attachment because it is not averred in the face of the proceedings that *the plaintiff is a resident of this State,* must be supported by an affidavit asserting that fact.

MOTION to dismiss an attachment, heard before *Dick, J.,* at the Fall Term, 1859, of CHATHAM.

The affidavit, bond and attachment in this case are as follows:

STATE OF NORTH CAROLINA—Chatham County.

Peter G. Evans maketh oath that Thomas Andrews is justly indebted to him in the sum of $3,750, with interest from 22 June, 1853, to the best of his knowledge and belief, and that the said Thomas Andrews is the inhabitant of another government.

(Signed by the affiant and certified by a justice of the peace.) (118)

NORTH CAROLINA—Chatham County.

Know all men by these presents, that we, the subscribers, are held and firmly bound unto Thomas Andrews in the sum of $7,500, for the payment whereof we bind ourselves and our heirs firmly by these presents.

The condition of the above obligation is such that whereas Peter G. Evans has prayed and obtained an attachment against the estate of the said Thomas Andrews for the sum of $3,750, with interest from the 22 June, 1853, returnable, etc.: Now, if the said Peter G. Evans shall prosecute, etc. (Signed, with sureties, and witnessed by the justice of the peace taking the affidavit.)

State of North Carolina to the Sheriff of Chatham County—GREETING:

Whereas Peter G. Evans hath complained, on oath, before the subscriber that Thomas Andrews is justly indebted to him in the sum of $3,750, with interest from 22 June, 1853, and oath having also been made that the said Thomas Andrews is a resident of another government, so that the ordinary process of law cannot be served on him, and the said Peter G. Evans having given bond according to law: We therefore command you that you attach the estate of the said Thomas Andrews which may be found in your county, or so much thereof, repleviable on security, as shall be of sufficient value to satisfy the said debt, etc. (Returnable to the next term of court; date 17 October, 1857, and signed by the same justice of the peace.)

In the county court the defendant's counsel moved to dismiss the proceedings, which was refused, and the defendant appealed to the Superior Court. In the Superior Court the same motion was made, and
(119) allowed by his Honor, from which the plaintiff appealed to this Court.

The grounds for this motion were:

1. Because the affiant did not make oath in the affidavit that the defendant is an inhabitant of another government, *and cannot be personally served with process,* as required by the act of Assembly.

2. Because the bond is not double the sum demanded.

3. Because it does not appear that the bond was taken before the attachment was granted.

4. Because the bond and affidavit are not dated.

5. Because it is nowhere averred on the face of the proceedings that the plaintiff is a resident of this State.

Geo. E. Badger, J. H. Haughton, and J. H. Manning for plaintiff.
Hugh Waddell and E. Cantwell for defendant.

PEARSON, C. J. All of the positions taken in support of the motion to dismiss (or quash) the attachment because of supposed defects either in the affidavit or bond are untenable, for the statute which originates the proceeding by attachment expressly provides "that every attachment issued without bond and affidavit, taken and returned as aforesaid, shall be abated on the plea of the defendant," thereby excluding *a motion to quash.* And herein is a marked distinction between an attachment for debt and one for damages where the person or property is injured. The statute in the latter case enacts that "for such defects the proceeding shall be void, and the court shall not proceed therein." Rev. Code, ch. 7, secs. 3 and 17; *Webb v. Bowler,* 50 N. C., 362.

But the objection that it nowhere appears, and is not averred, on the face of the proceeding that the plaintiff is a *resident of this State,* to whom alone the remedy by attachment is given against debtors who are inhabitants of another government (Rev. Code, ch. 7, sec. 2), is not so readily disposed of; for it raises a question of jurisdiction; and, although the court of pleas and quarter sessions, to which the attachment was returned, has a general jurisdiction in respects to debts, still (120) the proceeding by attachment is in derogation of the common law, and must be *limited* by the provisions of the statute; so that an attachment against an inhabitant of another government can only be entertained by the court in a case where the plaintiff is a resident of this State; and the question is, that fact not being averred, and not appearing on the face of the proceedings, should the court "proceed" until the plaintiff has an opportunity of making an averment of the fact in his declaration, or should it quash the proceeding on the motion of the defendant?

This Court is of opinion that the proceeding may be quashed on motion, provided it be supported by an affidavit that the plaintiff is not a resident of this State, so as to present a preliminary question of fact, on which depends the jurisdiction of the court. But a motion, unless so supported, cannot be sustained; for, as we have seen, the justice of the peace was authorized to issue the attachment, the bond and affidavit being given, and the statute does not require that the fact of the plaintiff's being a resident of the State should be set out in the affidavit; and if the attachment properly issued without this fact appearing, it follows that a naked motion to quash because it does not appear ought not to be entertained; for, if so, the attachment ought not to have been granted. Hence, we conclude that the motion must be supported by an affidavit, so as to present an issue upon a fact, which the plaintiff, according to the form of proceeding prescribed by the statute, was not required to aver beforehand, and which, in fact, he had no opportunity to aver, and, therefore, if the defendant makes a motion on this ground, in anticipa-

tion of the declaration wherein the fact may be averred, the motion should be sustained by affidavit. No affidavit being made in this case, the court below erred in quashing the attachment. Order reversed and *procedendo.*

PER CURIAM. Reversed.

Cited: Cherry v. Nelson, post, 143; *Leak v. Moorman,* 61 N. C., 169.

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(121)

STATE v. HARDAWAY BONE.

1. Where in a capital case a juror answered on the trial as to his competency, before the judge as trier, that he had formed and expressed an opinion that the prisoner was guilty, but that this opinion was founded on rumors, and that these rumors had not produced such an impression as to prevent him from listening to the testimony and giving the prisoner a fair trial, it was *Held* that the decision of the court that the juror was competent was no ground for a *venire de novo.*

2. The prisoner has no right to postpone showing cause of challenge to a juror and have him stand aside until the panel is finished, this being entirely the privilege of the State.

MURDER, tried before *Heath, J.,* at the last Fall Term of GASTON.

On the trial one Pegram was called as a juror and challenged for cause by prisoner, and it was agreed that the judge should act as trier, not only in this instance, but throughout the trial. In answer to questions propounded to him as to his competency, being duly sworn on that issue, he said that he had formed and expressed the opinion that the prisoner was guilty; that this opinion was formed upon rumors which he had heard in the neighborhood four days after the affair took place; but he said further, to interrogatories by his Honor, that these rumors had not produced such an impression on his mind that he could not listen to the testimony and give the prisoner a fair trial. The juror was declared to be competent, and tendered to the defendant. The defendant's counsel excepted.

One Rutledge was drawn, and having answered that he had formed and expressed an opinion, from rumor, that the defendant was guilty, the counsel for the defendant asked that he might stand aside until the panel was gone through with. The court declined to permit this, saying, "This was the State's privilege, and not that of the defendant." The juror, was on further examination, found to be indifferent, and tendered. Defendant's counsel again excepted.

No other point being specially noticed, in the opinion of the Court it is not deemed necessary to set out the details of the case, which are very fully stated in the record sent to this Court. A view of the leading features of the case, however, is contained in the con- (122) cluding observations of the opinion.

The defendant was found guilty of murder, and judgment being pronounced, he appealed to this Court.

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

MANLY, J. The exceptions presented in the elaborate case reported to this Court have been examined, and we find no error.

Those exceptions, which arose upon the selection of the jury, are clearly untenable, according to recent and well-considered cases in our own Court. The leading case is *S. v. Benton,* 19 N. C., 196, and this has been followed by *S. v. Craton,* 28 N. C., 164, *S. v. Ellington,* 29 N. C., 61, and others; in all of which the rights of the State and the prisoner, respectively, in challenges to jurors are discussed and defined.

One point is made in the case of consideration, in connection with this subject, which it may be as well to notice specially, as it is new, and that is, whether the *prisoner* has a right to postpone showing his cause of challenge to a juror until the panel is gone through. Such a right was not demanded by the apparent necessity out of which grew the practice as exercised by the State, and has never been used or claimed in this State or elsewhere, as far as our information extends.

As a privilege of the prosecution, it is known to have sprung up in England at the time when the right of peremptory challenge was entirely taken away from the Crown by 33 Edward I. In that state of the law the Crown, having no power to set aside a juror objectionable, but not legally disqualified, was permitted to put him aside until the end of the panel, that it might be seen whether the prisoner could not get a jury of his choice from persons unobjectionable to the Crown.

This right, after our political independence, was transferred (123) to the State, and has been continually exercised by it since. There is no warrant for such a right or privilege in the prisoner, and his Honor below was, therefore, right in declaring it to be a privilege of the State.

The questions made as to the admissibility of testimony are all governed by such familiar principles, so often repeated in this Court, we deem it unnecessary to notice them in detail. No one of them is tenable.

The instructions asked for seem to us to severally predicated on assumptions without proof to support them. There is no proof of a mutual combat or affray. It is a case in which the deceased is assailed with a dangerous stick, is severely beaten, acts only in defense, but, unable to defend himself, calls for assistance, and is then, before assistance could be rendered, stabbed to death with a knife.

This is a most favorable view for the prisoner which can be taken of the transaction, and upon this it is a clear case of murder. Clothe it in the details of the evidence, and it is a very bad case.

We have examined the whole record in the case, and find

PER CURIAM. No error.

Cited: S. v. Green, 95 N. C., 613; *S. v. Boyle,* 104 N. C., 832.

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(124)

AMOS COATES v. EDWARD STEPHENSON.

There is no authority under the statute, Rev. Code, ch. 31, sec. 78, where the plaintiff in slander, etc., recovers less than $4, for the defendant to recover any of his costs from the plaintiff.

MOTION before *Shepherd, J.,* at Fall Term, 1859, of JOHNSTON, to tax certain costs against the plaintiff.

The facts of the case are as follows: In a suit for slander the plaintiff recovered of the defendant 5 cents in damages, and thereupon the court gave judgment that the plaintiff recover against defendant the damages aforesaid, and 5 cents in cost to be taxed by the clerk. The defendant then moved to tax the plaintiff with his (defendant's) costs, which motion was disallowed, and thereupon the defendant appealed.

S. H. Rogers and Geo. V. Strong for plaintiff.
No counsel for defendant.

MANLY, J. The recovery of costs by a party to a lawsuit is by virtue of statute law. Such recovery must be in conformity to some express provision, or not at all, and the answer, therefore, to the motion of the defendant is that there is no warrant for it in The Code. Chapter 31, sec. 75, of the Revised Code provides: "That in all actions whatsoever the party in whose favor judgment shall be given, or in case of nonsuit, dismission, discontinuance or stay of judgment, the defendant shall be entitled to full costs, unless where it is or may be otherwise directed by statute."

Under this provision the plaintiff who establishes his right to recover, however small the amount, establishes at the same time his right to *full* costs. This is the general rule; but section 78 of the same chapter provides "that in actions on the case for *slanderous words,* and in actions for assault and battery, if the jury, upon the trial of the issue or inquiry of damages, do assess the same under $4, the plaintiff shall only recover as much costs as damages." Considering these express (125) provisions of law in connection with the general principle above stated, it must appear perfectly plain that no costs can be recovered in the case before us, except 5 cents by the plaintiff. The plaintiff recovers no more because he is cut with that by the law. The defendant recovers none, because none is given him. Thus the law punishes each party by subjecting each to the payment of his own costs—the one for having slandered his neighbor, the other for having brought a frivolous suit.

PER CURIAM. Affirmed.

STATE ON THE RELATION OF ABNER C. WILKERSON, ADMR. DE BONIS NON OF WINEFRED WILKERSON v. LEMUEL T. DUNN AND M. WHITEHURST, EXRS. OF B. M. WILKERSON.

1. Where an administrator holds a distributive share without closing up the estate by a settlement and payment of the balance struck, the remedy of the distributee can only be barred by the common-law presumption arising from the lapse of twenty years.
2. Where an administrator files a settlement setting out the admitted balance, and the matter is closed upon that footing, by a receipt in full of such balance, if the distributee afterwards seeks to impeach the settlement he must do so within ten years or he will be barred.
3. The common-law presumption does not begin to run against one until he becomes of age.

DEBT on an administrator's bond, tried before *Ellis, J.,* at Spring Term, 1858, of EDGECOMBE.

The plaintiff declared on a bond executed by Benoni M. Wilkerson, the defendant's testator, as administrator of one Winefred Wilkerson, in the sum of $500, dated in 1833, the execution of which is admitted.

Winefred Wilkerson resided in the county of Pitt, and died intestate in 1833, and at November Term, 1833, of the county (126) court of that county the said Benoni M. Wilkerson was duly appointed her administrator, and executed the bond declared on. The next of kin of the said Winefred were her four children, viz., the said Benoni M., the relator, Abner C. and Cockburn Wilkerson, and Nancy

Brown, wife of one Lemmon Brown, and her three grandchildren, viz., John Wilkerson and William Wilkerson, the only children of John Wilkerson, a deceased son, and William W. Stringer, an only child of ..... Stringer, daughter of the said Winefred. The said John, the elder, and Mrs. Stringer both died in the lifetime of their mother. All the next of kin lived in the State at the time of Mrs. Wilkerson's death.

The said Cockburn Wilkerson, Lemmon Brown and wife, and William W. Stringer afterwards left the State in or before 1837, and have remained away ever since. The latter was a minor when he left the State, and has not been heard of in twenty years.

John and William Wilkerson both died intestate during their infancy, and at November Term, 1843, of Edgecombe County Court the said Abner C. Wilkerson was duly appointed administrator on their respective estates.

The said Benoni returned an inventory and an account stated to February Term, 1834, of Pitt County Court, also an account current to February Term, 1836, of said county court.

The account current exhibits a balance in his hands for distribution of $206.86, principal and interest to 1 February, 1836, after retaining for commissions the sum of $32.80, as charged therein.

The inventory omits the sum of $80 in money received by him from one Nancy Brown on 30 November, 1833, as of the estate of his intestate; also, a bed and furniture belonging thereto, worth $25, which he purchased at his own sale, nor did he charge himself with either in the account current.

Said Benoni M. paid Lemmon Brown and wife $34 on 7 January, 1837, and took from them a receipt, of which the following is (127) a copy:

Received 7 January, 1837, of Benoni M. Wilkerson, administrator of Winefred Wilkerson, $34, in full of our share of said estate as heirs at law.

LEMMON BROWN.
NANCY BROWN.

Test: WM. C. LEIGH.

On the same day Brown and wife executed a refunding bond under their hands and seals, which recites that Benoni M. Wilkerson had paid the $34 as their distributive share of the estate of Winefred Wilkerson, and that the payment was in full of all demands against the said Benoni M. as administrator of Winefred Wilkerson. On 1 April, he paid Abner C. Wilkerson $41 as his distributive share, and took a receipt from him acknowledging the payment to be in full of all demands, and releasing all right, title and interest in and to said estate. This was signed Abner C. Wilkerson.

On 24 February, 1844, he paid him, as administrator of John and William Wilkerson, $55.90, and took from him a receipt acknowledging the payment, releasing and discharging the said Benoni M. from all claim on him as administrator in respect of the distributive shares of the said William and John. (Signed) Abner Wilkerson.

Said Benoni M. Wilkerson died in January, 1855, and the defendants are his executors.

The relator, Abner C. Wilkerson, became administrator *de bonis non* of the said Winefred Wilkerson at May Term, 1856, of Pitt County Court, and commenced this action on 10 November in the same year, in the county court of Edgecombe. It was referred to a commissioner to state an account of the estate of Winefred Wilkerson, and he reported to May Term, 1857, of said court. The commissioners charges the said Benoni M. with everything that came to his hands as administrator, and the interest thereon to 30 May, 1857, and credits him with his disbursements made in discharging the debts of his intestate, and interest on the same to 30 May, 1857, and with the necessary (128) expenses of administration, including an allowance of commissions at the rate of 5 per cent on his *actual* receipts and disbursements, such commissions amounting to the sum of $12.81, instead of $32.80, as charged in the account current filed by him, February, 1836, leaving a balance to his debit of $720.85, making a distributive share thereof of $120.31. He then credits him with the several payments made to Lemmon Brown, and wife, and to the relator, Abner C. Wilkerson, in his own right as above stated, and the interest on each to 30 May, 1857; with $120.31 the full share of John and William Wilkerson, deceased, treating the receipt of their administrator for $55.90 as a release; also, with the like sum of $120.31, being the said Benoni's own distributive share, leaving still a balance to his debit of $307.50, of which sum $141.07 is principal money; of which said balance of $307.50 the said Cockburn Wilkerson and William W. Stringer's distributive shares are each $120.31, Lemmon Brown's, in right of his wife Nancy, $44.70, for residue of his distributive share, and the relator's Abner C. Wilkerson, is $22.18, for residue of his distributive share.

It is agreed that if the plaintiff is entitled to judgment at all, and there is no presumption of satisfaction, or that presumption is rebutted, then that said report correctly states the amount due the several parties.

The defendants rely on the pleas of release, payment and accord and satisfaction, and contend that a presumption of a satisfaction arises from the lapse of time and other circumstances.

If the court shall be of opinion with the plaintiff, judgment is to be rendered in his favor for $500, the penalty of the bond declared on, to be discharged upon the payment of $307.50 to the relator as damages

for the breaches assigned, of which sum $141.17 is principal, and to carry interest from 30 May, 1857, or for as much as the court shall think the relator entitled to recover by reason of the breaches of the condition of the bond, and for the costs of suit, including $15 to the com-
(129) missioner for taking account and making report; otherwise, judgments to be entered for defendants.

The court adjudged, on the foregoing case agreed, that plaintiff do recover the sum of 500, the penalty of the bond declared on, of the goods and chattels of the said testator, Benoni M. Wilkerson, in the hands of the defendants as his executors, and further, that the relator recover his costs of suit, to be taxed by the clerk, including an allowance of $15 to the commissioner for taking account and making report, the whole to be discharged, however, upon the payment to the relator of $300.57 as damages for the breaches assigned, of which sum $141.07 is principal money, and to carry interest from 30 May, 1857, and his cost of suit. From this judgment defendants appealed.

B. F. Moore for plaintiff.
W. B. Rodman for defendants.

PEARSON, C. J. The bond of an administrator is a security for the performance of the trust reposed in him for and on behalf of the distributees. It follows that there can be no presumption of the payment or satisfaction of the bond, unless there is a presumption that the trust has been performed by payment of the distributive share, or that the right has been abandoned.

It is settled that the act of 1826, raising a presumption in ten years, does not apply to legacies and distributive shares, while the trust remains unclosed and the relation of trustee and *cestui que trust,* by agreement of the parties, continues to exist. *Salter v. Blount,* 22 N. C., 218; *McCraw v. Fleming,* 40 N. C., 348; *Cotton v. Davis,* 55 N. C., 430.

In the latter case a distinction is taken between an *estate* and a right in equity, and it is held that where an administrator holds a distributive share, without closing up the estate by a settlement and payment
(130) of the balance struck, the distributee has an *estate* in the fund, and his remedy can only be defeated by the common-law presumption, *i. e.,* the lapse of twenty years. But where an administrator files a settlement, setting out the admitted balance, and the matter is closed upon that footing by a receipt in full of such balance, if the distributee afterwards seeks to impeach the settlement on an allegation of fraud, or to surcharge and falsify the account, he is not considered as having an estate, but a *mere right,* which falls within the operation of

the act of 1826, and will be presumed to have been abandoned or satisfied if nothing has been said or done in regard to it for ten years.

These cases, and those referred to in this discussion, put the subject of presumption from lapse of time on its true ground, and no further elaboration is called for.

In the application of the principles thus settled to the case under consideration there is error in the judgment rendered by the court below in several particulars.

1. Benoni M. Wilkerson, as administrator, filed his account in February, 1836, showing a balance of $206.86, and upon the footing of that account Brown and wife and Abner C. Wilkerson, two of the distributees, settled and received their respective shares, and executed receipts and refunding bonds. This was done more than ten years before the commencement of the present action. Consequently there was a presumption of an abandonment of their right to surcharge and falsify the account, and the distributive share of each is presumed to have been satisfied under the act of 1826.

2. Cockburn Wilkerson removed from this State about 1837. There is no evidence that he received the share apparently due to him by the account rendered by the administrator; but it was rendered in February, 1836, and the writ in this case issued November, 1856; so more than twenty years have elapsed, and the common law raised a presumption that his distributive share had been paid or satisfied in some way, or was abandoned, which presumption is made for the sake of repose and to discourage "stale claims."

3. The only distributive share not disposed of is that of Wil- (131) liam Stringer. He left the State in 1837, and was then under age, and the presumption did not begin to run as to him until he arrived at age. Consequently the plaintiff was entitled to recover in respect to his share. *Seawell v. Bunch,* 51 N. C., 195.

Upon the case agreed, the judgment of the court must be reversed and judgment entered for the penalty of the bond, the execution to be discharged by the payment of the amount of one distributive share, to wit, $120.31, with interest and the costs of the court below. Judgment for the costs of this Court in favor of defendants.

PER CURIAM. Affirmed.

Cited: Cox v. Brower, 114 N. C., 423.

DOE ON THE DEMISE OF WM. B. CARR AND WIFE ET AL. v. ELISHA H. STANLEY.

A certificate, in writing, by one still living, stating the payment of money, is not admissible evidence of the fact of such payment.

EJECTMENT, tried before *Saunders, J.*, at the last Fall Term of DUPLIN.

The case is presented upon the single exception to the ruling of his Honor below in admitting the certificate of Samuel Stanford, which goes to state that before the day of payment fixed in a mortgage of the premises in question to him, the mortgage money was all paid off. This certificate was made after he had sold the premises to the lessors of the plaintiff, who showed title under his deed, he, the said Stanford, at the time of the trial being alive. The plaintiffs insisted that this certificate was inadmissible, because it was not the declaration of Stanford, not under oath, and because he could have been examined as a witness.

Verdict for defendant, and appeal by plaintiffs.

(132) *Allen for plaintiffs.*
W. A. Wright for defendant.

BATTLE, J. It appears from the bill of exceptions (so far as we are able to understand it) that the lessors of the plaintiff claimed title to the premises under a deed of mortgage executed by their father to one Samuel Stanford on 2 April, 1838, providing for the payment on 1 April, 1839, of certain debts therein named, to which the said Stanford was surety, and a deed from Stanford, the mortgagee, to them, made on 23 December, 1839. The lessors then offered evidence to show that the defendant claimed under a sheriff's deed, on an execution against their father, of a *teste* later than the deeds under which they claimed, and rested their case.

The defendant, among other grounds of defense, contended that all the debts mentioned in the mortgage deed made to Stanford had been paid on or before 1 April, 1839, so that the title of the property therein conveyed had become reinvested in the mortgagor, and left nothing in the mortgagee to be transferred to the lessors of the plaintiff by his deed of December, 1839. To sustain this position the defendant offered in evidence a certificate, dated January, 1840, given by Stanford, the mortgagee, which contained an acknowledgment that all the debts intended to be secured by the mortgage had been fully paid. Stanford was living, and the plaintiff's lessors objected to the evidence, but it was received by the court. In this we think there was error. The certificate given by Stanford was nothing more than a written declaration made

by him, not under oath, and as he was then living, his testimony might have been had either by producing him as a witness at the trial or by having his deposition taken in the usual manner. Indeed, it appears that his deposition had been taken to prove other facts, and was used at the trial for that purpose. In *Finch v. Ragland,* 17 N. C., 138, it was held by the Court that written receipts for money of living persons are not strictly legal evidence of disbursements by an administrator, especially where the money is due by account. The reason (133) is, manifestly, that the receipts are nothing more than written declarations of persons who, being alive, might be examined as witnesses on oath. We are aware that such written receipts are often received and acted upon, but it is only because (where there is no suspicion of unfairness of fraud) the parties do not choose to object to them. There are some cases where, if a person who has peculiar means of knowing a fact makes a declaration or a written entry of that fact which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons. See *Peck v. Gilmer,* 20 N. C., 391, and the cases there cited. That rule is clearly inapplicable to the present case, where the person who gave the certificate is still living.

We are not to be understood as intimating that the certificate in question was given under such circumstances as that it would have been admissible even if Stanford had been dead; but as he was alive, and might have been examined as a witness, it was, on that ground, and without reference to any other, clearly improper to receive it.

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

PER CURIAM. Reversed.

Cited: Smith v. Moore, 142 N. C., 290.

LEGATEES AND DEVISEES OF S. W. SAWYER v. S. W. SAWYER'S HEIRS AND DISTRIBUTEES.

1. A holograph will revoked by the marriage of the testator can only be revived and republished by a written instrument setting forth his intention, and duly attested by two witnesses, or by a writing by the testator himself, found among his valuable papers or handed to one for safe keeping.

2. A holograph will found among the valuable papers of a decedent, bearing a particular date, is presumed to have been put there by him, and that it was so deposited at the time of its date.

DEVISAVIT VEL NON, tried before *Saunders, J.,* at Spring Term, (134) 1859, of CAMDEN.

On the trial the propounders proved by three credible witnesses that the paper-writing offered for probate, and every part thereof, was in the handwriting of the decedent, S. W. Sawyer, as well as the signature thereto, and was found, after his death, among his valuable papers and effects. The paper-writing bore date 6 November, 1853, at which time the decedent was unmarried, and he was married to his last wife, who survived him, in 1854. In order to prove a republication, the propounders proved by two witnesses that in December last, a few weeks before his death, the alleged testator was in the store of one of the witnesses, and in conversation with him, after speaking of a special administration which had been just granted, and of his own delicate health, he said: "My affairs are all right. I have a will." The witness asked him who was his executor, and he replied: "My son Lem. is my executor; he is young and inexperienced, and I hope you will help him out." No paper was present, nor did either witness ever see the script propounded till it was offered for probate. The alleged testator lived about three miles from the store spoken of. Lemuel G. Sawyer the person named as executor in the script, is the son of the decedent, S. W. Sawyer, and the paper-writing propounded is the only paper-writing found purporting to be the will of the said decedent.

The propounders further proved by a witness that he heard the decedent say, in September last, when sick, "I have a will, and dare
(135) any person to tell what is in it"; that he had frequently during that year heard him say he had a will. The witness never saw the script in question until after the decedent's death.

The admissibility of the declarations above stated to republish the script was objected to by the caveators, but the evidence was admitted by the court, and the caveators excepted. The counsel for the caveators insisted:

1. That the mere verbal declarations could not, in law, amount to a republication of the will, revoked as it was by the marriage.

2. That if competent to republish, the words used by the testator only indicate a belief in the validity of the script as an already executed instrument, and admit of no inference of an intent to republish and reestablish the alleged will.

3. That the jury cannot find in favor of the script as a republished and reëstablished will unless clearly satisfied that the decedent, in the conversations deposed to, intended by them to republish and reëstablish the instrument as his will.

4. That the declarations adduced afforded no evidence of such intent to republish and reëstablish it.

The court charged the jury that the marriage of the deceased after the making of the will rendered it void; but, should the jury be of opinion,

from the declarations of the deceased as testified to by the witnesses, that it was his purpose and intention that the paper-writing should stand and operate as his will, notwithstanding his marriage, they should find in favor of the will; otherwise they should find against it. Caveators excepted to this charge.

The jury found a verdict in favor of the will. Judgment. Appeal by the caveators.

Johnson and W. A. Moore for propounders.
Geo. E. Badger, Jordan, and P. H. Winston, Jr., for the caveators.

PEARSON, C. J. The ground on which his Honor based the in- (136) struction, "Should the jury be of opinion from the declarations of the deceased, that it was his intention that the paper-writing should stand and operate as his will, notwithstanding his marriage, they should find in favor of the propounders," is not set forth distinctly. It must have been either because the intention thus inferred from the declarations prevented his marriage from having the effect of a revocation, or because the will, although revoked by the marriage, was republished or, more properly speaking, *revived* by the force of such declarations and intention.

This Court is of opinion that the instruction cannot be supported on either ground.

1. If the instruction was based on the first ground, his Honor fell into error by not adverting to the distinction between the *presumed* revocation which, as the law formerly stood, was the effect given to the marriage of a woman, or the marriage of a man and the birth of a child, and the *positive* revocation which, according to the act of 1844, is the effect of a marriage. The former being a matter of presumption merely, arising from a change of circumstances, was open to evidence by way of rebuttal; whereas the latter, by express enactment, is *positive* without any reference whatever to the intention; so that, to adopt the language of Jarman in his learned work on wills, vol. 1, page 114, "No declaration, however explicit and earnest, of the testator's wish that the will should continue in full force after the marriage, still less any inference of intention drawn from the contents of the will, and least of all evidence collected *aliunde*, will prevent the revocation." The object of the statute was to put an end to the many perplexing distinctions which had grown up out of the doctrine of presumptive revocations, and after the positive enactment, "Every will made by a man or woman shall be revoked by his or her marriage," a general clause is added in order to sweep away the faintest trace of the notion that such revocation was to depend on the presumed intention. Section 24: "No will shall be revoked by any pre-

sumption of an intention, on the ground of an alteration in cir-
(137) cumstances." The object of the statute is set out as plainly as language can do it. *Winslow v. Copeland,* 44 N. C., 17, fixes its construction. In that case it was decided that a will made by a woman a few days before marriage, and in contemplation of the marriage, and in pursuance of articles executed for the very purpose of authorizing her to make a will was, nevertheless, revoked by the marriage, although the intention that the paper should stand and operate as a will, notwithstanding the marriage, was manifest.

2. Assuming that the will was revoked by the marriage, it was not republished or revived by the declarations of the testator and his intention that it should operate. Indeed, if these declarations did not have the effect of preventing the revocation (as we have seen above), it would be strange if they were allowed to revive the will after it was revoked. Can that bring to life which could not prevent the death? And such a conclusion would let in, under a different aspect, all the mischiefs of fraud and forgery against which the statutes were intended to guard. His Honor, we apprehend, fell into error by not adverting to the difference between what was formerly held to amount to a republication of a *will of personalty,* and what was necessary to republish a *devise* after the statute of frauds, and a *will of personalty* as well as a devise after our statute, Rev. Code., ch. 119, secs. 1 and 22, which puts wills of personalty on the same footing with devises in respect to the ceremonies necessary to their execution and revocation. At common law no ceremony was requisite to the due execution of a will of personalty; hence, no ceremony was necessary to republish or revive such a will, the intention established by the testator's declarations being sufficient for all purposes. But the statute of frauds made an entire change of the law in respect to devises. If the devise be subsisting, a republication can only be made by a codicil, with witnesses attesting in the presence of the devisor, or by an instrument declaring the intention, executed with the like ceremony. If the devise be revoked, it cannot be republished in the proper sense of the term, but must be revived; and as, in order to
(138) republish a subsisting devise, an instrument attested according to the statute of frauds is necessary, *a fortiori,* in order to revive a revoked devise an instrument of as high a nature must be necessary; for instance, if a revocation be executed in writing, as required by the statute, then an instrument revoking the revocation will revive the original devise, as a statute repealing a repealing statute revives the first; but the instrument must be executed with like ceremony, as the statute requires in regard to the revocation. This is a reviving by implication. There may be, also, an express reviving, as if a devise be revoked by writing, and the devisor then executes an instrument setting up the revoked

devise: here the effect is to revive, and also republish, for the devise will then take effect as of the date of the last instrument; and, in this instance, of course the reviving and republishing instruments must have witnesses attesting as required by the statute of frauds, under the maxim, *Eo ligamine quo ligatur;* for it is to undo that which has been done, to wit, the act of revocation. Here it may be well, by way of explanation, to notice the distinction between the *revocation* of a devise, which could have been done without the ceremony necessary for its execution (for the maxim did not apply, inasmuch as a devise is in its nature "ambulatory," and hence, the necessity for an express provision in the statute requiring revocation to be in writing, or by burning, cancellation, etc.), and the reviving and *republication* of a revoked devise; for the revocation, being a thing *done* and complete, is not, in its nature, "ambulatory." *Acherly v. Vernon,* Comyn, 381; 9 Mod., 78; *Martin v. Savage,* 1 Vesey, sen., 440; Jarman on Wills, title "Revocation," ch. 7; "Republication," ch. 8.

Although the principles here stated are developed by cases in reference to the reviving of devises revoked by the *act of the parties,* it is clear they are equally applicable to the reviving of devises revoked by the *act of the law,* to wit, the effect of marriage; for, in either case the devise, being revoked, is of no effect until new life is given to it; and as this kind of revocation is of recent date, both in England and in this (139) country, it is for the courts to extend the application of the principle, so as not to allow the statute of frauds to be eluded. Lord Hardwicke in *Martin v. Savage, supra,* says: "Parol evidence of a republication of a will of land cannot now be admitted, as it would elude the statute of frauds"; and the principle must now be extended to wills of personalty, as our statute above cited puts them on the same footing with devises.

Such being the law in regard to wills attested by witnesses, it remains to make the application to holograph wills, in respect to which the English cases furnish no aid, except by way of analogy, as that species of wills depends on our statute, which regulates the mode of execution and revocation. In *Battle v. Speight,* 31 N. C., 288, and *S. c.,* 32 N. C., 459, it is held that a subsisting holograph will is not republished by being handed by the devisor with other valuable papers to a third person for safe keeping; and the question whether such a will can be republished by parol declarations is discussed at some length. It is also discussed in *Love v. Johnson,* 34 N. C., 355, but a decision was not called for, and the subject is treated very cautiously, being an unexplained branch of the law. It seems to us clear, as a necessary consequence of the provision of our statute, that a subsisting holograph will cannot be republished, much less can a revoked holograph will be revived and repub-

lished by verbal declarations, "however explicit and earnest." If an attested devise cannot be republished, or be revived and republished, except by a written instrument, attested in the manner required by the statute of frauds in regard to the execution and revocation of devises, it follows by precise analogy that a holograph will cannot be republished, or revived and republished, except by a written instrument attested as required by the statute of frauds, or by a holograph verified in the manner required by our statute in regard to the execution and revocation of such wills. So our conclusion is that a holograph will revoked by the marriage of the testator can only be revived and republished by a written instrument setting forth his intention, duly attested by
(140) two witnesses, or written by the testator himself and found among his valuable papers or handed to one for safekeeping, as if he makes an entry to that effect upon the holograph, or strikes out the date and inserts a new one, or adds a codicil and puts the paper back among his valuable papers, or deposits it for safe keeping, so as to meet all the requirements of the statute.

Mr. Johnson, on the argument before this Court, seeming to feel that the weight of the revocation was too heavy for him, took the ground that the will had not been revoked; for, although it was found among the valuable papers, yet *non constant* that it was there before the marriage; ergo, it was not then a will, and could not then be revoked. The fallacy of the argument is in this: the paper, being found among his valuable papers, the law makes the inference that it was put there by the testator, and carries the inference back to the time of its date, in the absence of any proof to the contrary; just as a bond is presumed to have been executed at the time of its date; for a date, although not a necessary part of an instrument, when inserted becomes a very material part of it, and it is forgery to alter it. This suggests another reason why a holograph will cannot be republished by verbal declarations, for that changes its date; and then, instead of being altogether in the handwriting of the testator, a material part would not be written at all. There is error.

PER CURIAM. *Venire de novo.*

(141)

T. R. CHERRY v. JAMES NELSON.

1. In an attachment for debt, objections to the sufficiency of the affidavit or bond can only be taken by a plea in abatement.

2. An attachment under ch. 7, sec. 1, Rev. Code, may be issued by a clerk of a county or superior court.

CHERRY *v.* NELSON.

MOTION to quash proceedings in an attachment, before *Manly, J.,* at a Special Term of PITT, July, 1859.

The affidavit was in the usual form, stating the defendant's indebtedness, etc., except that it was not signed by the plaintiff, or by any one for him, and was not certified by any one. This was the first ground on which the motion to quash was predicated.

The writ of attachment was issued by the clerk of the County Court of Pitt. This was the second ground urged for quashing.

There was a bond filed, following the form as prescribed in the statute (Rev. Code, ch. 7, sec. 4), which, it was contended, did not secure the defendant his costs in the suit, as it only provided for the costs and damages that might be recovered in any suit that may hereafter be brought, which was the third ground for quashing.

The court refused the motion to quash, and the defendant appealed.

Donnell and Warren for plaintiff.
Rodman for defendant.

MANLY, J. The first ground of objection to the proceedings will not sustain a motion to quash. The statute (Rev. Code, ch. 7, sec. 3) requires an affidavit of the debt and a bond for costs, and also for damages which may be recovered, before the officer is authorized to issue the attachment, and directs that the bond, together with the affidavit of the party complaining, subscribed with his proper name, shall be returned, etc. But it provides, at the close of the section, that every attachment issued without bond and affidavit taken and re- (142) turned as aforesaid, shall be *abated on the plea of the defendant.*

A form of affidavit is set out in the proceedings, but it is neither subscribed nor is it certified in the usual way. However fatal such a defect might be if brought forward *by plea of abatement,* we think it quite clear it can only be taken advantage of in that way. This is the mode of redress given by the statute, and excludes all others.

There are obvious reasons why the Legislature might require an absconding or nonresident debtor to enter an appearance and replevy before he could be permitted to take exception to the form of proceeding in a matter not at all touching the merits of the complaint. The law, at any rate, gives this remedy, and we think no other is admissible.

This complaint was made to the clerk of the Court of Pleas and Quarter Sessions of Pitt County, and the attachment was issued by him. It is expressly provided by the statute that this officer shall have the power to receive such complaint and issue process, and the objection, therefore, to the officer is untenable.

To the third objection, that there was no bond given to secure the defendant's cost, it is to be observed a bond has been taken and returned, and it is the bond prescribed by the statute. Whatever *we* may think of it, the Legislature seems to have thought it fulfilled the requirement of the law. Be this as it may, we think the alleged defective conditions of the bond can only be taken advantage of by the plea. Here, again, reasons may be perceived why the Legislature would not allow one to take advantage of such defects without appearing and pleading, as in the matter of defect now under consideration the Assembly might not deem it expedient to secure the costs of a defendant before any were likely to be incurred.

Upon the whole, the judgment of this Court is, there was no (143) error in refusing to quash. *Evans v. Andrews, ante,* 117.

PER CURIAM. Affirmed.

Cited: Leak v. Moorman, 61 N. C., 169.

WEST MASSEY v. REDDIC WARREN.

Where a deed conveyed all the grantor's property *except such part as the law allows poor debtors,* it was *Held* that property which might have been set apart for the debtor, under sections 8 and 9 of chapter 45, Rev. Code, but was not, did not fall within the exception, but passed by the deed.

TROVER, tried before *Dick, J.,* at the Spring Term, 1859, of JOHNSTON.

The plaintiff declared for the conversion of a number of hogs, a quantity of corn and fodder, farming utensils, and several articles of household furniture consisting of beds, chairs, etc., which he claimed under a deed executed to him by one George W. Edwards, dated 7 September, 1855, duly proved and registered, the material portion of which deed is as follows:

"Know all men by these presents, that I, George W. Edwards, of the county of Johnston aforesaid, in consideration of the sum of $1, to me in hand paid by West Massey, of the county aforesaid, the receipt whereof is hereby acknowledged, do hereby give, grant, sell and convey unto the said West Massey all the goods, chattels, wares, and merchandise following, to wit, one sorrel horse, six head of hogs, one cart, one carryall, all my farming utensils, all of my growing crop, and household and kitchen furniture (excepting only such part as the law allows poor debtors), to have and to hold the same," etc.

It was proved that the defendant had the property in controversy levied on and sold by a constable to satisfy sundry executions which he held against Edwards, issued on judgments obtained (144) subsequently to the making and registration of the deed.

It was insisted by the defendant's counsel that a part of the property in question was excepted from the deed as being that which the grantor was entitled to hold free from execution by Rev. Code, ch. 45, sec. 8, entitled "Executions."

The court was of opinion against the defendant upon this point, and under instructions to that effect the jury found a verdict for the plaintiff. Judgment. Appeal by defendant.

A. M. Lewis and R. G. Lewis for plaintiff.
H. W. Miller and S. H. Rogers for defendant.

MANLY, J. We concur with the court below in the opinion the whole of the debtor's property passed under the deed of 7 September, 1855, except the articles enumerated in Revised Code, ch. 45, sec. 7.

Articles which may be allowed under section 8 until they are set apart according to the provisions of section 9 are in every respect undistinguishable from the rest of the debtor's property. The whole is subject to execution, and may be treated in all respects as property unincumbered by any lien growing out of the statute provisions made for "poor debtors."

The object of the deed under consideration seems to have been to convey everything that was not already protected from a levy, and consequently it embraced everything not absolutely exempt. Other articles than the excepted ones of section 7 are only conditionally exempt, and do not belong to the charity list until certain legal proceedings are had by which the property is impressed with a new character—a character which it does not intrinsically possess. It does not appear that any articles had been set apart under the provisions of sections 8 and 9 of the act at the time of the execution of the deed, and from this defect of evidence, as well as from the fact that the defendant made a levy on all such as might have been allotted, we assume there (145) was no allotment.

Under such circumstances a deed of all property "except such as is allowed by law to poor debtors" covers all except such as was then under legal exemption.

If this deed be tested by another rule of construction it may be made, perhaps, a little more plain. Take its provisions, as we are required to do, most strongly against the grantor, and allow the greatest amount

of property to pass by it which its words will warrant, and clearly all will be embraced save such as possesses an *inherent* exemption from the claims of creditors—the articles enumerated in section 7. There is

PER CURIAM. No error.

Cited: Norman v. Craft, 90 N. C., 214.
Dist.: Branch ex parte, 72 N. C., 110.

EDWIN G. HODGES, ADMINISTRATOR WITH THE WILL ANNEXED OF ELIZABETH HOLLAND, v. CRANDLE LITTLE.

A bequest of a slave to a man and his wife *during their natural lives,* and *then to the lawful heirs of the wife,* gives the absolute estate to the wife by the rule in *Shelley's case,* which immediately vests in the husband *jure mariti.*

DETINUE, tried before *Manly, J.,* at a Special Term (January, 1858) of BEAUFORT.

The facts of the case were agreed on and submitted to the court for its judgment, as follows: William Gordon died in 1841, leaving a will, in which is contained, among other things, the following bequest, out of which the controversy in this case arises: "I loan to my daughter Elizabeth and to her husband, John D. Holland, during their natural lives, one-fourth part of my negroes, and then give them to the lawful heirs of Elizabeth." The slave sued for was one of those which
(146) came to Holland and his wife under this bequest, and passed to the defendant as the property of J. D. Holland under the will of Gordon. Mrs. Holland survived her husband, and, supposing she was entitled thereto, willed the slave to two of her children, and this suit is brought by her administrator with the will annexed, to recover him for their benefit.

It was insisted for the plaintiff that the husband and wife took by a *quasi* joint tenancy, and the wife had the benefit of survivorship.

The court being of opinion with the defendant, gave judgment accordingly, from which the plaintiff appealed.

W. B. Rodman for plaintiff.
Ed. Warren for defendant.

PEARSON, C. J. If the limitation had been to Elizabeth Holland for life, and then to her lawful heirs, there can be no question she would

have taken the absolute estate by force of the rule in *Shelley's case. Ham v. Ham,* 21 N. C., 598; *Sanderlin v. Deford,* 47 N. C., 74. Indeed, this position is assumed by Mr. Rodman for the plaintiff.

Taking that to be so, it would follow that John Holland, her husband, would, *jure mariti,* have been entitled to the slaves, and, consequently, this action could not have been maintained by the plaintiff as the administrator of the wife.

We are at a loss to see how the fact that the limitation is to John Holland, as well as to his wife, for their lives, can put him in a worse situation or make his marital rights less effective in vesting the absolute title in him than if he had not been named.

Needham v. Branson, 27 N. C., 426, which was cited and relied on by Mr. Rodman to avoid this conclusion, does not sustain him. In that case *land* was conveyed to Needham and his wife, and their heirs, and it was held they took estates in fee by *entireties,* and the wife surviving, she was entitled to the whole estate. But ours is a case of gift of *personal property,* in respect to which the *marital rights* are very different. If land is given to a wife and her heirs, and (147) there be issue born alive, the husband takes as tenant by the curtesy. If he be included in the gift, he takes a joint estate, with a chance of taking the whole survivorship. If personal property is given to a wife and her heirs, the husband takes the absolute estate, *jure mariti,* and of course he can take no less if he be included in the gift. *Robertson v. Fleming,* 57 N. C., 387.

We concur in the opinion that the plaintiff was not entitled to recover.

PER CURIAM. Affirmed.

STEPHEN PAGE v. MOSES EINSTEIN.

1. Money paid on the sale of a promissory note satisfied and extinguished was *Held* to be recoverable back in an action for money had and received, and it does not vary the principle that the payment was made in a note on a third person, which was afterwards converted into money.

2. Where the question was, collaterally, whether a certain note had been paid off and discharged, it was *Held* not necessary to produce such note on the trial.

ASSUMPSIT for money had and received, tried before *Shepherd, J.,* at the Spring Term, 1859, of LENOIR.

The plaintiff proved that he had purchased from the defendant an unendorsed note, produced by him on the trial, payable to Mrs. C. E.

Custis, made by Nelson & Clark, which was given for the hire of two slaves. The note was not delivered to plaintiff in payment of any precedent debt, but was a mere purchase, for which he paid a part in cash and the residue in a note on one Johnson H. Bryan. The plaintiff then proved that the note had been fully paid to the agent of Mrs. Custis, who gave a receipt for the money, but, not having the
(148) note, did not surrender it to Nelson & Clark before the sale of it to plaintiff by the defendant; that he informed the defendant of this, demanded a repayment of the money before suit, to which defendant replied he had given full value for the paper to one Perry, who was indebted to him; that he knew nothing of the previous payment to Mrs. Custis, and would not account to him for the loss.

The defendant then offered evidence to show how he came by the note, viz., that he found it in possession of Perry, who was indebted to him; that he made inquiries of sundry persons in reference to the paper, who told him that Clark, the surety, was undoubtedly good; that he then receipted in full an account of some $90 which Perry owed him, and paid money for the balance of the amount due on the note.

There was no evidence of how Perry became possessed of the note, nor was it shown that the note had been surrendered to Nelson & Clark by any one. In the cross-examination of one Fields, offered by defendant, the plaintiff's counsel asked him whether he knew that the note of Bryan had been paid to the defendant. Objection was made by defendant that no notice to produce the note had been given, but the objection was overruled, and the defendant excepted. Fields then answered that he had purchased Bryan's note from defendant, and that Bryan had paid it to him. Defendant sold the Bryan note to him (Fields) before this suit was brought. There was no evidence that defendant had any other note of Bryan. There was no evidence that defendant knew, at the time of the sale to the plaintiff of the Clark & Nelson note, that it had been paid.

Upon this case the court directed the jury to find for the plaintiff. Exception by the defendant.

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

Green for plaintiff.
J. W. Bryan for defendant.

(149) MANLY, J. A recovery in assumpsit can only be effected where there is a *total* want of consideration, as where the promise is based upon the sale of a horse that is at the time dead. And a payment made of the purchase money upon such a sale would be money

had and received to the use of the party paying, and might be recovered back, irrespective of any question of fraud.

So we think money paid for a promissory note, satisfied and extinguished, and which, therefore, has no longer any life as an obligation, stands in the same condition. While the seller of an article of personal property, and likewise, as we suppose, of a *chose in action,* is not held, in the absence of an express promise, to be liable for defect of quality, yet he is liable if it turn out that the article sold had no existence at the time, or that it was a nullity by reason of forgery, or the like. The liability is not in the nature of a warranty, but rests upon the plain principle of justice, that when something is paid for nothing, through ignorance of facts, the law will reinstate the parties by nullifying the whole transaction. Assumpsit has long been held to be the remedy in such cases. The case of *Anderson v. Hawkins,* 10 N. C., 568, was an exchange of bank notes, in which the money received by plaintiff turned out to be counterfeit, both parties being equally ignorant of the fact. The plaintiff was permitted to recover his money back in an action of assumpsit. This case is in point. The only distinction is, in the one case the notes were *forged,* in the other paid. In both they were equally null and worthless, and, it seems to us, the same principles and rules of law ought to govern them. See *Hargrove v. Dusenbury,* 9 N. C., 326. On the trial it was necessary, in order to charge defendant as for money had and received, to show that he had received payment of a note taken from plaintiff, and a witness was asked if he knew it was paid. The testimony was objected to for reasons stated in the bill of exceptions, but the witness answered, under leave from the court, that he had purchased the note in question from defendant, and that the obligor had paid it to witness. Objection to this evidence, on any ground, (150) is untenable. If the note had been in existence and produced, it could have shown nothing pertinent to the inquiry. The contents were not material. The point under investigation was whether Einstein had turned the note into cash, and the best evidence of this was the oath of the person to whom it had been sold. There was

PER CURIAM. No error.

Cited: *Hicks v. Critcher,* 61 N. C., 355.

STATE ON THE RELATION OF WILLIAM HEARN v. JAMES H. PARKER ET AL.

1. A delay to execute a *fi. fa.* for eight days, where the officer lived within 10 miles of the debtor, was *Held* to be such a want of diligence as would subject him in damages to the creditor.
2. A constable is bound to the same degree of diligence in the execution of process, where he takes it out himself, as where it is taken out by the creditor or his agent and put into his hands.

DEBT upon a constable bond, tried before *Shepherd, J.*, at the last Fall Term of EDGECOMBE.

The facts of the case were as follows: During the official year for which the defendants had given bond for the faithful discharge by Parker of his office, to wit, 17 January, 1857, a claim within the jurisdiction of a justice of the peace was put into the hands of Parker, but whether any special instructions were given him was left doubtful by the evidence. He proceeded to take judgment, and took out a *fieri facias,* but took no step to enforce it at any time. It was proved that the general understanding was that the debtors were insolvent, but that from the time of taking out execution, 17th to the 26th of the month, the debtors were in possession of a steam sawmill in his county, which was worth $800, and which, during that time, was unincumbered; that on the 24th of the month they made an assignment of the saw-
(151) mill and their other property, which was registered on the 26th.

The constable lived 10 miles from the debtors, but was the officer who generally did the business of this district. The counsel for the plaintiff asked the court to charge the jury that if they believed the facts to be as above stated, the plaintiff was entitled to recover.

His Honor declined so to charge, but told the jury if they were satisfied that certain instructions were given the officer for him to proceed with urgency in the collection of the claim, then they should find for the plaintiff; otherwise, to find for the defendants. The plaintiff excepted. Verdict for defendant. Judgment and appeal.

No counsel for plaintiff.
Ed. Conigland and J. B. Batchelor for defendants.

MANLY, J. After the statute of 1818, Rev. Code, ch. 24, sec. 7, charging the constable officially with the collection of claims, it was held to be its object only to recognize an agency in the officer for that purpose, and to make the official bond a security for its fulfilment. It has never been supposed to attach to him, in this new field of official duty, any higher degree of responsibility than would attach to any other agent

undertaking the same duties for compensation. The degree of diligence, as a *collecting agent,* to which he has been uniformly held is *ordinary diligence* only.

But this, neither before the statute nor since, was the grade of diligence to which an officer *with process* has been held. It is his duty to execute the precepts with a dispatch and care quicker and greater than *ordinary*—with that degree which would be used, under similar circumstances, by a man of the strictest diligence and prudence.

We do not perceive any reason for a difference between the cases of an officer with process put into his hands by the plaintiff, or put into his hands by an agent, or sued out by the officer himself, acting in that behalf as an agent. In the absence of any specific instructions as to the collection, they stand upon the same ground, and the (152) officer is bound to the same grade of diligence in the execution. In the case before us, upon the finding of the jury, we assume that no specific instructions were given in respect to the collection of the debt, and the case then presents the point whether an officer who has a *fieri facias* in his hands against a debtor 10 miles from the officer's residence, and who delays execution from the 18th to the 26th of January, is guilty of culpable delay. We differ in opinion from his Honor below, and think so long a delay is not in accordance with the strictest diligence, which is the grade of his duty. And, therefore, the persons injured may have an action on the bond to recover the damage.

Indulgence to a debtor is confined to the creditor and to those impediments which the law has thrown around the former to prevent oppression. *Sherrill v. Shuford,* 32 N. C., 200; *Murphy v. Troutman,* 50 N. C., 379.

PER CURIAM. *Venire de novo.*

THOMAS JONES, TRUSTEE, v. JOHN BAIRD ET AL., EXECUTORS OF WILLIAM BAIRD.

1. The doctrine which allows the owner of a personal chattel, wrongfully converted by a sale, to waive the tort and bring assumpsit for money had and received, can only apply where the owner has a right to the money at the time when the tort is committed.

2. Whether the doctrine of the presumption of the death of a person, arising from his having gone to parts unknown and not heard from in seven years, applies to slaves, *quere.*

ASSUMPSIT for money had and received, tried before *Caldwell, J.*, at Spring Term, 1859, of PERSON.

In 1826, William Baird married Mrs. Lucy Jones. They were
(153) both persons of fortune, and before the marriage joined in executing a marriage settlement, in which it was stipulated that after the death of either of them the survivor should have no right to any portion of the property of the decedent in consequence of such marriage, and the said Lucy conveyed all her estate, including a number of slaves, to the plaintiff, as trustee, upon the following declared trusts, viz., in trust for the said Lucy until the marriage, and then that he should permit the said William Baird, during their joint lives, to cultivate the land therein mentioned, and use the slaves and other personal property, and have, receive, take and enjoy the crops, hires, issues, rents, and profits to and for his own use and benefit, and after the decease of such one of them as should first happen to die, then upon trust that he, the said trustee, should assign, transfer, and deliver over all to the said Lucy, in case she survived the said William, but if she should be the first to die, then to such person as she should appoint to receive the same, and in the absence of such appointment, to such persons as by the acts of descents and distributions of Virginia should be entitled to the same, exclusive of her said husband.

In 1846 William Baird sold William, a slave of about the age of 13, a child of one of the female slaves conveyed by Mrs. Baird to her trustee, the plaintiff, to one Thomas Woods, then and now a resident of Person County, at the price of $325, which was considered to be his full value. This slave was, during the same year, taken by Woods to the State of Alabama, and sold there, and has not been since heard from.

William Baird died in 1857, and a demand was made of defendants, as his executors, before the suit was brought.

The plaintiff contended that he had a right to waive the *tort* and acquiesce in the sale of the slave, and allow Mr. Baird to retain the price, according to the terms of the marriage settlement, during his life, and then to recover the same in this action.

The defendants contended that, in consequence of the death of the slave William, which the law presumed to have taken place in the
(154) lifetime of Mr. Baird, the plaintiff had lost all right or claim to the price for which he sold. They also relied on the statute of limitations, which was pleaded. A verdict was taken, by consent, in favor of the plaintiff, subject to the opinion of the court upon the question whether, in law, the plaintiff was entitled to recover, with power to set it aside and enter a nonsuit in case he should be of opinion against the plaintiff.

Afterwards, being of opinion that the plaintiff had lost all remedy against the defendants by the death of the slave, the court directed a nonsuit to be entered, from which plaintiff appealed.

J. W. Norwood for plaintiff.
W. A. Graham for defendants.

BATTLE, J. In *Lewis v. Mobley,* 20 N. C., 467, it was held that where the purchaser of a slave from a tenant for life sold him *out and out* during the life of the tenant for life, the ultimate owner could not maintain trover against the seller for the alleged conversion, because, during the life of the tenant for life, his right of possession had not accrued, and after the death of such tenant there was no act of conversion. It had been previously decided in *Andrews v. Shaw,* 15 N. C., 70, that the action of trover could not be maintained against the hirer of a slave for a year, who sold him *out and out* during the year, if the action had been commenced during the term of the hiring, because the plaintiff, in trover, must have both the right of property and of present possession. *Lewis v. Mobley, supra,* is but an extension of this doctrine, and shows that the right of property and of immediate possession must exist at the time when the *act of conversion* occurs. For a similar reason, we think that the doctrine which allows the owner of a personal chattel, wrongfully converted by a sale, to waive the tort and bring an action of assumpsit for money had and received, can apply only when the owner has a right to the money at the time when the (155) tort is committed.

We have seen that a sale of a slave *out and out* by a tenant for life is not an act of conversion at the termination of the life estate, and it would seem to be a necessary consequence that the action of assumpsit for money had and received, which depends upon the waiver of a tort, could not then be maintained against the executors of the tenant for life, because there was not then any tort to be waived.

Such is the conclusion to which we have been led upon the ground taken by the counsel that the testator of the defendants was a tenant for life of the slave, which he sold, with a remainder of the absolute interest in the plaintiff. But in truth, the plaintiff had the legal estate in him as trustee all the while, and might have brought an action of trover or assumpsit for money had and received against the testator immediately after the sale of the slave. Such action ought, however, to have been brought within three years after the cause of it accrued, and the one which was brought was, therefore, barred by the statute of limitations, so that the case of the plaintiff is not altered for the better by this view of it.

We therefore concur with his Honor that the action cannot be maintained. But we do not undertake to say that the plaintiff has lost all remedy, either by the presumption of the slave's death or by any other cause. It is a matter for his consideration whether he cannot, by a bill in equity, follow the fund, upon the principle recognized in *Haughton v. Benbury,* 55 N. C., 337; *Cheshire v. Cheshire,* 37 N. C., 569, and *McKeil v. Cutlar,* 57 N. C., 381.

This view of the case makes it unnecessary to notice the argument, strongly and ably urged by the counsel for the plaintiff, that the doctrine of the presumption of the death of a person, arising from his having gone to parts unknown and not heard from for seven years or more, ought not, for obvious reasons, to be applied to slaves. It must be admitted that our courts have recognized the doctrine as appli-
(156) cable to slaves as well as to free persons, but it does not appear that the attention of the Court was called to the supposed distinction in any of the cases contained in our Reports. See *Lewis v. Mobley* and *Haughton v. Benbury, ubi supra.* It may be well worth the inquiry whether the doctrine in question, as applied to slaves, is so fixed in our law by judicial recognition that it cannot be changed except by legislative action, and if such action be necessary, whether it ought to be invoked.

PER CURIAM. Affirmed.

Cited: Isler v. Isler, 88 N. C., 580; *Olive v. Olive,* 95 N. C., 490.

CLERK'S OFFICE, ETC., v. RICHARD ALLEN.

Where the plaintiff in a suit was ordered to pay certain costs of witnesses, and fees to the clerk and sheriff, it was *Held* not irregular to issue a *fi. fa.* for the same, in the name of the clerk's office, and on its appearing that he was insolvent, it was *Held further,* that the court might properly order such costs to be paid out of certain money in the hands of the sheriff, raised on an execution in favor of such insolvent party.

MOTION as to costs, before *Dick, J.,* at the Fall Term, 1859, of ROCKINGHAM.

The defendant in this motion, Richard Allen, had brought a suit and recovered against one Summers, but was ordered to pay the costs of the attendance of certain witnesses, also the clerk's costs for issuing the subpœnas and the sheriff's for serving them, and the execution was

ordered to issue therefor. The clerk having taxed these costs, issued a *fieri facias* against Allen, in the name of the clerk's office as plaintiff. At the return of this process the sheriff made an affidavit stating that he had not been able to find any property wherewith to satisfy this execution, and that the said Allen was insolvent, except as to a sum of money in his hands which had been raised on an execution in his favor against Summers.

On this affidavit it was moved that the sheriff apply so much (157) of the said money to the satisfaction of the *fieri facias* aforesaid as was sufficient for that purpose, which was ordered by the court, and the defendant in this motion appealed.

Morehead for plaintiff.
Gorrell for defendant.

BATTLE, J. The counsel for the defendant Allen, who was plaintiff in the court below in the suit of *Allen v. Summers,* contends that what purported to be a judgment rendered against him at Spring Term, 1859, was a nullity, (1) because it was partly in favor of witnesses not named, and (2) because it was partly in favor of the "clerk's office," which is not a person, either natural or artificial, but only "a place," and he concludes, as the judgment was a nullity, no execution could rightly be issued thereon.

The counsel contends further that the court had no right to order the payment of what was due to the officers of the court and witnesses (whose fees and attendance was charged to the plaintiff in that suit) out of the money collected for him by the sheriff on the execution against the defendant Summers.

We are clearly of opinion that both objections are untenable. What the counsel calls a *judgment* is not such an one as is given in favor of one of the parties in an adversary suit; but it is only an *order,* which every court has a right to make to enforce the taxing and payment of costs to the officers and witnesses. Each party is at all times liable to pay his own costs, and whenever it may be necessary such payment may be enforced by a rule upon him and an attachment thereon, or by the milder process of *fieri facias. Merritt v. Merritt,* 2 N. C., 20; *Office v. Lockman,* 12 N. C., 146; *Office v. Taylor, ibid.,* 99; *Clerk v. Wagner,* 26 N. C., 131. The order in the present case is very much the same as those made in the cases referred to. The costs were, of course, to be ascertained by the clerk's taxation, and the name of the clerk's office was used as a mere formality, the substance of the order being that execution should issue to collect what the clerk should (158)

find to be due to the officers and witnesses, whose fees the court had directed to be taxed against the plaintiff.

Upon the second point we have no doubt that the court had the power to appropriate the money in the sheriff's hands belonging to the plaintiff in the execution to the payment of his own costs, which he, under the order of the court, was bound to pay. We have seen that such payment might have been enforced by a rule and attachment, and it would be strange that the court, instead of resorting to that stringent remedy, should not have the power to take the party's money then in the custody of one of its officers and apply it, as the party himself ought to have done, under its order. That the court does possess such power seems to be settled both upon reason and authority. See *Armistead v. Philpot,* 1 Doug., 230; *Turner v. Fendall,* 1 Cranch, 117 (1 Curtis, 361).

PER CURIAM. Affirmed.

Cited: Blount v. Wright, 60 N. C., 91; *Wood v. Wood,* 61 N. C., 541; *Clerk's Office v. Bank,* 66 N. C., 216; *Jackson v. Maultsby,* 78 N. C., 176; *Sheppard v. Bland,* 87 N. C., 167; *S. v. Wallin,* 89 N. C., 580; *Perkins v. Berry,* 103 N. C., 143; *Long v. Walker,* 105 N. C., 97; *Hinnant v. Wilder,* 122 N. C., 153.

STATE v. G. M. LYERLY.

1. Where a bill of indictment, under the statute, Rev. Code, ch. 34, sec. 45, charged that "A. (a male)," and "B (a female)," "unlawfully did bed and cohabit together without being lawfully married," and "did commit fornication and adultery," it was *Held* that the offense was sufficiently charged.

2. Where in a bill of indictment against two for fornication and adultery one of them was not taken, and on the trial of the other a general verdict of guilty was found, it was *Held* that this afforded no ground for an arrest of judgment.

INDICTMENT against the defendant and one Jane May for fornication and adultery, tried before *Heath, J.,* at the last Fall Term of ROWAN.

The bill of indictment was in these words:

(159) "STATE OF NORTH CAROLINA—Rowan County.

"The jurors for the State, upon their oath, present, that George M. Lyerly (a male), late of said county of Rowan, and Jane May

(a female), late of said county of Rowan, on 1 January, in the year of our Lord 1859, and on divers other days and times, both before and after that day, with force and arms, in the said county, unlawfully did bed and cohabit together without being lawfully married; and then, and on said other days and times, and there did commit fornication and adultery, against the form of the statute in such case made and provided, and against the peace and dignity of the State." Signed by the solicitor, and endorsed "A true bill."

The defendant Jane May had not been taken. The jury found a general verdict of guilty. The defendant moved in arrest of judgment, first, that the offense defined in The Code was not charged in the bill with sufficient certainty; secondly, that the verdict was general, the other defendant not having been taken.

The motion was overruled, and the defendant appealed to this Court.

Attorney-General for the State.
Fleming and B. R. Moore for defendant.

MANLY, J. Two grounds are alleged in support of the motion to arrest. First, that the offense defined by The Code is not *charged* in the bill with the required certainty. Secondly, that there has been a general verdict of guilty, the other defendant not being on trial or taken.

The degree of certainty required in an indictment is declared to be "certainty to a certain intent in general." Co. Lit., 303a.

This is further explained thus: "That everything which the pleader should have stated, and which is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him." Applying this rule to the case before us, (160) we think the indictment will do.

The statute declares: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be deemed guilty of a misdemeanor." The indictment charges that George M. Lyerly, a *male,* and Jane May, a *female,* on 1 January, 1859, and on divers other days, etc., unlawfully did bed and cohabit together without being lawfully married, and then and there, and on said other days, etc., did commit fornication and adultery.

The certainty required by the rule above stated in such a description of the *corpus delicti* as embraces every ingredient of the offense, either by express words or by necessary implication from what is expressed. A plain illustration of the rule may be drawn from the descriptive words, "male" and "female," adopted by the draftsman of the bill. These

words do not *per se* import that the parties were man and woman, but when you connect them with other parts of the indictment, it appears by necessary implication.

So, we think, where all the words used in the indictment to charge the offense are taken together, every ingredient of the misdemeanor as defined by statute is included.

The words "lewd" and "lascivious," used by The Code in the definition of the offense, are intended, we suppose, to exclude the idea that the bedding and cohabiting might be innocent. The words that are added in the bill of indictment, "and did then and there commit fornication," exclude the presumption more conclusively. If the words of the statute had been preferred, they would not have expressed and omitted ingredient in the offense, and would scarcely have excited any additional idea in the mind.

We dismiss the matter with one other observation, and that is, in framing bills of indictment upon statutes, it is much better to pursue *strictly* the words of the statute. Such words receive a certain judicial interpretation, and by adhering to them steadfastly all question as to the meaning of the words used is avoided. The indictment
(161) seems to have been a precedent under the statute as it stood prior to 1856.

The other ground for the motion is not tenable. It is true, the offense cannot be committed except by more than one; but the general verdict of guilty finds the guilt of the woman as well as the guilt of the defendant, as against the latter. The extent to which the cases have gone is that where one only is convicted, and the others *acquitted,* there can be no judgment. It is well settled, however, that *one,* in the absence of his confederate, may be put upon trial, convicted and punished. The possibility that the confederate may be afterwards acquitted will not arrest the execution of the law upon the one found guilty. *S. v. Tom,* 13 N. C., 569.

The motion in arrest was correctly overruled on both grounds.

PER CURIAM. Affirmed.

Cited: S. v. Guest, 100 N. C., 412; *S. v. Cutshall,* 109 N. C., 773; *S. v. Britt,* 150 N. C., 812.

DOE ON THE DEMISE OF AARON M. HOUSTON ET AL. v. GASSELL D. BROWN.

It was not the intention of the act of 1848 (Rev. Code, ch. 56, sec. 1) to deprive the husband of his estate by the curtesy.

EJECTMENT, tried before *Heath, J.*, at last Fall Term of UNION.

The case was submitted upon the following facts agreed upon by the counsel: The defendant, in 1854, was married to one Eleanor L. Houston, who at the time of the marriage was seized in fee of the land in controversy. On 14 September, 1855, she gave birth to a child, born alive, and she died within a few hours after that event. The child survived its mother about ten months, and then died also. The defendant took possession of the premises immediately after the marriage, and has continued to hold them ever since. The lessors of the (162) plaintiff are the children of the said Eleanor by a former marriage, and her heirs at law. The only question in the case was whether the act of 1848 (Rev. Code ch. 56, sec. 1) takes away the husband's right to an estate by the curtesy.

His Honor being of opinion against the plaintiff upon that question, gave judgment for the defendant, and the plaintiff appealed.

Wilson for plaintiff.
Ashe and Jones for defendant.

PEARSON, C. J. The case presents this question: Does Rev. Code, ch. 56, sec. 1, deprive the husband of his right, according to the common law, to an estate for life in the land of the wife as tenant by the curtesy?

In the absence of an express provision to that effect, we should be slow in adopting the conclusion that it was the intention of the lawmakers to enact so radical a change in the law, because, if such was the intention, it is reasonable to presume it would have been declared in direct terms, and not be left as a matter of inference. We are not able, however, to see anything in the section referred to calculated to raise even a doubt as to its proper construction. The purpose was to adopt, to a partial extent, the principle of a "homestead law," and to provide a home for the wife during her life, leaving the rights of the husband unimpaired and unrestricted after her death. To this end the husband is not allowed to sell the land, or even make a lease for years, in her life-time without her consent, authenticated by deed and privy examination. Nor can his estate in the land be sold under execution. To this extent the power of the husband is restricted, but no further; and after her death there

is no intimation of an intention to interfere with his rights according to common law. This is manifested by the provisions as to the wife's privy examination and the general scope of the enactment. The
(163) sole object is to provide a home for her, of which she could not be deprived either by the husband or by his creditors. There is

PER CURIAM. No error.

Cited: Long v. Graeber, 64 N. C., 432; *Wilson v. Arentz,* 70 N. C., 673; *Jones v. Cohen,* 82 N. C., 81; *McGlennery v. Miller,* 90 N. C., 220; *State v. Mills,* 91 N. C., 593; *Morris v. Morris,* 94 N. C., 617; *McCaskill v. McCormac,* 99 N. C., 551; *Cobb v. Rasberry,* 116 N. C., 139.

Dist.: Thompson v. Wiggins, 109 N. C., 509; *Walker v. Long, Ib.,* 511; *Taylor v. Taylor,* 112 N. C., 136.

A. B. McMILLAN ET AL. V. J. B. PARSONS ET AL.

1. An attaching creditor acquires a lien from the date of his levy, which is not displaced by a *fi. fa.* issuing on a judgment prior in date to the judgment on attachment.

2. *Harbin v. Carson,* 20 N. C., 523, so far as it decides in favor of a purchaser under the lien by the attachment against a prior purchaser under the *fi. fa.,* questioned.

MOTION before *Heath, J.,* at last Fall Term of ASHE, for the application of certain moneys paid into court under various executions against one John McMillan. The motion was originally made in the county court, to which the executions were returnable, and came up to the Superior Court by appeal. The contest arose among the creditors as to the proceeds of the sale of his land. At February Term, 1859, of Ashe County Court the sheriff had in his hands writs of *fieri facias* against the debtor in favor of Jesse Bledsoe, J. B. Reeves, A. B. McMillan, and S. H. Thompson, issuing from the previous November term of that court, and two writs of *venditioni exponas* in favor of J. P. and S. C. Waugh and James Gambill, issued upon a final judgment in attachments which had been levied at the same time on the land, between August and November terms. Bledsoe's *fieri facias* was an alias, issuing on a *fi. fa.* issuing from August term. The land was sold at February term aforesaid, and brought the sum of $3,000, which was enough to satisfy these writs, and left a surplus, but not sufficient to satisfy the whole of the executions in his hands.

At the said term (February) final judgments were obtained (164) in suits begun by attachments levied on the land of the debtor previously to the November term aforesaid, but after Waugh's and Gambill's. The first of these were one in favor of John Parsons, and one in favor of Joseph B. Parsons, both levied at the same time. The next were one in favor of A. B. McMillan, and one in favor of A. D. Parsons, levied at the same time, but after the preceding two. Next were one in favor of Solomon Parsons and one in favor of Wright Wingate, levied at the same time, but after the preceding two sets were levied. Next, one in favor of Hugh Smith, levied after the preceding three sets of levies. Writs of *venditioni exponas* issued on these judgments, and were in the hands of the sheriff when he made this application for directions.

His Honor, in the court below, decided that Bledsoe's *fi. fa.*, issuing from August, and aliased at November, was first entitled, then the *venditioni exponas* of Waugh and Gambill; then the *venditioni exponas* of John Parsons and J. B. Parsons; then the *venditioni exponas* of A. B. McMillan and A. D. Parsons; then the *venditioni exponas* of Solomon Parsons and Wright Wingate; then the *venditioni exponas* of Hugh Smith, and that the surplus be applied *pro rata* to the *fi. fas.* of J. B. Reeves, A. B. McMillan, and S. H. Thompson. The last three, being dissatisfied with this order, appealed.

Nat Boyden for appellants.
Lenoir for appellees.

PEARSON, C. J. The attachment law, Rev. Code, ch. 7, sec. 1, provides: "The attachment shall be deemed the leading process, and the same proceedings shall be had thereon as on judicial attachments." The court law, Rev. Code, ch. 31, sec. 52, provides: "When the sheriff shall return in a civil action that the defendant is not to be found in his county, the plaintiff may, at his election, sue out an attachment against the estate of such defendant," "and the estate so attached, if not replevied, or sold, according to the rules prescribed for estates taken in original attachments, *shall remain in the custody* (165) *of the sheriff until final judgment, and then be disposed of in the same manner as estates taken in execution on a writ of fieri facias.*" Thus it will be seen that property taken under an original attachment is in the custody of the sheriff from the *date of the levy,* in the same manner as if it had been taken under a *fieri facias;* and the consequence is that the attaching creditor acquires a lien from the date of the levy. This is the only construction that the statute admits of, although, as

was forcibly urged on the argument, the effect is to give to a creditor who proceeds by attachment an advantage in respect to the property over a creditor who proceeds by an ordinary writ; for although he may have issued his writ before the attachment was levied, still he can acquire no lien until he gets his judgment; so he may start first, and get judgment first, and yet the attaching creditor is entitled to be first satisfied, because his lien took effect by force of the levy.

It seems to have been considered necessary to make the attachment bind from the levy, for if the estate attached could afterwards be taken away, this "leading process" would be left without a foundation to rest on; and it was, no doubt, taken into consideration that the advantage which the attaching creditor acquired as a consequence thereof, in respect to the *property* of the debtor, was compensated for by the fact that the creditor, suing by writ, had a lien on *the body* of the debtor, and could resort to the bail for his satisfaction; whereas the former had nothing to rely on but the estate attached, and in regard to any other property of the debtor the creditors were left to acquire priority by the test of their respective executions.

Upon an examination of the authorities we find this construction of the statute is settled, and we can see no sufficient reason for disturbing it. In *Amyett v. Backhouse,* 7 N. C., 63, it is assumed that the attachment created a lien from the date of the levy, although the case goes off on the ground that the lien was lost because it was not followed up by a *venditioni exponas,* but had been waived by suing
(166) out a *fieri facias.* So in *Harbin v. Carson,* 20 N. C., 523, the lien of the attachment, from the date of the levy, is assumed, and the decision goes so far, in order to give effect to it, as to hold that a purchaser at a sale under the *venditioni exponas* was entitled to the land in preference to one who had before purchased at a sale by the sheriff under a *fieri facias,* which bore test after the date of the levy of the attachment. We are not prepared to say that we could follow that case to the extreme of holding that a purchase under a *venditioni exponas* divested the title previously acquired by a purchaser under a *fieri facias,* but the case shows how entirely settled the principle of the lien of the attachment was considered to be.

This quære, as to *Harbin v. Carson,* is predicated on the ground of a long-established principle in favor of purchasers at sheriff's sales. A title thus acquired is not allowed to be disturbed by the lien of a senior *fieri facias,* or of an elegit, or, as it would seem, of an attachment, *Green v. Johnson,* 9 N. C., 309; *Ricks v. Blount,* 15 N. C., 128, where the matter is elaborately discussed. In short, the books are full of cases fixing the principle in favor of the purchaser at sheriff's sale and

leaving the creditors to contest in respect to the distribution of the money made by the sale, as in our case.

We entirely concur with his Honor who presided in the court below as to the manner of distributing this fund. The attaching creditors acquired a lien by the levies, subject to the execution bearing a prior test. When that is satisfied, these levies attach as if there had been no such execution.

PER CURIAM. Affirmed.

Cited: Glass Plate Co. v. Furniture Co., 126 N. C., 893.

(167)

STATE v. J. F. CLARK.

1. In an indictment for arson, under sec. 2, ch. 34, Rev. Code, a house built for and at one time occupied as a dwelling-house, but untenanted at the time of the burning, is not within the meaning of that act.
2. Where, upon a charge for arson, a special verdict was rendered finding that the defendant did wilfully and maliciously burn a dwelling-house, which was at the time uninhabited, the court can proceed to judgment as for a misdemeanor, under sec. 103, ch. 34, Rev. Code.

ARSON, tried before *Heath, J.,* at Fall Term, 1859, of GASTON.

The house which the defendant was charged with burning was built for a dwelling-house, and had once been occupied as such, but was untenanted at the time of the burning. Under a charge from the court upon the facts, the jury found a special verdict as follows: "That John F. Clark, the prisoner at the bar, is guilty, wilfully and maliciously, of burning the dwelling-house in manner and form as charged in the bill of indictment; but that said dwelling-house, when burned, was an uninhabited house, though it was built as a dwelling-house, and had before that time been inhabited." Upon this verdict, judgment was directed to be entered for the defendant. Appeal by the State.

Attorney-General for the State.
Thompson for defendant.

MANLY, J. There are several considerations which bring our minds to the conclusion that *"dwelling-house"* in the section of the statute under which this indictment is framed means an *inhabited* house.

An adequate reason for so high a penalty is only to be found in the supposition that the Legislature intended to restrict it to inhabited houses.

We find it grouped with other buildings, such as a barn with grain in it, mills and manufactories, which are of special value on ac-
(168) count of their contents, and on that account, as we suppose, are all put upon the same penal footing. And we find the Legislature, in section 103 of the same chapter of The Code, providing that the burning of *"uninhabited houses"* shall be a misdemeanor only.

By a reference to this last section it will be perceived, by necessary implication from the context, that the uninhabited house spoken of is a house that is fitted for habitation, but is unoccupied at the time. These considerations, taken in connection with the rule of construction that penal statutes, and especially highly penal ones, are to be strictly interpreted, conduct our mind, clearly, to the conclusion above announced.

We concur, therefore, with his Honor below, that judgment of death cannot be pronounced upon the special verdict of the jury, but we are of opinion that judgment may be pronounced against defendant as for a misdemeanor. *S. v. Upchurch,* 31 N. C., 454.

The interpretation which we thus give to the phrase, "dwelling-house," puts the section in harmony with itself, with other parts of the chapter, and with the whole frame of our jurisprudence. Give it a different construction, and allow the phrase in question to embrace the entire class of houses fitted for human residence, whether occupied or not, and it is neither humane nor consistent. Ample reasons are found in a sound public policy, and in the peculiar jealousies of our people for protecting the house which is the home of the citizen by the highest penalties of the law. No good reason can be found for throwing this guard about an uninhabited tenement. The judgment below is reversed, and this opinion must be certified, to the end that that court may proceed to judgment and sentence agreeably to the decision of this Court and the laws of the State.

PER CURIAM. Reversed.

Cited: S. v. Goldston, 103 N. C., 326; *S. v. Lumber Co.,* 153 N. C., 613.

(169)

STATE ON THE RELATION OF JENKINS & ROBERTS v. HENRY TROUTMAN ET AL.

1. Where a sheriff had a writ against a resident of another State, who was known by the sheriff to be in his county on a temporary visit, and such sheriff was also informed by one of whom he inquired, that the person sought would be at a particular place, near the county line, on a certain day mentioned, on his way out of the State, and he failed to be present on the day mentioned, when, if he had been there, he might have arrested the defendant, and showed no reasons for not going there, it was *Held* to be negligence.
2. Where a sheriff is shown to be guilty of negligence in failing to serve a writ, the *onus* of showing that the defendant in the writ was insolvent devolves upon him.
3. In a case where the question was as to the ability of the debtor in a *capias ad respondendum* to meet the debt, if he had been arrested, evidence of his being indebted to others was held to be immaterial and irrelevant.

DEBT, on a sheriff's bond, tried before *Heath, J.*, at the last Fall Term of ROWAN.

The execution of this bond by the defendant Troutman, as the sheriff of Iredell, and the other defendants as sureties, was proved by the subscribing witness. The breach assigned was the failure on the part of Troutman to arrest one Julius W. Houston on a *capias ad respondendum*. The plaintiffs proved that prior to September, 1855, and up to the time of the issuing the writ in this cause, said Houston was indebted to them in the sum of $690.84, which is not yet paid. That on 4 September, 1855, a writ of *capias ad respondendum* against said Houston and one Randolph for the debt aforesaid was placed in said Troutman's hands. Randolph was a resident of Rowan, and was at that time insolvent, and has so continued ever since, possessing no goods or effects out of which this debt could be made, either in whole or in part. That Houston was then not a resident of this State; was raised in Iredell, but removed in 1851 or 1852 from Rowan to California. That Houston, at the time of the writ aforesaid came to the sheriff's hands, was on a visit to his relations and friends in Iredell County.

That defendant Troutman, between the 1st and 15th of September, went to a witness, one Roseborough, and said he did not (170) know Houston, and asked where he was to be found. Roseborough told him he understood he was at the house of his (Houston's) brother-in-law, who lived in Iredell, about 2½ miles from Statesville, where this conversation occurred. That Troutman lived about 7 miles from Statesville. The same witness further proved that early in the morning of the Monday on which Houston left the State, about 1 October,

1855, he saw said Houston in a carriage with his mother, passing through Statesville towards Charlotte; that after they had passed, Troutman came into witness's store and inquired for Houston. Witness told him that he had passed in the carriage with his mother, and that Troutman said from description he must have met Houston 2½ miles from Statesville, and started away. On cross-examination witness said that Houston, when he left the State in 1851 or 1852, was generally reputed to be insolvent and without property.

The plaintiff's proved by Mrs. Thom that she is an aunt of Houston; that she lived in Iredell County, about 20 miles from Statesville, and within a mile of the Mecklenburg line; that Troutman came to her house on Wednesday or Thursday before Houston left the State, and made inquiry for him; that she told him she had seen Houston, and expected him at her house on the following Friday, Saturday, or Monday, on his way to Alabama, though he might not come; that Houston came to her house on the next Monday in a carriage with his mother, whom he left at her house, took a cup of coffee, and left soon after, about 12 o'clock midday, in the direction of Charlotte, there to take the cars for Alabama; since which time she had not seen him. She further swore that defendant Troutman was not at her house on either of these days, nor had she any recollection that his brother was there on these days. On cross-examination, she said that Houston stayed at no one particular place in Iredell; while there, he was mostly at his brother's house aforesaid—sometimes at one friend's or relation's house, sometimes at another's, and that he visited Catawba,
(171) Mecklenburg, and Rowan. The return of the sheriff was, "Not to be found." The plaintiffs then read the depositions of Julius W. Houston and Dr. Houston. J. W. Houston, in his deposition, stated that he was in Iredell County, North Carolina, in September and October, 1855; that he remained there some five or six weeks; that he then left for Alabama, and has not been back since. That while in North Carolina he was possessed of no property, and had no money or effects of any kind, either in his own hands or hands of any one else; that no one was indebted to him in this State at the time alluded to, or since. He further stated that he had money and effects accumulated by him in California at the time he was in North Carolina.

Dr. Houston, in his deposition, stated that J. W. Houston was at his house in Iredell County, N. C., for some two or three weeks during the months of August and September, 1855, and that he left for Alabama some time about 1 October, the same year.

The defendant introduced one Troutman, brother of the defendant Troutman, who swore that on Monday morning about the last of

September or the first of October, 1855, the defendant Troutman came to witness's house, about 2½ miles from Statesville, on the road towards Mrs. Thom's; that he said he was going to arrest J. W. Houston, and desired him to go along with him; that witness started with him; that the road to Mrs. Thom's forked about a mile from his house, both fork's leading to Mrs. Thom's; that witness took one fork, and defendant Troutman the other; that defendant Troutman did not tell him that Houston was ahead, or that he expected to find him at Mrs. Thom's, or that she had told him anything about Houston or his whereabouts; that after they separated at the fork, witness rode on at ordinary speed and reached Mrs. Thom's at 2 or 3 o'clock in the evening, inquired for Houston, learned that he had left; turned back and met defendant Troutman near Mrs. Thom's, and they returned to his house together; that defendant Troutman lived between Statesville and Mrs. Thom's, and that in going home from Statesville would travel (172) that road. The defendant offered to prove that Houston was largely indebted to different persons in Iredell and Rowan. The plaintiffs objected that this evidence of debt was irrelevant, and that the evidences of debt, which were notes and bonds, were not produced. The objection was sustained, and the evidence ruled out. Defendants excepted. The plaintiffs then proved that Houston had many wealthy relations and friends in Iredell County, at the issuing of the writ and the return thereof. The defendants insisted that the deposition of Houston, in connection with the evidence of his insolvency when he left the State in 1851 or 1852, showed he was insolvent in 1855, and had no effects or property from which plaintiffs' debt could have been made, in whole or in part, and that plaintiff was not entitled to recover anything, or, if entitled to recover anything, the recovery must be limited to nominal damages.

The judge charged the jury that, taking all the evidence into consideration, if believed, there was negligence, and that plaintiffs were entitled to their verdict; that as the deposition of Julius W. Houston showed, if believed, and that was a question for them, that he had considerable moneys and effects in California, then the plaintiffs were entitled to indemnity for loss of their debt, and ought to recover the full amount thereof, unless the defendant had shown that the full amount could not have been realized therefrom. But if defendant had shown that the full amount could not have been realized out of those moneys and effects, then the plaintiffs were entitled to recover damages an amount equal to what the jury were satisfied could have been realized from Houston had the sheriff arrested him and held him to bail, or imprisoned him under the *capias ad respondendum.*

There was a verdict for the full amount of the debt in favor of the plaintiffs. Judgment. Appeal by defendants.

Fleming for plaintiffs.
D. G. Fowle, Osborne, and Sharpe for defendants.

(173) BATTLE, J. The testimony in this case is not materially variant from that given on the trial of *Murphy v. Troutman*, 50 N. C., 379. The principal defendant, Henry Troutman, was unquestionably guilty of negligence in not executing the writ of *capias ad respondendum*, which, as the sheriff of the county of Iredell, he had in his hands against J. W. Houston. So far from making a diligent effort to arrest the debtor, as the exigency of the writ demanded and as his duty required, he seems rather to have avoided a meeting with him, and to have contented himself with making a few inquiries about him, and, at last, an exceedingly slow pursuit after him. The presiding judge was, therefore, fully justified in his instruction to the jury that the defendant was guilty of neglect in failing to make arrest. The charge of his Honor was, in our opinion, equally correct on the question of damages. "As the plaintiff had put the defendant *in the wrong*, he was liable for such damages as had been sustained thereby, which *prima facie* was the amount of the debt that was lost, and it was for the defendant to mitigate the damages by proving that the effect of his wrongful act was not so great, because the debtor, who had been suffered to leave the State, had not the ability to pay the debt, and his arrest would not have enabled the plaintiff to realize the amount, or any part thereof; or, if a part only could have been thereby realized, then to limit his liability to that amount." This was the doctrine held in *Murphy v. Troutman, supra*, and although the English cases on the subject seem to be in a state of perplexing uncertainty, the current of decisions in the different states of the Union supports the conclusion at which we have arrived. See Sedgwick Dam., 510 *et seq.*, and 2 Hilliard on Torts, 340 *et seq.* The testimony offered by the defendants to show that J. W. Houston was largely indebted by notes and bonds to different persons in the counties of Iredell and Rowan was properly rejected, because it was immaterial and irrelevant. The object of the testimony was, we are told, to lessen the amount of damages to which the plaintiff would have been otherwise en-
(174) titled, because, it is argued, the debtor would, if he had been arrested, probably have assigned his property to secure the payment of those debts, and would thereby have diminished the plaintiff's chance to get theirs. This argument is fully answered by what

was said by the Court in the somewhat similar case of *Sherrill v. Shuford,* 32 N. C., 200: "If it can shield the sheriff in this case from answering in substantial damages, it will answer in any other where the defendant may owe more than he can pay. In all such cases the officer may keep the writ in his pocket and, when sued, turn upon the plaintiff and say, 'You have suffered no injury; if I had executed the writ and taken bail, the defendant might have paid away all his property in discharge of other debts, and you would have got nothing.' This cannot be law. The true inquiry is, Has the defendant, by his negligence deprived the plaintiff of any legal means of securing the payment of this debt? If he has, and the debtor had property which might, by due process, have been subjected to it, he shall answer to the full amount of the debt."

PER CURIAM. No error.

H. B. WHITE TO THE USE OF J. A. LYTAKER v. EDMUND CLINE AND C. N. WHITE.

Where one borrowed of a master certain moneys given by him as a gratuity to his slave, and gave his bond therefor, payable to the master, expressed to be for the use of the slave, it was *Held* that it was not against public policy to allow the master to recover this money, and that the court would not inquire what disposition would be made of it.

DEBT, submitted to *Heath, J.,* at last Fall Term of CABARRUS, upon the following case agreed:

That in 1851 the slave Elijah and his then master, C. L. White, went together to the State of California, under an arrangement between them by which the slave, if faithful, was to get a certain (175) amount for his services in that State; that after about four years service, the master, pursuant to this arrangement, paid over several hundred dollars to the slave, who, in the fall of 1854, voluntarily, and with leave of his master, returned to North Carolina, where both formerly resided, and surrendered himself in bondage to H. B. White, the agent of his master and the obligee named in the above bond; that the slave, upon his return, handed over to the said H. B. White the money so earned by him in California, with the request that the said White would manage and take care of it for him; that said H. B. White thereupon loaned $410 of said money to the defendants, who executed for the same the bond declared on; that afterwards the said H. B.

White, under instructions from C. L. White, sold the slave, Elijah, and transferred the said bond, without endorsement, to Jacob A. Lytaker, who brings this suit. If the court shall be of opinion for the plaintiff, judgment is to be rendered in his favor for the amount of the bond declared on, with interest, subject to credits allowed thereon; otherwise, judgment is to be entered for defendants.

The court being of opinion with defendants, that the bond is against public policy, and is, therefore, void, gave judgment accordingly, and plaintiff appealed.

V. C. Barringer and J. W. Osborne for plaintiff.
D. M. and R. Barringer for defendants.

MANLY, J. The slave cannot be the owner of property, money, or any material thing, except in a low and qualified sense. The ownership of the slave, as recognized by the statute, in specific articles for his own use is to be understood in this sense, of course, subject to the paramount right of property in the master, as incidental to his property in the slave himself. In the management and control of slaves the owner allows gratuities for extra fidelity and diligence, and through means of these slaves are permitted to supply themselves and their families with such things as may contribute to their greater (176) comfort, health and happiness. We are not aware of any limitation to this right of the master to indulge his slaves, provided the indulgence do not violate any express provision of law or offend against a just public policy.

The case before us is not an allotment of specific articles, but an investment of the earnings of the slave in a bond payable to the master's agent *for the use of the slave,* and the question is, whether this trust in the master, as thus admitted by him, is against public policy.

A contract void for such reason is where the toleration of it would work an injury or inconvenience to the public, and, testing the transaction by this definition, we do not perceive the ground upon which it should be set aside. As long as the master keeps the actual as well as the legal control of the fund, it can no more endanger the public safety than any other portion of his property. If the slave enjoy any part of it, it is as a gratuity from the master and not as a matter of right. The fact that the slave is nominally the owner of it is of no public concern.

The *alien enemy,* not domiciled in the country, cannot sue in our courts and recover debts, because it is against public policy, and yet a trustee, competent to sue, may recover upon a bill payable to him-

self for the use of an alien enemy. The Court, in the case referred to, *Dombay v. Morehead,* 6 Taunton, 332, says it will not inquire what use the trustee proposes to make of the money. The *status* of the slave is not unlike that of the alien in social disabilities, and the same indulgence may be as safely extended to the master in one case as the trustee in the other. In the case of the master there is less reason to inquire into the use that is to be made of it; for whether he take it to himself or put it to the use of the slave, the Court has the highest assurance (viz., the interest of the owner) that nothing will be done to injure the slave or the rights of the public.

Barker v. Swain, 57 N. C., 220, is distinguishable from the case before us. That was a case in which a bill was filed by one who possessed a sum of money belonging to a slave, calling upon the (177) owner of the slave and a person who was the creditor of the slave, for the property which had been sold to produce the fund, to interplead and settle to whom it belonged. It appeared the slave had been going at large and hiring his own time, whereby he had been enabled to make the purchase from one of the defendants of the property spoken of. The Court held that neither the master nor the creditor of the slave was entitled to the money, because it had sprung out of a violation of the law by both: a violation by the creditor, in trading with the slave without permission, and a violation by the master, in allowing the slave to go at large, having the control of his own time. The case before us now has no demerit of this sort. The slave, for aught that appears, was continually under the dominion of his master or his agent, and employed about his lawful commands.

That he was in an eminent degree industrious and economical is apparent from the large sum which he accumulated, and that he possessed a proper spirit of subordination as well as a proper trust and confidence in his owner is apparent from the disposition he makes of it. The history of the transaction discloses, prominently, characteristics of the relation between master and slave not unfrequently found upon well-governed plantations—relations of mutual good-will, of respectful and faithful service on the part of the slave, and of a watchful and just care of the slave's comfort and happiness on the part of the master. This is accordant, in our view, with a just public policy, not detrimental to it.

The duties and obligations belonging to the relation of master and slave are mutual and diverse. Among them, on the part of the master, is that of giving strength and moral health, and consequent permanence to the system itself, as a part of the foundation upon which rest our social affairs. This can only be done by carrying into the domestic

government of slaves a principle of justice administered in a spirit of benevolence. While industry, submission, and obedience are (178) required on the one hand, a provident attention to their wants, and the application of every lawful stimulus to brace them up to a fulfillment of the duties of their station, are due on the other. Among the incentives to a virtuous and diligent course of conduct stands prominent a system of rewards which, we confidently think, may be developed to any desired extent without violating either the express law or general policy of the country.

The recovery of the note does not seem to us to be against public policy. There has been no violation of our statute law in the transaction from which it originated. The parties to it are competent to contract, and have contracted, and we see no reason why it should not be recovered. The judgment below is reversed, and there must be a judgment here for the plaintiff.

PER CURIAM. Reversed.

Cited: Love v. Brindle, post, 562; *Lea v. Brown,* 58 N. C., 381; *Jervis v. Lewellyn,* 130 N. C., 617.

S. D. WATSON v. JAMES H. DAVIS.

In an action of assumpsit, where the plaintiff declared on a promise to pay the balance struck on an account rendered, it was *Held* that the account, itself was not competent evidence, and that, therefore, it was error to allow the jury to take it out with them against the consent of the defendant. (*Outlaw v. Hurdle,* 46 N. C., 150, which lays down the principle that the jury cannot be allowed to take with them, to their room, papers which have been received as competent, approved.)

ASSUMPSIT, tried before *Dick, J.,* at a Special Term, July, 1859, of MECKLENBURG.

The plaintiff's counsel introduced a witness who testified that he was present when the plaintiff presented the account, then before the court, to the defendant; that the latter, after examining the account, said that it was all correct, although larger than he expected, and that he would pay it, or arrange it with the plaintiff. The witness further stated that this conversation took place at Kerr's Hotel, in the town of Charlotte, on Monday morning of the October County (179) Court.

The defendant then introduced a Mr. Taylor, who stated that the plaintiff and defendant came to his store, in Charlotte, on Monday evening of October County Court, and in a conversation about the said account the defendant said some of the charges in the account were extravagant, and he would not pay them.

When the jury were about to retire, they asked leave of the court to take the account with them to their room, which was objected to by the defendant's counsel, but the court permitted it, and the defendant's counsel excepted.

The jury found a verdict for the plaintiff, and the defendant appealed.

J. H. Wilson for plaintiff.
Nat Boyden and J. W. Osborne for defendant.

PEARSON, C. J. In the statement of the case by his Honor it is set out as "an action of assumpsit on an open account"! There is in the books no such form of action. But to carry out the very liberal understanding acted upon by the gentlemen of the bar in this State for the purpose of allowing cases to go off *on the merits,* and not on mere *matter of form,* this Court is to consider the declaration to have been framed according to the evidence, so as to make the *allegata,* and also the form of action, correspond with the *probata,* which is assumed as the guide.

The account, sent as a part of the case, sets out "dealings" by the plaintiff as *agent* of the defendant, in carrying to the south and selling a number of slaves, to wit, charges for travelling expenses, for board of slaves, for clothes, for medical bills paid, and for draft paid in New Orleans, which is the principal item of charge; with credits for the price of slaves sold, showing a balance of $2,330.66. If the defendant admitted this balance, and assumed to pay it, assumpsit is the proper action, based upon the express promise. If there was no such admission and assumpsit "upon account rendered," then the case (180) is one of unsettled dealing between agent and principal, for which an "action of account," or a bill in equity for an account, is the proper remedy. So we are to assume that the action was upon a special promise to pay the balance struck upon an account rendered, to wit, $2,330.66. For treating it as "an open account" there is no evidence as to any *one item,* and, in that point of view, his Honor ought to have charged the jury that, the *onus* being on the plaintiff, it was not sufficient that the defendant, when the account was presented to him, said "some of the charges are extravagant, and he would

not pay them," but to sustain the account for "goods sold and delivered," or for "services rendered," or for "money paid to his use," proof in respect to the several items was necessary.

Accordingly, we find that the plaintiff rested his case on the testimony of a witness who swore that he was present when the plaintiff presented the account to the defendant and demanded payment of the apparent balance, and heard the defendant, after examining the account, say *"it was all correct,* although larger than he expected, and *he would pay it."* In opposition to this evidence the defendant called Mr. Taylor, who swore that on the same day the plaintiff and defendant came into his store, and, in speaking of the same account, the defendant said to the plaintiff, "some of the charges are extravagant, and I will not pay them." So, whether the plaintiff could sustain his action or not depended on the question, Were the jury satisfied that the defendant did assume to pay the apparent balance, as sworn to by the witness called by him, or was the matter left open upon objections to some of the charges, as sworn to by Mr. Taylor? Thus it will be seen that "the account" drawn up by the plaintiff upon this issue was not *competent* evidence, and ought not to have been read to the jury, even in the presence of the court, for, at most, it could only be referred to by the witness to refresh his memory in respect to the balance which the defendant assumed to pay. It follows that his Honor erred in matter of law when he permitted the jury, at the instance of the plaintiff, but in
(181) the face of the objection on the part of the defendant, *to take the account to their room,* for that paper was not competent evidence, and could not have been read to the jury in the presence of the court. It was made up by the plaintiff; he did not pretend to be able to offer evidence in respect to the particular items, and could only sustain his action by proof of an *express promise to pay the apparent balance.* So the point is, Was it error to allow the jury to take to their room (the defendant objecting) a paper drawn up by the plaintiff which could not have been offered as evidence on the trial? This view of the case makes it unnecessary to enter upon a consideration of the authorities cited on the argument, Buller's Nisi Prius, 308; Co. Lit. 541, where the question is made to depend on matters of which profert may be required, as deeds, letters testamentary, and matters not under seal, but which have been received by the court as evidence on the trial, for the account of the plaintiff was not competent evidence.

It may be well, however, to say that we fully concur with what is said in *Outlaw v. Hurdle,* 46 N. C., 150. The jury ought to make up their verdict upon evidence offered to their senses, *i. e.,* what they see and

hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the jury-room, so as to make a comparison of hand-writing, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court. Judgment reversed, and *venire de novo.*

PER CURIAM. Error.

Cited: Burton v. Wilkes, 66 N. C., 612; *Williams v. Thomas,* 78 N. C., 49; *Fuller v. Fox,* 101 N. C., 121; *Martin v. Knight,* 147 N. C., 574; *Nicholson v. Lumber Co.,* 156 N. C., 68.

(182)

W. C. HEWIT v. ROBERT WOOTEN AND WILLIAM H. MASSEY.

Where an action was brought against one for having sued out a writ against plaintiff, and upon his being arrested, having consented that the sheriff might take a sum of money from him in lieu of bail, it was *Held* that it could not be considered in any other light than an action for a malicious arrest, or malicious prosecution, in which the termination of the former suit must be shown.

CASE, tried before *Heath, J.,* at the last Spring Term of CUMBERLAND.

The plaintiff declared:

1. For wrongfully and improperly suing out a writ against the plaintiff to recover a penalty due by statute not then in existence.

2. For wrongfully and improperly setting the law in motion against the plaintiff, whereby the said plaintiff was held in duress, and for damages consequent thereon.

It appeared that on 4 January, 1856, the defendants Wooten and Massey sued out a writ against the plaintiff and one Randolph, in a plea of debt of $2,000 penalty, under the act of Assembly passed in 1791, for using a faro bank, to their damage $50.

By virtue of this writ, the sheriff arrested the plaintiff, and in lieu of bail took from him, by consent of defendants Wooten and Massey, the sum of $1,050. The suit for the penalty is still pending.

His Honor being of opinion that, until the determination of that suit, the present action would not lie, the plaintiff submitted to a nonsuit, and appealed.

Strange for plaintiff.
W. McL. McKay for defendants.

BATTLE, J. In an action for a malicious arrest, or a malicious prosecution, it is essential that the termination of the previous proceeding should be proved, and that the absence of reasonable and probable cause should be alleged as well as proved. This is conceded by the counsel for the plaintiff, but he contends that the present is not a suit (183) of that kind, but is a special action on the case for an abuse of the process of the law, in which it is not necessary to show the termination of the suit in which the process has been abused. In support of this proposition the counsel has referred to several cases, and, among the rest, to the leading one of *Grainer v. Hill,* 4 Bing. N. C., 212 (33 E. C. L., 328). In that case the plaintiff declared that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendant for the sum of £80, with a convenant for repayment in September, 1837, and under a stipulation that, in the meantime, the plaintiff should retain the command of the vessel and prosecute voyages therein for his own profit; that the defendant, in order to compel the plaintiff, through duress, to give up the register of the vessel, without which he could not go to sea before the money lent on mortgage became due, threatened to arrest him for the amount unless he immediately paid it; that upon the plaintiff's refusing to pay it, the defendant, knowing that he could not provide bail, arrested him under a *capias,* endorsed to levy £95 17s. 6d., and kept him imprisoned until, by duress, he was compelled to give up the ship's register, which the defendant then unlawfully detained, whereby he lost the benefit of four voyages from London to Caen. After the plaintiff had proved the facts alleged in his declaration, it was objected that he could not recover because he had not shown that the suit commenced by the defendant had been terminated. *Tindall, C. J.,* said that the answer to this objection was that the action was for an abuse of the process of the law by applying it to extort property from the plaintiff, and not an action for a malicious arrest, or malicious prosecution. The learned judge then draws the distinction between the two kinds of action thus: "In the case of a malicious arrest the sheriff, at least, is instructed to pursue the exigency of the writ; here, the directions given to compel the plaintiff to yield up the register were no part of the duty enjoined by the writ. If the course pursued by the defendant is such that there (184) is no precedent for a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law

has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause." *Bosanquet, J.,* said: "This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done. The process was enforced for an ulterior purpose: to obtain property by duress to which the defendant had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court." *Park* and *Vaughan, JJ.,* expressed themselves to the same effect.

If it appeared that the present defendant sued out the writ mentioned in the bill of exceptions against the present plaintiff for the purpose of extorting money from him by reason of his arrest, then the case would be within the principle sanctioned by the Court of Common Pleas in the case above referred to of *Grainer v. Hill;* but such does not seem to have been the fact. There is not the slightest proof that the defendants gave the sheriff any instructions not enjoined by the exigency of the writ which he had in his hands. It is true that after he had arrested the plaintiff he took from him, with the consent of the defendant, a certain sum of money in lieu of bail; but it does not appear that the money was paid over to the defendants or that they were in any manner benefited by it. On the contrary, it is rather to be inferred that the sheriff took the money for the ease of the plaintiff, and, so far as we are informed, has kept it merely as a security for the plaintiff's appearance, instead of bail. We think, therefore, that the present case is plainly distinguishable from that of *Grainer v. Hill* and the others of the like kind to which the plaintiff's counsel referred, and that it cannot be considered in any other light than that of an action for a malicious arrest or malicious prosecution, in which the termina- (185) tion of the former suit must be shown.

PER CURIAM. Affirmed.

Cited: Johnson v. Finch, 93 N. C., 207; *Ely v. Davis,* 111 N. C., 26; *Lockhart v. Bear,* 117 N. C., 304, 307; *Wright v. Harris,* 160 N. C., 546.
Dist.: Sneeden v. Harris, 109 N. C., 357.

TOBIAS KESTLER AND G. LYERLY v. JOHN H. VERBLE.

Where one owned a tract of land whereon there was a mill, and afterwards sold a part of the land, including the mill, it was *Held* that an easement in the lands reserved passed to the purchaser, entitling him to flood them to the same extent as they were at the time of his purchasing the mill; and in a suit against the purchaser for overflowing the reserved land, it was *Held further*, that it devolved upon the plaintiff to show that the dam had been since raised.

PETITION filed by the plaintiffs in the County Court of ROWAN against the defendant for overflowing plaintiff's land by water thrown back by a milldam, and appeal was tried before *Heath, J.*, at Fall Term, 1859.

The plaintiffs proved that the land owned by them and the lands owned by the defendant were all owned by one Thomas E. Brown in 1850, and for some time previously thereto; that a stream of water ran through the entire tract; that there were, at and prior to 1850, on said tract, two milldams and two mills on the said stream, both of which mills were running, occupied, and used at the time of the sale to the defendant hereinafter mentioned; that in 1850 said Brown sold the land whereon the lower mill was and is situated, including the mill, to defendant, and subsequently sold the upper part of the tract, including the mill, to one Smith, under whom plaintiffs claim. The defendant has the older deed from Brown. It was further proved that at and prior to the sale to defendant in 1850 the water was ponded back to some considerable extent by the lower dam upon the land now owned by
(186) plaintiffs. There was conflicting evidence as to whether the lower dam had been raised or not since the sale in 1850, the witnesses for the plaintiff swearing that the water was ponded back further on the plaintiff's land than it was in 1850, and that the dam had, in their opinion, been raised, and that its ends had been extended back further on the shore, while the witnesses for the defendant swore that the water was no higher than it was when the defendant purchased the land in 1850; that from their observation the dam had not been raised; that the extensions on each end of the dam did not raise the water higher, but they were rendered necessary by the earth's being washed away by freshets at these places, and that the extensions were on defendant's land.

The presiding judge charged the jury:

1. That the defendant had a right to keep his dam of the same capacity as it was at the time he purchased, and if he had not ponded the water further back on the plaintiffs' land by raising the dam, or enlarging it at the ends, than it was ponded at the date of the purchase, the plaintiffs could not recover.

2. That if the defendant had raised his dam, or increased it at one or both ends, so as to pond the water back further on the plaintiffs' land than the dam ponded it at the time of his purchase, then the plaintiffs would be entitled to recover.

The counsel for the plaintiffs then prayed the instruction that if it were established that the plaintiffs' land was overflowed by backwater from the defendant's milldam, it was then incumbent on the defendant to show that the water was backed up to the same extent on plaintiffs' land by the dam before defendant bought from Brown. The judge declined to give the instruction in this form, but submitted the case to the jury on the instructions previously given. Plaintiffs' counsel excepted.

Verdict for the defendant. Judgment, and appeal.

Fleming for plaintiffs.
Nat. Boyden and J. W. Osborne for defendant.

MANLY, J. It seems entirely clear to us, upon the sale of the (187) parcel of land, including the lower mill, to the defendant Verble, that an easement in the lands reserved by Brown passed by implication to defendant, to the extent, at any rate, held by the judge below. The defendant purchased, as an appurtenant to his mill, the right to keep the water-power in the condition it then was for the purpose of propelling his machinery; and the subsequent sale of the residue of his land, including the other mill, by Brown, passed the estate to the purchasers, Kestler and Lyerly, encumbered with this easement. Brown could not disencumber it, nor can his vendees do it without the concurrence of Verble. The instructions to the jury are based upon this view of the case, and are, in our opinion, entirely correct.

The only ground for a complaint to rest upon is the assumption that Verble's dam had been elevated, and the water raised higher upon the land of the plaintiffs than it was accustomed to stand prior to defendant's purchase. This was the gist of the action, and, we take it, the burden of proving it was upon the complainants.

The instructions asked for were, therefore, properly refused. There is

PER CURIAM. No error.

Cited: Jones v. Clark, post, 421; *Latta v. Electric Co.,* 146 N. C., 298.

RUFUS BARRINGER, ADMINISTRATOR v. SAMUEL G. BOYDEN.

Where money was paid by a surety to the plaintiff in an execution, on an understanding that the judgment was to be assigned to a third person for the benefit of the surety, and such assignment was *subsequently* made, it was *Held* that this was not a payment of the judgment, but that it might be enforced against the principal, in the name of the plaintiff, for the benefit of the sureties.

SCIRE FACIAS to revive a judgment, tried before *Heath, J.*, at the last term of ROWAN.

(188) The *sci. fa.* was brought first in Rowan County Court, at the instance of D. W. Hunnicutt and the administrator of one Holshouser, who had been the sureties of the defendant Boyden, and was brought to the Superior Court by appeal. It recited the judgment against the three correctly. A *fi. fa.* had issued and been returned *nulla bona;* a *ca. sa.* had also issued against Boyden, on which he took the benefit of the act for the relief of insolvent debtors. The execution docket of Rowan County Court showed this entry opposite to the statement of the execution in this case: "January 18, 1851, for value received, I assign this judgment to Archibald Hunnicutt." Signed, A. W. Brandon.

It was shown by James E. Kerr, Esq., clerk of the County Court of Rowan, that at the time this assignment was made, the plaintiff in the judgment, Colonel Brandon, and the two sureties, came to him and told him that the sureties had paid or settled with the plaintiff, and they wished to have the matter so fixed on the docket as to keep the judgment alive for the benefit of the sureties. He did not recollect *when* it was said this arrangement was made, but his impression was *it was then.* He saw no money paid.

The judge charged the jury:

1. If it was understood at the time the plaintiff received the money from the sureties that it was a payment, the plaintiff was not entitled to recover.

2. If there was no understanding at all at the time the plaintiff received the money from the sureties, then it was a payment, and the plaintiff would not be entitled to recover.

3. If at the time when the plaintiff received the money for the sureties it was understood that an assignment was to be made in order to keep the judgment in force and alive for the benefit of the sureties, and the assignment was *then* or *subsequently* made in pursuance of such understanding, then such receipt for the money on the part of the plaintiff was not a payment, and the plaintiff would be entitled to their verdict.

Defendant excepted.

Verdict and judgment for the plaintiff; appeal by the de- (189) fendant.

Fleming for plaintiff.
Nat. Boyden for defendant.

MANLY, J. The right of a surety to keep alive a judgment which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desire it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal.

Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intendment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment.

The money furnished to pay the judgment was from a surety, but it is affirmed as a fact by the verdict of the jury that it was not intended to extinguish the judgment, but to purchase it. There was no release or satisfaction entered of record, or otherwise declared, but an assignment to an indifferent person for the use of the purchaser.

There is no authority or reason against the revival of the judgment upon this state of facts. The instruction of the judge below, based upon it, is entirely correct, and the judgment is, therefore, affirmed. *Hodges v. Armstrong,* 14 N. C., 253; *Hanner v. Douglass,* 57 N. C., 262.

PER CURIAM. Affirmed.

Cited: Rice v. Hearne, 109 N. C., 151; *Fowle v. McLean,* 168 N. C., 542.

(190)

STATE v. WILLIS, A SLAVE.

An entry at night through a chimney into a log cabin in which the prosecutrix dwelt, and stealing goods therein, will constitute burglary, although the chimney, made of logs and sticks, may be in a state of decay, and not more than 5½ feet high.

PEARSON, C. J., *dissentiente.*

BURGLARY, tried before *Manly, J.*, at the Fall Term, 1859, of CHOWAN.

On the trial it appeared that a cabin, the dwelling-house of one Judy Ross, was entered on the night of 8 April, 1859, and her meat, consisting of several pieces of bacon, forcibly taken from her. The entry was effected by getting on and going down the chimney, which appeared to be a structure of logs or sticks of wood raised to the height of a man's head (5½ feet high), and covered over at the top with boards to prevent the rain from falling in and putting out the fire. The boards were removed by the defendant, and his entry then made by descending the chimney into the fireplace. It was also in evidence that the chimney had partially rotted down and was in a ruinous condition.

The defendant's counsel took the ground that the entering of the house through an aperture as above described was not burglary; but his Honor held the contrary, and so instructed the jury. Defendant's counsel excepted.

Verdict finding the defendant guilty. Judgment, and appeal.

Attorney-General for the State.
William A. Moore and Jordan for defendant.

BATTLE, J. Burglary is defined to be "the breaking and entering the dwelling-house of another, in the night-time, with intent to commit a felony therein." Arch. Cr. Pl., 251; 4 Bl. Com., 224; 3 Inst., 63. With regard to that part of the definition which relates to the breaking and entering, it was held anciently that if a man entered into
(191) the dwelling-house by an open door, in the night, and stole goods therein, it was sufficient to constitute burglary. See Cro. Car., 65, 265; Crompt., 32a; 27 Assize, 38. But it soon after became the settled law that an entry by an open door or window, or any hole in the wall or roof of the house, was not a burglarious entry. 1 Hale Pl. Cr., 552; Kel., 67-70.

Lord Hale says that "It was held by *Manwood, Chief Baron,* that if a thief goes down a chimney to steal, this is breaking and entering (Crompt. fol., 32b); and hereunto agrees Mr. Dalton, page 253." 1 Hale Pl. Cr., *ubi supra.* The reason of this, he says, seems to be that

the chimney is as much shut as the nature of the thing will admit. All the elementary writers of any note, from that day down to the present, lay down the law in the same way, and assign the same reason for it. See 1 Hawk. Pl. Cr., Book 1, ch. 17, p. 131; 2 East Pl. Cr., 485; 3 Chit. Crim. Law, 1106; 2 Rus. on Cr., 3; 4 Bl. Com., 226; Roscoe's Cr. Ev., 256; Archibald Cr. Pl., 258a; Wharton Cr. Law, 1543.

The same rule, in 1821, received the sanction of all the judges in England. See *Rex v. Brice,* Russ and Ryan Cr. Cas., 450. The prisoner was convicted of burglary for entering, in the night-time, the chimney of a dwelling-house, with an intent to steal goods in the house. He was detected and apprehended before he had come down the chimney lower than a place just above the mantel-piece, and the question whether he had broken and entered the house was reserved for the opinion of all the judges. Ten of them, including the three chiefs, held the conviction to be right, and the other two dissented only because they thought that the prisoner could not be said to have broken and entered the dwelling until he was below the chimney-piece. From this we must necessarily infer that, had he descended below it, these two judges would have concurred in the propriety of the conviction.

So in this State it has been held that an entry by a chimney is a burglarious breaking. *S. v. Boon,* 35 N. C., 246.

In all this long and strong array of great authorities not a word is said about the height, size, or quality of the chimney; and it seems to a majority of the Court that any attempt to make a distinction between the different kinds of chimneys will be attended with (192) great difficulty, and lead to much uncertainty and confusion. Where will the dividing line be drawn? If the entry through a chimney in a certain state of decay, and only 5½ feet high, is not a burglarious one, in how much better condition and how much higher must it be before the law will recognize it as a protection against nocturnal invaders? This is a question more easily to be asked than to be successfully answered. We are unwilling to undertake the task of answering it, and are content to hold that the chimney, as described in the bill of exceptions, was such an one as could not be entered by a thief in the night-time without committing the crime of burglary.

PEARSON, C. J., *dissentiente:* It is settled that to enter a dwelling-house by coming down the chimney is a burglarious breaking. But I cannot concur in the conclusion that the opening used in this instance for the passage of smoke comes within the application of the principle. It is true, the structure is called a chimney in the statement of the case, but a description is given of it, so as to present the question, Is it a

chimney within the meaning of the law in reference to burglary? It is also true that this, like many other questions of law, is attended with difficulty; but it seems to me that the mode resorted to for its solution is not the true one. If to enter a chimney 5½ feet high be not burglary, how much higher must it be?—10, 15, or 20 feet? A good rule works both ways. If to enter a chimney 5½ feet high be burglary, how much lower may it be?—4, 3, or 2 feet?

Upon a consideration of the reason of the law in respect to chimneys, and calling in aid the analogies furnished by the cases on other points, although no case is found on the point now before us, my conclusion is that the opening or structure, or chimney—call it what you please—must be such a one as may reasonably be relied on for protection against felonies; which is a question to be decided by the court upon the
(193) facts of each case, like ordinary diligence, probable cause, reasonable time, etc.

The law making it burglary to enter by a chimney is founded on this reason: The purpose of a chimney requires that it should be left open, and its construction is usually such that more effort and daring is necessary to enter in that way than to force a door or hoist a window. From the cases this principle may be deduced in respect to burglary: The law will not protect, by capital punishment, when the owner of a dwelling-house is negligent or omits to take reasonable care, *e. g.*, if the door be shut, but is left unfastened. *S. v. Henry,* 31 N. C., 463. So if the door of a smokehouse, within the curtilage, be locked, but the key is left in it; so if a window is left partly open, say 2 inches, but not enough to admit a man, and he raises it higher and enters, it is not a burglarious breaking. *Rex v. Smith,* 1 Moody, 178. So if the opening has no sash in it, or the sash is partly gone from decay or otherwise, and one enters through it; because it is the folly of the owner to allow his house to be in this unprotected condition. 1 Hale, 552.

The purpose of a chimney requires that it should be open, but, as I apprehend (in order to bring it within the principle, the structure must be such a one as may reasonably be relied on for protection; for if it be partly rotted down, so as to be no higher than a man's head, and as easy to enter as a window with the sash out, it must stand on the same footing. The old cases which established the doctrine that an entry by coming down the chimney is a burglarious breaking were decided with much hesitation, because the hole was open, and although a description of the chimney is not given in any of them, still it is clearly to be inferred the entrance in that mode was difficult, and that circumstance was taken to counterbalance the fact of its being open. In *Rex v. Brice,* Russ and Ryan Cr. Cas., 450, it is evident that the chimney was a high

one, for it had to be cleaned by a sweep, and the prisoner, who was a chimney-sweep, had been employed to clean it a few days before the night he was apprehended in the attempt to come down through it. In the case now before us the top part of the chimney, a (194) funnel, had rotted off, and but for the few loose boards that were laid over it to keep out the rain (upon which no stress is laid), a smart dog could easily have jumped in and stolen the lady's meat, and if one or two more rounds had been off, an enterprising old sow could have performed the same feat! I cannot bring my mind to the conviction that to enter through such a hole constitutes the crime of burglary, nor am I satisfied by calling this structure a chimney, and relieving myself from the difficulty of distinguishing between the different kinds of chimneys by saying that "a chimney is a chimney"; for that seems to me to be sticking in the letter, which we are admonished not to do, even in the construction of statutes, by the maxim, *"Que haeret in litera haeret in cortice,"* and of course it should not be done in making the application of a principle of the common law, which rests on "the reason of the thing."

PER CURIAM. No error.

FRANCIS D. KOONCE v. LOUISA WALLACE.

Where at the time of a marriage the female was under the age of 14, and the parties continued to live together as man and wife after she reached that age, it was *Held* that there is nothing in the statute, Rev. Code, ch. 69, sec. 14, to abrogate the rule of common law, that such living together as man and wife after the age of consent amounted to a confirmation of the marriage.

MOTION to grant letters of administration on the estate of James G. Wallace, deceased, before *Shepherd, J.*, at last Spring Term of ONSLOW.

The facts of the case are as follows: In February, 1858, James G. Wallace, being then under 21 years of age, but over 16, was married to Caroline Tilghman, then under 14 years of age. She (195) became 14 in June, 1858, and lived with Wallace as his wife until 23 September, 1858, when he died, being still under 21. The parties lived together as man and wife, and strictly recognized each other as such, from the marriage in February, 1858, until the death of the husband in September of the same year. At December term of Onslow County Court, Caroline Wallace, widow of James Wallace, applied for letters of administration on his estate, when the defendant

in this case, the mother of the intestate, and also his highest creditor, opposed the motion, alleging that no marriage had taken place between her son and the applicant, inasmuch as the applicant was under 14 years of age when married. The county court granted the letters of administration to the applicant, and from this judgment there was an appeal to the Superior Court, when the applicant, Caroline, relinquished to Francis D. Koonce her right to administer, and that court accordingly granted him letters of administration; and from this judgment defendant appealed to this Court.

McRae and E. G. Haywood for plaintiff.
Green and L. W. Humphrey for defendant.

PEARSON, C. J. It is enacted, Rev. Code, ch. 69, sec. 14: "Females under the age of 14 and males under the age of 16 years shall *be incapable of contracting marriage.*"

A marriage is duly solemnized in all respects, save that the female is a few months under the age of 14; the parties lived together as man and wife until she arrives at that age, and afterwards continue so to live together until the death of the other party.

The question is, upon the construction of this statute, Was the marriage *void, i. e.,* a mere nullity, or was it *voidable, i. e.,* imperfect, but capable of being confirmed and made perfect by subsequent consent and cohabitation as man and wife?

(196) At common law, 14 in males and 12 in females was *the age of consent,* and if one or both of the parties, at the date of the celebration of the marriage, were under the requisite age, such marriage was *imperfect,* by reason of the fact that the parties were incapable of contracting marriage, but it became perfect and was confirmed if the parties, after attaining the requisite age, assented to it by continuing to cohabit together as man and wife. In other words, the marriage was not void, but was only imperfect or voidable from the want of capacity, but could be made perfect or be confirmed by the consent of the parties, implied from subsequent cohabitation as man and wife, on the same principle by which it was held that the contract of one under the age of 21, in respect of property, except for necessaries, although imperfect and voidable because of a supposed want of capacity, may be confirmed and made perfect by assent after attaining the age of 21. Indeed, the application of this principle is especially called for in regard to the contract of marriage, from its peculiar nature and consequences. Coke Lit., 33a; *ibid.,* 79a, note 43; 1 Bl. Com., 436. Such was the settled rule of law in regard to incapacity to contract for the want of age pre-

vious to the statutory enactment above recited; and, in the opinion of this Court, the only effect of the statute was to make 16 instead of 14 years in respect to males, and 14 instead of 12 years in respect to females, the ages at which the parties, respectively, were capable of making a perfect marriage, leaving the rule of the common law unaltered in all other respects; for, as is said by Bishop in his treatise on "Marriage and Divorce," sec. 192: "The common-law rule of 14 in males and 12 in females, as the age of consent, was derived from the civil and canon law. It originated in the warm climate of Italy, and it has been thought not entirely suited to more northern latitudes. In some of the United States it has been altered by statute, and the age of consent fixed at later periods of life."

This construction of the statute is supported by "the reason (197) of the thing," for no ground of public policy can be conceived of making it expedient to deprive the parties of the common-law right to confirm, by subsequent consent and cohabitation as man and wife, a marriage solemnized in due form of law, although imperfect because both or one of the parties were incapable, for want of age, of making a perfect marriage, whereby, notwithstanding such confirmation by assent and cohabitation, they should be subjected to indictment for living together in fornication, and their issue should be deemed bastards. And, as we conceive, the correctness of this construction is put beyond reach of doubt or question by a comparison with other sections of the same statute, to wit, section 9: "All marriages contracted after," etc., "between persons nearer of kin than first cousins shall be void." Section 7: "All marriages since," etc., "between a white person and a freed negro, or free person of color, to the third generation, *shall be void.*" Section 8: "No minister of the gospel or justice of the peace shall marry a white person with an Indian, negro, or free person of color to the third generation, knowing them to be so, upon pain of forfeiting," etc. Thus in the statute some marriages are made *void,* and, in respect to others, it is enacted that the parties shall be incapable of contracting marriages. Why this change of expression, if the same idea was intended to be expressed? Taking into consideration the law as it was before settled, there is no rule of construction which would justify the Court in giving the same meaning and effect to modes of expression so different, and such a construction would shock common sense.

On the argument, *Gathings v. Williams,* 27 N. C., 487, was cited, and the counsel relied on this passage in the opinion: "Where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a *want of age* or understanding, or

a prior marriage still subsisting, the marriage is void absolutely, and from the beginning." In that case there was a prior marriage still subsisting, and the *point* presented was the effect of a second marriage, so what dropped from the Court in regard to a want of age or
(198) understanding, was an *obiter dictum.* There is a marked distinction. It may well be that a second marriage, while the first is still subsisting, is void and incapable of confirmation, because it is so utterly denounced by the law as to subject the party marrying a second time to capital punishment as a felon; but a mere want of age or understanding rests on a different footing entirely.

Crump v. Morgan, 38 N. C., 91, was also cited. That was a case where the marriage was duly solemnized, but the woman was a lunatic at the time, and at no time afterwards was in the possession of her faculties "so as to be capable of judging of her rights and interests, or of making or confirming a contract." So the very learned disquisition on the question whether, *if she had been restored to sound mind,* the marriage was such an one as could have been confirmed by her subsequent assent and cohabitation, was extrajudicial, and in regard to it "the doctors differ," for Bishop Marriage and Divorce, secs. 188, 189, 190, inclines to the opinion in his comments on that case that such a marriage could be confirmed, and calls attention to the fact that the passage in Paynter on Marriage, relied on in *Crump v. Morgan,* was misapprehended, for the author had reference to marriages void for want of due solemnity, as where the party officiating was not a minister of the gospel, or where there was the impediment of a former pre-existing marriage, and he establishes by the authorities cited, sections 122 and 123, that marriages under fraud, terror or duress, though generally spoken of in the books as void, are in effect only voidable, and may be confirmed by subsequent assent and voluntary cohabitation as man and wife. However this may be, we think it clear that the statute under consideration does not abrogate the principle of the common law in respect to marriages where both of the parties, or one of them, are under the age of consent; and although the marriage is imperfect for the want of capacity, it may be confirmed, and the effect of the stat-
(199) ute is only to change the age of consent, so as to make it conform to our more northern latitude. There is no error.

PER CURIAM. Affirmed.

Cited: S. v. Parker, 106 N. C., 713; *Sims v. Sims,* 121 N. C., 300; *Walters v. Walters,* 168 N. C., 412.

DOE ON THE DEMISE OF WILLIAM SAFRET v. JOHN HARTMAN.

1. Where a deed called for a stone, and in the designated course pointers corresponding in age with the deed were found around a spot (no stone being there), and a marked line of trees was also found, corresponding in age with the deed, and corresponding with the next course, called for, and leading from the spot, so designated by the pointers, it was *Held* that the deed should be construed as if it read, "a stone marked as a corner by pointers," and such point was to be gone to, irrespective of distance.

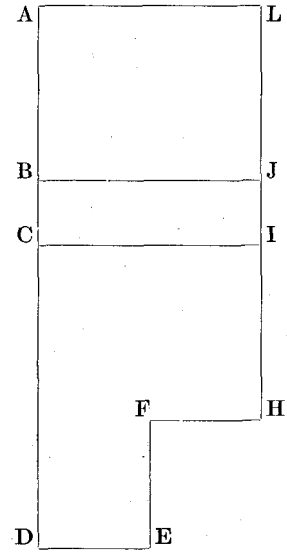
2. Where the first line, running from an admitted beginning corner, is established, and there is a line of marked trees corresponding in age with the deed, and with the course called for, running to the third corner, which is established, the second corner may be fixed by reversing the second line, and the point of intersection of the latter line with the former will be adopted irrespective of course and distance.

EJECTMENT, tried before *Bailey, J.*, at the last Spring Term of ROWAN.

The lessor of the plaintiff and defendant both claimed title under George M. Hartman; the former by a deed to James Bean, dated 5 February, 1850, and by a deed from Bean to him, dated in 1852; the latter by a deed dated in 1845. The land in controversy is contained in the parallelogram, B, C, I, J; the plaintiff claiming that within the diagram B, J, H, F, E, D, B, and the defendant that within the figure A, C, I, L. It was admitted that, according to course and distance, the disputed part is within the calls of the deed of the plaintiff's lessor. It was also admitted that, according to course and distance, the disputed part is not covered by the calls of the defendant's deed, but the defendant insisted that he had a right to run beyond the distance (200) called for, viz., to C and I, which he claimed as corners actually made when the land was conveyed to him by George M. Hartman. The description in the defendant's deed is as follows: "Beginning at a post-oak, one of the old corners (A), thence south with Smith's line 145 poles to a stone and a ....., a new corner (claimed to be at C), thence east 110 poles to a stone (claimed to be at I), thence north with the old line 145 poles to a white-oak (L), thence to the beginning."

George M. Hartman, intending to divide the land equally between his two sons, John and Alexander, procured a surveyor, one Crosby, to run off the two tracts, and went with him on the premises for that purpose. Several of the lines of the old tract were run, and the line was then run from I to C, and marked plainly by the grantor, George. No witness testified as to the starting of the surveying party from the point I, but it was proved that there were immediately after the survey, and are at this time, several loose stones at that point, one about the

(201) size of a man's head, and pointers around it, and the line corresponding in age with the deed aforesaid marked up to these stones. A witness testified that he fell in with the party as they were running the marked line I, C., when about a third of it was run; that he kept with them to the end of it; that G. M. Hartman proceeded to mark the line as far as it extended, and at the end of it marked a black-oak as a corner; that after it was finished, the surveyor made a calculation and informed the parties that this line, I, C, would not divide the land equally, but would give John more than Alexander; to which the father replied that the land was poor, and that they, the grantees, were brothers, and if they said so, he would make the deed according to the survey as



just made, to which they (John and Alexander) both assented, and the deed to John was made that evening after the parties returned to the house of the grantor. The deed to Alexander was not made to him at all, but at his request, and for his benefit, was subsequently made to Bean, the bargainor of the plaintiff's lessor. After the conveyance to John, and before that to Bean, it was proved that George M. Hartman recognized the line marked C, I, as the true boundary, and offered the land for sale according to it. It was also proved that James Bean, while he owned the land now claimed by the plaintiff's lessor, fenced nearly up to that line, and the defendant did the same, leaving a narrow lane between them. It is admitted that no stone can be found at C,

but that there is a black-oak there, marked as if for a corner to defendant's tract, with pointers around, and that these marks agree in date with defendant's deed.

The plaintiff's counsel contended that there was nothing in the deed to the defendant that authorized him to claim to the line C, I, to the disregard of course and distance, and called on the court so to instruct the jury.

The court declined giving the instruction prayed for, but charged the jury that if there was a corner actually made at I for the purpose of having the deed made according to it, and another actually made at C for the same purpose, and the evidence satisfied them of (202) these facts, they ought to find their verdict for the defendant, and in arriving at these facts the existence of pointers around these points, and a marked line, corresponding in age with the deed to defendant, from the one to the other, were circumstances to be considered by them.

The jury found for the defendant. Judgment. Appeal by plaintiff.

Fleming for plaintiff.
Jones for defendant.

PEARSON, C. J. Every deed must speak for itself, and a defective description cannot be aided by parol evidence, although in fitting the thing to the description, for the purpose of identifying the subject, such evidence is not only admissible, but necessary.

In respect to "marked trees," a departure from this rule, to a limited extent, has been admitted, and is acted upon in numberless cases, so as to allow a defective description to be aided and added to, by an implication, based on the known practice of surveyors in making corners. For instance, a call "south 145 poles to a black-oak, thence east 110 poles," etc., is vague and uncertain in respect to the black-oak. We know from the deed that it is a corner, for at it the course changes; but what black-oak is it? Unless it stand at the end of the distance, no description is given, and so far as the deed speaks, it may be this, that, or another black-oak. But surveyors always mark "corner trees" in a particular manner—three chops on the "coming" and three on the "leaving" line, and if a black-oak is found marked as a corner, corresponding with the two lines, and corresponding with the date of the deed, that fact has the effect of aiding the description, and adding to it, by implication, so as to make it read "a black-oak *marked as a corner,*" which makes the description perfect, and establishes the black-oak for a corner, controlling both course and distance. Surveyors also mark line (203)

trees in a particular manner—two chops on a side-line tree and two chops coming and leaving on a "fore and aft tree"; and although we do not decide that a line so marked, corresponding with the date of the deed, except in *ancient* deeds and patents, is of itself sufficient to control course and distance, unless it is called for in the deed, yet it is clear that such a line, if found, may aid in fixing a corner which has been removed or destroyed, for the marks so made on growing trees, according to the custom of surveyors, cannot afterwards be put there or counterfeited, and are treated as facts, in some degree incorporated into the deed, so as to make a part of the description, by implication, and are thus distinguished from mere parol evidence, resting on "the slippery memory of man." So that where the first line, running from an admitted beginning corner, is established, and there is such a line of marked trees corresponding in age and with the course called for, running to the third corner, which is also established, the second corner may be fixed by *reversing* the second line, to wit, the line so marked, and the point of intersection with the first line is considered to be the corner, although the distance in the first line may be thereby elongated or shortened. This is assumed to be settled law in *Harry v. Graham,* 18 N. C., 80. It was decided in that case that a posterior line could not be reversed, in order, by its intersection with a prior line, to show the corner, unless such posterior line was certain, because to do so would be to extend the *distance* of the prior by the *course* of the posterior line. The chance of mistake resting on the one or the other being equal, it was deemed proper to follow the order in which the survey was made. But the Court say: "So if, even upon such calls as this deed contains, a *line of marked trees* was found, by tracing the line back from the post-oak, corresponding with the survey of the 300-acre patent, that might carry the other line to the point of intersection, because it would prove an *actual survey,* and be the evidence of *permanent natural* objects to show where the black-oak once actually stood, which, wherever
(204) it stood, would be the terminus and control the *distance* mentioned in the deed."

The same consideration, based on the practice of surveyors and the nature of marks made on growing trees, by which the fact of a tree being found marked as a corner is allowed to aid the description in a deed by adding to it the words "marked as a corner," applies to a case where trees are found marked "as pointers"; for it is the practice of surveyors, and a part of their art, to mark a point as a corner in a particular manner, to wit, by blazing three trees, so as to point to the center spot as the corner, which, from their office, are called "pointers," and the blazes so made on growing trees are just as permanent, count

age as well, and are as hard afterwards to be put there or counterfeited, as the chops on a corner tree, and are consequently equally entitled to be treated as *facts,* incorporated into the deed, so as to make a part of the description, and aid by adding to it the words, "marked as a corner by pointers." For instance, a call "south 145 poles to a stone, thence east 110 poles," etc., is vague and uncertain in respect to the stone; but if the trees are found marked as "pointers," corresponding with the date of the deed, and especially if there be also an established line coming to the point indicated, and a line of marked trees corresponding in age, and with the course leaving the point, these facts have the effect of aiding the description, and adding to it by implication, so as to make it read a stone "marked as a corner by pointers," which makes the description perfect.

It was objected on the argument that, according to this mode of reasoning, a *stake,* as well as a *loose stone,* might, by the aid of pointers and marked line trees, be fixed as a corner so as to control course and distance, which, as was contended, would be in conflict with *Reid v. Schenck,* 14 N. C., 65, where a stake is held to be an "imaginary point."

It is true, in that case it is held that where course and distance are given, calling for "a stake," it is ordinarily intended by the parties, and should be understood merely to designate an "imaginary point"; but it is there conceded that stakes may be *real boundaries,* and (205) we see no reason why its character, as well as that of a loose stone, may not be fixed as a real boundary by a description calling for it as a corner designated by means of pointers, although this part of the description rests on implication; for in *Reid v. Schenck* the land in dispute was a lot in a town, where there were no trees marked, either as corners, pointers, or line trees, and the question rested on monuments of boundary of a different kind, in respect to which there was nothing to aid, by implication, the description in the deed. If a rock or a stone pillar be called for as a corner, and there are no pointers or marked line trees to aid the description by implication, that case decides there must be some other description given in the deed so as to identify the particular rock or stone pillar, as a rock "by the side of a branch," or with the letter "C," for instance, marked on the face of it, or a stone pillar with a certain inscription, like those erected to mark the boundary between the United States and Mexico, and the difference between monuments of boundary of that kind and those marked on growing trees is relied on to distinguish that case from "the series of cases" cited by the learned judge who presided in the court below.

In our case we have an admitted corner to begin at, an established line to fix the corner trees, marked as "pointers," and the line trees

running off to fix the second course, which line of marked trees go to another point, where there are also trees marked as pointers in an established line of the original tract, and we concur with his Honor that, according to the adjudications of our courts, *these facts* are competent and sufficient to fix the corners so as to control the distance mentioned in the deed.

We have not relied on the fact that the call is for a "stone and a ..... (a blank), a new corner." This fact certainly does not weaken our conclusion, and, we think, tends to support it, taken in connection with the additional fact that a black-oak stands at the point marked as a corner, corresponding in age with the coming and leaving lines; (206) for the description shows that there was something else at the point, and it is probable the draftsman, being uncertain as to the kind of tree on which the corner-marks were made, left it blank for fear of a mistake; but at all events the description shows that a *new* corner was then and there made, and agrees that far with the fact that a black-oak was then and there found, marked as a corner. So that there is, at least, no inconsistency between the description in the deed and the facts *dehors*.

PER CURIAM. No error.

Cited: West v. Shaw, 67 N. C., 494; *Norwood v. Crawford,* 114 N. C., 518, 521; *Duncan v. Hall,* 117 N. C., 444, 446; *Brown v. House,* 118 N. C., 881; *Higdon v. Rice,* 119 N. C., 625; *Tucker v. Satterthwaite,* 123 N. C., 531; *Gunter v. Mfg. Co.,* 166 N. C., 166.

STATE v. HENRY SIZEMORE.

1. What is *time to cool* between the occurring of a legal provocation and the inflicting of a mortal blow is a question of law, and it is error to leave it to be passed on by the jury.
2. It is not necessary that a blow, in order to amount to legal provocation, should be one that endangered the life of the slayer.
3. A hypothesis as to the motives of the accused in striking a fatal blow, submitted to the jury by the court without sufficient evidence to justify it, is error.

INDICTMENT for the murder of one Nimrod Elliott, tried before *Bailey, J.,* at the Fall Term, 1859, of MCDOWELL.

The evidence was that J. L. Alred, Henry Alred, John Grice, and others were working in a pit for gold, and that the prisoner and the deceased, both intoxicated, came to where they were bringing with them a jug of spirituous liquor; that the party, shortly after the arrival of the two (Elliott and Sizemore), all engaged in scuffling and throwing clods of dirt at each other, which seemed to be in the way of amusement, and without anger; that the prisoner then said to J. L. Alred "The first thing you know you will get a d—d whipping," to which the deceased replied, "You will not whip John here"; that the prisoner, the deceased, and the witness drank of the spirits, and seemed to be friendly; that the deceased then said the prisoner had come to whip John (207) Alred for swearing to a lie against him, to which the prisoner said that was a lie, for that he, the deceased, had said it, and the two disputed about this for some time; that the prisoner then rubbed his fist in the face of the deceased and chucked him under the chin, on which the deceased said if the prisoner struck him, he would whip him; that thereupon the prisoner jerked off the hat of the deceased, slapped it in his face, put both hands against him and pushed him, on which the deceased told the prisoner that "He said he could whip John Alred, and Alred shall whip him if he wants to do so." It was further in evidence that J. Alred told them to leave, for that he wanted no fuss, and went into the pit; that the prisoner said to John Alred, "If you take it up and will come out, I will give you a whipping"; upon which J. Alred told him again to leave, and an altercation ensued between J. L. Alred and the prisoner, which proceeded till Alred threw an old axe at the prisoner, which struck him in the stomach; that the prisoner then told Alred he ought not to have thrown the axe at him, for the deceased had told the lie; that the prisoner then took up the axe, which was taken away from him by Henry Alred, when he jumped back for his gun, which he got hold of, when the witness J. L. Alred ran out of the pit with a shovel in his hands; that John Grice then took the gun from the prisoner, and the deceased took the shovel from Alred, and said, "Have no fuss"; that Grice then told John Alred to go down into the pit, and he would make them leave, which Alred did; that Grice then told the prisoner to leave, and that the latter had his hand upon his stomach, and was complaining and crying, and said that John ought not to have hit him with the axe; that the prisoner took up his gun and shot-pouch and said, "Nimrod Elliott, if you follow me, I will put a ball through you"; that he was walking backwards, with his gun held towards the deceased, when this was said; that after he had gone backwards about 30 feet the deceased threw a shovel at the prisoner, when the latter immediately fired and gave the mortal wound. (208)

Elliott died very shortly after receiving the wound, and the prisoner ran off, but was soon apprehended, when he said he had "killed the d—d dog," and had always wanted to, for he had thrown up stealing to him.

One of the witnesses swore that from the time the prisoner was struck with the axe by Alred till the deceased was shot was about five or six minutes.

Another witness, Grice, stated that "it all occurred in as short a time as could have been."

The court charged the jury that if, at the time the prisoner shot, he was smarting under the blow he had received from the axe, and there had not been time to cool, that this would be, in law, a legal provocation, provided the deceased was aiding and abetting John Alred in throwing the axe.

2. That if, at the time he was walking backwards with his gun in his hands, the deceased threw the shovel at him, which endangered his life, and in consequence of it he shot the deceased, it would be a case of manslaughter, as the counsel contended; but that if they should be satisfied he had determined to kill, and used the expression, "If you follow me, I will shoot you," to induce the deceased to follow, and he killed him, it would be a case of murder.

The defendant's counsel excepted to these instructions for error.

The jury found the defendant guilty of murder, and sentence being pronounced, the defendant appealed.

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

PEARSON, C. J. There is error in the instructions given to the jury:

1. "If, at the time the prisoner shot, he was smarting under the blow he had received from the axe, and *there had not been time to cool,* this would be, in law, a legal provocation," etc. What is time to cool is a question for the court, and his Honor ought to have instructed
(209) the jury whether, according to the facts of the case, there was or was not, in contemplation of law, time for the passions to cool. Consequently, it was error to leave that question to be passed on by the jury.

2. "If, at the time he was walking backwards, with his gun in his hands, the deceased threw the shovel at him, *which endangered his life,* and in consequence of it he shot the deceased, it would be a case of manslaughter." According to the doctrine of homicide, it is not necessary that the life of the party should be endangered by the assault or

blow in order to mitigate the killing and make the offense manslaughter. The mitigation is allowed, not because of the danger in which the party is put, but because the *furor brevis* is presumed to be excited by a legal provocation, and the law imputes the killing to sudden passion, and not to malice pretense.

3. "If the jury should be satisfied that the prisoner had determined to kill, and used the expression, 'If you follow me, I'll shoot you,' *to induce the deceased* to follow, it would be a case of murder."

After a careful examination of the testimony, we are unable to see any evidence to support this view of the case, and it was error to submit it to the jury. The prisoner had been struck a violent blow with an axe, and was in the act of starting off, going backwards for fear of being struck. The deceased had the shovel. The prisoner said, "If you follow me, I'll shoot you." The deceased then threw the shovel at him, and he fired the gun. Can there be any ground to support the inference that the prisoner gave this warning deceitfully and for the purpose of inducing the deceased to follow him? We think not, and although the words used by the prisoner after the killing tended to show malice pretense, it did not tend to support this view of the case. We think his Honor ought to have instructed the jury that if the evidence was believed, the killing was manslaughter, unless they were satisfied that the prisoner had formed a determination beforehand to kill the deceased, and sought this occasion to effect his purpose, and if so, it was murder; and it would have been proper, in reference to what the (210) prisoner said after the act, to call attention to the difference between threats, deliberately made beforehand, and words used afterwards in a state of excitement.

PER CURIAM. *Venire de novo.*

Cited: S. v. Matthews, 78 N. C., 532; *S. v. Merrick,* 171 N. C., 793.

ALFRED W. DARDEN AND WIFE v. RICHARD COWPER ET AL., EXECUTORS.

1. Where one of two tenants in common of land, being in the sole possession, proceeded to clear all the arable land, and by a succession of crops wore it out, and left no timber to repair fences, it was *Held* that these injuries were not such as the law would remedy by an action on the case, in the nature of waste, but the proper mode of redress was by an action of account or a bill in equity for an account.

2. Whether an action on the case, in the nature of waste, will lie for one tenant in common against another, even where the injuries amount to *destruction*, Quere?

ACTION ON THE CASE, in the nature of an action of waste, brought by one tenant in common against another, and tried before *Manly, J.*, at Fall Term, 1859, of HERTFORD.

The defendant's testator was in sole possession, and it appeared that the lands, held in common, consisted of a tract of about 500 acres, 400 of which were valuable for tillage, the residue a swamp, with little or no timber, and of no value. Of the tillable land when defendant's testator went into possession, 250 acres were under fence and in cultivation; the residue was in the primitive forest, and well covered with timber. The defendant's testator, in his use of the lands, proceeded to cut down and clear up and reduce to cultivation the entire 150 acres which he found in forest, not leaving timber on the lands for repairing fences or for other necessary purposes, and declared his purpose
(211) to be *to wear it out,* and then remove his slaves to the Southwest. He accordingly removed, after having cultivated the land every year until it was exhausted. By the defendant's use of the land, and especially by his destruction of all the timber suitable for fencing, etc., it was proved that a permanent and irreparable injury had been done to the land by depreciating the value of it, either for sale or for use.

The court was of opinion that injuries to the extent and of the kind proved, permanent and irreparable in their nature, constituted waste, and would sustain an action by one tenant in common against another.

Verdict for plaintiff. Judgment. Appeal by defendant.

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

PEARSON, C. J. We do not concur in the opinion of his Honor, that the evidence establishes such an injury to the land and wrong on the part of the defendant as will enable a tenant in common to maintain an action on the case, in the nature of waste, against his cotenant.

There is a marked distinction in respect of what constitutes waste, in the relation of a remainderman, or reversioner after an estate for life or years, and the particular tenant, and the relation of tenants in common who have each an estate of inheritance in possession.

If a tenant in common receives more than his share of the profits by an *excessive use of the property,* as by wearing out the land, or by an *improper use of it,* as by cutting down the timber and selling it, he cannot be treated as a *tort feasor,* but the remedy of the cotenant is by

an action of account, or a bill in equity for an account. *Walling v. Burroughs,* 43 N. C., 61. Even if he removes a part of the land, as marl, an action on the case in the nature of waste will not lie, although the land is thereby permanently injured and made of less value. *Smith v. Sharpe,* 44 N. C., 91.

A tenant in common of personal property cannot bring trover (212) against his cotenant unless the thing is destroyed, either actually or in effect, as by removing it to parts unknown. On the same principle, a tenant in common of land cannot bring an action for waste against his cotenant, or an action on the case in the nature of waste, which is a substitute for the action of waste, unless there be destruction, so that an action of account, or a bill in equity for an account, would not be available, because nothing was received whereof an account could be taken; for instance, where a tenant in common willfully burns down the houses, or cuts down ornamental shade trees. Indeed, a question may be made whether a tenant in common can, even for destruction, maintain an action on the case in the nature of waste, for his right to bring an action of waste is given by a different statute than the one which gives the action to a remainderman or reversioner, and the remedy is not by the recovery of damages, but to compel partition, and in the allotment to have the place wasted assigned to the lot of the tenant who committed the waste; whereas the remedy given to a remainderman or reversioner is to recover the place wasted and also *damages* for the injury to his fee-simple estate. But we will not enter into this subject, because the point is not presented by the case under consideration, for there is no evidence of destruction or irreparable injury which could not be charged to the defendant in stating an account for what he had received over and above his share of the profits. It is true, the case sets out "It was proved that a permanent and irreparable injury had been done to the land," but this is explained by other parts of the case, and the amount of it is that the defendant had cleared all of the tract of land which was fit for cultivation, and had, by successive crops, worn it out, so as to leave no timber or fencing, and no soil on the land, whereby its value, either for sale or use, was much depreciated. Suppose all of this to be true, it is only an excessive or improper use of the land whereby the defendant is liable to be charged in account for the larger amount of profits which he has or ought to have received; but it does not amount to what the law understands to be destruc- (213) tion or irreparable injury, which cannot be compensated for in money, for, at most, it would only subject the defendant to a charge for the full value of the land, as if he had not made this excessive use of it, or to an extra charge for profits which he ought to have received

by reason of such excessive use, supposing it to have been excessive; for, under certain circumstances, a "prudent proprietor" who owns a body of rich land will clear every foot of it and put it in cultivation, and depend on getting rail timber and firewood from the ridges if it be in the mountain country, or from the swamps if it be in the low country. And it would be considered bad management if an owner of river bottoms, in the western portion of our State, or of upland dry enough for cultivation in the eastern portion, should let it remain uncleared merely for the sake of the wood. At all events, clearing and cultivating it would not be considered destruction, or such an injury as could be deemed irreparable, and for which damages would not be ample compensation, provided he was able to pay.

PER CURIAM. *Venire de novo.*

E. D. McGINNIS v. COCHRAN HARRIS.

Where a testator, after giving his estate to his wife for life, and then over, proceeded, "In the event of my wife's death, having and leaving an heir, provided it attains maturity, the above will is revoked, and my property is to be divided, by law, between my wife and heir or heirs," it was *Held* that a child of his wife, by a second husband, could not take under the terms of the will.

REPLEVIN, submitted to *Heath, J.*, at last Fall Term of CABARRUS, on the following case agree:

(214) Robert L. Cochran, late of the county of Cabarrus, died in 1853, leaving a last will and testament, which was admitted to probate at the October session of 1853 of Cabarrus County Court. The part of this will material to be stated is as follows: After bequeathing to his wife all his estate, both real and personal, for the term of her natural life, he proceeds: "In the event of my wife's death, all my real and personal property to pass to my nephew and niece, William Brice and Martha L. Harris, either of whom dying without heirs, it passes to the other. I give to my niece, Martha L. Harris, one bed furnished and a bureau. In the event of my wife's having and leaving an heir, provided it attains maturity, the above will is revoked, and my property is to be divided by law between my wife and heir or heirs."

It was also agreed that the said Catherine, the widow, had no child by the testator; that in 1855 she intermarried with the plaintiff, Elijah D. McGinnis, who, after marriage, took possession of the slaves in con-

troversy, as a part of the estate of Robert L. Cochran, deceased, and held them until they were taken from him by the defendant; that the said Catherine died in June, 1858, leaving her husband and one child, Virgil L. McGinnis, the other plaintiff, her surviving. That the defendant was the guardian of William Brice and Martha L. Harris, and as such took possession of the slaves in controversy, in January, 1859, without the knowledge or consent of the plaintiffs, in whose possession they were at the time of such caption. The value of the slaves were also agreed upon. If the court shall be of opinion for the plaintiffs, judgment is to be rendered in their favor for the penalty of the bond, to be discharged upon the surrender of the slaves, and for the further sum of $320 damages by reason of the taking and detention of said slaves, and costs; otherwise, judgment of nonsuit is to be rendered.

The only question intended to be presented in the case is as to the rights of the parties, to wit, whether the child of Catherine by the second marriage, or the nephew and niece, are entitled under the will above recited.

The judgment of the court below upon this case was in favor (215) of the defendant; and from this judgment plaintiffs appealed.

D. G. Fowle, J. W. Osborne, and J. H. Wilson for plaintiffs.
Nat Boyden for defendant.

BATTLE, J. In the will, which is made a part of the case agreed, the testator, after devising and bequeathing to his wife for life all his estate, real and personal, adds the following clauses: "In the event of my wife's death, all my real and personal property to pass to my nephew and niece, William Brice and Martha L. Harris, either of whom dying without heirs, it passes to the other. I give my niece, Martha L. Harris, one bed furnished and a bureau. In the event of my wife's having and leaving an heir, provided it attains maturity, the above will is revoked, and my property is to be divided by law between my wife and heir or heirs." The question presented by the case agreed is whether, in the events which happened, the slaves for which the suit was brought passed under the will as a part of the testator's property to the child which his wife had by her second husband, and we are clearly of opinion that they did not. Besides the great improbability of the testator's having an intention to provide for the child which another husband might have by his wife, to the exclusion of his own nephew and niece, we think the fair grammatical construction of the will is opposed to the claim of the plaintiffs. The use of the indefinite article "an" as applied to the heir of the wife is restricted by the subsequent use, in the same sentence, of the personal pronoun "my" in connection with the words "wife and

heir or heirs," in the division of the testator's property. If I use the expression, "my wife and children," or "my wife and heir or heirs," I certainly cannot be understood to mean "my wife" and "another man's children or heirs." *Evans v. King,* 38 N. C., 387, is plainly distinguishable from this, because in that case there was nothing to limit the signification of the indefinite pronoun "any" in the deed which created a trust in favor of the wife of the grantor and his daughter,
(216) "and any child or children that the aforesaid E. L. H. (the wife) may hereafter have." The Court said, "It is certainly unusual for a man to convey property with an intent to provide for a child that his wife may have by another husband; but he may do so if he chooses, and the fact that it is unusual will not, of itself, justify a court in departing from the ordinary meaning of the terms used in the deed. There is nothing whatever in the deed to qualify or explain the words 'and any child or children that the aforesaid Elizabeth L. Holmes may hereafter have.' " Had there been anything in the instrument to afford such qualification or explanation, the Court would undoubtedly have availed itself of it for the purpose of avoiding a construction leading to such an unusual and unnatural result. *Good v. Harris,* 37 N. C., 630.

PER CURIAM. Affirmed.

MARTIN TOWE TO USE OF G. W. BROOKS, ASSIGNEE, v. WILLIAM FELTON, ADMINISTRATOR.

One joint principal has no equity to be subrogated to the rights of a judgment creditor as against his associate; so that satisfaction made by him cannot be regarded otherwise than as a payment.

SCIRE FACIAS, tried before *Saunders, J.,* at Spring Term, 1859, of PERQUIMANS.

The following are the facts of the case: The assignor, Martin Towe, at November Term, 1856, of the Court of Pleas and Quarter Sessions for Perquimans County, obtained judgment by default against James L. Ball and the defendant, William Felton, as administrator of one Thomas B. Long, upon a partnership debt due by Long and Ball. Upon this, execution issued, and was returned, "Nothing to be found," as to said Felton as administrator, and a levy was made upon the property of James L. Ball. A *venditioni exponas* with a *fi. fa.* clause was
(217) issued from August Term, 1857, against said Ball and Felton as

administrator. The sheriff did not make sale of the property of Ball levied upon, but, by agreement, Ball was permitted to sell it and place the proceeds in the hands of the sheriff, who therewith satisfied the execution, and endorsed it, "Satisfied in full." Subsequently to this, and previous to the return of the execution into court, the plaintiff therein assigned the same for value to George W. Brooks in trust for James L. Ball, whereupon the sheriff, at the instance and by direction of the counsel of the plaintiff in the execution, erased the endorsement above recited and returned the execution into court, "Forborne by the plaintiff." A *scire facias* then issued at the instance of Towe to charge the defendant, Felton, *de bonis propriis,* for the payment of one-half the judgment rendered against Ball and said defendant as administrator of T. B. Long.

The defendant pleaded *"Nul tiel record"* and "Payment." His Honor held that there was no such record, and if such record were shown, the facts set forth constituted a payment and satisfaction. From this judgment the plaintiff appealed.

William A. Moore for plaintiff.
Jordan for defendant.

MANLY, J. The point upon which the case turns is decided in *Hinton v. Odenheimer,* 57 N. C., 406.

By a reference to the facts there stated it will be found that it presents the case of a payment by a copartner of a judgment against the firm, and an attempt to enforce its collection against the bail of the other partners, and the case is put upon the point whether payment under such circumstances does not extinguish the judgment. It is there decided that it did, and that the judgment could not be kept alive by the intervention of an assignment. The case now before us rests on (218) the same ground, and must be decided in the same way.

One joint principal or one cosurety, as against another, has no equity to be subrogated to the rights of the judgment creditor. This equity subsists only in favor of a surety against his principal. A joint principal or a cosurety has an equitable right to contribution, but he has no such right to the use of the creditor's judgment to force collection of the whole. The creditor may regard all as principals (except so far as he is restrained by statute), and collect the whole out of any one, but it would be iniquitous to confer upon the associate debtor the same power.

We therefore hold that a payment made by one who is a principal obligor, or by one copartner of a partnership debt, is simply a payment.

The ruling of the court below to this effect is correct, and the judgment is

PER CURIAM. Affirmed.

Cited: Fowle v. McLean, 168 N. C., 542.

J. I. McMILLAN, ADMINISTRATOR v. ELIZABETH DAVIS AND H. H. ROBINSON.

1. Where a judgment, bearing a certain date, was signed by one justice, and at the foot of the judgment there was a grant of an appeal, bearing no date, but signed by a different justice, it was *Held* that this afforded no ground for presuming that the judgment and appeal were parts of different transactions, and at different times.
2. Where an appeal from a justice's judgment had pended for several terms in the county court, before a motion to dismiss, for irregularity in taking the appeal, was made, and had afterwards pended several terms in the superior court before the like motion was made, it was *Held* to have been such an acquiescence as waived the irregularity, and that the motion was properly refused.

(219) MOTION to dismiss an appeal, heard before *Caldwell, J.,* at the last Fall Term of BLADEN.

The suit was commenced before a justice upon a note and the judgment of the justice is in the following words:

The plaintiff produces a note for the sum of $60. The defendant pleads a set-off, which is allowed. Judgment against the plaintiff for costs.

Given under my hand and seal, 13 April, 1857.

W. T. Jessup, J. P. (SEAL)

At the foot of this judgment is added:

Appeal by plaintiff to the county court craved, and granted upon the security of James Baker.

JAMES BAKER.

Witness: W. D. McNEILL, J. P.

In the county court there were three continuances of the cause, and at the fourth term the defendants moved to dismiss the appeal because the justice did not note on the judgment the application for time to appeal. The motion was disallowed, and defendants appealed to the

Superior Court. In that court, after the cause had pended for three terms, the motion to dismiss the appeal, for the same defect, was made, but was overruled by the court, his Honor holding that the motion could not be sustained because not taken in apt time, and because the act, in such cases, is only directory to the justice. From this judgment defendants appealed to this Court.

Baker for plaintiff.
No counsel for defendants.

MANLY, J. The provision in our law for an appeal from a justice's judgment, when the dissatisfied party is not prepared at the trial with sureties (Rev. Code, ch. 62, sec. 26). seems to be for the protection solely of the party desiring the appeal. The noting of the prayer for an appeal, and allowance of time to put in the requisite security, and the consequent suspension of final proceedings upon the judgment for that time, can have no other operation. Without that there would be nothing to hinder the successful party from resorting immediately to process which might compel satisfaction of the judgment. The (220) failure to make a note of the prayer for an appeal cannot, therefore, by any possibility work an injury to the opposite party, and the objection from that quarter should be of no avail.

Supposing the appeal to have been asked for, as we are authorized to do from the fact that it was granted (upon the principle that all things are presumed to be done rightly until the contrary appear), the omission to make a memorandum of it would be mere official *laches,* which ought not to vitiate the appeal or prejudice the rights of the parties. The requirement is merely directory to the justice, and intended to obviate certain possible difficulties, and does not in any way affect the rights of the parties in respect to the appeal. This seems to have been one of the views which the court below took of the matter, and which influenced its judgment.

Whatever may be said of the foregoing, which we suppose, at any rate, will be considered debatable matter, there are two grounds upon which we think the judgment of the court below may safely stand.

First. It does not appear that the appeal was taken after time allowed to put in sureties, under the provision of the statute, or that it was taken otherwise than such appeals usually are, upon and after the announcement of the judgment, with no greater interval of time than may be well allowed, according to the course of business, for the convenience of the parties. There is nothing tending to show the appeal was at a different time from the granting of the judgment, except that the same justice that entered the judgment did not attest the appeal.

There is nothing in the statute requiring the justice to be the same; and the fact, of itself, is by no means sufficient to rebut the presumption that all things are done in order and according to law until the contrary appear.

At the foot of the judgment rendered on 13 April, 1857, it is added: "Appeal by the plaintiff to the county court craved, and granted upon the security of James Baker," etc., with no date; from which the inference is reasonable that it was done at the same time—that the
(221) judgment and grant of appeal were parts of the same transaction.

Secondly. If it could be otherwise inferred, the lapse of time between the filing of the appeal and the motion to dismiss in the county court (four terms of the court having intervened) was a waiver of the informality. Putting in security at the proper time, or, indeed, putting it in at *all,* is not necessary to give jurisdiction to the appellate court. The omission of the justice to require a strict compliance with the law would be an official misprision that the appellee might complain of, and which he might have had corrected by motion upon the filing of the appeal; but he may waive it, and if he make no motion, but go on to the fourth term, preparing for trial, it will be considered as waived.

The same may be said of the case in the Superior Court. After it was in that court, two years elapsed and three continuances were effected before the motion was made to dismiss.

It was too late to move a peremptory dismission on account of the original defect in the appeal. *Wallace v. Corbitt,* 26 N. C., 45; *Arrington v. Smith, ibid,* 59.

The case in which it had been held that acquiescence or lapse of time would not prevent a dismission for defect in the appeal will be found to turn upon the position that the appellate court got no jurisdiction by the attempted appeal. *Hicks v. Gilliam,* 15 N. C., 217; *Smith v. Cunningham,* 30 N. C., 460.

We think there was no error in the judgment of the Superior Court for Bladen refusing to dismiss.

PER CURIAM. Affirmed.

Cited: Council v. Monroe, post, 396.

(222)

SARAH J. DUNTON v. JESSE L. DOXEY ET AL.

1. Where claims, subject to a single justice's jurisdiction, are placed in the hands of a constable for collection, and he gives an accountable receipt therefor, the presumption is that they are committed to him as an officer, unless the contrary appear.

2. Where a claim against a nonresident of the State, but subject to a single justice's jurisdiction, was put into a constable's hands for collection, and he collected the money, it was *Held* that a failure to pay over such money on demand was a breach of his official bond.

DEBT upon a constable's bond, tried before *Manly, J.*, at Fall Term, 1859, of CURRITUCK.

The bond contained the usual conditions, and was executed by Jesse L. Doxey as principal, and the other defendants as sureties, at February Term, 1857, of Currituck County Court.

On 28 March following, the defendant Doxey gave the following receipt:

Received of Sarah Dunton three notes on David Dunton's and Alexander Dunton's estates.

1. A note for the sum of $39.90, with interest from 7 March, 1855.
2. A note for the sum of $34.59, with interest from 18 August, 1852.
3. A note for the sum of $36, with interest from 20 May, 1849.

The above notes are put into my hands to be collected or returned. This 28 March, 1857.

JESSE L. DOXEY.

The evidence was that Doxey collected all the claims thus put into his hands, and that the money was demanded of him within the official year, but no part paid, the constable replying to the demand that he had no money, and that his official bond made it as secure as he could make it.

It was also in proof that one of the debtors lived, at the date of this receipt, and continued to live through the official year, out of the State.

Defendant's counsel contended that relator could not recover upon the bond as to any of the claims put into the constable's (223) hands, because they were not received officially, so as to charge the sureties, there being no addition to the constable's name in the receipt; and especially was this the case as to the claim against....., who resided out of the county, in the State of Virginia.

But the court was of opinion that, upon the proofs and the fact of the defendant's acting as a constable, there was a presumption that the claims were received by the constable in his official capacity, and that

the relator might recover all the claims upon the breach alleged of collection and nonpayment on demand, as well that against the nonresident as the other two.

There was a verdict accordingly. Judgment. Appeal by defendants.

Jordan for plaintiff.
Johnson and Hines for defendants.

MANLY, J. We perceive no error in the judgment of the court below.

Where claims subject to the jurisdiction of a single justice are placed in the hands of a constable for collection, and he gives an accountable receipt for them, the presumption is they are committed to him as an officer, and he is accountable as an officer, unless it appear that he received them in some other capacity. It would have added no force to this presumption if, as is most usual, the officer had added to his name the usual initial letter of his office.

The other branch of the exception, that the officer was not officially charged with the collection of the note against the nonresident debtor, is likewise untenable. Although not at liberty to go beyond the limits of his county, and not responsible, of course, for failure to do so, yet if the debtor be in his county, so that he may collect, and the claim is of an amount and nature subject to be collected by a warrant
(224) before a justice, the constable is officially bound to collect, and is, in the same way, responsible for the money when collected.

There is a class of cases in which it seems to be established as a principle that the constable is not chargeable in his official capacity for claims to collect which were out of the jurisdiction of a justice, either on account of the amount or character of the demand. Such claims could not be collected by him through any official action, and it could not, therefore, be in the contemplation of the obligors to the bond, the sureties, to become responsible for misconduct in regard to such matters. But with respect to all claims of an amount and nature to be collected through a justice's judgment, and which might be collected within the limits of the county for which the constable is appointed, it would be different.

It is not a question of domicile, but is a question whether the officer, acting within the sphere of his official duty as prescribed by law, and exercising the proper degree of diligence, might have collected. The cases to which we refer are *Blythe v. Outland,* 33 N. C., 134, and others there cited, which, we think, were decided on correct grounds, and are entirely consistent with the ruling of the case now before us.

Dave v. Morris, 7 N. C., 146, to which our attention has been directed, turned upon the peculiar but erroneous conditions of the bond, which

were for the performance of the constable's duties within a particular district of the county; and there was no breach alleged, or, if alleged, proved, within that district. It therefore stands upon a different ground from the one now under consideration.

PER CURIAM. Affirmed.

Cited: Graham v. Buchanan, 60 N. C., 95.

(225)

H. M. SHAW v. THOMAS J. ETHERIDGE.

1. Where there was a ditch which drained the lands of two proprietors, respectively, and the owner of the lower tract so obstructed the ditch as to injure the other party's crop by the ponding of the water, it was *Held* that an action of trespass on the case was the proper remedy.
2. Where a judge gave the jury instructions not material to any point in the controversy, it was *Held* no ground for a *venire de novo*, whether they were correct or not.

CASE, tried before *Manly, J.*, at last Fall Term of PASQUOTANK.

It appeared that defendant conveyed to plaintiff a parcel of land in November, 1853, being a portion only of a larger tract which he owned at that time.

It further appeared in evidence that the part sold was the upper part, and drained naturally through a portion of the land reserved by the defendant, and could only be drained in that way except at great expense.

It also appeared that a ditch had been dug along the course of this natural drainage to aid in conducting off the water, and this ditch the defendant commenced in 1851 and finished in the early part of the fall, before the sale to the plaintiff.

The ditch was common to both parcels of land (the part sold and the part reserved), and when finished there was placed in it some logs; and among them a *hollow log,* with a stop or plug in it. The ditch, without the removal of the plug, afforded a very imperfect drainage through the logs, but with the plug removed would serve as a drain to both parcels, and especially to plaintiff's.

At the date of the sale the ditch was finished, with the stop removable at pleasure, as above stated, and this stop was only a few feet from the dividing line between the parties, on the defendant's side.

The plaintiff took possession of the land in the winter of 1853, and attempted, the next season, to cultivate a crop on the land which the ditch was intended to drain; but the defendant, in the spring of that season, by throwing in clay and other material, rendered the obstruction
(226) so complete, and the use of the plug so impracticable, that a considerable portion of the plaintiff's crop was damaged by the water.

The defendant's counsel contended, generally, that no right of drain through the ditch passed or was conveyed by the sale and deed to plaintiff, especially in the condition in which the ditch then was, and that he had a right to close it up.

The court was of opinion with the plaintiff upon his right to drain through the ditch, and instructed the jury if it was rendered less serviceable as a drain to the plaintiff's cultivated land by the additional obstructions thrown in by defendant, plaintiff would have a right of action.

The court was furthermore of opinion that in case of a common ditch, with a stop or lock in it (as a plug in a hollow log), each proprietor would have a right to use the stop, no matter on which side of the line it might be, and so instructed the jury. Defendant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

Hines, W. A. Moore, and Johnson for plaintiff.
P. H. Winston, Jr., and D. G. Fowle for defendant.

BATTLE, J. When this case was before the Court on a former occasion we ordered the judgment which the plaintiff had obtained in the court below to be reversed, and a *venire de novo* to be awarded for misdirection upon the question of damages. *Shaw v. Etheridge,* 48 N. C., 300. No objection was then taken to the form of the action, and, in our opinion, none can be urged with success now.

The injury for which the present action is brought is similar to that which is caused by ponding water back upon the land of another by the erection of a mill or other dam; and trespass on the case has always been considered the proper remedy in cases of that kind, when they do not come within the provisions of the act concerning "mills and millers." Rev. Code, ch. 71. *Bryan v. Burnett,* 47 N. C., 305. The case is manifestly distinguishable from *Kelly v. Lett,* 35 N. C., 50, in
(227) which it was alleged that the plaintiff was the owner of a mill a short distance below one occupied by the defendant on the same stream, and that the defendant *wilfully, and with intent to injure the plaintiff,* frequently shut down his gates, so as to accumulate a large head of water, and then raised them, by which means an immense volume of water was thrown, with great force, against the plaintiff's dam, and

swept it away. In that case, because the act was wilful, and done with a direct intent to injure the plaintiff, trespass *vi et armis,* and not trespass on the case, was held to be the proper remedy, and the manner in which the injury was inflicted was compared to the firing by the defendant of a cannon against the plaintiff's dam. Certainly no such comparison can be made between the wrongful act complained of in that case and the one charged in the present.

The other objection, that the judge erred in his instruction to the jury that both parties had a right to use the plug in the hollow log as a drain to the ditch, which was common to both, no matter on which side of the dividing line the log might be, cannot avail the defendant. The remark was entirely immaterial to any question between the parties as raised by the facts in proof, and whether correct in point of law or not, could not in any way affect the case.

PER CURIAM. Affirmed.

Cited: Jones v. Clarke, post, 420.

(228)

DOE ON THE DEMISE OF REBECCA WELLBORN v. JOHN FINLEY ET AL.

1. The nonage and coverture of a feme *cestui que trust* cannot have the effect of preventing an adverse possession for seven years under color of title from ripening into a good title.

2. Where A. mortgaged his land for a term of years, and then assigned the equity of redemption, and the mortgagee permitted an adverse claim under color of title to ripen into a good title by adverse possession it was *Held* that the assignee, on the payment of the purchase money and a reconveyance of the term, was barred of his entry until after the expiration of the term.

3. Where a bill was filed to settle all litigation concerning titles to several tracts of land that had become confused by the nonpayment of mortgage money and adverse claims under junior grants, and one of the tracts was withdrawn from the litigation, it was *Held* that a decree as to those remaining tracts in controversy did not prevent such possession of an adverse claimant, under color of title, from ripening into a good one.

4. Where a husband and wife joined in a deed purporting to convey a legal estate in fee of the wife's land, in which he then had no interest, and the deed of the wife was inoperative for the want of a privy examination, it was *Held* that the assignment to the wife of a term that had been carved out of the estate (the reversion in fee being then in trustees) vested the term in the husband *jure mariti,* and fed an estoppel created by the deed of the husband.

5. A deed by B. and wife, reciting a conveyance of the legal title to A., a mesne conveyance to trustees in trust for a daughter of A., a marriage of B. with the daughter, and reciting also that the bargainees were empowered by act of Assembly to purchase land for a town site, but which is silent as to whether the trustee had conveyed the legal estate to the feme, and which then proceeds to "give, grant," etc., the land itself in the usual form, was *Held* to purport a conveyance of the legal estate.

EJECTMENT, tried before *Heath, J.*, at last Fall Term of WILKES.

The action was brought to recover the possession of certain town lots in the town of Wilkesboro (and was to determine the rights as to all the other lots in the town). The lessor of the plaintiff claimed title under a grant from Lord Granville to Henry Cossart, in 1754, for a tract called the lower Moravian tract, and a deed from Christian Frederick Cossart to Hugh Montgomery, dated in 1778. The plaintiff then offered evidence of a deed from Hugh Montgomery to James
(229) Kerr, David Nesbitt, and John Brown, dated 13 December, 1779, in trust for the support and education of Rebecca and Rachel, his infant daughters, until they arrived at the age of 21 or married, and then to be divided between them. The word "heirs" was left out of this deed, but a will which was also given in evidence was executed three days afterwards, and the two instruments, taken together, were declared by this Court, in *Gray v. Winkler,* 57 N. C., 308, to convey an estate in fee. The plaintiff further offered the will of John Brown, the surviving executor of Hugh Montgomery, and a deed from John Brown, Jr., one of the executors of John Brown, Sr., dated in 1829, conveying the said lower Moravian tract of land to Rachel Stokes and Rebecca Wellborn.

The plaintiff then offered in evidence a mortgage from Hugh Montgomery to John Michael Graff for the same tract of land, for a term of five hundred years, which was dated in 1778, to secure the payment of the purchase money; that Montgomery died in 1779, and the unexpired portion of the term, by a regular series of assignments, became vested in Christian Lewis Benzein. He showed the proceedings of the Court of Equity of Iredell, instituted in 1794, by the mortgagees and trustees and *cestui que trusts* against Lenoir Lovelace, Mary Gordon, and others, for a settlement of the ligitation growing out of the nonpayment of the purchase money, and to remove the confusion and distrust upon the title produced by the conflicting claims of Lenoir, Lovelace, Mary Gordon, and others. The decree in this case, made in 1814, was that one of the tracts be sold to pay the remainder of the purchase money, to secure which the mortgage had been made, and that Lenoir, Lovelace, Mary Gordon, and others, the subsequent grantees and their assigns, should surrender and reconvey the lands they were in possession of.

Also, that on the payment of the balance of the purchase money the remainder of the term should be assigned to Mrs. Stokes and Mrs. Wellborn, and that John Brown, Jr., the trustee appointed by the court for the purpose, should make title to them for the legal estate in the land in fee simple. In pursuance of this decree the executors (230) of C. L. Benzein, having been paid the purchase money in full made a deed of assignment of the said term of five hundred years to Rebecca Wellborn and Rachel Stokes. This was dated 17 May, 1815. It was also shown by the plaintiff that in 1829 the said John Brown, Jr., made a deed in fee, according to this decree, of the estate in fee simple to Mrs. Wellborn and Mrs. Stokes.

It appeared in the case that in 1779 the land in question had been granted to one Pittman, and from him conveyed by a succession of deeds to Mary Gordon, who had possession of the same for seven years ensuing her entry on 28 October, 1791, and who, on 8 May, 1800, conveyed to the commissioners appointed by act of Assembly to purchase a site for the public buildings of Wilkes County, who conveyed to the defendants, or those under whom they claim.

On 17 May, 1800, in pursuance of the same act of Assembly, the following deed was made by James Wellborn and his wife, Rebecca, and others, for the lands in question, but which was not perfected as to her by a privy examination:

"This indenture, made this 17 May, 1800, between James Wellborn and Rebecca Wellborn, and Montfort Stokes and Rachel Stokes, of the county of Rowan and State of North Carolina, of the one part, and Thomas Fields, George Gordon, Robert Martin, Walter Brown, and George Brown, commissioners for fixing on a plan for the purpose of erecting the public buildings for the said county of Wilkes, of the other part: Whereas Christian Frederick Cossart, by deed bearing date 23 July, 1778, did convey to the late Hugh Montgomery, of Salisbury, a certain tract and parcel of land situate and lying in the county of Wilkes aforesaid, on both sides of the Yadkin River, against the Mulberry fields, beginning at a white-oak, running thence west, etc., containing in the whole 4,933 acres, be the same more or less; and whereas, by a deed of gift in trust bearing date 13 December, 1779, the said Hugh Montgomery hath conveyed to James (231) Kerr, David Nesbitt, and John Brown, trustees, for Rebecca and Rachel, the infant daughters of the said Hugh Montgomery, the aforesaid tract of land, with the appurtenances, lying and being as aforesaid; and whereas James Wellborn, of Wilkes County aforesaid, hath intermarried with Rebecca, and Montford Stokes, of Rowan County aforesaid, hath intermarried with Rachel, the daughters of the said

Hugh Montgomery, deceased; and whereas the said Thomas Field, etc., commissioners as aforesaid, are empowered and required by an act of the General Assembly of the State of North Carolina, passed at Raleigh in 1799, to purchase or procure 50 acres of land at the place where the courthouse now stands, for the purpose of erecting the public buildings for the said county of Wilkes: Now this indenture witnesseth, that the said James Wellborn and Rebecca, his wife, and the said Montfort Stokes and Rachel, his wife, for and in consideration of the sum of £5, current money, to them in hand paid by the said Thomas Fields, etc., commissioners as aforesaid, the receipt of which is hereby acknowledged, hath given, granted, bargained and sold, aliened and confirmed, and by these presents do give, grant, bargain, sell, alien and confirm unto the said Thomas Fields, etc., a certain piece or parcel of land in the county of Wilkes aforesaid, beginning at a stake and walnut, etc. (describing the town site and lots in question), containing 50 acres, be the same more or less, being part of the aforesaid tract of 4,933 acres, and including the present courthouse of the said county of Wilkes, etc., to have and to hold the said 50 acres of land, with the appurtenances, to the said Thomas Fields, etc., commissioners aforesaid, to the only proper use and behoof of the said Thomas Fields, etc., their heirs and assigns forever. And the said James Wellborn and Rebecca, his wife, and Montfort Stokes and Rachel, his wife, for themselves and their heirs, the aforesaid 50 acres of land, with the premises and appurtenances, and every part thereof, unto the said Thomas Fields, etc., commissioners afore-
(232) said, and their heirs and assigns, against them, the said James Wellborn and Rebecca, his wife, and said Montfort Stokes and Rachel, his wife, and against the claim or claims of any person, or by or from or under them, or either of them, or the said Hugh Montgomery, deceased, will warrant and defend by these presents. In witness whereof the said James Wellborn and Rebecca, his wife, and the said Montfort Stokes and Rachel, his wife, have hereunto set their hands and affixed their seals the day and date herein first written."

The deed was signed by the several parties named as bargainors, and acknowledged by the husbands, and ordered to be registered, but there was no evidence of any privy examination as to their wives.

Deeds were also made to these commissioners by the president of the board of trustees of the University, bearing the same date. James Wellborn died in 1854, and this suit was brought by his widow within two years afterwards.

The defendants submitted to a verdict, with the right to set it aside and enter a nonsuit if the court should, upon consideration of the case, be of opinion against the plaintiff's right to recover.

Afterwards, upon consideration of the whole case, the court being of opinion with the defendants, ordered a nonsuit, from which the plaintiff appealed.

Nat. Boyden and W. P. Caldwell for plaintiff.
Anderson Mitchell, Barber, and Lenoir for defendants.

PEARSON, C. J. Conceding that the deed to Mrs. Wellborn did not take effect by reason of the defect in the mode of taking her privy examination, and that the title was regularly deduced from the original grantee down to Hugh Montgomery, and that as between those claiming under him it vested in her (see *Gray v. Winkler,* 57 N. C., 308), this Court concurs with his Honor in the court below, that the plaintiff was not entitled to recover.

We put our conclusion on two grounds: (233)

1. The commissioners got *the title,* as well as the possession, from Mary Gordon, and of course the defendant has a right to set it up.

In 1791 Mary Gordon, who was then living on the land, bought it at sheriff's sale, and a deed was executed to her. This gave her color of title. She continued in possession under this deed, claiming adversely and without interruption, from 1791 to 1800. This ripened her color of title, and she became the owner of the land so held in possession by force of the statute, unless there was some ground which prevented its operation. Two were relied on in the argument, but we think neither is tenable, viz.:

Mrs. Wellborn married in 1794, was then under age, and afterwards continued under coverture until shortly before this action was commenced. If we put out of view the term of five hundred years created by Montgomery, and suppose the entire estate to have vested in Brown and others, in trust for Mrs. Wellborn, by force of the deed and will of Montgomery in 1779, it is clear that the nonage and coverture of the *cestui que trust* could not have had the effect of preventing the possession of Mary Gordon from ripening her title and defeating the title of the trustees, by tolling their right of entry, after which, certainly, the *cestui que trust* could not have had any remedy at law, and none in equity, save to hold the trustees accountable for a breach of duty in permitting the title to be divested by reason of *laches* on their part.

Or, if we suppose Montgomery to have executed a mortgage in fee, and then to have assigned his equity of redemption in trust for Mrs. Wellborn, it is clear her nonage and coverture could not have had the effect of preventing the possession of Mary Gordon from ripening her title and divesting the title of the mortgagee by tolling his right of entry; after which, neither the trustees nor Mrs. Wellborn could have had any

remedy in law or equity against Mary Gordon; for she would, by force of the statute, have acquired a title, not *under* the mortgagee, but *paramount* and above all of them. So that, if the mortgage money had been paid, and the mortgagee had reconveyed to the trustees, her right (234) would not have been affected, for the mortgagee, having lost the title, had nothing to convey, and could not by a naked deed put the trustees in a better condition than he was in himself. Mrs. Wellborn's title, therefore, if she has any, must depend on the fact that the mortgage was for a term of years.

If one create a particular estate, say for life or years, and the estate of the particular tenant be divested, and his right of entry tolled by an adverse possession for seven years, under color of title, after the termination of the particular estate, the reversioner will have a right to enter by force of his original estate, because his right of entry did not accrue until the particular estate determined, and the statute did not begin to run as against him before his right of entry accrued, and it is clear that after the entry of the particular tenant was tolled, he could not, by a surrender of his estate, put the reversioner in a better condition than he was in himself, for he had no estate to surrender, and, consequently, the reversioner would have no right of entry until he acquired one by force of his original estate.

Nor is the case varied by the fact that the particular estate is a term for years, created by way of mortgage, for after the mortgagee has lost his estate he has nothing to surrender, and the mortgagor, if he redeems, must wait until his right of entry accrues by force of his reversion. These conditions are all plainly deducible from familiar principles of the common law, and we presume no authority need be cited in support of them.

Mrs. Wellborn's nonage and coverture being of no avail, the other ground relied on to prevent the effect of the adverse possession of Mary Gordon was the pendency of a suit in equity between the mortgagees and the trustees and the *cestui que trusts,* and one Lenoir, Lovelace and Mary Gordon and others, instituted in the year 1794 for a settlement of all the litigation growing out of the nonpayment of the mortgage money, and adverse claims set up under junior grants, in which a decree (235) was made in 1814, under which one tract of land was sold to pay the balance due of the original purchase money for which the mortgage was executed, and the mortgage was decreed to assign the mortgage term to Mrs. Wellborn, and Lenoir, Lovelace and Mary Gordon and others were decreed to release and surrender all claim derived under the junior grants.

This would be a complete answer to the statute of limitations but for the fact that in 1800 the piece of land now in controversy, being a part

of one of the larger tracts, was withdrawn from the operation of the proceedings in equity above referred to because it was supposed that by the deeds of Wellborn and wife, Mary Gordon and the trustees of the University, and others, the title to this particular parcel had become vested, both in law and equity, in the commissioners as the site of the town of Wilkesboro, and all the various conflicting title having, as it was supposed, centered in them, the suit was discontinued in respect to this land, and it is not embraced in any of the subsequent orders or in the final decree. So, as to it, the case is the same as if such proceedings had never been instituted.

There is, consequently, nothing to prevent the title of Mary Gordon from having ripened into the better title, and Mrs. Wellborn has no cause of action. How it may be after the expiration of the five hundred years we will not venture to speculate further than we have been forced to do in order to establish our conclusion.

2. The deed of Wellborn and wife, as we have seen above, did not take effect as to her. Nor did it operate at the date of its execution in 1800 to pass any estate from Wellborn, for he then had no interest in the land. He was married in 1794, and had issue born alive, but he did not become tenant by the *curtesy initiate* in the trust estate of his wife, for, in order to that, there must be an actual seizin in regard to a legal estate, or something equivalent to it in regard to a trust, which was prevented by the adverse possession of Mary Gordon. So the deed of Wellborn operated by way of estoppel, and afterwards, in 1814, when the term of five hundred years was assigned to Mrs. Wellborn, it passed to him *jure mariti,* and then passed to the commissioners, (236) or those claiming under them, "to feed the estoppel," in the quaint language of the books, and the legal effect was to vest the title in the commissioners, or those claiming under them, in the same way as if he had been the owner of the term when he executed the deed. This is a well settled rule of law, and is an instance of that being done by mere act of law which the party had before professed to do by a solemn act. *Foscue v. Satterwhite,* 24 N. C., 470; *McNeely v. Hart,* 31 N. C., 61; 2 Smith Lead. Cases, 460 (notes).

To meet this view of the case the counsel for the plaintiff again relied on two grounds, viz.: Where the deed sets out the fact that the party has no estate, and professes to pass only such interest as he may own, there is no estoppel; for, as the books say, "An estoppel against an estoppel leaveth the matter at large," as if the deed sets out that the party is entitled to a contingent interest, which is not the subject of a conveyance, and professes to pass it, there is no estoppel, and should the interest afterwards vest, it will not pass—under the rule as to feeding

an estoppel; but it is necessary for the purchaser to apply to a court of equity in order to get an assignment, under the allegation that the deed is evidence of an *executory agreement* to convey, of which equity will decree specific performance.

This position is true, and for the purpose of showing its application to the present case the learned counsel insisted that Wellborn's deed sets out a mere trust estate, and professes only to pass the equitable estate of himself and wife. So the question turns upon the construction of that deed. We think it does profess to pass the *legal title in fee simple*—that is, the land itself, and not a mere trust estate. It recites that Cossart had conveyed the land in 1778 to Montgomery, and that he, in 1779, conveyed the land to Brown and others *in trust* for his two infant daughters, Rebecca and Rachel, and the marriages of the said Rebecca and Rachel with Wellborn and Stokes, and that the commissioners are empowered to purchase 50 acres of land for the site of
(237) the public buildings for Wilkes County, but is silent in respect to whether the trustees, Brown and others, had conveyed the legal title to the *cestui que trusts,* Rebecca and Rachel, and by its silence leaves it to be inferred that they had so conveyed, for it then professes to "give, grant, bargain and sell, alien and confirm" to the commissioners a certain piece or parcel of land, bounded, etc., containing 50 acres, to have and to hold the said 50 acres of land to the commissioners, and to their only use and behoof, to them, their heirs and assigns forever, with warranty against themselves and their heirs, and all persons claiming under Montgomery—in short, it conveys in the usual form the legal title in the land itself, as if they had legal title by a previous conveyance from the trustees. Consequently, the deed operated by way of estoppel.

But, in the second place, it was insisted that, as Wellborn acquired the term of five hundred years *jure mariti,* and his wife would take by survivorship in the event of his death without making a disposition of it, the law will not dispose of it for the purpose of feeding the estoppel, and thereby deprive the wife of her chance of survivorship.

No authority was found to support this distinction between a case where a husband buys a term for years and where it is acquired *jure mariti,* and it is opposed to principle, for when he afterwards acquires the estate, no matter how, provided he does not hold it in *autre droit,* as where it devolved upon the wife as executrix, the law, in its justice, will pass it to the party to whom he had professed to convey the land in like manner as if he had owned it at the time he made the deed. This is decided in *Doe v. Oliver,* 2 Smith Leading Cases, 417, where the authorities are collected. The Court say: "We are satisfied, upon the authorities, that a fine by a contingent remainderman, though it oper-

ates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens, and that the estate, which then becomes vested, feeds the estoppel, and that the fine operates upon that estate as though that estate *had been vested in the conusees* at the time the fine was levied." (238)

The cases referred to show that there was no difference in the operation of a fine and a deed in this respect, and the conclusion is that the law does that for the party which he ought to do himself—transfers the estate the instant he acquires it, and has the right of disposition.

If Mrs. Wellborn had acquired the legal estate in the reversion before the term was assigned to her, a very interesting question would have been presented, *i. e.,* Would the term have instantly *merged* so as to give her the fee simple in possession? Or would it have passed to her husband *jure mariti,* and instantly passed to feed the estoppel? Both the *merger* and the *feeding of the estoppel* being acts of law. However, the question does not arise, as the surviving trustee did not convey to her until some years afterwards, and it is alluded to merely because it was suggested on the argument.

PER CURIAM. Affirmed.

Cited: Herndon v. Pratt, 59 N. C., 334; *Parker v. Banks,* 79 N. C., 483; *Cheatham v. Rowland,* 92 N. C., 344; *Clayton v. Cagle,* 97 N. C., 303; *King v. Rhew,* 108 N. C., 701; *Culp v. Lee,* 109 N. C., 679; *Ervin v. Brooks,* 111 N. C., 360; *Kornegay v. Miller,* 137 N. C., 668; *Ford v. McBrayer,* 171 N. C., 425; *Olds v. Cedar Works,* 173 N. C., 165, 166; *Baker v. Austin,* 174 N. C., 435; *Weathersbee v. Goodwin,* 175 N. C., 238.

WILLIAM WOOTEN, ADMINISTRATOR DE BONIS NON v. SARAH JARMAN.

A bequest cannot, in law, have the effect of confirming a parol gift of a slave, so as to vest the title in the donee, independently of the assent of the executor.

TROVER, tried before *Saunders, J.,* at last Fall Term of LENOIR.

The action was originally commenced by the executor of Windall Davis for the conversion of certain slaves, Chaney and her children, and, on the suggestion of the executor's death, was carried on in the name

of the plaintiff as administrator *de bonis non.* The following case was agreed on, and submitted for the judgment of the court below:

(239) It is admitted that the will of Windall Davis contains the following clauses:

"Item. I give and bequeath unto my daughter, Sally Jarman, one dollar, with the negroes and other property I have given her before.

"Item. I leave two negroes to be sold, . . . and the money to be divided among my seven children. The names of the two negroes are Chaney and Isaac, and the rest of my property of all kinds to be sold and divided also."

It is admitted that the plaintiff is the administrator *de bonis non* of Windall Davis.

It is further admitted that the defendant, Sally Jarman, is the daughter of Windall Davis.

It is further admitted that the slave Chaney was placed in the possession of the defendant by her father during his lifetime, and has continued in her possession up to the commencement of this suit, and that the other slaves sued for are the children of Chaney, born before the commencement of this suit, and before the demand, and since the said Chaney was placed in the possession of the defendant.

It is admitted that the slaves are of the value of $3,500.

It is further admitted that, previous to the commencement of this suit, the plaintiff made a demand upon the defendant for the slaves, and she refused to surrender them.

If, upon this statement of facts, the plaintiff is entitled to recover, then judgment is to be rendered for the sum of $3,500. If otherwise, judgment is to be rendered for the defendant.

The court gave judgment for the plaintiff for the sum agreed, and the defendant appealed.

J. H. Bryan and George V. Strong for plaintiff.
McRae, Greene, Stevenson, and J. W. Bryan for defendant.

PEARSON, C. J. Waiving a consideration of the question growing out of the fact that the testator directs a negro named "Chaney" to be sold, thereby, as it would seem, taking her out of the general words of the bequest under which the defendant claims, unless there be two

(240) negroes of the same name, we concur with his Honor that, upon the facts agreed, the plaintiff was entitled to recover.

In this Court the parties must stand on the legal title. That was in the testator, and at his death passed to the executor, and at his death, without an assent to the legacy, passed to the plaintiff as administrator

de bonis non, etc. It is not stated on the case agreed that there was an assent; on the contrary, the record shows that this action was commenced by the executor. So the plaintiff acquired the legal title to the slaves, as effects of the testator not administered, and the defendant must assert her right, if she has any, in another form.

To meet this difficulty Mr. McRae assumed the position that an assent was not necessary, for the defendant does not derive title through the executor, under the will, but has a title paramount, by force of the original parol gift, the effect of the will being a confirmation thereof.

The position is untenable. There is no authority to support it. "The reason of the thing" is against it, and it is in direct violation of the statute making parol gifts of slaves void except in cases of intestacy. The legal effect of a will is to pass the title to the executor, by whose assent it passes to the legatee, and a legacy which has the effect of confirming a prior gift in such wise that the title shall pass by force of the gift and not by force of the will, is an anomaly in the law. The title was in the testator at the time of his death. How could it get to the legatee except through the executor under the will? That which is *void* cannot be confirmed; consequently the bequest, "I give Sally Jarman one dollar, with the negroes *I have given her before,*" cannot have the effect of setting up a parol gift so as to make the title jump back and vest by force of the gift, in violation of the statute; and the reference to the gift can only have the effect of answering the purpose of a description of the negroes which he intended to bequeath. Under this view a reference to a prior gift of a negro woman has been seized upon by the courts, in many cases, to enlarge the subject of a bequest so as to take in children born between the making of the will and (241) the death of the testator, who would be otherwise undisposed of or fall into the residuum, under a long established rule of construction. But this is, we believe, the first attempt ever made to give it the effect of vesting the title of slaves by force of the parol gift, so as to exclude the right of the executor, and force creditors to sue the donee, as executor *de son tort.*

Our attention was called on the argument to *Lawrence v. Mitchell,* 48 N. C., 190. That was detinue, by an executor, for slaves. In the court below the plaintiff had judgment on the ground that the slaves passed to the residuary legatee. In this Court the judgment was reversed on the ground that, by force of the words, "all my negroes *not heretofore disposed of,*" and other special circumstances, the negroes did not pass to the residuary legatee, and that by a proper construction the will was a confirmation of a parol gift of a negro woman, who was the mother of the negroes sued for. From this case Mr. McRae draws the

inference that where a will confirms a parol gift the title does not pass to the executor; for, if so, then the plaintiff was entitled to judgment, whether the negroes fell into the residuum or not. The inference is a just one from the case *as reported,* and we were induced to examine the original papers. We there find this important fact, which is not noticed in the report: "It was not contended by the plaintiff that he was entitled to recover if the will confirms the gift to the defendant."

This admission was made in order to present the question of construction, for, otherwise, it was clear the plaintiff was entitled to recover, at law, whether the negroes fell into the residuum or not, and but for the admission no question could be made as to his right to a judgment. So that the case, correctly stated, is an authority against the position assumed on the argument.*

(242) It was also insisted by Mr. McRae that, supposing the direction to sell the negro woman has the effect of taking her and the children born *since* the death of the testator out of the general description contained in the bequest to the defendant, yet there is nothing to prevent the children born before the death of the testator (to whom the direction to sell does not apply) from passing to the defendant under the general description made by the reference to the prior gift. That may be so, but we are not at liberty to decide the question, as it can only be presented in a proceeding by the defendant against the plaintiff to recover her legacy, and, in the meantime, the plaintiff having the legal title, as administrator *de bonis non,* is entitled to the judgment of this Court.

PER CURIAM. Affirmed.

STATE ON THE RELATION OF MAJOR STRICKLAND v. P. MURPHY.

It is not necessary for a creditor of an estate to obtain a judgment against the administrator alone before bringing an action on the administrator's bond for the same debt.

DEBT on an administrator's bond, tried before *Saunders, J.,* at last Fall Term of DUPLIN.

H. Sullivan died in the county of Duplin, and David Reid administered on his estate, and filed his administration bond, dated 19 April, 1852, with the defendant Murphy as one of the sureties. The inventory showed assets to the amount of $3,600. Two justice's judgments in

* The Reporter claims to be excused for this omission, as no allusion is made to the omitted matter in the opinion of the Court in *Lawrence v. Mitchell,* and no stress laid on the fact involved in it.

favor of Carroll and Kenan against H. Sullivan were introduced, which had been assigned to the relator.. Defendant objected to the receiving the judgments in evidence.

The court held that they were competent, and the defendant appealed.

Allen for plaintiff.
Wright for defendant. (243)

BATTLE, J. This case presents the interesting question whether a person claiming to be a creditor of a decedent's estate can bring an action of debt upon an administration bond against the administrator and his sureties until he has established his debt by a judgment against the administrator alone, fixing him with assets. The precise question has never yet, so far as we are aware, been brought before this Court for adjudication, but we think the principles upon which it should be decided have been, on several occasions, incidentally laid down by our predecessors.

In *Washington v. Hunt,* 12 N. C., 475, the counsel for the defendant made a very able and elaborate argument to prove that the bond which an administrator is compelled to give upon taking out letters of administration upon an estate was not intended for the benefit of creditors, but only for the next of kin, and that, therefore, a suit could not be sustained upon it at the instance of a creditor; but the Court felt itself constrained, for the reasons given in the opinion of *Judge Henderson,* to decide otherwise; and the propriety of the decision has never been questioned. In that case, however, and the subsequent one of *Smith v. Fagan,* 13 N. C., 298, the creditor had previously to the suit upon the administration bond obtained a judgment against the administrator, in which it was found or admitted that he had assets. In the latter case it was said expressly that the suit on the administration bond might be brought without a previous judgment against the administrator in debt *for a devastavit;* but the case did not require an expression of opinion upon the point now before us. These decisions, however, establish beyond doubt that an administration bond is given as much for the security of creditors as of the next of kin. We may well suppose, therefore, the same rules by which proceedings may be had upon them by the latter class of persons will prevail in favor of the former.

In *Williams v. Hicks,* 5 N. C., 437, and also in *Chairman v.* (244) *Moore, ib.,* 22, it was decided that the next of kin of an intestate may bring suit upon the administration bond against the sureties thereto, without any previous proceeding against the administrator, although he has made no settlement of his administration with the court, nor

filed an account current; and we believe such has been the uniform practice ever since. If, then, a suit can be brought upon the administration bond by the next of kin, without a previous proceeding against the administrator himself, why not permit a creditor to do so? The duties and liabilities of the administrator with respect to the creditors are quite as great as they are with regard to the next of kin, and the inconveniences to the sureties will be as annoying in the one case as in the other. Indeed, in one particular it will be better for the sureties that a creditor should sue upon the bond at once, without obtaining a previous judgment against the administrator, because they would be at liberty to contest the validity of the debt as well as the amount of assets; whereas, if a judgment had been obtained against the administrator, they would be concluded as to the debt, though not as to the assets. *Armistead v. Harriamond,* 11 N. C., 339. The difficulties imposed upon the defendants in suits upon administration bonds have been much diminished ever since the passing of an act in the Revised Statutes which authorized the courts, where such suits were brought, to refer them to the clerk or some other person, as a commissioner, to state an account of the administration, under the same rules and regulations which prevail in stating accounts in courts of equity. See 1 Rev. Stat., ch. 31, sec. 119; Rev. Code, ch. 31, sec. 114.

In opposition to the conclusion at which we have arrived, the counsel for the defendant has cited and relied upon *Ferebee v. Baxter,* 34 N. C., 64. That case, however, will be found to establish nothing more than that where the administrator has died before the estate has been fully and finally settled there must be an administrator *de bonis non* appointed, who alone can collect what may still be due the estate,
(245) and upon whom alone the creditors and next of kin can call for the payment of their debts or distributive shares. *S. v. Johnston,* 30 N. C., 397; *Williams v. Britton,* 33 N. C., 110; *S. v. Moore, ibid.,* 160, and *Duke v. Ferebee, ante,* 10.

In the case now before us it was not proved at the trial, nor does it appear to us in any way, that the administrator was dead, and we cannot, therefore, perceive any good reason, consistent with the well established principles of former decisions, why the creditor should not sustain his action upon the administration bond, though he had not obtained a previous judgment against the administrator.

PER CURIAM. Affirmed.

Cited: Bond v. Billups, 53 N. C., 424; *Brown v. Pike,* 74 N. C., 534; *Badger v. Daniel,* 79 N. C., 387; *Speer v. James,* 94 N. C., 424; *Morgan v. Smith,* 95 N. C., 400; *Leak v. Covington,* 99 N. C., 562.

ZACHARIAH OWENS, EXECUTOR v. WILLIAM KINSEY.

To constitute a pawn or pledge the property must be delivered to the pawnee.

TROVER, tried before *Manly, J.*, at last Fall Term of CURRITUCK.

The action was brought for an anchor and chain, in which it appeared that they had belonged to a man by the name of Sawyer, and were lost from his vessel in Currituck Sound in a gale of wind. Sawyer owed plaintiff's testator some amount (not disclosed), and told testator if he could find the anchor he might *dispose of it and pay himself.*

An anchor was found by defendant, which testator claimed to be the one lost by Sawyer, and he made a demand of it on board of Kinsey's vessel in the sound, when he answered :"I shall be passing here several times." At another time defendant said: "Let me keep (246) it, and when I get mine, which is at home, you shall have it."

The plaintiff contended, first, there had been a valid pledge of the anchor, etc., by way of pawn, which would enable him to sustain an action; and, secondly, there had been a bailment of them by plaintiff's testator to defendant, and the latter was not at liberty to deny plaintiff's right of property and possession.

The court was of opinion, to constitute a pawn or pledge for security so as to affect the rights of third parties, there must be a possession and delivery; and to constitute a bailment there must be a submission on Kinsey's part to hold under Owens, and, in that case, defendant would be bound to surrender it upon demand. Plaintiff excepted.

Verdict for defendant. Judgment. Appeal by plaintiff.

Jordan for plaintiff.
Hines for defendant.

PEARSON, C. J. We concur in opinion with his Honor that to constitute a "pawn or pledge" the article must be delivered. A *sale* of personal property may be made, and the title will pass without delivery; so a *mortgage* of personal property may be made without delivery, for it is a sale to be void on the performance of a subsequent condition; consequently a sale or a *mortgage* may be made of a runaway slave, or an anchor which is lost in the bottom of Currituck Sound, and is not susceptible of delivery. But a pawn or pledge is a *bailment* of personal property to be kept until a debt is paid, so that delivery is of the very essence; the thing must be *deposited, i. e.*, put into the possession of the party, otherwise no title passes, and he cannot maintain an action for the article against the owner who had promised to deliver it, or even against a wrongdoer who shows no title. Even if the article be deliv-

ered, and title is thereby acquired in it, as a pawn or thing pledged, it is necessary for the pawnee to continue his possession, for if he delivers it back to the pawnor he loses his title as against credi-
(247) tors and *bona fide* purchasers, although he may recover it from the pawnor, or one who gets it in possession without title; but this supposes the bailment to have been originally perfected by a delivery. These positions are well settled. *Doak v. Bank,* 28 N. C., 309; *Barrett v. Cole,* 49 N. C., 40; *Smith v. Sasser, ibid.,* 43, where the authorities are collected.

The other point, as to the alleged bailment by the plaintiff to the defendant after the anchor and chain were found, was properly left to the jury on the evidence.

PER CURIAM. No error.

Cited: Milling Co. v. Stevenson, 161 N. C., 512.

HENRY C. FITE v. WILLIAM LANDER ET AL.

1. The only remedy given by our act of Assembly to one against a clerk who has issued a writ against him without requiring security to the prosecution bond is the penalty of $200 given by Rev. Code, ch. 31, sec. 42.

2. Where an action was brought against the administrator of a clerk, on his official bond, for the penalty of $200 for issuing a writ without requiring security to the prosecution bond, it was *Held* that the right to sue for the penalty abated at the death of the clerk.

DEBT upon a clerk's official bond, tried before *Heath, J.,* at Fall Term, 1859, of GASTON.

The bond declared on was executed in 1856 by Robert Williamson, as clerk of the Superior Court for Lincoln County, and signed by the defendant Thompson as his surety. The facts of the case agreed are these: In April, 1856, Slade and Barrett sued the plaintiff, H. C. Fite, in an action of covenant for a breach of warranty in the sale of a negro. A prosecution bond was filed at the time the writ issued, and was signed by Slade and Barrett, but no security was given to the bond, and none required by the clerk. Slade and Barrett, at the time the suit
(248) was brought against Fite, were solvent. The case was continued on the docket until Spring Term, 1858, when it was dismissed for want of a prosecution bond, Slade and Barrett having in the meantime failed. Execution was issued against H. C. Fite for his own costs, and he paid them, to the amount of $194.39.

Robert Williamson, the clerk, died before the issuing of the present writ, and William Lander administered on his estate.

It was agreed that if his Honor should be of opinion with the plaintiff, judgment should be entered for him for $194.39; but if not, that a nonsuit should be entered. His Honor being of opinion with the defendant, gave judgment accordingly.

The plaintiff appealed.

Bynum and D. G. Fowle for plaintiff.
Thompson for defendants.

BATTLE, J. The case agreed presents two questions, of which the first is whether the relator had any right of action against the defendant Lander's intestate for his neglect, as clerk, to take security when he issued the writ in favor of Slade and Barrett against him, except for the penalty of $200, given by section 42, chapter 31, Rev. Code; and if he had not, then the second is, whether a suit can be sustained upon the intestate's official bond after his death.

Upon the first question we are entirely satisfied that the only remedy given by the statute to a defendant in an action against whom the clerk has issued a writ or other leading process without taking a bond with sufficient security for the prosecution of the suit from the plaintiff, as required by section 40 of the act above referred to, is the penalty mentioned in section 42. No other or additional remedy is mentioned, and none other can be necessary, if the defendant choose to avail himself of his right to have the suit dismissed on motion at the return term, as prescribed in the latter part of the above mentioned 40th section. His costs, at that time, must necessarily be inconsiderable, and (249) if he be compelled to pay them on account of the insolvency of the plaintiff the penalty of $200, which he may recover from the clerk, will be an ample remuneration. Hence, we find the act entirely silent as to any other or additional remedy; whereas in several other cases in which a right of action in addition to the penalty is intended to be given to an injured party it is given in express terms.

Thus, in section 60 of same chapter 31, Rev. Code, we find it provided that a defaulting witness shall pay the sum of $40 to the party at whose instance he was summoned, "to be recovered by *scire facias,* and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony."

So, sec. 17, ch. 105, Rev. Code, prescribes that a sheriff, for not making a due return of process which has been placed in his hands twenty days before the term of the court to which it is returnable, shall

pay to the party aggrieved $100; and for a false return shall forfeit and pay $500, one-half to the party grieved and the other half to any person who will sue for the same, "and moreover, be further liable to the action of the party grieved for damages."

Again, by sec. 81, ch. 34, a person who entices away a slave, or harbors a runaway slave, shall forfeit and pay to the owner the sum of $100, "and be further liable to the owner in an action for damages." These instances show that wherever the Legislature intends to give an action for damages on account of an injury done to a person, in addition to a penalty for the wrongful act, it is so declared in express terms, and the inference is irresistible that where the penalty only is mentioned, the party injured cannot have any other remedy.

It may be noticed, as a confirmation of this view, that in the Revised Statutes (1 Rev. Stat., ch. 31, sec. 46) the $200 which the clerk is required to pay to the defendant for failing to take a well secured
(250) prosecution bond is not prescribed as a penalty, but as a certain sum in the nature of stipulated damages; for in the same section a penalty of $100 is given to a common informer for the same wrongful act, and we are not to presume that two distinct penalties were given for the same offense.

It being thus ascertained that the only redress given by the act to the relator, for the *nonfeasance* of the clerk, was for the penalty of $200, we are of opinion upon the second question that the right to sue for that abated by the death of the clerk, and that no action can now be sustained upon his official bond. The first section of the first chapter of the Revised Code expressly excepts suits for penalties from the provision which prevents the abatement of other suits, actions, or proceedings in court. The right to sue for the penalty being gone, there is nothing to sustain the allegation of a breach of the clerk's official bond. The right to an action for the wrongful neglect of the clerk died with his person, and a suit cannot now be maintained upon his official bond any more than it can against his personal representative alone. The loss sustained in the present case by the relator was as much owing to his own neglect as to that of the clerk, because he might have prevented it by having the suit dismissed at the return term for the want of a prosecution bond. After such neglect, he has no pretext for complaining of the loss of his remedy for the penalty, caused by the death of the clerk.

PER CURIAM. Affirmed.

Cited: Wallace v. McPherson, 139 N. C., 298.

(251)

T. J. FRESHWATER AND WIFE v. CALEB L. NICHOLS ET AL.

As against wrongdoes and trespassers, a paramount right of property is not necessary to support an action of replevin, but a naked possession, or a right of possession coupled with the beneficial interest will do.

REPLEVIN, tried before *Saunders, J.*, at Fall Term, 1858, of NEW HANOVER.

The slaves in controversy originally belonged to one Caleb Nichols, who by his last will and testament, dated in 1797, bequeathed them to his wife for life, and then over to such of his children as should survive her. The testator, Caleb Nichols, left one child, the defendant Caleb L. Nichols. After the death of the testator, Unity Nichols, his widow, married a second husband, and Mrs. Freshwater, the wife of the plaintiff in this suit, is the offspring of this marriage.

The plaintiffs offered in evidence a deed of gift to Mrs. Freshwater, of which the following is a copy:

Know all men by these presents, that we, the undersigned, do hereby agree and firmly bind ourselves to the following articles, to wit, that we, the said John Cruise and Unity Cruise and Caleb L. Nichols, do hereby agree to give unto Mary Jane Lee the following property for her and her heirs, Unity Cruise's natural life excepting, Orrice, Thomas and Ritty, three negroes, which we, the said John Cruise, Unity Cruise, and Caleb L. Nichols, do defend all other claims made by us hereafter, whereof we set our hands and seals, this 12 May, 1819.

JOHN CRUISE. [SEAL.]
UNITY (her × mark) CRUISE. [SEAL.]
CALEB LOPER NICHOLS. [SEAL.]

Witness:
DANIEL MCCLAMMY.
A. M. SWANN.

Unity Cruise, the signer of this instrument, is the original Mrs. Nichols, and John Cruise is her husband.

The donee in this instrument, Mary Jane Lee, was married in 1826 to Thomas O'Neal, and he, in pursuance of articles signed before marriage, executed a conveyance of the slaves in question, Orrice (252) Thomas and Ritty, and their descendants, to the trustees, Elihu Larkins and John Walker, in trust for the said O'Neal and wife, for their lives and the life of the survivor, then over to their children, should they have any, in such proportions as the surviving parent might by will direct; but in default of issue, then such other person as the said

surviving parent might by will direct. O'Neal died in 1849, and left his wife, the plaintiff, him surviving, but left no child. His wife administered on his estate.

Plaintiffs then offered a deed of release from Walker, the surviving trustee, to Mrs. O'Neal, then a widow, dated in 1854, releasing to her all right and title in the slaves. Larkins, the other trustee, was then dead, and his personal representative did not join in the release, being then unknown.

Unity Cruise, the mother of the said Mary Jane, married one Holland, who was her last and fourth husband, whom she survived; and, upon her death, her daughter administered on her estate.

A witness of the plaintiff proved that the negroes sued for, all of whom, with the exception of Orrice, were the children or grandchildren of Ritty, were in the possession of Mrs. Holland as far back as she could remember, say fifteen or twenty years, and that witness was about 32 years of age; that the negroes remained in the possession of Mrs. Holland until her death, which happened in 1847 or 1848; that she several times said she only claimed them for her life, and that at her death they were to go to her daughter, Mary Jane. After the death of Mrs. Holland the negroes went into the possession of the plaintiff, Mary Jane, and she held them for more than two years, at the end of which time they were taken from her by the defendants, who kept them for three or four days. An action of replevin was then commenced by the present plaintiff, Mrs. O'Neal having, in the meantime, become Mrs. Freshwater, and, in pursuance of the usual proceedings in such actions, the negroes in question were taken from the defendants by the sheriff and delivered to the plaintiffs. That suit terminated in 1855
(253) by a nonsuit, and the negroes were put in jail for a few days, after which, being turned out, the defendants carried them off, when the writ in this case was issued and the slaves restored to the plaintiffs.

The defendants contended:

1. That by the marriage contract the title was shown to be in the trustees therein named.

2. That the release from John Walker did not operate, because of an adverse possession in the defendants at the time of its execution, and that Walker had lost his title at the time of the execution of the release.

3. That if it did operate, the plaintiff could not recover, because the personal representative of Larkins, the other trustee, did not join in the release.

4. Plaintiffs' claim was barred by the statute of limitations.

The court charged the jury that the plaintiffs were entitled to recover, reserving the question of law presented by the defendants' exceptions. The jury found a verdict for the plaintiffs, and the court, upon consideration, gave judgment for plaintiffs. Defendants appealed.

Wright and Strange for plaintiffs.
E. G. Haywood and London for defendants.

MANLY, J. The deed of gift, under date of 1819, from John Cruise, Unity Cruise, and Caleb L. Nichols, to the plaintiff, then Mary Jane Lee, was sufficient to pass the title to the slaves now in controversy.

This deed has been once before in this Court for construction (*Nichols v. Holmes,* 46 N. C., 360), and was then upheld as a valid conveyance of the slaves embraced in it. Indeed, upon an examination of the points made on the trial of the case below, we do not find that the question on the legal effect of that deed was renewed. It may be assumed, therefore, that the title to the grantee by virtue of this deed was originally valid.

Unity Cruise, the mother, died in 1847. Mary Jane Lee mar- (254) ried, first, Thomas O'Neal, in 1826, who died in 1849. The plaintiff Mary is administratrix, both of her mother and her first husband. She became possessed of the slaves immediately after the death of her mother, and has continued in possession (with short intervals stated in the record) until the present time.

Thus, *prima facie,* a right of property in the plaintiff, and a consequent right of possession, seems to be clear. The points in defense made below rest upon an alleged outstanding title, under a settlement made by the first husband upon trustees for his wife, dated in 1826. It will be found by a reference to the facts bearing on this matter of defense that all that is outstanding of this trust title is that which may be in the representative of one of the trustees, Elihu Larkins, who died in 1830, and whose representative is not known.

The matter alleged to defeat the operation of the release from the other trustee, Walker (viz., that there was an adverse possession at the time), is without foundation to rest upon. The release is made in 1854 to Mary Jane O'Neal, who was at the time in possession of the slaves, claiming them in her own right, and we can see no reason why the instrument did not operate to convey the interest of the trustee and vest it in Mrs. O'Neal, so that, as we have before said, there was nothing outstanding of the legal title except what remained in the unknown representative of Larkins.

We are decidedly of opinion this outstanding right cannot be made available by the defendant as a bar to plaintiff's recovery.

Defendants do not in any way connect themselves with the title of Larkins, and appear to be mere trespassers and wrongdoers. As against such, proof of a paramount right of property is not necessary; a naked possession, certainly a right of possession (connected, as it is in our case, with beneficial as well as legal interest), will do. In *Armory v. Delamere* (1 Strange, 504; *S. c.,* Smith Leading Cases, 151) it was apparent from the evidence that the true right of property was (255) in a third party; but as this property was not connected by authority or transfer with the defendant, judgment was given against him. In *Rogers v. Arnold,* 12 Wend., 37, the same law was applicable to replevin.

This view of the case disposes of the exceptions to the ruling below upon the first, second, and third points of defense. The remaining one, arising upon the plea of the statute of limitations, we do not perceive the force of. There are no proofs for it to rest upon. There has been no possession in the defendants which could give title or bar a right, and none in anybody else that could inure to their benefit.

We think, therefore, the judgment of the Superior Court is correct. The needful rights of possession and property to support this action as against mere wrongdoers are found in plaintiffs, and they are entitled to their judgment.

PER CURIAM. Affirmed.

Cited: Freshwater v. Baker, post, 256.

T. J. FRESHWATER AND WIFE v. DANIEL B. BAKER.

Judgment of nonsuit is within the equity of the proviso, Rev. Code, ch. 65, sec. 8, and the plaintiff may commence a new action within a year after the termination of the first.

DETINUE, tried before *Saunders, J.,* at Fall Term, 1858, of NEW HANOVER.

The facts of this case are almost identical with those set forth in *Freshwater v. Nichols, ante,* 251. The negro in question, Henry, is the son of Orrice, one of the slaves mentioned in the deed of Unity Cruise, John Cruise, and Caleb L. Nichols to Mrs. Freshwater, then Mary Jane Lee. The negro Henry, together with the other slaves, went into the possession of the plaintiff at the death of her mother, and was

held by her for two years, when he was taken from her by the (256) defendant, some time in 1850. An action was commenced by her against the defendant for the said negro in the same year, which pended until Spring Term, 1855, when it ended in a nonsuit. Plaintiff proved a demand and refusal before bringing this suit.

The points made by the defendant, and the ruling of the court in this case, are identical with those in *Freshwater v. Nichols, supra.* Appeal by defendant.

Wright and Strange for plaintiff.
E. G. Haywood and London for defendant.

MANLY, J. The facts in this case, so far as they relate to the first, second, and third points of defense, are identical in all matters of substance with those in *Freshwater v. Nichols, ante,* 251. The form of action is different, but the requirements as to proofs are the same. For the reasons, therefore, which governed us in our conclusions as to these points, reference may be had to the opinion in that case.

The replication to the plea of the statute is good, and is sustained by the proof. The first action was instituted within the year after the defendant took possession (1850). There was a nonsuit in 1855, and the present action commenced to the next term of the court (within the year). It has been repeatedly held that a nonsuit, though not specially named, is within the equity of the *proviso,* in sec. 4, ch. 65, Rev. Stat. (Rev. Code, ch. 65, sec. 8). The time pending the first action is not counted against plaintiffs. *Blackwell v. Hawkins,* 28 N. C., 428; *Long v. Orrell,* 35 N. C., 123.

We are of opinion plaintiffs are entitled to recover.

PER CURIAM. Affirmed.

Cited: Wharton v. Comrs., 82 N. C., 15; *Prevatt v. Harrelson,* 132 N. C., 254; *Trull v. R. R.,* 151 N. C., 549; *Bradshaw v. Bank,* 172 N. C., 635.

(257)

HANNAH E. PRIDGEN ET AL. v. W. W. ANDERS ET AL.

Petitions to lay out roads are within the meaning of the section 1, chapter 3, Revised Code, authorizing the courts to amend pleadings, etc., in "any action" at any time before judgment.

PETITION for a public road, heard before *Caldwell, J.,* at Fall Term, 1859, of BLADEN.

This petition was originally filed in the county court, and after reciting that a public road, commencing above Mount Zion Church, where the new road turns out, and ending below Lake Creek, where the Elizabeth road intersects said road, had been closed up by petition to court, to the great inconvenience of the public, it prays the court to "issue a writ to the sheriff commanding him to summon a jury to *reopen* said road." From the judgment of the county court granting this petition the defendants appeal to the Superior Court, and at Spring Term, 1859, the plaintiffs moved for leave to amend. This was granted, and time allowed until the next term for the purpose. At the succeeding term the amended petition was filed, praying the court "to issue a writ to the sheriff commanding him to summon a jury to *lay out* a public road, commencing above Mount Zion Church, where the new road turns out, and ending below Lake Creek, where the Elizabeth road intersects said road, as nearly as convenient as the old stage road runs."

The defendant objected to the allowance of this amendment, (1) because it should have been done at the last term, and (2) because it was not such an amendment as it was in the power of the petitioner to prescribe, viz., how the road should run.

The court refused the motion, and defendants appealed to this Court.

Baker for plaintiffs.
E. G. Haywood for defendants.

(258) BATTLE, J. The very broad and extensive power given by ch. 3, Revised Code, to every court in the State, from the Supreme Court down to the lower tribunals, "to amend any process, pleading, or proceeding" in any action, "either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered thereon," will certainly extend to the case of a petition to lay out and establish a public road. Why should it not? There is certainly as much necessity for the exercise of the power in such a proceeding as in any other, and we are unable to discover even the pretense of a reason why an act which, it has been said, "allows anything to be amended at any time," should be more restricted in a case like the present than in any other process, pleading, or proceeding in any other kind of action. *Lane v. R. R.,* 50 N. C., 25; and all the cases there cited and commented upon.

PER CURIAM. Affirmed.

Cited: McDowell v. Asylum, 101 N. C., 659.

D. S. REID, GOVERNOR, TO THE USE OF C. W. GRANDY, v. J. HUMPHREYS ET AL.

Where a bond in the form of a constable's bond recited that the principal obligor had been appointed a constable by the county court, and the bond was payable to the Governor of the State, but regular in other respects, and the reputed constable acted notoriously in that capacity, it was *Held* this bond might be sued on as a common law bond, although the record of the county court was silent as to the appointment and qualification of the obligor as constable.

DEBT on a bond purporting to be a constable's bond, tried before *Saunders, J.*, at Spring Term, 1859, of CAMDEN.

The bond declared on bears date 11 March, 1851, is payable to the Governor of the State, and is in the usual form of constables' bonds. In the condition it recites that "Whereas John Hum- (259) phreys is, by the court of pleas and quarter sessions held for the county of Camden, appointed constable for the county of Camden, now," etc. The plaintiff, on the trial, proved the handwriting of the several obligors to the bond, and also that the teste was in the handwriting of the person who was clerk of the county court at the date of the bond, and who is now dead; that the persons in whose presence it purported to have been acknowledged and signed, as the court, were all acting justices of the peace of the county at that time; and that the bond was found on file in the clerk's office of the county court. He proved that Humphreys acted openly and notoriously as constable in Camden during 1851, but offered no other evidence of his appointment or qualification except the recital in the bond. In answer to a question by defendant, the clerk stated that he had searched the minute docket of the court, but could find no record of the appointment of Humphreys as constable, or of his qualification.

The evidence of Humphreys acting as constable was objected to as inadmissible to prove the fact of his being constable, but was received by the court. The plaintiff further proved that C. W. Grandy, for whose use the suit was brought, in May of the same year as the date of the bond, put claims in the hand of Humphreys to collect, against solvent persons, and that by reasonable diligence they could all have been collected, and that one of the claims had been collected. It was further in proof that Humphreys left the State some years since, and that a proper demand had been made of the other obligors by the person for whose use this suit is brought. It was insisted by the defendant:

1. That there was no sufficient proof of the delivery and acceptance of the bond sued on.

2. That such a bond as that declared on is against the policy of the law, and void.

3. That the condition of the bond can only inure to the benefit (260) of the obligee, and there is no breach or injury affecting him.

4. If there can be a recovery, the damages are nominal only.

His Honor reserved the question as to the right to recover on the bond and as to the measure of damages, and charged the jury, who rendered a verdict for plaintiff, assessing his damages at the full amount of the claims placed in the hands of Humphreys by said Grandy. And it was agreed by the parties that if the court should be of opinion with the defendant upon the first point reserved, then the verdict should be set aside and a nonsuit entered; or, if with the defendant on the second point, then the verdict might be reduced to a nominal sum.

The court being of opinion against the defendant, gave judgment for plaintiff on the verdict. Defendant appealed.

Johnson for plaintiff.
W. A. Moore and P. H. Winston, Jr., for defendant.

MANLY, J. There is no question made but that the bond declared on was executed by the obligors, was filed in the proper office, and that the person whose appointment to the office of constable is therein stated as a fact assumed and performed the duties. Under these circumstances, we think the bond may be supported and enforced as a common-law bond. It is quite well settled that bonds intended to be official, but which for want of conformity in some respects to the statute are not so, will be supported as good bonds at common law. *Williams v. Ehringhaus,* 14 N. C., 297, and cases there cited.

And so public officers or agents who are not such *de jure,* by reason of a want of authority in the appointing power, or defect in the mode of appointment, but who have acted in the office under such defective appointment, are precluded from alleging the informalities as a defense for misconduct. Neither can the sureties, who have voluntaritly joined him in a bond for the performance of his duties and put him (261) forward as an authorized officer, allege such informalities. These principles, as well as others involved in the case before us, are so fully discussed in *Iredell v. Barbee,* 31 N. C., 250, that we refer to it for authority on all the points. The defendant in that case was the surety of King, who had been appointed by the county court guardian of a woman alleged to be a lunatic, and who had given the bond in suit, payable to the Governor of the State.

The bond ought to have been payable to the chairman of the county court, and was, therefore, defective in form, and the guardian appointed was without power *de jure,* because the woman had never been found a lunatic, so as to confer the power to appoint on the court; yet it was

held the bond might be put in suit by the administrator of the lunatic in the name of the payee, and substantial damages recovered. The delivery and acceptance of the bond for the purposes declared was held to be a matter of presumption, and other objections, identical with those now made in the case before us, were held not to be available by way of defense.

In *United States v. Maurice,* 2 Brockenborough, 115, referred to in *Iredell v. Barbee,* an officer was held accountable, and the sureties upon his bond liable, for moneys received by him, although his appointment was made by one who had no power to make it, and was, therefore, void. These two cases are in point, and, together, are decisive of the case under consideration.

PER CURIAM. Affirmed.

(262)

WILLIAM B. RODMAN v. JEREMIAH GAYLORD.

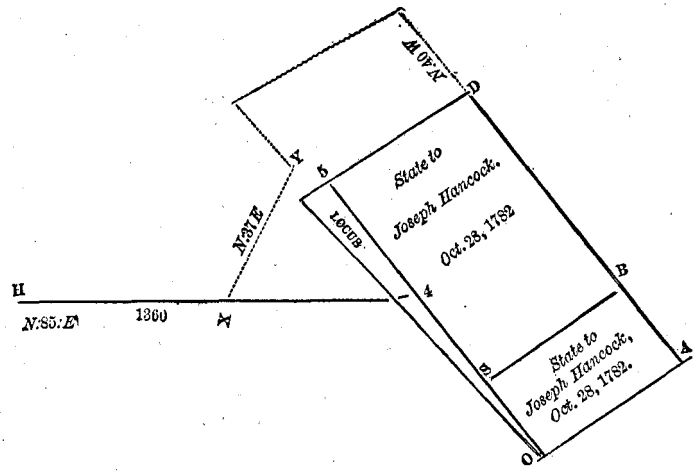
1. Where the evidence as to the identity of a line belonging to another tract called for in a deed is unsatisfactory, and to reach it requires a great departure from the course and distance, it was *Held* to be error to instruct the jury that the course and distance had to be abandoned, and that the line was called for and must be run to.

2. The running and marking a line in 1825, by a surveyor (though now dead), under a deed made in 1782, is not proof of the true position of that line, nor is it evidence of what the variation of the compass was between 1782 and 1856.

TRESPASS Q. C. F., tried before *Heath, J., at* Fall Term, 1858, of BEAUFORT.

The action was brought for a trespass, alleged to have been committed just west of the line 4, 5. The plaintiff introduced a grant from the State to J. G. Blount, for 8,960 acres of land lying in Beaufort County, dated 22 December, 1798, the several lines of which, at first called for, are not material to this controversy. The first material call is "N. 88 degrees E. 1,360 poles to stake" (X in the annexed diagram), then N. 37 degrees E. 358 poles to Redding Blount's line of his Hancock survey (claimed by plaintiff to be at 4), then his line N. 50 degrees W. 100 poles to his corner (claimed to be at 5), then his line N. 50 degrees E. 160 poles to Gaylord's line (D), then his line N. 40 degrees W. 225 poles to his corner, then N. 54 degrees W. 50 poles to his corner, then his line S. 40 degrees W. 50 poles, then his line N. 66 degrees W. to his corner in Collins & Co.'s line, then their line S. 85 degrees W. 110 poles to their corner, then to the first station. The figures A, B, S, O, and

B, D, 5, S, represent tracts of land granted to one Joseph Hancock in 1782, but it did not appear that Redding Blount was ever connected with them in any way. The line O, S, 5, in the Hancock patents, is laid down in those patents as running N. 50 W., and a point taken on it 100 poles from the end would be at 4, nearly in a line with the course of plaintiff's line H, X, 4; the next line of the upper patent is laid down as running N. 50 E. 160 poles. After arriving at X, the terminus of the distance called for in the line H, X, pursuing the course of the next call in plaintiff's deed, the Hancock grants would not be
(263) reached at all, but the line would run north of it, X, Y. The nearest point of the Hancock line from X is at 5.



The defendant contended that the line S, 5, in the Hancock patent laid down in the plat D, B, S, 5, was not the one called for in the Blount grant, inasmuch as it was not shown to be "Redding Blount's line of his Hancock survey," and that there being nothing to control the call for course and distance, the plaintiff would have to run the line as laid down X, Y. He also contended that if it was necessary to run the said grant as being the one called for, then it would have to be reached by the shortest distance, which was X, 5.

His Honor charged the jury that, there being no evidence of any other Hancock patents or survey other than those represented, the line of Blount's patent from X must abandon the course called for, and strike the line of one of these patents; that in order to determine the point to be arrived at after leaving X, it was proper to resort to the
(264) next subsequent call in the Blount patent, by reversing which, and

running 100 poles from 5 to 4, the point was found, which would be at 4. Defendant's counsel excepted.

The beginning of the lower Hancock patent was admitted to be at A. It was proved by a surveyor that he ran the line from A to O; that he found a line of marked trees from O to S, and that, extending the line towards 5, according to the course of that marked line, the *locus in quo* would be on the plaintiff's land as above contended for by him; but that, running the line according to the compass, it would be on the Hancock land, and that between these two courses there was a difference of about a degree and a half. It was also in proof, by one Windley, a surveyor, that, according to his experience, old lines were found to vary from the present running of the compass from one to two degrees. It was in evidence that the line of marked trees referred to was made by another Windley, a surveyor, in 1825, for the purpose of making partition between certain heirs at law of persons claiming under Hancock, and that the said Windley is now dead.

Upon this point the court charged the jury that if they were satisfied that the compass had varied from the date of Hancock's patent, then in running that line from 4 to 5 they should allow the variation accordingly, and if satisfied that the marked line was the line run on the original survey (though marked afterwards), that was the course now to be run, though it departed from the course called for as shown by the present pointing of the compass. Defendant's counsel again excepted.

There was a verdict for the plaintiff, upon which the court gave judgment, and the defendant appealed.

Donnell for plaintiff.
Warren for defendant.

PEARSON, C. J. For the purpose of extending the lines of the grant to John G. Blount, under which the plaintiffs claim, they relied on the allegation that the line O, S, 5, the western boundary of (265) the two grants issued to Joseph Hancock in 1782, was the line called for in the grant to John G. Blount, under the description, "Redding Blount's line of his Hancock survey." Whether this be the line is a question of fact, and his Honor erred in assuming that to be the fact, as he did in charging, "There being no evidence of any Hancock patents or survey, other than those represented, the line of Blount's patent from X must abandon the course called for and strike the line of one of those patents." Whether any one of the lines of those patents was *the line* called for in the patent to Blount was a question for the jury, provided there was any evidence to support the allegation, it

may well be doubted whether the absence of evidence in respect to any other Hancock patent or survey furnishes any evidence upon the question. If it does, it was for the jury to say whether it is sufficient to establish the allegation, taken in connection with the fact that it was not proven that Redding Blount ever owned the two tracts granted to Joseph Hancock, and with the further fact that from X, where the distance gives out, the next call *north* 37 east 350 poles makes a large angle, and both the course and the distance would carry you greatly *north* of either of the two tracts granted to Joseph Hancock, and the next call, N. 50 W. 100 poles to his corner, would carry you still further *north* of them; and the next, then *his line* N. 50 E. 160 poles to Gaylord's line, would carry you entirely away from them, thus giving room to infer that the "Redding Blount line of his Hancock survey" had no reference to the lines of either of those two tracts of Joseph Hancock, but referred to the line of some other tract lying to the *north,* which *Joseph* Hancock, or some other Hancock, had at one time surveyed and sold to Redding Blount, but for which he never took a grant; and the jury should have been instructed, if they were not satisfied in respect to the line called for, there was nothing to control the course and distance of the grant under which the plaintiff claimed.

We think his Honor erred also in the position that a line mark-
(266) ed in 1825 for the Joseph Hancock grants furnished sufficient data to show the variation of the compass in 1782. It was not competent evidence to establish the location of the line; and supposing that to have been the line in 1825, when the surveyor took occasion to mark it according to the compass at that time, *non constat* that it corresponded with the compass in 1782 any nearer than in 1856, the date of the last survey.

As the verdict was for the plaintiff in respect to both of the alleged trespasses, an error as to one entitles the defendant to a *venire de novo;* for which reason we will not enter into a consideration of the points made as to the other.

PER CURIAM. *Venire de novo.*

DANIEL N. BUIE v. DUNCAN KELLY.

1. Suits upon notes of different dates, due at different times, and payable to plaintiff in different rights, cannot be consolidated.
2. Where the court directs a consolidation of suits it can only direct the costs of the rule to be paid by the plaintiff, and should leave the general costs to abide the result.

BUIE *v.* KELLY.

MOTION to consolidate, heard before *Caldwell, J.*, at last Fall Term of BLADEN.

The plaintiff in this suit had sued out attachments against the defendant for seven different causes of action:

1. Upon a note dated 4 February, 1848, due one day after date, for $11.50, and payable to plaintiff as guardian of John Campbell's children.

2. Upon a note for $10, dated 7 February, 1848, due February, 1849, and payable to plaintiff as guardian of Angus Campbell's children.

3. Upon a note for $15, dated 1 February, 1847, and due on 1 February, 1848, payable to plaintiff as guardian of Angus Campbell's children. (267)

4. Upon a note for $1.50, dated 3 March, 1845, and due in February, 1846, payable to plaintiff as guardian of John Campbell's children.

5. Upon a note for 75 cents, dated 1 September, 1844, and due February, 1845, payable to plaintiff as guardian of John Campbell's children.

6. Upon a note for $5, dated 26 October, 1851, due one day after date, and payable to plaintiff in his own right.

7. Upon a note for $1.60, dated 23 August, 1852, due one day after date, and payable to the plaintiff in his own right.

These suits were commenced before a justice of the peace, from whose judgment an appeal being taken to the Superior Court, a motion was made in that court to direct the consolidation of the first five suits as they are stated above, and also the last two. The court allowed the motion, and directed a judgment against plaintiff for the costs of three suits. From this judgment the plaintiff appealed to this Court.

Baker for plaintiff.
E. G. Haywood for defendant.

MANLY, J. The rule for consolidation, which is the subject of this appeal, is erroneous. There are several reasons why it is so.

The notes in suit originated at different times, were due at different times; two of them are due to the plaintiff in his own right; two as the guardian of one family of children, and three as the guardian of another. With this diversity of claim, it is probable the matter of defense, if there be any, is different, and consequently the replication and proof in each will be different.

To compel a consolidation under such circumstances would not be in accordance with any practice in the courts of North Carolina, or elsewhere, that we are aware of it.

(268) In *Thompson v. Shepherd,* 9 Johns., 262, it was adjudged in the Supreme Court of New York that a consolidation rule, moved for under precisely similar circumstances, was improper. And the Court, prescribing a guide in such cases, says that to prevent oppression by an unnecessary accumulation of costs, a consolidation may be ordered when separate suits are brought upon notes or contracts made *at the same time,* and which might have been united in one action, and when *the defense is the same* in all.

There is another reason, arising out of the particular laws of this State, why a consolidation of small claims, subject to the jurisdiction of a justice of the peace, should not be compelled. The stay of execution is not the same, and the rights of the plaintiff might, in that way, be injuriously affected; for if a court of record may consolidate, we suppose a justice of the peace may.

The order below for the costs of the case to be paid by the plaintiff is without any warrant of law. The utmost power of the court, in a case proper for consolidation, is to direct *the costs of the rule* to be paid by plaintiff, and the general costs should be allowed to abide the issue, subject to such discretionary powers as are vested in the court by statute.

PER CURIAM. Reversed.

Cited: Caldwell v. Beatty, 69 N. C., 371; *Glenn v. Bank,* 70 N. C., 203; *Hartman v. Spiers,* 87 N. C., 30.

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(269)

WILLIAM FELTON, ADMINISTRATOR, v. MARY C. REID.

1. Where a *feme covert,* having a separate estate, but living with her husband, contracted debts without charging them specifically on her estate, and without the concurrence of her trustee, and after her husband's death promised, without any consideration, to pay such debts, it was *Held* that such promise was void.

2. Where one of two partners of a firm retires from it, and assigns all his interest in the store accounts to the other, and the latter afterwards dies, it was *Held* that actions to recover such debts should be in the name of the surviving partner, and not in that of the personal representative of the deceased one, to whom they had been assigned.

ASSUMPSIT., tried before *Saunders, J.,* at Spring Term, 1859, of PERQUIMANS.

The following *case agreed* was submitted to the court:

The intestate of the plaintiff and one Ball were in copartnership in trade, up to 13 November, 1855. During 1854 and 1855 an account was

contracted by the defendant with the firm. On 13 November, 1855, the partnership of Long & Ball was dissolved, and Ball, for value, conveyed and assigned all his interest in the goods on hand and the notes, bonds, and accounts of the firm to Long, the intestate of the plaintiff. Amongst the accounts so assigned was that against the defendant. Long continued the business, and the defendant traded with him until his death, which happened in September, 1856.

During 1854 and 1855 the defendant was a *feme covert,* and lived with her husband, but had separate property in the hands of a trustee, and it was in evidence that she promised to pay these bills herself, after they were contracted. In 1856, after the death of her husband, she wrote to Long a note, the material part of which is as follows:

"Mr. Long:—At your convenience, some time soon, please make out my last year's account and send it up to me. I want to see how we stand. I shall pay you $50 as soon as I can get it from....., and by the last of the year, if I live, I will settle up all I may at that time owe you. Be assured, my dear sir, you shall never lose one cent by (270) me."

The whole amount of the account against the defendant for 1854 and 1855 was $297.77, and for 1856 was $143.41. Upon this was a payment, made to the present plaintiff, of $200.37 on 14 April, 1857. The defendant made one of these payments by an agent, and directed him to tell the plaintiff to credit her account with the amount, and not her husband's. The plaintiff applied this payment to her account of 1854 and 1855. This payment was larger than her account of 1856. It was also shown that her husband had an account with the plaintiff's intestate, which was produced and identified on trial, and shown to be still unpaid.

Long died in September, 1856, and the plaintiff, his administrator, carried on the store for a while. The defendant, after Long's death in the latter part of 1856, wrote to one Ferrell, a clerk in the store, as follows:

"MR. FERRELL:—Say to Mr. Felton, when I can see Mr....., at February court, to settle with him for the bond of his wards, I shall be able to pay him near $200 on my account."

Upon this state of the facts his Honor directed a verdict to be entered for the plaintiff for the sum of $164.07, the balance due, subject to the opinion of the court as to whether the action could be maintained. His Honor afterwards set aside the verdict, and directed the plaintiff to be nonsuited, upon the ground that, as the defendant was a *feme covert* when the accounts, in 1854 and 1855, were contracted, no action could be brought against her individually, notwithstanding the death of her husband before action brought, and the promise she made in the note to

Long, after her husband's death; and further, upon the ground that the plaintiff could not claim, in this suit, for the partnership debt of Long & Ball. From this decision the plaintiff appealed to this Court.

Winston, Jr., and Hines for plaintiff.
Jordan for defendant.

MANLY, J. The judgment of the court below is warranted (271) by either one of the grounds upon which it is placed in that court.

The account of goods which the *feme covert* ran up in 1854 and 1855 she was not bound to pay, either in law or equity. An original obligation, *at law,* we suppose, is not alleged; and in equity, by reason of her separate estate, we have decided, at this term, she is not bound.

The subject was considered in *Draper v. Jordan,* 58 N. C., 175 (in equity at this term), and the general principles there established that a *feme covert,* having a separate estate, is not liable, in equity, through such estate, to her debts and engagements, unless these be charged specifically upon the separate estate, with the concurrence of the trustee.

Being bound, therefore, neither in law nor equity to pay this account, it will follow that her promises, made after discoverture, are not supported by any sufficient consideration, and will not sustain the action. The insufficiency of such consideration is well settled. *Hatchell v. Odom,* 19 N. C., 302, and cases there cited.

The judgment of the court is sustained by the other ground also. The action ought to have been in the name of the surviving partner, and not in the name of the representative of the assignee.

PER CURIAM. Affirmed.

Cited: Fulke v. Fulke, post, 498; *Rogers v. Hinton,* 62 N. C., 106; *Bank v. Bridgers,* 98 N. C., 71; *Puckett v. Alexander,* 102 N. C., 99; *Berry v. Henderson,* 102 N. C., 528; *Long v. Rankin,* 108 N. C., 337.

(272)

WILLIAM HAYES v. JOHN O. ASKEW.

1. Where the owner of land conveyed it, reserving a right of way therein through a certain avenue, and afterwards built a house in said avenue. it was *Held* that an action of trespass was the proper remedy for the grantee.

2. Where a person built a house on the land of another, so near the house of the owner to darken it and otherwise greatly impair its value, it was *Held*, in an action of trespass, that the jury were confined to the actual pecuniary injury, and could not give vindictive or exemplary damages.

TRESPASS, QUARE CLAUSUM FREGIT, tried before *Manly, J.*, at Fall Term, 1859, of HERTFORD.

This action was brought for putting up a house on plaintiff's land. It appeared that the land trespassed upon had been conveyed, a few years before, by defendant to plaintiff; that in the conveyance there was a reservation by the defendant of a right of way along an avenue through the land; that plaintiff purchased it for a business site; that he erected a storehouse on it, fronting the avenue and near to it, and was then carrying on a mercantile business, when the defendant, becoming unfriendly, put up a warehouse for his own use in the avenue, immediately in front of the store, the corner of the house being about 7 feet from the plaintiff's store, and extending along its side somewhat obliquely. This warehouse was put up by defendant against the remonstrances of plaintiff, he being present and endeavoring ineffectually to prevent it. The warehouse was so close to the store as to darken it and make it liable to smoke when the wind was from a certain quarter, and it was impossible to turn a cart before the storehouse fronting the avenue, thus greatly impairing its utility and agreeableness as a place of business. The avenue above mentioned had been laid out by the person from whom defendant purchased, and was used by him as a passage from his dwelling to the public road, and had been so used by the defendant; it had also been used by the public for the space of twenty-five years or more, but no jurisdiction over it had at any time been assumed by the county court, and it continued to be (273) called after the owner of the land (Askew Avenue.)

Two points were made: First, whether the action of trespass would lie; and, secondly, whether vindictive or exemplary damages could be given.

Upon a finding by the jury that this was a way laid off by the person under whom the defendant claimed for his private use, and subsequently used by all who wished the permission from said former owner or from defendant, with no claim at any time of a right of way by the public, the court held that it was a private way, and the dominion and right of soil continuing in the owners (the Askews) passed by the conveyance to Hays, and gave him such a right to the *locus in quo* as to make the action of trespass the proper remedy.

The court furthermore thought that if the trespass was committed forcibly, in the plaintiff's presence, and under circumstances of insult

and oppression (that is to say, if the jury found so), they were at liberty to go beyond the simple pecuniary injury and give exemplary or vindictive damages. Under instructions accordingly, the jury found for plaintiff. Judgment. Appeal by defendant.

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

PEARSON, C. J. We concur with his Honor that trespass *quare clausum fregit* is the proper form of action. But we do not think the evidence makes a case where the jury are at liberty to give vindictive damages. We can see no evidence of personal indignity offered to the plaintiff, or of "insult or oppression," other than such as ordinarily occurs when two men differ as to their right to a piece of land, and one, in the confident belief that it is his property, takes possession in the presence of the other, and contrary to his remonstrance, and is determined to assert his right of property at the risk of the consequences. (274) That the defendant had some ground to believe that the land belonged to him is apparent from the fact that the question of title depended upon the construction of a deed which was decided in his favor in the court below, although otherwise held in this Court, on the ground that the reservation gave to the defendant only a right of way, as distinguished from a right of property in the soil. *Hays v. Askew,* 50 N. C., 63.

And that he actually believed the land belonged to him is apparent from the fact that he built a house on it, which, if it turned out that the land belonged to the plaintiff, would pass with it, so that he might use or otherwise dispose of it without paying anything for it.

As the defendant, after his entry, retained the possession of the house and the land on which it stood, the plaintiff was only entitled to recover for the *original entry,* and could not allege a trespass with a *continuendo* from day to day until he had regained the possession, so as to have the benefit of the *jus postliminii.* There is error.

PER CURIAM. *Venire de novo.*

Cited: Hays v. Askew, 53 N. C., 228.

(275)

NEUSE RIVER NAVIGATION COMPANY v. THE COMMISSIONERS OF NEW BERN.

1. Where an act of Assembly authorized a corporation to take stock in a public enterprise to a certain amount, and the only means provided for raising the money was by issuing bonds, and the amount of the bonds to be issued was restricted to the amount of the stock to be taken, it was *Held* that these bonds could not be sold for a price less than par.
2. A corporation can take nothing in payment of stock subscribed, except money, unless by express provision of its charter.
3. Where the authorities of an incorporated town were authorized by act of Assembly to subscribe for stock in a navigation company, and to pay for the same by the sale of their bonds, to be issued on certain terms, and such subscription was made: to a mandamus to compel the payment of the money, it was *Held* to be a sufficient return by the defendants that they had prepared and executed the bonds, and had offered the same for sale by public advertisement, and had diligently endeavored otherwise to effect a sale thereof, on the terms prescribed by the acts of Assembly, and had not been able to sell them.

PETITION for peremptory mandamus, heard before *Shepherd, J.*, at Spring Term, 1859, of CRAVEN.

The petition sets out an act of Assembly incorporating the Neuse River Navigation Company, and also an act amending its charter and authorizing the company to increase their capital stock to an amount not exceeding $400,000. It then sets out an act incorporating the town of New Bern, and providing for the election of commissioners by the freemen of said town, and provides that when so chosen and qualified, and agreeably to said act, they shall be a body politic by the name of "The Commissioners of New Bern," and by that name to have perpetual succession by election of the freemen of the town. It next recites an act of Assembly, passed 22 December, 1852, entitled "An act to enlarge the powers of the commissioners of the town of New Bern." This enacts, among other things, "That it shall and may be lawful for the commissioners of the town of New Bern to subscribe for five hundred shares of the capital stock of the Neuse River Navigation Company, to be held by the commissioners of the town of New Bern for the use (276) and benefit of said town." By the second section of said act it is enacted, "That to enable the commissioners of the town of New Bern to meet the payments which may be required by the Neuse River Navigation Company on the stock subscribed by virtue of said act, the said commissioners are authorized and empowered, from time to time, or at such time or times as to them shall seem fit, to make, execute, and deliver their bonds for the payment of such sums of money as they may think

proper, in the aggregate not exceeding $50,000, which bonds shall be signed by the intendent of police for said town, and sealed with the corporate seal of said corporation; shall be payable not less than ten nor more than twenty years from the time of their respective dates; shall severally be for sums not less than $500 nor more than $10,000, and shall bear interest at a rate not exceeding 6 per cent per annum, to be paid annually; that the owners or holders of said bonds shall not be required to include the interest accruing thereon in the list of taxable property, and that such bonds or interest shall not be subject to any tax whatever; and to provide for the payment of the interest on these bonds, as the same may become due, and raise a sinking fund for the discharge of the bonds when they should become due, the commissioners are authorized, from year to year, to levy and collect from the real estate within the limits of the said town such an amount of taxes, in addition to those required for other purposes, as will be sufficient for this."

Said amendments were duly accepted by said corporation, and on 13 July, 1854, at a regular meeting of the commissioners of New Bern, they passed a resolution, which was regularly entered upon the books of the corporation, in the following words: *"Resolved,* That we, the commissioners of New Bern, by virtue of the power and authority vested in us by an act of the General Assembly passed on 22 December, 1852, entitled 'An act to enlarge the powers of the commissioners of the
(277) town of New Bern,' will subscribe for five hundred shares of the capital stock of the Neuse River Navigation Company, to be held by the commissioners of New Bern for the use and benefit of the said town; and the intendent of the said town, John D. Whitford, is hereby authorized and appointed to make said subscription in the name of the commissioners of New Bern, and that the said intendent be furnished by the clerk to the commissioners of New Bern with a copy of this resolution, under the seal of said corporation, as his authority to act in the premises."

By virtue of this resolution a subscription for five hundred shares of the said capital stock was duly made, and the Neuse River Navigation Company required, shortly thereafter, a payment of $15,000, to be paid by said commissioners on said subscription, and at a regular meeting of said commissioners on 31 July, 1856, they passed a resolution, which was duly entered upon the books of the corporation, in the following words:

"Resolved, That as the Neuse River Navigation Company has called for $15,000 of the town subscription on the books of said company, that the intendent be and is hereby authorized and requested to prepare bonds to that amount, which said bonds to bear date from 31 July, 1854, and payable twenty years after date, and that a tax of 17 cents on the $100

valuation of real estate be laid to meet the annual interest on said bonds."

The petition further alleges that the Neuse River Navigation Company duly required and called for two assessments from the commissioners of New Bern on the capital stock subscribed for as aforesaid, amounting, together, to the full sum of $50,000, of both of which the said commissioners were duly notified. That this money was repeatedly demanded of the said commissioners, and a frequent request made that they would fulfill their contract under the provisions of the act, but they refused to do so, or to lay any taxes, or to issue any bonds, under the said act in relation thereto.

In the return of the defendants they admit these facts as stated in the petition. But with regard to the bonds prepared by them, and for answer to the charge of having violated their contract, (278) the defendants state in their return, "We, commissioners, do further return and certify that the then commissioners of the said town did offer the said bonds for sale, did by advertisements in divers newspapers, towit, the *Weekly News,* a newspaper published in said town, by the space of five months, towit, from 30 September, 1854, to 1 March, 1855, notify the public that the said bonds were made and ready to be issued to purchasers, and did invite any and all persons to apply for and become purchasers thereof, and did also send out agents into different parts of the country, towit, the then president of the Navigation Company and others, to endeavor to procure purchasers for the said bonds, and did otherwise faithfully and diligently endeavor to make sale of said bonds during the time aforesaid and afterwards. These efforts notwithstanding, no persons did or would purchase the said bonds or any of them; and so, in fact, as we, the said commissioners, do return and certify, the said bonds were not issued because no one would purchase them, and for no other reason."

It is further stated in the return that at a meeting of the stockholders of the Neuse River Navigation Company, held on 14 August, 1854, a resolution was passed which, after reciting in the preamble that the stockholders had learned that it was the intention of the president and directors of the company to accept the bonds of the town of New Bern in payment of the stock subscribed for by the said town, proceeds to characterize such a proceeding as illegal and unjust to the other stockholders, who were required to pay their installments in cash, and it further declares that the president and directors have no authority thus to compound for the payment of the stock, and it expressly requires that all payments must be made in cash.

Upon this return being made, the counsel for the petitioners moved to quash the said return. The court, after argument and inspection of

the return, declared the same insufficient, and allowed the motion,
(279) and thereupon ordered the peremptory mandamus to issue. Defendant appealed to this Court.

Donnell, McRae, and Haughton for petitioners.
Badger, J. W. Bryan, Green, Winston, and Stevenson for defendants.

PEARSON, C. J. Where an individual subscribes for stock, or otherwise contracts a debt, it is no reply to an action for him to say he is unable to raise the money! In regard to a municipal corporation, other considerations are presented, and the question may be a very different one, by reason of its known limited capacity. A corporation has no power to subscribe for stock, or to raise money to pay the subscription, except the power expressly given by its charter. Consequently, the subscription is made, and is presumed to be accepted, with direct reference to this state of things, and if the money to pay the installment cannot be raised by the means authorized by the charter, owing to the restrictions imposed, after a dilligent and honest effort to do so, the corporation is in no legal default, because the failure originates in a want of capacity, which was known to both of the contracting parties, and subject to which the subscription was made by one and accepted by the other party. This qualified power to raise funds might have been a very proper ground for refusing to accept the subscription, but it can furnish no just ground of complaint, although, from unexpected circumstances, it turns out that the power cannot be made available.

The present case presents this question, Does the charter restrict the power to issue bonds so that none can be issued except at par? This Court is of opinion that such is the proper construction. The amount of stock subscribed for (500 shares) is $50,000. The only means of raising the money to meet the payment is by issuing bonds, and this power is expressly restricted, "not exceeding $50,000." As the amount of the bonds is not to exceed the amount to be raised, of course the bonds cannot
be issued except at par, and indeed an expectation is fairly to be
(280) implied that, possibly, as the bonds were not to be subject to taxation by the State, and the interest was payable annually, to be secured by town taxes and the stock in the navigation company, together with all dividends, after paying the interest, was to constitute a sinking fund for the ultimate discharge of the principal, the bonds thus secured might command a premium, so as to make it unnecessary to issue the full amount. At all events, that amount was not to be exceeded, and there is nothing to support the construction that the bonds were to be issued if they would only realize 50 cents in the dollar, whereby one-half of the

stock would be unpaid for and a debt of $50,000 incurred, and then the stock be forfeited and sold for the balance due of subscription, leaving the town minus $50,000 and the bondholders deprived of the collateral security of the stock, and with nothing to look to but taxes on the town, to be imposed by the citizens themselves, or if their public virtue could not stand that test, then to be coerced by peremptory writs of mandamus from time to time. The suggestion that the plaintiff will receive the bonds of the defendant at par, *i. e.,* in payment of the subscription, is met in two ways. It is set out in the return, which, as there is no traverse, must be taken as true, that the Neuse River Navigation Company had taken this subject into consideration, and refused to allow their president and directors to accept the bonds of the defendant at par. But the main objection to it is that the plaintiff, like the defendant, is a corporation of *limited powers,* and is not authorized to accept in payment of subscription of stock anything but money, dollar for dollar; and it is well that it should be so, for in those charters where power is expressly given to receive work and materials in payment of subscriptions we believe experience has shown that the company is always subjected to much loss and inconvenience.

As there is no traverse, the allegations of facts set out in the return are taken to be true, and this Court is of opinion that the return was sufficient. The judgment of the court below, directing a peremptory mandamus to issue, will be reversed, and judgment entered (281) in favor of defendant.

It may be proper to add that the counsel of the defendants have waived objections to form, in order to put the case on its merits. We have not considered the variance between the prayer of the petitioner for the writ and the writ. One is "to pay the money," the other to "issue the bonds."

PER CURIAM. Judgment reversed.

COMMISSIONERS OF LOUISBURG v. EDWIN HARRIS.

1. An act of Assembly allowing a magistrate of police of an incorporated town to fine offenders for disorderly conduct not cognizable by the general law is not unconstitutional.
2. Where a town ordinance provided that for certain disorderly conduct the offender should pay a penalty of not less than $1, nor more than $20, it was *Held* that such ordinance was void for vagueness and uncertainty.

COMMISSIONERS *v.* HARRIS.

Action for violation of a town ordinance, brought by appeal to the Superior Court of FRANKLIN County, and tried before *Shepherd, J.*, at Fall Term, 1859.

The plaintiffs gave in evidence an act of Assembly, passed in 1855, entitled "An act to provide for the better government of the town of Louisburg, in Franklin County." This act gives the commissioners full power to pass all needful rules, regulations, and by-laws for the government of the town, not inconsistent with the Constitution of the United States or of the State of North Carolina.

The plaintiffs then gave in evidence an ordinance passed by the commissioners of said town on 12 February, 1858, which provides that "All disorderly conduct, whether committed by white men, boys, free negroes, or slaves, shall be prohibited under a penalty of not less (282) than $1 nor more than $20. All persons guilty of violating the peace, quiet, or good order of the town of Louisburg shall be arrested by the town constable and carried before the magistrate of police and fined as above provided, not less than $1 nor more than $20."

The act of Assembly incorporating the town of Louisburg gives the right of appeal to the Superior Court to persons convicted under town ordinances passed in pursuance of said act.

It was admitted that after the passing of this ordinance the defendant Harris came into the town, became intoxicated, and was disorderly, disturbing persons by loud shouting in the streets. He was brought before the magistrate of police and fined $3, and from this judgment he took an appeal to the Superior Court. The warrant under which he was arrested, after reciting the act of Assembly and the town ordinance, and after declaring that Edwin Harris had violated the same, proceeds: "Whereby, and by force of said statute, the said E. Harris has forfeited, for the said offense, according to the penalty of said ordinance, the sum of not less than one nor more than twenty dollars, and thereby, and by virtue and force of said act of Assembly or statute, and of said ordinance, an action has accrued to the commissioners of the town of Louisburg. These, therefore, are to command you to take the body of the said Edwin Harris, and him have before me, William H. Pleasants, magistrate of police for the town of Louisburg, to answer said complaint of the commissioners of said town, for a violation of said ordinance, etc., and to render to said commissioners the penalty for such violation. Herein," etc.

The defendant's counsel asked his Honor to instruct the jury that, according to law, the defendant was not guilty. This was refused by the court, who charged the jury that, if the testimony was believed, they should find the defendant guilty. Defendant excepted. Verdict for the State.

The defendant moved in arrest of judgment for the reason that the act allowing the magistrate of police to fine was unconstitutional, but the motion was refused. Judgment for plaintiff for $3 and costs. Defendant appealed. (283)

J. J. Davis for plaintiff.
W. A. Jenkins and J. B. Batchelor for defendant.

PEARSON, C. J. There is no ground to support the position that the statute is unconstitutional. The Legislature has power to confer on a municipal corporation authority to make by-laws and regulations for its "better government," and, in pursuance thereof, the corporation may impose fines and penalties so as to prevent the commission of acts calculated to disturb the good citizens of the town, although such acts be not of a character so grave as to fall within the rules of the common law or any provision of the general statute law. Indeed, one main purpose of an act of incorporation is to enable the town to have more stringent rules for its better government than such as apply to the State at large, the supposed necessity for it being that a dense population has collected in a particular locality, so as to call for special regulations in order to insure good order and promote the quiet and comfort of the citizens.

But this Court is of opinion that the ordinance in question is void for uncertainty, and its enforcement is impracticable, according to the settled mode of proceeding in our courts, by reason of its vagueness in respect to the amount of the penalty. That is not fixed by the ordinance, but is left open, between $1 and $20, to be afterwards fixed by the magistrate of police on the trial, according to the circumstances of each case. This manner of imposing penalties commends itself in one point of view, because it leaves the matter open until the evidence is heard and the aggravating or mitigating circumstances are found; but, as before remarked, it is impracticable according to the settled modes of proceeding in our courts, although the same end could be effected by a slight change in the provisions of the ordinance, that is, by imposing a fine of $20 for the offense, with a provision that, after conviction and judgment, the magistrate of police shall have power to reduce the penalty to a sum not less than $1 by remitting the (284) excess.

For the purpose of showing that the ordinance as framed cannot be enforced, it is only necessary to advert to the fact that an action of debt will only lie for a "sum certain," and the inconsistency of the warrant, in this instance, with the nature of the action of debt is obvious on its face, and, we have no doubt, greatly embarrassed the learned counsel

who drafted it, "Whereby the said Harris has forfeited, etc., the sum of *not less than one nor more than twenty dollars!* and an action has accrued to the commissioners to demand the *same:* these, therefore, are to command you to have, etc., before the magistrate of police, to *render* to *said* commissioners the *penalty* of *said* violation." All is fixed with certainty except the amount of the sum which he is "to render," and which is the gist of the action. So no proceeding in the nature of an action of debt and, it is scarcely necessary to say, nothing in the nature of an "action of assumpsit" will meet the exigency of the case.

But it is suggested that the commissioners had power to adopt a new mode of proceeding, and were not tied down to the old forms of the common law! That may be true, provided the matter was to be confined entirely to themselves; but this statute allows an appeal to the Superior Court, and the commissioners hardly had power to lay down a new mode of proceeding for that court; at all events, they have not attempted to do so, and where the case is constituted in the Superior Court this difficulty arises, *i. e.,* by the appeal the judgment of the magistrate of police was vacated. Suppose the jury find the facts alleged by the plaintiffs, who is to fix on the amount the defendant has forfeited, and should have rendered to the plaintiffs? The jury? Certainly not; because it is not in the nature of damages. The court? On what ground? It is not a criminal proceeding, where he may exercise his discretion in fixing the punishment; otherwise, it would
(285) have been before the grand jury; and, treating it as an action, or proceeding in the nature of one, on the civil docket, he has no right, according to the authority and power vested in him by the general law, to fix the amount of the plaintiffs' debt, and although the commissioners have conferred such power upon their magistrate of police, their ordinance does not confer it on the judge presiding in the Superior Court!

Piper v. Chappel, 14 Mees. & Wels., 624, is an authority to show that the penalty must be fixed. It is there held: "We do not see any objection to this mode of fixing the penalty. It is a certain penalty of £5, with the power of mitigation, not below £2, and we do not think this unreasonable."

In *Commissioners v. Frank,* 46 N. C., 436, the point was not adverted to.

There is error. Judgment reversed, and a *venire de novo.* As the facts are not disputed, it is to be regretted that the case was not put in a shape to enable this Court to enter judgment in favor of the defendant.

PER CURIAM. *Venire de novo.*

Cited: S. v. Crenshaw, 94 N. C., 878; *S. v. Cainan, id.,* 884; *S. v. Rice,* 97 N. C., 422; *Bd. of Education v. Henderson,* 126 N. C., 691; *S. v. Maltsby,* 139 N. C., 585; *S. v. Addington,* 143 N. C., 686.

CHARITY CROWELL v. ROBERT SIMPSON.

Where one sold property, and took a note for the price, and there was a lien upon such property at the time of the sale, and the purchaser paid the price to the encumbrancer, it was *Held* that the law presumed the payment to have been made at the request of the vendor, and that such payment was valid.

DEBT on a single bill, tried before *Bailey, J.,* at Spring Term, 1859, of UNION.

The bill was executed by defendant and payable to one Parrott Williams and his wife, Charity. A suit was brought upon the note in the name of Williams alone, and while the suit was pending he died, and it abated. The widow of Williams then married one Crowell (286) and he died, and the present plaintiff is his widow and one of the obligees. The defendant insisted that the notes had been paid. It was in evidence that the plaintiff said it had been paid to her first husband, Williams. The plaintiff then introduced evidence, from the defendant's admissions, how and in what way payment had been made. It appeared the note had been given in the purchase of an equitable interest in two slaves, which had belonged to plaintiff before she intermarried with her first husband, and which had been conveyed by deed of trust by said husband, Williams, to one Draffin, to secure certain debts which Williams owed to Hugh and Eli Stewart, which were unpaid at the time of the purchase. The defendant paid off these debts, which amount was as great as the sum due upon the note, and said if he could be allowed this payment, the note would be discharged, otherwise not; that Williams said he had paid them without authority. He said, in the same conversation, that Williams said at one time that he might pay them, and he, defendant could prove this by Hugh Stewart.

The court charged the jury that if the defendant paid this money, at the request of Williams, they should find for the defendant; that if Williams did not request him to pay these debts, there was no evidence of ratification of such payment subsequent thereto, as was insisted by defendant's counsel; and further, that if he paid without request, the law did not imply one. Defendant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

Ashe and Jones for plaintiff.
Osborne for defendant.

MANLY, J. The debt for which this warrant was brought was incurred in the purchase of certain slaves which had belonged to the plaintiff prior to her marriage with one Williams, and which Williams, after coverture, sold to the defendant. The slaves at the time of the sale were subject to the lien of Eli and Hugh Stewart, for debts (287) due them by deed of trust to one Draffin as trustee. The question is whether when the money fell due to Williams and wife the application of it by the defendant to pay off the encumbrance upon the slaves was a payment of Williams' debt, without proof of a request or of an agreement to such application. It is a question not free from difficulty, but we have concluded it is good as a payment of defendant's debt to Williams upon the contract of purchase.

An analogous principle is well established in relation to the rights of landlord and tenant. Where there is a separate ownership of the ground and house, the lessee who finds a back ground rent due, for which he is liable by distress, may apply the money due to his landlord to the payment of the ground rent, and consider it a payment made to his landlord. Several cases are found to support this principle, as *Sapsford v. Fletcher,* 4 T. R., 511; *Taylor v. Zamira,* 6 Taunt., 521; *Carter v. Carter,* 5 Bing., 406; *Lampleigh v. Brathwait,* 1 Smith Leading Cases, 67, and notes, 70 *et seq.*

The principle upon which these cases rest is this: the immediate landlord is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due. There was precisely a similar constraint upon Simpson to protect himself in the enjoyment of the slaves, by relieving them from the lien of the trust, and his payment to that object should receive a similar construction.

Proof of express authority to make the application is not necessary. It should be presumed from the circumstances. There is error, therefore, in the instructions to the jury in this respect, and there must be a

PER CURIAM. *Venire de novo.*

(288)

JOSEPH COCKERHAM v. JOSHUA BAKER.

1. Where a sheriff mailed an execution in time, by the ordinary course of the mails, to have come to the hands of the clerk, to whom it was directed, before the sitting of the court to which it was returnable, it was *Held* he was not guilty of a breach of duty.

2. A sheriff cannot be amerced if he return an execution within the time prescribed by law, though he fail to return the money levied thereon, into court, or pay it to the party or his attorney.

SCIRE FACIAS against sheriff for failing to return a process in due time, tried before *Bailey, J.*, at Spring Term, 1859, of SURRY.

The defendant Baker was sheriff of Ashe, and the process, in reference to which the failure to return is alleged, was issued by the Superior Court of Surry and directed to defendant, returnable to Spring Term, 1858, of that court, which court commenced on Monday, 22 February, 1858. The sheriff mailed the execution in a stamped envelope, at Gap Civil, a postoffice in the county of Ashe, on Wednesday, 17 February, five days before court. The mail from Gap Civil to Dobson, the county-seat of Surry, leaves Gap Civil on Wednesday evening and arrives at Dobson on Saturday evening, and a letter mailed at Gap Civil on Wednesday would reach Dobson on Saturday evening, unless delayed by accident. The execution did not arrive during the term, but reached Dobson on Monday, two days after the court, and was endorsed satisfied, but no money was paid by the sheriff.

The court instructed the jury that if the execution was mailed on Wednesday at Gap Civil, and by the regular course of the mails, a letter so mailed would, without accident, arrive at Dobson on Saturday evening following, although it did not so arrive, that would amount to a valid return.

Verdict for defendant. Judgment. Appeal by plaintiff.

Fowle for plaintiff.
Boyden for defendant.

BATTLE, J. It has frequently been decided by this Court, (289) after argument and full consideration, that if it be made to appear that a clerk has sent a writ to the sheriff of another county, enclosed in a stamped envelope, in due time to reach him in the regular course of the mails twenty days before the sitting of the court to which it is returnable, it is sufficient to authorize a judgment *nisi* for an amercement for the nonreturn of the process. *State v. Latham,* 51 N. C., 233. If, then, the mail can be used as a medium by

which process can be transmitted to a sheriff, so as to charge him with its reception, it would seem that he ought to be allowed to adopt the same means for making his return, at least so far as the *due time* of the return is involved. Accordingly, in *Waugh v. Brittain,* 49 N. C., 470, we intimated that he might do so, and that he would be excused if the letter, endorsing the process, with his return upon it was properly mailed in due time. The instruction of his Honor to the jury in the court below was in accordance with this opinion, and we are unable to discover any error in it.

The question of the return of process *in due time* seems to have been the only one raised on the trial, but in the argument here the counsel for the plaintiff contended that there was not a "due return" of the process as required by sec. 17, ch. 105, Rev. Code, because, though returned "satisfied," the money was not sent with it, nor paid into the clerk's office, nor to the plaintiff or his attorney. If this question were before the Court for the first time, we should be strongly inclined to hold this objection to be fatal to the return. The writ, in its terms, demands that the sheriff shall have the money levied before the court, and it would seem a return of "satisfied," without the "satisfaction," is but a mockery. But at a very early period a different construction was put upon the act of 1777 (ch. 118, sec. 6, Rev. Code of 1820), and as that act has been twice reenacted in the same terms, we must consider that construction as settled. See *Davis v. Lancaster,* 5 N. C., 255, and see, also, 1 Rev. Stat., ch. 109, sec. 18, and Rev. Code, ch. 105, sec.
(290) 17, in both of which there is a marginal reference to that case, and according to it a sheriff cannot be fined if he return the execution within the time prescribed by law, though he fail to return the money levied thereon into court, or pay it to the party or his attorney.

PER CURIAM. No error.

Cited: Yeargin v. Wood, 84 N. C., 329; *Person v. Newsom,* 87 N. C., 145.

ANDERSON DULA v. J. AND C. J. COWLES.

1. Where a party had agreed to deliver a certain quantity of pork, and having delivered a part, refused to reliver the balance, it was *Held* that he could not recover for the part delivered.

2. What amounts to an abandonment of a contract, so as to enable the opposite party to sue on the common counts in assumpsit for the value of a part performance, is a matter of law to be determined by the court, and it is error to leave it to the jury.

DULA *v.* COWLES.

ASSUMPSIT, tried before *Bailey, J.*, at Spring Term, 1859, of WILKES.

In November, 1852, the plaintiff sold and agreed to deliver to the defendants 1,500 pounds of pork on 1 January, 1853, at 6 cents per pound, and the defendants agreed to pay for the pork in two notes and a judgment, and also an account which they had against the plaintiff. The defendants held two notes against the plaintiff, one for $25.86 and one for $16.57, and a store account for goods sold and delivered amounting to $17.54; also a judgment in the hands of one Brayhill for collection.

The plaintiff did not deliver any pork according to his contract on 1 January, 1853. He delivered 271 pounds about the middle of that month, and this, at 6 cents per pound, amounted to $16.26, which amount the defendants endorsed on the note for $25.86, leaving a balance upon that note of $9.40. The plaintiff afterwards, to wit, on 24 January, 1853, delivered 762 pounds of pork, and also, on (291) that day, sold and delivered to defendants some corn, tallow, and a raw hide, the pork amounting to $45.72, and the corn, tallow, and raw hide to $6.48. A memorandum of the pork, corn, tallow, and raw hide was made by one of the defendants, at his dwelling-house, and delivered to the plaintiff, with directions to deliver same to Mr. Martin, a clerk in the store, and have the same entered to his credit upon the books. Mr. Martin entered the price of the pork, etc., to the credit of the plaintiff upon the books, and paid 75 cents to Thomas Dula, and charged the same to the plaintiff.

The plaintiff returned to the store the next day, on the 25th, and asked Martin to look over the books and see how the accounts stood. Martin and plaintiff looked over the books together, the defendants being present. After ascertaining what was due upon the notes, and the amount of the book account, the notes were delivered up to Dula, and the balance for the pork, corn, etc., was ascertained to be $18.49. This balance plaintiff demanded in cash. The defendants refused, because the plaintiff had not delivered all the pork, and had not delivered up an order which defendants had given him on Brayhill for the judgment against him. The plaintiff then said he would deliver the balance of the pork the next day, and he would then see if the defendants would not pay him.

The court charged the jury that if the contract for the pork had not been altered, the plaintiff could not recover; that he had agreed to deliver 1,500 pounds of pork on 1 January, and as he had delivered 1,033 pounds only, he had no right to recover anything until he had delivered the whole; that it was competent, however, for the parties to change this contract if they thought proper, and the only question in the case was, Had they altered or modified their contract?

The court further charged that there was evidence of a change or modification of the contract; that the endorsement on the note of $16.26, the amount of the first lot of pork, and the delivery up of the (292) notes to plaintiff was evidence of a change or modification of the contract; that it was for the jury to say whether there had been a change or not; if they were satisfied that the parties agreed to settle their accounts as they then stood, that the plaintiff was entitled to recover.

Under these instructions, the jury found a verdict for plaintiff. Judgment. Appeal by defendant.

Nat Boyden for plaintiff.
D. G. Fowle for defendant.

PEARSON, C. J. The statement of the case now sent does not set out how the remainder of the price of the pork was to be paid. This, we presume, was through inadvertence, as the variance was not referred to on the argument, and in the case when before us, *Dular v. Cowles,* 47 N. C., 454, it is stated as a fact *undisputed* that the balance of the price, if any, was to be paid "one-half in goods, the other in cash," and when before us *Dula v. Cowles,* 49 N. C., 519, the fact that the remainder of the price was to be paid "one-half in goods, the other half in cash," is set out *"as admitted by the parties."* In all other respects there is no substantial difference in the proof, and we must account for the error into which his Honor has fallen by supposing he did not rightly apprehend the principle of the two former decisions.

The principle has been acted upon in two recent cases, *Johnson v. Dunn,* 51 N. C., 122; *Lane v. Phillips, ibid,* 456; and a majority of this Court can see no reason to change their opinion. Indeed, the principle is settled by numerous cases, and the only one which looks the other way is *Carter v. McNeely,* 23 N. C., 448; and it is put upon the ground of being excepted from the application of the principle by its peculiar circumstances.

The principle is this: where a contract is *entire,* and not made divisible by its terms, one of the parties cannot take advantage of his own default, either from *laches* or from a willful refusal to perform his part, for the purpose of putting the contract out of his way, so as to (293) enable him to maintain assumpsit on the common counts, and thereby evade the rule, that while the special contract is in force general assumpsit will not lie, and the contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act *inconsistent with the duty imposed upon him by the con-*

tract, which amounts to an abandonment. This is as plain as we can find language in which to state the principle.

What amounts to an abandonment is a question of law, and his Honor erred in not deciding it. He also erred in leaving the jury in a situation liable to be misled in consequence of the indefinite words in which his instructions were given. "It is for the jury to say whether there had been a *change* or not." What kind of change? To what extent? In what particulars? In whose favor was the change allowed as an indulgence?

The instruction ought to have been that the plaintiff was not at liberty to treat the contract as annulled, and could not recover on the common counts, unless the defendants had abandoned the contract, and that to amount to an abandonment they must have done some act which was inconsistent with the duty imposed on them by the contract, and there was no evidence of any such act.

For the sake of illustration: If the contract had been that the remainder of the price of the pork *was to be paid in cash,* and the defendants had refused to pay the remainder in cash, insisting upon paying half in goods, that would have been an act inconsistent with the duty imposed on them by the contract, and would have amounted to an abandonment; but there was no evidence that such was the contract. The plaintiff, in the last interview, said, "He would deliver the balance of the pork the next day, and then see if the defendants would *not pay him.*" Does this mean pay all of the remainder of the price *in cash?* If so, that seems to be the kink in this little case, where the cost has already far exceeded the sum in controversy, and "the play has not been worth the candle." Thus furnishing another instance of the fact that small cases are more apt to become complicated than large ones; a skein of silk is (294) more easily tangled than a coil of rope.

On the argument Mr. Boyden insisted with great earnestness that the delivery of 271 pounds of pork about the middle of January, and the endorsement of the amount as a credit on one of the notes, *was a payment!* There can be no doubt of it; and it is exactly what the plaintiff ought to have done, save only that he ought to have delivered the whole, and ought to have done so *sooner,* to wit, on the day fixed by the contract.

The defendants might have refused to receive this parcel after the day, and sued for breach of contract: Surely they were at liberty to indulge the plaintiff by not insisting rigidly upon a strict performance on his part, and such indulgence gave him no cause of complaint. After this the defendants could have sued for a breach of contract in not delivering the balance of the pork within reasonable time. The same remarks are applicable to the delivery of the several parcels; so the defendants had a good cause of action for the nondelivery of the balance, and it would be

strange if the plaintiff also can maintain an action treating the contract as nullified—in other words, taking advantage of his own wrong and making the indulgence extend to him a ground of complaint! The policy of the law is to require parties to perform their contracts in good faith, and this policy should not be defeated by yielding to what may be called a "hard case." If one agrees to sell a horse at the price of $150, the money to be paid at ninety days, and the horse to be delivered when paid for, the vendee fails to pay at the day; afterwards, he offers to pay $50, which is received in part payment; afterwards he pays $50 more, and then refuses to pay the balance: he cannot get the horse, nor can he recover back the money, for it was not "received to his use," but in part payment for the horse. Is it hard that he should lose his money? And is it not right that he should be required to perform his contract
(295) and not be allowed to evade it because he may think it a bad bargain?

One agrees to act as an overseer for one year at $250; in the middle of the year he does an act which justifies his discharge: he cannot recover the $250, nor can he recover *pro rata* wages. *Lane v. Phillips, supra.* If this be not law, the whole current of the cases must be changed.

PER CURIAM. *Venire de novo.*

MANLY, J., *dissentiente.*

Cited: Russell v. Stewart, 64 N. C., 488; *Few v. Whittington,* 72 N. C., 324; *Buffkin v. Baird,* 73 N. C., 289; *McMahon v. Miller,* 82 N. C., 320, 322; *Jones v. Mial,* 89 N. C., 92; *Thigpen v. Leigh,* 93 N. C., 49; *Lawrence v. Hester, Id.,* 81; *Thornburgh v. Mastin, Id.,* 262; *Wooten v. Walters,* 110 N. C., 256; *Sitterding v. Grizzard,* 114 N. C., 111; *May v. Getty,* 140 N. C., 316; *Willis v. Construction Co.,* 152 N. C., 105; *Aiken v. Ins. Co.,* 173 N. C., 404.

J. H. JENKINS, ADMINISTRATOR, v. J. W. HALL AND WIFE.

Where the propounders of a paper-writing, alleged to be a last will and testament, lived in the house with the alleged testatrix, it was *Held* not to be competent for the caveators to give in evidence declarations of the propounders calculated to influence the testatrix in the disposition of her property, without at the same time showing that such declarations were made in the presence of the alleged testatrix or communicated to her.

DEVISAVIT VEL NON, tried before *Bailey, J.,* at Spring Term, 1859, of ROWAN.

The following statement, in the nature of a bill of exceptions, was drawn up by the counsel in the case and certified to this Court by his Honor.

A paper-writing, purporting to be the will of Elizabeth Cowan, deceased, was produced by J. H. Jenkins, the propounder thereof, the executor named in the said paper-writing. The caveators, J. W. Hall and wife, Mary, admitted the execution of the will, with all the solemnities required by law, and also the testamentary capacity of the said Elizabeth Cowan, but insisted that the said paper-writing was not the will of the said Elizabeth, because the making of the same was dictated to her, or procured from her by undue influence and false and fraudulent representations made by the said J. H. Jenkins and Charlotte, his wife, and others, by means of which she was controlled (296) in the disposition of her property, and induced to make, by the paper-writing propounded, dispositions contrary to her affections, and which, but for such undue influence, she would not have made. In support of these allegations the caveators offered evidence of the following facts:

The alleged testatrix had been the wife of Thomas L. Cowan, of Salisbury, the wife of the propounder, Jenkins, and Mary, one of the caveators, who intermarried with Joseph W. Hall, the other caveator, on 1 December, 1853. Charlotte had been the wife of Jenkins for a number of years before, and had several children. Mary has never had any children. Thomas L. Cowan and wife, Elizabeth, lived in the same house with their two daughters and their husbands and the children, forming one family, meeting at the same table and occupying common parlors. The caveator Mary was the favorite daughter of Mrs. Cowan, to whom she was most tenderly attached, and who returned her attachment with the most devoted affection.

On 25 February, 1856, Thomas L. Cowan died, leaving a will, of which he appointed Jenkins and Hall the executors, both of whom qualified and undertook its execution. The meaning of this will being somewhat obscure, the counsel of the executors prepared a case for the opinion of the Supreme Court, but for some reason nothing effectual was done during the life of Mrs. Cowan. Soon after this Mrs. Cowan began to manifest dislike for Hall; she also treated her daughter Mary with coolness and distance. After the death of Mr. Cowan the parties continued to reside in the same house as before. Just before the time limited by law Mrs. Cowan dissented from her husband's will, and thereby acquired a personal estate of more than $60,000 in value. She died on 31 December, 1857, in the 74th year of her age, and her mind was below the average of intellect; she was uneducated, credulous, and of (297) yielding disposition.

The caveators then proposed to give in evidence declarations of the propounder, Jenkins, made to different connections of the family at various times, between Mr. and Mrs. Cowan's death and before the making of the propounded paper, in disparagement of the character of Hall. The counsel were asked by the court if they expected to prove that such declarations were made in the presence of Mrs. Cowan, or were communicated to her, to which the counsel replied they did not, except the fact of their living together in the same house, from which the jury might infer that such declarations came to the knowledge of Mrs. Cowan.

This evidence was objected to by the propounders and rejected by the court, to which ruling the caveators excepted. The caveators further offered to give in evidence declarations made by Mrs. Jenkins, the wife of the propounder, to different persons, who were connections of the family, after Mr. Cowan's death and before the making of the propounded paper, in disparagement of the character of Hall; whereupon the same question was asked by the court, and the same answer made by the counsel for the caveators, as above stated. The propounders objected to the evidence, and it was rejected by the court, and to this ruling the caveators again excepted.

Verdict for the propounders. Judgment. Appeal by the caveators.

McLean, Fowle, and Wilson for propounders.
Badger, Boyden, and Osborne for caveators.

MANLY, J. The evidence offered and rejected, which is the basis of the exceptions, could only be pertinent to the issue on the supposition that the *disparaging declarations* were communicated to the testatrix, or upon the supposition that the making of such, under the circumstances, justify the inference that similar ones were made by the parties to the testatrix. The point upon which the admissibility hung was the probable influence on the mind of the testatrix.

Upon the first supposition they are clearly inadmissible, for
(298) the reason that the connections of the family to whom they were made might have been called to establish, positively, what the party wished to be left to inference; and as they were not called, the legal presumption is they would not prove the alleged communications.

Upon the second supposition, the declarations seem to be alike inadmissible, for want of connection between the premises and conclusion. The propounder and wife and the testatrix lived together as one family. To connections, outside of the family, the former made disparaging declarations, and, therefore, they made them to testatrix. The inference is not natural or reasonable, but is, at best, only conjectural. It is no evidence of the making of a declaration to a proposed person to show

that it was made to another, though equally convenient. The repetition of it frequently to others raises a chance that it may have been said to the person in question, but yet it rests on a calculation of chances merely, and is but a remote possibility. Under the special circumstances of our case the evidential declarations could justify nothing higher, by way of inference, than a conjecture or suspicion; and these, according to well established principles, are entitled to no weight.

In connection with this view we will call attention to what was said by the Court in *S. v. Henry,* 50 N. C., 70. The case did not go off upon that point, but it was yet held to be clear law that a remarkable occurrence, which took place in the presence of his fellow-servants on the plantation, could not be evidence in the prisoner's favor for any purpose, *because there was no evidence that it had been communicated to him.* An inference, however, to that effect would have been quite as probable in that case as in this.

Only direct proof, touching the issues in a cause, or proof of such circumstances or collateral facts as will justify a reasonable inference bearing upon the issues, is admissible. To allow a wider latitude in the selection of matter for proof would place courts and juries under influences foreign to the special merits of a case and bring about results in the trial of our cases based upon irrelevant considerations and unjust in respect to the particular controversy on (299) hand.

The purport of the declarations offered is not set forth further than to state, in general terms, that they were "disparaging." Whether they were such as to be reiterated in the presence of the testatrix would depend upon their *nature* and the *occasion* upon which they were uttered.

Hasty and injurious expressions, used upon occasions of supposed provocation, would not probably be repeated; it is very improbable, indeed, that they would be. And yet, in the absence of information on this point, it is in the hypothesis most likely to be *true;* and thus the connection between the evidential matter and the point to be proved is made still more remote.

This last consideration suggests another objection to the evidence.

The propounders of the will, and those interested in propounding it, may be supposed ready with such means as they can command to repel and explain any proofs as to direct or indirect influences brought by them to bear upon the mind of the testatrix; but no such readiness could be expected on the part of the propounders to meet the proofs in question by counter-proofs; to explain casual conversations with connections on various occasions, so as to rebut inferences from them con-

trary to the truth. With respect to these it surely could not be expected that they would be forearmed, because they are too remote to be foreseen. There is no error.

PER CURIAM. Affirmed.

(300)

JOHN F. STONE, TRUSTEE, v. JOSEPH MARSHALL.

Where a debtor included several feigned notes in a deed of trust, it was *Held* that such deed was void, in toto, as against creditors, notwithstanding there were other *bona fide* debts included, and there was no evidence of any complicity in the fraud on the part of the trustee.

TROVER, tried before *Caldwell, J.*, at Fall Term, 1859, of STANLY.

The plaintiff declared for the conversion of three negroes and a wagon. The plaintiff offered in evidence and proved the execution of a deed of trust bearing date 7 March, 1856, from one John Stoker, conveying to him all his property, in cluding the three negroes and wagon in controversy, to secure the payment of a number of debts set forth in said deed of trust, of various amounts and due to different persons, amounting to about $3,000 the most of which were proved to be just debts.

The defendant proved that John Stoker, the vendor in the deed of trust, at the time of the execution of the deed of trust, was indebted to one Caleb A. Heilig by note for the sum of $1,300, which was put in suit against him in Rowan County Court and reduced to a judgment at May Term, 1856, of said court, upon which judgment a *fieri facias*, tested as of that term, was issued to the defendant, who was then sheriff of Stanly County, and was by him levied on the three negroes and wagon, which were sold by him according to law and the proceeds of the sale applied to the satisfaction of the execution. It was also in proof, on the part of the defendant, that in 1853 and 1854 John Stoker and one James Kirk were merchants and partners in the county of Rowan; that Stoker was the business man of the concern, attended regularly at the store, kept the books, money, etc., while Kirk lived 10 miles distant, and was there only occasionally; that they dissolved the copartnership in the fall of the same year, 1854, owing a considerable northern debt at the time. On the dissolution Kirk bought out the store and the goods on hand, and Stoker agreed to pay all the debts of the con-
(301) cern, but failed to do so, and they were paid by Kirk to an amount over $3,200, as admitted by Stoker, who, however, insisted at the time that Kirk had received enough of the copartnership fund to indemnify him, but this was denied by Kirk.

It was further in proof by the defendant that Stoker told one Kendall, a witness, some few months before the execution of his deed, that he was worth $2,000 or $3,000. It was also in proof by him that three of the notes given by John Stoker, and secured in the deed of trust, one of date 29 February, 1856, for $600, payable to his brother, one A. T. Stoker, one of date 26 February, 1856, for $200, payable to James Roseman, and another payable to the same, for $300, and bearing the false date of 26 June, 1854, its true date, as proved, being 26 February, 1856, were fraudulently made without any consideration, and that there was an express agreement in relation to the two last notes between Stoker and James Roseman, the payee therein, that he should collect the same from the trustee, and deducting certain commissions for his services, pay over the residue of their proceeds to John Stoker, and that some two years ago, since the pending of this suit, Stoker offered to give Roseman $100, if he would swear they were genuine.

There was no evidence that the trustee had any knowledge of the said Stoker's fraudulent conduct. The defendant's counsel insisted that if the deed of trust was made with the fraudulent intent of hindering or delaying the creditors of Stoker, or for his ease and benefit, that the deed was *void* under the statute of 13 Eliz., although there were some just debts secured therein.

The court charged the jury, as a general rule, it was true that a deed of trust made to defraud creditors, or for the ease and benefit of the trustor, was void; but in this case, if they believed the debts were true debts, as set forth in said deed, save the three alleged to be founded, in fraud and there was no collusion between the trustor and trustee, and there was no evidence of any, as to the trustee, the estate vested in the trustee, and he could maintain the action. Defend- (302) ant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

Ashe for defendant.

No counsel appeared for plaintiff in this Court.

MANLY, J. If a conveyance be made upon several considerations alike moving the maker, one of which is against law, the whole is void. But if the consideration be good, and there is attached to the conveyance several conditions or trusts, separate and independent of each other, some of which are good and some bad, the deed will be supported as to the good. The difference is that every part of the deed is induced and affected by the illegal consideration; but when the consideration is not thus tainted, but some of the considerations only are illegal, the illegality of the bad does not contaminate the good, except in some peculiar cases where they are inseparable or dependent. This distinc-

tion is taken and supported by a number of cases cited in the note to *Collins v. Blantern,* 1 Smith Leading Cases, 169.

In the assignments to pay debts, the debts secured from the consideration for the deed. In the case now before us, some of these are admitted to be fabricated and fraudulent. They are inseparably connected together, and as a whole, constituted the consideration which moved the debtor to make the conveyance. The Code declares that every conveyance made with the intent to delay, hinder, or defraud creditors, as against such creditors (and only as against them), shall be utterly void. Rev. Code, ch. 50, sec. 1.

The *intention* of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covenous the *intent* is necessarily so.

The charge of the judge below cannot, as we think, be sustained. In substance, it was that no matter for the fraudulent purpose of
(303) the grantor, if the trustee did not participate in that purpose, and there were honest debts secured by the trust, the deed should be upheld. The enactment of the Legislature is that every conveyance made with the intent to delay, hinder, or defraud shall be void. The intent of the *maker* is the criterion, and if that intent be bad, the trustee, however innocent, cannot hold as against creditors.

In *Harris v. DeGraffenreid,* 33 N. C., 89, it was held that a *bona fide* purchaser for value, from a trustee holding under a fraudulent deed, would get a good title; for there was a legal title in the trustee as against the grantor and others (not creditors), which was transmissible, and which would be effectually transmitted to one who buys without notice of the fraud and for value. This decision is in accordance with a number of cases in which it has been held that although a deed may be void, for fraud, as against creditors, yet, if the assignees were free from participation in the fraud, their acts, done in good faith, would be ratified and protected.

And so it has been held, and we take that to be clear law, too, when there is no trust implied, but a debtor conveys directly to his creditor in payment of a *bona fide* debt, the conveyance should be upheld, notwithstanding the debtor made it with a fraudulent intent. The cases of this class rest upon the ground that the creditor was not a party to the fraud, but received the conveyance in good faith, in payment of an honest debt; and in conformity to the rules of law which govern the case of an ordinary vendee who is without fraud and pays value, the creditor is not affected by the fraud of his vendor.

But the rule which exists as between vendor and vendee has never been applied, so far as we know, to a case like the one now under consideration. Assignments of this kind, preferring creditors, can only be

made by an *insolvent* debtor. They are not favored when preferences are given. The law only tolerates them when honestly made for the purpose of giving the perference and devoting the property of the debtor to the payment of his debts. If, then, there be in the mind of the debtor a purpose to defraud or make provision for himself (which is a fraud), the assignee who is selected by him to carry out his (304) fraudulent designs cannot hold as against the creditor. The assignment is void under the provision of The Code referred to (the stat. 13 Eliz.).

The conclusions here reached are supported by the cases in our own reports of *Hafner v. Irwin,* 23 N. C., 490, and *Flynn v. Williams,* 29 N. C., 32, and the case in New York of *Rathburn v. Platner,* 18 Barbour, 272. *Brannock v. Brannock,* 32 N. C., 428, does not conflict with *Hafner v. Irwin* and *Flynn v. Williams,* though relied on for that purpose. By referring to the reasoning of the Court in that case, it will be seen that is made to turn upon the distinction taken by Smith in his leading cases between bad considerations that are inseparable from the others and furnish the bad motive for the deed, and bad considerations that are separable and independent, and inserted without covin or malice. In the former case the whole is tainted, and the conveyance is void under the statute in toto; in the latter, the bad may be eliminated by the creditors, and the conveyance upheld as to the good. In *Brannock v. Brannock, supra,* the objection to the assignment was the insertion, among the debts secured, of some that were founded upon usurious considerations, not covinously inserted; but, as the case supposes, *bona fide,* with intent to have them paid. On this state of facts the deed was upheld for the good debts upon the distinction stated.

The case now before us for decision is between the assignee and the sheriff. The former claims as trustee under an assignment made by the debtor with an intent to defraud; the latter justifies under a *fi. fa.* of a judgment creditor. As between these parties, we think the assignment clearly void, notwithstanding the freedom of the trustee from any participation in the fraud, and notwithstanding there were some honest creditors secured in the deed.

PER CURIAM. *Venire de novo.*

Cited: Johnson v. Murchison, 60 N. C., 292; *Blair v. Brown,* 116 N. C., 644; *Commission Co. v. Porter,* 122 N. C., 698.

Dist.: Carter v. Cocke, 64 N. C., 242; *Lassiter v. Davis,* id., 500; *Hicks v. Skinner,* 71 N. C., 558.

Overruled: Morris v. Pearson, 79 N. C., 258; *Woodruff v. Bowers,* 104 N. C., 207; *Ballard v. Green,* 118 N. C., 392.

(305)

STATE v. OSCAR (A SLAVE).

1. Where the credit of a witness was impeached on the ground of partiality towards the accused, and to rebut the imputation it was proved that the prisoner and witness had lately had a fight, it was *Held* to be competent for the State to show that next morning, after the act charged, the two were seen together in a conversation that appeared to be friendly, and that without any preliminary inquiry of the witness as to the terms on which they stood towards each other.

2. It was *Held* to be error in a judge, on the trial of a capital case, to state to the jury that "To exclude rational doubt, the evidence should be such as that men of fair ordinary capacity would act upon it in matters of high importance to themselves."

INDICTMENT against a slave for an assault on a white woman, with an intent to commit a rape, tried before *Heath, J.*, at last term of ROWAN.

The prisoner was found guilty, and appealed upon exceptions taken at the trial. The points made by the exceptions are so clearly stated in the opinion of this Court that it is deemed entirely unnecessary to state the case at large.

Attorney-General for the State.
Boyden and Osborne for defendant.

BATTLE, J. In the bill of exceptions filed by the counsel for the prisoner it is alleged that the court erred, first, in the reception of improper testimony, and secondly, in giving an erroneous instruction to the jury.

With regard to the first alleged error, the circumstances are as follows: After the solicitor for the State had introduced testimony to establish the guilt of the prisoner, his counsel called one of his fellow-servants, named Harry, who gave evidence tending to criminate another man and to exculpate him. On cross-examination this witness made some statements which, together with what he had stated in his examination in chief, induced the solicitor to say that he should contend that the witness was an accomplice with the prisoner in the com-
(306) mission of the offense. The counsel for the prisoner then called his master, who testified that the witness Harry and the prisoner had shortly before had a fight, and were not on friendly terms. The solicitor then called a witness to prove that Harry and the prisoner were on friendly terms, and to show this he was permitted by the court, after objection by the prisoner's counsel, to state that he saw Harry and prisoner conversing together the next morning after the transaction, and that he heard the sound of the conversation sufficiently to know that

it was apparently friendly, but he did not hear it with sufficient distinctness to understand its import. The witness Harry had not been previously asked whether or not he was on friendly relations with the prisoner.

Under the circumstances, and for the sole purpose for which the testimony was offered, we think it was clearly competent. It was not offered to discredit the witness Harry by proving that he had made contradictory statements before the trial, in which case it would have been necessary to have asked him what is called the preliminary question. *S. v. Patterson,* 24 N. C., 346; *Edwards v. Sullivan,* 30 N. C., 302. But it was introduced for no other purpose than to rebut the testimony given for the prisoner, to show unfriendly relations between him and the witness. The testimony was offered and relied on by the prisoner's counsel to sustain the credit of the witness, and, surely, the solicitor for the State had a right to reply to it by proving the conduct of the witness and the prisoner towards each other, to show that in fact they were not unfriendly. The evidence may possibly not have been proper had it been offered in chief, before the prisoner's master was examined, but we are clearly of opinion that it was admissible in reply. *Fain v. Edwards,* 33 N. C., 305.

The objection to the charge of the court applies to that part of it only which relates to the subject of a rational doubt. As to that, his Honor said to the jury, "That the humanity of the law was such that if they had a rational doubt upon either of those points" (to wit, the unlawful assault upon the prosecutrix, and the identity of the prisoner with the perpetrator), "they were required to throw (307) those doubts into the scale of the prisoner, and to acquit; that a rational doubt, however, was not a possible doubt, for that might exist in all cases. To exclude this rational doubt, the evidence should be such as men of fair ordinary capacity would act upon in matters of high importance to themselves. If the evidence here did not produce this degree of belief in their minds, then they ought to acquit the defendant; if it did produce that degree of belief, it authorized a conviction."

It is manifest that to the first part of this charge no just exception can be taken. It is supported by all the elementary writers on the subject and has received the sanction of this Court. *S. v. Rash,* 34 N. C., 382; *S. v. Frank,* 50 N. C., 384. It is to the latter part of the charge, in which his Honor undertakes the difficult, if not impossible, task of giving a precise and intelligible definition of what a rational doubt is, and what is sufficient to exclude it, that the counsel for the prisoner object. They contend that the standard by which the judge attempts to measure the evidence which is to exclude a rational doubt is fallacious

in itself and perilous to a prisoner charged with a crime. They insist that men of fair ordinary capacity will often act upon very slight evidence in matters of high importance to themselves, and that the very fact of the matter being of high importance to themselves will the more readily induce them to act upon such slight evidence. Thus, they say, if one person were to say to another, "Sir, I fear that your house is on fire," he would instantly rush to the spot without stopping for a moment to inquire whether the information was founded upon a great or slight assurance of its truth; whereas, if the alleged threatened danger of loss was slight or insignificant, the person exposed to it would probably stop to inquire into the grounds of his informant's belief, and not act upon it at all until he was satisfied of the great probability of its being true. It must be confessed that there is great force in the objection, thus stated and illustrated. The idea which his Honor intended
(308) to convey was no doubt suggested to him by the following passage from a very popular and learned work on evidence: "A juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." 1 Starkie Ev., 414. At first view the charge of his Honor may seem to be identical in meaning with this passage; but upon a more minute and critical examination of the two expressions a marked difference between them will be observable. Mr. Starkie introduces the idea of *venturing to act,* thereby implying that the party who acts upon the proposed evidence is making a *venture* which, one way or the other, will be of the highest importance to his own interest. Supposing him to be a man of ordinarily sound mind, and to have the usual prudential regard to his own interest, we may well take it for granted that he will require almost a moral certainty in the evidence on which he *ventures to act* in a matter of life or death or the loss or gain of a large estate. This idea of *venture,* or a putting to hazard, is not *necessarily* involved in the language used by the learned judge. He merely says that "To exclude the rational doubt the evidence should be such as men of fair ordinary capacity would act upon in matters of high importance to themselves." Now, we have seen that such men might, and probably would, act upon comparatively slight evidence in matters of the highest import to themselves, if what they did was, at the moment, prompted by their feelings or their interest, and no risk was incurred by it. But if, in the case supposed by the prisoner's counsel, the owner might, by running to his house, be exposed to a greater calamity than its destruction, in the event of its not being on

fire, we may be sure he would require strong proof that the cry of fire was well founded before he would make the venture and incur the risk. We think it likely that the learned judge intended to convey this idea, but his language, as reported to us in the bill of exceptions, does not embrace it, and as his charge in this particular may have misled the jury upon a point all important to the prisoner, (309) it is erroneous.

PER CURIAM. *Venire de novo.*

Cited: S. v. Brown, 76 N. C., 225; *S. v. Pitt,* 166 N. C., 272.

J. D. ROUNTREE v. THOMAS WADDILL.

Where a prisoner was brought into open court by his bail, and it was announced, publicly, that he was surrendered, but was unknown to the sheriff, to the plaintiff, and to the plaintiff's counsel, and a stranger to all present, except to the bail and the presiding judge, and upon being ordered in custody, fled from the courtroom and escaped, without having been in the custody of the sheriff, it was *Held* that these facts did not amount to a valid surrender, although so adjudged by the court then present, and a record to that effect ordered by it.

SCIRE FACIAS against the defendant, as bail of Nathan King, heard before *Shepherd, J.,* at Spring Term, 1859, of WILSON.

The pleas were *nul tiel record* and a special plea "that King was discharged at Fall Term, 1856, of Chatham Superior Court as an insolvent debtor." Cause against the motion for judgment was further shown upon the following facts agreed:

On Monday of Spring Term, 1859, of WILSON the bail of Nathan King brought him into open court, and their counsel, at the bar, having given previous notice during the day to the plaintiff's counsel, who were present, said to the court: "We surrender Nathan King in our discharge as his bail." The plaintiff's attorney then moved for time to file an affidavit, that he might make a motion to commit King, which time was allowed, and upon the affidavit being read, the court said: "Your motion is allowed; take him into custody."

King was not personally known to the plaintiff's counsel, (310) and was a stranger to the community and to the officers of the court, and although in the court room, in the presence of the court, he was not brought into the bar nor immediately to the counsel of the bail, nor to the sheriff, nor delivered to the plaintiff, or designated to

the plaintiff especially, but was recognized by the presiding judge, and held by him to be present, being personally known to him. When the court allowed the motion to commit, and told the plaintiff to take King into custody, he fled from the room, made his escape, and could not afterwards be arrested.

Upon these facts the court held the surrender complete as to Waddill, the bail and discharged him upon payment of the cost. The court ordered a record to be made accordingly.

Upon the special plea as to the discharge of King at Chatham Superior Court in 1856, the following facts are agreed:

The note sued on was given to Roundtree, Watson & Co., who were merchants, and had their regular place of business in the city of New York, Roundtree, the present plaintiff being a member of the firm, though then and always a resident of this State; and when King took the oath of insolvency he gave general notice in a newspaper of the State to his nonresident creditors, but no personal service was made on Roundtree in the State, or on his attorneys of record, who were then prosecuting suit here.

Upon this point the court was with the plaintiff; upon the other plea, *nul tiel record,* the court gave judgment for the defendant.

The plaintiff excepted to the ruling of the court upon the first and third points, and appealed therefrom to this Court.

G. V. Strong and George Howard for plaintiff.
W. T. Dortch for defendant.

MANLY, J. The principal question in the case is whether the facts stated by the court as bearing upon that point amount in law to a surrender by the bail of their principal. We think they do not.

(311) When an act of this sort is spoken of in the books as a surrender to *the court,* it means, of course, a delivery under the directions of the court to its ministerial officer, the sheriff. It cannot be supposed, without absurdity, that the presiding officer takes charge of the person in custody, for a moment, for any purpose.

We take it, too, that there is no interval of time between the custody of the bail and the custody of the sheriff. The debtor (or culprit, in a State case) passes *from one to the other,* and it follows that he is not out of the custody of the bail until he is in the custody of the sheriff. We do not mean by this that he should be in the actual manual custody of the officer, but that he should be in a condition to be taken by him if needful.

By a recurrence to the facts, it will be seen that the bail and the principal came into the courtroom at Wilson, being strangers in that

community and known by no one except the presiding judge. The bail said, "We surrender Nathan King in our discharge as his bail," and moved for a record to be made of it. The plaintiff's attorney moved for time to file an affidavit, in order to hold the debtor in custody under the statute, which time was allowed. The affidavit was prepared, the motion to commit made and allowed, and the court thereupon told the sheriff to take him into custody, upon which he fled from the courtroom and could not be overtaken. In the meantime, while the affidavit was preparing, no action was taken by the court on the motion to make a record of surrender, and no direction given to the sheriff. The principal, King, was unknown to the plaintiff, to his attorney, to the sheriff or sheriff's officers, or to the bystanders, and was not pointed out to any of them.

Upon this state of facts the court held the surrender to be complete, and made a record of it in pursuance of the motion above stated. This judgment of the court, we think, is erroneous.

The debtor was not out of the custody of the bail until he (312) fled, and, of course, not in the custody of the sheriff at all. This *tradition,* one to the other, would have been complete if, when the presiding officer ordered the sheriff to take the debtor, he had been presented to the sheriff, or if, in any other way, he had been in a condition to be attached and detained by him. That was, according to our view of the transaction, the turning point in the attempted ceremony of surrender. And to hold it good as a surrender, effectual to discharge the bail, and consequently to charge the sheriff, would impose upon the latter insuperable hardships and difficulties, an instinct to pick out the proper man in a crowd, and fleetness of foot to overtake him in his flight.

We attach no importance to the fact stated, that the debtor was known to the judge who presided. He was not known to the sheriff, nor was he in the sheriff's immediate presence or power. The judge did not point him out to the sheriff or put him effectually in charge of that officer.

There seems to have been some misunderstanding in the court below as to the issue raised by the plea of "no such record." The matter to which that plea is intended to apply is the judgment set forth in the *scire facias* against the bail, viz., the judgment against the debtor King.

Upon an examination of a copy of the record, submitted with the case, it seems to be identical with that recited in the *scire facias,* and we think there was error in the judgment of the court upon that point.

The judgment of the Superior Court upon the remaining plea was correct. A taking of the body in the execution, and its discharge under

our insolvent debtor law, exempts it from future arrest only as to creditors who were notified in writing (Rev. Code, ch. 5, sec. 11). The propriety of this requirement is obvious, and the Code is peremptory.

The Court being of opinion with the plaintiff upon all the points presented in the case agreed, reverses the judgment below and gives judgment here for the plaintiff.

PER CURIAM. Reversed.

(313)

DOE ON THE DEMISE OF MAUGER LONDON v. O. G. PARSLEY AND Z. LATIMER.

A deed of trust made by a corporation, or an individual, for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage, and prevent a sacrifice by a sale for cash, where the company or individual has the means and resources from which enough might be realized to pay all of the debts, is fraudulent and void as against creditors.

EJECTMENT, tried before *Caldwell, J.*, at last Fall Term of NEW HANOVER.

The premises in dispute had belonged to The Clarendon Iron Works Company, a corporation existing by virtue of certain letters patent dated 26 September, 1854, issued by the Governor, under the provisions of the act of the General Assembly, entitled "An act to encourage the investment of capital for mining and agricultural purposes," ratified 22 December, 1852.

The capital stock of the company was $300,000, and the corporators were Adrian H. Van Bokkelen, Robert B. Drane, Alexander MacRae, and the defendants Parsley and Latimer. The plaintiff gave in evidence a deed from the sheriff of New Hanover to the lessor of the plaintiff, for the premises sued for, dated 14 March, 1857, and made by virtue of a levy and sale under certain executions against the said company, issued on judgments against said company at June Term, 1856, of New Hanover County Court. These judgments, amounting to $11,000 or $12,000, were founded upon debts owing by said company, and upon which suits were pending at and before the making of the assignment hereinafter referred to, all of which debts were included in the fourth class of debts in the deed of assignment. Upon these judgments, or some of them, executions were issued, returnable to September Term, 1856, alias executions to December Term, and pluries executions to March Term, 1857, under which last the lessor of the plaintiff purchased at the price of $5,000.

The defendant then gave in evidence a deed of assignment (314) from the said company to Levi A. Hart for the premises sued for, dated 6th of June, and proved and registered on the same day. The defendants then produced a deed from the said Levi A. Hart to themselves, dated in December, 1856.

It was admitted on the part of the defendants that of the capital stock of the said company only $50,000 had been called for or paid in, and it was admitted by the plaintiff that all of the debts of the company set forth in the deed of assignment were just.

It was in evidence that the trustee, Hart, on 19 September, 1856, caused to be inserted in the two daily papers published in Wilmington an advertisement for the sale of the premises sued for, by public auction, on 12 November, 1856, which advertisement was continued from day to day in said papers up to 12 November, 1856, when the said premises were sold upon the terms set forth in the deed of assignment, and the defendants became the purchasers of the sum of $28,000, and having complied with the terms of sale, received from the trustee, Hart, the deed above referred to. And it was also in evidence that of the capital stock of the company, A. H. Van Bokkelen had subscribed for $192,000, and paid in $32,000; R. B. Drane had subscribed for $30,000, and paid in $5,000; Alexander MacRae had subscribed for $18,000, and paid in $3,000; and each of the defendants had subscribed for $30,000, and paid in $5,000; that at and before the organization of the company the corporators had agreed among themselves that they would commence their operations in manufacturing under the letters patent upon a capital of $50,000, and that no greater amount of the capital stock should be called for without the assent of all the corporators, as the business being new, they did not know how far it might prove profitable; and if, upon trial, they should find it did prove profitable, they could then increase it if they chose, without the necessity of taking out new letters patent; that the business of the company was the manufacturing of iron machines and machinery, and almost all kinds of iron manufactures; that the business of the company, after it had been conducted for some (315) time, six or eight months, proved to be unprofitable, and the corporators wished to stop the business and sell out their shops and machinery, which had cost them $50,000, and advertised them for sale in the cities of New York, Philadelphia, Baltimore, and other places in the United States; and the president of the company made a visit to the northern cities to look for purchasers, but failed to find one; that in conformity to the advertisements referred to, the premises used for, and in addition thereto the machinery and tools of the establishment, among which were two large lathes, which cost $3,000, were offered for sale at public auction in the town of Wilmington on 18 April, 1856,

upon the following terms, to wit, $7,500 cash, $7,500 at ninety days, $7,500 at six months, and the balance at nine, twelve, eighteen, and twenty-one months.

At this sale the highest *bona fide* bid was under $23,000. The corporators were willing to take $30,000, but at a meeting which they had the evening before the sale it was stated that certain parties might be willing to give more than $30,000; whereupon it was agreed that Parsley and Van Bokkelen, two of the corporators, should run the property up to that sum, and accordingly on the next day they continued to bid against each other after the price of $23,000 was reached, until they ran it up to $39,000, at which price it was knocked off to one of them; and Mr. Van Bokkelen stated in his evidence that this was done to prevent the price of the property from being injured in the market; that efforts for the sale of property were continued until the date of the deed of assignment; that the said deed conveyed all the property of the company which could be reached by an execution, and also all the debts due to the company; that the usual terms of sale of valuable real estate in Wilmington, in 1856, were upon a credit of one, two, and three years, with interest from date, and the more valuable the property, the longer the credit; that the premises in dispute would not have sold for more than $15,000 or $16,000 at a cash sale; that they were unfit for
(316) any other purposes than those for which they were constructed, and could not be used for any other purpose without an expenditure of much money; that the provision in the deed of assignment authorizing the assignee to make a private sale of the premises before the first of November, 1856, upon such terms as might be agreed on by all the corporators, was inserted in the deed because the corporators were unwilling to leave the price to the sole discretion of the trustee at private sale; they wanted the property sold for a fair price, and to that end they wished to be consulted, and to exercise their own discretion; that the corporators, at and before the making of the assignment, had full and frequent conferences with their counsel in reference to the making thereof, and were fully advised that they were individually liable to the creditors of the company to the extent of the balance uncalled for and unpaid on their respective subscriptions to the capital stock of the company; that their object, as stated to their counsel, in making the assignment was that they considered certain of their creditors more meritorious than the rest, and wished to prefer them in the order afterwards set forth in the deed, and also because they wished to make the property bring a fair price and prevent it from being sacrificed; that they were advised by their counsel that they had the right to make an assignment of the property and estate of the company for the benefit of the creditors of the company, and that the provisions of this deed

were submitted to their counsel, and they were advised by him that there could be no objection to them; that they were fair and reasonable, and creditors could have no objection to them; that the debts referred to and set forth in the assignment embraced all the debts due by the corporation, except possible some small bills which were not remembered; that the property and estate conveyed by the deed of assignment were, at the time of its execution, supposed to be worth more than the debts due by the company, but from bad debts and other causes the trustee had failed to realize enough to pay all the debts; that the defendants, at the time of their subscription and at any time since, could have raised $30,000 each, the amount of their subscription; that Van Bok- (317) kelen, at the time of his subscription, supposed himself to be worth $100,000, but became insolvent in the fall of 1855; that Robert B. Drane was always a man of very moderate means, and that Alexander MacRae, though possessed in June, 1856, of a considerable property, was thought to be considerably involved by reason of a large railroad contract in Florida, which afterwards turned out profitable; that the company had not filed in the office of the clerk of New Hanover County Court any exhibit of its receipts and disbursements and liabilities and credits; that at the sale by the sheriff, when the lessor of the plaintiff purchased, the defendant Parsley was present and forbade the sale, and that one Cassidy, at that sale, bid several thousand dollars as the agent of the defendants, said Parsley having requested him to bid, stating that his object in bidding was to save any lawsuit about the property, if possible.

The judge charged the jury that, taking the whole of the evidence in the case together, written and unwritten, there was a presumption of fraud, and that there was no sufficient evidence to rebut that presumption; and that if the jury should find the facts according to the evidence, written and unwritten, then the law pronounced the deed fraudulent, and the plaintiff would be entitled to their verdict. Defendants excepted.

Verdict for plaintiff. Judgment. Appeal by defendants.

Pearson and Strange for plaintiff.

W. A. Wright and B. F. Moore for defendants.

PEARSON, C. J. The effect of every deed of trust like that under consideration is "to hinder and delay" creditors, because it deprives them of a direct and prompt mode of collecting their debts by *fieri facias* and sheriff's sale.

A debtor, at any time before his creditors obtain a lien, has a right to make a preference in favor of some to the exclusion of others.

In order to reconcile these two conflicting rights, the law, as established by the adjudications of our courts, allows a debtor (318)

who is in *failing circumstances* to make a deed of trust, and will not impute to him an intent to defraud, provided he does so with a single eye to the exercise of his right to make a preference and without any purpose, either directly or indirectly, to secure to himself any benefit or advantage. *Palmer v. Giles* (in equity, decided at this term), 58 N. C., 75. But to entitle himself to this indulgence he must see to it that there is no sinister design, with a view to his own interest.

To rid our case of any unnecessary complication, we concede, at the outset, the position assumed by the counsel of the defendant, *i. e.*, a corporation has the same right to make a deed of trust that an individual has, and in making this concession we assume that it follows that a corporation, in the exercise of this right, is subject to the same limitations and restrictions as when it is exercised by an individual. It is unnecessary to refer to the many authorities cited on the argument; such is the conclusion fairly to be deduced from them.

Suppose one, with ample resources to pay all his debts (with money enough in bank, if you please), some ten days before a creditor obtains judgment, should make a deed conveying all of his property which is subject to execution to a trustee for the payment of all his creditors, arranged in classes, one, two, three, four, would this deed be made with a single eye to the exercise of his right of making a preference among creditors? That is the question. Certainly not, for there was no occasion to make a preference, as he was able to pay all; so there could be no doubt his object was to secure an advantage for himself; he wished to have the privilege of paying his debts when it suited him, and to use his money for other purposes; he did not choose to have his property sacrificed at sheriff's sale, but intended to sell upon his own terms, and for that purpose he put his property out of the reach of an execution. It follows, there is nothing to relieve the deed from the imputation of being made with a fraudulent intent. This conclusion is so pal-
(319) pable that a mere statement is the only argument that can be made about it.

Such is the case now before us for consideration. Besides the land, buildings, machinery, and debts due, The Clarendon Iron Works Company had a fund of $250,000, unpaid stock, from which it could, by a call upon the shareholders, have realized an amount which, in addition to its resources above set out, would have been much more than enough to pay off all its liabilities. Admit that Van Bokkelen had failed, and could answer the call to the amount of the debt due him; that MacRae was not, at the time, reliable; that but little could have been paid in by Drane: there were the defendants, Parsley and Latimer, bound for $25,000 each, and amply able to pay. So the purpose of the deed of trust, was not to prefer creditors, but to hold them off, at arms length, until

the property could be disposed of and the other resources of the company be made available, and in that way secure a benefit to the shareholders by not calling on them for the portion of their subscription remaining unpaid! thus perverting an indulgence which the law extends to debtors, under certain circumstances, and making it a pretext in order to effect an object for the benefit of the debtor, which the law cannot tolerate. The debts were due; it was the duty of the company to pay them, and, although the creditors were at liberty to give further time, the debtor had no right to exact it in the manner attempted. The conclusion that a deed of trust made by a corporation, or an individual, for the purpose of gaining time, at the expense of creditors, in order to dispose of property to advantage, and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from which enough might be realized to pay all of the debts, is fraudulent and void as against creditors, is clearly deducible from principle, and we are glad to find, upon examination of the authorities, that it is fully supported by them. See Burrill on Assignments, (2 Ed., pages 38, 39, and 40, where the cases are collected and referred to; *Planck v. Schermerhorn,* 3 Barbour Ch., 644; *Ogden v. Peters,* 15 Barbour, 560, and many others, all to the same effect. For the purpose of rebutting the imputa- (320) tion of fraud, the defendants, on the trial below, and in the argument before us, relied on the fact that the corporators had agreed among themselves, as the business was new, to commence operations on $50,000, and if, upon trial, it proved profitable, other portions of the subscription could be called for. If the company had confined its operations within this limit, it would have been well enough; but, unfortunately, the agreement was not observed, for the operations were extended *on credit* to a large amount, based on its unpaid stock; and when a creditor called for payment, it was no answer to tell him, "We had agreed among ourselves to make a trial on $50,000." The reply is, "True; but that was not done, and honesty requires that you should meet this extended credit by calling for unpaid subscriptions to an amount sufficient to pay your debts." An individual, under such circumstances, would hardly have the face to say to a creditor, "When I commenced this business, I determined with myself, as it is new, only to trade on a limited sum; true, I stretched my credit, but I do not feel bound to resort to my other resources to meet your debt, so you must wait until I can see what can be done for you out of the sum appropriated to the business!"

In *Palmer v. Giles,* 58 N. C., 75, the fraud was apparent on the face of the deed, and the jury had nothing to do with it; in this case it was necessary for the jury to find the facts upon which the law pronounced the deed to be fraudulent; but, notwithstanding that difference, the principle involved is the same, and the Court concurs with his Honor in

the conclusion that, if the evidence was believed, there was a presumption of fraud, and there was no evidence to rebut it; and we also approve of the "fair and square manner" in which his Honor met the point, and submitted the case to the jury; for in cases where, as in this, there was no actual fraud, and the deed is void against the creditors only by intendment of law, upon the facts disclosed by the evidence, the due administration of justice requires that the judge should "take the responsibility" of announcing the law in a manner so plain and (321) direct that juries cannot misunderstand the instructions.

PER CURIAM. No error.

Cited: Winchester v. Reid, 53 N. C., 380; *Cheatham v. Hawkins,* 76 N. C., 338; *Boone v. Hardie,* 83 N. C., 475.

STATE v. TYRE GLEN.

1. All watercourses, not navigable for sea vessels, but capable of being navigated by boats, flats and rafts, technically styled *unnavigable* streams, are the subject of special grant by the State under the entry law.

2. Rights acquired by special grants from the State in watercourses, technically styled *unnavigable,* cannot be taken from the grantees by the Government except in the exercise of the power of eminent domain, and then only for public use, with a provision for a just compensation.

INDICTMENT under the act of Assembly for failing to remove obstructions to the passage of fish up the Yadkin River, tried before *Heath, J.,* at Fall Term, 1859, of YADKIN.

The parts of the said act material to the question considered are sufficiently apparent from the recitals by his Honor in delivering the opinion of the court. The special verdict rendered in this case discloses the following state of facts:

The defendant, in 1857, built a milldam across the Yadkin River, from bank to bank, for the purpose of supplying his grist and sawmills with water; that by this dam shad and other fish were prevented from passing up the channel of the river above said dam, whereby the citizens above the defendant, on the river, were prevented from catching these fish; that before the erection of this dam these fish were accustomed to ascend for 40 or 50 miles above this point; that the said Yadkin River is an inland stream, 170 yards wide, but not so free, open and deep as ever to have been navigated with steamboats or any sailing vessels, and

navigable only for flats and canoes in crossing; that within the (322) last twenty years, on a few occasions, lime and flour have been carried in flats from a point on said river 35 miles above the defendant's said dam, down to a point some fifty miles below the same; that no tide ebbs or flows in the said river; that the defendant was the owner of the land on both sides of the river at the time said milldam was erected, and hath so continued to be owner thereof up to this time; that he is also the owner of the bed of said river, holding under a grant from the State, dated in 1794, the boundaries of which include his said milldam; that the defendant also holds the land on both sides of the river under grants from the State anterior to 1794, the river being one of the boundaries of said grants, respectively.

Upon this state of facts, the court being of opinion with the plaintiff, in accordance with the verdict, gave judgment against the defendant.

From this judgment, defendant appealed.

Attorney-General, with whom was Boyden, for plaintiff.
B. F. Moore, McLean, and D. G. Fowle for defendant.

BATTLE, J. The act under which the defendant is indicted, after directing, in the first and second sections, that the Peedee and Yadkin rivers shall be opened and kept open for the passage of fish, and prescribing the manner in which it shall be done, declares in the third section "That all persons now having obstructed the passage of fish up the said river (the Yadkin), either by the erection of milldams or dams for any other purposes, or in any manner whatever shall have obstructed the free passage of fish, contrary to the true meaning of this act, and shall fail to remove all such obstructions on or before the first day of March next, or any other person or persons who may hereafter obstruct the said channel by dams, hedges, seines, wire, or in any way or manner, shall forfeit the sum of $15," etc.; and the fourth section makes the offense a misdemeanor, and subject to indictment. Laws 1858, ch. 244. The special verdict sets forth that the defendant had, in 1857, which (323) was before the enactment of the law above referred to, erected a dam entirely across the Yadkin River, from bank to bank, which obstructed the passage of fish up that stream, and had kept up the same for the purpose of supplying water to his grist- and sawmills, until the time when the bill of indictment was found. It states further that he was the owner of the river's bed on which his dam was erected, under a grant for the same from the State, issued in 1794; and also the owner under distinct grants of a prior date of the land on both sides of the river at that place, the river being one of the boundaries of the said grants; that the river is, at that part of it, an inland stream, 170 yards

wide, but above the ebb and flow of the tide, and not so full, open, and deep as ever to have been navigated with steamboats or sailing vessels, but navigable only for flats and canoes in crossing; and that within the last twenty years, on a few occasions, lime and flour have been carried in flats from a point on the river 35 miles above the defendant's dam to another point 50 miles below it.

Upon this statement of facts the indictment presents the question whether the Legislature had the power, under the Constitution of the State and the United States, to compel the defendant to take away, at his own expense, a part of his dam so as to make an opening for the passage of fish, without providing for him an indemnity for the loss which he might thereby sustain.

Every case which calls in question the constitutionality of an act of the legislative department of the Government is necessarily an important one, and the consideration of it ought to be approached and conducted with becoming solemnity and respect. Our predecessors were the first of any judges in any State in the Union to assume and exercise the jurisdiction of deciding that a legislative enactment was forbidden by the Constitution, and therefore null and void. (See *Bayard v. Singleton*, 1 N. C., 5, decided in November, 1789, which was four or five years anterior to the earliest case on this subject referred to by Chan-
(324) cellor Kent, 1 Kent Com., 450.) But while they were the first to vindicate for themselves this important function, they have always exercised it in a spirit of proper deference towards that coördinate branch of the Government upon whose acts they were sitting in judgment. Hence, it has become a settled and invariable rule with the courts of this State never to pronounce an act of the Legislature unconstitutional and void unless there is a clear repugnance between its provisions and the Constitution. *S. v. Manuel*, 20 N. C., 144; *S. v. Newsom*, 27 N. C., 250; *S. v. Matthews*, 48 N. C., 451. It is in this spirit that we propose to consider the question now presented for our decision.

In conducting our inquiry it is first necessary for us to ascertain the true condition and character of the river across the bed of which the defendant's milldam was erected. For this purpose we will go at once to the highest authority on the subject, Lord Hale's treatise *de jure maris et brachiorum ejusdem*, in Mr. Hargrave's edition of it. He says, at page 809: "There be some streams or rivers that are private, not only in propriety or ownership, but also in use, as little streams or rivers *that are not a common passage for the King's people*. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for a man or goods, or both, from one inland town to

another." Again, at page 5, he says: "Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the propriety of the soil, and consequently the right of fishing *usque ad filum aquae,* and owners of the other side the right of soil or ownership and fishing unto the filum *aquae* on their side; and if a man be owner of the land on both sides, in common presumption, he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." From these extracts it appears that "all rivers above the flow of tidewater are, by the (325) common law, *prima facie* private; but when they are naturally of sufficient depth for valuable *flotage,* the public have an *easement* therein for the purposes of transportation and commercial intercourse; and, in fact, they are *public highways* by water." But they "are called public rivers, not in reference to the *property* of the river, for that is in the individuals who own the land, but in reference only to the public use." Angel on Watercourses, sec. 535. With regard to the right of fishing, if a man be the sole owner of the soil over which a watercourse runs, he alone is entitled to the use and profits of the water; but if he be only a riparian proprietor on one side of the stream, his right to the water extends only to the middle of the stream. "Concomitant with this interest in the soil of the beds of watercourses is an exclusive right of fishing; so that the riparian proprietor, and he alone, is authorized to take fish from any part of the stream included within his territorial limits." *Ibid.,* sec. 61.

In England, navigable waters which are *publici juris,* and as such distinguishable from those which we have been describing, are ascertained by the ebb and flow of the tide. This criterion has been held by our courts not to be applicable to the watercourses of North Carolina, and has been long since repudiated. We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not the subject of entry and grant under our entry law, and the rights of fishing in which are, under our common and statute law, open and common to all the citizens of the State. *Wilson v. Forbes,* 13 N. C., 30; *Collins v. Benbury,* 25 N. C., 277; *S. c.,* 27 N. C., 118; *Fagan v. Armstead,* 33 N. C., 438, and *S. v. Dibble,* 49 N. C., 107. In streams not navigable the bed of the river may be, under the general entry law, the subject of a grant to private individual; and the riparian proprietor will be, without an express grant of the bed of the stream, entitled to the propriety of the soil, and the right of fishing *usque ad* (326) *filum aquae. Williams v. Buchanan,* 23 N. C., 535.

It is manifest, from the description of it in the special verdict, that the river Yadkin is not a navigable stream at or near the place where the defendant's dam was built. It certainly was not navigable in fact for sea vessels, and, therefore, is not a watercourse altogether *publici juris*. It is very doubtful whether it can be considered, in its present condition, as so far public that all persons have an *easement* in it for the purposes of transportation and commercial intercourse, for it is said to be "navigable for flats and canoes in crossing; and that within the last twenty years, on a few occasions, lime and flour have been carried in flats" down it from one point to another. In *Menson v. Hungerford,* 6 Barbour (N. Y.), 265, it was held that a stream above the ebb and flow of the tide, which is not navigable for boats or vessels or rafts, is not a navigable stream within the meaning of the authorities, though, when swollen by the spring and autumn floods, it might be capable, three or four weeks in the year, of carrying down in its rapid course whatever might have been thrown upon its waters, to be borne at random over every impediment; but that such a stream was altogether private property. It is unnecessary, however, for us to decide this point, for it is certain that the Yadkin River is capable of private ownership, and that some parts of the bed of the river have been granted to private individuals, and the validity of their titles have been upheld by at least one decision of this Court. *Smith v. Ingram,* 29 N. C., 175. This case relates to the grants of the bed of the Peedee River, but it must necessarily apply to the Yadkin, which is the upper part of the same river.

The principles to which we have adverted will enable us to determine the nature and extent of the defendant's right in the river at the point where his mill and dam are situated. As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an *easement* in the public for the pur-
(327) poses of the transportation of lime, flour, and other articles in flats and canoes. He is also, as such proprietor, entitled to the exclusive right of fishing entirely across the stream; but as the proprietors above him have the same right to catch fish on their soil, his right must be so used as not to prevent a reasonable use of theirs. Hence, he cannot, by force of his riparian proprietorship merely, erect any dam or put any other obstruction in the river so as to prevent altogether the passage of fish up it. The golden rule of the law, *sic utere tuo ut non alienum laedas,* applies to him, and its observance may, no doubt, be enforced by statutory enactments. Hence, the various acts which have been passed by the Legislature from time to time for the last hundred years for the purpose of preventing obstructions to the passage of fish up almost all the rivers and creeks of any size in the State,

and for regulating in other respects the rights of fishing, are not inconsistent with any provision of the Constitution, and have generally been dictated by a sound and correct policy; and of them the defendant, as a riparian proprietor merely, would have no just cause to complain. But he is much more than a riparian owner. He claims under a direct grant from the State for the bed of the river, in which the State, for what she deemed a fair equivalent, conferred on those from whom he derives title the full ownership of the soil, without any reservation whatever, except the right to impose such imposts and taxes as may be necessary for the support of the Government. In the exercise of his power of dominion over the soil, he has erected thereon grist and saw-mills, and a dam which is necessary to supply them with water. Can the State now, by means of a legislative enactment, take from him this property, or do anything to materially impair its value, without making him a fair compensation therefor? It is established by the greatest weight of authority that she cannot do so for any other than a public purpose, either with or without compensation. *Fletcher v. Peck,* 6 Cranch, 128; *Hoke v. Henderson,* 15 N. C., 1; *Stanmire v. Taylor,* 48 N. C., 207. That the requisition made upon the defendant to take away a part of his dam, or to alter it in such a manner (328) as to allow the free passage of fish up the channel of the stream, comes within the same principle of conservative right, seems to be fully established by the ably argued and well considered case of the *People v. Platt,* decided by the Supreme Court of New York in 1819, and reported in 17 John, 195. It was there held that by a patent granted Zepheniah Platt, in 1784, of a tract of land bounded on the east by Lake Champlain and extending west on both sides of the river Saranac, 7 miles square, the whole river to that distance passed to the patentee; and that as there was no reservation of the river, nor any restriction in the use of it, the public had no right of fishing in it, within the bounds of the patent; and that, therefore, the erection of a dam by the patentee, in 1786, near the mouth of the river, by which salmon were prevented from passing up the stream from the lake, was not indictable as a nuisance, neither at common law nor under a statute which enacted that the owners of milldams made across any river running into lakes Ontario, Erie, or Champlain, so as to prevent the usual course of salmon in going up, should, within eighteen months from the passage of that act, so alter the dam by making a slope thereto, that salmon may easily pass up over into the waters above the dam, etc., and, in case such dam should not be so altered, it should be deemed a public nuisance. In delivering the opinion the Court said the statute ought to be construed with an implied exception of such rivers or streams, not being navigable, as had been fully and absolutely granted by the State, without any reservation;

and that so far as it affected the rights of Zepheniah Platt and his assigns, it impaired the obligation of a contract, and was unconstitutional and void. In the New York case, as in the one now before us, *Stoughton v. Baker,* 4 Mass., 522, was strongly pressed in the argument as establishing a different principle, but the Court declined to acquiesce in it as an authority, for the following reasons assigned by *Spencer, C. J.*:

"In that case the Supreme Court of Massachusetts held that a legislative resolution appointing a committee, who were authorized (329) to require the proprietors of certain dams on the Nepsonset River to alter them in such a way as should be sufficient for the passage of shad and alewives at the dams, was a legal proceeding, not repugnant to the Constitution. The opinion is founded on the ancient and long continued usage of the General Court of Massachusetts to appoint commissioners to locate and describe the site and dimensions of passage-ways for fish, and under the circumstances of the case it was held that the right of the proprietor of the dam was subject to the limitation that a reasonable and sufficient passage should be allowed for the fish. The Court, however, expressly say that any prostration of the dam, not within the limitation, would be an injury to the owner for which he might appeal to his country and have a remedy; and that if the Government, in the grant of a mill privilege, expressly or by necessary implication waive this limitation, it would be bound. In the case, then, under consideration, the Court said it would be an unreasonable construction of the grant to admit that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled. Whether, in that case, the Nepsonset River was navigable above the dam is nowhere affirmed or denied; but it is perfectly clear that the Court proceeded on local usages and customs, and not upon the general and received doctrines of the common law; for not a single case is referred to, nor is it even asserted that the principles advanced are sanctioned by the English common law."

In addition to what was said by *Spencer, C. J.,* to weaken the force of *Stoughton v. Baker,* as an authority, it may be remarked that what was said by the Court upon the subject now under consideration was entirely unnecessary for the decision of the cause, as judgment was given for the defendant upon another and distinct ground. It must be admitted, however, that even the dicta of *C. J. Parsons,* when well considered, are entitled to great weight, but as his opinion was founded on local customs and usages, and not upon the principles of the common law, it cannot have any influence upon the question which we (330) are now discussing.

We are not apprised that any principles, other than those of the common law, have ever prevailed in this State in relation to our watercourses. On the contrary, we think, it will be found that our courts have always adopted and applied the principles of the common law to all our waters, so far as they were applicable to the peculiar geographical condition of the State. We have seen that the incidental rights of the riparian proprietors of our unnavigable streams are the same with those in England, and the various acts of the General Assembly which have been passed from time to time for the purpose of keeping open the streams for the passage of fish have done nothing more than recognize those rights and regulate the manner of their enjoyment. From *Hooker v. Cummings,* 20 John, 90, it seems that the same rules prevail in the State of New York.

If our argument has been so far well founded, the conclusion has been established that the defendant's mill property cannot be taken from him, nor its value materially impaired, by any legislative enactment for any other than the public use. Is the right of catching fish, which is incidental to the propriety of the soil, *usque ad filum aquae,* which belongs to the riparian proprietors living above the defendant on the Yadkin River, such an one that its enforcement and protection can be considered a public use? That is a question which it will be unnecessary for us to decide, if we ascertain the law to be that the defendant's interest in his mill cannot be destroyed, taken from him, or materially impaired in value for the use of the public by the Legislature without making him a fair and adequate compensation therefor. Upon this point we have no doubt; and our opinion is that the act upon which the indictment is based is clearly repugnant to our State Constitution, because it not only does not give him any compensation for the damage he may sustain by the destruction of his dam, but actually requires him, under a heavy penalty for failing to comply, to destroy it himself, and at his own expense. The right to compensation for private property taken for public use is expressly provided in the Constitution of (331) the United States, in the last clause of the Fifth Article of the amendments to the Constitution. That clause is in these words: "Nor shall private property be taken for public use without just compensation"; but that has always been understood to be a limitation of the Federal Government, and not of that of the States. *Barrow v. Baltimore,* 7 Peter, 243. There is no such express restriction of the power of the Government to be found in our State Constitution, but it has been generally supposed to exist; and it is strongly intimated in *R. R. v. Davis,* 19 N. C., at page 460, that it may be implied from section 12, Bill of Rights, which declares that "No freeman shall be disseized of his freehold, or deprived of his life, liberty or property, but by the law

of the land." "Under the guaranty of this article (say the Court), it has been held, and, in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another. We doubt not it is also protected from the power of despotic resumption upon legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such acts have no foundation in any of the reasons on which depends the power, in virtue of the right of eminent domain, to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it without compensation. But it is a point on which the Court is not disposed, nor at liberty, to give a positive opinion." The reason why the Court did not give a positive opinion on the subject was that it was unnecessary, because the charter of the railroad company did provide compensation for the defendant and all other persons whose lands were taken for the use of the road; and the Court held that the payment of the land damages, as they were called,

(332) need not precede the occupation of the lands by the company for the purposes of the road. Had the case demanded it, we cannot doubt that the judges who then composed the Court would have decided in favor of the restriction, and in doing so they would have found themselves sustained by similar decisions in many of our sister States. See the cases referred to in Angel on Watercourses, sec. 461, note 2. Our Legislature has always, with very rare exceptions, exercised the power of eminent domain in the just and liberal spirit of providing a fair compensation for private property taken for the public use. This will appear in all the charters which it has granted to railroad and navigation companies and other companies of a like kind. There is a seeming exception to this in the act of 1854, ch. 170, entitled "An act to incorporate the Yadkin Navigation Company," and the act supplemental thereto, passed at the same session, and numbered as ch. 171. The first of these acts provided in sections 11 and 12 for compensations to such persons whose land or other property might be taken for the use of the company; and in section 11 forbade the company from invading the mill house for milldam of any person without his consent; but the supplemental act repealed this part of section 11, and then declared that "The said company shall have full and ample powers to remove all obstructions to the free and convenient navigation of said river, whether the same have been erected by individuals or otherwise exist." This act, we learn, was passed upon the supposition that the only obstructions in the river were put there by the riparian proprietors, which it was

supposed the company created for the express purpose of making the river navigable had the right to remove without making compensation to the owners. It was not then generally known that any person had a grant from the State for the bed of the river in that part of it, as the defendant had not, at that time, erected his dam across the stream. It will be observed that neither the act of 1854, ch. 170, nor the previous ones of 1852, ch. 86; 1850, ch. 115, and 1816 (ch. 930, Rev. Code of 1820), (all of which were passed for the purpose of creating (333) companies to open and improve the navigation of the Yadkin River), professed to declare the river to be a navigable stream, and thereby to make it such in law; as we held, in *S. v. Dibble,* 49 N. C., 107, was done with regard to the river Neuse.

The authorities to which we have referred, and the principles plainly deducible from them, enable us to state the following as a summary of the law of North Carolina in relation to the watercourses of the State:

1. All the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether *publici juris,* and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free. *Collins v. Benbury,* 25 N. C., 277, and the other cases to which we have referred on this point.

Where the tide ebbs and flows, the shore, between the high and low water, is also within the prohibition of private appropriation, under the general entry law, but may be the subject of a direct, special legislative grant. *Ward v. Willis,* 51 N. C., 183.

2. All the rivers, creeks, and other watercourses not embraced in the above description, but which are, in fact, sufficiently wide and deep to be navigable by boats, flats, and rafts, are technically styled unnavigable, and are open to be appropriated by individuals, by grants from the State, under the entry laws. When the bed of the watercourse is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled as an incidental easement, to go to the middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public have in the stream, for water communication, between different points on it. The mode and the extent of the enjoyment of this easement may be regulated by statute, and as the riparian (334) proprietors paid nothing into the public treasury for it, the soil which composes the bed of the river may be granted to others, and the Legislature may, *perhaps,* resume the incidental rights, for the public use, without making compensation for them; though we believe it has often given such compensation. See *Threadgill v. Ingram,* 14 N. C.,

59; *Smith v. Ingram,* 29 N. C., 175, and the various charters granted to companies for improving the navigation of nearly all our largest rivers.

3. All the rivulets, brooks, and other streams which, from any cause, cannot be used for intercommunication by inland navigation are entirely the subjects of private ownership, are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling, or other lawful trade or business. The only restriction upon this right of ownership arises *ex necessitate* from the nature of running water, and it is that the owner shall so use the water as not to interfere with the similar rights of other proprietors above or below him on the same stream. See *Pugh v. Wheeler,* 19 N. C., 50. Rights acquired in streams of this class by grants from the State, or, in watercourses of the second class, by grants from the State for the bed of the stream, cannot be taken from the owners by the Government except in the exercise of the power of eminent domain, and then only for public use, with a provision for the just compensation. *R. R. v. Davis, supra.*

Believing that the act of the General Assembly under which the defendant is indicted, so far as it affects him, is unconstitutional and void, we must direct that the judgment rendered against the defendant be reversed, and a judgment rendered for him.

PER CURIAM. Reversed.

Cited: Cornelius v. Glenn, post, 514; *Gatlin v. Walton,* 60 N. C., 334; *Johnson v. Rankin,* 70 N. C., 555; *S. v. Pool,* 74 N. C., 405; *S. c.,* 75 N. C., 602; *Walton v. Mills,* 86 N. C., 282; *Hodges v. Williams,* 95 N. C., 334; *S. v. Narrows Island Club,* 100 N. C., 482; *S. v. Lyle, id.,* 501; *Staton v. R. R.,* 111 N. C., 555; *Staton v. R. R., id.,* 283; *Gwaltney v. Timber Co., id.,* 570; *S. v. Eason,* 114, N. C., 791; *Comrs. v. Lumber Co.,* 115 N. C., 596; *S. c.,* 116 N. C., 732, 733; *McLaughlin v. Mfg. Co.,* 103 N. C., 105; *Staton v. Wimberly,* 122 N. C., 111; *Wilson v. Jordan,* 124 N. C., 709; *Hutton v. Webb, id.,* 754; *Greene v. Owen,* 125 N. C., 214; *Rowe v. Lumber Co.,* 128 N. C., 303; *S. v. Baum, id.,* 605; *Hutton v. Webb,* 126 N. C., 904; *Phillips v. Telegraph Co.,* 130 N. C., 520; *Dargan v. R. R.,* 131 N. C., 629; *Land Co. v. Hotel,* 132 N. C., 531; *S. v. Sutton,* 139 N. C., 578, 579.

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MEMORANDA.—Since last term, the Hon. Thomas Ruffin resigned his seat as a judge of this Court, and the Hon. Matthias E. Manly was appointed by the Governor and Council in his place.

George Howard, Esq., of Wilson, was appointed by the Governor and Council judge of the Superior Courts, in the place of Judge Manly, resigned.

James W. Osborne, Esq., of Charlotte, was appointed by the Governor and Council judge of the Superior Courts in the place of Hon. David F. Caldwell resigned.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1860

CHARLES LATHAM v. MONTREVILLE BOWEN.

1. Registration of a marriage settlement, embracing the slaves of a *feme*, was *Held* to be properly made in the county where the *feme* resided and the slaves were at the time the instrument was executed.

2. Where a deed of marriage settlement was attested by two subscribing witnesses, and an order of registration was made by a judge on the oath of one who added his name to the number of subscribing witnesses on the acknowledgment of the woman after marriage, it was *Held* that this was a sufficient compliance with the formal requirement of the statute, but that on a trial about the property conveyed, the deed had to be proved by the other subscribing witnesses.

3. Where the probate of a deed and an order of registration are regular on its face, it cannot be vitiated by going behind it and showing that the witness on whose oath it was made was incompetent.

TROVER for several slaves, tried before *Dick, J.*, at last Spring Term of WASHINGTON.

In June, 1859, Thomas Wynne intermarried with Sarah (338) Slaughter, but before the marriage they executed to the defendant, in trust for the separate use of the wife, a deed of marriage settlement, conveying all her estate, which consisted of slaves, to the defendant. The deed was executed by the parties previously to the marriage; by the defendant Bowen in the presence of one Bennett, a subscribing witness, and by the others in the presence of A. G. Britt, who also became a subscribing witness. After the marriage the deed was acknowledged by all the parties in the presence of H. A. Gilliam, who then became a subscribing witness, and upon his oath before a

judge of the Superior Court it was ordered to be registered, and was registered in the office of the county of Hertford within six months after its execution.

Sarah Slaughter was under age at the time of her marriage, and lived in the county of Hertford. Wynne, the husband, had up to the marriage resided and done business in Hertford, but the defendant Bowen resided at that time in Washington County, and immediately after the marriage the husband and wife removed to the county of Washington, where they continued to reside, boarding with the defendant Bowen till the bringing of this suit.

The plaintiff was the sheriff of Washington County, and having in his hands executions against the husband, Thomas Wynne, levied the same on certain slaves (the subject of this controversy) as the property of the husband. These slaves had been conveyed to the defendant in the deed of marriage settlement, and having afterwards come to the hands of the defendant, he refused to let the plaintiff take them. Thereupon this action was brought, and the only question before this Court is whether the deed of marriage settlement had been proved and registered within the six months prescribed by the act of Assembly. It was agreed that a verdict should be taken, subject to the opinion of the court upon the point of law, with power to order a nonsuit in case he should be in favor of the defendant.

The court, on consideration of the point reserved, nonsuited (339) the plaintiff, who appealed.

P. H. Winston, Jr., and W. N. H. Smith for plaintiff.
H. A. Gilliam, Donnell, and W. A. Moore for defendant.

PEARSON, C. J. The case depends upon the sufficiency of the registration of the deed under which the defendant claims.

Two objections are made to it: 1. "It ought to have been registered in the county of Washington." We think it was properly registered; in the county of Hertford because Mrs. Wynne, who conveyed the slaves in trust for herself, resided in that county at the date of the execution of the deed, and the slaves were hired out in that county by her guardian. *Marriage settlements* are required to be registered, "in the same manner as deeds for lands," within six months. Rev. Code, ch. 37, sec. 24. Where a slave is the subject of a settlement, this reference to deeds for lands is not apposite, but still the statute so provides, and the construction must be—in the county where the property is situate, as in the case of deeds for land. If an analogy be drawn from the other sections of the statute, as this deed was for the benefit of the maker, it resembles more a deed of trust or mortgage than a bill of sale for valuable consideration, and

section 22 requires the former to be registered in the county where "the donor, bargainor, or mortgagor resides," while section 20 requires the latter to be registered in the county where the purchaser resides. So, both in reference to the county where the property was situate, and where the maker of the deed, who was entitled to the beneficial ownership, resided, Hertford was the proper county.

2. "As Gilliam did not attest the deed until after the marriage, he was not a subscribing witness in respect to Mrs. Wynne, within the meaning of the statute, and therefore the probate by him did not support the order of registration."

We admit the proposition, but do not concur in the conclusion drawn from it. Had there been no subscribing witness at the time the deed was executed, we conclude it would have been inoperative; but as there was two such witnesses, and they proved its execution (340) on the trial, we think it passed the title, and that the registration was sufficient. The argument urged against it was this: A married woman has not capacity to execute a deed; therefore, she has not capacity to acknowledge the execution of one. If the purpose of the acknowledgement was to give legal existence to the deed, or to add in any way to its legal effect, this would be a logical conclusion; but where there has been a complete execution of the deed before marriage, it is a *non sequitur* that she has not capacity to acknowledge its previous execution. It is true, a wife cannot give evidence for or against her husband, and, as a general rule, her declarations or admissions cannot be given in evidence for or against him, as if he be sued for a trespass committed by her, or slanderous words which she may have uttered, her subsequent admissions, we presume, would not be evidence against him; but that is a different question from the one now before us. As respects the husband, the acknowledgment of the wife was made in his presence, and by his consent, and, as respects her, it was, obviously, on the side of her interest, which repels all idea of restraint, and the question is, simply, when a deed has been duly executed, may not a wife, in the presence of the husband, acknowledge its execution for the mere purpose of registration, in order to save the trouble and expense of sending for the subscribing witnesses? We can see no objection to it, and in the absence of authority, must conclude there is none; for, assuming the deed to have been duly executed before the marriage (as was proved in this case), the title had passed, so that the husband had no interest, and the law does not presume that a woman loses her memory by getting married. A wife has capacity to make a will of personalty, with the consent of her husband; so she may convey real estate, a privy examination being required to guard against constraint;

and if a woman, before marriage, execute a deed for land, we suppose she may, after marriage, acknowledge its execution, at least for
(341) the purpose of registration, without a privy examination. Her incapacity to make a contract, except as the agent of her husband, or to convey personal estate, arises from the fact that all of her rights are vested in him, and she has no property of that kind to deal with. But there is another ground in support of the registration, which seems to be conclusive. If a deed be put on the books of the register without probate and an order of registration, it amounts to nothing. *Williams v. Griffin,* 4 N. C., 31. But if there be a probate and order of registration by competent authority, and the proceeding upon its face is regular and in due form, the registration is valid, for the mere purpose of registration, although the witness who proved the execution of the deed was incompetent. *McKinnon v. McLean,* 19 N. C., 79. This decision is put on the ground that such registration gives the notice designed for creditors and purchasers, and as every object of the law is answered, a proceeding before competent authority and in due form ought not to be vitiated by proof, *aliunde,* of a fact which shows the proceeding to have been erroneous, provided the execution of the deed be proved at the trial.

In our case everything is regular on the face of the proceeding, and on the authority of *McKinnon v. McLean,* we are of opinion that the registration cannot be vitiated by going behind it and proving a fact from which it appears the witness Gilliam, although a subscribing witness according to the face of the paper, was not so within the meaning of the statute. Of course, the principle is confined to the mere act of registration, and cannot be extended so as to allow a deed to be read in evidence at the trial without proof of its execution.

Carrier v. Hampton, 33 N. C., 307, does not conflict with *McKinnon v. McLean,* or with the decision in this case, for the opinion that the registration of the deed in that case was insufficient is put on the ground that the defect in the probate appeared on its face; and supposing the registration to be sufficient in respect to the mere ceremony of
(342) registration, as the object of giving notoriety was answered, still such registration was not sufficient to dispense with proof of the execution of the deed at the trial.

PER CURIAM. Affirmed.

Cited: Holmes v. Marshall, 72 N. C., 40; *Mabe v. Mabe,* 122 N. C., 555.

BENJAMIN S. SKINNER v. THOMAS NIXON.

The commissioners ordered under the act, Rev. Code, ch. 40 (on the subject of drainage), constitute a separate and distinct tribunal and an appeal (generally) from the county to the Superior Court is not an appeal from the report of such commissioners so as to vacate it.

PETITION for a drain or canal, tried before *Dick, J.,* at last Spring Term of PERQUIMANS.

The petition set forth that the plaintiff is the owner of a tract of land adjoining that of the defendant, and that it is overspread with water so as to be unfit for cultivation without the removal of it by means of a drain or canal; that this cannot be effected by any ditch or canal which can be made on his own land, but only by means of such a work over the land of the defendant, which lies below that of the plaintiff, in the course of the natural flow of the water, and he prays that commissioners may be appointed to view the premises, report on the facts alleged, and designate a route for such a drain. On the return of the petition to the County Court of Perquimans, to which the proceeding was instituted, the court made an order for commissioners, who went upon the premises, and at the next term made a report, finding the facts to be as alleged in the petition, and describing a route over the defendant's land for the proposed drain.

The report of the commissioners was, on motion, affirmed in the county court, and the defendant appealed to the Superior Court of that county.

In the Superior Court his Honor heard testimony on both (343) sides as to the facts. The defendant's evidence tended to show that the natural flow of water was not over his land, and that the plaintiff had it in his power to make a good and sufficient drain over his own land without resorting to that of the defendant.

On hearing the evidence the Superior Court affirmed the judgment of the county court, and the defendant appealed to this Court.

In this Court a motion was made in arrest of the judgment, upon the ground that the appeal from the county to the Superior Court vacated the report of the commissioners, and that new commissioners should have been appointed in the latter court, and the facts found *de novo.*

H. A. Gilliam and Johnson for plaintiff.
Hines and Jordan for defendant.

PEARSON, C. J. In the Superior Court the defendant resisted the confirmation of the report of the commissioners on the ground that the petitioner could drain his land by cutting a ditch on his own land,

without crossing the land of the defendant, and on the same ground moved to dismiss the petition. This raised a question of fact, which his Honor undertook to decide, and, thereupon, witnesses were examined by him, and in the case made up for this Court the testimony of the witnesses on both sides is set out.

It is clear this Court cannot review the decision of his Honor in respect to the question of fact, and if we were confined to the points taken before him, it would follow that the judgment must be affirmed. But in this Court the defendant's counsel moved in arrest of the judgment on the ground that the appeal from the county court vacated not only the judgment, or order of confirmation made by that court, but likewise the report of the commissioners; so that in the Superior Court there was nothing to act on, and it became necessary to proceed *de novo,*

(344) by the appointment of commissioners, who should make a report upon which the court could act, on the same principle which applies to appeals in ordinary cases, where the court does not give judgment on the verdict in the county court, but the trial is *de novo.*

The motion presents this question: Is the appeal allowed merely in respect to the action of the court, or is it also allowed in respect to the action of the commissioners? And this depends upon whether the commissioners constitute an integral part of the court, as the jury does in the trial of ordinary cases, or form a separate and distinct tribunal, whose action is made subject to the control of the court, provided good cause can be shown against it; for if it be a separate and distinct tribunal, although the county court is authorized to control it by passing on the question whether good cause is or is not shown against its action, an appeal would only have the effect to vacate the judgment of the county court with respect to the question which was before it, and carry up that question for the decision of the Superior Court, leaving the report of the commissioners open to be set aside or confirmed by the county court upon a writ of *procedendo,* according to the opinion of the Superior Court.

That the commissioners do form a separate and distinct tribunal is settled upon the construction of the statute as it formerly stood in Rev. Stat., ch. 40; *Collins v. Haughton,* 26 N. C., 420; *R. R. v. Jones,* 23 N. C., 24; *Stanly v. Watson,* 33 N. C., 124. So the question is narrowed to this: Does the statute, as reënacted in Rev. Code, ch. 40, change the character of the commissioners, so as to put them on the footing of an ordinary jury, whose province is, as an integral part of the court, to decide "issues of fact," or do they still form a separate and distinct tribunal?

This statute is much amplified in the Revised Code by going into many details, and being made to embrace embankments against in-

undation, as well as ditches and canals for draining. But in respect to the commissioners, the provisions are substantially the same. The number is changed from twelve to seven, and a majority are authorized to act, which, if it affects the question at all, seems (345) to depart from the idea of an ordinary jury, but the main provisions are unchanged, viz., the commissioners are to be *selected by the court,* not to be summoned by the sheriff upon a *venire,* and the commissioners are to *"determine* and *report* whether the land can be conveniently drained," etc. They are also to "decide and determine the route of the canal," etc. These enactments, taken in connection with the fact that the courts had put a construction upon them in the Revised Statutes, establish so conclusively that it was the intention of the Legislature to use them in the same sense that it would seem nothing short of a direct and express provision to the contrary could justify a different construction.

The counsel for the defendant, in support of his position, relied upon these words, "unless good cause be shown to the contrary," which, in the Revised Code, are added to the provision requiring the commissioners to report the whole matter to the court, who shall confirm the same, but are not expressed in the Revised Statutes. The whole force of this suggestion is met by the fact that, in the cases above cited, the Court assumes that these words are implied in the Revised Statutes from the provision which requires the commissioners to report the whole matter to the court, and makes the report subject to the confirmation by the court, so that in construing the statute, the court considers these words as understood, and all that is done in the Revised Code is to express the very words which the courts had said were implied, thereby presenting matter for the action of the county court, which was subject to be reviewed in the Superior and Supreme Courts—not by way of *unlimited appeal,* which would vacate as well the report of the commissioners as the judgment of the county court, and make it necessary for the Superior Court to proceed *de novo,* but by way of a writ of *certiorari,* in the nature of a writ of error, which would be in effect a *limited* appeal—in other words, an appeal restricted to the questions which the county court were authorized to pass upon, leaving the report of the commissioners open to be confirmed or set aside, according (346) to the decision reviewing the action of the county court.

The counsel for the defendant, in support of his position that the Revised Code changed the character of the commissioners, also relied on the words used in section 15: "Where either party shall appeal to the Superior or Supreme Court, the cost of the appeal shall be paid as the court may direct." This certainly does assume that there is the right of appeal, and if there was no other mode of appeal known to our

laws but an unlimited one, which vacates all that had been previously done, and puts the matter in the court appealed to, to be proceeded on *de novo,* it would be difficult to resist the conclusion that it was the intention of the Legislature to change the character of the commissioners from that of a separate and distinct tribunal and put it on the footing of a jury, so that there report, like a verdict, should be vacated by the appeal. But the cases before cited show that there are different modes of appeal known to our law, viz., an unlimited appeal, which vacates all that had been previously done, and a limited appeal, or a proceeding in the nature of an appeal, which brings up only questions of law, leaving what had been determined in regard to questions of fact open to be acted on, or set aside, according to the decision of the higher tribunal; and besides the consideration that it can hardly be supposed that it was the intention to make so material a change by a mere incidental provision in respect to the question of costs, there is the further consideration that no provision is made as to the manner of proceeding in the Superior Court, on the supposition that the matter is there to be tried *de novo.* Is the judge to hear testimony and decide matters of fact as well as of law, as his Honor did in this case? Or is he to have a jury impaneled? Or is he to appoint commissioners, who are to go on the premises? As this proceeding is not according to the course of the common law, in the absence of directions as to the mode of proceeding, it would obviously be impracticable for the Superior Court to entertain and dispose of an unlimited appeal; so the conclusion
(347) is irresistible that the appeal referred to is one of a limited kind, bringing up only the questions of law decided by the county court on the question of confirming the report of the commissioners. This view of the question is supported by the fact that the appeal to the Superior Court is connected with and treated as standing on the same footing as the appeal to the Supreme Court, in which latter case the appeal is limited and restricted to the questions of law, so as not to vacate any other part of the proceeding, except that involved in the action of the court as distinguished from the action of the commissioners.

There is no error. This will be certified to the Superior Court, to the end that a writ of *procedendo* may issue, directing the county court to confirm the report. The defendant must pay the costs in this and the Superior Court.

PER CURIAM. Affirmed.

Cited: R. R. v. Ely, 95 N. C., 80; *Porter v. Armstrong,* 134 N. C., 451.

WILLIS S. GRANDY v. JOSEPH McPHERSON.

1. The return made by a constable on the back of an execution is evidence of the fact of a levy, and of the time when it was made.
2. What was said by a constable at the time of making a levy, as to the fact of the levy, was *Held* to be evidence, as part of the *res gestæ* and as corroborative of the evidence afforded by the return.

TROVER for the conversion of a negro woman and her child, tried before *Dick, J.*, at last Spring Term of CAMDEN.

The plaintiff claimed title to the slaves in question, by purchase from one Thomas F. Grandy, and produced a bill of sale, dated 14 February, 1859, purporting to convey the mother to the said plaintiff, the child being born afterwards.

The defendant was a constable in the county of Camden, and (348) had in his hands various executions from a magistrate against the property of Thomas F. Grandy, which had been delivered to him on 20 January, 1859, and on which were entered levies on the female slave in question, dated 28 January, 1859. The property was sold under these executions, and this suit was brought for that act. The question was whether the levy and sale were valid, and particularly whether the levies were made as alleged by the defendant before the bill of sale to plaintiff.

The entries on the back of the executions were objected to as evidence for the defendant, but were admitted, and plaintiff excepted.

One McCoy testified that the slave in question stayed in a cabin on his land, and that he saw the defendant go to this cabin, and when he came to him where he was in his field he told him he had levied executions on the said woman; that she was too far gone in pregnancy to remove her then, and engaged him to take care of her until he could remove her, which he did in March, still previously to the birth of the child; that while the woman remained in the cabin, he had charge of her as defendant's agent. These conversations with the witness McCoy were objected to, but admitted by the court, and the plaintiff again excepted.

The court instructed the jury that the entry on the back of the executions by the defendant of a levy on the property in controversy, together with the testimony of McCoy, if believed, was evidence to go to the jury that the levy was made as alleged by the defendant; that this return was on oath; that it was but *prima facie* evidence, and liable to be rebutted; that if they believed the defendant had the executions in his hands, or any one of them, and had levied the same on 28 January, 1859, the day on which he returned that he had made the levy,

the plaintiff would not be entitled to recover; but if they did not so believe, the plaintiff would be entitled to recover.

The plaintiff's counsel asked the court to instruct the jury that although the defendant did have the executions in his hands on
(349) 28 January, 1859, yet, if he did not levy them on that day, the plaintiff would be entitled to recover; and further, to instruct the jury that there was no evidence apart from the entry by defendant himself to prove that the levy was made on 28 January, 1859. The court declined to give the instructions asked for, and plaintiff again excepted.

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

Johnson and W. A. Moore for plaintiff.
Hinton, Hines, and Jordan for defendant.

MANLY, J. The case does not disclose any error of which the appellant has a right to complain.

The exception first in order, upon the admissibility of a conversation between the witness McCoy and defendant, is untenable. The point then under investigation was the alleged levy upon the slave on 28 January. McCoy testified that he saw the defendant go to the cabin where the woman was about that time, and that he came thence to witness in the field, and engaged him to take the custody of her. The visit to the woman's cabin, and the contract with the witness for the future care of her, were facts fit and proper to be proved. The latter could only be proved by the words used between the parties, and the former would be shorn of much of its significance and weight unless accompanied by the declarations explanatory of its object. The whole conversation, therefore, between defendant and witness McCoy was competent as a part of the *res gestæ*.

The return of the constable, as endorsed on the executions, is evidence in his behalf, rebuttable by proofs to the contrary. It is made under oath, is the memorandum of an official act, made in the appropriate place, and supposed to be contemporaneous with the act itself, and is therefore, according to well settled analogies, evidence, of neces-
(350) sity. It is, in the case before us, as held by the judge below, *prima facie* evidence.

In this connection, another ground is suggested upon which the conversation of the officer with the witness McCoy is admissible. If it be rejected as a part of the *res gestæ*, it is, nevertheless, admissible simply as hearsay, to corroborate the return, by showing that the officer has been uniform in the testimony he gives. This is in accordance with a well established exception to the general rule excluding hearsay.

The entire instruction given by the court below to the jury is free from any just ground of exception. The first branch of the instructions asked for was properly refused, because it had already been substantially embraced in the charge. The court is asked to declare, if the executions were in the officer's hands, but not levied on the day named, the plaintiff would be entitled to recover, when they had just been told that if the officer had the executions, or any of them, and levied on the day, and subsequently sold to satisfy, plaintiff would not be entitled; *otherwise he would.* This was sufficiently explicit, and excluded any idea that the defense would be made good except by an execution *levied* prior to the date of plaintiff's bill of sale.

With respect to the second branch of instructions asked for, that is, that there was no evidence of the levy save the return endorsed by the defendant himself, what has already been said touching the admissibility of the declarations of the defendant in the field will show why it was proper to refuse this also. The declarations in question, the arrangement for keeping the woman and the contemporaneous visit to her cabin, were all proper to be considered in confirmation of the return.

PER CURIAM. No error.

Cited: Simon v. Manning, 99 N. C., 330.

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NATHAN NEWBY v. MOSES JACKSON.

In an action of trespass *vi et armis*, for killing plaintiff's slave, where it had been proved that the defendant shot some one in the night-time, near a particular spot, at a stated hour, and the plaintiff's slave was found about that time, near the place, badly wounded with gunshot, it was *Held* competent to show that there was no rumor or report in the neighborhood that any other person had been shot about that time and near that place.

TRESPASS *vi et armis,* tried before *Dick, J.,* at last Spring Term of PASQUOTANK.

It was proved that on the night of 22 September, about the hour of 2 o'clock a. m., the defendant shot a person near the shelter of one E. Leigh, in the county of Perquimans, whom he supposed to be a certain runaway slave named Tony; that he first hailed the person shot, and commanded him to stop, which he refused to do; that the person alluded to was shot about three-fourths of a mile from the residence of the plaintiff; that it was so dark as to make it impossible to distinguish one per-

son from another; that about 4 o'clock of the same morning the overseer of the plaintiff was aroused, and found the boy Jeff (the slave in question) badly shot in the back part of the left thigh, just above the knee joint; that on the next morning the premises of Leigh, and the neighboring swamps, were searched for the wounded person, but no trace of any one could be found; that on the same day the defendant remarked to the overseer that "he understood one of Newby's negroes was shot," to which the other replied, "Yes, and badly shot." To this the defendant rejoined that "he shot him, but supposed he was a runaway; that he hailed him, but he ran the faster, and that when shot, he never saw a negro jump so high in his life."

The plaintiff's counsel then asked the witness whether he had heard of any other person being shot in the neighborhood and at that time, which was objected to and ruled out. Plaintiff excepted.

It was in proof that the slave died of the injury received, in a few days thereafter.

Verdict for the defendant. Judgment, and appeal by the (352) plaintiff.

Hinton and Hines for plaintiff.
Jordan for defendant.

PEARSON, C. J. It being admitted that the defendant, about 2 o'clock at night, had shot a negro who was running from him, the fact that about two hours afterwards, and within three-quarters of a mile of the place, a negro of the plaintiff was found who had been recently badly injured with a gunshot wound in the back part of his leg, as it seems to us, raised a *violent presumption* on which the jury ought to have acted, in the absence of any evidence to weaken or rebut it, that this was the negro who had been shot by the defendant; and we at first inclined to the opinion that the exception of the plaintiff, because of the rejection of the negative evidence which he wished to offer, could not be sustained, on the ground that it was uncalled for, and had no bearing on the matter at issue. But the question presented a different view when our attention was called to the fact that the jury had, by a verdict which his Honor permitted to stand, refused to draw the inference from the facts above stated that the defendant had shot the negro of the plaintiff.

The inference was susceptible of being weakened by positive proof, as if the defendant had proved that just after he shot, another negro was found injured by a gunshot wound at the place where he shot, or in the swamp, which was not far off; so it was susceptible of being strengthened by negative proof, as that upon search being made no

wounded negro was found near the place or in the swamp. Proof to this effect was received, and the question is, Was it not admissible to carry it further by asking the witnesses if they knew that any other negro had been shot in that neighborhood on that night, and, if they did not know it, "had they heard that any other person was shot in that neighborhood on that night?" We are satisfied that negative proof of this kind was calculated to make a jury adopt the inference more readily. (353) Upon what ground, therefore, was it proper to reject it?

The defendant's counsel insisted that it was properly rejected because it is a species of hearsay or second-hand evidence.

That position is not true. The fact that the witness did not know of any other person having been shot in that neighborhood on that night, that there was no rumor to that effect, and that the witness had not *heard* of any other person having been shot on that night, was certainly primary, and not secondary, evidence; for the point was, had he heard of any such occurrence, and not whether what he may have heard was true or untrue. By way of explanation: Suppose the *defendant* had asked the witness, "Did you not hear A, say that his negro was shot on that night." This would be excluded as hearsay or secondary evidence, for the object being to prove, not merely that A. had said so, but that in point of fact the negro of A. was shot, so as to weaken the inference that the negro who was shot by the defendant was the plaintiff's negro. The testimony of A. would be required as the primary evidence of the truth of the fact, and what the witness had heard A. say would be but hearsay or secondhand evidence; for like the copy of a deed, it presupposes that better evidence exists, and the failure to introduce it casts a suspicion upon that whereto it is offered as a substitute. But in our case the question whether there was any rumor, or whether the witness had heard that another person had been shot on that night, so far from presupposing that better evidence of the fact existed, assumes that such was not the fact, and of course there could be no evidence of it—the object of the evidence being simply to aid the inference that the negro who was shot by the defendant was the plaintiff's negro, by excluding even a conjecture that it was some other negro by the substantive and primary fact that the witness had not heard that any other person had been shot on that night, which it had a tendency to do; in the same way as the fact that, upon search being made, no other negro was found near the place or in the swamp. As a parallel case, the fact that a resi- (354) dent of a town did not know of and had not heard of any smallpox in that town would be primary and, in our opinion, admissible evidence to support a negative allegation that the smallpox did not prevail in that town.

We are satisfied that the evidence ought not to have been rejected on the ground of its being hearsay or second-hand, and as no other ground was suggested by the learned counsel, and no authority was cited to show that it was inadmissible, we are of opinion that it ought to have been admitted. There must be a

PER CURIAM. *Venire de novo.*

Cited: Horton v. Green, 66 N. C., 599.

JOHN L. BURDEN v. RICHARD T. HARMAN.

1. A right of appeal exists under the statute in the case of a petition for a cartway.
2. In ordering the laying out of a cartway it is the duty of the court, in its judgment, to fix both the *termini* of such way.

PETITION for a cartway, tried before *Dick, J.,* at last Spring Term, of BERTIE.

The petition in this case was filed in the County Court of Bertie, and brought to the Superior Court by appeal. The prayer of the petition is for a jury to lay off a cartway over the lands of the defendant, leading to the fork of the Conaritsa and Snakebite roads, at Thomas Rice's. The judgment in the Superior Court, to which the case came by appeal, is as follows: "It is ordered by the court that a jury be summoned, who shall lay off a cartway, beginning at plaintiff's house, across the land of the defendant, in the direction of Rice's Cross-Roads, and report to the next term."

It appeared from the statement of the case forwarded by his Honor that the lands of other persons laid between the land of the
(355) defendant and the station at Rice's, and that these persons were not made parties to the case. The court, on argument and proofs as to many facts raised between the parties, granted the foregoing order, from which the defendant appealed.

In this Court a motion was made to dismiss the appeal.

Winston, Jr., for plaintiff.
Garrett for defendant.

BATTLE, J. The objection made by the plaintiff's counsel, that no appeal lies from the County to the Superior Court on a judgment given

in a petition for a cartway, is clearly untenable. It was settled to the contrary, *Ladd v. Hairston,* 12 N. C., 368. No appeal was expressly given in such a case by the original act of 1798 (ch. 508, Rev. Code, of 1820), and none is now so given by Rev. Code, ch. 101, sec. 37; but in the case referred to it was held that when the person over whose land the cartway was sought to be laid out came in, upon notice, and was made a party defendant to the petition, he was entitled to appeal under the general law 1777 (ch. 115, sec. 75, Rev. Code of 1820), which is re-enacted almost in *totidem verbis* by the last Revised Code, ch. 4, sec. 1.

Upon the merits of the case it is manifest that the judgment of the Superior Court cannot be sustained. In petitions for a private cartway, as in those for a public road, it is the exclusive province of the court to fix the *termini* of the way or road, leaving to the jury the exclusive province of laying out the route of such way or road between those *termini.* See *Welch v. Piercy,* 29 N. C., 365. That was a petition for a public road, but the principle decided applies with equal force to the case of a private cartway. The judgment in the present case fixes one only of the *termini,* leaving the other entirely indefinite. The way is to start from the house of the petitioner, and is to go in the direction of Rice's Cross-Roads, but whether it is to go it, or stop short of it, does not appear. The reason why the judgment is thus imper- (356) fect, we learn from the statement of the case, is that the way, if laid out over the land of the defendant only, will not reach any public road, the land of another person not before the court being interposed. The court has no power to order the laying out of a cartway over the land of another, to stop in the woods. The petition ought to have stated the lands of all the persons over which it was intended to pass, and, by notice, to have made the owners parties, and then a proper judgment might have been given fixing the *termini,* and ordering a jury to lay out the route in such a manner as might be most convenient and proper for all the parties.

The judgment given was erroneous, and must be

PER CURIAM. Reversed.

Cited: McDowell v. Asylum, 101 N. C., 659.

JAMES K. MELVIN v. HENRY EASLEY.

The sale, privately, of a horse on Sunday by a horsedealer to one knowing of the calling of the seller, was *Held* (BATTLE, J., *dissentiente*) not to be such a violation by the buyer of ch. 118, sec. 1, Rev. Statutes, as to prevent him from recovering in an action for a deceit and false warranty against the seller.

CASE for deceit and false warranty on the sale of a horse, tried before *Person, J.*, at Spring Term, 1857, of NEW HANOVER.

The plaintiff gave in evidence a paper-writing acknowledging the receipt of the purchase money, and warranting the horse in question to be "sound and healthy," which was dated 8 January, 1849, and witnessed by a subscribing witness. It was proved that the sale of the horse took place on the day preceding that set forth in the writing, to wit, on Sunday, the 7th of that month, when the animal was delivered.

There was much evidence tending to show the unsoundness of the
(357) property at the time of the sale, all of which, with the instruction of the court on that point, was submitted to the jury without exception. There was evidence that Easley, the defendant, came to the house of the plaintiff's mother on Saturday night, and that the sale took place next morning just after breakfast, also; that the defendant said, in the hearing of the plaintiff, that he was a horse trader. There was no evidence that the plaintiff and defendant were known to each other before the time spoken of.

The defendant's counsel asked the court to instruct the jury that if they should find that the ordinary calling of Easley was that of a horse trader, and the plaintiff knew it, and the horse was sold on Sunday, the plaintiff could not recover.

The court declined giving the instruction asked, and the defendant excepted.

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

E. G. Haywood and Baker for plaintiff.
Troy and London for defendant.

PEARSON, C. J. The defendant sold a horse to the plaintiff with a warranty of soundness which was false. The sale was made on Sunday, in the country, no one being present except the parties and a witness. The defendant was a horse trader, which was known to the plaintiff. The question is, Can the defendant defend the action because the sale was on Sunday?

The defense was put on the statute, Rev. Statutes, ch. 118, sec. 1: "That all and every person and persons whatsoever shall, on the Lord's day, commonly called Sunday, carefully apply themselves to the duties of religion and piety, and that no tradesman, artificer, planter, laborer, or other person whatsoever shall, upon the land or water, do or exercise any labor, business, or work of their ordinary callings (works of necessity and charity only excepted) on the Lord's day aforesaid or any part thereof, on pain that every person so offending, being of the age of 14 years and upwards, shall forfeit and pay the sum of $1." This statute is taken from 29 Car. II., ch. 2, sec. 1, which was (358) enacted in this colony in 1741, and reënacted after the adoption of the Constitution. My opinion is that the defense cannot be supported, and I put it on two grounds:

I do not believe the plaintiff comes within the operation of the statute. Buying horses was not his "ordinary calling," so the statute does not prohibit him from doing so, or impose any penalty upon him.

I admit that if a shop is kept open on Sunday, or goods are sold at auction, the price cannot be recovered. I also admit, for the sake of the argument on this view of the case, that the defendant could not maintain an action for the price of the horse. It is said the plaintiff knew the defendant was a horse trader and concurred in his violation of the statute, and consequently was *particeps criminis*. Does this consequence follow? In crimes there are accessories; in misdemeanors, all who aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subject to a penalty, so he cannot be *parteceps criminis* in the legal sense of the terms. He is not in *pari delicto*, and it is against the policy of the law, and will defeat its object so to consider him. The Court will not aid any person who violates the law; therefore, the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and if confined in its operation to the actual offender its application will be salutary, but if it be extended to the party who is not an offender, so far from checking, it will encourage a violation of it, by letting it be known to "horse traders," "shopkeepers," and "all whom it may concern," that they may *cheat with impunity*, provided, always, it may be done on the *Lord's day!!* They will readily purchase "this indulgence and dispensation" by paying "one dollar," if it should be sued for.

If it be said this will prevent people from trading with them, (359) the reply is, that is not the object of the statute, but to prevent "tradesmen," "artificers," etc., from exercising their ordinary callings on Sunday, etc., so this action of the court shifts the operation

and fixes the burden on those not included, to the encouragement of those who are included in the prohibition, and upon whom, *alone,* the penalty is imposed.

Our attention was called in the argument to a remark of *Bailey, J.,* in *Bloxome v. Williams,* 3 Barn. & Cres., 232 (10 E. C. L., 60). In that case the plaintiff did *not know* that the defendant was a horse-dealer, and it is held that he could recover, and the learned judge incidentally says: "If the plaintiff had known the defendant was a horse-dealer, such knowledge of the illegality of the contract would have prevented him from maintaining the action." This was a mere *dictum,* not even called for in aid of the argument. I cannot suppose that the learned judge took time to consider of it, for he overlooks the fact that the prohibition and the penalty apply to the *defendant only.*

In the second place, I do not believe a contract like that under consideration comes within the operation of the statute. A contract made on Sunday may be enforced by an action at common law. This is settled, *Drury v. Defontaine,* 1 Taunton, 130, in which it is decided that one whose ordinary calling was to sell horses at auction may recover the price of a horse sold on Sunday at private sale. The ordinary calling of the defendant was to sell horses at private sale, and I admit that this case comes within the words of the statute, although the sale was made in the country, where no one was present except the parties and the witness. So the case of a lawyer who sits in his room and reads a law book or writes a deed, or a merchant who in his counting-room posts his books, or an old lady who sits by her fireside and knits, if done on Sunday, comes within the words of the statute. But my opinion is that the statute is void and inoperative in respect to cases of this kind, and that its operation is confined to manual, visible, or noisy labor, such as is calculated to disturb other people; for
(360) example, keeping an open shop or working at a blacksmith's anvil, or crying an auction in a town. The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency and to prevent public devotion from being disturbed, in the same way as the exhibition of animals or the sale of spirituous liquors within a certain distance of a religious assembly is prohibited. But when it goes further, and, on the ground of forcing all persons to observe the Lord's day and carefully *apply themselves* to *the duties* of *religion* and *piety* on *that day,* prohibits labor which is done in private, and which does not offend public decency or disturb the religious devotions of others, the power is exceeded, and the statute is void for the excess, by force of the Declaration of Rights, sec. 19: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." Ours is a Christian country, but

Christianity is not established by law, and the genius of our free institutions requires that Church and State should be kept separate. In England religion is established by law. The head of the Church is the head of the State, and the statute 29 Car. II. has full force and effect. Here, there is a different condition of things, and only such part of the statute as is necessary to enforce public decency is of force and effect. In *Fennell v. Ridler,* 5 Barn. & Cres., 406 (11 E. C. L., 261), the case of a private sale by a horse-dealer on Sunday is held to be within the operation of the statute, on the express ground that "the spirit of the act is to advance the *interest of religion*—to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion, and the act cannot be construed according to its spirit unless it is so construed as to check the course of worldly traffic." This is the language of *Bayley, J.,* who, in *Bloxome v. Williams, supra,* expressed a doubt whether the statute applies to a bargain of this description, and inclined to think "that it applies only to manual labor and other work visibly laborious, and the keeping of open shops." This was while he was under the impression that the intention of the act was to promote "public decency"; but afterwards, in *Fenner v. Ridler, supra,* upon further consideration, he expressed himself (361) satisfied that "There is nothing in the act to show that it was passed exclusively for promoting public decency, and not for *regulating private conduct.* Labor may be private and not meet the public eye, and so not offend against public decency, but it is equally labor, and equally interfers with a man's religious duties." So these two cases establish the position that considering the act as passed exclusively for promoting public decency, the case of a private sale would not come within its operation, and it was only be extending its object to the regulation of *private conduct,* and the enforcement of *religious duties,* that such a sale was brought within its operation. It follows that a private sale is not within operation of the statute, so far as it can be allowed force and effect.

The cases cited from the New England States have no bearing. Their statutes prohibit *all secular labor* on the Sabbath, and the notions there entertained are far more strict and intolerant than the sentiments that have heretofore prevailed in this State.

The general one of *S. v. Williams,* 26 N. C., 400, and *Shaw v. Moore,* 26 N. C., 25, fully accords with this conclusion. In my opinion there is no error.

MANLY, J. Concurring: The defense raises two points: *First,* whether the transaction, as to either of the parties, was unlawful under the provisions of Rev. Stat., ch. 118, and, *secondly,* whether the plaintiff's complicity was such as to deprive him of redress upon the con-

tract, in case it was unlawful for the other. My opinion is adverse to the defense upon the first of these points.

The range of operation to be given to the statute, under the restraining influence of the Bill of Rights, embraces only the public conduct of the citizen, and cannot be intended, or so construed, as to apply to his private conduct.

This is inferble from several considerations, but mainly, as I (362) think, from the uniform habits and customs of our people, putting, practically, this construction upon it, and from the omission on the part of the Legislature to exempt from the operation of the law certain acts (neither of necessity nor charity), which we suppose it certainly would have done if it had intended the law to apply generally to the class of cases to which they belong—such as cooking in private families and in inns, and victualing houses; the work of a ferryboat, of coaches upon rail and other roads, and boats upon waters, in their ordinary calling. An absolute and entire suspension of all secular employment, which would be implied in the prevention of these, and in a strict construction of our statute, has never been supposed to be compulsory in any part of our country, except, perhaps, at one time in New England, by force of their peculiar laws. In North Carolina it would be clearly contrary to the fundamental law to attempt an enforcement of that part of our statute which enjoins upon all persons a careful application of themselves, on the Lord's day, to the duties of religion and piety. To enforce such an injunction it must first be settled by the State what specific duties are embraced in our obligations to God, and all men be then called upon to conform to the State ritual. This is forbidden by our Bill of Rights (sec. 19), and would be violative of religious freedom, without which society could not be held together by the ties which at present bind it.

So we are of opinion it is against the spirit of our legislation, and, therefore, not in the contemplation of the Assembly, to restrain the private conduct of the citizen where there is no offense against public order and decency, and no disturbance of others in their proper observance of the day. At common law the religious observance of Sunday has never been considered a duty of perfect obligation. This is true even in England. Restraints, therefore, upon the conduct of the citizen on that day is matter dependent upon express legislative provision, and it would be against rule to extend these beyond the plainly ex- (363) pressed will of the Legislature.

I entertain no doubt the Legislature of the State has the power, under the Constitution, to prohibit work on Sunday, as a matter pertaining to the civil well-being of the community, and I am also well convinced there is nothing more essential to the physical, social, and

religious elevation of a people than the institution of a weekly day of rest—a day set apart especially for recreation and for the worship of Almighty God. But this is not the point. It is, how far the Legislature has thought proper, actually, to take this matter in hand, in aid of the teachings of religion, and to enforce, by law, the observance of Sunday. The leading idea in the original framework of our Government, and in the subsequent legislative and executive action under it, has been to leave men as free as is consistent with safety—to interfere no more with social liberty, by law, than is needful to secure order and the rights of each and every one. Outside of this, it is left to the individual citizen to govern himself, guided by the religious and moral teachings to which he is accustomed to resort, and hence the spirit of individual responsibility, of independence and self-reliance, which is so remarkably characteristic of the American people, and which has given such force and effect to our institutions. Of all the classes of human rights, those which belong to conscience, in the worship of God, are held the most sacred. They cannot be touched without arousing public attention and censure, and it is the last subject on which the State would resort to legislation not actually needed for political safety and repose.

In view of these things, especially of the practical construction put upon the law by the usage of our people from the beginning (which is high evidence of what was meant), connected with the generality of the words used, I am of the opinion already stated, that it was not intended by our Legislature to act by the law *upon* the private conduct of the citizen.

The transaction out of which this controversy has arisen was, we suppose (nothing to the contrary being stated), private—between the parties, in the presence of a single individual, the wit- (364) ness, and was not, therefore, within the purview of the statute.

The decisions in the other States of our country which have been cited in the discussion may be supported upon the particular phraseology of their respective statutes, and the sense in which they have been accepted and practiced by our people, and from the general course of legislation in those States. I refer to *Robeson v. French,* 12 Metc., 24; *Lyon v. Strong,* 6 Vt., 214; *Northup v. Foot,* 14 Wind., 249; *Specht v. Com.,* 8 Barr, 313; *Bloom v. Richards,* 22 Ohio, 387; *Charleston v. Benjamin,* 2 Strob. (S. c.),, 508. To the point of *legislative power,* some of the cases which I have examined (where the States have similar constitutional provisions to our own) are germane to the case before us, but upon the construction of our statute they are not believed to be so. As my difficulty is not upon the former but upon the latter question, I do not derive any considerable aid from them.

The English cases cited are in exposition of 29 Charles II., ch. 7, and establishes the conclusion (after doubts) that the statute was intended to operate upon the private conduct of the subject. The force of this conclusion, in its bearing upon our case, is impaired by important differences between the statutes in the two cases, and by important differences in the constitutional power of the two governments, affecting the construction. The cases referred to are *Bloxome v. Williams,* 10 E. C. L., 60; *Fennell v. Ridler, ib.,* 261; *Smith v. Sparrow,* 13 *ib.,* 351; *Williams v. Paul,* 19 *ib.,* 192; *Scarfe v. Morgan,* 4 Mees. & Welsby (Exch.), 270.

Two things are especially noticeable upon an examination of these cases: *First,* the doubts of the English judges whether the statute should have the more extended operation, and, *second,* their reluctance to construe it so as to make void private contracts, especially those that had been partly executed. It seems, however, that these difficulties were finally overcome by force of the special provisions of the statute, and by force, as I suppose, of the powers and general course of legislation (365) in the country. It will be perceived, by reference to the statute at large (29 Charles II.), that it has many provisions giving it an operation manifestly upon the personal and private conduct of the subject, which our extract from it has not. And when this is considered, in connection with the spirit of their laws and the religious establishment as part of that law, conclusions upon the respective statutes may be in opposite directions without any violation of principle in either. In England there is a Christian ritual established by law, with parliamentary provisions for inculcating it privately and publicly, and a consequent right in the Government to decide matters of faith and matters pertaining to established rites. In our State there is nothing of the sort, with the single exception that officers of the State must be Christians. There is no privilege or disability on account of religion. The State confesses its incompetency to judge in spiritual matters between men or between man and his Maker, and leaves in all a perfect religious liberty to worship God as conscience dictates, or not to worship Him at all, if they can so content themselves. Both peoples are equally Christian, and governed in their affairs, national and personal, alike by the principles of Christian morality, but the one, through its Government, deems it proper to coöperate with the ministers of religion in fostering and enforcing; the other adjures all power to interfere, and leaves spiritual matters exclusively in the hands of the teachers of religion. Hence, the English cases are not regarded as entitled to the weight of authority here. Their judges are interpreting a different statute, in many important particulars, from that which we are called upon to expound. Their Constitution and parliamentary powers and

usages are different, and in the light of such differences the same minds would probably come to different conclusions.

The defense is a novelty in North Carolina, and it has the singular demerit of being unconscientious and at the same time wearing a garb of Christian morality. I do not think it will do as the result of the construction of the statute as it now stands. If it be the purpose of the Legislature by that statute to prohibit acts of the class (366) now before us, it is due to the great importance of the principle involved, and to the fact that it is contrary to the general tenor of the legislation of the State, to express it unequivocally, and not to leave it to a doubtful construction. Should the public will desire further provision of law upon the subject, it may be speedily put right in the next General Assembly by proper statutory enactments.

The view which is thus taken of the first point makes it unnecessary for me to express an opinion as to the other, about which I entertain some doubts. The anomaly of the case is that the act is not prohibited alike to both parties. For one, it is not lawful; for the other, it is, unless he be effected by knowingly dealing with the first. It is a matter of doubt whether mere knowledge on the part of the purchaser puts him *in pari delicto* and makes him amenable for the violation of the statute. Upon this point I decline expressing an opinion, but being of opinion with the plaintiff upon the first point, I think the judgment below should be affirmed.

BATTLE, J., dissenting: This is an action of trespass on the case, in which the plaintiff declares in two counts: first, for a deceit, and, secondly, for a false warranty of soundness on the sale of a horse by the defendant to the plaintiff. On the trial there was testimony tending to show that the sale was made on a Sunday; that the defendant was a horse-dealer, and that the plaintiff knew it. The defendant's counsel prayed the court to instruct the jury that "if they should find that the ordinary calling of Easley was that of a horse trader, and the plaintiff knew it, and the horse was sold on a Sunday, the plaintiff could not recover." His Honor refused to give the instruction, and there was a verdict for the plaintiff. The bill of exceptions does not state whether the sale was made in a town or in the country, in public or in private, in the presence of many persons or of few; so that the naked question is presented, whether the contract, assuming it to have been made on a Sunday, was by the law of this State void—as to either or both of the parties to it. (367)

In the argument of this question it was admitted by the counsel for the defendant that the contract was good at the common law, but he contended that it was in violation of section 1, ch. 118, Revised Statutes, and was, therefore, void as to both parties, so that neither could

maintain any action upon it. The section and chapter of the act referred to (which was in force when the contract was made) declares, "That all and every person and persons whatsoever shall, on the Lord's day, commonly called Sunday, carefully apply themselves to the duties of religion and piety, and that no tradesman, artificer, planter, laborer, or other person whatsoever, shall, upon the land or water, do or exercise any labor, business, or work of their ordinary callings, etc.," "on the Lord's day aforesaid, or any part thereof, upon pain that every person so offending, being of the age of 14 years and upwards, shall forfeit and pay the sum of $1." This enactment in the Revised Statutes was taken from the act of 1741 (Rev. Code of 1820, ch. 30, sec. 3), and is in very nearly the same words as the statute, 29 Charles II., ch. 7, sec. 1.

Upon the general principle, which has been repeatedly recognized by the courts, both of England and this State, that a contract made in contravention of the law, whether *malum in se* or *malum prohibitum*, cannot be sustained, it has been settled in the former country that a contract of sale entered into on the Lord's day, by any person in the exercise of his ordinary calling, is void. Thus in *Fennell v. Ridler*, 5 Barn. & Cres., 406 (11 E. C. L., 261), it was decided that a horse-dealer who purchased a horse in the course of his ordinary business on a Sunday could not recover on a warranty contained in the contract of sale. So in *Smith v. Sparrow*, 4 Bing., (13 E. C. L., 351), it was held that an action would not lie on a contract made on a Sunday, although it was made by an agent, and although the objection was taken by the party at whose request the contract was entered into. The case of *Bloxome v. Williams*, 3 Barn. & Cres., 232 (10 E. C. L., 60), (368) lays down the same doctrine, but *Bailey, J.*, who delivered the opinion of the Court, said that the party who was not acting in his ordinary calling, and was ignorant of the fact that the other party was so acting, might recover from such a contract. He intimates strongly, however, that if the plaintiff had known that the defendant was acting in his ordinary calling he would have been regarded as having aided in the violation of the law, and, for that reason, could not have sued on the contract.

It has been said in argument here that the latter proposition of the learned judge was a mere *dictum*, not necessary to the decision of the cause, and, therefore, not fully considered by him. I cannot so regard it, because the fact that the plaintiff was ignorant of the other party's calling was stated as an exception to the general rule, and of course admitted the rule.

In England the doctrine is confined to persons having an ordinary calling, and acting in the course of it, *Drury v. Defontaine*, 1 Taun., 131; *Rex v. Whitemarsh*, 7 Barn. & Cres., 596; *Sandiman v. Breach*,

ib., 100. These cases all recognize the general rule, and I think that it may be considered well established in England that where a contract is entered into by any person in the exercise of his ordinary business on a Sunday, he cannot recover upon it, nor can the other party do so, if he knew of the fact that the first was so acting when the contract was made. From a note to the American edition of Smith on Contracts, 264 (marginal page 181), it appears that provisions more or less similar to those of statute of Charles II. exist in nearly all the States in the Union, and that contracts in contravention of them are void. Thus, in Massachusetts, no action can be maintained for a deceit in the exchange of horses on a Sunday. *Robeson v. French,* Metc., 24. Nor in Vermont for a breach of warranty on such a sale. *Lyon v. Strong,* 6 Vt., 214. In *Northup v. Foot,* 14 Wend., 249, which was an action upon a contract entered into on Sunday in Connecticut, the Court held that it was void by the law of that State, and that neither (369) an action on the case, for a deceit, nor in assumpsit, could be maintained upon it. That was the sale of a horse, and the suit was brought by the vendee, which makes it direct authority in favor of my view of the present case.

If I understood the counsel for the plaintiff, he did not deny that if the present case had occurred in England his client could not have sustained the action. But he insists that the construction of our act must be different from that put on the English statute, because in England there is an established church, and their statute was intended to compel a better observance of Sunday by directing "that every person shall, on every Lord's day, apply himself to the observation of the same, by exercising himself in the duties of piety and true religion," as was declared by *Bailey, J.,* in the above mentioned case of *Fennell v. Ridler.* In this State, the counsel said, we have no church establishment, and our Bill of Rights declares "that all men have an unalienable right to worship Almighty God according to the dictates of their own consciences." (Bill of Rights, sec. 19.) He thence inferred that our act must be so construed as not to enjoin upon any person the observance of Sunday as a religious duty, but only a political regulation, and that it embraces such acts only as offend public decency.

I admit that we have not any church establishment, and that the constitutions, both of this State and of the United States, forbid that there ever should be; but yet it cannot be denied that ours is a Christian country, and that the Constitution of North Carolina recognizes the Christian religion as a part of our system of government. Without looking to other parts of it, the famous 32d section of the Constitution expressly declares "That no person who shall deny the being of a God, or the truth of the Christian religion, or the divine authority of the

Old or New Testament, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil depart-
(370) ment within this State" (see Amendments to the Constitution, Art. IV, sec. 2). Our governors and magistrates, then, must be Christians, and it seems to me to be a necessary consequence that our Government is a Christian Government; and so it was undoubtedly considered to be by all the great men who, in the convention of 1835, took part in the debate on the proposed abrogation of section 32 just referred to. (See Debates of the Convention of 1835.) It is well known that the Christian Sabbath, sometimes called the Lord's day, but more commonly "Sunday," is a Christian institution, and I cannot perceive any good reason why our Legislature may not direct it to be observed by any person and in any manner which their wisdom may suggest for the happiness of the people and the welfare of the State, saving and reserving always to every person the right to worship God according to the dictates of his own conscience. The Bill of Rights seems to recognize the duty of all persons to worship Almighty God in some manner, and only leaves the manner to be determined by their own consciences. How the compelling them to abstain from their ordinary secular business on Sunday (the day usually set apart in all Christian countries for public worship and private devotion) can interfere with their rights of conscience is what I cannot well comprehend. *Ruffin, C. J.*, did not seem to think so, when he gave the reasons of the Court for the decision in *S. v. Williams,* 26 N. C., 400. It was there held that a master was not indictable, at common law, for compelling his slaves to do the ordinary work of the farm on Sunday. But it was strongly intimated that he might have been warranted for the penalty given by the act of Assembly upon which I am commenting. Speaking on the propriety and political necessity of keeping one day in the week for the purposes of "public worship, relaxation and refreshment," the learned Chief Justice says that "The institution, wherever it has existed, has proved to be a great good—promoting private virtue and happiness among all classes, and the public morals and prosperity. It is, therefore, fit that every commonwealth, and especially one in which Christianity is generally professed, should set apart, by
(371) law, a day for those purposes, and *enforce* its due observance by such sanctions as may seem adequate. By a statute in this State the profanation of Sunday by working in a person's ordinary calling is punishable by pecuniary fine, recoverable by a summary proceeding before a justice of the peace (Rev. Stat., ch. 119, sec. 1). As that statute does not make the offense indictable, it is not punishable in that mode, unless it be so at the common law." In another part of the opin-

ion he thus expresses himself in relation to the Christian religion: "In this State, however, although recognized as an existing and as the prevalent religion, it is not, and cannot be, established by law in any form, nor special duties of worship, or of worship at particular places or periods. Therefore, however clearly the profanation of Sunday might be against the Christian religion, it is not, and could not here be made, merely as a breach of religious duty, an offense; and much less can it be held an offense at common law. The Legislature, deeming it, as it does many other violations of Christian duty, detrimental to the State, may prohibit, and then it will be punishable to the extent and in the manner pointed out by the Legislature." He concludes his able opinion by intimating that the Legislature might cause the observance of Sunday to be enforced by stronger measures than had been prescribed in the statute before spoken of. He says: "But that is with the Legislature. If they think it needful, higher penalties may be laid, or the profanation of Sunday may be prohibited in general terms, and thereby it will become a misdemeanor and indictable." In the whole of this opinion it will be seen that *Chief Justice Ruffin* did not once question the validity of the statute nor intimate that it must be construed differently, here, from what he knew was the settled construction of the statute of 29 Charles II. in England. It seems to me that the conclusion is irresistible in that the defendant in the present case might have been warranted for the penalty incurred by selling his horse, in the ordinary course of his business, on Sunday. If so, the act was unlawful and the contract of sale void. *Sharp v. Farmer,* 20 N. C., 255; *Ramsey v. Woodward,* 48 N. C., 508; *Ingram v. Ingram,* 49 N. C., 188; *Powell v.* (372) *Inman, ante,* 28. The plaintiff was *in pari delicto,* because, with full knowledge that the defendant was a horse trader, he concurred in the violation of the law, showing his consciousness that he was doing wrong by putting a false date to the sale-note, dating it on Monday instead of Sunday, the day on which it was in fact given. In the conclusion to which I have come upon the constitutional question involved in this case, I am glad to find myself sustained by a case decided in Pennsylvania. In *Specht v. Commonwealth,* 8 Barr, 313, it was *held* (affirming the previous decision of *Commonwealth v. Wolf,* 3 Ser. & Rawle), that the Pennsylvania Lord's day act was not at variance with the provision in the State Constitution declaring the right of freedom of conscience in religious matters; and a conviction, under the act, of one of the sect called Seventhday Baptists was therefore affirmed, the decision being based upon the ground of a day of rest being necessary to the welfare of society, and that the mere prohibition of secular occupation did not interfere with the rights of conscience. (See the case referred to in a note to p. 264, Am. ed. Smith on Contracts, m., p. 181.) Sim-

ilar decisions have been made in Ohio and South Carolina, upon similar statutes, on the same grounds. (*Bloom v. Richards,* 22 Ohio, 387; *Charleston v. Benjamin,* 2 Strob., 508; Sedg. on Stat. and Com. Law, 85, in note.) I think the judgment ought to be reversed, and a new trial granted.

PER CURIAM. No error.

Cited: McRae v. R. R., 58 N. C., 397; *Covington v. Threadgill,* 88 N. C., 189; *Rodman v. Robinson,* 134 N. C., 507; *McNeill v. R. R.,* 135 N. C., 684; *S. v. Medlin,* 170 N. C., 684; *Auto Co. v. Rudd,* 176 N. C., 500.

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FRANCIS A. BOYLE v. NORTH CAROLINA MUTUAL INSURANCE COMPANY.

1. Under a charter for mutual insurance against loss by fire it was *Held* that every member of the company is bound by the conditions annexed to the policies through the by-laws.
2. Where one of the by-laws of a mutual insurance company required that the insured, within thirty days after loss by fire, should give notice to the company, specifying the amount of loss, the manner of it, and other particulars as a condition to his right to recover, it was *Held* that a declaration to the insured by a traveling agent of the company, that "the matter would be all right with the company," was not a waiver of the necessity of such notice.

COVENANT, on a policy of insurance against fire, tried before *Dick, J.,* at last Spring Term of WASHINGTON.

The plaintiff having proved the destruction by fire of the house insured, and the execution of the policy by the defendant, the defendant moved that the plaintiff be nonsuited, on the ground that the plaintiff had not complied with the stipulation of the contract of insurance as contained in the company's by-laws, and especially the terms of the following provision, which is section 10 in this pamphlet containing the laws of the company:

"All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the secretary, and within thirty days after said loss to deliver a particular account of said loss or damage, signed with their own hands and verified by their oath or affirmation, and also, if required, by their books and accounts and other proper vouchers. They shall also declare under oath whether any or what other insurance has been made upon the property, what was the

whole value of the property insured, when and how the fire originated, so far as they may know or have reason to believe, and what their interest in the property insured was at the time of the loss or damage sustained. They shall also procure certificates under the hands (374) of a magistrate, notary public, or clergyman most contiguous to the place of the fire, and not concerned in the loss or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured, and knows, or verily believes, that he, she, or they really, and by misfortune, and without fraud or evil practice, hath or has sustained, by such fire, loss and damage to the amount therein mentioned; and until such proofs, declarations, and certificates are produced, the loss shall not be deemed payable; and shall state whether, since the time of effecting such insurance, the risk has been enhanced by any means whatever. And any misrepresentation or concealment, or fraud or false swearing by the insured in any statement or affidavit in relation to the said loss or damage shall forfeit all claim by virtue of the policy, and shall be a full bar to all remedies upon the same."

In regard to the notice, the evidence was that one of the agents of the company was present at the fire; that some ten or fifteen days after its occurrence the traveling agent of the company was in Plymouth, and, in conversation with the plaintiff, said that *the matter would be all right with the company.*

Upon this, the plaintiff's counsel insisted that this was evidence of a waiver of notice and a promise to pay without it, and was matter to be submitted to the jury; but his Honor thought otherwise, and ordered a nonsuit, from which the plaintiff appealed.

P. H. Winston, Jr., for plaintiff.
W. A. Moore and J. H. Bryan for defendant.

MANLY, J. *Woodfin v. Ins. Co.*, 51 N. C., 558, decides the point that the insured, in such a company, are members of the corporation and bound by the conditions annexed to the policies through the by-laws. In the by-laws of the defendant (the North Carolina company) it is required by section 10, that all persons insured and suffering (375) loss shall forthwith give notice thereof to the secretary, and within thirty days after said loss deliver a particular account of said loss or damage, signed with their own hands and verified by their oath or affirmation. They shall also declare, under oath, whether any and what other insurance has been made on the property, what was the whole value of the same, what the loss, and what the interest of the

insured in the property at the time; and until such proofs, declarations, and certificates be produced, the loss shall not be deemed payable, etc.

A compliance with these conditions is necessary in order to fix the liability of the company upon any of its policies. In *Woodfin v. Ins. Co., supra,* it will be found that the conditions there in question were similar in all respects to those above quoted from the by-laws of the North Carolina company. So that the case is in point to the extent that unless the conditions of these policies be strictly complied with the insured cannot recover, except a compliance be in some way dispensed with by the company.

The only open question, therefore, apparent upon the case is, Did that which is stated to have occurred between the plaintiff and a person, denominated "the traveling agent" of the company, amount to any evidence of a waiver of the requirements of the by-laws?

We concur with the Court below in the opinion that it did not. The traveling agent said to the plaintiff, in a conversation in Plymouth, "the matter would be all right with the company." It is not stated to what this declaration was a response, or in what connection it was made, and we are unable to see that it tended, of itself, in any way to prove that the agent undertook for the company that it should pay at all events. It seems to be merely an affirmation on the part of the agent that the company will comply with the obligations of the policy. It dispenses with nothing, but rather implies a warning that all must be right with the insured. The declarations, under oath, prescribed in section 10 of the by-laws, are required to be made to the sec-
(376) retary of the company—doubtless, for the company's action.

In the absence of all proof upon the subject, a power to dispense with or waive would reside only in the president and directors *collegealiter,* and one who is simply described as a traveling agent cannot be presumed to have that power. Our inferences, if at liberty to draw them, would be that the agent was employed to guard the company, by observation and inquiry, against imposition, not to dispense with the safeguards which it has thought proper, in orther ways, to throw around itself.

But whatever may be the scope of the traveling agent's duties and powers, we are of opinion that what occurred between him and the plaintiff afforded no evidence of a waiver on the part of the company of the conditions of the policy as contended in section 10 of the by-laws.

PER CURIAM. Affirmed.

Cited: Gerringer v. Ins. Co., 133 N. C., 417.

DEN ON THE DEMISE OF CHARLOTTE CHESHIRE v. JOSEPH McCOY.

Where a widow, being under age, and having no guardian, dissented from her husband's will in person, in open court, and on a petition, dower was assigned to her by a decree of the proper court, it was *Held* that, though the dissent was made erroneously, yet, dower having been assigned by the judgment of a court of competent jurisdiction, her right to it could not be impeached in an action of ejectment brought by her for its recovery.

EJECTMENT, before *Dick, J.*, at Spring Term, 1860, of CHOWAN.

The following case was agreed by the parties: Alexander Cheshire, junior, executed his last will, and died in Chowan County in 1858. At December Term, 1858, of the County Court the will was admitted to probate, and James E. Norfleet, the executor named therein, was qualified. Everything he was worth was willed to his wife, but being advised that the estate was insolvent, and that no part of (377) said legacies would be available, she went into open court, within six months, and by her attorney dissented from said will. She then filed her petition for dower in the said county court, and the premises in dispute were formally allotted to her by the order and judgment of the said court upon the report of commissioners appointed by the court, which, on motion, was affirmed without objection on the part of the heirs at law.

After the institution of these proceedings for dower, and confirmation of the report and judgment as aforesaid, the executor of Alexander Cheshire, junior, filed his petition to make the real estate assets for the payment of debts, and under an order thereon obtained sold the whole land, including the widow's dower, to the defendant McCoy, who went into possession thereof, and holds the same under title derived under that proceeding, which was afterwards confirmed by the court making the order.

It was agreed by counsel that if the court should be of opinion with the plaintiff on the foregoing facts, a judgment in the usual form should be entered for the plaintiff, but if of a contrary opinion, then the court should order a nonsuit.

The court being of opinion with the plaintiff on the case agreed, a judgment was entered for the plaintiff. Defendant appealed.

Hines for plaintiff.
W. A. Moore for defendant.

BATTLE, J. We are clearly of opinion that the lessor of the plaintiff ought to have entered her dissent to her husband's will by guardian, and not in person. As she was an infant, under 21 years of age, sec. 1,

ch. 118, Rev. Code, expressly so required, and the construction which had been put upon ch. 121, sec. 1, Rev. Statute, in the analogous cases of *Hinton v. Hinton,* 28 N. C., 274, and *Lewis v. Lewis,* 27 N. C., 72, forbids us from adopting any other than the literal meaning of
(378) the terms used. If the objection, then, had been made in the proceeding instituted by the widow to obtain an assignment of her dower, it would, upon the authority of those cases, have been fatal to her suit.

But we are, nevertheless, of opinion that the lessor of the plaintiff is entitled to recover in the present action, for the reason that the judgment in her favor in her suit for dower, though it is erroneous, cannot be collaterally impeached by the defendant in the present suit.

The judgment of the County Court of Chowan in favor of the widow upon her petition for dower was upon a judicial proceeding of a court of competent jurisdiction, and is conclusive, unless upon some other proceeding directly to avoid it. *Skinner v. Moore,* 19 N. C., 138, and the cases referred to in the note to the second edition, and also *Craige v. Neely,* 51 N. C., 170.

PER CURIAM. Affirmed.

BRANCH AND THOMAS v. FLORA CAMPBELL.

One who was in adverse possession, cultivating turpentine, though not the owner of the land, was *Held,* nevertheless, the owner of the turpentine gathered, and might support the action of trover against the true owner of the soil for taking it.

TROVER, tried before Shepherd, J., at last Spring Term of HARNETT.

The plaintiffs showed that in January, 1854, they were put into possession by one Cameron of several thousand turpentine boxes in Harnett County, and went upon a tract of land where they cut a few thousand more, and during the spring of that year, while occupying and working the land where these boxes had been made, and after the turpentine had run down into the boxes, the defendant dipped the turpentine out and carried it away. They showed the value of the turpentine, and closed their case.

(379) The defendants then offered in evidence two grants from the State, one in 1836 and one in 1850, covering the *locus in quo,* and offered to show themselves the owners, but the court ruled that the grants, as evidence of title, were immaterial. The grants were then put in evidence for the purpose of showing the character and extent of possession in the defendants. The defendants then showed that in 1853

they had cut boxes on part of the land within their grant, and that they forbade the entry of the plaintiffs when they began to work in 1854. They further showed that they had a tenant on some part of this land two years before this time, and that one King had also worked turpentine on a part of the land for one year, under a lease from them, but it appeared that the boxes made and worked by King were half a mile distant from those made by the plaintiffs. The defendant did not claim to have made the boxes let by Cameron to Branch and Thomas, nor did she show any possession other than that set out.

The court instructed the jury that the plaintiffs were entitled to recover if they had the actual possession of the land in the part where their boxes had been made, and if they had produced the turpentine which was dipped out and carried away by the defendants; and further, the court charged that if the plaintiffs had worked these boxes during the spring, in the usual course of turpentine cultivation, and were so doing when the defendants carried the turpentine off, this was such an actual possession as was sufficient for the action. The defendants excepted.

Verdict and judgment for plaintiffs. Appeal by defendants.

B. F. Moore, N. McKay, and Strange for plaintiffs.
T. C. Fuller for defendants.

MANLY, J. There is nothing in this case to distinguish it from the cases heretofore in this Court involving the same matter of dispute, *Branch v. Morrison,* 50 N. C., 16, and *S. c.,* 51 N. C., 16.

It can make no difference that the defendants were in pos- (380) session under grants covering the *locus in quo* before the entry of plaintiffs. The latter had entered, and were, as the case affirms, in possession also. Each had a separate and distinct possession, and in this state of facts the rights of the parties are decided by the cases referred to. Principles are there settled entirely exclusive of the rights of the parties here.

It is settled, not only in those cases, but also in previous adjudications, that the cultivation of pines for turpentine, in the usual course of that business, is a possession of the land on which they grow, and the true owner must regain the dominion, if he desire it, by an action of ejectment, and get the intermediate profits by the remedy appropriate to that right. To allow one to seize the product of another's labor as it may be severed from the land would be to encourage amongst citizens a resort to force and oppression in the adjustment of their rights, and lead ultimately to anarchy and ruin.

Hence, it was held by this Court in the cases between the parties when they were before us on former occasions that one who was in adverse possession, cultivating turpentine, though not the owner of the land, was, nevertheless, the owner of the turpentine gathered, and might support the action of trover against the true owner of the soil.

We have seen no reason to doubt the authority of these cases; there is no material difference between them and the case now presented, and there should, therefore, be a similar disposition made of them.

PER CURIAM. No error.

(381)

W. R. COVILL v. THOMAS MOFFITT.

The act, Rev. Code, ch. 31, sec. 37, appointing the venue for transitory actions, makes no provision for the case of a resident plaintiff and a nonresident defendant, and it was *Held*, therefore, that the case remains as at common law, which allows the plaintiff to sue in any county, subject to the power of the court to change the venue according to certain rules governing its course.

CASE, tried before *Shepherd, J.*, at last Spring Term of BRUNSWICK.

On the return of the writ, the defendant pleaded an abatement, that he is a citizen of the county of Monmouth, New Jersey, and that the plaintiff is, and was at the time of bringing suit, a citizen of the county of New Hanover, in this State. To this plea the plaintiff demurred, and the court below sustained the demurrer, and awarded a respondeat ouster, from which judgment the defendant appealed to this Court.

No counsel for plaintiff.
M. London for defendant.

MANLY, J. Revised Code, ch. 31, sec. 37, appointing the venue of transitory actions, is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of a venue anywhere within the State.

It will be perceived, by reference to the section in question, that provision is made for the case of a nonresident plaintiff, the defendant being a resident, but no provision is made for the case of a resident plaintiff, the defendant being a nonresident, and, therefore, as we concluded, the case is at common law. It might have been brought to any county, subject to the power of the court to change the venue according to the course of the court.

In 1 Tidd Pr., 371, it is said: "The place of transitory actions is never material, except when by particular acts of Parliament it is made so."

The demurrer must be sustained, and the defendant answer over (382)

PER CURIAM. Affirmed.

STATE ON THE RELATION OF R. G. SNUGGS v. JOHN F. STONE ET AL.

1. Where one was superintendent of common schools for several consecutive years, giving bond for each year, and then gave a bond for 1853, it was *Held*, that all the amount that had come to his hands that he could not show had been misapplied or wasted in the previous years, was recoverable on the last bond.

2. Where a superintendent gave a bond for a given year, and continued in office for several years afterwards without giving bond for the subsequent years, it was *Held* that by force of the Acts of 1844 and 1848 he and his sureties were liable on the last bond given for school money received by him in the succeeding years and not accounted for.

DEBT, tried before *Shepherd, J.*, at last Spring Term of STANLY.

John F. Stone was appointed superintendent of common schools by the County Court of Stanly County, and gave bond sued on at its February Term, 1853, with the other defendants his sureties, in the sum of $3,000. The conditions of the said bond are as follows: "Now, therefore, if the said Stone shall well and truly perform the duties of chairman aforesaid, and shall honestly and faithfully account for and pay over all moneys that may come into his (hands) by virtue of his appointment, during the time for which he has been elected, to all such persons as may be by law entitled to recover the same at his hands, then," etc.

Stone continued to act through 1854 and 1855, but gave no bond after 1853. He had been chairman for several consecutive years immediately previous to 1853, and for those years had given bonds with different sureties.

After this suit was brought a reference was made to com- (383) missioner to state an account, and from the report made by that officer it appeared that the sum of $816.07 was in Stone's hands as a balance of school money remaining at the date of the bond sued on, and that other amounts of school money came to his hands in 1854 and 1855, which he did not account for. The nonpayment to his successor the lator in this action, of the said sum of $816.07, and the sums received in 1854 and 1855, are the breaches alleged of the conditions of the bond declared on.

The defendant's counsel insisted that the sum of $816.07 received before the bond of 1853 was executed, was not recoverable on that, and that the sums received after the official year 1853 had expired were also not recoverable on that bond.

The court ruled against the defendant on both these points, and his counsel excepted.

Verdict for the plaintiff for $1,864.10, for which judgment was given, and the defendants appealed.

R. H. Battle for plaintiff.
No counsel for defendants.

BATTLE, J. The only questions which we deem it necessary to consider are two, which appear in the bill of exceptions filed by the defendants, and in the opinion expressed on these by the court below we entirely concur.

1. The first is that the principal defendant was not chargeable with the amount $816.07, which was in his hands when he was elected and gave the bond now sued on, in February, 1853. He had been chairman of the board of superintendents of common schools for several consecutive years immediately preceding this time, and, as it is not shown that he had wasted or misapplied the money which he had received in his official capacity, we must suppose that he had it in his hand, ready to be paid to his successor at the time above mentioned. As he was himself reelected, he is to be regarded as his own successor, and consequently to have received, in his new official capacity, what it was his (384) duty to pay in his old. Viewed in that light, it was clear that the bond which he then gave made him and his sureties responsible for that amount.

2. The second exception, that the defendants were not responsible for the defaults of the principal defendant during the subsequent years of 1854 and 1855, is fully answered by the decision of this Court in the late case of the *Chairman of Common Schools v. Daniel,* 51 N. C., 444. When the defendant Stone was elected and gave bond, in February, 1853, his office was, by the express provisions of the acts of 1844 and 1848, to continue for one year, and until another should be appointed, and, of course, his bond continued as a security for the faithful discharge of his duty during all that time. One of these duties, and not the least important, was the payment into the hands of his successor of such moneys as had been received by him as an officer, and not expended according to law. For his default in this respect he and the other defendants, his sureties, are clearly responsible, and the judgment to that effect given in the court below must be

PER CURIAM. Affirmed.

NATHANIEL WOODARD, JR. v. WILLIAM G. HANCOCK.

1. What is reasonable skill and due care in a physician in the treatment of a patient is a question of law, and it is error to leave it to be determined by the jury.

2. Where it appears from a bill of exceptions that a question of reasonable skill in a physician was left to the jury, to be decided by them, and the facts of the case are not stated, and it cannot be seen that the error did the appellant no harm, *Held* that he is entitled to a *venire de novo*.

CASE for unskilled and negligent treatment of the plaintiff by defendant as a physician, tried before *Dick, J.*, at last Spring Term of CHOWAN.

The case sent up by the judge is as follows: "The evidence (385) was conflicting, but it is deemed unnecessary to state it, as the charge of the court only was excepted to. His Honor charged the jury that the evidence was before them, and it was for them to say whether the defendant possessed the ordinary skill necessary for a physician, and whether he had used that skill in the treatment of the plaintiff, or whether he had been guilty of negligence in the treatment of him. If he did not possess the requisite skill, or had been guilty of negligence, and in consequence the plaintiff had sustained injury, it was for them to say what amount of damages he should recover, and about which the court could give no advice." Defendant excepted.

Verdict and judgment for plaintiff for $500. Appeal by defendant.

P. H. Winston, Jr., for plaintiff.
Hines and Jordan for defendant.

MANLY, J. What amounts to reasonable skill and care belongs to a class of questions which are said to be compounded of law and fact. In this class stand reasonable time, due diligence, legal provocation, probable cause, and the like. A division of the question in such cases between the court and the jury is now considered settled, and therefore where there is a state of facts conceded, or proved, it becomes the duty of the court to draw the conclusion as matter of law. If there be a conflict of testimony presenting different views of the case, it is, in like manner, the court's duty, upon these views, to draw the proper conclusions.

We have no information as to the evidence in the Superior Court, save that it was conflicting. From this we infer that there were states of facts deposed to which might justify opposite conclusions as to the skill or care of the surgeon; or if the conflict were not to that extent, the case presented a *single* phase on which there was only a single inference of law to be drawn. The Court below, on the trial before the jury,

left the matter at large, both law and fact, to be decided by them. Upon the proofs, they were required to find whether the defendant pos-
(386) sessed the requisite skill and had exerted it in the plaintiff's behalf. This was an inquiry compounded, according to the authorities, of law and fact, and it was, consequently, erroneous to leave it in that state to be decided by the jury. This error may have affected injuriously the rights of the defendant. We cannot tell certainly in the absence of the proofs; but an error being committed, unless it appear from the proofs that it has done the appellant no harm, it will follow there must be a *venire de novo.*

Plummer v. Gheen, 10 N. C., 66, is in all respects similar to the case before us, except that in the former case the question was one of *probable cause.* The judge there left it to the jury, under a general definition of probable cause, to decide "whether the defendant had probable grounds of suspicion amounting to probable cause," no special instructions being asked for. This was held to be erroneous.

The principle of this decision seems to have been followed since in *Beale v. Roberson,* 29 N. C., 280; *Avera v. Sexton,* 35 N. C., 247, and *Vickers v. Logan,* 44 N. C., 393. None of these cases concerned the requisite skill and care in a learned profession; but if a separation of the inquiry in such cases into questions of law and fact be proper, in order to refer matters purely of reasoning to the tribunal most capable of considering them, and, therefore, most likely to maintain uniformity of decision, much more ought the question arising in this case to be so judged. It is seen to involve not only matter of reasoning, but reasoning as to the due execution of work in a learned science.

We are of opinion that it was error in the Superior Court to leave it to the jury to decide the questions of skill and care in a surgeon's treatment of his patient, without the aid of the court's opinion, based upon proper supposition as to the facts found by the jury.

PER CURIAM. *Venire de novo.*

Cited: Boon v. Murphy, 108 N. C., 192; *Emry v. R. R.,* 109 N. C., 598; *McCracken v. Smathers,* 122 N. C., 805; *Long v. Austin,* 153 N. C., 512.

(387)

WILMINGTON, CHARLOTTE AND RUTHERFORD RAILROAD COMPANY v. JOSEPH THOMPSON.

In an action against a subscriber to the stock of a railroad company on a bond for the payment of an instalment of such stock, it was *Held* that the existence of a president and an engineer, acting and purporting to act for and in behalf of the corporation, and a charter authorizing the appointment of such officers, were sufficient to establish its organization as against the defendant and all others dealing and treating with them in their corporate capacity.

DEBT on a bond, tried before *Shepherd, J.*, at last Spring Term of ROBESON. Pleas, *Non est factum* and, specially, that the bond is void as being against public policy; also, that the bond has been discharged by a material alteration of the charter subsequent to its execution.

The plaintiff declared on a bond which had been given for an instalment of the stock subscription. To show the organization of the company, the plaintiff, after showing the charter of the company passed by the Legislature by which the company, when organized, are authorized to appoint a president, directors, engineer, and other officers, proved that H. W. Guion was acting as president and that John C. McRae was acting as engineer for and on behalf of the company at the time the bond in question was executed. The plaintiff also offered in evidence the minutes of the proceedings of a meeting of the subscribers, held in the town of Wadesboro, previously to the execution of the bond sued on.

The execution of the bond was duly proved. The defendant insisted that there was no competent evidence to show that the corporation had been organized, and asked his Honor so to instruct the jury, but he declined doing so, and held that the evidence was admissible for that purpose, and that, if it was believed, the corporate existence of the company was sufficiently established. The defendant excepted. There were other exceptions sent to this Court, but not insisted on by the defendant's counsel here.

Verdict and judgment for the plaintiff, and appeal by the (388) defendant.

Person and Strange for plaintiff.
William McL. McKay and D. G. Fowle for defendant.

BATTLE, J. Most of the exceptions taken by the defendant on the trial and set forth in his bill of exceptions have been properly abandoned by his counsel in the argument here.

That the bond on which the suit was brought is not against public policy, and void on that account, was settled by the decision of the Court in *McRae v. Russell,* 34 N. C., 224, and we are not disposed to disturb it or call it in question.

The defendant comes with a bad grace to object to an alteration of the charter which he had concurred in recommending. It was surely not erroneous in the court to require him to prove that he had subsequently dissented from the amendment, if, indeed, such a dissent could then have availed him.

The testimony which he offered for the purpose of showing that the agent of the plaintiff had made misrepresentations to him with regard to the route of the road, that the route selected was not the "most eligible," and that the bond which another subscriber had signed was clear of erasure or interlineation when he first saw it, was properly rejected by the court. *R. R. v. Leach,* 49 N. C., 340.

The only exception relied upon by the counsel for the defendant in the argument before us is that there was no evidence of the organization and corporate existence of the plaintiff at the time when the bond in controversy was given, and that, consequently, it was a nullity for the want of an obligee, as was decided in this Court in *R. R. v. Wright,* 50 N. C., 304. Upon the question which was mainly debated between the counsel, whether the paper which purported to contain the proceedings of the subscribers for stock in the organization of the company (389) was admissible as evidence for that purpose on the part of the plaintiff, and, if so, whether it proved such organization, is, in the view which we have taken of the case, unnecessary for us to decide. The plaintiff produced the acts by which the charter was granted, and then showed that at the time when the bond in controversy was executed there was a president and an engineer acting and purporting to act for and in behalf of the corporation. That, we think, was enough to be shown to establish the existence of the corporation as to those who treated and acted with it in its corporate capacity. We so decided in *R. R. v. Saunders,* 48 N. C., 126, and the same doctrine had been previously held in *Navigation Co. v. Neil,* 10 N. C., 520. The principle is that the officers of the corporation, acting on its behalf, were so *de facto,* and that those who treat with and enter into obligations to them cannot be permitted to repudiate such obligations. It is the sovereign alone who has the right to complain of the usurpation, when such exists. The spirit of this principle was applied, at the last term, to the case of the commissioners *de facto* of a town, and it was found to be supported by the highest authority in England. *Commissioners v. McDaniel, ante,* 107; *Scadding v. Lorant,* 5 E. L. & Eq., 113.

This doctrine is not at all opposed by the decision in *R. R. v. Wright, supra,* for there it is stated expressly that there was *no evidence* that the plaintiff had a corporate existence at the time when the note sued on was given.

PER CURIAM. No error.

Cited: Dobson v. Simonton, 86 N. C., 496; *Cotton Mills Co. v. Burns,* 114 N. C., 355.

(390)

DEN ON THE DEMISE OF CLEMENTINE EVERETT ET AL. V. ALFRED DOCKERY.

1. A conveyance of a tract of land by A. to B. containing the words, "C.'s mill-seat excepted," was *Held* not to convey to C. the soil upon which water had been ponded for the use of a mill for twenty years.
2. The existence of an easement on land, such as the privilege of ponding water on it for the use of a mill, is not such adverse possession of it by the holder of the servient tenement as to prevent the owner of the dominant tenement from conveying the right of soil.

EJECTMENT, tried before *Shepherd, J.,* at Spring Term, 1860, of RICHMOND.

The lessor gave in evidence a grant from the State to Thomas Dockery, dated in 1771; then a deed from him to William Webb, dated in 1806; then a deed from William, John, Richmond, and Alexander Webb to Euclid A Everett, the ancestor of the lessors of the plaintiff, dated 1 January, 1842, and offered evidence further to prove the defendant in possession, and also that the land described in the grant and the two deeds included the *locus in quo.* The deed from the Webbs contains a description of the land by metes and bounds, following a general description, which is as follows: "lying on both sides of Cartridge's Creek, *with Alfred Dockery's mill-seat excepted.*" The lessors further showed that they, and those from whom they claimed, had been in possession of the land described for from thirty to fifty years, and that their boundaries were known and visible. They further offered evidence that the mill of the defendant was disused by him for several years, and that from 4 to 6 acres, where the pond had been, were in cultivation, under fence, in 1855, when this suit was brought. When the deed, in 1842, was made to Euclid Everett, the defendant was in occupation of the mill.

The defendant then offered evidence that he had built a mill on Cartridge's Creek, which he had occupied for twenty years previous to

1845; that the water had been ponded continually during that time up to the limits where the fence had been placed in 1855, and that
(391) he had cut trees in the pond for logs, which had been sawed up at the mill.

The court charged the jury to inquire, first, whether the grant and deeds offered by the lessors of the plaintiff covered the land sued for, and if they should find this fact for the lessors of the plaintiff, they should next inquire whether the defendant was in possession at the bringing of the suit, and if they should find this to be so, whether he had being in possession twenty years before the right of the lessors accrued. The jury were further instructed that the ponding of the water upon the land and the cutting of timber from time to time were not, in themselves, an occupation, actual and adverse, but only evidence of a claim to the thing so used; that the occupation for twenty years of the mill would be a possession, from which the law would presume the necessary assurance of title to the defendant, and that with the mill would pass whatever else had been so held that was needful for its use and enjoyment. And the court further instructed the jury that if the defendant had such possession on 1 January, 1842 (the date of the Webb deed), no title passed by it to Euclid A. Everett, under whom the lessors claimed. The plaintiff's counsel excepted to these instructions.

Verdict for the defendant, and appeal by the plaintiff.

R. H. Battle for plaintiff.
No counsel for defendant.

BATTLE, J. It cannot be disputed that the lessors of the plaintiff established, by their proofs, a full and complete title to the land in controversy, unless the exception in the deed from the Webbs to the ancestor of the lessors included it, or the defendant had acquired it himself, or prevented the lessors from acquiring it himself, or prevented the lessors from acquiring it by his adverse possession. It is clear that the exception in the deed referred to gave no title in the soil of the mill-pond to the defendant. By it he could acquire, at the utmost, only the land necessary for the mill-site, the dam, and the right of ponding the water upon the soil above as an easement. *Whitehead v. Garris,*
(392) 48 N. C., 171. This being so, as it undoubtedly is, no length of time in the enjoyment of his easement by the defendant could take from the lessors and give to him the ownership of the land covered by the water. The lessors certainly had no right of action against the defendant for keeping up his dam and ponding the water back upon their land, and if he had continued to do so for fifty years, instead of twenty, it would not have availed him anything towards acquiring title

to the soil. His Honor erred, therefore, in leaving it to the jury to infer a title in the soil from such possession. The cutting of trees in the pond for saw-logs was equally unavailing to the defendant. It is not stated how many he cut, nor during how long a period he was engaged in doing it. It is simply said that "He cut trees in the pond for logs, which had been sawed up at the mill." This was not such an adverse possession as, if continued for seven years under a color of title, would have conferred a title on the defendant. *Green v. Harman,* 15 N. C., 158; *Loftin v. Cobb,* 46 N. C., 406. It could not therefore, prevent the deed from the Webbs, which was executed in 1842, from passing the title which they had to the ancestor of the lessors. Neither, as we have already shown, could the enjoyment by the defendant of his easement in the mill-pond have that effect. His Honor erred again in that part of the charge.

PER CURIAM. *Venire de novo.*

Cited: Bowling v. Burton, 101 N. C., 180; *McLean v. Smith,* 106 N. C., 178.

ROBINSON D. JONES v. JOHN McLAURINE ET AL.

This Court has no jurisdiction of a *scire facias* against bail, in an action brought here by appeal, and in which judgment has been rendered here against the principal.

SCIRE FACIAS (issued on motion in this Court), to subject bail. (393) The defendants became the bail of one John McLeran to a writ, issued in favor of the plaintiff, returnable to the Superior Court of CUMBERLAND. The original cause came to this Court by an appeal from the said Superior Court of Cumberland, and a final judgment was rendered here against the principal for $995.87, with interest and costs, which is still unsatisfied.

On the return of the *scire facias,* defendant moved to dismiss upon the ground that this Court has no jurisdiction of the proceeding.

J. H. Bryan for plaintiff.
D. G. Fowle for defendant.

PEARSON, C. J. We are of opinion that this Court has no jurisdiction of a *scire facias* against bail, in an action brought here by appeal and in which judgment has been rendered here against the principal.

In support of this jurisdiction two provisions by statute are relied on: ch. 33, sec. 6, "The Court shall have power to issue writs of *certiorari, scire facias,* etc., and all other writs necessary and proper for the exercise of its jurisdiction," and ch. 4, sec. 22, "In every case of appeal the Superior Court shall render such," etc., . . . "and may cause the same to be enforced by the proper process."

These provisions, we think, only embrace writs and other process which, we think, are necessary and proper to enforce a judgment which this Court has *previously rendered,* as a *fieri facias* or a *scire facias,* to have execution on a judgment which has become dormant, and clearly do not apply to writs and other process for the purpose of getting *another judgment* against persons who have not previously been before the Court, as it the case of a *scire facias* against bail, against whom another judgment is asked for, not simply that execution may issue on the judgment previously rendered against the principal. So that, although it presupposes a judgment to have been rendered, yet, in respect to the bail, it is an original proceeding, and is so treated in the statute, ch. II, sec 4;

"When a *scire facias* against bail shall be returned 'Executed,'
(394) they *may appear and plead as in other cases,* but the plea of *non est factum* shall not be received unless verified by affidavit filed with the plea."

In respect to prosecution, appeal, and injunction bonds there are express provisions that judgment may be rendered, on motion, by the Court, which renders the principal judgment in the case. In respect to bail bonds there is no such provision, which furnishes a potent implication against the jurisdiction.

It is settled that a bail bond is no part of the record. *Hamlin v. McNeil,* 30 N. C., 172. So that, although the remedy by *sci. fa.* is given by statute, *non constat* that it was the intention to affect in any way the question of jurisdiction; and besides the consideration that a court ought not to assume jurisdiction by implication, there is the further consideration that to do so, in this instance, would involve the Court in much embarrassment as to the mode of proceeding, for the bail are allowed to appear and plead "as in other cases," and if they plead *"non est factum,"* "release," "surrender of the principal," or any other matter *in pais,* on which issue is taken, how is the Court to proceed? It has no jury in attendance, and the omission of any provision for such a state of things repels the idea of an intention to confer jurisdiction by implication.

Our conclusion is supported by *American Bible Society v. Hollister,* 54 N. C., 13; *Smith v. Cheek,* 50 N. C., 213, where it is held that this Court has no jurisdiction to allow a bill of revivor or issue a writ of

error, because they are in the nature of original proceedings, and its jurisdiction is limited to cases brought before it by appeal at law and by appeal or removal in equity. So it was necessary to confer the jurisdiction by express provision.

It is also supported by the learning and authorities cited in Foster on *Scire Facias,* pages 11, 13 (73 Law Lib.), to which we were referred on the argument.

The different kinds of *scire facias* are there classified:

1. Those in continuance of a suit, as a *sci. fa.* to have execution (395) on a dormant judgment.

2. Those which constitute an original proceeding, as a *sci. fa.* to repeal a patent.

3. Those in the nature of an original proceeding, as a *scire facias* on a recognizance of bail.

Our case being a *sci. fa.* on a bail bond, is, of course, more strictly an original proceeding than a *scire facias* on a *recognizance* of bail, for the latter is a matter of record, while the other is a matter *in pais,* on which, at common law, the remedy was an action of debt; and the provision of the law, as it stood in the Revised Statutes, that bonds payable to the sheriff, or the bail to the writ, should be assigned by the sheriff, by his endorsement under seal, or should be considered as assigned by him when filed, and not excepted to, as provided in the Revised Code, and that the bail should be charged thereon by *sci. fa.* does not take from the proceeding its character of an original proceeding against the the bail, the only change being that, inasmuch as the remedy against the bail to the writ was an action of debt, and that against the bail to the action was a *scire facias* after the actual or implied assignment of the bond executed to the sheriff, the remedy should be by *scire facias.*

Lastly, it is supported by the fact that our "old and experienced" clerk informs us no such writ has ever before been issued by him, or any of his predecessors so for as the papers of his office show. This proceeding, therefore, is of the first impression, and has no precedent to support it.

PER CURIAM. Motion to dismiss allowed.

Cited: Cates v. Whitfield, 53 N. C., 268; *Bryan, in re,* 60 N. C., 49.

(396)

JOHN T. COUNCIL v. PETER MONROE ET AL.

Where a plaintiff in a warrant failed to appeal on a judgment rendered against him before a justice, at the rendition of such a judgment, or to make application for time to appeal, but appealed several days afterwards, it was *Held* that a motion to dismiss the appeal at the second term after it was returned to the court was in *apt time*.

MOTION to dismiss an appeal before *Caldwell, J.*, at last Fall Term of BLADEN.

The judgment was rendered against the plaintiff as to one of the defendants, and in his favor as to the other, on 30 November, 1857, and an appeal was prayed by him and granted on 9 December, 1857. The appeal was returned to Spring Term, 1858, of Bladen and at next term (fall of 1859) the defendant moved the dismissal of the appeal because "not taken within ten days, and because the said justice did not note on the judgment the application for time to give security." His Honor refused to dismiss, "because the motion was not made in apt time."

The defendant appealed to this Court.

W. McL. McKay for plaintiff.
Strange for defendant.

PEARSON, C. J. In *McMillan v. Davis, ante,* 218, it did not appear that the appeal was taken at a different time from the granting of the judgment. In our case it does appear on the face of the paper that the appeal was taken at a different time. Indeed, his Honor considered the appeal liable to objection because it appeared not to have been taken in the manner required by the statute, and puts his refusal to allow the motion to dismiss on the ground that it was not made in apt time. In this, we think, he erred. What is *apt time* depends on circumstances. In *McMillan v. Davis, supra,* there were three continuances in the county court, an appeal and three continuances in the Superior Court, and this Court was of opinion that the motion was not in apt time, because,
(397) after the delay, and the unnecessary accumulation of costs, it was unreasonable for the defendant to fall back upon an objection which he might have taken at first, and therefore the Court treated the objection as having been waived. So, in *Wallace v. Corbitt,* 26 N. C., 45, where the case had been removed to an adjoining county for trial, and pended three years, a motion to dismiss the appeal was considered too late. So in *Arrington v. Smith ibid.,* 59, the cause had been continued in the Superior Court two years, and witness had been summoned on both sides.

In our case the appeal was returned to the Spring Term, and the motion was made the next Fall Term. So only one term intervened. The probability is that it was not reached the first term; and there is this further circumstance—as the plaintiff did not appeal, or have his intention to appeal entered at the time when the judgment was rendered, the defendants were justified in taking it for granted that no appeal would be afterwards allowed. So there is nothing to show that they had notice of the appeal *until after the first term*, and it would be strange if the plaintiff could take advantage of a consequence of his own neglect in not appealing in apt time, and put on the defendants the blame of "being behind time." Where a defendant fails to appeal in proper time, and is allowed to do so afterwards, it is probable the plaintiff will soon hear of it, because he is concerned in taking out execution; but when a plaintiff fails to appeal, the defendant has no further concern in it, and may be taken by surprise if required to move to dismiss the appeal at the first term. So we conclude he is in "apt time" at the second term. There is error. The judgment must be reversed, and motion to dismiss the appeal allowed.

PER CURIAM. Reversed.

(398)

BANK OF FAYETTEVILLE ON THE PETITION OF JAMES DODD v. GEORGE W. SPURLING.

It is not according to the course of a court of law, nor is there any authority given by statute, for the plaintiff in a junior attachment to be allowed to intervene in an attachment of earlier date for the purpose of contesting the existence and validity of the debt therein sued for.

PETITION, heard before *Shepherd, J.*, at Spring Term, 1860, of CUMBERLAND.

The petition is as follows:

NORTH CAROLINA—Cumberland County.

Superior Court of Law—Spring Term, 1860.

To the Honorable, the Judge of the said Court:

The petition of James Dodd, humbly complaining, showeth unto your Honor that a writ of attachment has been issued at the instance of the Bank of Fayetteville against one George W. Spurling, which has been levied by the sheriff upon certain goods, wares, and merchandise and other property belonging to the said Spurling, and returned to the present term of this court. Your petitioner further shows that he himself is now, and was at the time of issuing and levying of the said attach-

ment, a creditor of the said Spurling, and that as such he also sued out a writ of attachment against the said Spurling upon the debt then due to your petitioner, which was levied upon the same goods, wares, and merchandise, and returned to March Term, 1860, of the County Court of Cumberland.

Your petitioner further shows to your Honor that he is informed, and has good reason to believe, and does verily believe, that the said Bank of Fayetteville did not have, at the time of issuing and levying of its said writ of attachment, a legal and subsisting debt then due from the said George W. Spurling, and, therefore, was not entitled to the remedy by attachment against him, and this your petitioner avers he is prepared to prove whenever an opportunity is allowed him by this honorable court.

(399) Your petitioner further shows to your Honor that the said Spurling has not appeared and pleaded to the said suit of the Bank of Fayetteville against him, and that should judgment be entered therein, and the property levied on be subjected to the satisfaction of the claim alleged to be due from the said Spurling to the Bank of Fayetteville, that the entire amount and value thereof will be absorbed, leaving nothing to be applied to the satisfaction of your petitioner's just debt, and rendering your petitioner entirely remediless in the premises.

Your petitioner, therefore, prays your Honor to allow him to intervene and contest the existence and validity of the claim alleged to be due from the said Spurling to the said Bank of Fayetteville, and to contest the right of the said bank to the said writ of attachment issued thereon.

Upon hearing this petition, which was verified by affidavit, the court made an order that the petitioner be allowed to intervene in the cause and contest the existence and validity of plaintiff's debt, upon giving bond and security for the costs.

From this order the Bank of Fayetteville appealed.

R. P. Buxton for petitioner.
C. G. Wright for bank.

PEARSON, C. J. The proceeding which was allowed by his Honor in the court below is of the first impression in this State. We find nothing to warrant it, either according to the course of the common law or under our statute, giving the process of attachment as a substitute for the ordinary process where the latter cannot be served.

Suppose, pending an action commenced in the ordinary way, a third person should file a petition setting out that he was a creditor of the defendant; that should the plaintiff get judgment all of the defendant's property would be sold under execution, and any judgment that the petitioner might afterwards obtain would be fruitless; that there was nothing owing to the plaintiff, but the petitioner feared he would get judgment, either because the defendant would neglect to contest the claim or would act collusively, and thereupon pray that "he should be allowed to *intervene* and contest the existence and (400) validity of the alleged debt of the plaintiff," is it too much to say such an application would astonish every member of the legal profession in the State of North Carolina? The appeal of the petitioner: "Must I lose a just debt because of the negligence or fraud of my debtor?" "Will a court of justice lend its aid to one who, as I am ready to prove, has no subsisting debt," would be met by the reply, "If you are permitted to contest the plaintiff's debt, he must be permitted to do so in respect to your debt, and thus make a double suit, wholly at variance with the course of a court of law, and for which there is no precedent.

Is the case altered where the action is commenced by original attachment? If so it must be by force of some provision of the statute, for the proceeding is still in *a court of law*—a fact, by the bye, which there seems to be a strong disposition to overlook in a blind effort to do *justice,* under the idea that the long established modes of proceeding at law are not calculated to effect it. This may be so; but while the matter is at law, "the course of the court" must be observed, except so far as it is changed by statute. So the question is narrowed to this: Does the statute contain a provision which authorizes the court to allow a third person to contest the debt of the plaintiff?

It is manifest that the case does not fall under sec. 10, ch. 7, Rev. Code: "When the property attached shall be claimed by any other person, the claimant may interplead," etc., for the petitioner does not claim the property; on the contrary, the proceeding assumes that the property belongs to the debtor. Indeed, the counsel for the petitioner did not insist that this section embraced the case, but referred us to the remarks of Drake on Attachments, and the cases there cited, in support of the proceeding.

There are some considerations which may tend to show the expediency of allowing, with proper restrictions, a junior attaching creditor to contest the debt of the plaintiff, but they addressed themselves to the lawmakers, and not to the courts, and we cannot yield our assent to the suggestion that the cases cited by Drake, "proceed- (401)

ing upon principles of strict right and justice, and fulfilling the law's aversion to every species of fraud," are sufficient authority to induce the Court to put a strained construction upon our statute, so as to make it meet the case, however desirable it may be to have a uniform practice in the courts of the different States.

In respect to the cases cited, this general remark may be made: but little aid can be derived in the construction of a statute from the decisions of the courts of other States, because the provisions of the statutes are scarcely ever the same, and there is no telling how far the question of construction may be affected by the current of legislation on other subjects. The case cited from New Hampshire, *Buckman v. Buckman,* 4 N. H., 319, does not aid us, for it merely states the fact that it is the ordinary practice in that State to allow a creditor to intervene and defend in the name of the defendant on a suggestion of collusion between the plaintiff and defendant, but it does not account for the origin of this practice, or show how a court of law was authorized to adopt it; and it seems, in that State, "attachment" is the *ordinary* process, and the writ of *capias ad respondendum* and other mesne process known to the common law is not in use.

The case from South Carolina, *Walker v. Roberts,* 4 Rich., 561, does not aid us, for in that State the effect of a judgment rendered on attachment against an absconding debtor does not reach beyond the property attached, and the statutory provision is treated merely as a mode of distributing the money arising from the attachment, similar to a "creditor's bill in equity, for the distribution of the effects of a deceased debtor."

The case from Virginia, *McClung v. Jackson,* 6 Gratt., 96, tends to support the construction we give to our statute, for the right of a junior attaching creditor to intervene is not put in the section allowing a third person who claims the property attached to interplead (which provision is similar to that contained in our statute, but is de-
(402) rived from the provision which allows the defendant *to make defense* without giving bail, whereas, by our statute, *the defendant is not* allowed to defend unless the property is replevied by giving bail, section 5).

Nor is the case from Georgia, *Smith v. Gettinger,* 3 Ga., 140, applicable to the question before us, for the decision that a judgment rendered on an attachment may be set aside in a court of law, at the instance of a creditor who has *obtained a judgment,* on the ground that the first judgment was obtained without consideration (that is, where there is no subsisting debt), is put on the ground that "in questions of fraud the jurisdiction by express statute, and indeed by the general law

in courts of law and equity, is concurrent." In this State there is no "express statute" to that effect. Nor is the jurisdiction in courts of law and courts of equity concurrent in all questions of fraud according to "the general law," as understood by our courts. On the contrary, there are many questions of fraud on which the courts of law do not assume jurisdiction—as one instance out of many: a woman in contemplation of marriage secretly conveys away all her property. This is a fraud upon the intended husband, and yet a court of law does not assume jurisdiction over it, because, in the absence of a statute, it has no jurisdiction except over frauds against *existing rights. Logan v. Simmons,* 18 N. C., 13; same parties, 38 N. C., 487.

Upon these four cases this additional general remark may be made: they do not establish any uniform practice. In South Carolina and Georgia the petitioning creditor is required to have reduced his debt to a judgment; in New Hampshire and Virginia he is allowed to intervene before he obtains judgment; and we are not informed what is the practice when the plaintiff, in the first attachment, in his turn, avers collusion between the petitioner and debtor, or that the petitioner has no subsisting debt; and certainly in "a proceeding according to the principles of strict right and justice" the right to charge fraud and impeach the alleged debt of the other must be mutual, so as to result in a double suit, which in a court of law is without precedent, except it be allowed by the express provisions of a statute. (403)

It was asked on the argument, Is a judgment conclusive on third persons, so that a creditor of an absconding debtor cannot be heard to aver that it was obtained without a subsisting debt? If so, is there no way for him to intervene, so as to prevent a judgment from being rendered? The reply is that there is no way, in a court of law, by which a third person, he being a creditor, can prevent a judgment from having *its legal effect,* unless there is a statute by which it is made void as against creditors. This is settled. *Skinner v. Moore,* 19 N. C., 138; *Respass v. Pender,* 44 N. C., 78. Where there is collusion between the alleged creditor and the absconding debtor, with an intent to defraud his true creditors, we suppose the case would come under the provisions of the statute, Rev. Code, ch. 50, sec. 1, which makes "every gift, grant, and conveyance of lands, goods and chattels, and every *bond, suit, judgment and* execution, made with an intent to hinder and defraud creditors, void as against creditors." But to bring the case within this statute it would not be sufficient to prove that the plaintiff in the attachment had no subsisting debt when the attachment issued; it would be necessary to connect the debtor with the fraud, as by showing that before absconding he executed a note for a feigned debt, for the

purpose of being made the groundwork of the fraudulent attachment, by which his property was to be put beyond the reach of his creditors; and even in that case the proceeding would not be by *intervening,* so as to prevent the judgment, or by moving to set it aside, for there is no such mode of proceeding according to the course of the court, but by taking a judgment and having the property seized under execution—treating the first judgment and the proceedings under it as void, in the same way as is done in the case of a deed made to defraud creditors; the legal effect of which, a third person, by the statute, is allowed to avoid. But for the statute, the deed as well as the judgment would, as a matter of course, have its legal effect as well in reference to third per-
(404) sons as to parties and privies.

The conclusion to which we have arrived is unavoidable unless, in an effort to do what seems to be "just and right," the Court should break through the long established distinction between the jurisdiction of a court of law and a court of equity, so as to confound the two. This can only be done by that department of our Government whose province is *to make laws.*

The order in the court below will be reversed, and the petition be dismissed.

PER CURIAM. Reversed.

THOMAS J. FRESHWATER AND WIFE v. DANIEL B. BAKER.

Where in the trial of an action for the detention of a slave, in the Superior Court, a verdict was rendered subject to the opinion of the judge as to the questions of the law governing the case and an appeal to this Court these questions were decided in favor of the plaintiff, but in making up the record below it was omitted to set out the jurors, and the verdict was left blank as to the value of the slave and the damages for his detention, it was *Held* that the court in which omission was made might amend the record *nunc pro tunc,* and, to enable it to do so, might order an inquiry as to the value of the slave and damages for the detention.

MOTION to amend, and for an inquiry, heard before *Shepherd, J.,* at last term of NEW HANOVER.

The cause in which this motion was made was originally tried before *Saunders J.,* at Fall Term of that court, and a verdict was taken subject to the opinion of the court on the questions of law governing the case. These questions came to this Court by appeal, and were disposed of at last term, *ante,* 255. It turned out that in making up the record in the court below the verdict was left blank in several particulars, par-

ticularly as to the value of the slave and the damages for de- (405)
taining him. The record omitted also to state the names of the jury rendering the verdict. The court allowed the record to be amended *nunc pro tunc,* so as to set out the names of the jury trying the cause. His Honor also ordered that an inquiry be submitted to a jury to ascertain the value of the slave, Henry, sued for, and the amount of damages the plaintiffs were entitled to for the defendant's unlawful detention of the said slave. From the ruling of the court, in both these particulars, the defendant appealed to this Court.

W. A. Wright and Strange for plaintiffs.
E. G. Haywood for defendant.

PEARSON, C. J. The objection that the court had no power to order the amendment in respect to setting out the names of the jurors, and the verdict, was not insisted on before us, and in regard to the want of notice, the facts are not stated, but we see from the record that the defendant was heard upon the motion to amend, and that, we think, was sufficient. There is no rule of practice requiring any particular notice to be given—ten or five days, for instance; and we cannot suppose that the court would allow a party to be taken by surprise.

Whether, under the power to amend, and its general power and control over its records, the court was authorized to direct an inquiry as to the value of the slave and the damages for detention, to be executed at its next term, for the purpose of putting itself in a condition to perfect the record by filling up the blanks which had been left in the verdict, is a question of more difficulty. It was the duty of the court, *ex officio,* when the case was tried, to have the value and the damages for the detention fixed by the jury, but at the trial many interesting questions of law were presented, and as the facts were not controverted, his Honor directed a verdict to be entered for the plaintiffs, subject to his opinion on the questions of law. Under such circumstances the attention of the court, and the gentlemen of the bar, is mainly directed to the points of law, the details of the verdict being left open to be filled (406)
up afterwards, which is usually done as *a matter of consent.* In this instance, it seems, the details of the verdict were not attended to, and the question is, Had the court power after an appeal, and at a subsequent term, to supply the omissions in the verdict by means of an inquiry? It would be a matter of regret if the court does not possess this power, for otherwise the plaintiff will be forced to lose the value of the services of the slave during the time of the unlawful detention by the defendant, and this failure of justice will be the result of an omis-

sion of the *ex officio* duty of the court to have the damages for detention as well as the value of the slave, fixed by the verdict.

We were, therefore, relieved by finding a precedent which recognizes the power to supply all such omissions by means of an inquiry. *Key v. Allen,* 7 N. C., 523. In that case the subject of writs of inquiry is fully explained, and it is decided that in this State an inquiry may be resorted to to *supply all such omissions,* the Court holding that the restraint upon it in England, by reason of the doctrine of attaint, has no application here, where that doctrine does not obtain—*cessante ratione,* and recommending its liberal use "when convenience or the justice of the case requires it," the more especially because inquiries are executed here before the court, and not, as in England, before the sheriff, acting in a judicial capacity; so that here the proceeding can be more readily reviewed.

This is an answer to the objection, made on the argument, that in taking the inquiry a question of law would arise as to the time for which the plaintiffs were entitled to recover the value of the services of the slave. In *Key v. Allen* it did not become necessary to decide whether the inquiry should be executed before the Superior Court or before this Court, and neither the report of the case nor the original papers (which have been examined) show how the matter was disposed of. We presume, after the power to supply the omission was established, no further difficulty was made, and the matter was arranged by
(407) consent. The Court concurs with his Honor, in the court below, in the opinion that it is proper to execute the inquiry in that court, because the omission in the verdict, which it is the object to supply, occurred there, and it is, consequently, the duty of that court to resort to all its powers in order to perfect its record, and thereby put itself in a condition to comply with a writ of *certiorari* by sending such a transcript as will enable this Court to render judgment. There is

PER CURIAM. No error.

JOSEPH H. BURNETT v. JOHN THOMPSON.

1. 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.

2. Where A. has an estate for life in possession, in a term for ninety-nine years, B. has an estate in the 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 cut-

ting 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.

3. 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.

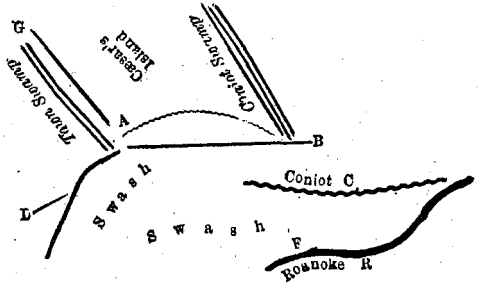
TRESPASS, q. c. f., tried before *Shepherd, J.*, at last Fall Term of WASHINGTON.

WRIT OF ERROR.

On the following case, 51 N. C., 210:

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, (408) 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 Swamp (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 question 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. (409)

The defendant offered evidence to show that there was a continuation of the waters from Town Swamp to Coniot Swamp, through the swash, known as Broad Water, and that Coniot Swamp extended to Coniot Creek.

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 Swash and then proceed in a straight line through to Coniot Swamp." The defendant excepted to this instruction.

All 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 ninety-nine years, which would expire in 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 defendant.

W. N. H. Smith and W. A. Moore for plaintiff.
P. H. Winston, Jr., Hines, and H. A. Gilliam for defendant.

BATTLE, J. This writ of error, which is filed under Revised Code, ch. 33, sec. 19, brings before us for reconsideration the errors which were assigned by the defendant in his bill of exceptions, upon which we gave an opinion, which will be found 51 N. C., 210. We (410) have given to the arguments by which the counsel for the defendant have attempted to show errors in our judgment, an attentive consideration, but without being able to come to any other conclusion than that to which our former deliberations conducted us.

1. The first alleged error is in respect to the question of boundary. His Honor, in the court below, had instructed the jury with regard to the disputed line of the deed under which the defendant claimed, "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 to Coniot Swamp." We held that we could not discover any error in this charge, but the counsel for the defendant now contends that in so holding

we committed an error, for that in law the true course of running from Town Swamp to Coniot Swamp was not a straight line from one point to the other through the swash, but was along the edge of the swash, and for this they rely upon the intimation of the opinion of a majority of the Court when this cause was before it on a former occasion. *Burnett v. Thompson,* 35 N. C., 379.

It will be seen that the calls of the defendant's deed, so far as it is necessary to state them, are as follows: "down Miry Branch to the run of Town Swamp, thence down the Town Swamp to the swash, thence down the swash to Coniot Swamp." The case now before us then states that the defendant offered evidence to "show that there was a continuation of the waters from Town Swamp to Coniot Swamp through the swash, known as Broad Water, and that Coniot Swamp extended to Coniot Creek." That is all the testimony given in relation to the swash. Nothing is said of its nature, extent, or position, except the simple statement that there was a continuation of the water from Town Swamp to Coniot Swamp through the swash, known as Broad Water. We learn from this that what is called the swash lies between Town Swamp and Coniot Swamp and extends from one to the other, but are left in ignorance of its boundaries in other particulars, especially as to *the nature and direction of its edges.* Where any two points are (411) given a call from one to the other is always a straight line, unless there be something additional in the description to vary it, for instance, up or down the meanders of a stream, or along the shore of a lake, or the edge of a swamp. In this case the call is "down the swash," but there are no facts stated to show that any other than a straight line would lead from Town Swamp to Coniot Swamp "down the swash," and hence the defendant's bill of exceptions has failed to give us the means of ascertaining whether his Honor's instruction was erroneous or not. By comparing the statement of the case as it appears before us now with that which was presented on the former occasion, it will be plainly perceived that the variance is too great for the one to be permitted to have any influence over the other.

2. With regard to the question of damages, it may well be doubted whether the additional acts to which the counsel have referred us in relation to the lease of the Indian lands in Bertie County are not private acts, for if they be so we cannot judicially notice them. However that may be, we have looked into them and find that they do not vary in any material degree—certainly they do not enlarge the interest given to the lessee by the act of 1824. Indeed, the latter act having been passed long after those of 1778 and 1802 (chs. 136, 607, Rev. Code of 1820), may well be taken as the true exposition of the legislative will

concerning them, and we are unable to add anything to what we said of its construction in our former opinion. If that, then, be the true construction, we have heard nothing in the argument of the counsel upon that point to induce us to change our opinion as to the rule of damages by which the amount of the plaintiff's recovery is to be ascertained.

The result is that the errors assigned by the defendant in his writ of error must be overruled and the judgment be again

PER CURIAM. Affirmed.

Cited: Dorsey v. Moore, 100 N. C., 45.

(412)

JOSHUA G. WRIGHT, PROPOUNDER, v. MARY HOWE, CAVEATOR.

Undue influence, in order to invalidate a will, must be established to be fraudulent and controlling, and even where the relation of client and attorney existed, such influence must be made to appear to the satisfaction of the jury by that and other facts of the case, and is not to be inferred from the relation as a matter of law.

DEVISAVIT VEL NON, tried before *Shepherd, J.,* at last Spring Term of NEW HANOVER.

The maker of the will was an aged person of color, living in the town of Wilmington, and it was proved that she looked to Mr. Wright, the sole legatee, for counsel as a lawyer and for protection, habitually, and, occasionally, for small sums of money; it was proved, also, that he had the collection of moneys due her for rents. The defendant had no relation except one neice, for whom she had provided by a deed of gift for a house and lot in the said town. It was proved that Mr. Wright carried the message to Mr. Davis, a gentleman of the bar, also in Wilmington, from the decedent, Mary Green, as to writing her will, and gave him the instructions how it was to be done. There was much corroborating testimony as to the decedent's purpose of making her will in favor of Mr. Wright, particularly that the witness had said her husband's wish was that she should give her property in that way, and that she had got the whole property from her husband, which was shown to be true; also, that her niece had been provided for, which was shown by the deed of gift and many declarations to the same effect, as tending to show that it was her deliberate intention so to dispose of her property. Her testamentary capacity was established beyond dispute,

and the ground of opposition insisted on was certain declarations of the decedent disclaiming the act as her will, and complaining that she did not understand it, and was unwilling that it should stand as her will. These and various other facts of the same tendency were left to the jury, with the following instructions from the court:

After explaining to the jury that by undue influence is meant (413) a fraudulent influence, overruling and controlling the mind of the person operated upon, directed the jury further, that if they should become satisfied that the propounder was in the relation towards the decedent as her attorney, the relation was one of confidence, and their dealings, where the attorney took a benefit from the act of his client, as in this case, were regarded with suspicion, and were to be scrutinized with a degree of care and closeness such as would not be required in dealings between those who stood in no such relations. The court further charged the jury that an undue influence, fraudulent and controlling, must be shown, and if they were satisfied that it existed in this case, they must find for the defendant, even though Mary Green might have had capacity; but if they were not so satisfied upon all the facts proven, then they would find for the propounder. The caveator excepted.

Verdict for the propounder. Judgment and appeal.

Strange and W. A. Wright for propounder.
E. G. Haywood for caveator.

MANLY, J. We have examined this case, and do not find any error in the instructions excepted to. The case yields all question as to the formal execution of the instruction of the instrument and its execution by one having sufficient capacity, and makes a question only upon the point of undue influence. Our attention, therefore, is directed to certain instructions upon that point alone. Undue influence is denied to be an influence by fraud or force, or by both, and, in its application to the making of a will, signifies that through one or both of these means the will of the decedent was perverted from its free action, or thrust aside entirely, and the will of the influencing party substituted for it. This definition is substantially given when the jury are told "it is a fraudulent influence overruling or controlling the mind of a person operated on."

It seems the decedent and the legatee stood in the relation of attorney and client, *patron* and *dependent,* and the court below, in noticing this, informs the jury "that dealings between persons bear- (414) ing these relations, one to another, are to be suspected and scrutinized more closely and carefully than dealings between others." These

relations, as facts pertinent to the issue, with the other facts in the cause bearing upon the point, were submitted to the jury with proper instructions. This is all, we think, the court was authorized to do by the law of the land.

A paper that does not emanate from the consent of the maker, freely given, is not a will, but the want of such consent is not a legal conclusion from the relations referred to, or from any or all of the facts in the cause. Altogether, these form a body of facts from which undue influence may or may not be inferred. But this inference should be drawn by the jury, and not by the court. *Downey v. Murphy,* 18 N. C., 90.

We concur with the court below, therefore, that undue influence must be fraudulent and controlling, and must be shown to the satisfaction of a jury, in a court of law, upon an issue of *devisavit vel non.*

No special instructions were asked for by the appellant. Of the instructions given and excepted to, no particular portion has been pointed out as the object of the exception. We have, therefore, gone through the whole, and find

PER CURIAM. No error.

Cited: Horah v. Knox, 87 N. C., 490; *Wessell v. Rathjohn,* 89 N. C., 383; *Westbrook v. Wilson,* 135 N. C., 402; *In re Abee,* 146 N. C., 274; *Myatt v. Myatt,* 149 N. C., 141; *In re Craven,* 169 N. C., 569; *In re Mueller,* 170 N. C., 29; *In re Broach,* 172 N. C., 523; *McDonald v. McLendon,* 173 N. C., 177.

(415)

DOE ON THE DEMISE OF EZEKIEL OVERTON v. ALISON G. CRANFORD.

The purchaser of a tract of land under an order of a court of competent jurisdiction for a sale for the payment of debts, on the petition of the administrator, who was also the sheriff serving the notices on the heirs at law (such purchaser not being a party to the proceedings), was *Held* not to be affected by such irregularity nor by the fact that the petition was not sworn to.

EJECTMENT, tried before *Shepherd, J.,* at Special Term, June, 1859, of MONTGOMERY.

There was a verdict for the defendant, and the following are the exceptions taken to the ruling of his Honor in the progress of the trial:

The plaintiff offered, as part of his title, a deed for the land in dispute, from one A. H. Saunders, who had been appointed by the county court a commissioner to sell certain lands belonging to the heirs at law

of one Burgess Goings. Saunders was the administrator of Goings, and filed a petition in 1849 to make the real estate assets for the payment of debts. He was also sheriff of the county, and as such served the notices issuing in the cause upon the heirs at law, who were made parties defendant, and the returns were made in his own name as sheriff. The court held that this service by the plaintiff in the cause was void, and could not support the deed from Saunders offered by the plaintiff. For this the plaintiff's counsel excepted.

There was no affidavit to the petition, as required by the statute. The court held the order of sale to be void on that account. For this the plaintiff's counsel excepted. The plaintiff then offered a deed from the widow of Goings for a tract of land allotted to her as dower, and it became a question whether the *locus in quo* was within boundaries of the said deed, upon which questions as to the principles of law regulating boundaries arose, and were decided against the plaintiff, and exceptions taken, but as this Court did not proceed to their consideration, it is not deemed necessary to state them. Appeal by plaintiff.

Luke Blackmer and J. H. Bryan for plaintiff.
D. G. Fowle for defendant. (416)

MANLY, J. The case states the plaintiff attempted to show title through Burgess Goings, by proceedings on the part of his administrator, A. H. Saunders, to make the real estate assets. It seems there was a petition, and copies with notices served upon the heirs by A. H. Saunders, who was at the time sheriff, and a decree for a sale, appointing Saunders commissioner to sell. Two irregularities are noted in the proceeding, and for these it was objected in the court below that the sale under the proceedings was void. The court sustained these objections, and this evidence of title was excluded. How far, or in what respect, this ruling affected the controversy (that is, the boundary between the parties) we are not enabled to see, but suppose from its insertion it had a material bearing. In this ruling we think there is error.

Neither of the parties to this controversy was a party to the petition for the sale, or in any way interested in it, and we are of opinion a mere stranger cannot go behind the decree of sale and take advantage of the irregularities noted to defeat the rights of the purchaser. The order, which is the commissioner's warrant for selling, being regular on its face, and issuing from a court of competent jurisdiction, the purchaser ought to be protected, otherwise all confidence in judicial sales will be lost and the free and perfect competition for property on such occasions, essential to the rights of all parties, entirely subverted.

It may be remarked with regard to the first of the defects mentioned in the case that neither as administrator in preferring the petition nor as sheriff in serving the notices does Saunders act *proprio jure,* but in both he is the minister of the law. There is not, therefore, in his conduct, strictly speaking, the inconsistency of acting as ministerial officer in his own cause. It is an irregularity which the court might have corrected, upon exception, pending the proceedings, but it cannot be inquired into collaterally. And with respect to the objection that
(417) no affidavit of the facts of the petition was made, it would have been corrected upon the motion of any party in the cause, while it was pending, but the decree of sale cannot now be annulled therefor upon the motion of a stranger.

The object of calling in the parties in interest is to guard the court from acting against law to the injury of any one, and everything of form, as well as substance, is supposed to be done, or waived, until the contrary be established by proper proceedings instituted for the purpose. These principles seem to be fully settled in the case of a constable's levy on land returned to court. A sale made in pursuance of an order from the court in such a case cannot be impeached collaterally, although it did not appear from the constable's return there were no goods and chattels, and although no notice was given to the owner. *Jones v. Austin,* 32 N. C., 20.

The able judge who tried the case below had, as we suppose, *Leary v. Fletcher,* 23 N. C., 259, in his mind, where it is decided that an order made for the sale of an orphan's land by the county court on the motion of the guardian was void for certain irregularities in the proceedings. The cases may be distinguished. In *Leary v. Fletcher* the decree or order of sale which constituted the sheriff's warrant was contrary to the requirements of the law in this: no particular property was *specified,* but the sheriff required to sell *so much as might be sufficient,* whereas the law requires the court to designate. The order, upon its face, was outside of the court's power, and was consequently void. Not so in the case now before us.

We have not thought proper to discuss the point of evidence raised on the question of boundary, as it becomes unnecessary to do so from the view taken of the other points, and because, upon a second trial, it may possibly be eliminated altogether from the case by the introduction of the title excluded upon the former trial. In exclud-
(418) ing this title, derived from the administrator's sale, there was error, and for this there must be a

PER CURIAM. *Venire de novo.*

CALVIN JONES v. HENRY T. CLARKE.

In a petition for damages for ponding backwater, where in the county court the plaintiff's right to relief is denied, the proper course is to impannel a jury to try the allegations made in bar of such right, and if such allegations are found for the plaintiff, the proper course is then to order a jury on the premises to assess the damages; but in all cases where there is an appeal to the Superior Court the facts are to be ascertained by a jury at bar, but in that court those pertaining to the question of relief, and those as to that of damages, are to be separately submitted.

PETITION, filed in the County Court for damages for obstructing plaintiff's ditch or canal, and tried on appeal before *Saunders, J.*, at last Spring Term of EDGECOMBE.

The petitioner alleged that he owned very valuable lands about 2½ miles from Tar River, which was a good deal composed of swamp, and that he owned other qualities of land, all of which required draining, and that when drained the lands were of great fertility. He further alleged that the natural flow of the water from these lands is through the land of the defendant into a gut which empties into the said river; that about thirty years ago one David Barnes, under whom the plaintiff claims, with the permission of the then proprietors of the land now owned by the defendant, cut a canal from the said lands of the plaintiff through those now owned by the defendant, into the gut above described, and that for more than twenty years, to wit, till 1855, he has enjoyed the unobstructed use of the said canal; that in 1855 the defendant, H. T. Clarke, placed a dam across the said gut, and ponded the water back up the said canal, by which the discharge of its water was (419) obstructed, and the land which had been drained theretofore became sobby and of little value. The prayer is for a jury of view to assess the damages on the premises, etc.

The defendant, among other defenses, denies the plaintiff's right to have a canal on his land; he says the canal spoken of by the petitioner was originally of a particular size, to wit, 8 feet wide and 4 feet deep; that this was amply sufficient to drain the land the plaintiff then owned, but that he afterwards bought other lands adjacent to his, and turned the water from these, contrary to their natural tendency, into the canal; that he also sold the right to others owning lands adjoining his to turn water into this canal, and that it was this increase of water, and not the dam erected by him, that caused the grievance complained of by plaintiff. He also says in his replication that at the time alleged by plaintiff as the commencement of the use of the easement claimed, the then proprietor was an infant at the time the canal was cut, and could not, therefore, give her consent; that previously to her estate, her mother, who was a

feme covert, was the owner, and that he, defendant, bought the estates of both at a sale made by the clerk and master of Edgecombe.

The replication further states that previously to his purchase of the land the persons to whose title he succeeded had a mill where the present one is situated, and used it for many years, but that they found it convenient to let it go down, and that he has done nothing more than restore the state of the water to what it had before been.

The county court declared that the petitioner was entitled to relief, and therefore ordered that a writ be issued to the sheriff commanding him to summon a jury to meet on the premises to inquire of the damages, etc.

The Superior Court gave the following judgment: "This cause is heard on the appeal, and the court confirms the judgment of the county court and directs that the cause be sent back to the county court, with directions to proceed to issue a writ commanding the sheriff to summon a jury to view the premises and assess the plaintiff's (420) damages." From which judgment the defendant appealed.

W. T. Dortch and W. B. Rodman for plaintiff.
B. F. Moore, J. L. Bridgers, and Whitfield for defendant.

PEARSON, C. J. The damage complained of is the consequence of an obstruction to an easement to which the plaintiff alleges he is entitled, and we were at first inclined to think the proper remedy was an action on the case; but *Bryan v. Burnett,* 47 N. C., 305, *Shaw v. Etheridge, ante,* 225, settled the question. The mode of proceeding by petition applies to all cases where damage to land is caused by the erection of a milldam.

This is the first case in which the Court has been called on to put a construction on the statute in respect to the mode of proceeding where the *right* of the petitioner is denied, for cases of the kind usually involve questions merely as to the damages.

The statute provides, Rev. Code, ch. 71, sec. 12: "If, upon the hearing of any petition, the court *shall judge the petitioner entitled to relief,* they shall order a writ," etc., to have the damages inquired of by a jury on the premises. It seems to have been supposed that the matter of damages would generally be the only question presented (and this, as we have seen, has been the case), and no express provision is made as to the mode in which the owner of the mill is to make defense so as to raise the question whether the petitioner is *entitled to relief;* but the practice has become general merely to put in an answer in writing without regard to form, and without attending to the rules of pleading. The question is: Suppose the answer alleges that the land set out in the petition as being damaged by the ponding of the water is the property of the defendant, so

as to raise the question of title, as upon a plea of *liberum tenementum,* or that the defendant has a license, or has acquired an easement by prescription: in what way are the facts about which the parties (421) are at issue to be tried, so as to enable the court to adjudge as to the petitioner's right to relief? We are of opinion that the mode of trying the issues of fact according to the course of the common law should be pursued; that is, the court has a jury impaneled to try the issues, and if the verdict be for the petitioner, then the court adjudges the petitioner entitled to relief; and, *in the county court,* a writ of inquiry as to the damages should issue to the sheriff directing him to have it executed on the premises by the view and examination of a jury. Upon appeal the Superior Court should likewise have the issues of fact tried by a jury, and, under the act of 1809, a writ of inquiry was issued to inquire of the damages on the premises; but by the act of 1813, the damages are now, in the Superior Court, to be assessed by a jury at bar, and, of course, when issues of fact are raised, the same jury which tries the issues will assess the damages, as in other cases. In our case the petitioner alleges that he is entitled to an easement by prescription. This is denied by the defendant, because of the infancy and coverture of the supposed grantors; and, in the second place, the extent of the easement is put in issue, both in respect to the size of the ditch and the scope of country the petitioner is entitled to drain by means of the ditch—thus raising issues of fact to be tried by a jury under the directions of the court as to the law involved.

The record does not show how the matter was disposed of in the Superior Court; it simply sets out that "This cause is *heard on the appeal,* and the court confirms the judgment of the county court, and directs that the cause be sent back with directions to the county court to have the damages assessed by a writ of inquiry executed on a view of the premises." So we are to assume that the Superior Court acted without the intervention of a jury. In this there is error. A jury in that court should have passed on the facts, and also have assessed the damages, if, under the charge of the court, they found in favor of the petitioner, as was done in *Kesler v. Verble, ante,* 185, and no question was made as to the mode of proceeding. The suggestion that the case should (422) be sent back to the county court, in order to have a writ of inquiry executed on view of the premises, has nothing to support it, for an appeal is allowed in all cases, which vacates everything done in the county court, and, under the act of 1813, in the Superior Court the damages are to be assessed by a jury at bar, which excludes the idea of an intention to give any particular effect to an action of the jury of view which is directed by order of the county court. The fact is, experience proved that a jury of view did not answer as well as was anticipated, and, under

the act of 1813, when a case gets to the Superior Court the damages are to be assessed at bar, so as to let the jury have the benefit of the instructions of the judge, which it is supposed would aid them more than a view of the premises, exposed as they would be to irregularities and improper influences. There is error.

PER CURIAM. Reversed.

DOE ON THE DEMISE OF JOSEPH G. GRANBERY v. JOSIAH NEWBY.

A rule in the county court for a defendant, in ejectment, to give security for costs on the pain of a judgment against the casual ejector cannot be made returnable to the Superior Court, and carried up with an appeal to that court by the plaintiff, who submitted to a nonsuit, and it was *Held* to be error in the Superior Court to give judgment enforcing such a rule.

EJECTMENT, tried before *Dick, J.*, at Spring Term, 1860, of PERQUIMANS.

A declaration in ejectment, on the demise of Joseph Granbery, was served on the defendant, returnable to the county court of Perquimans, and at February Term, 1859, he entered into the common rule and pleaded "General issue, License, and *Liberum Tenementum.*" (423) At August Term, 1859, the plaintiff took a nonsuit, and at the same term a rule was made for the defendant to give surety for the costs on or before the first day of the Superior Court next ensuing, or allow a judgment against the casual ejector. At the same term the plaintiff took an appeal from the judgment of nonsuit to the Superior Court. On Friday of the Superior Court, no surety having been given, the court ordered a judgment to be entered against the casual ejector, from which the defendant appealed to this Court.

Johnson for plaintiff.
Jordan for defendant.

PEARSON, C. J. We think it clear that after a person, served with a copy of the declaration in ejectment and notice, has been made the defendant by entering into the common rule and pleading not guilty, he may be required to give bond for the cost, under a rule that unless he does so his appearance will be stricken out and judgment be entered against the casual ejector, as the failure of the plaintiff to insist upon the bond in the first instance is not an absolute waiver of his right to do so afterwards.

But his Honor erred in attempting to give effect to the rule which had been previously made in the county court.

If, as appears in the face of the record, the rule was made *after* the plaintiff had submitted to a nonsuit, it was of no force, because there was no case in court, and nothing to act on. If the rule was made before the nonsuit, then it was superseded thereby, for although while the rule was pending the plaintiff was at liberty to discontinue his suit, yet he was not in a condition to submit to a nonsuit and appeal, as from a judgment with which he was dissatisfied, which supposes that the case is in a condition to be tried, and the plaintiff submits to a nonsuit in deference to the opinion of the court, and the case cannot be in a condition to be tried while the rule is pending; or if the nonsuit and the rule and the appeal be considered as concurrent acts, the rule was of no force, because the county court had no authority to make a rule which is to be enforced in the Superior Court. There is no precedent for such (424) a proceeding. Every court must make rules with reference to its own action. So the county court cannot make a rule in anticipation that the case is to be taken out of that court and carried to another, upon which the duty of enforcing the rule shall be thereby imposed.

PER CURIAM. Reversed.

MILLS H. EURE v. NATHAN PARKER ET AL.

A deed of trust conveying slaves, to secure the payment of debts, with the usual power to make sale, *not having a subscribing witness*, is, according to Rev. Code, ch. 50, sec. 13, inoperative and void.

TROVER, tried before *Dick, J.*, at last Spring Term of GATES.

The plaintiff offered in evidence, as part of his title, a deed of trust made to John W. Hinton by one Gilbert Harrell. The deed is in the common form, conveying lands and slaves, including the one in question, and other property, to secure certain debts therein enumerated, with power to sell the same on certain specified terms. The deed has no subscribing witness, and it was contended that as to the slaves it was inoperative on that account. His Honor was of that opinion, and in deference thereto plaintiff submitted to a nonsuit and appealed.

W. A. Moore and Hines for plaintiff.
Jordan for defendants.

MANLY, J. The case comes up to us upon a single question, the (425) admissibility of a deed dated 17 June, 1856. It is without a sub-

scribing witness. Rev. Code, ch. 50, sec. 13, declares that "All sales and conveyances of slaves shall be in writing, *attested by a credible witness subscribing thereto,* or otherwise shall be void." The point made is whether the deed in question is embraced in the class of instruments designated in The Code; for, I suppose, it is not at all questionable that if the instrument be void, it has no legal entity or validity *per se,* for any purpose. Is it, then, a conveyance of slaves within the purview of The Code? It is, we think, clearly so. The suggestion that it may be upheld as a power of attorney, and admissible as such, is not sound. The class of instruments called powers of attorney convey no legal estate, but is mere authority to the attorney to sell for and in the name of his principal; and when he executes the power, he does it by making conveyances and acquittances in the name of the principal, and until such execution of the power the estate continues in the principal. That is not the character of the instrument before us. It purports to be a conveyance of the legal estate in the property (land, slaves, and other personalty), with a power to sell at private or public sale and apply to certain objects. It would be, if effectual for any purpose, a transfer of the legal estate, and it is in its tenor and significance not the less a conveyance because it annexes to the estate certain trusts.

This is an attempted conveyance of slaves; a power of attorney to convey is a very different thing. The former is void if without a subscribing witness; the latter would not be. A conveyance of land would not be. Writings to convey slaves are distinguished in the law from other conveyances, and the safeguard of subscribing witnesses made necessary to the former. Why this is so we are uninformed, but thus the law is written.

There is no error in the judgment of the Superior Court excluding the deed.

PER CURIAM. Affirmed.

(426)

McKAY AND DEVANE v. JOHN ROYAL AND WIFE.

The debt made by one acting as executor in employing counsel, after the testator's death, to advise and assist such executor in the discharge of his duties, is a personal debt, and not one against the executor as such.

ASSUMPSIT, tried before *Shepherd, J.,* at last Spring Term of SAMPSON.

The plaintiffs, who are attorneys at law and professional copartners, appeared as counsel for Catherine Royal, who propounded the will of her husband, Rezen Royal, for probate, wherein she was named executrix,

and they also acted as counsel for her generally in the management of the estate. After the rendition of these services the plaintiffs demanded payment, which the defendant refused, whereupon this suit was brought against her individually, without declaring against her as executrix. The counsel for the defendant asked the court to instruct the jury that as no express promise was made by the defendant to pay this demand, the plaintiffs could not recover.

His Honor refused the instruction, and defendant excepted.

Verdict for plaintiffs. Judgment and appeal.

D. G. Fowle and E. G. Haywood for plaintiffs.
No counsel for defendants.

BATTLE, J. There is not the slightest foundation for the defense attempted to be set up by the defendant. As the plaintiffs were employed by the executrix to advise and assist her in the probate of the will of the testator, and in the management of his estate, she became liable to them upon a *quantum meruit* in her individual and not in her official capacity. Their claim against her could not be a debt of the testator, for, say the Court in *Hailey v. Wheeler,* 49 N. C., 159, "It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time. If an executor make an express contract in reference to the property of the estate, (427) as if he employ one to cry the sale of the property, as auctioneer, this is not a debt of the testator." So in the present case, the executrix having employed the plaintiffs as her attorneys and counsellors, though in relation to the business of the estate of her testator, the debt is hers, and she must pay it, and if the disbursement be a proper one, she will be allowed a credit for it in the settlement of her account with the estate. This is common learning, and it is unnecessary to enlarge upon it or cite any other authority in support of it.

PER CURIAM. No error.

Cited: Beaty v. Gingles, 53 N. C., 304; *Kessler v. Hall,* 64 N. C., 61; *Kerchner v. McRae,* 80 N. C., 223; *Tyson v. Walston,* 83 N. C., 95; *Banking Co. v. Morehead,* 116 N. C., 412; *Banking Co. v. Morehead,* 122 N. C., 323; *Lindsey v. Darden,* 124 N. C., 309; *LeRoy v. Jacobsky,* 136 N. C., 450; *Kelly v. Odum,* 139 N. C., 282; *Knights v. Selby,* 153 N. C., 208; *Craven v. Munger,* 170 N. C., 427; *Cropsey v. Markham,* 171 N. C., 46; *Whisnant v. Price,* 175 N. C., 614.

FANNIE FROLICK v. JAMES T. SCHONWALD.

Where the mother of an illegitimate child and its father entered into covenants whereby the mother obliged herself to keep and educate it till it got to be 21, and the father to pay her a stipulated monthly price for so doing, with a provision that if the father should *become dissatisfied with the manner of its education and treatment*, he might resume the possession of the child, and the payments cease, it was *Held* that in order to get rid of the obligation to pay, the father had to show that he had *reasonable cause of dissatisfaction.*

COVENANT, tried before *Shepherd, J.,* at last Spring Term of NEW HANOVER.

The plaintiff being the mother of an illegitimate child, begotten by the defendant, they entered into articles of agreement in respect to the custody and nurture of the child, the provisions of which material to this suit are as follows: "That the said James T. Schonwald, being anxious to provide support and maintenance for a certain female child, known by the name of Eveleen, and the said party of the second part having agreed to keep, rear and maintain the said child until she comes of lawful age, hath, and by these presents doth, for himself, his heirs, etc., covenant . . . to and with the said party of the second (428) part that he will well and truly pay, or cause to be paid, to her, or her order, annually during the minority of said child, . . . $120, in twelve equal annual instalments of $10 each, . . . and to continue during the minority of the said child, or for such period only as the said child shall remain in the custody of the said party of the second part." Then comes a covenant on her part to "keep, rear and board, clothe and instruct" the said child "during the whole time of her minority, or during the whole time in which she shall remain in her custody." . . . "And it is agreed, understood, and mutually covenanted by and between the parties hereto that if at any time hereafter the said party of the first part shall become dissatisfied with the manner in which the said child is educated, treated, and maintained, or any other cause, or at the request of the said party of the second part, or in the event of her marriage or decease, or the like, that then it shall and may be lawful for the said party of the first part to resume the possession of the said child, without any question, doubt, suit, or trouble."

It was in evidence that the defendant made several payments according to the terms, and some months previous to the beginning of the suit he demanded that the child should be given up to him, which was refused by the mother. It was further in evidence that she has had the custody and nurture of the child from the date of the covenant.

The court was of the opinion that the demand made by the defendant for the surrender of the child discharged the defendant from subsequent liability, and so instructed the jury.

The plaintiff excepted. Verdict for the defendant. Judgment and appeal.

W. A. Wright and Baker for plaintiff.
No counsel for defendant.

MANLY, J. The decision made in the court below is predicated upon the construction that defendant's obligations arising out of the contract were determinable by him at will. In substance, it was there held that a demand for the child operated as a rescission of the (429) covenant to pay the stipulated price for her support. This seems to us not to be reasonable, and therefore not the true construction of the instrument. It amounts, according to this view, to nothing more than a putting of the child with plaintiff to be brought up, and a promise to pay at the rate of $10 per month for the time she might be permitted to stay there. The parties would hardly have conceived it necessary to resort to the amount of verbiage adopted in the paper to evidence so simple an idea. We take it something more was meant. Our construction is that the child is committed for nuture and education to the plaintiff, to remain until the ward attained the age of 21, unless plaintiff in the meantime shall fail to perform or improperly fulfil her duties (other stipulations and conditions not affecting our inquiries, we omit to notice).

The words of the paper are that "the custody of the child may be resumed by the defendant when he shall become dissatisfied with the manner of its education, treatment, or maintenance, *or other cause.*" A capricious and wanton dissatisfaction on the part of the defendant seems not to have been in the minds of the parties, and would be inconsistent with a fundamental idea in respect to mutual covenants, viz., equal as well as mutual benefits and obligations. The defendant must have cause —*reasonable cause,* for dissatisfaction. It is only in that state of things he can terminate the woman's right, under the contract, to the custody of the child. And it is very certain that as long as the right is united with the actual custody, the plaintiff may recover the stipulated pay. There was error in the instructions to the jury, and there should, therefore, be a

PER CURIAM. *Venire de novo.*

(430)

DOE ON THE DEMISE OF WILLIAM McRAE v. MASTIN C. WILLIAMS.

A deed cannot operate as color of title, so as to have effect beyond the estate which it professes to pass.

EJECTMENT, tried before *Shepherd, J.*, at last Spring Term of MONTGOMERY.

The lessor of the plaintiff, in order to show title to the land described in the declaration, gave in evidence a deed from the defendant to Murphy McRae, dated 21 October, 1845; then a deed from Murphy McRae to James M. Lilly, dated in 1854 and a deed to the lessor William McRae in 1857. The demise is laid on 1 May, 1857. It was admitted by the lessor that the deed from Williams to Murphy McRae conveyed only an estate for the life of the bargainee, the word "heirs" having been omitted. Murphy McRae died in 1854, and the defendant entered on the premises and had possession at the bringing of this suit.

The plaintiff's counsel insisted that the deed from Williams to Murphy McRae, though conveying no estate in fee, was good as color of title, and he offered to prove the said Murphy had had seven years possession under it and adversely to the defendant. The court intimated an opinion that seven years possession under the deed mentioned did not enlarge the estate of the grantee for life into a fee. In submission to this opinion the plaintiff submitted to a nonsuit and appealed.

No counsel for plaintiff.
Blackmer for defendant.

PEARSON, C. J. The legal effect of the deed executed by Williams to Murphy McRae was to pass to him an estate for his own life. There is nothing to support the notion that a deed may be color of title, so as to have effect beyond the estate which it professes to pass. It is clear that the possession of Murphy McRae could not operate in respect to Williams as an adverse possession during the continuance of the life estate created by the deed from Williams to McRae.

(431) If it was the object of the parties to create a fee-simple estate, and the purpose was defeated by the omission of the word "heirs," relief may be obtained in a court of equity by the correction of the mistake in the deed; but it cannot be effected by a shortcut in a court of law. These questions are too plain to admit of argument.

PER CURIAM. Affirmed.

Cited: Carson v. Carson, 122 N. C., 648.

JOHN M. WORTH *v.* WALTER A. WINBOURNE.

Upon exception taken to the bail returned by the sheriff, in order to charge him there must be notice and a judgment declaring the insufficiency of the bail, and adjudging that the sheriff stand as special bail, and it was *Held* to be too late to give notice and have such adjudication after the trial and judgment in the principal suit.

MOTION to subject a sheriff as bail, heard before *Shepherd, J.*, at Spring Term, 1860, of MONTGOMERY.

The plaintiff sued out a *capias ad respondendum* against James T. Foster, returnable to Spring Term, 1858, of Montgomery Superior Court, which came to the hands of Winbourne, sheriff of Guilford County, and by him was executed and returned to that term, and a bail bond filed. At that term the following entry was made on the record: "The plaintiff excepts to the bail for Foster taken by the sheriff of Guilford." Winbourne remained in office until August, 1858. In April a paper was mailed for him by the clerk of Montgomery Superior Court, directed "To the sheriff of Guilford County," informing him that he was looked to as special bail in the case of *Worth v. Foster*. No return was made of this paper, nor did it appear that he ever received it. The plaintiff then took no other steps against Winbourne until he had recovered judgment against Foster, which was at Special Term, June, 1859. He then issued the notice on which this motion is made, and had the same made known to him on 6 August, 1859, and (432) returned to Fall Term, 1859.

The court being of opinion that these proceedings by the plaintiff were not sufficient to give the sheriff *due notice,* refused the motion to charge him as special bail, from which judgment the plaintiff appealed.

No counsel for plaintiff.
D. G. Fowle for defendant.

MANLY, J. It is very clear, upon a consideration of the statute, Rev. Code, ch. 11, sec. 1, that to fix the sheriff as special bail, when he has returned a bond which is excepted to, there must be a judgment of the court upon the exception, after "due notice" to the sheriff; and we think it is also clear that the necessary inquiry should be prosecuted to judgment upon the exception and notice as upon process, according to the course of the court.

The sheriff is entitled to the judgment of the court at an early day, that he may, if needful, protect himself from or discontinue his responsibility. The sheriff's authority as bail in such case springs out of the

judgment of the court, and has no prior existence. Should he arrest again before the judgment it would be unlawful.

Hence, we hold, upon exception to bail, there must be a notice making the sheriff a party to future proceedings, a judgment declaring the insufficiency of the bond, and declaring the sheriff to be special bail, before he is chargeable as such.

The necessity for prosecuting the exception to judgment seems to have been in the mind of the plaintiff's attorney when, subsequently to the judgment in the original action, proceedings were had against the sheriff. They are in all respects regular, but, as we think, are too late.

It will be perceived by a reference to the facts of the case that the original action was commenced to Spring Term, 1858. At that term exception was taken, and an order for notice to issue. An in-
(433) effectual attempt was made to notify, and then a discontinuance of further proceedings against the sheriff until after the judgment in the original action in June, 1859. After this judgment notice to the sheriff was issued and executed, and, thereupon, the sheriff appeared and resisted the motion to declare him special bail upon the plea of a want of "due notice."

We concur with the court below in its conclusion upon this state of facts, that due notice was not given. It must be in time to enable the sheriff to have the earliest possible judgment of the court upon the exception; that is, it must be returnable to the next term after the exception is made, and subsequent proceedings should be, as stated before, according to the course of the court. Notice after a year had elapsed was not *reasonable notice* of the plaintiff's purpose, and therefore not such as was *"due."*

PER CURIAM. Affirmed.

HENRY P. WHITEHURST v. NORTH CAROLINA MUTUAL INSURANCE COMPANY.

A requisition in a policy of insurance that the assured shall *forthwith* give notice of a loss to the company is not complied with by giving notice at the expiration of twenty days.

COVENANT on a policy of fire insurance, tried before *Saunders, J.*, at last Spring Term of CRAVEN.

The execution of the covenant declared on, and the loss by fire of the building insured, were proved, and the defendants, for their defense,

alleged that the plaintiff had not complied with the stipulation contained in the contract to give the company notice of the destruction of the property, also a statement of the particulars of the destruction; and they relied on the following clauses of the policy and annexed (434) conditions. In the policy is provided: "This policy is made and accepted in reference to the conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The condition relied on in their defense as being annexed to the contract of assurance is as follows: "10. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the secretary, and within thirty days after said loss to deliver a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation."

The evidence was that after the expiration of *twenty* days the insured furnished the company with the affidavit containing the particular account of the loss, but there was no evidence that any other notice of the loss was given by the insured to the company. His Honor held that the notice furnished was a compliance with the terms of the contract on the part of the plaintiff. Defendant excepted.

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

Stevenson and Green for plaintiff.
J. W. Bryan and J. H. Haughton for defendant.

PEARSON, C. J. We differ from his Honor upon the first point made by the defendant. The affidavit, etc., furnished by the plaintiff and forwarded to the secretary of the company was not, in the opinion of this Court, a *full* compliance with the condition of the policy which requires "all persons sustaining loss or damage by fire *forthwith to give notice thereof to the secretary,* and within thirty days after the loss to deliver a particular account of such loss or damage, signed with their own hands and verified by oath or affirmation," etc. This condition imposes two duties; the latter was complied with, but the former was not, and, consequently, the plaintiff was not entitled to recover, accord- (435) ing to the decision in *Woodfin v. Ins. Co.,* 51 N. C., 558.

The first, or general, notice is required to be given *"forthwith,"* to enable the company, as soon after the loss as practicable, to institute proper inquiry; and the second, or particular notice, within thirty days. It was not proven that any notice was given until after the expiration of some *twenty days.* This certainly does not satisfy the word "forthwith," which must be construed, considering the purpose for which it is

required, to mean *immediately,* or within reasonable time; and, under the circumstances, the rule which has been adopted in regard to bills of exchange, *i. e.,* on the same day, if in the same town, or else by the next mail, would seem to furnish a fit analogy. As this point is decisive, we will not enter upon the other, especially as the statement made up by his Honor, and his charge in reference to it, are not so clearly set out as to enable us to see that we understand it.

PER CURIAM. *Venire de novo.*

CORNELIUS McMILLAN v. SOLOMON TURNER.

1. Whether, where a widow entered into a certain tract of land, and occupied it for more than twenty years, claiming it as her dower in her deceased husband's estate, the law will not presume an assignment by the heirs at law, *quere.*

2. If one enter into the adverse possession of a tract of land, and hold it for more than three years, he cannot be made liable in an action of trespass until the owner is restored to the possession by an action of ejectment, which must be brought within twenty years, to avoid the claim arising from presumption.

(436) TRESPASS, q. c. f., tried before *Howard, J.,* at last Spring Term of DUPLIN.

The land in question was that of which James Teachy died seized and possessed, and the lessors of the plaintiffs are his heirs at law.

The said Teachy died intestate about twenty-five or thirty years ago, leaving a widow. A witness testified that after her husband's death, there being other lands, he heard her father propose to the administrators that his daughter should take the tract in question in lieu and satisfaction of her dower, to which there was no reply; but she immediately entered into the occupation of the same, and held it for more than twenty years, holding part of the time by herself, partly by a second husband, who cleared and cultivated the same at will, and partly through tenants, who used the pine timber for the collection of turpentine and obtaining tun-timber. This suit was brought in January, 1858.

The defendant's counsel asked the court to charge, first, that there was evidence from which the jury might presume that the *locus in quo* had been assigned to the widow of James Teachy (under whom defendant claimed), as her dower; and, secondly, that there was evidence that the widow of James Teachy, and her second husband, were in possession of the *locus in quo,* claiming it adversely at the time the alleged trespass

was committed, and that in either aspect the plaintiffs were not entitled to recover. The judge declined giving such instruction, and defendant excepted.

Verdict and judgment for the plaintiff, from which defendant appealed.

W. A. Wright for plaintiff.
W. A. Allen for defendant.

Battle, J. Whether the first instruction which the counsel for the defendant requested the court to give to the jury is a proper one, it is unnecessary for us to decide, because we are clearly of opinion that the second ought to have been given, and that is fatal to the right of the plaintiff to recover in the present form of action. (437)

In *Spencer v. Weston,* 18 N. C., 213, a question is made but not decided whether, in this State, dower is not necessarily assignable at law by petition only. There is no doubt that the remedy by petition, as prescribed by the act of 1784 (Rev. Code, ch. 118, sec. 2), is a substitute for the action of dower at the common law; but we cannot well imagine any good reason why the heirs may not assign dower to the widow, and if that may be done, it is well worth the inquiry whether the presumption of such an assignment might not be raised from twenty years continuous possession by the widow of a certain tract or parcel of land, claimed as a dower.

There is a strong intimation of the Court, in *Spencer v. Weston,* that a release, if properly pleaded, might be presumed against a widow who had failed to claim her dower for twenty years or more.

We have said that the second instruction asked for by the defendant's counsel ought to have been given, and we think *Smith v. Bryan,* 44 N. C., 180, is an authority for that position. It is there held that if a person, without any color of title, enters upon a tract of land with certain known boundaries, and continues to occupy it and exercise ownership over it by clearing and cultivating different parts for more than twenty years, he will acquire, by the presumption of a conveyance, a right which will enable him to maintain ejectment against a stranger who enters into any part of the land, though it may not be that part upon which the lessor of the plaintiff had actual *positio pedis.* It is true that this doctrine will not apply to the case of an owner of an adjacent tract which lapped upon the one claimed by the lessor, because, unless the lessor had made an actual entry upon the lappage, he would not have exposed himself to the action of the owner of the other tract, and, therefore, could not, by a mere verbal claim, extend his possession so as

to acquire a title to the lappage by the presumption of a grant. In any other case where the title is shown to be out of the State, an entry (438) into a tract, though without any color of title, claiming the whole of it, will extend the possession of the whole, provided the true owner is not in actual occupancy of it, so as to raise the presumption of a conveyance for the whole tract. Why is this? Certainly because the person making the entry is exposed to the action of the true owner for a trespass to any part, and there is no necessity for restricting the possession to one part more than another of the entire tract. If, then, such a person enter and remain in possession for more than three years, so that the trespass in making the original entry is barred by the statute of limitations, the owner cannot maintain the action of trespass *quare clausum fregit* until he regains the possession by means of the action of ejectment, which must be brought within twenty years to prevent the enterer from protecting himself by a claim of title arising from the presumption of a conveyance. This principle applies directly to our case. The widow of James Teachy was in possession of a certain tract of land which had belonged to her husband, and she first, and afterwards she and her second husband, claimed and occupied portions of it for many years, and then leased a part of it to the present defendant, who entered and was in possession under his lease. Under these circumstances the plaintiffs, as the heirs at law of James Teachy, had lost their possession, and, consequently, could not maintain trespass without first regaining it by an action of ejectment. The judgment must be reversed.

PER CURIAM. *Venire de novo.*

Cited: McLean v. Murchison, 53 N. C., 41; *Scott v. Elkins,* 83 N. C., 427.

(439)

BENJAMIN HARTSFIELD AND WIFE v. JEREMIAH N. ALLEN.

Where general letters of administration were granted, in ignorance of the existence of a will, which was afterwards produced and proven, a delay of such administrator to prosecute a claim due the estate, after he had been informed of the existence of the will, and before its production and probate, during which delay the debtor became insolvent and the debt lost, it is not such negligence as to subject such administrator to its payment.

PETITION for the recovery of a legacy, tried before *Howard, J.,* at last term of CRAVEN.

The matter was referred to a commissioner to state an account of the estate in the hands of the administrator with the will annexed, and the

only question in the case arises on an exception to the report as to the charge of $731.50, due by a note on an individual, who became insolvent before the defendant qualified as administrator with the will annexed. The defendant had previously taken out letters of administration without knowing of the existence of a will, which was in the hands of a gentleman resident in a distant State. Soon after his qualification he was informed that there was a will, and was advised not to do any further act of administration. This course he pursued, and the will, at the end of the year, was brought forward and proved, but the executor named renounced, and the defendant took the administration with the will annexed. The will was brought forward the earliest convenient day. The insolvency of the debtor occurred during this delay.

His Honor being of opinion with the plaintiff, overruled the exception, and gave judgment for the plaintiff, from which the defendant appealed.

Green for plaintiffs.
J. W. Bryan and J. H. Haughton for defendant.

MANLY, J. We are of the opinion the exception to the commissioner's report in respect to the note of $731.50 ought to have been sustained. The facts appear to be that at December term of Craven County Court, 1856, a general administration of the estate of (440) Ishman Jackson was granted to the defendant. A short time after, and before the next court, it was ascertained that the supposed intestate had left a will. The will, from unavoidable causes, was not proved until December, 1857, administration having been in the meantime suspended. The executor renounced, and administration *with the will annexed* was then granted to the defendant, and thereafter he proceeded to administer the estate with proper diligence. The question raised by the exception is whether a failure on the part of the defendant to proceed in the administration after he was informed of the existence of the will, whereby the note of $731.50 was lost, was official negligence, making the defendant responsible for it.

The contingency upon which the proper court in our State is authorized to grant general administration of an estate is when no appointment or disposition of his estate has been made by the deceased himself. It is intestacy that gives power to the court. Hence, we find it well settled that such letters, improvidently granted upon an assumed intestacy (which assumption turns out to be incorrect) is void. 1 Williams Exrs., 367.

It is true that the granting of general letters is a judicial decision that there is a case of intestacy, and it might not be possible for one by

any competent evidence to resist the effect of this conclusion until there shall be an express repeal of the letters or until there shall be an implied abrogation by an opposite judicial sentence; yet it is equally true that upon a judicial ascertainment that it is a case of testacy, and not of intestacy, the letters and acts of the administrator became null and void. *Mitchell v. Adams,* 23 N. C., 302; *Slade v. Washburn,* 25 N. C., 562.

In view of this, it would be unreasonable to require of an officer to proceed in an administration with certain defeats and penalties before him. He is surely at liberty to anticipate events, and to act upon the conceded fact that there is a will, and upon the further reason-
(441) able and proper expectation that it will not be suppressed, but brought forward in due time. The fact of the actual probate of the will, and the consequent repeal of his letters, justifies the previous suspension of his duties.

Our conclusion, then, is that when general letters are granted in ignorance of the existence of a will, but of the existence of which the administrator has information a few weeks after the grant, and when, in point of fact, the will is subsequently produced and proved, the loss of a debt by the omission of the administrator to act under his letters in the interval between the granting of them and the probate of the will is not negligence so as to subject him to its payment. The exception should be sustained, the account reformed in this respect, and a decree for the balance.

PER CURIAM. Reversed.

ELIZABETH BUIE v. ROBERT WOOTEN.

1. The grantor of a slave, by deed, can by means of a release from his grantee be made competent to testify for him.

2. A surety to a prosecution bond is not discharged by a second bond, given as security upon a rule obtained at the instance of the defendant, and therefore an obligor in the former bond is not a competent witness for the plaintiff.

TROVER, tried before *Shepherd, J.,* at Special Term, January, 1860, of CUMBERLAND.

The plaintiff claimed title to slave, the property sued for, by a bill of sale from her son, James D. Buie, reciting the payment of $730 as the price given. One Murphy, a brother-in-law of James D. Buie, was the attesting witness. James D. Buie was largely indebted at the time of

making this deed, and was then sued on some of his debts. The defendant, as a constable, seized the slave in question, under executions, and sold him as the property of James D. Buie. (442)

The court charged the jury fully upon the questions raised by the counsel as to the fraud alleged in the transaction; explaining that the law looked with suspicion upon dealings among kindred, as these parties were, and required a degree of proof to show fairness that was not required among strangers.

In order to show that the sum mentioned in the bill of sale had been paid, the plaintiff executed a release to James D. Buie, and offered him as a witness. He was objected to by defendant, who insisted that the witness had an interest in supporting his own deed and in showing that there was no fraud in the conveyance; but he was admitted, the court remarking that this went to his credit and not to his competency. Defendant's counsel excepted.

Jane Buie was offered by the plaintiff and objected to by the defendant. At the bringing of this suit she was on the prosecution bond. Afterwards an affidavit was filed by the defendant, and a rule obtained on the plaintiff "to give a prosecution bond on or before the next term, or the suit to be discontinued." Under this rule a paper was filed as a bond, to which no exception was taken until the trial, and then it was objected to because not dated, and because the name of the surety does not appear in the body or condition of the bond. The surety taken in the second instance was admitted to be sufficient. The former bond was left on the files of the court. Upon this showing, the court ruled the witness competent, and the defendant excepted.

Verdict for the plaintiff; judgment accordingly, from which the defendant appealed.

E. G. Haywood for plaintiff.
Neill McKay for defendant.

BATTLE, J. The objection to the competency of the maker (443) of the bill of sale as a witness was properly overruled. After the release which the plaintiff executed to him, he had no interest which would disqualify him from testifying in support of the plaintiff's title, and whatever objection there was to him went to his credit and not to his competency.

The exception to the charge of the judge was likewise untenable. His Honor explained the nature of the case fully and fairly, and we are unable to discover anything in what he said, or omitted to say, of which the defendant has any right to complain.

In the admission as a witness of the plaintiff's daughter, Jane Buie, we do not concur with his Honor. She was undoubtedly, at one time, one of the sureties to the bond for the prosecution of the suit, and, as such, incompetent as a witness; and nothing is shown which removed that incompetency. Had the *plaintiff* applied to the court for leave to file another prosecution bond for the avowed purpose of having it substituted for the first, in order to restore the competency of the witness, the order of the court allowing it to be done would have sufficed upon the filing of the second bond, without an actual cancellation of the first. *Otey v. Hoyt,* 48 N. C., 407. But in the present case the application for another prosecution bond came from the *defendant,* and upon its being given, we are not aware of any principle of law by which it superseded the first. It was, in fact and in legal effect, only an additional security, and unless the defendant chose to cancel the first bond, he was clearly entitled to both. We believe that it is a common practice for a defendant who doubts the sufficiency of the prosecution bond to apply for and obtain a rule upon the plaintiff either to justify it or to give an additional one. That was what the defendant intended to do in the present case, and it is what, in legal effect, he did do, for the order which he obtained that the plaintiff should "give a prosecution bond" could not, *proprio vigore,* annul or cancel the one already given. The surety to the first bond still continued liable for the defendant's costs, and
(444) as such was incompetent to testify as a witness. It was, therefore, error in the court to permit her to testify in the cause.

PER CURIAM. *Venire de novo.*

Cited: Mason v. McCormick, 75 N. C., 264.

JOHN E. CLAYTON ET AL. v. J. W. FULP.

Where a warrant was dated of a certain day, and an execution dated of the same day with the warrant, it was *Held* that a judgment on the same piece of paper with them was thereby made sufficiently certain as to the time of its rendition.

DEBT on a former judgment, coming up by appeal from a justice of the peace, tried before *Bailey, J.,* at last Spring Term of FORSYTH.

In support of their action the plaintiffs offered in evidence a former judgment, which was without date, but the warrant was dated on 19 April, 1853, and was signed by the same justice that granted the judg-

ment, and immediately following the judgment was an execution dated of the same date with the warrant (19 April, 1853), which was signed by the same magistrate whose signature was to the other two precepts.

The defendant contended that the judgment was of no validity, for the want of a date, and called on his Honor so to charge. This the court declined, and gave it as his opinion that its date was rendered sufficiently certain by the other two dates on the same piece of paper. The defendant's counsel excepted.

Verdict for plaintiff. Judgment, and appeal by defendant.

McLean for plaintiff.
Morehead for defendant. (445)

MANLY, J. This was a warrant upon a justice's judgment, begun 23 February, 1859. Upon the introduction of the testimony on the trial below, it appeared there was no date to the judgment, and it was contended, on that account, it was void and could not support the action. The facts in respect to this seem to be that the warrant in the usual form has a date, 19 April, 1853. At the foot of the warrant is the judgment, signed by the justice who gave the warrant, but without date; and still, below all, on the same piece of paper, is an execution in the regular form, and of the same date with the warrant, 19 April, 1853.

We think the date of the judgment is sufficiently certain. *"Id certum est quod reddi certum potest."* The warrant is dated, the execution is dated, both of the same day. The position of the judgment as to time ought to be between the warrant and execution. There is among them a legal sequence and dependence in that order, and we accordingly find it inserted in a body of writing between the other two. The inference is conclusive that the judgment was given on the same day, during an interval of time between the other two; that is, after the warrant and before the execution.

It seems as certain as anything inferential can be. At the last term of this Court, when the regularity of an appeal without any date was questioned, it was held that as it followed immediately the judgment in its position on the paper, it would be taken to be on the day of the judgment, upon the principle that everything is supposed to be done at the proper time and in order, until the contrary appear. As this is the only matter of defense to this action, the judgment below should be

PER CURIAM. Affirmed.

(446)

STATE v. ROBERT T. WILLIAMS.

1. Where a female suddenly disappeared from the neighborhood where she lived, and the hypothesis was that she had been murdered and her body consumed by fire, certain metalic articles of a female dress having been found among the ashes where a large quantity of wood had been burned, it was *Held* to be competent for the purpose of showing her identity, to show that the deceased had worn such things previously to her disappearance, and that the length of time elapsing between the period of her wearing such articles and of her disappearance, though it would proportionally weaken the force of such testimony, yet could not destroy its competency.

2. The rule which seems at one time to have prevailed in England, "that upon charges of homicide the accused shall not be convicted unless the death be first distinctly proved, *either by direct evidence of the fact or by inspection of the body*," *Held*, not to be of universal application, but that where the identity of the body is completely destroyed by fire or other means, the *corpus delicti*, as well as other parts of the case, may be proved by presumptive or circumstantial evidence.

3. It was *Held* sufficient, in a bill of indictment for murder, to charge that it was done "in some way and manner, and by some means, instruments and weapons to the jury unknown."

MURDER, tried before *Bailey, J.*, at Spring Term of ROCKINGHAM.

The indictment is as follows:

State of North Carolina—Rockingham County.

Superior Court of Law, Spring Term, 1860.

The jurors for the State, upon their oath, present, that Robert T. Williams and Murray L. Williams, late of the county of Rockingham, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the first day of December, in the year of our Lord one thousand eight hundred and fifty-nine, with force and arms, in the county aforesaid, in and upon one Peggy Hilton, alias Peggy Isly, in the peace of God and the State then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and in some way manner, and by some means, instruments and weapons to the jurors unknown, did then and there feloniously, wilfully, and of their malice aforethought, deprive her, the said
(447) Peggy Hilton, alias Peggy Isly, of life, so that the said Peggy Hilton, alias Peggy Isly, then and there instantly died.

And so the jurors aforesaid, on their oath aforesaid, do say that the said Robert T. Williams and Murray L. Williams her the said Peggy Hilton, alias Peggy Isly, in the manner and by the means aforesaid, to the jurors aforesaid unknown, then and there feloniously, wilfully, and

of their malice aforethought, did kill and murder, against the peace and dignity of the State. T. SETTLE, *Sol.*

The defendant Robert T. Williams was alone put on his trial.

William Isly married the mother of the deceased, and it was in proof that the latter lived with them within half mile of the defendant's house.

There was evidence tending to show that Robert Williams, the defendant, had criminal intercourse with Peggy Isly for a year or two. The deceased left the house of her stepfather on Thursday night, 1 December, 1859, about 10 o'clock, and took with her one calico frock, two petticoats, and a piece of cloth, all of which were wrapped in her apron. She has not since been seen.

The prisoner was one of the special court of Rockingham, and was one holding the court on that Thursday, and left the village of Wentworth after night, between 7 and 8 o'clock.

Several days after Peggy Isly's disappearance the neighbors collected together for the purpose of making some search for her. On Sunday, 11 December, they examined about Troublesome Creek, which flows through the prisoner's land. About 600 yards from defendant's house, on a private place near the creek, they discovered where a "log-heap" had been burned. The fire was not out, but a few of the logs or parts of the logs were still burning. A search was made among the ashes, and a good many fragments of bones were found. Some of these were shown to the prisoner, but he denied knowing anything about them. Most of these bones were found in the center of the log-heap.
They also found a substance in the ashes that was slick like (448) tallow.

There was evidence that the prisoner was informed that another search was intended, and on the next day a good many persons went to the place where the logpile had been, and found the burnt place dug up. This had been done by a son and a slave belonging to the prisoner, by his direction.

Standing near the place of the log-pile, and near the creek, was a hollow beech-tree, which, on Monday, the 12th of that month, was on fire.

On 23 January, 1860, the coroner of the county, with many persons, went to the creek with the purpose of making a further search and holding an inquest. The prisoner alleged that the place of the log-pile was intended for a plant-bed; that it had been prepared for that purpose, and after 11 and 12 December it had been enlarged, and in doing so the beech tree had been burnt down. A search was made in the stump of this tree, and in it was found a black substance which the witnesses called bones. The creek was dragged, and they found bones, three hair-

pins, three common pins, one button, one eye of a hook-and-eye, and a grain of wheat, also a black substance and fire coals similar to what was found in the place of the burnt log-pile. Most of the articles found in these several researches were preserved by the coroner and produced in court.

Four physicians and one dentist were examined, who stated that among the bones they recognized part of a human skull and part of the cheek-bone of a human being. The dentist deposed to the identity of human teeth among the bones exhibited.

It was further in evidence that the prisoner said "he had no doubt of the death of Peggy Isly, and that the bones found in the creek were hers; that her stepfather or some of his boys had knocked her in the head and thrown her body on the log-pile, and did not blame Isly for trying to get his head out of the halter by putting others in."

(449) It was further in evidence that Peggy Isly was in the habit of wearing hairpins. Two witnesses were examined as to this; one stated that she commonly wore hairpins, but she could not state that she had worn them shortly before she left or when she left. The other stated that she was in the habit of wearing hairpins some two or three years before her disappearance. This testimony was objected to, and being admitted, defendant's counsel excepted.

It was further in evidence that it was not usual to burn plant-beds for tobacco as early as 10 December, nor was it usual to prepare the ground and burn it in the way the prisoner had at this log-pile; that it was usual to burn with *skids,* and not before January or February; that the prisoner himself was particular in preparing his ground, and used skids. This testimony was excepted to.

It was further in evidence that the Monday before Peggy Isly was missing she got from the witness fourteen common pins, seven of which were large and the others small ones.

It was further in evidence that the prisoner was courting a young lady in the neighborhood, and that some six weeks before the Christmas of 1859 she asked him if he had been to see Peggy Isly, to which he replied he had never been to see her, and never intended to court her.

James Jones testified that in a conversation with the prisoner he said he expected, under the gallows, to confess every crime he was guilty of; that it was probable he would confess sooner, but this one crime he would never divulge.

The court was requested to instruct the jury that there was no evidence in the case identifying the bones and pins found as being part of the bones and apparel of the deceased. The court declined to give this instruction, but, on the contrary, told the jury that there was evidence

that the bones and pins found were a part of the body and dress of the deceased. Defendant's counsel excepted.

The court further instructed the jury that the testimony, being circumstantial, ought to be as satisfactory as the positive testimony of one credible witness; that they must be satisfied beyond a reasonable doubt, and the following rules were read from a book, viz: (450)

1. That the circumstances from which the conclusion is drawn should be fully established.

2. That all the facts should be consistent with the hypothesis.

3. That the circumstances should be of a conclusive nature and tendency.

4. That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

Defendant's counsel again excepted.

The jury found the defendant guilty of murder, and sentence being pronounced, he appealed.

In this Court, besides the exceptions above set out, the defendant's counsel moved in arrest of judgment because the offense was not sufficiently charged in the bill of indictment.

Attorney-General, with whom was McLean, for the State.
Morehead for prisoner.

BATTLE, J. On his trial the prisoner made two objections to the admission of testimony, which were overruled, and prayed an instruction to the jury, which was refused, all of which are set forth in his bill of exceptions as the grounds of his application to have the judgment against him reversed and a *venire de novo* awarded. He has also submitted a motion that, if another trial be refused him, the judgment shall be arrested for an alleged insufficiency of the indictment.

In order to understand the pertinency of the objections to the testimony, as well as that of the instruction which was prayed, it is necessary to observe that every criminal charge involves two things: first, that an offense has been committed, and secondly, that the accused committed it. In the present case neither of these things could be proved by direct or positive testimony, so that it became necessary on the part of the prosecution to resort to circumstantial or presumptive evidence for the purpose of establishing both. After the finding of what (451) was alleged to be the charred bones of a human being in the ashes of the log-pile and in the creek, it became all-important to identify them, if possible, as parts of the remains of the supposed deceased Peggy Isly. The first testimony objected to was offered to show that certain hairpins which were found among the bones in the creek belonged to her, and with

that view it was proposed to prove that she was in the habit of wearing such pins. No objection was, or could be, offered to the proof that the pins were found; and we presume that none would have been made to a statement that she had such in her hair when she left home. But as the witness could not testify as to that fact, the point of the objection was to the proof that she had been in the habit of wearing them some time before, and particularly for so long a time as two years before the time when she was last seen. The objection, it will readily be perceived, applies more against the *force* than the *competency* of the testimony. The fact, if it had been so, that the hairpins formed a part of her headdress when she left home might have been proved as one in a chain of circumstances to show that the human bones found in the creek were those of a female, and that that female was probably the supposed deceased. The testimony actually offered and given tended to prove, though with less strength, the same thing, and it was, therefore, pertinent and natural. There can be no doubt that it was open to the prisoner to reply to this testimony, and to prove, if he could, that the supposed deceased had never worn hairpins, for the purpose of negativing the inference that the remains were hers.

The testimony offered to show the proper season for burning plant-beds for tobacco, and the manner in which the prisoner usually prepared his, had too obvious a tendency to connect him with the transaction relative to the burnt human bones to require much comment. That it had such a tendency no one can deny, and that, of itself, makes it competent as a circumstance which may, with others, coil around the
(452) prisoner and fasten him to the guilty deed. *S. v. Bill,* 51 N. C., 34.

The question raised by the instruction which the prisoner requested the court to give to the jury is one of much more importance than those which we have already considered, and has been attended with more trouble in the discussion and decision of it. The instruction prayed and refused was, "That there was no evidence in the case identifying the bones and pins found as being part of the bones and apparel of the deceased." In support of the propriety of this prayer the counsel for the prisoner contends that if it were admitted that the bones found in the log-pile, the beech stump, and the creek, were those of a human being, there is no part of the testimony which shows, from any particular mark about them or relating to them, that they were the bones of the supposed deceased more than any other dead body; and that, in this respect, the case differs essentially from that of *Rex v. Clews,* 4 Car. & Payne, 221 (19 E. C. L., 354), where the body of a man was, after lapse of twenty-three years, identified by his widow, from some peculiarity

about his teeth; and also from that of the celebrated case of *Commonwealth v. Webster,* 5 Cush., 295, where the remains of Dr. Parkman were identified from a similar cause by a dentist. Assuming that there was no such testimony given on the trial, the counsel insists upon it, as an established rule of law, that the *corpus delicti* must be proved by direct or positive testimony before the accused can be convicted of the offense charged against him. The authorities upon which the counsel relies in support of his position are Lord Chief Justice Hale and Lord Stowell. In 2 Hale Pl. Cr., 290, the learned author says: "I would never convict any person of murder or manslaughter unless the facts were proved to be done or, at least, the body found dead." Lord Stowell, in pronouncing his celebrated judgment in *Evans v. Evans,* 1 Hagg. Con., 105, said: "When a criminal fact is ascertained, presumptive proof may be taken to show who did it—to fix the criminal, having there an actual *corpus delicti;* but to take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact would, I take (453) it, be an entire misapprehension of the doctrine of presumptions." So, Mr. Starkie, in his valuable work on Evidence (see 1 Star. Ev., 575, 3d Ed.), lays it down as an established rule "that upon charges of homicide, the accused shall not be convicted unless the death be first distinctly proved, *either by direct evidence of the fact or by inspection of the body.*" Mr. Best, in his Treatise on the Principles of Evidence, thinks that the language of these eminent authorities is too broad, and that the general principle which they lay down must be taken with considerable limitation. After noticing that, in some offenses, the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving the author of it undetermined, he proceeds to remark thus of the latter: "In most cases the proof of the crime is separable from that of the criminal. Thus, the finding of a dead body, or a house in ashes, may indicate a probable crime, but do not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The *corpus delicti,* in cases such as we are considering, is made up of two things: first, certain facts forming its basis, and, secondly, the existence of criminal agency as the cause of them. Now, it is with respect to the former of these that the general principles of Lord Stowell and Sir Matthew Hale especially apply, and it is the established rule that the facts which form the basis of the *corpus delicti* ought to be proved, either by direct testimony or by presumptive evidence of the most cogent and irresistible kind." Best Ev., 321 (66 Law Lib., 205, 206). The admission of proof of the *corpus delicti* by presumptive evidence of any kind is manifestly a quali-

fication of the strict rule laid down by the great judges whose remarks we have quoted. This qualification of the rule is contended for by the celebrated Jeremy Benthan, who says: "Were it not so, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other of (454) the known chemical menstrua, or to sink it in an unfathomable part of the sea." 3 Smith Jud. Ev., 234. Mr. Best states in a note to page 323 of his work that he believed that eminent judge, Baron Rolfe, afterwards Lord Chancellor Cranworth, had instructed a grand jury that the rule excluding presumptive evidence of the basis of the *corpus delicti* was not universal. Such, too, seems to have been the opinion of *Best, J.,* in the elaborate opinion which he gave in the case of *Rex v. Burdett,* 4 Barn. & Ald., 95 (6 Com. Law Rep., 358). In speaking of presumptive evidence, he says: "Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised as to the *corpus delicti,* that it ought to be strong and cogent." The same view of the rule is taken by the later writers on this subject, and we adopt it as a correct one. See Will Circum. Ev., 204 (41 Law Lib., 85), Wharton Am. Cr. Law, sec. 747. We hold, therefore, that his Honor committed no error in refusing to give the instruction as prayed, and we cannot discover anything in the charge which he did give of which the prisoner has any just cause of complaint.

The motion for the reversal of the judgment and the grant of a *venire de novo* is overruled, and that brings up for consideration the motion for an arrest of the judgment. This is founded upon the alleged insufficiency of the indictment, and the objection to it is the means whereby the homicide is charged to have been committed are stated to be to the jurors unknown. The indictment is substantially, if not literally, the same with the fourth count of the indictment against Dr. Webster, which, after argument and mature deliberation, was sustained by the judgment of the Supreme Judicial Court of Massachusetts; see *Commonwealth v. Webster,* 5 Cush., 296. If the person killed be a stranger, it is well settled that it may be charged in the indictment that his name, if the fact be so, is to the jurors unknown, and we are unable to (455) perceive any difference in principle between such a charge and one where the instrument and means of death are, in fact, not known to those who are called upon to find the bill. The motion in arrest of judgment is, therefore, refused.

PER CURIAM. No error.

Cited: S. v. Parker, 65 N. C., 457.

JOHN NORFLEET, ADMINISTRATOR, v. JOSEPH M. EDWARDS ET AL.

Where a promissory note of a firm appeared on a piece of paper, in a form that had been prepared for a bond with sureties, but the scroll containing the word "seal," opposite to which was the signature of the firm, was scratched and cross-marked with ink (evidently with a design to obliterate it), it was *Held* to be erroneous to charge the jury it was incumbent on the plaintiff to show that the obliteration took place before or at the time the instrument was executed.

ASSUMPSIT, tried before *Saunders, J.*, at last Spring Term of EDGECOMBE.

The plaintiff declared in two counts: first, on a promissory note, and, secondly, for goods, wares, and merchandise sold and delivered.

In support of the first count it was proved that the instrument declared on was executed by Joseph M. Edwards, and that he was at that time a partner with defendant W. W. Parker and one John Edwards, under the name and style of the signature of the note.

The instrument in question is as follows:

$500. With interest from date, we, or either of us, promise to pay W. A. Grimmer, or order, $500, for value received, as witness our hands and seals, this 1 January, 1857.

EDWARDS, PARKER & Co.

Witness, [SEAL.]

[SEAL.]

Upon the second count, plaintiff relied on the instrument afore- (456) said, and proved that Grimmer sold to the firm of Edwards, Parker & Co. his stock of goods (he having been a merchant) and his real estate.

It appeared on inspection of the paper that it had been originally drawn as a bond, with seals, in a handwriting different from that of the signature, with the word "witness" in the usual place, in the same handwriting with the body, though not attested; and that the seal, opposite the signature, had been defaced, first by scratching with a knife or something of a similar kind, and then by drawing lines through it.

The defendant insisted that the instrument was not their promissory note, because the seal had been defaced after the execution. The plaintiff denied that the seal had been defaced after the execution, and insisted that from an inspection of the paper it would be seen that the erasure of the seal was done with the same ink as that of the signature; also, that the jury had a right to inspect the paper, and from its appearance, and all the matters appearing in proof, to judge whether the seal had been defaced before, at the time, or after the execution of the paper.

The court intimated an opinion that the defacement of the seal, of itself, created a suspicion against the instrument which had not been explained, and that it was incumbent on the plaintiff to show, by proof, that the defacement was before or at the time of its execution, of which there was no sufficient proof; and further, that there was no sufficient proof to support the second count, although the instrument might have been executed as a bond. The plaintiff's counsel, in submission to this opinion, took a nonsuit and appealed.

Dortch and B. F. Moore for plaintiff.
Rodman and Bridgers for defendants.

BATTLE, J. There is scarcely any question of law upon which there is a greater conflict of decisions in the English and American courts than that which has been discussed in the case now under considera-
(457) tion. Mr. Parsons, in his excellent work on the law of Contracts, says that "In the absence of explanation, evident alteration of any instrument is generally presumed to have been made after the execution of it; and consequently it must be explained by the party who relies on the instrument or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others, of perhaps equal weight, hold that there is no such presumption, or, at least, that the question whether the instrument was written, as it now stands, before it was executed, or has since been altered, and whether as so altered it was done with or without the authority or consent of the other party, are questions which should go to a jury, to be determined according to all the evidence in the case." 2 Par. Contracts, 228. Very many cases are referred to in the note (a) to that page, which fully support the remarks of the learned author in the text. See, also, *Dunn v. Clements, ante,* 58.

In most if not all the cases in which the contrariety of decision may be seen, it will be observed that the erasures, interlineations, or rather alterations, were made in deeds, negotiable securities, or other instruments whose nature and character were determined upon or fixed, that is, they either were intended to be, or were, at the time when the alterations were made, deeds or negotiable securities or instruments of some other particular kind. The instrument in the present case differs from them all in this particular, that the alteration was made for the very purpose of determining and fixing its character. With a seal it would be a deed, while, if that were erased, it would become a promissory note. If it were executed as deed, it could not bind all the partners, but if made as a promissory note it would have that effect. The plaintiff's

intestate wished, undoubtedly, to take an instrument by which all the partners with whom he was dealing should be bound, and the partner who signed the instrument in the name of the firm wished, undoubtedly, to give one by which all the members of the firm should be bound. Under such circumstances is it not a fair presumption that the seal was erased at the time when the instrument was given by the (458) one party and accepted by the other? If we are to suppose that the parties to the transaction were apprised of the law applicable to it, the presumption that they acted in accordance with that law follows as a necessary consequence. Now, we believe that it is a general rule that in civil as well as in criminal cases parties are presumed to know the law and act in reference to it, unless the contrary appears; and hence we conclude that in a case like the present, where the interest of the parties is in accordance with their manifest intent, the maxim that *omnia presumuntur rite esse acta* must prevail. We are, therefore, of opinion that his Honor, in the court below, erred in holding that it was incumbent upon the plaintiff to show that the obliteration of the seal was made before or at the time when the instrument sued upon was executed.

PER CURIAM. *Venire de novo.*

Cited: Wicker v. Jones, 159 N. C., 110, 117.

DOE ON THE DEMISE OF PHAROAH RICHARDSON v. YOUNG N. THORNTON.

1. Where a purchaser under execution takes immediate possession after the sale, there is no reason why the sheriff's deed, afterwards made him, should not relate to the time of the sale, so as to annex the title to the possession as against any transfer subsequent to the sale.

2. The obligee in a bond to make title to land who goes into possession under a parol agreement that he is to occupy the premises till the money become due, is but a tenant at will to the obligor, and cannot maintain ejectment or trespass against the latter, or one taking title from him.

EJECTMENT, tried before *Saunders, J.,* at last Spring Term of JOHNSTON.

Both parties admitted that the title to the premises was in one Calvin Simpkins. On 27 January, 1855, he entered into a contract, in writing, to convey the same to one Richard Hamlet on the payment of the last five certain bonds of $600 each, given for the (459)

purchase money, which would fall due on 1 January, 1860. It was verbally agreed between the parties that Hamlet should immediately take possession and have the occupation of the premises on the execution of the bonds for the price. He did accordingly take possession, and remained therein, carrying on the business of hotel-keeping for fourteen months, when he leased the premises back to Simpkins for the residue of 1856.

Sometime in August, 1856, the property was sold by virtue of a judgment and execution against Simpkins, and purchased by the defendant Thornton, who was then in possession of it as the servant of Simpkins. Thornton from this time, carried on the business in his own name, Simpkins also remaining on the premises. On 28 August, 1857, Thornton took a deed from the sheriff, and continued such occupation until this suit was brought in September, 1857. Simpkins left in April, 1857.

On 16 February, 1857, Hamlet, for value, assigned to the lessor of the plaintiff all his right, title, claim and interest in and to the said bond. And it was contended that the defendant having entered into the premises as a servant under Hamlet's lessee, Simpkins, he was estopped to deny the title of the landlord to which he succeeded.

It was contended by the defendant that Richardson got nothing by his purchase in February, 1857, for that defendant's title and possession went back to August, 1856, the time he purchased the property. On this state of facts, which was agreed, it was submitted to the judgment of his Honor whether the plaintiff was entitled to recover. He decided against the plaintiff, whereupon he took a nonsuit and appealed.

B. F. Moore for plaintiff.

H. W. Miller, W. T. Dortch, and G. W. Haywood for defendant.

(460) BATTLE, J. It has long been a settled rule that a deed executed by a sheriff for land, sold by him under execution, relates to the time of the sale, and operates from that time against any subsequent transfer, whether made by the party himself or by the sheriff under an execution of a later teste against the party. *Dobson v. Murphy,* 18 N. C., 586; *Festerman v. Poe,* 19 N. C., 103. It cannot, indeed, so operate as to support an action of ejectment, or of trespass *quare clausum fregit* commenced before the purchaser, who is not in possession, has taken his deed from the sheriff. *Davis v. Evans,* 27 N. C., 525; *Presnell v. Ramsour,* 30 N. C., 505. But where the purchaser, under execution takes possession immediately after the sale, we can perceive no reason why the sheriff's deed, afterwards made to him, should not relate to the time of the sale, so as to annex the title to his possession from the time as against any transfer subsequent to such sale.

Seeing the strength of this position, the lessor of the plaintiff has sought to assail it by contending that Hamlet, to whose rights under the contract of purchase from Simpkins he succeeded, acquired the possession of the land as a lessee by a parol agreement with the latter, until the time when the last bond for the purchase money should be paid, which possession he had the right to regain from the defendant in the present action. To this the counsel for the defendant makes the unanswerable reply that whatever may have been the equitable rights of Hamlet, or of the plaintiff's lessor as his assignee, each was, in law, but the tenant at will of the vendor, Simpkins, and as such could not maintain ejectment against him or against the present defendant, who became invested with all his legal rights by his purchase under an execution against him. *Love v. Edmunston,* 23 N. C., 152. The idea that Hamlet, by parol agreement with Simpkins, became more than a tenant at will, to wit, a tenant for five years from 1855, when his contract of purchase was made, until 1860, when the last bond of the purchase money became due, cannot prevail, because such contract, if made, was void and of no effect under the statute of frauds, (461) Rev. Code, ch. 50, sec. 11.

Concurring in the opinion given by his Honor in the court below, that the action cannot be maintained, the judgment of nonsuit is

PER CURIAM. Affirmed.

Cited: Young v. Griffith, 84 N. C., 718.

M. C. C. LAWSON v. ELIAS BAER.

In an action for a deceit in the sale of a horse, where it appeared that the animal sold was affected with spavin, and slightly lame from that cause, and that there was a knot on the leg affected, which could be plainly seen, but the plaintiff took the nag without seeing it in motion, it was *Held* that the defect being patent, and there being no evidence of any art to withdraw plaintiff's attention, he could not recover.

CASE for deceit in the exchange of horses, tried before *Saunders, J.,* at Fall Term, 1859, of LENOIR.

The following bill of exceptions is sent up as part of the record:

Smith, a witness for the plaintiff, testified that he was present at the trade. Defendant said she was the Davis mare. Witness asked why was she so poor. Defendant replied, she had been hauling tur-

pentine with mules. Witness thought the mare worth $25 more than the horse which defendant got, if sound. But plaintiff said he knew the mare better than defendant. Nothing further said by either party.

Davis testified that his father raised the mare, who had let him have her; that she was too fast for him, so he had traded her; that defendant told him she was spavined—had a small knot on one of her legs, which (could be) easily seen by any one; slightly lame. Plaintiff lived near his father's, and knew the mare; the trade took place
(462) the same day defendant got home. She had been worked with mules in hauling turpentine; that his father took her out of the wagon because she was too fast.

Herring testified to her being slightly lame. The defendant offered no evidence.

The court charged that to entitle the plaintiff to recover, the jury should be satisfied that the mare was spavined, and that the defendant knew of the defect and failed to disclose it, unless the defect was such that a person of ordinary prudence might have discovered it.

The plaintiff's counsel asked the court to add: "unless the defendant, at the time, practiced some art to divert the plaintiff's attention."

The court asked, "Where was the evidence of the defendant's having practiced such art?"

The counsel replied, "That was a question for the jury."

The court replied that "The jury could take it." Defendant excepted.

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

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

PEARSON, C. J. A patent defect is one that may be discovered by the exercise of ordinary diligence. The mare, in reference to which the action was brought, "had a small knot on one of her legs, which (could be) easily seen by any one, and (was) slightly lame." In the exercise of ordinary diligence, the purchaser of a horse should look at the legs and have the animal moved. So the defect, in this instance, was patent, and the charge of his Honor is supported by *Brown v. Gray,* 51 N. C., 103, by which the law in regard to patent and latent defects is considered as settled.

The interrogatory put by his Honor, "Where was the evidence of the defendant's having practiced such art?" may be taken as an intimation of an opinion that there was no such evidence, which was a mat-
(463) ter proper for him to decide. We concur with him in the opin-

ion that there was no evidence of the fact. So the defendant has no right to complain that, instead of deciding it absolutely, he "let the jury take it"; and as their verdict corresponds with his opinion and that of this Court, it set the matter right. There is

PER CURIAM. No error.

H. M. C. STROUD v. CORNELIA MORROW.

A devise of "all my property to my beloved wife, during her natural life or widowhood, with power to dispose of the same by sale, will, or otherwise at her discretion," was *Held* to confer upon her, she not having married, the power to convey the real estate in fee simple.

COVENANT, tried before *Bailey J.*, at last Spring Term of ORANGE.

The defendant, Cornelia Morrow, by her deed of bargain and sale, conveyed to the plaintiff and his heirs certain land lying in the counties of Orange and Alamance, being the same mentioned in the plaintiff's declaration, and by the said deed covenanted as follows: "And the said Cornelia Morrow, for herself and her heirs, doth covenant with the said H. M. C. Stroud and his heirs that at and immediately before the delivery of these presents she hath a good right and title, and lawful power and authority to grant, bargain, and sell the said premises, and every part thereof, unto the use of the said H. M. C. Stroud and his heirs, according to the true meaning of these presents." The only title or authority to or over the premises claimed by the said covenantor is under the will of her husband, Alexander Morrow, which is as follows: "All my property, both real and personal, without any reserve, I bequeath to my beloved wife during her natural life or widowhood, with full power to dispose of the same by sale, will, or (464) otherwise, at her discretion, for her and our common children's benefit, and especially for the education of our children and payment of all just debts. In the event of my wife's marriage to another man, it is my will that she have such portion of my estate as the laws of North Carolina provide for widows whose husbands have died without wills, and that the remainder be divided among my children."

The will was duly proved before the making of the deed, and the said covenantor has not married a second time. It was agreed that if by the above will the defendant had power to convey the land for an indefeasible estate in fee simple, a nonsuit shall be entered, otherwise a judgment be entered for the plaintiff, and an inquiry of damages to be awarded as upon a judgment of *nil dicit*.

The court, being in favor of the defendant on the above case, gave judgment accordingly, and the plaintiff appealed.

S. F. Phillips for plaintiff.
No counsel for defendant.

MANLY, J. The question presented for decision upon the case agreed is as we think, free from difficulty. The wife's estate for widowhood is coupled with a power of disposition by sale, will, or otherwise, absolute and unconditional. There seems to be no restriction upon it, except that discretion in which her deceased husband so entirely confided, and we are accordingly of opinion that her covenant of a right to convey, as set forth in the case, is true, and, consequently, the action cannot be maintained.

Our opinion is based upon the strong and explicit language employed by the testator in his will. All property is given therein to the wife during life or widowhood, *with full power to dispose of the same by sale, will, or otherwise, at her discretion,* for her and their common children's use and benefit, etc.

The power to convey by will is clear to the point that the estate to the wife was not simply during widowhood, with power to apply
(465) the *income,* but intended to leave it to her discretion, if circumstances required it, to sell in her lifetime or to dispose of it by will at her death. The power of sale is scarcely less significant. It would be an extraordinary use of that term to mean by it a power to mortgage or pledge for a limited time, only to raise moneys or pay debts.

The power to sell absolutely is clear, which disposes of the case before us, and we forbear to discuss the rights of persons under the will which may arise upon other possible contingencies. By reference to *Little v. Bennett,* 58 N. C., 156, it will be seen that an estate given for similar purposes to the present, and with a power of sale for the more complete fulfillment of these purposes, was held to be a trust estate with an absolute power of disposition, and that the estate in reversion was subject to be divested by and to the extent of the exercise of the power. The case before us, we take it, is governed by the principles of that case.

PER CURIAM. Affirmed.

Cited: Taylor v. Eatman, 92 N. C., 609; *Wright v. Westbrook,* 121 N. C., 156; *Herring v. Williams,* 153 N. C., 235; *Mabry v. Brown,* 162 N. C., 221; *Makely v. Land Co.,* 175 N. C., 103; *Makely v. Shore, ib.,* 124.

WILLIAM HASSELL v. ALEXANDER C. LATHAM.

Where a sheriff endorsed truly the day on which he received a declaration in ejectment, returnable to a county court, and returned on the same "Too late to hand," although five days intervened between the day endorsed and the return day, it was *Held* that he was not liable under sec. 17, ch. 105, Rev. Code, to the penalty for making a *false return.*

DEBT, tried before *Howard, J.*, at last Spring Term of CRAVEN.

The action was brought against the defendant for making a false return as sheriff, on a declaration in ejectment, returnable on the second Monday of March, 1859, the return day of the next county court. It appeared that the paper in question was received on 8 March, 1859, and the defendant, as sheriff, endorsed thereon, truly, the (466) day of its coming to hand. The return made by him on the said declaration was, "Too late to hand." It appeared also that between that day and the return day there were more than five clear days intervening. Afterwards, by leave of the county court, the sheriff amended his return by striking out "Too late to hand," and returning and substituting as follows: "This writ came to hand Tuesday evening, 8 March, 1859, and from that day till Thursday, which was too late to execute. I and my deputies were engaged in returning writs, etc., in my hands before this writ was received, so that I could not serve this writ on the defendant, who lives 20 miles from New Bern, where I then was attending to other business of my office, and during which time I did not see the defendant."

The court instructed the jury that the plaintiff was not entitled to recover on this state of facts. Plaintiff excepted.

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

J. W. Bryan for plaintiff.

Haughton, Green, Stevenson, and McRae for defendant.

MANLY, J. This is an action for the penalty of $500 under the provisions of our Code, which compels the sheriff to make true return of all process to him directed. Rev. Code, ch. 105, sec. 17.

To subject one to the heavy penalty of the statute, the falseness must be stated as a fact, and not merely by way of inference from facts.

An instance of the former kind is found in *Lemit v. Freeman,* 2 N. C., 317, where the return was simply "Too late to hand," which was held to be false, when the sheriff was known to have had it in his hands seventeen days. An instance of the latter will be found in *Lemit v. Mooring,* 30 N. C., 312, where the return was, "This writ came to hand on 22 February, 1847, during the term of Martin Superior Court of law, and from that day until Friday, inclusive, of (467)

that court, I and my deputies were engaged, so that I could not serve said writ on defendant, who lives 15 miles from the courthouse," etc., and this was held to be not a false return. If anything was false about it, it was a mere inference from facts truly stated.

The return in the case before us is, "Received 8 March, 1859; too late to hand." This falls directly within *Lemit v. Mooring, supra.* The day of its reception is endorsed; the day of its return is known; the "Too late to hand," in this case, is merely a *false inference,* if false at all. The distinction between our case and *Lemit v. Freeman* is that in the latter no facts are given other than "Too late to hand"; and, standing thus alone, it is a statement to the effect that five days did not intervene between its reception and return day, which was false in fact.

The amendment of the sheriff's return, which was allowed by the County Court of Craven, did not in any respect alter its character. It was still a statement of facts with a false inference. Indeed, the amended return seems to have been copied from the return made by the sheriff in *Lemit v. Mooring,* and the latter case would, therefore, be a direct authority against the maintenance of this action upon the amended return. So that, whichever way you take it, upon the original or upon the amended return, the action cannot be supported.

This makes it unnecessary for us to consider the propriety of the amendment allowed by the county court. The action could not be maintained upon the return in either form, and the instruction of the court below was correct.

PER CURIAM. No error.

Cited: Tomlinson v. Long, 53 N. C., 472; *Stealman v. Greenwood,* 113 N. C., 358; *Campbell v. Smith,* 115 N. C., 499.

(468)

JOHN LAWS v. NORTH CAROLINA RAILROAD COMPANY.

It is not the duty of the owners of cattle, in this State, to keep them within enclosures, so as to prevent them from trespassing upon the lands of others.

TRESPASS *vi et armis,* tried before *Dick, J.,* at Fall Term, 1859, of ORANGE.

The action was brought to recover the value of a cow which was killed on the defendant's railroad, by running over it with a locomotive. It was agreed that judgment should be rendered for the plaintiff for $30

and costs of suit, unless, upon the further facts stated, the court should be of opinion in favor of defendant. The defendant was the proprietor of the track, by purchase, and for 100 feet on each side of it when the cow was killed, and the plaintiff was owner of no adjacent lands. The train at the time, being the passenger train, was running at its usual time and speed. The track of the road was not enclosed.

The defendant's counsel contended that the defendant was not responsible, because they were running their train according to their chartered rights, and the plaintiff was a trespasser, in the first instance, by suffering his cow to get upon the road of the defendant.

His Honor was of opinion against the defendant on the case agreed, and gave judgment accordingly, from which the defendant appealed.

J. W. Norwood for plaintiff.
W. A. Graham for defendant.

BATTLE, J. The case agreed presents the question whether it was the duty of the plaintiff to keep his cattle within his own enclosure, so as to prevent them from trespassing upon the road of the defendant. In England, where all or nearly all the lands are enclosed by the respective owners, the law requires that each proprietor shall keep his horses, cattle, and other livestock on his own premises, and if he permit them to go upon the land of another it will be a trespass, for which he will be held responsible. In the first settlement of this country (469) by our ancestors the condition of things was so entirely different that we were compelled to adopt another rule. Here only a very small part of the lands—that is, such as were actually in cultivation—were enclosed, and it was impossible for the proprietors to keep their comparatively numerous flocks and herds within the bounds of their enclosures. These flocks and herds were, therefore, allowed to go at large, and, as early as 1777, every planter was compelled, under a heavy penalty, to keep a sufficient fence, at least 5 feet high, about his cleared ground under cultivation during crop time. This was manifestly done to prevent disputes, and possible worse consequences, arising from damages done to growing crops by the ravages of livestock; and the act proceeds upon the assumption that the livestock, whether consisting of horses, cattle, or hogs, were not to be kept up by their owners, but might lawfully be permitted to range at large. The law, then, directly sanctioned what the necessities of the people required, to wit, the establishment of a general common because of vicinage throughout the State. See 2 Black. Com., 33.

As the plaintiff was not bound to keep up his cow, so as to prevent her from going on the road, we think that the defendant was *prima facie*

responsible for having killed her, and there is nothing stated in the case to vary that responsibility. Had it appeared that the engineer employed the usual mode for driving cattle from the track of the road by means of the steam whistle, then the defendant might have been excused under the authority of *Aycock v. R. R.*, 51 N. C., 231. But in the absence of such proof we must hold the defendant liable for the damage caused by the negligence of its servants.

PER CURIAM. Affirmed.

Cited: Morrison v. Cornelius, 63 N. C., 351; *Burgwyn v. Whitfield,* 81 N. C., 264; *Jones v. Witherspoon, post,* 557; *S. v. Anderson,* 123 N. C., 709; *S. v. Mathis,* 149 N. C., 548; *Marshburn v. Jones,* 176 N. C., 521.

(470)

BURR HIGGINS v. THE NORTH CAROLINA RAILROAD COMPANY.

1. The contents of a letter from the plaintiff to the defendant is only evidence to prove a demand or to show the pertinency or explain the meaning of any reply which the defendant may have made to it.
2. Where a letter written by the plaintiff, strongly stating his case, was permitted to be read to the jury, and pressed by his counsel in the argument, it was held to be error to pronounce that the whole letter had become evidence by the defendant's relying on a part of it for his defense.

CASE, tried before *Bailey, J.*, at last Spring Term of GUILFORD.

The declaration was against the defendant as a common carrier, and for negligence in not delivering at Raleigh certain boxes, containing parts of a steam engine which the plaintiff was sending to New York to be altered and readjusted. Before the suit was commenced the plaintiff wrote a detailed statement of the transaction to his counsel, from which it appears that he had put this machinery in the hands of the defendant's agent at Greensboro, to be delivered the Monday following to the Raleigh and Gaston Railroad Company, at Raleigh, on the way to New York via Norfolk; that the boxes were not delivered at Raleigh, but sent on to Goldsboro, and detained there for more than three months; that nothing could be learned of this machinery for most of this time, and that in consequence of not getting these parts of the engine to New York, the plaintiff had to buy other machinery. The letter proceeds to comment argumentatively on the conduct of the defendant's officers, and claims that the company should pay him $10 a day while the goods were delayed. This letter had been laid before the board of directors of the

company, and by its order referred to the president of the company, to inquire into the facts of the claim, and in case he was satisfied of the liability of the company he was authorized to settle it. Some time afterwards the plaintiff called on the president to know the result of his inquiries, and his determination in the premises, who informed him that he had not had time to make the investigation. Where- (471) upon the letter was returned to the plaintiff and this suit brought. The reading of the letter to the jury was objected to by the defendant's counsel, but allowed by the court. Defendant excepted.

On the argument of the cause the letter was commented on by the plaintiff's counsel at length, and some parts of it by the defendant's counsel. The judge, in charging the jury, informed them that there were no admissions by the defendant going to show any liability to the plaintiff. The counsel for the plaintiff then stated that a portion of the letter had been commented on by the counsel for the defendant, and he asked his Honor to instruct the jury that if the defendant relied on any part of the letter as evidence for him, it made the whole of it evidence for the plaintiff. The court here asked the defendant's counsel if he relied upon parts of the letter, to which he replied that he did. Upon this, the court instructed the jury that the whole letter was evidence. Defendant again excepted.

Verdict and judgment for the plaintiff, from which defendant appealed.

Morehead and McLean for plaintiff.
Gorrell for defendant.

BATTLE, J. It is apparent from the bill of exceptions that an error was committed against the defendant by the unqualified admission in evidence of the letter from the plaintiff to one of his counsel. An attempt seems to have been made to correct that error, but we are unable to discover that it was done so effectually as to remove entirely the prejudice which it was well calculated to create, and no doubt did create, against the defendant's cause; and for that reason we feel constrained to reverse the judgment and grant a *venire de novo.*

In saying that the letter from the plaintiff to his attorney was admitted without qualification, we are not unmindful of the fact that his counsel contends that it was offered and received in evidence only for the purpose of showing that it was laid before the board of (472) directors, and thereby proving a demand made on the company. It was certainly competent only for that purpose, or to show the pertinency and explain the meaning of any reply which the defendant, through its officers, may have made to it. See *Overman v. Clemmons,*

19 N. C., 185. But whatever may have been the ground upon which the letter was admitted, the case does not show any restriction, either in its reception or in the use made of it. It is simply stated that it was offered, and, notwithstanding the defendant's objection, was admitted in evidence, and afterwards that it was commented upon at length by the plaintiff's counsel. Surely, it was error in the court to permit a letter, which tended to prove the plaintiff's whole case, to be thus used, when the only purpose for which it was competent was the very restricted one of proving a demand made by the plaintiff on the defendant, or of showing the pertinency and meaning of any reply which may have been made to it.

The question remains, Was this error cured by the action of the court afterwards? And we think very clearly that it was not. The court instructed the jury that "there were no admissions by the defendant going to show any negligence or liability to the plaintiff in the action." Well might the court say that there were no *admissions by the defendant,* for there manifestly were none; but the court did not go on and say that the plaintiff's letter was not competent to prove the defendant's negligence and consequent liability. A vague inference that the court so intended may, perhaps, be drawn from the next motion of the plaintiff's counsel and the court's response to it. After the full comment which the plaintiff's counsel had made upon the letter, the defendant's counsel followed by commenting upon certain parts of it. This he clearly had the right to do, notwithstanding his previous objection to the admission of the evidence. It was at this stage of the case that the

(473) counsel for the plaintiff called upon the court to instruct the jury that if defendant's counsel relied upon any part of the letter, the whole of it was competent as evidence for their consideration. Upon an inquiry from the court, the counsel for the defendant replied that he did rely upon certain parts of it. It will be noticed that the court had not before, nor did then, inform the counsel that the letter was not fully before the jury as evidence of the truth of its statements; and even if the court intended to withdraw the letter, or supposed that it had done so, the counsel was well warranted in the belief that such was not the fact. We cannot impute to the counsel the folly of doing or saying anything to admit the letter as full evidence in the cause, after he had objected previously to its admission at all. He must have supposed that it was already in evidence before the jury, and he only intended to insist upon his right to make the best use of it he could. If he were mistaken in his supposition, it was a mistake into which the conduct of the presiding judge had led him by not informing the jury distinctly that the letter was not evidence before them to prove the truth

of the statements which it contained, but, at most, could be used by the plaintiff only to show a demand. The jury were probably misled by the course pursued by the court, and as defendant's cause may have been prejudiced thereby, the judgment must be reversed.

PER CURIAM. New trial.

DOE ON THE DEMISE OF MARY ANN JONES v. WILLIAM NORFLEET.

Where a testator, owning a parcel of land embracing two town lots, on which he had settled a woman, having built her a dwelling on one lot and an out-house on the other, and permitted her to enclose a garden, partly on each "lot, and to use the whole parcel enclosed within one fence, devised to her the lot of ground and house thereon erected in the said town where she now lives," it was *Held*, that the whole parcel, embracing both lots, passed by the devise.

EJECTMENT, tried before *Saunders, J.*, at last Spring Term of (474) EDGECOMBE.

Case agreed. The lessor of the plaintiff, a colored woman, claims title under the will of Henry S. Lloyd, made in 1860, which contains the following clause: "I give and devise to Mary Ann Jones, a free colored woman of the said town of Tarboro, and to her heirs and assigns forever, the lot of ground and the house thereon erected in the said town, on which she now lives."

The defendant, William Norfleet, being authorized, as executor, to sell the testator's real estate in the town of Tarboro, except such as was specifically devised, took possession of Lot 118, insisting that only Lot 107 passed to the lessor of the plaintiff. (See diagram.)

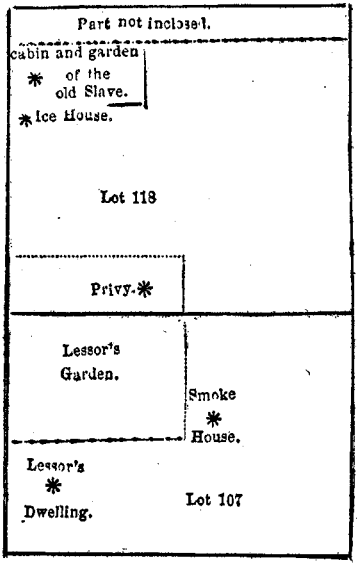
The two lots adjoin each other, and together constitute one (475) acre, and are enclosed under one fence, except 9 or 10 feet of Lot 118 at the upper end, which was difficult of enclosure on account of its steep descent. They are situated in the suburbs of the town.

In 1856, before the lots were enclosed, the devisor erected on Lot 118 an ice-house, at a cost of some $800, for the purpose of storing ice for the use of a tavern in the same town, of which he owned one-half, which tavern he directs in his will to be sold.

The said two lots were surrounded by a board fence in 1857, and in the same year the devisor built the dwelling-house on Lot 107 for the lessor, who immediately thereafter took possession, and has continued to reside in it ever since.

There is not, nor has there been, any designation of a dividing line between the two lots. In the spring of 1859 the lessor of the plaintiff

enclosed a small portion of the ground for a garden. There was on Lot 107 a smokehouse, which was built when the dwelling was erected by the devisor, and afterwards he built on Lot 118, for the use of the lessor, a small privy. Beside the ice-house, on Lot 118, the devisor built, in



1858, a rude cabin for an aged slave, whom he had in charge, to which is attached quite a small garden, which was used by this slave. The lessor had the use, for the purpose of cultivation, of all the residue of both lots.

In the plan of the town the lots are 50 yards square, by actual measurement, and according to such measurement part of the lessor's garden and the privy are situated on Lot 118. The devisor acquired both these lots from the same person at the same time. He resided near them, and frequently saw them, but whether he knew where the line between them would run cannot be stated. There is no mark or trace of the boundary of the upper end of 118.

It was agreed by counsel that if his Honor should be of opinion that the plaintiff was entitled to recover on the foregoing statement of facts, judgment should be rendered accordingly; otherwise judgment for the defendant.

His Honor *pro forma* gave judgment for plaintiff, and defend-
(476) ant appealed.

W. T. Dortch for plaintiff.
B. F. Moore for defendant.

MANLY, J. The case turns upon the proper construction of the bequest to the lessor contained in the will of Henry S. Lloyd.

The facts are distinctly and clearly stated, and after duly considering them, in connection with the language of the will, we are of opinion that the entire parcel of ground, embracing Lots 107 and 118, passed under the devise, except such portion as had been appropriated by the devisor to the ice-house and to the cabin and garden of the old slave.

The term *lot,* used in the description of the ground devised, is not found in such connection nor employed in such way as to lead to the conclusion that the testator had in his mind at the time *a plan of the town,* and intended to restrict the occupation then enjoyed by the woman to the lot in the plan, on which her dwelling-house stood, but we suppose the term "lot" was used as synonymous with *piece or parcel,* and in such case it would clearly embrace not only the spot on which the house or houses stood, but also all the ground which was used as appurtenant to the dwelling. In *Stowe v. Davis,* 32 N. C., 431, the phrase, "the plantation on which I now live," was held to embrace two tracts, bought at separate times and from different individuals, but which had been worked together by the testator as one plantation. And in *Bradshaw v. Ellis,* 22 N. C., 20, it was held that the expression "my plantation" carried two parcels, not adjoining, which had been worked together.

It seems that one of the outhouses belonging to the dwelling was situated on Lot 118. The garden used by her was partly on one lot and partly on the other. Both lots were in one general enclosure, and the possession and use by the woman extends over the whole, except that part actually occupied by the ice-house and by the cabin and (477) small garden of the old slave, as above stated. These facts, which it is proper for us to consider "in fitting a thing to the description," strengthen the conclusion that the gift to the woman is not confined to the 50 yards square, called a lot in the plan of the town, but extends, at least, to the lands enclosed and used in connection with the house. A different construction would create the necessity of making a change in the location of the outhouse, garden, fences, etc., which, if the testator had intended, he would hardly have failed to notice.

PER CURIAM. Affirmed.

HEZEKIAH ROBERSON v. SAMUEL KIRBY.

In an action on the case under the statute, Rev. Code, ch. 16, sec. 2, for an injury to adjoining land, by one's setting fire to his own woods, without a notice in writing, it was *Held* that the proof of a waiver of a written notice was an answer to such action.

CASE, tried before *Shepherd, J.*, at last Spring Term of BRUNSWICK.

The plaintiff declared in two counts—one for the negligent use of fire by the defendant, whereby his woods were burned, and, secondly, in case upon the statute for injury to his trees by defendant's setting fire to his own woods without giving notice in writing.

It was in evidence that the defendant did set fire to his own woods on 9 March, 1858, and that he gave no notice in writing to the plaintiff, who was the owner of an adjoining tract of land, the woods of which were burned. The plaintiff had been informed of the defendant's (478) intention to burn his woods, and on the day the fire was set out cautioned him to be particular lest he might do injury to himself and others. The fire in the plaintiff's woods was seen on 11 March. The plaintiff was with the defendant while the fire was burning on the 8th.

The defendant offered a witness who stated that soon after the fire had burned the plaintiff's woods the plaintiff said, "We had a fine time for burning, and while we were at it I wish we had burned a certain other part of my woods," pointing to the place.

The court charged (among other things not excepted to) that the plaintiff had a right to insist upon a notice in writing, if he pleased; but he might waive it; and if the jury found that he gave his consent to the defendant's setting the woods on fire, he thereby discharged him from the action. Plaintiff excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

Baker for plaintiff.
No counsel for defendant.

PEARSON, C. J. The first count, for an injury at common law, cannot be sustained, because there was no proof of negligence.

The second count, under the statute, cannot be sustained, for, however it may be in respect to an indictment, or an action for penalty, we concur with his Honor that in an action for the injury done to the plaintiff proof that he waived his right to a notice in writing is an answer to the action. The notice being required for his benefit, it may, of course, be waived in respect to himself; and if damage ensue, in the absence of

proof of negligence on the part of the defendant, it is *damnum absque injuria*, and falls under the maxim *voluntas non fit injuria*. Indeed, to maintain an action in favor of one who is present and concurs in the act would be to aid him in committing a fraud on the defendant.

PER CURIAM. No error.

Cited: Lamb v. Sloan, 94 N. C., 537; *Roberson v. Morgan*, 118 N. C., 995; *Wood v. R. R., id.*, 1064.

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JOSEPH W. GILMER v. JOHN W. McMURRAY.

Where upon the transfer of a note an endorsed credit was overlooked, so that the endorsee paid the full amount called for in the face of the paper, and afterwards, on being applied to and the mistake pointed out, the endorser said he was willing to do what an honest man ought to do, and paid back the amount of the credit thus overlooked, it was *Held* that this was no promise, express or implied, to pay, nor was it a distinct acknowledgment of a subsisting debt, so as to repel the statute of limitations.

ASSUMPSIT, tried before *Shepherd, J.*, at Special Term, January, 1860, of GUILFORD.

Rankin and McLean were indebted to the defendant as guardian of certain minor heirs, and afterwards, upon appointment of Gilmer to that office, the note of Rankin & McLean was transferred to him by the defendant's endorsement. Two payments had been endorsed on the note, which were not noticed at the time of the transfer, and the plaintiff allowed the full value called for in the face of the note. Afterwards the parties met in the office of Mr. Gorrell, in Greensboro, and the plaintiff pointed out the mistake, and claimed to have the amount of these credits refunded to him. The defendant said "he was willing to do what an honest man ought to do" in the matter. It was then submitted to Mr. Gorrell to revise the transaction and ascertain whether the mistake complained of existed. Upon examining into the matter, Mr. Gorrell ascertained that there was a mistake and overpayment to the amount of these endorsed credits, which the defendant immediately rectified by paying back the amount, with interest, in money. The defendant being sued on the endorsement, pleaded the statute of limitations, to which the plaintiff replied, the above transaction as a new promise to pay. The court held that this was not a good reply to the statute. Plaintiff's counsel excepted.

Verdict for defendant, and appeal by plaintiff.

McLean for plaintiff.
Morehead and Gorrell for defendant.

(480) BATTLE, J. Whether a special replication of a new promise can be relied on to take the case out of the operation of the statute of limitations, when the action is brought by the endorsee against the endorser of a note, it is unnecessary for us to decide, for we cannot find in the facts stated in the present case any evidence of such promise, either express or implied. The rule has been so often laid down by our Court as to have become trite, that to repel the bar of the plea of the statute of limitations in the action of assumpsit there must be an express promise to pay, or a distinct acknowledgment of the claim as an existing debt from which a promise to pay it may be implied. See *Vass v. Conrad, ante,* 87, and the cases therein cited. There is certainly, in the present case, no pretense that the defendant expressly promised to pay the debt in dispute, and, to our apprehension, there is nothing shown from which it can be inferred that he acknowledged or intended to acknowledge it. From the testimony of Mr. Gorrell it appears that the defendant, as the former guardian of some minor children, had failed to pay the plaintiff, who had been appointed as his successor in the office, a certain sum which was due to the wards. The failure had been caused by the omission to take into account two credits endorsed on the note of Rankin & McLean, which had been assigned, together with others, by the defendant to the plaintiff. The omission was rectified by the payment of the amount of these credits, but the payment was manifestly not one in part of the Rankin & McLean note, and had no reference to the defendant's liability as the endorser thereof. It was made simply to correct a mistake, and for no other purpose whatever. The defendant neither did anything nor said anything that touched his liability as the endorser of the note in question, and therefore there was no acknowledgment of the debt as his from which there can be inferred a promise that he would pay it. We concur in the opinion of his Honor in the court below, that the plaintiff cannot recover, and the judgment of nonsuit must be

PER CURIAM. Affirmed.

(481)

CAPE FEAR AND DEEP RIVER NAVIGATION COMPANY v. GEORGE WILCOX.

1. One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance.
2. Where a statute incorporating a company gives a remedy by the sale of stock within three years after an assessment, and then by a suit for the balance due, it was *Held* the plaintiff had three years from the sale of the stock to bring suit for the balance; for, until such sale, no balance could be ascertained.

ASSUMPSIT, tried before *Bailey, J.*, at last Spring Term of CHATHAM.

The plaintiff declared under section 9 of the act of 1848, incorporating the Cape Fear and Deep River Navigation Company, to recover the balance due on the following subscription:

"We, the subscribers, promise to pay the amount annexed to our names, provided that the suits now pending in Moore Court of Equity are decided in our favor, and that it is understood that we pay no installment or money for the opening of the river until these suits are decided in our favor. February 28, 1849.

"George Wilcox ..... $750."

The suit referred to was compromised by the defendant's paying the cost and some money, and taking a release and deed of quitclaim from Williams, his adversary in that suit. Nothing was ever paid by the defendant on his subscription, but, after the last assessment on the stock subscribed was made, to wit, 20 January, 1853, the defendant's stock was regularly sold on 9 May, 1854, in strict pursuance of the section of the charter above referred to. Under this state of things the judge instructed the jury that the plaintiff was entitled to recover. Defendant excepted.

Verdict for plaintiff, from which defendant appealed.

J. H. Haughton for plaintiff.
S. F. Phillips for defendant.

PEARSON, C. J. One who prevents the performance of a con- (482) dition, or makes it impossible by his own act, shall not take advantage of the nonperformance. Lord Coke illustrates the rule by this case: "If A. be bound to B. that J. S. shall marry Jane G. upon such a day, and before the day B. marry with Jane, he shall not take advantage of the bond, for that he himself is the means that the condition could not be performed, and this is regularly true in all cases." Co. Lit., 20b.

In our case the defendant, by compromising the suits and acquiring the right of Williams by means of his release, made the condition impossible, and, according to the rule, cannot take advantage of its nonperformance in order to defeat his subscription.

This action is not barred by the statute of limitations, for a sale of the stock was made within less than three years after the assessment, and this action for the balance after deducting the proceeds of the sale, was commenced within less than three years after the sale, at which time the balance due was ascertained and the cause of action for the balance accrued.

Admit that the remedy given by the statute is cumulative, and that the plaintiff might have brought an action of assumpsit at common law for the amount assessed, and that the common-law action was barred by the statute of limitations when the writ in this case issued, the remedy given by the statute embraces not simply a sale of the stock, but also an action for the balance, and as the election to pursue the statute remedy was made within three years after the assessment, no question can be made as to its not being in time; and, being commenced in time by a sale, the other branch of the remedy, to wit, an action for the balance, was not barred until three years after the sale, because that right of action did not accrue until the sale. There is

PER CURIAM. No error.

Cited: Harris v. Wright, 118 N. C., 424; *Harwood v. Shoe,* 141 N. C., 163; *Whitlock v. Lumber Co.,* 145 N. C., 125.

(483)

JEFFERSON FISHER v. JOSEPH J. B. PENDER.

Where upon the face of an instrument it appeared that one signed, sealed, and delivered it in order to bind the firm of which he was a member, and not as his own individual deed, it was *Held* he could not be held individually bound.

DEBT, commenced by warrant before a justice of the peace, and on appeal tried at last term of EDGECOMBE by *Saunders, J.*

The plaintiff declared on the following sealed instrument:

Due J. Fisher, $45, for value received, 12 October, 1854.

PENDER & BRYAN. [SEAL.]

The execution by the defendant Pender was admitted. The note was given by him for a balance of a partnership debt, due on a trading

between plaintiff and Pender & Bryan, as partners. It was admitted, also, that Pender had no authority to bind the firm by deed.

It was insisted on behalf of the plaintiff that the bond was good as the deed of Pender.

The defendant pleaded the general issue and statute of limitations. And the foregoing facts being agreed by the parties, the case was submitted for the judgment of the court.

His Honor being of opinion with the defendant on the case agreed, gave judgment accordingly, from which the plaintiff appealed.

Moore and Bridgers for plaintiff.
No counsel for defendant.

BATTLE, J. The bill of exceptions in this case presents the question whether an instrument in the form of a sealed promissory note, given by one partner, in the partnership name and for a partnership debt, but without any authority to bind the other partners by a deed, is the bond of the partner who signed it.

Mr. Collyer, in his valuable work on Partnership, says that (484) "Where a partner executes a deed for himself and his copartner, it has frequently been decided that he himself is bound, though his copartner is not." Coll. on Pars., p. 444, sec. 471, Perkins' Ed. Several cases have been referred to by the counsel for the plaintiff, in this and other States of the Union, in which similar language has been used. In North Carolina the rule, though so stated, has never been directly adjudicated. *Blanchard v. Pasteeur,* 3 N. C., 590; *Person v. Carter,* 7 N. C., 321; *Horton v. Child,* 15 N. C., 460; *Spears v. Gillett,* 16 N. C., 466; *Wharton v. Woodburn,* 20 N. C., 647, and *Fronebarger v. Henry,* 51 N. C., 548. The only English case relied upon for his position by Mr. Collyer is *Elliot v. Davis,* 2 Bos. & Pul., 338, and it is necessary that we should examine that case with some care, for by a proper analysis of it we apprehend that the true rule upon the subject which we are now discussing may be ascertained and applied. It was an action of debt on a bond, to which the defendant pleaded the general issue of *non est factum.* On the trial it appeared that the bond sued on was given to the plaintiff by the defendant as surety for a third person; that previous to its execution, the defendant having brought it to the plaintiff's counting-house, filled up with his own name only as a surety, it was objected on the part of the plaintiff that he meant to have the joint security of the defendant and his partner, one Marsh; that upon this objection being made, the bond was, with the consent of the defendant, but in the absence of Marsh, altered into a joint and several bond in the name of the defendant and Marsh, and being signed by the defendant

"Davis & Marsh," was, by the former, regularly sealed and delivered as his deed; and that Marsh, on being informed of the transaction, expressed his disapprobation of what the defendant had done. Upon this evidence it was insisted on the part of the defendant that there was no regular single execution of the bond, there being but one seal, against which were set the names of "Davis & Marsh," and that the execu-
(485) tion, therefore, being insufficient as against both, was insufficient also as against the defendant. A verdict was found for the plaintiff, with leave to the defendant to move to have the verdict set aside and a nonsuit entered. Accordingly, a rule *nisi* having been obtained for that purpose on a former day, it came on to be argued, and was argued before the Court of Common Pleas by counsel on both sides, when Lord Eldon, who was then the Chief Justice of that court, pronounced for himself and his brethren the following opinion:

"The alteration which was made in the bond appears to have been as much the act of the defendant as of the plaintiff, so that no argument in his favor can be drawn from that circumstance. His single security being objected to, he offered to execute a bond for himself and his partner, Marsh, having no authority from the latter to bind him. The way in which the obligation begins is this: 'Know all men by these presents, I, T. Davis and G. Marsh,' etc. The defendant meant it to be his several bond, and the joint and several bond of himself and Marsh. Having no authority to bind Marsh, the bond becomes the several bond of the defendant, but not the joint and several bond of himself and Marsh. The bond being sealed and delivered is sufficient, and we would, if it were necessary, hold him to have described himself by the name of 'T. Davis and G. Marsh,' and to be estopped from showing that his name is T. Davis only."

It is apparent from this case that one partner may bind himself by deed by signing it in the name of the partnership, provided he seal and deliver it as his own deed as well as that of the partnership, and he will be bound by the instrument, though the other partner or partners will not, unless he had their authority, under seal, to execute for them. That is the true rule, and it is in accordance with the well established principles which govern the execution of deeds. A deed is a written instrument, signed, sealed, and delivered by the parties, and on account of its solemnity it estops them from denying anything therein asserted. But, in order to have this effect, it must be signed, sealed, and delivered as the deed of him who is to be bound by it. If it be delivered
(486) as the deed of another, and in the name of another, we apprehend it would not bind the person who signed and sealed it, because it was not executed as his deed. He did not intend to be bound by it,

and the party to whom it was delivered did not intend that he should be bound by it, and it would be strange that it should operate contrary to the intention of both the parties to it. *Delius v. Cawthorn,* 13 N. C., 90. It is true that one person may bind himself by deed for another, as, for instance, an agent for his principal; but to do so he must purport and intend to bind himself by signing and sealing the instrument with his own name and with his own seal, and then deliver it as his own deed. *Appleton v. Binks,* 5 East., 148. So one partner may bind himself by deed for the firm, and he will be bound if he sign, seal, and deliver it as his own, though he may also intend that it shall operate as the deed of the partnership; but it would be against principle to hold him bound by an instrument which upon its face showed that he did not sign, seal, and deliver it as his own individual deed, but as the deed of the partnership of which he was a member. In the case before us the instrument sued on is in that simplest form of a promissory note commonly called a due-bill. As such it was intended to be given by the makers and to be received by the payee. The addition of a seal altered its character, and made it a bond, but it was not sealed and delivered as the deed of the defendant Pender, but of the firm of which Pender and Bryan were members. There is nothing on the face of the instrument to show that the plaintiff received it otherwise than as the deed of the partnership, and in that particular it differs essentially, as we have already seen, from *Elliott v. Davis,* upon which we have heretofore commented. It was upon the principle that the instrument in *Sellers v. Streator,* 50 N. C., 261, did not purport to be, and was not intended to be, the individual bond of the member of the partnership who signed and sealed it, and we held that it could not be treated as his bond; and upon the same principle the present case must be decided against the plaintiff.

In all the other cases in this State in which it was incidentally (487) said (for in none of them was it directly decided) that a member of a partnership might bind himself by a bond, by signing, sealing, and delivering in the partnership name, the distinction was not adverted to between a case like that of *Elliott v. Davis* and one like *Sellers v. Streator,* or the present. If the party intend that the instrument shall operate according to its purport, as his bond, it shall do so, and none the less because of his intending it to operate as the bond of the other partners also; but if it were his intention, as appears from the instrument itself, that it should bind the firm, and not himself alone, then it shall not be taken to be his individual bond. When thus executed for the purpose of securing a partnership debt, although it cannot be sued on as a bond of the firm, or of the partner who signed and sealed it, yet in an action on the contract, express or implied, which created the debt,

it may aid other evidence of the contract by showing the amount of the debt and the time of the payment agreed on. *Fronebarger v. Henry, ubi supra.*

PER CURIAM. Affirmed.

Cited: Davis v. Goldston, 53 N. C., 30; *Holland v. Clark,* 67 N. C., 106; *Bryson v. Lucas,* 84 N. C., 683; *Boyd v. Turpin,* 94 N. C., 139; *Burwell v. Linthicum,* 100 N. C., 149.

Dist.: Henderson v. Lemly, 79 N. C., 170; *Pipe Co. v. Woltman,* 114 N. C., 186; *Supply Co. v. Windley,* 176 N. C., 20.

(488)

STATE v. DANIEL WORTH.

1. The delivering of a copy of an incendiary publication to one individual, with an unlawful intent, is a circulation within the prohibition of the act of Assembly, Rev. Code, ch. 34, sec. 16.
2. In order to show the mischievous intent in the delivery of an incendiary publication to the individual, described in the bill of indictment, it is competent to prove that defendant before that sold and delivered other copies of the same work to other persons.
3. In a prosecution under the statute, Rev. Code, ch. 24, sec. 16, it is not necessary to aver, or prove, that the forbidden publication was delivered to a slave or free negro, or read in their presence.
4. A bound volume of the tendency described in the act is within its purview.
5. A book which denounces slavery as worse than theft, and as leading to murder, and proclaims that it must be put an end to, even at the cost of blood, certainly has a tendency to excite slaves to insurrection.

INDICTMENT, tried before *Bailey, J.,* at last Spring Term of GUILFORD.

The defendant was indicted under section 16, ch. 34, Rev. Code, for the publication and circulation of a book known and styled "The Impending Crisis of the South, by Hinton Rowan Helper of North Carolina." The indictment contained two counts: *first,* that the defendant published and circulated the book, setting forth extracts from the same; *secondly,* the second count is as the first, except that therein it was charged that the defendant sold and delivered a copy of the said book to George W. Bowman. The extracts compare the existence of slavery to the introduction of smallpox into a community, putting strychnine into a public well, and the turning loose of mad dogs upon a community, and that it is the imperative duty and the determined purpose of the

author and his associates to *abate the nuisance* and *exterminate the evil,* even at the cost of blood, if it be necessary. In the said book it is asserted that slavery leads to murder, and has produced murder; that "slave owners are more criminal than common murderers"; that masters of slaves are worse than thieves, and with many inflammatory epithets and much ranting, a purpose is declared to effect the abolition of slavery; and unless the owners will consent to do this volun- (489) tarily, and to give each slave $60, it is threatened in the said book that this is to be effected by the abolitionists at the North with the assistance of the slaves, who, it says, "in nine cases out of ten would be delighted with an opportunity to cut their master's throats."

On the trial it was proved that defendant sold and delivered a copy of the book in question to George W. Bowman, and evidence was offered to show that the defendant had sold and delivered copies, in bound volumes, to other persons than to George W. Bowman. This evidence was objected to, but admitted by the court, and the defendant's counsel excepted.

It was insisted on behalf of the defendant:

1. That a bound volume, or book, was not a pamphlet or paper within the prohibition of the statute.

2. That the sale and delivery of a copy to George W. Bowman was not a publication of circulation within the meaning of the statute.

3. To constitute the offense, the publication or circulation should be in the sale and delivery of a copy to a slave or free negro, or the reading the same in their presence.

The court declined so to instruct the jury, but told them that the sale and delivery of a bound volume was within the prohibition of the statute, and that the sale and delivery of a volume to George W. Bowman, if done with a wicked intent, was a publication and circulation within the meaning of the statute. Defendant's counsel again excepted.

Verdict for the State. Judgment and appeal.

Attorney-General, with whom was McLean, for the State.
Morehead and Gorrell for defendant.

MANLY, J. The case of the defendant has been duly considered in this Court upon the exceptions taken below, and also upon a motion in arrest of judgment, made here. We discover no reason for reversing or arresting the judgment of the law upon the verdict.

The evidence of the vending of other copies of the book than (490) that to Bowman was properly admitted. We suppose that a copy might be delivered from one person to another, in North Carolina, under

such circumstances as to divest it of criminality, as when it is delivered not approvingly and for the purpose of propagating its principles, but to gratify curiosity, both parties to the act being equally opposed to the design. The criminality consists in the intent, and this must be collected from the circumstances. Where the question is whether the defendant was justified by the occasion, or acted from malice, every circumstance is admissible which can elucidate the transaction and enable the jury correctly to conclude whether the defendant acted fairly and honestly, or vindictively, for the purpose of causing evil consequences. Upon this principle, in an action for libel contained in a weekly paper, evidence was allowed to be given of the date of other papers, with the same title, at the same office, for the purpose of showing that the papers were sold deliberately and in the regular course of transaction for public perusal, and, therefore, if libelous, distributed *mala fide. Plunkett v. Cobbett,* 5 Coke, 136. The evidence was admissible, then, to show the intent of the defendant in delivering the book to Bowman.

We think it admissible in another point of view: The indictment, in the second count, charges the circulation to consist in delivering a copy to a single individual.

The correctness of this would depend upon whether the act alleged was intended to aid in giving publicity to the principles of the book, and pertinent to this inquiry is the proof in question. The vending of other copies of the work affects the defendant with a knowledge that it was a work consisting of divers copies in a course of transmission to the public. Every act, therefore, of the defendant, putting out a copy of such a work, is an aiding in the circulation. The evidence was, therefore, admissible to explain the act of defendant in delivering a copy of the book to Bowman; that is, to establish it as an act of circulation. In both
(491) views the principle is the same—the evidence being proper to show the wicked intent.

The next exception presented by record is one based upon the language of the law under which the defendant is indicted, Rev. Code, ch. 34, sec. 16. It will be seen, by reference to the section, that the incendiary publication prohibited is designated as any written or printed *pamphlet or paper,* and it is objected that the proof is as to the circulation of a *book,* which is neither a pamphlet nor a paper. The distinction between books and pamphlets is not very definitely marked in the popular use of the terms, but we suppose there is some legal distinction, for we find in section 82 of the same chapter of The Code that books and pamphlets are spoken of. The distinction is that, perhaps, which is made by the case between a parcel of sheets, stitched and bound, and a sheet or parcel left unbound. But whatever may be the distinction, we are of opinion

that the term paper, which is added in the statute, is used in a comprehensive sense—is intended to enlarge the purview of the statute, and to embrace all written or printed matter, whether in dignity it rise above or fall below the class called pamphlets. No qualifying phrase is prefixed to or accompanies the term, and it is certainly sufficiently broad to embrace a book as well as a pamphlet and other minor publications. A book is obviously within the mischief intended to be guarded against, and we must suppose it was intended to be included in the general term used. The court was correct, therefore, in holding that a bound volume was within the prohibitions of the law.

The court was also correct in ruling the delivery to Bowman, with the wicked intent described by the statute, was a circulation within the meaning of the law. Upon this subject we have already said what is deemed sufficient in disposing of the exception to the evidence.

It is not deemed necessary, as we conceive, that a party should put out, and then remove from hand to hand, incendiary matter in order to make him guilty of circulating; nor is it necessary he should put out distinct copies to different individuals. Where a work is printed for public perusal, every one who delivers a copy in furtherance of the design of publishing is an actor in the work of publication, and, in the case of incendiary matter forbidden by law, is guilty as a (492) principal, provided it be done willfully and with the evil intent.

The remaining exception is to that part of the instruction to the jury which declares that it was not necessary, in order to constitute the offense, that the sale should be to a slave or a free negro, nor that the matter should be read in the presence of either. We find no error in this. There is no such qualification of the offense in the language of the statute as that which is here supposed. It is made by The Code unlawful to circulate, or aid in circulating, written or printed matter the evident tendency of which is to cause slaves to be discontented and free negroes dissatisfied. No license is given to circulate amongst any class by restricting the prohibitory provisions to some particular ones. The circulation within the State is alike prohibited, whether it be amongst whites or blacks. The Legislature seems to have assumed that if a circulation within the State was once established, that its corrupting influence would inevitably reach the black. The enemies to our peace act upon this assumption, and it is not unreasonable to ascribe to our legislative assembly the same amount of foresight.

It is clear to us that in a mixed population, consisting of both whites and blacks, matter put into circulation calculated to excite insubordination amongst the latter would ultimately extend itself to them, and effect the object it was calculated to accomplish. Thus the inevitable tendency of a circulation, in whatever circle, would be to make blacks

discontented. The language of the law in regard to this point is unrestricted. The spirit of the law can only be accomplished by giving it an unrestricted construction, and where both the letter and the spirit concur, there can be no doubtfulness as to the duty of the court.

The motion in arrest of judgment raises the inquiry whether the matter extracted from the book and collated in the evidence be, in law, within the prohibition of the statute, "the evident tendency
(493) whereof is to cause slaves to become discontented with the bondage in which they are held by their masters, and the laws regulating the same; and free negroes to be dissatisfied with their social condition, and the denial to them of political privileges, and thereby to excite among the said slaves and free negroes a disposition to make conspiracies, insurrections, or resistance against the peace and quiet of the public." We have considered this matter, too, and do not regard it as admitting of any serious question. Without going into a detailed consideration of the offensive matter, it is sufficient to say the expressed object of the book, as disclosed by the extracts, is to render the social condition of the South odious, and to put an end to that which is held up as the odious feature, by force and farms if necessary. This object is constantly kept in view by the execution of the work, and the considerations resorted to are manifestly designed to accomplish the object. The scope of the extracts is to place slave-holders and their slaves in antagonism and hostile array, and thus, by force, to bring about an extinction of slavery.

We do not perceive how there can be any difficulty in discovering the tendency of matter, every passage of which is a declaration, in the most inflammatory words, that the slave ought to be discontented with his condition and the master deposed from his, and that the change should be effected even at the cost of blood. The language, in direct terms, recommends the accomplishment of the object as a duty, and argues in favor of its rectitude. It would seem to follow, somewhat after the manner of a corollary, that the tendency is in accordance with the object and argument.

We conclude the evident tendency is that which is attributed to it in the indictment; that it is against law, and is a mischievous attempt to disturb the happiness and repose of the country.

We have considered the case only upon one of the counts in the indictment, viz., that which charges the circulation to be by delivering a copy to George W. Bowman. Holding that to be good under a general
(494) verdict, it will be unnecessary to consider the others, as there may be judgment upon that count.

PER CURIAM. No error.

ELIZABETH J. WARREN v. ROBERT WADE ET AL.

1. An office copy of a deed *inter partes* executed *in pais*, acknowledged and recorded in the court of another State, is not such a record and judicial proceeding as can be authenticated under the provisions of the act of Congress of 1790.

2. *Perhaps*, if authenticated in the form required, the copy of such a deed from an *office book* might be admitted under the supplemental act of Congress passed in 1804.

DEVISAVIT VEL NON, tried before *Bailey, J.*, at Spring Term of CASWELL.

The script was propounded as the will of one Ellis Wade. It was in the ordinary form of a will, with two subscribing witnesses. The probate was opposed on the ground that the decedent had not sufficient capacity to make a will, and, secondly, on the ground of undue influence exerted over him by Elizabeth Warren, the propounder. The decedent was a man of very intemperate habits; he lived at the time of the execution of the paper, and had for several years previously, in a state of adultery with the propounder, by whom he had several children; he had a wife, by whom he had no children, who lived separate from him in the State of Virginia. There was evidence tending to establish both the points made in the issue, which was submitted without exception. In order to rebut this testimony, the caveators offered in evidence the certified copy of a deed, executed in Halifax County, Virginia, reciting that his wife, Susan Wade, had obtained a decree for alimony (495) against the said Ellis in the county court of Halifax, and had obtained a writ of *ne exeat* to compel the satisfaction of said decree, and providing, in order to settle and put an end to said suit, that one-third of the whole estate of the said Ellis shall be vested in a trustee, for the sole and separate use of the said Susan, with full power in her to dispose of the same by deed or will.

The probate of the said deed is as follows:

HALIFAX CLERK'S OFFICE—27 February, 1844.

The within indenture was presented in the clerk's office aforesaid, and acknowledged by the within named Ellis Wade, a party thereto, to be his act and deed, and admitted to record according to law.

Teste: M. M. HOLT, C. H. C.

The certificate of the transcript, offered in evidence, is as follows:

STATE OF VIRGINIA—COUNTY OF HALIFAX—Sct.

I, William S. Holt, clerk of the County Court, in the county and State aforesaid, do certify that the foregoing deed from Ellis Wade to Edward Boyd, trustee, is truly copied from the records of my office.

In testimony whereof I have hereunto affixed the seal of the said county, subscribed my name, this 7 November, 1859.

[L. S.] WM. S. HOLT, *Clerk.*

To which is added the following:

"I, Beverly Snyder, presiding justice of the County Court of Halifax, in the State of Virginia, do certify that William S. Holt, who hath given the preceding certificate, is clerk of said court, and that his attestation is in due and usual form. Given under my hand, this 5 November, 1859. "BEV. SNYDER, P. J. P. H. C."

The admission of this copy was objected to on the ground that it was not proper evidence in itself, and because it was not attested according to the act of Congress. The objections were overruled and the (496) evidence admitted. The caveators excepted.

Verdict in favor of the propounder. Judgment, and appeal by caveators.

Hill for propounder.
Morehead and Norwood for caveators.

BATTLE, J. The only question presented by the bill of exceptions is as to the admissibility in evidence of the certified copy of a deed purporting to have been copied from the records of the County Court of Halifax County, in Virginia. The transcript of the instrument was objected to on two grounds: first, because it was irrelevant, and, secondly, because it was not properly authenticated. The first ground of objection is clearly untenable. On the trial of the issue of *devisavit vel non,* the alleged will was opposed upon the allegations that the supposed testator was *non compos,* and that the script was procured by the exercise of undue influence over him. In answer to such allegations, made by the caveators, it was certainly very material for the propounders to show, if they could, that the testator had not, by giving his estate to other persons, lost sight of his primary duty to provide suitably for his wife. This proof was amply furnished by the instrument offered in evidence, and it only remains for us to inquire whether, as the original deed was not produced, the copy was authenticated in such a manner as justified its admission. Upon that point our opinion is adverse to the propounders.

The instrument, though purporting to have been recorded in the County Court of Halifax County, in Virginia, is manifestly not a judicial proceeding nor part of a judicial proceeding in that court. It

is nothing more nor less than an indenture between the testator and another person as the trustee of his wife, whereby a certain part of the testator's estate is conveyed to the trustee for the sole and separate use of the wife. It is true that a part of the consideration for the deed was the compromise of a suit which the wife had instituted for the recovery of an alimony, but it does not appear that the deed was recorded as any portion of that judicial proceeding. It was a deed *inter partes* (497) executed *in pais,* and afterwards acknowledged in the court, and recorded according to the laws of Virginia, instead of being proved or acknowledged and registered according to our laws. Not being properly a record and judicial proceeding of the court, it cannot be authenticated as such under the act of Congress of 1790. See Appendix to the Revised Code, page 623. It may, perhaps, be considered as the record of an office book, and as such come within the provisions of the supplementary act of Congress, passed in 1804, but, unfortunately for the propounders of the will in this case, that act requires not only the attestation of the keeper of the office book, and of the certificate of the presiding justice of the court, but also the certificate of the clerk or prothonotory of the court, under his hand and seal of office, that the said presiding justice is duly commissioned and qualified. This latter certificate is wanting in the case now before us, and for that reason the certified copy of the instrument ought not to have been admitted in evidence. This was error.

PER CURIAM. *Venire de novo.*

Cited: Hughes v. Debnam, 53 N. C., 132; *Kinsley v. Rumbough,* 96 N. C., 196.

JAMES W. FULKE v. AUGUSTINE FULKE.

Where the obligor and obligee in a bond, conditioned for the conveyance of land, agreed to rescind the contract, and in pursuance of such agreement the obligee gave up the bond and the obligor the notes taken for the price of the land, it was *Held* that a promise afterwards made by the obligor to pay back a sum of money which had been paid towards the land was a *nudum pactum.*

ASSUMPSIT, tried before *Osborne, J.,* at last Spring Term of SURRY.

In 1855 the defendant covenanted to convey to the plaintiff a tract of land on the payment of certain notes given as the price thereof. The plaintiff paid towards the land $106.79; but becoming in- (498) volved beyond his ability to make further payment, the contract,

in 1856, was rescinded, the plaintiff giving up his bond for title and the defendant surrendering the notes. Three months afterwards the plaintiff asked the defendant if he would pay him the $106.79, which he had received towards the land, to which the defendant replied that he had got the land back and had received the $106.79 toward the same, and it was wrong for the plaintiff to lose it, and he, the defendant, promised to pay back the said sum. On this special promise the suit was brought. The defendant contended that that was a promise without consideration, and that no action would lie on it, and asked his Honor so to instruct the jury. The court held to the contrary, and instructed the jury that, if they believed the evidence, the plaintiff was entitled to recover. Defendant's counsel excepted.

Verdict for plaintiff. Judgment, and appeal.

J. M. Clement for plaintiff.
Barber for defendant.

BATTLE, J. We entertain a different opinion from that expressed by his Honor in the court below as to the sufficiency of the consideration upon which the defendant's promise was made. The contract entered into by the plaintiff for the purchase of the defendant's land had been completely rescinded, and two or three months had elapsed before the defendant agreed to return the money which he had received in part performance of the contract. The promise was, therefore, founded upon an executed or past consideration, and was, consequently, a *nudum pactum. McDugald v. McFadgin,* 51 N. C., 89; *Hatchell v. Odom,* 19 N. C., 302; *Felton v. Reid, ante,* 269. But the plaintiff's counsel insists that the action for assumpsit for money had and received is an equitable action, and that it is against equity and good conscience of the defendant to keep this money. If the action could be supported upon
(499) that ground, it could be maintained as well without as with an express promise of the defendant to pay it. For instance, if one take my horse and sell him, without my consent, and receive the price, I can sue him in assumpsit upon the count for money had and received to my use, whether he has promised to pay me or not. The law in such a case will imply a promise to pay—not, however, solely upon the ground that it would be iniquitous in him to withhold the price from me, but because there is a consideration of loss to me which is sufficient to imply a promise from him to pay what justly belongs to me. The true test of a consideration is to be found in the inquiry whether there was any benefit to the party promising, or any loss or inconvenience to the other party when the promise was made; for if there were, the promise is

binding, but if not, then it is a *nudum pactum* and not binding. *Findlay v. Ray,* 50 N. C., 125.

In the present case, the contract for the purchase of the land having been fully and effectually rescinded by the delivering up of the papers on each side, the plaintiff lost nothing, and the defendant gained nothing, as the foundation of the defendant's promise. It was, therefore, without a consideration, and void.

PER CURIAM. *Venire de novo.*

Cited: Oldham v. Bank, 85 N. C., 244.

(500)

JOHN M. MOREHEAD v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.*

1. A corporation may be sued in the county court in any county in the State where the plaintiff resides.
2. Where the defendant, in a county court, pleaded in abatement to the jurisdiction of the court, to which the plaintiff demurred, and the court overruled the demurrer and sustained the plea, on an appeal to the Superior Court, where the judgment below was properly reversed and the jurisdiction of the county court sustained, it was *Held* that it was error to order a *procedendo* to the county court, for that the whole case was brought up to the Superior Court.

ASSUMPSIT, tried before *Bailey, J.,* at last Spring Term of GUILFORD.

The writ in this case was returnable to the Court of Pleas and Quarter Sessions of Guilford County, and served on one of the directors of the railroad. At the return term the defendant, by its attorney, pleaded that John D. Whitford (and others, mentioning them) "were, during all the time aforesaid, and now are, the directors of the said Atlantic and North Carolina Railroad Company, and that John D. Whitford was president of the road," and the plea sets out the residences of these several individuals, which were all beyond the limits of Guilford County, and prays judgment whether the court will take further cognizance of the action.

To this plea the plaintiff demurred, and there being a joinder in demurrer, the county court, on argument, overruled the demurrer and sustained the plea, and gave judgment that the action be abated, from which the plaintiff appealed to the Superior Court.

In the Superior Court the judgment was that the plea is insufficient,

*Judge MANLY, being a stockholder, did not sit on this case.

and the demurrer was sustained, and that the defendant answer over, and that a writ of *procedendo* issue to the county court for that purpose. From this judgment the defendant appealed.

(501) *Morehead and Geo. E. Badger for plaintiff.*
McLean and B. F. Moore for defendant.

PEARSON, C. J. A corporation has no actual residence, and no residence, in contemplation of law, is given to the defendant by statute. The allegation of the residence of the president and other officers, set out in the plea, is immaterial, and has no bearing on the question of jurisdiction; for the officers are not parties to the action, and the reference made to them in the statute is merely for the sake of providing a mode for the service of process, and does not affect the question of venue. It follows that the suit was properly instituted in the county where the plaintiff resides, and that the court of pleas and quarter sessions of that county had jurisdiction. There is, consequently, no error in so much of the judgment of the Superior Court as sustains the demurrer and requires the defendant to answer over.

But this Court is of opinion there is error in that part of the judgment which directs a writ of *procedendo* to issue to the county court.

It is settled that where the judgment of the county court is final, so as to put an end to the case so far as that court is concerned, under our statutory provisions in regard to appeals from the county to the Superior Courts, the appeal brings up the case and so constitutes it in the Superior Court that all further proceedings are to be had in that court (*Shaffer v. Fogleman,* 44 N. C., 280; *Russell v. Saunders,* 48 N. C., 432); for, as the case is out of the county court, no legitimate purpose can be answered by sending it back, inasmuch as, after a trial there, either party would again have the right of appeal, by which the case would be brought back to the Superior Court, where there would be a trial *de novo,* treating the whole proceeding in the county court as vacated by the appeal, which circuity would, of course, be attended with delay and useless expense.

It was said on the argument, as the county court erred in refusing to take jurisdiction, the proper way to correct the error is to send
(502) the case back, for, unless that be done, the plaintiff will be deprived of the fruits of his appeal, and the position was assumed that a case should always be sent back where it was not tried on its merits in the county court. We think the proposition is laid down too broadly. By entertaining the suit in the Superior Court, the error of the county court is corrected, and the plaintiff has the fruits of his

appeal by having a suit commenced on the day the writ issued, and by having the case treated as if it had been instituted in the county court, and he is put in the same plight and condition as if there had been a trial in that court on the merits and an appeal to the Superior Court. Suppose any other plea in abatement—one for a misnomer, for instance —had been sustained, or suppose on the trial of the general issue a witness for the plaintiff had been rejected and thereupon he had submitted to a nonsuit and appealed, he could, with like reason, insist that the only proper way to correct the error is to send the case back; and it could with equal propriety be asked, *Cui bono?* Why incur the unnecessary delay and expense, as a second appeal will vacate all that is done?

PER CURIAM. Reversed.

Cited: Millsaps v. McLean, 60 N. C., 82; *Overton v. Abbott,* 61 N. C., 294; *Stancill v. Branch, id.,* 218.

DOE ON THE DEMISE OF CONSTANT GRAY v. SUSANNAH MATHIS.

1. Where, by a deed to a feme covert, a life estate was conveyed to her for her own life, it was *Held* that her husband had no interest in such estate except the right to receive the rents and profits during the coverture.
2. Where a feme covert, having a life estate in land, made a deed purporting to convey it in her own name, without that of her husband's being in the body, but only affixed after the signature of the wife, it was *Held* that it was void as to her on account of the coverture, and as to him, because not a party to it, and that no privy examination could give validity to such an instrument.

EJECTMENT, tried before *Osborne, J.,* at Spring Term, 1860, (503) of WILKES.

The plaintiff produced a grant for the land in question to James Gray, the father of the lessor of the plaintiff, dated in 1799, and showed that the said grantee died some ten or twelve years ago. He then offered a deed from Gray, the grantee, to Edna Johnson and Milly Sale, married women, dated in 1832, which said deed does not contain the word "heirs," or any other words of inheritance, though there is a covenant to warrant and defend the land aforesaid to them and their "heirs." The plaintiff then offered a deed from the said Edna Johnson and Milly Sale to the lessor, which is alike deficient in words of inheritance, and which purports to convey the premises in their names, those of their husbands not being included in the body of the deed, but both are affixed with their seals to the instrument after those of their wives. There were certain

forms of a privy examination endorsed on the latter instrument, and certain questions raised as to them, but these are rendered unimportant by the view taken of the case in this Court.

In submission to an intimation from the court, the plaintiff took a nonsuit and appeal.

Boyden for plaintiff.
Barber for defendant.

BATTLE, J. We fully concur in the propriety of the nonsuit by the judge in the court below. In the deduction of his title, the lessor of the plaintiff claimed under a deed from one James Gray to Milly Sale and Edna Johnson, and a conveyance purporting to be a deed from the said Milly Sale and Edna Johnson, but signed and sealed as well by their husbands (they being married women) as themselves. The deed from James Gray passed a life estate only to the grantees, for the want of the word "heirs," and that was not enlarged into a fee by the covenant of warranty "to them and their heirs." *Seymour's case,* 10 Coke (504) Rep., 97; *Roberts v. Forsythe,* 14 N. C., 26; *Snell v. Young,* 25 N. C., 379.

The grantees having life estates only in the lands conveyed to them, their husbands could not become tenants by the curtesy, nor acquire any other interest in the land than the right to receive the rents and profits during coverture. One of the grantees having died, her interest, of course, terminated, so that no question can arise about the validity, as to her, of the alleged conveyance from her and the other grantee to the lessor of the plaintiff. But if it could, we should hold as to her, what we do as to the other, that it is void as being the deed of a woman laboring under the disability of coverture. Husbands are not mentioned in the deed as parties to it, and they could not become so by adding their signatures and seals to those of their respective wives. If this doctrine needed authority, it is found in the cases referred to by the defendant's counsel: *Leefflin v. Curtis,* 13 Mass., 233; *Catlin v. Weare, ibid.,* 217; 2 Cruise Dig., 260, note 2. See, also, *Kerns v. Peeler,* 49 N. C., 226.

This view of the case renders it unnecessary to consider whether the privy examination of the wives was properly taken, for we suppose no person will contend that the privy examination of a wife to the execution of a deed to which her husband is not a party can be of any avail.

PER CURIAM. Affirmed.

Cited: Harris v. Jenkins, 72 N. C., 186; *King v. Rhew,* 108 N. C., 699; *Featherston v. Merrimon,* 148 N. C., 207.

Dist.: Barnes v. Haybarger, 53 N. C., 82.

WILLIAM PARRISH v. WILLIAM G. STRICKLAND.

Upon an arbitrament and award, a claim, which was entertained and preferred in good faith, though not strictly allowable in law or equity, was *Held* to be a good foundation for an award, and recoverable in an action of assumpsit on such award.

ACTION, begun before a justice of the peace, for an amount (505) "due by account rendered by arbitrators," and on appeal tried before *Saunders, J.*, at last term of WAKE.

The defendant had employed the plaintiff as an overseer, at the price of $125 for the year, and to find his family. The plaintiff remained in the defendant's service for eight months, and, upon some disagreement occurring between them, left the defendant's service. The particulars of the dispute are stated in the case with much particularity, from which it would seem that the plaintiff was afraid that he would owe, upon a settlement, thirty-five or forty dollars. At length the parties agreed to leave the matter to two arbitrators, who were present, before whom they produced their books and opposing charges. After an adjournment, as to an item of plank, they finally awarded in favor of the plaintiff $34.85.

It seems from the case stated that the court below permitted the parties to go into the original grounds of the controversy, and, at the request of the defendant's counsel, charged that the plaintiff could not recover for the whole $125 unless the defendant was in fault and failed to furnish the necessary provisions, but that they might consider what took place between the parties after the plaintiff left the defendant's service, which would "aid them in determining the question how the plaintiff came to leave the defendant's employment, and whether the plaintiff or defendant was at fault."

Under these instructions, which the defendant excepted to, the jury found the amount awarded, and, after judgment, the defendant appealed.

H. W. Miller and S. H. Rogers for plaintiff.
A. M. Lewis and K. P. Battle for defendant.

MANLY, J. This was a warrant for the amount of an award which had been made between the parties with respect to a balance due upon a contract, set forth in the case, which award was the result of an arbitration consented to by the parties.

Without going into a consideration of the question that was chiefly discussed below, of whose fault it was that the original contract was not fulfilled, we think, from the facts stated in the case, that the defendant is liable in *indebitatus assumpsit* upon the award (506) made.

There is a dispute about unsettled matters of account. The parties agreed to refer it (which is evidenced by their presence and conduct at the trial). The arbitrators made an award and announced it to the parties. The promise to pay what might be awarded will be obligatory, without establishing a legal demand as a consideration. It might be conceded, without breaking the force of this conclusion, that the plaintiff's claim was of a nature *not* to be enforced by any legal or equitable proceeding; yet, if it was entertained and preferred in good faith—made the subject of negotiation and arbitrament—then an express promise to pay the sum which might be awarded would be binding, and might be enforced. This seems to be the case before us. *Findlay v. Ray,* 50 N. C., 125, is believed to be in point and decisive.

We think, therefore, upon the facts stated in the case, that the plaintiff was entitled to recover according to his demand the sum awarded by the arbitrators.

PER CURIAM. Affirmed.

GRANDISON ROBERTS, ASSIGNEE, v. JAMES A. MCNEELY ET AL.

1. Where a contract is made in one country to be performed in another, the rate of interest will be according to the law of the latter.
2. Where a stock of merchandise was sold and a note taken in this State, payable in New York, where 7 per cent is the lawful rate, there being no evidence of an intent to evade the statute, it was *Held* not to be usurious.

DEBT, tried before *Osborne, J.,* at last Spring Term of ROWAN.

The declaration was upon a promissory note, payable ninety (507) days after date at the Bank of the Republic, New York City.

The defense relied on was the plea of usury. It was proved that the parties reside in North Carolina, and the note was given for merchandise sold to the defendants in Salisbury. The note was also proved to have been executed in Salisbury, and the defendants reside in Rowan and Iredell counties. It was admitted that the lawful rate of interest in New York was, at the time of the execution of the note, and still is, *seven per cent.*

The defendants' counsel contended that the note given under the circumstances stated was usurious, and asked his Honor so to charge the jury. This was declined by the court, and the defendants excepted.

The plaintiff had a verdict and judgment, from which the defendants appealed to this Court.

Blackmer and Clement for plaintiff.
Boyden for defendants.

PEARSON, C. J. It seems to be settled that where a contract is made in one country, and is to be performed in another, the rate of interest will be according to the law of the latter. This conclusion is put upon the ground that the parties had in view the law of the country where the money was to be paid, and intended to be governed by that law, and not by that of the *loci contractus*. *Davis v. Coleman,* 29 N. C., 424; *Arrington v. Gee,* 27 N. C., 590, where the subject is fully discussed and the authorities cited.

So, by the terms of the note sued on, the plaintiff was entitled to 7 per cent interest (the rate in the State of New York), and if it had been given for money loaned, or for a debt previously contracted in this State, there would have been ground to support the allegation of usury. But the note was given as the price of merchandise, and the inference is that the place of payment, and consequently the rate of interest, was taken into consideration by the parties, and affected the price which was to be given for the goods—the plaintiff selling at a (508) lower sum because of the benefit they were to derive from having the price paid in New York, so as to give them the control of Northern funds and save exchange. The transaction being a sale of goods, and not a loan of money, puts the idea of usury out of the question, in the absence of proof that it was intended as a cloak to cover what was in fact a loan of money, or an arrangement to get "forbearance" on a pre-existing debt. *Bute v. Bidgood,* 7 B. & C., 453 (14 E. C. R., 80), fully supports this conclusion. That was a contract by parties in England (where the interest was 5 per cent), for the sale of a plantation in the colony of Demarara, where the interest was 6 per cent, and, in fixing the price, which was to be on a long credit, 6 per cent was calculated and included in the note given for the price, which was payable in Liverpool, England. *Lord Tenterden, C. J.,* delivering the opinion of the Court, says: "The case which is now presented to the consideration of the Court arises out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded, partly, upon what was considered the present price of the estate, and partly upon what was considered its price if paid at a future day. It appears to me that this was, in substance, a contract for the sale of the estate at the price of £20,000, to be paid by installments. In that there is no illegality."

In our case the contract was for the sale of goods, and not for the loan of money. The agreement was founded partly upon what was con-

sidered the value if paid for in Salisbury and partly upon what was considered the value if paid for in New York, and, of course, in Northern funds. So there was no illegality in it.

PER CURIAM. No error.

Cited: Meroney v. B. & L. Assn., 116 N. C., 896.

(509)

SHELLY & FIELDS v. HIATT.

Where an intestate and his administrator had been partners in building a mill, it was *Held* that the administrator had no right to retain of the assets for work done on the mill after the death of his intestate.

DEBT, tried before *Shepherd, J.,* at a Special Term, January, 1860, of GUILFORD.

The action was brought against the defendant as the administrator of one Othniel Hiatt. The defense relied on was the plea of *fully administered and no assets.* A reference was made to Mr. Swaim, a commissioner, to state an account of the assets, and the only question in the case arises on an exception to his report. It appeared that the defendant's intestate and the defendant were engaged in building a mill on Deep River, in copartnership; that they both being mechanics, worked at the building, and had each done several hundred dollars worth of work at the time of the intestate's death; that after that event the defendant continued to work at the mill, and then on a petition to the county court the mill was sold by order of the court, and the intestate's estate received the benefit of half the proceeds; the defendant, as copartner, receiving the benefit of the other half. In the commissioner's report the defendant charges the estate of his intestate with "the value of the improvements made by him on the said grain-mill after the intestate's death and before the sale of the land, per decree, $354.64," which was allowed by the commissioner and excepted to by the plaintiff. It was agreed that if the said exception was sustained the plaintiff was entitled to a judgment for his debt, and that if it was not sustained the defendant was entitled to the judgment. The court below sustained the exception, and the defendant appealed.

McLean for plaintiff.
Morehead for defendant.

MANLY, J. It will be seen from the written agreement on file (510) that the case is made to turn upon the allowance or disallowance of the first exception on the part of the plaintiff to the account taken of defendant's assets. If the exception be allowed, the plaintiffs are entitled to a judgment for their debt; if it be not allowed, they submit to a nonsuit. The exception, we think, was properly sustained in the Superior Court. The $354.64 which the administrator claimed to retain was due him by reason of certain expenditures in completing a mill after intestate's death, in which the administrator and his intestate were concerned as partners. The partnership being dissolved by the death of one partner, no further partnership liabilities could be incurred. The debt, therefore, did not stand upon the footing of a partnership debt, but was at best a demand for money paid to the use of his intestate's estate, which a court of equity might possibly assist him in the recovery of, if assets had been left subject to the payment of such a claim.

To sanction this credit in the administrator's account would be to allow him to retain his own demand, upon an open account, in preference to the bond debt of the plaintiffs, which is against law. The judgment should be

PER CURIAM. Affirmed.

BERSHEBA HINSMAN v. HENRY HINSMAN.

1. There can be no objection to the manner or form in which an obligor makes his signature to a sealed instrument, provided it appear that he made it for the purpose of binding himself.

2. Where, to repel the presumption of payment arising from time, it was proved that defendant said he "owed the plaintiff a little note, but she might wait," and, again, that he "owed the plaintiff a note," it was *Held* not to be error to leave it to the jury to say whether the bond sued on was the one referred to, and if they believed from the evidence that the note was unpaid, plaintiff was entitled to recover.

DEBT, tried before *Osborne, J.*, at the last term of CABARRUS. (511) The action was brought on a sealed instrument, dated in 1842, the signature to which was rudely made—so much so that no one could read it. At the time of its execution it was proved that Mr. Barnhardt, who became the subscribing witness, with the assent of the obligor, wrote his name plainly under his signature. The bond, thus executed, was handed to the obligee and kept until about the time this suit was brought. On the trial plaintiff offered to prove the handwriting of the subscribing

witness (he being dead), and to prove the facts above stated by persons who were present at the transaction. This was objected by the defendant, but admitted by the court, and the defendant's counsel excepted.

To repel the presumption of payment arising from the length of time, the plaintiff proved by one witness that defendant had told him that *he owed* the plaintiff, who is his *sister, a little note,* but she did not need the money, and might wait for it. To another witness he said that he owed the plaintiff a note, but she might wait for it. These two conversations occurred a short time before the suit was brought.

His Honor instructed the jury that if they believed the evidence as to the execution of the paper, it was a valid bond, and if the defendant was referring to this paper when he admitted he owed the plaintiff a note, and that in fact it was still unpaid, the plaintiff was entitled to a verdict. Defendant's counsel again excepted.

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

Fowle for plaintiff.
No counsel for defendant.

MANLY, J. We are at a loss to conceive upon what ground the insufficiency of the execution of the bond is put. One may execute such an instrument by making a mark in such way as to adopt the seal used, and it is a good bond. The *form* of the mark or the *number of* (512) *the strokes* of the pen is not material. It can make no difference whether it be an illegible attempt at writing or simply designed as a mark. The writing of the name below the scrawl does not hurt the execution or annul the obligation. Such a prefix or addition, as an interpreter, is of universal custom. Proper evidence was offered on the trial to establish the execution in the manner stated, and such an execution we deem unquestionably legal. The instruction, therefore, to the jury upon that point was correct. The instruction, also, as to the presumption of payment from lapse of time was correct.

PER CURIAM. No error.

WILLIAM J. CORNELIUS v. TYRE GLEN.

The Yadkin River not being a navigable stream, a grant from the State of the bed of the river passes it as does any other grant of land, and the Legislature has no power to take it away, either for private or public purposes, without making compensation to the owner.

DEBT for a penalty, on appeal from a justice of the peace, tried before *Bailey, J.,* at Spring Term, 1859, of YADKIN.

The penalty declared for is given by the act of Assembly, passed at the session of 1858, entitled "An act to open the Pee Dee and Yadkin rivers for the passage of fish." It was agreed by the parties that the defendant resides in the county of Yadkin, and owns a mill on the Yadkin River; that eight or ten years ago he built a dam entirely across the said stream at his mill, for the purpose of raising the water to propel his machinery; that in the fall of 1857 he rebuilt the dam to the height of 5 feet entirely across the stream, and that thereby the (513) free passage of fish is obstructed; that the dam in question abuts on one side at a point known as Glen's ford, and on the other side at a point about 75 yards above the said ford; that the river is the dividing line at this locality between the counties of Forsyth and Yadkin; that in 1794 a grant from the State issued to one Joseph Phillips and his heirs, bounded as follows: "Beginning at a white-oak below Glen's ford, runs north up the Yadkin River 50 chains; west, crossing the river, 10 chains; south, down the river, 50 chains, and then east to the beginning"; that the white-oak tree mentioned as said beginning corner is still standing, and that the entire dam aforesaid is included within the boundaries of the said grant; that by a regular chain of title from the said Phillips the right and title to all the lands included in the said grant became vested in the defendant, one-half in 1842 and the other in 1853; that the defendant is now owner of the fee simple of the lands on both sides of the Yadkin River, at each end of the dam, by a regular chain of title from the State; that the original grants to the land on both sides of the river aforesaid issued more than fifty years ago, and have been possessed and cultivated during all that period; that the boundaries of the tracts of land on both sides of the river, in all conveyances, call for the Yadkin River and along the river opposite to each end of the dam; that the said dam crosses the river at least 140 miles above any point on the said river where the same is navigated by any vessel, except by flats and canoes which are used at the ferries in crossing; that for the whole distance on the said river there are many obstructions to navigation, viz., falls, shoals, and large rocks; that in many places in the stream the water is very shallow—only the depth of a few inches during a large portion of the year; that where the dam crosses the river it is about 160 yards wide; that for about half a mile below the dam in question the average depth of the water is about 18 inches and is shoally, with a great many projecting rocks.

Upon the foregoing facts agreed, the court being of opinion with the plaintiff, gave judgment accordingly, from which the defendant appealed. (514)

No counsel for plaintiff.
D. G. Fowle, B. F. Moore, and McLean for defendant.

PEARSON, C. J. This case is governed by the decision in *S. v. Glen, ante,* 321. According to the principle laid down in that case, there is error in the judgment rendered in the Superior Court.

It is set out in the statement of the case "that in 1794 a grant from the State issued to one Joseph Phillips and his heirs, bounded as follows: 'Beginning at a white-oak below Glen's ford, runs north up the Yadkin River 50 chains; west, crossing the river, 10 chains; south, down the river, 50 chains, and then east to the beginning'; that the white-oak tree mentioned as a corner is still standing; that the dam is included within the boundaries of the grant, and that the defendant has derived title by a regular chain of mesne conveyances from Phillips, the original grantee." The defendant has, therefore, title to the bed of the river on which the dam stands, provided it was the subject of entry; and that depends upon whether the Yadkin River is a navigable stream or not. Many persons are of opinion that it is susceptible of *being made navigable,* but upon the facts set out in the case it is certainly not now a navigable stream, and the cases cited in *S. v. Glen* show that it has been repeatedly heretofore so decided.

Not being navigable, the defendant, by virtue of the grant to Phillips, is the owner of the bed of the river, and the Legislature had no more power to impair his right of ownership, either for public or private purposes, without making compensation, than it had to take away any other piece of land that he had bought and paid for, and for which the State had been paid.

This suggests what probably has led to an erroneous impression; that is, the distinction between the absolute ownership which is acquired to the bed of the river, when it has been actually granted and paid
(515) for, and the *limited ownership* which is acquired where a grant calls for a "corner on the bank of a river, then with its meanders to another corner," etc.; in which case, although by implication of law the grant extends to the middle of the river, and confers ownership for certain purposes as appurtenant to the land granted, yet, as it has not been actually granted and paid for, certain rights, by like implication, are still in the State. This will seem to account for the many acts of the Legislature that have been passed in former years in regard to the passage of fish, extending, at first, down to small streams, such as Haw River, Deep River, Uwharie, South Yadkin, and the like; which was well enough until the beds of these streams were entered and grants taken out; after which those streams were left out of the fish acts, until the

Roanoke, lower part of Neuse, Cape Fear, Yadkin, and Catawba became the only streams to which the acts applied; and the Yadkin is now excepted so far as its bed has been actually granted, of which there seems to have been few instances, for in most cases the grantees, not wishing to cross and pay for the bed, stopped at the bank, and were content with the appurtenance or privilege of going to the middle of the stream, under what is termed the right of riparian ownership, or the right of those whose grants stop at the bank as contradistinguished from the ownership of those whose grants actually cover the bed. There is error.

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

Cited: Johnston v. Rankin, 70 N. C., 555; *S. v. Pool,* 74 N. C., 708; *S. c.,* 75 N. C., 602; *Staton v. R. R.,* 111 N. C., 283; *Phillips v. Tel. Co.,* 130 N. C., 520; *S. v. New, ib.,* 737; *Dargan v. R. R.,* 131 N. C., 629; *S. v. Sutton,* 139 N. C., 578.

(516)

JOE C. NEWMAN ET AL v. ELIZA MILLER.

A bequest of slaves to a daughter, with a provision that *if she should have issue living at her death,* then to such issue; but *if she should die without leaving lawful issue,* then, over, was *Held,* upon her dying without leaving children, to be a good limitation in remainder.

DETINUE for certain slaves, tried before *Osborne, J.,* at last Spring Term of DAVIE.

The only question in this case arises on the construction of certain bequests in the will of Maxwell Chambers, who died in 1809, viz.: "I give and bequeath to my son, Edward Chambers, as trustee of my daughter, Ann Chambers (wife of Henry Chambers, Sr.), the five following negroes (naming them), to have and to hold to my said son, Edward, in trust, and for the benefit of my daughter, Ann Chambers, and her heirs forever. It is my wish and request that my son, Edward, will pay over to my daughter, Anne, the profits arising from the said negroes semiannually, for her support and comfort." To which is added the following codicil: "To express my intention in the annexed will, I add this codicil: My intention in the devise of five negroes, to wit, Beck, Mill and her three children, Louisa, Rachel, and Abb, to my son, Edward Chambers, as trustee of my daughter, Ann Chambers, I wish to be clearly and precisely understood. My intention

is this: I give the said five negroes, to wit, Beck, Mill, Louisa, Rachel, and Abb, to Edward Chambers, to hold in trust and for the sole benefit of my daughter, Ann, to support her during her life with the profits arising from the labor and hire of the said five negroes and of their increase; and if my daughter, Ann, should have lawful issue, or lawful heirs of her body, living at the time of her death, then I desire, will, and order, that my said son, Edward, trustee of my said daughter, Ann, shall deliver and convey, absolutely, at the death of my said daughter, the said five negroes, and all their increase, to the said lawful issue or lawful heirs of the body of my said daughter, Ann, living at the time of her death; and further, it is my intention, will, and order, if my said
(517) daughter, Ann Chambers, shall die without leaving lawful issue, or heirs of her body, that then, and in that case, my said son, Edward Chambers, shall deliver and convey, absolutely, the said five negroes, and all their increase, in equal distributive shares, to my own heirs, or shall sell the said five negroes and all their increase and divide the money arising from the sale thereof, in equal portions, among my said heirs." It is objected here that the legal title was in the representative of the trustee, but it was finally agreed by the parties that all objection as to the parties be withdrawn, and that the cause should stand and be heard and determined upon the merits only. It was agreed further that the slaves sued for are the increase of some of those bequeathed in the above recited will, and that the plaintiffs are the only heirs at law and next of kin of the said Maxwell Chambers. It is further agreed that after the death of her first husband, Henry Chambers, the said Ann married George Miller, whom she survived, and that the slaves in controversy were allotted to the defendant as one of the next of kin of the said George, who has held them in that character ever since, and that the legatee, Ann, died about June, 1859, without leaving children or issue living at the time of her death. The question was whether the limitation in remainder, after the death of Ann Chambers, was valid, and it was agreed that if it should be the opinion of the court that such was the case, then judgment should be rendered in favor of the plaintiffs; otherwise, the plaintiffs should be nonsuited. His Honor *pro forma* declared his opinion in favor of the defendant, and plaintiffs took a nonsuit and appealed.

J. M. Clement for plaintiffs.
Geo. E. Badger and Nat. Boyden for defendant.

MANLY, J. The single question presented by the case agreed is whether the limitation over of the estate given to the daughter, Ann, upon her dying without issue, be too remote. The language used

in the body of the will confers upon the daughter an absolute (518) estate in the property; but in the codicil the testator explains at large his intentions as to this bequest, and upon the language of this explanation the case turns.

After making some contingent limitations to such children as Ann might leave (into the validity of which it is not necessary for us to inquire, as she left no children), the testator proceeds to declare: "If my said daughter, Ann Chambers, shall die without leaving lawful issue, or heirs of her body, that then, and in that case, my said son, Edward Chambers, shall deliver and convey, absolutely, the said negroes and increase to my own heirs."

Without insisting upon the words "leaving" as sufficient of itself to restrict the "time" of the event then in the mind of the testator, and fix it at the death of the daughter (about which there might be some difference among learned authorities on the subject), a purpose thus to fix it is perfectly clear to our minds, when the language of that part of the codicil which immediately precedes it is considered. Having made provision for the daughter during life, the testator proceeds: "and if my daughter, Ann, should have lawful issue, or lawful heirs of her body, living at the time of her death, then I desire, will, and order, that my said son, Edward, trustee of my said daughter, shall deliver and convey, absolutely, at the death of my said daughter, the said negroes and increase to the said lawful issue or lawful heirs of the body of my said daughter, Ann, living at the time of her death." Then follows the clause which has been already quoted, viz.: "and further, it is my intention, will, and order, if my said daughter, Ann Chambers, shall die without leaving lawful issue, or lawful heirs of her body, that then," etc. It will be perceived that a disposition of the property is here made in two alternatives—*first,* if the daughter should have issue, and, *second,* if she should not. If she should have issue, *living at her death,* then *at her death* the property is to go to such issue *living at her death;* and if she should die without *leaving* issue, then the property to be conveyed to my own heirs. If it be asked with respect to the (519) latter part of the above clause, "without leaving issue," when? can any one who has the reasonable knowledge of or respect for the structure of our language be at a loss for the answer? The period of time to which the mind of the testator was directed then was the death of his daughter. He provides for children living at her death, and if she leave none, gives it over. Leave none when? At her death, is the irresistible response.

In the connection in which we find the word *leaving,* the other words, "living at her death," is an obviously grammatical ellipsis, and there was

no necessity for a repetition of it to make the sense clear. To avoid tautology, the testator seems to have dropped the phrase, "living at her death," and used a word which he evidently regarded as synonymous. Most men, indeed, would so regard it, and hold that the word *leaving,* in its application to a subject like the one before us, meant separation from such things as had a present existence.

We are aware that refinements on the subject have been occasionally at variance with common sense and grammar, but we do not think that any case can be found where, in the midst of such a context, "leaving" has not been interpreted as referring to persons then in being, and read *leaving living at her death.* This subject has been so recently discussed in this Court, *Newkirk v. Hawes,* 58 N. C., 265, that we shall not elaborate it further. That case, indeed, is considered as an authority in point.

It is the opinion of the Court that the limitation over to the testator's own heirs is not too remote, but valid, and the contingency having happened upon which that limitation was to vest, the heirs are entitled. This opinion makes it proper to reverse the *pro forma* judgment of nonsuit in the court below, and to enter a judgment for the plaintiffs according to the agreement.

PER CURIAM. Reversed.

(520)

DANIEL GRIFFITH v. JOHN A. ROSENBOROUGH AND OTHO GILLESPIE.

1. The allotment of slaves, under a bequest to an executor, with power to derogate from her estate and allot them among certain persons (testator's children), is, in substance, but the performance of his duty as executor, in assenting to and delivering over legacies, and need not be in writing.

2. Where an executor passed certain slaves to a legatee under a power to that effect conferred by the will, and afterwards a written memorial was made as to some of the slaves, which was signed by the parties, it was *Held* not to conflict with such writing to show the delivery of others of the slaves by the executor, under the same authority contained in the will, and to go into the whole history of the transaction.

TROVER for conversion of a negro boy, named Stokes, tried before *Osborne, J.,* at Spring Term, 1860, of YADKIN.

It was in proof that one Mark D. Armfield had been in possession of said slave, as his own property, from January, 1838, until June, 1856, when he sold and transferred him to Stephen L. Howell, B. Bailey, and G. Wilson, who held him in their possession until November, 1856, when they sold him at public sale to plaintiff, who took and kept possession of

him until the conversion by the defendant, which took place, as was admitted, in April, 1858. The defendants insisted that the title was in Lucy Belt, the executrix of Thomas Belt, who died in 1828, and they introduced in evidence the last will and testament of the said Thomas Belt, the material parts of which are the following items:

"Item. I will and bequeath to my beloved wife, Lucy Belt, all my estate for the benefit of raising up and schooling and supporting of my children, and to distribute unto them, as their case may require, during her natural life or widowhood.

"Item. I will and bequeath unto my seven daughters, Jerusha, Amelia, Polly, Elizabeth, Lamina, Emaline, and Rebecca, each of them to have one negro girl, to be lotted off unto them, and each to have one horse and saddle, one bed and furniture, to be equally laid off and divided in equal value."

The will then proceeds to appoint Lucy Belt, the wife of the (521) testator, and Thomas W. Belt, executrix and executor of said will.

The defendants also adduced in evidence the following receipt or certificate:

This is to certify that we have individually received of Thomas W. Belt, executor, and Lucy Belt, executrix, of the last will and testament of Thomas Belt, deceased, at our marriage, one negro girl of equal value, one horse and saddle, one bed and furniture, which has been given to us by Lucy Belt, executrix, in accordance to that clause of the will of the said Thomas Belt, deceased, which says: "I will and bequeath unto my seven daughters, Jerusha, Amelia, Polly, Elizabeth, Lamina, Emaline, and Rebecca, each of them to have one negro girl, to be lotted off unto them," etc., and we take this occasion to say that in receiving the above specified bequest for ourselves and our wives, are perfectly satisfied that the arrangement has been equal and satisfactory to ourselves.

Given under our hands and seals this 2 March, 1847.

F. K. ARMSTRONG.	[SEAL]
J. A. ROSEBOROUGH.	[SEAL]
M. D. ARMFIELD.	[SEAL]
OTHO GILLESPIE.	[SEAL]
R. M. ROSEBOROUGH.	[SEAL]
R. M. BELT.	[SEAL]
AMELIA BELT.	[SEAL]

The defendants proved that the slave, Stokes, was the issue of a woman, Harriet, who belonged to Thomas Belt at his death, and that Mrs. Lucy Belt, the widow and executrix of Thomas Belt, had, after the intermarriage of her daughter Elizabeth with Mark D. Armfield, put her into

their possession, and that Stokes was born four or five months before said marriage.

It was further shown in evidence that the receipt or certificate above mentioned was intended to apply to Harriet and other negro girls which Mrs. Belt had put in possession of her daughters on their respective marriages, and which they continued to hold, or had disposed of at the date of said receipt, and which negroes were distributed in compliance with the clause of the will directing a negro girl to be given to each of his daughters.

(522) The plaintiff then proved, by parol, that on said 2 March, 1847, Mrs. Lucy Belt, with the purpose to divide a part of the slaves at that time in her possession, under the will of Thomas Belt, among her daughters, the legatees named therein, called them together at her house; and she and the executor, Dr. Thomas W. Belt, appointed Dr. Gage, William Holman, and others, to value and divide said slaves. Previous to the commissioners proceeding, the above recited receipt was given by the legatees, and the plaintiff proved that the negro girls given by Mrs. Belt to four of her daughters, on their respective marriages, had each a child at the time they were put into their possession, and that the woman put into the possession of the defendant Otho Gillespie had two; that on the said 2 March, before any action by the commissioners, it was mutually agreed between the said Lucy Belt and Dr. Thomas W. Belt, the executrix and executor of the will of Thomas Belt, M. D. Armfield, the defendants Gillespie and Roseborough, and the other legatees under the said will, that M. D. Armfield and the other sons-in-law should hold as their own property the child which each of them received with their negro woman at the time of their marriage, without valuation, and that the single daughters should in like manner receive a child, without being valued, to make the division equal among said daughters; that Gillespie, whose negro woman had two children at the time of his marriage, should retain the oldest child and return the other for valuation and division, all of which was done as agreed upon. The commissioners then proceed to list, value, and allot the other slaves in the possession of Mrs. Belt, including the child returned by Gillespie, and reduced the same to writing, a copy of which is as follows:

Agreeable to a request of Mrs. Lucy Belt, we, the undersigned met at her house on 2 March, 1847, and proceeded to allot and set

(523) apart the following negroes to eight of her children, viz.:

No. 2. To Thomas W. Belt, assigned Mary and her two children, valued at $500.

No. 6. To F. K. Armstrong, assigned Mariah and Ben, valued at $600.

No. 4. To Rebecca Belt, assigned Adaline, valued at $500.

No. 8. To Amelia Belt, assigned Washington and Mitchell, valued at $475.

No. 5. To M. D. Armfield, assigned Isaac and Alfred, valued at $575.

No. 7. To R. M. Roseborough, assigned Marshall and Smith, valued at $500.

No. 1. To Otho Gillespie, assigned Nelson, valued at $500.

No. 3. To J. A. Roseborough, assigned Caroline and Ellick, valued at $550.

A. D. GAGE.
DAVID HOLMAN.

To this memorandum was attached the following receipt:

Received 2 March, 1847, of Lucy Belt, executrix, lot of negroes, No. 5, valued at $575, having paid out of this amount $37.50 to R. Belt.

M. D. ARMFIELD.

This testimony was objected to by defendant, but admitted by the court. Defendant excepted.

Verdict for plaintiff. Judgment, and appeal by defendant.

Clement and Mitchell for plaintiff.
Boyden for defendant.

MANLY, J. The only exception that appears on the record sent from below is to the admissibility of certain evidence on the part of the plaintiff respecting the arrangements between the executors of Thomas Belt and the legatees, on 2 March, 1847, touching certain children then in the possession of the legatees.

The evidence, we understand, is objected to on two grounds: (524) (1) Because it violates the rule that writing cannot be added to or detracted from by oral testimony. (2) Because such a transfer of slaves cannot be effected except by writing.

The first objection seems to be based upon a mistake of facts. It appears that on 2 March, 1847, there was, in the first place, a memorial made and executed of a past transaction, viz., a delivery to each of the legatees, upon her marriage, a woman slave in pursuance of a certain bequest in the will. It was also agreed at that time, 2 March, that the infant child which had gone with the mother into the possession of the legatees should remain as a part of their respective allotments under the will. Having disposed of these preliminary matters, the executors and legatees, aided by the advice of a committee appointed for that purpose, then proceeded to allot the slaves that remained on hand; and they reduced this to writing. It will be seen from this statement of the material facts connected with the exception that the children in question

constituted a special class, and were disposed of upon a different basis from the other slaves. Although it was done on the same day, it was a distinct transaction, having no connection with or dependence upon the transactions witnessed by the writings. The objection to it, therefore, as an attempt to alter the purport of the writing, is inapplicable. *Manning v. Jones,* 44 N. C., 368.

The other objection is equally untenable. The legatees were not deriving title *from* the executors, but from the testator *through* the executors. By adverting to the terms of the will it will be seen that the executors were carrying into effect the provisions of the will, and making distribution according thereto. The widow, who was also executrix, has an estate in these negroes, not absolute, but subject to the legacy to the daughters, with a power to say when she will derogate from her estate by allowing a distribution to them. The allotment, therefore, was but an assent to the legacies, and it has not been held, and we do not suppose it to be law, that such an assent (an assent to a legacy for a slave) must be in writing. It is neither an executory agreement, (525) gift nor sale, within the meaning of the statute, and consequently need not be evidenced by any writing. *Reeves v. Edwards,* 47 N. C., 458, is in point. We can perceive no valid ground of objection to the evidence offered and received.

PER CURIAM. No error.

PAUL W. FURR v. A. S. MOSS ET AL.

Where a justice of the peace, in good faith, and to preserve order, by parol, ordered one into the custody of the sheriff, and to be tied, who interrupted and insulted him, while officially engaged, and was otherwise behaving in a disorderly way, it was *Held* that he was not liable to an action.

TRESPASS for an assault and battery and false imprisonment, tried before *Osborne, J.,* at last Spring Term of CABARRUS.

The defendant Moss was a magistrate, the defendant Marshall sheriff of the county of Stanly. A number of citizens were gathered together in the said county for the purpose of paying public taxes, where the two defendants were present, attending to that business. During the day one Linker became very disorderly and committed a breach of the peace by assaulting one Parks, to which he was encouraged by the plaintiff. The defendant Moss ordered the defendant Marshall to take Linker into custody and tie him, which he did, and taking Linker outside of the assembly, tied him to a tree, where he remained tied for the space of

ten minutes. The defendant Moss was engaged in writing a warrant against Linker when the plaintiff's demeanor and conversation afforded the occasion for the acts complained of. The evidence was somewhat contradictory as to the deportment of the plaintiff on the occasion, the plaintiff's witnesses representing that he was taken up (526) and tied because he questioned the legality of the treatment Linker was receiving from the defendants, while the defendant's witnesses stated that the plaintiff violently interfered and abetted the attack of Linker on Parks, and that after he (L.) was tied, grossly abused, derided, and insulted the magistrate while engaged in writing the warrant against Linker; that for this the magistrate, Moss, ordered Marshall, the sheriff, to take the plaintiff into his custody, and to tie him, which was done without violence or disorder, the plaintiff submitting quietly to the act, but protesting against its legality, and declaring that he would have redress from the law; that after having been thus confined for a short space of time, he was released by order of the defendant Moss.

The court charged the jury that the facts deposed to by the witnesses, either on the part of the plaintiff or defendant, formed no justification for the acts of the defendants in seizing and tying the plaintiff as described; that it was the duty of the jury, on the evidence adduced, to find for the plaintiff, and that the amount of damages which they should give ought to be governed by the view which they should take of the circumstances of the transaction; that if they believed the defendants acted in good faith, believing they had the right to tie the plaintiff, and from a desire to keep the peace and preserve order, and the plaintiff's conduct and language was disorderly and insulting to the magistrate while engaged in the performance of a public duty, these were circumstances to be considered by them in the mitigation of damages. Defendants' counsel excepted.

Verdict for the plaintiff. Judgment, and appeal by the defendants.

D. G. Fowle for plaintiff.
No counsel for defendants.

MANLY, J. When a justice is acting in a judicial capacity within the sphere of his jurisdiction no action will lie for any judgment, however erroneous or malicious. This principle has been steadily (527) adhered to by our courts as indispensable in order to protect such officer from the peril of being arraigned for every judgment he may pronounce and to prevent the public justice of the country from thus being brought into scandal.

It is not so, however, with regard to such acts as are not judicial, but merely ministerial. With respect to the latter, if the officer transcend

his power, maliciously (*mala fide*), he will be amenable to the action of the person injured.

It is not always easy to say when an act is judicial and when it is ministerial; but assuming that the justice was acting in the latter capacity on the occasion complained of, still we think the instructions to the jury were incorrect. The court held that the act of tying, which was executed by the sheriff under the order of the justice, subjected them, without further proof, to damages. In this we do not concur.

In *S. v. Stalcup,* 24 N. C., 50, it was held that a prisoner, in the custody of an officer under State process, might be tied. The officer is bound to keep safely, and may resort to all the ordinary means used for such a purpose, and their propriety or necessity should not be inquired into by a jury. But if he grossly abuse his powers, that is to say, if the facts testified to convince the jury that the officer did not act honestly and according to his sense of duty, but, under the pretext of duty, was gratifying his malice, he would be liable.

If an officer whose duties are exclusively ministerial may, in his discretion, tie a prisoner, there seems to be no reason why a justice may not order it. It is laid down in Chitty Criminal Law, 24, upon high authority, that if one be committing an affray, a peace officer may not only arrest, but may confine by putting in the stocks until the heat be over, and then proceed according to law. At our country places of resort, where taxes are gathered, there are neither stocks nor prison to which resort can be had to secure order, and in such case we see no legal obstacle or just ground of complaint, in tying, as a substitute for stocks, (528) when it is apparently necessary. Happily for our country, the necessity for such means of repression is rare, and we add a hope that it may become still rarer. The power of the justice, under the facts of the case before us, was unquestionable. The justice was engaged at the time in writing a warrant for one who had been just arrested in an affray, when he was disturbed and grossly insulted by the plaintiff. It is within the sphere of every magistrate's power to protect himself from annoyance while in the execution of his official duties, by removing the source of annoyance and holding him in custody as long as it may be needful. The liability of the justice, then, would depend upon whether he used his authority to gratify his malice under a pretext of duty or acted honestly according to his sense of right.

And the liability of the sheriff would, in like manner, depend upon whether he acted in good faith in obedience to the order of the justice or availed himself of it to gratify his malice.

There was error, therefore, in assuming that it was a trespass to tie the plaintiff. The trespass, and consequent liability of the parties,

would depend upon whether there was an abuse of power according to the definitions given above. *Cunningham v. Dillard,* 20 N. C., 485; *S. v. Stalcup, supra.* There must be a

PER CURIAM. *Venire de novo.*

Cited: S. v. McNinch, 90 N. C., 700.

(529)

DANIEL KING v. DOCTOR H. WHITLEY.

A declaration in an action for slander, charging the slanderous words as having been spoken affirmatively, will not be supported by proof that the words were spoken interrogatively.

CASE for slanderous words, tried before *Saunders, J.,* at Spring Term, 1860, of JOHNSTON.

The declaration filed in this case charged in the first count that defendant said at a public gathering at Boon Hill, on the first Thursday in August, 1857, in the presence and hearing of many persons, as follows, viz.: "He (meaning the plaintiff) is the man who swore to lies against us," meaning himself, Haywood Ramis, and others, who had been indicted in the County Court of Johnston a short time before and tried, and in which case plaintiff was sworn and examined as a witness. The second count charges that at the same time and place defendant said: "He is the damned rascal who swore to damned lies against us." The third, that he said: "He is the rascal who swore damned lies against us." The fourth: "He is the one who swore to a lie," and the fifth: "You (meaning plaintiff) swore to a lie at last court."

One witness testified that he went with King, the plaintiff, to the election of Boon Hill, August, 1857; that on reaching the crowd, defendant said, "That is the man, or fellow, who swore to a lie against us," to which Ramis replied, "Yes, a damned lie; and we will have his ears." The witness knew that the plaintiff, King, had been a witness against Whitley and Ramis at court, and supposed he alluded to that. Other witnesses were examined by the plaintiff, who testified to the same facts.

The record of the county court, at August Term, 1857, was produced, the evidence from which appeared there had been a trial of an indictment against Whitley and Ramis, and that plaintiff had been examined as a witness.

Defendant then offered evidence of the words. The witness said the expression was, by way of inquiry, addressed to one Massey—

(530) King standing by: "Is that not the fellow who swore to a lie against us?" Massey replied it was. Other witnesses testified substantially to the same facts. The court instructed the jury "that if the defendant intended to charge, and did charge, plaintiff with swearing to a lie, in the case tried in court, it would support the charge." Defendant excepted.

Verdict for plaintiff. Appeal by defendant.

S. H. Rogers, H. W. Miller, and Saunders for plaintiff.
A. M. Lewis and B. F. Moore for defendant.

BATTLE, J. One of the questions upon which the counsel for the defendant have mainly relied in the argument before this Court is not so clearly and distinctly stated in the bill of exceptions as it ought to be, but enough appears to show that it was raised on the trial; and for that reason the defendant is entitled to the benefit of it, if it be in his favor.

Upon the issue formed by the plea of the general issue it was, of course, incumbent upon the plaintiff to prove that the words spoken were the same as he had charged in one or more of the counts of his declaration. The testimony of his witness, if believed, certainly sustained his allegations, but the words as sworn to by the witnesses for the defendant were spoken of the plaintiff interrogatively instead of affirmatively. His Honor, however, instructed the jury that if they believed that the "defendant intended to charge, and did charge, the plaintiff with swearing to a lie in the case tried in court, it would support" the declaration. Neither of the counts averred that the words were spoken in an interrogative form, and as the defendant had the right to have the credibility of the statement made by his witnesses submitted to and passed upon by the jury, the effect of his Honor's instructions was that it made no difference whether the words were spoken affirmatively or interrogatively, provided they were intended to import, and did import, a (531) charge of perjury. This brings up for consideration an important inquiry, whether the words spoken must be proved precisely as laid, or whether proof of the substance of them will be sufficient. "It was formerly holden," says Mr. Justice Buller in his Nisi Prius (p. 5), "that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them." This exposition of the rule leaves it very indefinite, and in the application of it to the various cases which have come before the courts for adjudication it will be seen that there has been a very unsatisfactory fluctuation of opinion. In some cases an apparently slight variation has been held to be fatal. Thus in *Walters*

v. Mace, 2 Barn. & Ald., 756 (4 E. C. L., 734), the declaration charged that the defendant said of the plaintiff: *"This* is my umbrella, and he stole it from my back door." The testimony was that the defendant said: "It is my umbrella, and he stole it from my back door." The variance was held fatal, because the words charged in the declaration applied to a particular umbrella, which was present, and the words proved applied to an umbrella which was absent. And yet the words, "it is my umbrella," may be spoken of a particular umbrella then present. So the evidence of words spoken in the second person will not support a count alleging them to have been spoken in the third person. *Avarillo v. Rogers,* Buller N. P., 5. So in an action for the defamation of the plaintiff's wife the words alleged in the declaration were the plaintiff's "wife is a great thief, and ought to have been transported seven years ago." The words proved were, "She is a bad one, and ought to have been transported seven years ago." It was held that the words proved did not support the declaration. *Hancock v. Winter,* 7 Taun., 205 (2 E. C. L., 71). Again, in *Barnes v. Halloway,* 8 Term, 150, words laid affirmatively were proved to have been spoken interrogatively, and this variance was held to be fatal. Yet it is clear that an interrogation may imply an affirmation, and may be so understood by the hearers. The Court said that whatever the parties may mean, the words must be proved as they are laid. There is "a manifest distinction between the same idea conveyed by words spoken affirmatively and put (532) interrogatively."

There are many cases reported in the books where variations between the words charged and those proved were decided to be immaterial. Thus, in *Orpwood v. Parks,* 4 Bing., 261 (13 E. C. L., 424), it was held that the words "'ware hawk there, mind what you are about," would sustain a declaration alleging the words spoken to have been "'ware hawk; you must take care of yourself there; mind what you are about." So, "I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while," will be supported by proof of the words, "He has worked for me some time, and has been continually robbing me." *Doncaster v. Hewson,* 2 Man. & Ry., 176 (17 E. C. L., 297). Again, "You stole one of my sheep" will be maintained by evidence, "You stole my sheep and killed it." *Robinson v. Willis,* 2 Star., 194 (3 E. C. L., 310). From these instances it is manifestly difficult to say what is to be regarded as substantial proof of the words charged; and it is evident that *Chief Justice Marshall,* after an able review of many of the cases of both verbal and written slander, was fully justified in remarking that "The person who looks into the subject will be surprised at finding how very unsatisfactory the cases are." See

Whitaker v. Freeman, reported in an appendix to 12 N. C., 271. (The remark quoted will be found on page 288.) In this apparent uncertainty as to what is and what is not to be deemed a fatal variance between the words charged and the words proved to have been spoken, we do not feel at liberty to set at naught the authority of a case adjudged by an able court and followed by all the text-writers on the subject of slander. *Barnes v. Holloway,* cited from 8 Term, 150, seems to have settled the rule that words charged to have been spoken affirmatively will not be supported by proof of words spoken interrogatively. Such were the words as testified to by the defendant's witnesses, and his Honor committed an error in not permitting the jury to decide whether
(533) that was the form of expression used by the defendant, instead of that which was sworn to by the plaintiff's witnesses. For this error the judgment must be reversed, and a *venire de novo* awarded. This result makes it unnecessary to notice the other points made in the cause, particularly as they will not probably be raised on the next trial.

PER CURIAM. New trial.

Overruled: Pegram v. Stoltz, 67 N. C., 148.

R. W. KING v. JOHN C. WOOTEN.

A suit by a county trustee, suing upon a sheriff's official bond, as relator in the name of the State, is within the meaning of the act, Rev. Code, ch. 31, sec. 40, requiring clerks to take prosecution bonds before issuing leading process; and a clerk failing to take such bond in such suit is liable to the penalty of $200 imposed by statute, Rev. Code, ch. 31, sec. 42.

DEBT for the penalty of $200, brought against the defendant as clerk of Lenoir, for issuing a writ without taking a prosecution bond, and tried before *Howard, J.,* at Spring Term, 1860, of JONES.

The court reserved the question of law upon which the exception is taken, and submitted the facts to the jury, who found that the defendant issued a writ in November, 1857, against the plaintiff and his sureties upon his bond as sheriff, in the name of the State, on the relation of the county trustee of Lenoir County, and failed to take a bond for the prosecution of the suit, as required by statute. The writ was returned to Spring Term, 1858, and at Spring Term, 1859, the county trustee was permitted by the court to file a prosecution bond in the cause.

Upon the question reserved, the court being of opinion that the county trustee, suing upon the bond of the sheriff, in the name of the State, was required by the statute to give bond for the prosecution, gave judgment for the plaintiff. From which judgment the defendant appealed. (534)

Stevenson and McRae for plaintiff.
J. H. Bryan and Geo. V. Strong for defendant.

PEARSON, C. J. The question depends upon the construction of our statutes. "*In all actions whatsoever* the party in whose favor judgment shall be given, etc., shall be entitled to full costs." Rev. Code, ch. 31, sec. 75.

"*No writ or other leading process* returnable to any court of record shall be granted or issued by the clerk or his deputy but under the following rules, to wit: The clerk, by himself or his deputy, *before issuing the same,* shall take bond with sufficient security *of the person suing,* conditioned that he will prosecute," etc. Ch. 31, sec. 40.

"If any clerk, by himself or deputy, shall issue any writ or other leading process otherwise than as by the two preceding sections directed, he shall pay to the defendant the sum of $200."

The words of the statute are as broad as they can be, and although we consider this a "hard case," we cannot avoid the conviction that it is embraced by the provisions of the statute. It is settled that in suits on official bonds the relator is the real plaintiff, or in the words of the statute, "the person suing," from whom the clerk is required to take a prosecution bond. But Mr. Bryan, on the part of the defendant, took this distinction: An individual suing as relator on a sheriff's or constable's bond must give a prosecution bond, but the relator in this case, being the county trustee, sues, for the use of the county, to recover the county funds, which are in effect the funds of the State; so that the suit is in fact a suit for the use of the State, and he insisted that the State, or one suing for the use of the State, is not liable for cost, and in support of his position cited 3 Blackstone, 397, where it is said: "The King, *or one suing* for the use of the King, is not liable for costs."

At common law neither party to a suit was liable to the other (535) for costs, but the court imposed a fine on the party in fault, for false clamor in case of the plaintiff, or for resisting a just claim in case of the defendant, who was in *miseriacordia,* which fine was a matter of substance, and was paid into the treasury of the King. By the act of Ed. I, the party in whose favor the principal judgment was rendered was also entitled to a judgment for his cost, after which the fine on the party against whom judgment was rendered became merely nominal. In put-

ting a construction on this statute it was held that a suit in the name of the King was not embraced. But an individual suing for the use of the King was held liable for cost, and therefore the statute 24 Hen. VIII, ch. 8, was passed, which enacts that one suing for the use of the King shall not be liable for costs. This statute is not reënacted by our Code, and its omission not only leaves the position of Mr. Bryan unsupported, but shows that there is nothing to restrict the general words of our statute or to relieve the defendant from the penalty.

PER CURIAM. Affirmed.

JESSE NOBLE v. THOMAS M. WIGGINS.

Where A. and B. entered into bond to abide by and perform the award of arbitrators chosen to decide certain matters in controversy between them respecting the cleaning out of a canal, and the arbitrators awarded that A. "should pay one-sixth part of the expense of cleaning out" said canal, it was *Held* that A.'s liability did not extend to the expense of deepening the canal.

(536) DEBT upon a bond given to abide by and perform an award, tried before *Saunders, J.*, at the last Spring Term of PITT.

Breach, that defendant failed to perform the award. The following is a copy of the bond and award:

Know all men by these presents, that I, Thomas M. Wiggins, of the county of Pitt and State of North Carolina, am held and firmly bound unto Jesse Noble, John P. Quinnerlly, William A. Pugh, and Lewis B. Pugh, all of the aforesaid county and State, in the sum of $1,000, good and lawful money of the United States, to be paid to the said Jesse Noble, John P. Quinnerlly, William A. Pugh, and Lewis B. Pugh, their heirs, administrators, executors, and assigns, to which payment, well and truly to be made, I do bind myself, heirs, executors and administrators, and every of them, firmly by these presents, sealed with my hand and seal, dated 3d December, 1853.

The condition of this obligation is such that if the above bound Thomas M. Wiggins should stand to and abide by the decision made by Churchill Moore and Benjamin Hazelton about clearing out the canal in Bixley's swamp, from the mouth up to said Thomas M. Wiggins' ditch that runs across the public road, then this obligation to be void and of no effect, or else to remain in full force and virtue.

In witness whereof I hereunto set my hand and affix my seal, this the day and date above written. THOMAS M. WIGGINS. [SEAL]

To all and to whom these presents shall come, or may come—Greeting:

We, Benjamin Hazelton and Churchill Moore, to whom was submitted, as arbitrators, the matters in controversy existing between Jesse Noble, Lewis B. Pugh, William A. Pugh, and John P. Quinnerlly, of the one part, and Thomas M. Wiggins of the other part, as by the condition of their respective bonds of submission, executed by the said parties respectively, each unto the other, and bearing date 3 December, 1853, more fully appears.

Now, therefore, know ye that we, the arbitrators mentioned in (537) said bonds, as chosen by consent of all interested, and having heard the allegations of the parties and examined the matters in controversy by them submitted, do make this award in writing, viz.: Thomas M. Wiggins is to pay one-sixth part of all expense in clearing out both canals, beginning at the head of Johnson's millpond, and to continue up both canals as far as said Thomas M. Wiggins' big ditch, then said Wiggins goes up his ditch on his own land as far as he chooses, until circumstances change in the neighborhood, or many other canals be cut in said canal; also, we allow said Wiggins the privilege of furnishing his own hands to work out his one-sixth part, if he chooses.

In witness whereof we hereunto set our hands and seals, 3 December, 1853.

BENJAMIN HAZELTON. [SEAL]
CHURCHILL MOORE. [SEAL]

The execution of the bond and award were admitted. The plaintiff proved notice and refusal of the defendant to work. The plaintiff went to work in August, 1858, and cleared out and deepened the canal in order to carry out the original design of cutting it. Cost, $420.

The plaintiff proved a demand and refusal of defendant to pay the one-sixth part, according to the award. The witness, on his cross-examination, stated that the deepening was necessary to get the fall; that the canal was cut deeper than it originally had been from the mouth up, but not more so than was necessary. That the deepening had considerably added to the expense of clearing out. Defendant contended that he was not liable for any part of the expense of deepening. The court being of opinion that the words to "clear out" would include the expense of deepening, so instructed the jury, who found their verdict accordingly.

Judgment for the plaintiff. Appeal by defendant.

W. B. Rodman and McRae for plaintiff.
W. A. Jenkins for defendant.

PEARSON, C. J. The case turns upon the meaning of the words (538) "clear out the canal," as used in the bond and award. The literal

meaning is to "clean out," or to remove all extraneous matter, such as trees that may have fallen in, or dirt by the caving in of the bank, or grass and weeds and any other substances that may have accumulated and obstructed the flow of the water, so as to restore it to its original condition and make it the same as when it was new. We are to be governed by the literal meaning of the words which parties make use of to express their intention, unless there be something in the instrument or the nature of the subjeet-matter to authorize a construction by which the meaning is extended. In this instance there is nothing to extend the meaning so as to include *deepening!* Admit that the canal, as at first made, was not deep enough, and did not answer the purpose of draining to the extent originally contemplated, what is there in the bond to show that the defendant was satisfied of the fact that the canal ought to be made deeper, or was not content with the benefit which he derived from it as it was made at first, and was willing to join in the expense of making it deeper? If the words include *deepening,* they could in like manner be made to include *widening,* and the absence of any stipulation for the purpose of ascertaining whether it was necessary in order to effect the *mutual* purpose of the parties to make the canal deeper or wider, and, if so, to what extent, proves that the defendant only intended to bind himself for a portion of the expenditure necessary in order to restore the canal to its original condition, and used the words "clear out" in their literal sense.

PER CURIAM. *Venire de novo.*

(539) (539)

WILLIAM B. ROGERS v. T. R. CHERRY.

1. Where a judge, in the court below, made the following order: "Verdict set aside and new trial granted on paying the costs of this court," it was *Held* that paying the costs was not a condition precedent to the new trial; but the failure of the court to revoke the order during the term and to give judgment on the verdict gave a new trial irrevocably.

2. Where a judge, at one term, granted a new trial, and ruled the plaintiff to "give security on or before Monday of the next court, or this suit will be dismissed," it was *Held* that the judge sitting at the next term might extend this rule, on a subsequent day of that term, so as to allow the plaintiff to give security.

TROVER, before *Saunders, J.,* at Spring Term, 1860, of PITT.

At September Term, 1859, the cause was submitted to the jury, and there was a verdict for the defendant. At said term the court made the following order, viz.: "Verdict set aside, and new trial granted on pay-

ing the costs of this court. Rule on the plaintiff to give security on or before Monday of next term, or this suit will be dismissed." At the next term of the said court the plaintiff moved, on Tuesday, to be allowed to pay the costs of the last court, and tendered a sufficient prosecution bond. He also filed the affidavits of Jesse A. Adams, agent for the plaintiff, and of William B. Rodman, one of his counsel on the former trial, proving that the plaintiff was a nonresident of the State; that Adams, his agent, resided in Wilson County; that after the trial, at September, 1859, the plaintiff, by his counsel, moved for a new trial, which motion was argued; that the judge did not then decide upon it; that afterwards, during that term, the judge did direct the clerk to make the entry, which appears of record, granting the new trial on terms; that neither the plaintiff nor his agent, nor his counsel, were in court at the time when the judge so directed the clerk, and they had no knowledge of the order until after the expiration of the term, but did have shortly thereafter, and that the plaintiff's agent attended this court, on Tuesday, to pay the money, by the advice of Mr. Howard, one of the plaintiff's counsel. The (540) defendant's counsel opposed the motion. His Honor allowed the motion of the plaintiff, who accordingly paid the cost and gave the bond, whereupon the defendant moved for judgment against the plaintiff according to the verdict, which motion was refused by the court. Defendant appealed to this Court.

W. B. Rodman for plaintiff.
Ed. Warren and Donnell for defendant.

MANLY, J. We have examined this case and do not find any error in the proceedings below. The new trial, granted at September Term, 1859, was not upon a condition precedent. The words used are not so interpreted ordinarily.

In *Spencer v. Cahoon,* 18 N. C., 27, it was held that a grant of administration, *upon giving bond* in the sum of $4,000, with J. B. and W. S. as sureties, was a valid grant of administration, although it was not stated on the record that the administrator gave bond and was properly qualified. The want of such a statement might render the grant defective and authorize the county court to annul it, but until that is done the grant must be respected as valid by the courts.

So we hold that the grant of a new trial was valid, unless the court, insisting upon the payment of costs as a condition, should, during the term, revoke the order and give judgment upon the verdict. Suffering the term to expire with the order in the condition in which we find it, and no judgment upon the verdict, in effect gives a new trial irrevocably.

A different interpretation of the words of the order would be inconvenient, if not impracticable.

We do not think there is any error in the action of the court below upon the rule for security. The power of the court, sitting in the fall term, to make an order of this kind, to be carried into effect at the subsequent term, unconditionally and without power of modification, is not admitted. It is of the nature of such orders, too, that they are at (541) all times subject to be modified to meet the exigencies of the case.

The court sitting in the spring had the unquestionable right to enlarge the rule for security on Monday, if the subject had been called to the attention of the court. And so we hold, on Tuesday the court might enlarge the rule, as of the day before, and allow the security to be put in then. This is what the court did, in substance. 2 Tidd., 769.

There is no error in the orders appealed from.

PER CURIAM. Affirmed.

WATERS & MIZELL v. DENNIS SIMMONS.

Where one of the calls of a grant was for the head of a certain creek, it was *Held* competent to show by parol evidence, where the head of this creek was.

TRESPASS, tried before *Saunders, J.*, at Spring Term, 1860, of MARTIN.

The plaintiffs claimed title under a grant issued to Edmundson Edwards Smithwick, on 12 October, 1779, for 400 acres of land lying in Martin County, beginning at a water-oak standing on the east side of Spellar's Creek, running thence down the gut, the various courses, 175 poles, to a water-oak, Edward Smithwick's corner; thence north 10 deg. east 485 poles to the head of Spellar's Creek; thence down the various courses of the creek to the beginning.

One George W. Ward, a witness for the defendant, had lived 6 miles from the place; had known Spellar's Creek since 1845; known it well, and had gotten timber on it; was asked by the defendant if he knew where the head of Spellar's Creek was. This question was ob- (542) jected to by plaintiffs and ruled out by the court on the ground that the answer of witness would be the expression of his opinion, and, therefore, incompetent. Defendant excepted.

The plaintiffs then inquired of witness, on cross-examination, if there was any point which a man of judgment and observation could locate as the head of the creek. Witness answered there was. On resuming the examination, defendant asked the witness to state where that point

was. Plaintiffs objected to the question. Objection sustained by the court. Defendant excepted.

Defendant offered Eli Spruill, a surveyor by profession, of experience and observation among the swamp lands and creeks of Roanoke River, who had known Spellar's Creek for ten years, and asked his opinion as to the location of the head of Spellar's Creek. Plaintiffs objected to the question. Objection sustained by the Court. Defendant excepted.

Verdict for plaintiffs. Judgment. Appeal by defendant.

W. B. Rodman, P. H. Winston, Jr., and W. A. Jenkins for plaintiffs. Donnell for defendant.

BATTLE, J. It has been so often said by this Court that *what* is the terminus of a call in a grant is a matter of law, but that *where it is to be found* is a matter of fact, that the proposition does not need the aid of any citation or authority for its support.

In the case now before us one of the calls of the grant under which the defendant claimed is "the head of Spellar's Creek," which is certainly as much a natural object as was the "bottom of a savanna," which was recognized as such in *Stapleford v. Brinson,* 24 N. C., 311. It was the duty of the court, then, to instruct the jury that, as a construction of law, "the head of Spellar's Creek" was one of the corners of the defendant's tracts of land, and it was the province of the jury to ascertain from the testimony which might be given on the subject *where* that corner was situated. How was the location of that natural object to be proved? We know of no method, and are unable to conceive of any, other than that of the testimony of witnesses who (543) profess to be able to point it out and identify it. If the testimony of such witnesses is to be rejected upon the ground that it is the expression of a mere opinion, it seems to us that the identification of no natural object whatever can be established by proof. In every case, what the witnesses may be prepared to state in respect to the identity of the object will be obnoxious to the objection that it is only his opinion. If a river, creek, marsh, swash, swamp, savanna, mountain, cove or ridge be called for in a deed or grant, it cannot be identified by the instrument itself, but its location must, in the very nature of things, be pointed out by parol proof—that is, by the testimony of witnesses who profess to know and to be able to state where it is. The identity of some objects of these kinds may be easily established, as in the case of Neuse River or the Pilot Mountain, while in the case of small streams or inconsiderable hills the proof will be more difficult and uncertain, and sometimes the proof may fail altogether. But surely the difficulty of the proof can be

no reason why the testimony should be rejected as incompetent. In the case now under consideration, one of the witnesses stated that there was a point which a man of judgment and observation could locate as the head of Spellar's Creek. Is there any principle of evidence to prevent his telling where it was, more than there was to prevent the identification of the small streams mentioned in *Hurley v. Morgan,* 18 N. C., 425? In that case no person thought of objecting to the testimony of the witnesses who were introduced to show that this or that stream was the one meant in the call of the deed or grant, and yet the witnesses could not have given more than what was, in a certain sense, their *opinions.* In that sense, *opinion* is used in contradistinction to *certain knowledge,* but in law it cannot be applied to impressions made upon the senses of the witnesses, and which he is, therefore, permitted to testify to as facts. When a person is called upon to identify a certain man, tree, river, or mountain, whom or which he has seen, his testimony will be as (544) to a *fact,* though he may be mistaken as to some very remarkable fact; mistakes have been known to occur in questions of that kind. The liability to mistake shows clearly that testimony, if taken in a sense opposed to certain knowledge, is only opinion; but in law, as it is opposed to the inference of the witness from facts deposed by others, or by himself, the testimony is not called the opinion, but the own proper knowledge of the witness, and as such has always been deemed competent. See 1 Green. Ev., sec. 440.

Our conclusion is that the witness in the present case was competent to state where the head of Spellar's Creek was, the plaintiff having the right to call other witnesses to prove that he was mistaken, either by showing that it was elsewhere or that the point where it was, when the grant was issued, could not be identified.

As the judgment must be reversed, and a *venire de novo* awarded on account of the error in the rejection of the testimony, it is unnecessary for us to decide whether the surveyor, Mr. Spruill, was competent to testify as an expert in ascertaining the location of the head of Spellar's Creek.

PER CURIAM. *Venire de novo.*

Cited: Mizell v. Simmons, 79 N. C., 192; *Brown v. House,* 118 N. C., 881; *Lumber Co. v. Lumber Co.,* 169 N. C., 103.

(545)

R. C. COTTEN v. JOHN W. ELLIS, GOVERNOR.

1. The only effect of the act of 1858, ch. 22, repealing so much of sec. 9, ch. 70, Rev. Code, as relates to the appointment and salary of the Adjutant General, is to take from the Governor the right to fill future vacancies in that office and to revest it in the Legislature, and to leave the salary to be paid semiannually as provided by Rev. Code, ch. 102, sec. 2.
2. The Legislature, whilst it continues an office, cannot oust an incumbent during the term for which he is chosen. (*Hoke v. Henderson*, 15 N. C., 1, cited and approved.)
3. The Legislature may reduce or increase the salaries of such officers as are not protected by the Constitution, during their term of office, but cannot deprive them of the whole.
4. A Superior Court may issue a writ of mandamus requiring the Governor to do an act merely ministerial.

PETITION for an alternative mandamus, heard before *Bailey, J.*, at Spring Term, 1860, of CHATHAM.

The petition sets out that the petitioner had been appointed, on 1 April, 1857, to the office of Adjutant General by Thomas Bragg, then Governor of North Carolina; that he entered upon and discharged the duties of the office, and was recognized as the legal incumbent from the date of his appointment up to 1 April, 1858; that there is now due him the sum of $100, as his salary for the half-year ending 1 October, 1859, and there will be due him the further sum of $100 for the half-year ending on 1 April, 1860; that this salary is payable only on the warrant of the Governor; that petitioner has applied to the Governor to make his warrant upon the Public Treasurer, who refuses to do so, and that he has applied to the Public Treasurer, who refuses to pay said salary without the warrant from the Governor. "And your petitioner further shows that the duties of his said office have been devolved by the Governor upon Graham Daves, Esq., private secretary to the Governor, and are in fact, by his Excellency's special command, constantly and daily performed by him, and that by reason of the refusal aforesaid, and the substitution just stated, he has been, and is, de- (546) prived and ousted of his said office, and denied the privileges and emoluments it confers upon him." It then prays a writ of mandamus, commanding the said John W. Ellis and D. W. Courts, respectively, to admit the petitioner to his office, to give the warrant and pay the salary aforesaid, or show cause to the contrary.

The following is the entry on the minute docket of said term: "Upon the hearing of the petition in this case, for a writ of mandamus, and the argument of counsel, it is considered and adjudged by the court that, by virtue of the provisions of an act of the General Assembly of

1858 and 1859, there is now no salary due or payable to the Adjutant General of North Carolina. Wherefore, it is ordered that the petition be dismissed."

From this order and judgment the plaintiff appealed.

Cantwell for petitioner.
Attorney General for defendant.

PEARSON, C. J. The matter brought up by the appeal makes it necessary for this Court to decide two questions: (1) Is the applicant entitled by law to the amount claimed for his salary as Adjutant General of the State? (2) Had the Superior Court of Law for the county of Chatham power to require the Governor of the State to make his warrant on the public Treasurer for the payment of the salary to which the applicant is by law entitled, upon an allegation that the Governor had refused to make the warrant?

1. The Constitution of the United States, Article I, sec. 8, part 14, 15, provides: "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the States, respectively, the appointment* of the officers and the authority (547) of training the militia according to the discipline prescribed by Congress." In pursuance of this power, Congress, by the act of May, 1792, provided for the organization of the militia, and created the offices required by the plan of organization, and among others the office of "Adjutant General," and in accordance thereto the Legislature appointed field officers and an Adjutant General by joint ballot, and continued to do so until 1856; having in 1812, fixed the salary of the Adjutant General at $200 *per annum*. In 1856, Revised Code, ch. 70, sec. 11, provides for the election of all field officers by the officers of the respective divisions, brigades, etc., to continue in office three years, and section 9 confers the appointment of Adjutant General on the Governor, to continue in office three years, by section 11, and fixes his salary at $200, to be paid *quarterly* by the Treasurer on a warrant from the Governor, while by chapter 102, sec. 2, the salary of the Adjutant General is fixed at $200, to be paid *semiannually* by the public Treasurer, upon warrant from the Governor. Laws 1858, ch. 22, enacts: "So much of the 9th section of the 70th chapter, Revised Code, entitled 'Militia,' as relates to the appointment and salary of Adjutant General be and the same is hereby repealed."

We were informed by the Attorney General, on the argument, that the Governor found his opinion adverse to the claim of the applicant on this statute. So the question depends on its construction. We have seen the office of Adjutant General was created by an act of Congress, in pursuance of the Constitution of the United States, and that only the right of appointment was reserved to the State and devolved upon the legislature. It follows that the Legislature had no power to abolish the office, and the suggestion that such was the effect of the act of 1858 falls to the ground; indeed, it was not pressed by the Attorney General, but he assumed the position that the effect of the act of 1858 was to vacate and nullify the appointment of the applicant by repealing the act under which it had been made. We do not concur in this view of the subject. In respect to all vacancies that should thereafter occur, the Legislature, unquestionably, had power to take from the (548) Governor the right of appointment which was conferred on him by the act of 1856, and either exercise it itself or provide some other mode for having the appointment made; but in respect to the appointment which had been made, the question is altogether different. The legal effect of the appointment was to give the office to the applicant, and he became entitled to it as a "vested right" for the term of three years, from which he could only be removed in the manner prescribed by law, and of which the Legislature had no power to deprive him. This is settled. *Hoke v. Henderson,* 15 N. C., 1. So the act of 1858 cannot have the effect contended for, even if in the absence of express words we were at liberty to infer that such was the intention, and its only effect is to take from the Governor the right of filling future vacancies and vest it again in the Legislature.

It was then urged that however it might be in respect to *the office,* the *salary* was created by the Legislature, and, at any rate, it has the power to abolish that! It is true, the salaries of all persons holding office under the appointment of the State are within the control of the Legislature, except those officers who are protected by the Constitution, as in the case of the judges, and the salary may be increased or reduced during the term of the office, for it is presumed offices are accepted with reference to a general power, of which the Legislature has not divested itself, and in this particular the appointment to and acceptance of an office with a salary differs from an ordinary contract, the terms of which cannot be altered without mutual consent. But in putting a construction upon this statute in respect to the salary, several considerations are to be weighed. A statute which *reduces* a salary during the term of office, and one which *takes away* the *salary altogether,* stand on a different footing, for, in the latter case, the object would evidently be to starve

the incumbent out of his office, and thereby do indirectly what could not be done directly. So as to make applicable the remarks made in *Hoke v. Henderson, supra,* in which there seems to be much force, that (549) such indirect legislation is as obnoxious to the charge of being unconstitutional as an act directly depriving one of his office.

A proper construction of the statute does not lead to the inference that it was the intention to abolish the salary in the event that the applicant still continued entitled to the office and liable for the discharge of his duties. On the contrary, the clause which repeals so much of section 9 as relates to the salary is a mere corollary or incident to the clause which repeals so much of that section as relates to the appointment of the Adjutant General, and, consequently, the one cannot, by any rule of construction, be made to extend in its operation further than the other. Indeed, to make the clause in respect to the salary apply to the present incumbent, when, as we have seen, the other does not deprive him of the office, would be to place the Legislature in this attitude: "We mean to abolish the office. If we have not the power to do so, then we mean to deprive the present incumbent of his office. If we have not the power to do that, then we mean to take away his salary!" A construction leading to such a result is inadmissible in the absence of express words showing such to have been the intention.

A suggestion was made by Mr. Cantwell which we think explains the clause in relation to the salary. It is this: by section 9, ch. 70, Rev. Code, the salary is payable *quarterly;* by section 2, ch. 102, the salary is payable *semiannually,* and the purpose of this provision of the act of 1858 was to remove that incongruity and leave the salary to be paid semiannually. So our conclusion is that the act of 1858 should be so construed as to take from the Governor the right to fill future vacancies and restore it to the Legislature, and to leave the salary to be paid semiannually, according to the provision of ch. 102, sec. 2.

2. Having arrived at the conclusion that the applicant is, by law, entitled to the salary claimed by him, the solution of the second question is an easy one, for as there is a legal right, the courts, as a matter (550) of course, have power to enforce it. The power of a court, by the writ of mandamus, to compel an executive officer to do an act merely *ministerial,* in order to enforce an ascertained legal right, is settled by *Mabry v. Madison,* 1 Cranche, 64, and *Kendal v. United States,* 12 Peters, 834. In the latter case, by an act of Congress, the Solicitor of the Treasury was authorized and directed to adjust the balance to which the relators were entitled for extra services in carrying the mail, and the Postmaster General was directed to give them a credit for whatever sum the solicitor should decide to be due to them. The

solicitor accordingly ascertained the balance, but the Postmaster General refused to give credit for the amount, and the court, by the writ of mandamus, compelled him to do so, on the ground that it was not an official duty about which he had a discretion, but a mere ministerial act; and in the argument it is assumed that, under like circumstances, the writ might be issued against the President himself, and the stress of the decision is put upon the question of its being a ministerial or an official act.

The alleged ouster from office set out in the petition is not a mere ministerial act, but evidently involves an inquiry into the official conduct of the Governor, which cannot be passed on its mode of proceeding. That portion of the petition which relates to it should be rejected.

We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question. This opinion will be certified, to the end that an alternative mandamus may issue requiring John W. Ellis, Governor, to make his warrant to the Public Treasurer for the payment of the salary of the applicant, R. C. Cotten, Adjutant General, according to the prayer of his petition.

PER CURIAM. Reversed.

Cited: S. v. Smith, 65 N. C., 371; *King v. Hunter, id.,* 612; *Bailey v. Caldwell,* 68 N. C., 475; *Brown v. Turner,* 70 N. C., 106; *Malpass v. Governor, id.,* 131; *Shaffer v. Jenkins,* 72 N. C., 278; *Bunting v. Gales,* 77 N. C., 285, 287; *Prairie v. Worth,* 78 N. C., 173; *Wood v. Bellamy,* 120, N. C., 217; *Russell v. Ayer, id.,* 197; *Caldwell v. Wilson,* 121 N. C., 436; *Garner v. Worth,* 122 N. C., 257; *Day's case,* 124 N. C., 366, 372, 392; *Greene v. Owen,* 125 N. C., 215, 225; *White v. Auditor,* 126 N. C., 576, 580, 612; *Mial v. Ellington,* 134 N. C., 165, 170.

Dist.: Scarborough v. Robinson, 81 N. C., 424.

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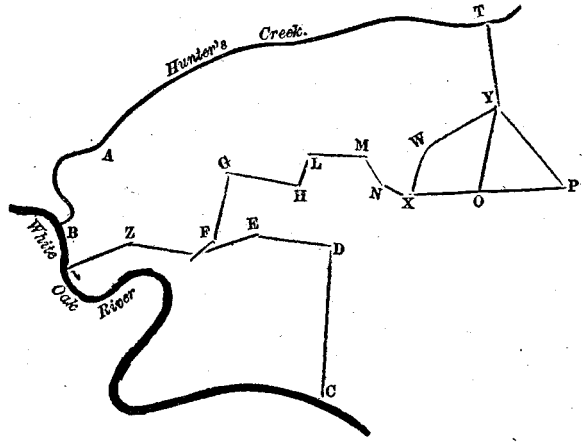
(551)

DOE ON THE DEMISE OF EDWARD HILL v. MATTHEW MASON ET AL.

Where a deed called for "an old line down a bottom to a given point," and there was no evidence as to the old line, but there was conflicting evidence as to two bottoms extending from the point reached to the one aimed at, it was *Held* not to be error for the judge to leave it to the jury to determine which of the two bottoms was the one called for.

EJECTMENT, tried before *Howard, J.,* at last Spring Term of CARTERET.

The land claimed by the plaintiff is the area contained between Hunter's Creek, White-oak River, and the lines described by the letters C, D, E, F, G, H, L, M, N, X, O, P, Y, T. The *loci in quo* are the spaces between V, Z and White-oak River and the triangle O, P, Y, which were proved to be in the defendant's possession at the commencement of the suit. As to the first parcel—the land between V, Z and the river—is



(552) not deemed necessary to set out the exception at large, for the bill states that it was admitted on the trial that the defendant had seven years possession of it, under color of title, when the suit was brought, which is deemed by this Court a full answer to the exception.

As to the other parcel, it was agreed that M, N, and X were lines established for the plaintiff, and the question was whether the line went from X by O to P, and thence to Y, or whether it ran from X by W to Y; and it was admitted, in the latter case, the triangle O, P, Y, would not be within the plaintiff's title. The call in plaintiff's deed was from M *down the bottom with Hill's line to a forked white-oak.* There was no evidence as to where Hill's line was, but there was evidence that there was a forked white-oak at Y, and that there was a bottom extending from M by N and X to O; also that there was bottom-land from W to Y, but that between W and X, according to one witness, there was a ridge, through which a ditch had been cut. Some of the witnesses testified that there was a clearly defined bottom all the way from X by W to the forked oak at Y.

The court charged the jury that it was a question of fact, to be determined by them, as to which of the two courses indicated by the bot-

toms, as described by the witnesses, was the one called for in the plaintiff's deed, and that if they were satisfied it was that described by the lines X, W, Y, the defendant would, as to this piece of land, not be guilty. Plaintiff's counsel excepted.

The jury found for the defendant, and the plaintiff appealed.

Houghton and Hubbard for plaintiff.
J. W. Bryan, Green, and McRae for defendant.

MANLY, J. It would be easy to show, if deemed necessary, that the first exception to the instruction of the court below is untenable; but as in the subsequent part of the case an admission is made which makes the controversy then on hand immaterial, it is now of no importance to a proper decision of the cause. The instructions excepted to were given in respect to the location of that part of the plaintiff's deed which lies contiguous to the White-oak River. The location (553) in question could only be material in reference to the possession of defendant on that river, to show that at that point in the diagram, between the river and V, Z, he was a trespasser. Now, the admission is that for the land embraced within that diagram defendant had acquired a good title by seven years possession under color, and, therefore, the location of the plaintiff's deed around the land would have been of no avail; for, locate it as you please, the defendant is not a *trespasser.* If the instruction had been incorrect, it was cured by the subsequent admission.

The second exception is as to the location of another part of the land of plaintiff's deed. The question was whether it covered a certain triangular piece of ground, denoted on the plat by Y, O, P.

After getting to M, which seems to have been a conceded corner, the call of the deed is "down the bottom with Hill's line to a forked white-oak." And upon the running of this line the controversy turned.

There was no proof as to Hill's line, but there was proof that there was a bottom extending from M in two directions, down to N, X, and O, and down to N, and then off in the direction of W, Y. At the terminus Y there was a forked white-oak anciently marked as a corner. Under these circumstances the court left it to the jury to decide, upon the testimony, which of the bottoms was to be followed, with proper instructions. In this we see no error. It was a question of fact, with testimony on both sides, and was submitted in proper terms to the jury.

PER CURIAM. No error.

Cited: Mason v. Pelletier, 77 N. C., 54; *Mason v. Pelletier,* 80 N. C., 66; *Mason v. Pelletier,* 82 N. C., 41.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

MORGANTON

AUGUST TERM, 1860

LLOYD S. JONES v. JOHN WITHERSPOON.

A planter who has not a fence, as required by law, about his cultivated field, nor any navigable or deep water to serve instead thereof, is not entitled to recover for a trespass committed by domestic animals on a field thus unprotected.

TRESPASS, tried before *Heath, J.*, at Spring Term, 1860, of CALDWELL.

The plaintiff declared for that the defendant so carelessly and negligently kept his horses, mules, and other cattle that they escaped from his land, went thence upon the plaintiff's land, then in cultivation, and there injured and destroyed a large quantity of plaintiff's corn and peas, then in his field maturing.

The plaintiff offered evidence to show, and did show, that he (556) was the owner of a plantation on one side of the Yadkin River, and that the defendant was the owner of another plantation on the opposite side of the same river, it being the dividing boundary between the respective tracts of land; that both plantations were surrounded by good and legal fences on all sides, save where the river was the dividing line; while along that and between the two plantations there was no fence whatever, and that the Yadkin, at this point, was a narrow, shallow stream, easily forded by cattle, horses, or mules. The plaintiff further proved that in the summer of 1858 he had in his field, bordering on the river as aforesaid, a crop of corn and peas then maturing and nearly matured; that the defendant at that time turned his horses, mules, and other cattle into his own field, situated as above described (which was in grass), and that they several times escaped and passed over the river into the plaintiff's field and ate and destroyed the plaintiff's growing crop of corn and peas. For this action was brought. The question of damages

was submitted to the jury, and the question whether the plaintiff was entitled to recover on the state of facts above described was reserved by his Honor. A verdict was taken for the plaintiff, subject to his Honor's opinion upon the point of law reserved, with leave to set aside the verdict and enter a nonsuit in case the court should be against the plaintiff on the question of law.

The Court, being of opinion that the plaintiff could not recover, set aside the verdict and directed a nonsuit, from which plaintiff appealed.

B. S. Gaither and G. N. Folk for plaintiff.
Lenoir for defendant.

MANLY, J. The case made by the transcript from the Superior Court of Caldwell is whether a planter who has not a fence, as required by law, about his cultivated field, nor any navigable or deep water to serve instead thereof, can recover for a trespass of the defendants domestic animals on a field thus unprotected. We answer, with the court below, that he cannot.

(557) To maintain a liability of the kind it would be necessary to hold that the proprietors of such animals are bound to keep them under restraint and prevent them from going and pasturing on the unenclosed grounds of a neighbor. For, we take it, the rights and liabilities of the parties would be the same in a case where there is no fence or barrier and one in which the barrier is declared by law to be insufficient.

At the term of this Court which has just closed its session at the city of Raleigh we held, incidentally, in *Laws v. R. R.* (*ante,* 468), that a proprietor of cattle is not obliged to keep them from the unenclosed lands of a neighbor. The going at large of all kinds of domestic animals upon unenclosed lands about them seems to be a matter commonly tolerated by the laws and usages of the country. The law makes it penal to kill animals trespassing upon a cultivated field that is not lawfully enclosed, and also indictable to kill them in the range in certain localities; from which it would appear that they are not without the pale of the law's protection when in these conditions. And although they may be trespassers, having no right of pasture outside of the owner's lands, and, therefore, may be driven and kept off, if possible, yet, to effect these objects, it is not lawful to kill, maim, or abuse. In short, the law recognizes, in a variety of ways, the going at large of domestic animals as a common privilege, and it would seem to follow as a necessary consequence that the owner is not liable in trespass for breaking the close when the former's cattle wander in search of food upon the latter's unenclosed grounds.

Thus the keeping under enclosure domestic animals, which is regarded as the rule of the common law of England, if it were ever recognized in our waste and thinly populated country, has been long since abrogated by various legislative acts and by constant usage to the contrary.

The stream between the parties to this suit, by the statement of (558) the case, appears to be insufficient as a substitute for a fence, and we have already said it is the same whether there be no fence or an insufficient one.

We are of opinion, therefore, in the case before us, neither proprietor would be liable to the other for damages done by animals of the one wandering across the common boundary upon the lands of the other.

PER CURIAM. Affirmed.

Cited: Burgwyn v. Whitfield, 81 N. C., 264; *Runyon v. Patterson,* 87 N. C., 344; *S. v. Mathis,* 149 N. C., 548; *Marshburn v. Jones* 176 N. C., 521.

ELIZABETH PITTS v. BURWELL PACE.

Where the words charged in a declaration as slanderous have a fixed and unambiguous meaning, it is not competent for a witness to say he understood the speaker to mean differently from the common import of such words.

SLANDER, tried before *Heath, J.,* at last Spring Term of HENDERSON.

The plaintiff, a female, declared against the defendant at common law, and under the statute, for speaking of her the following words: "She keeps a disorderly house (*innuendo,* that she kept a house of prostitution, and was herself incontinent). "This" (meaning the plaintiff's) "is a disorderly house" (meaning it was a house of prostitution, kept by her, and she was a prostitute and incontinent). "If I said she kept a disorderly house, I don't know it; but if I did, it is true" (meaning her house was a house of prostitution, and she was a prostitute and incontinent). There was no averment of special damages.

The plaintiff proved that the defendant came to her house one night when considerable company (males and females) was there; that two of defendant's daughters were there; that some of the company were standing on the floor, some sitting on chairs, and one gentleman and one or more ladies were sitting on a bed in the same room; (559) that the defendant said: "She keeps a disorderly house. I have seen enough to satisfy me. It is a disgrace to my children. I came here for a fuss, and I intend to have it. This is not the first time you have allowed them to pile up on your bed, and not ordered them up. This is a disorderly house." That, some days thereafter, speaking of the plain-

tiff, he said: "If I said she kept a disorderly house, I don't know it; but if I did, it is true; for it is not the first time by several she has allowed persons to pile up on her bed, and did not object nor order them up."

These words were all spoken within six months prior to the institution of the suit.

The plaintiff then tendered a witness to prove that he was present when all these words were spoken, and he understood the defendant to mean "to charge the plaintiff with keeping a house of prostitution—with being a prostitute, and being incontinent."

This testimony was objected to by defendant's counsel, and ruled out, for which plaintiff excepted and, submitting to a nonsuit, appealed.

Edney for plaintiff.
Dickson for defendant.

PEARSON, C. J. The words uttered by the defendant charge the plaintiff with keeping a house for prostitutes; in other words, it is a charge of keeping "a bawdy-house," which is an indictable offense. But every charge of an indictable offense is not actionable *per se,* without proof of special damage, and the case states there was no such proof. Whether to charge a *woman* with keeping a *bawdy-house* is actionable *per se,* either at common law or under the statute, on the ground that "the greater includes the less," and a woman who would keep a house for prostitutes must, necessarily, be a prostitute herself, is a question not presented by the case as made up by his Honor, and in regard to which we are not now at liberty to express an opinion; for the exception of
(560) the plaintiff is put on the ground that she offered to prove that the witness understood the charge of keeping a bawdy-house, which the defendant made against her, as being in fact a charge that she was herself an unchaste woman, which is clearly untenable.

Suppose a witness says he heard one say that A. kept a grog-shop: can the witness be allowed to go on and say that by these words he understood that A. was charged with being himself a drunkard?

The question is too plain for discussion, and the learning on the subject is fully set out in *Sasser v. Rouse,* 35 N. C., 142, where it is said: "Without the restrictions above pointed out, any man would be liable to be sued for slander who has the misfortune to speak in the presence of an *ignorant,* or of a prejudiced, or of a corrupt witness; for the misapprehension of the witness, whether real or pretended, would thereby be substituted in the place of the inference which it is the duty of the Court to make as to the meaning of the words." There is no error.

PER CURIAM. Affirmed.

Cited: S. v. Howard, 169 N. C., 313.

JAMES R. LOVE v. JAMES N. BRINDLE.

A note given as the price of a jackass, which was owned and controlled by a slave in this State, although made payable to and sued for by the master, was *Held* to be against the policy of the law, and therefore void.

DEBT on a note without seal, tried before *Heath, J.*, at Spring Term, 1860, of HAYWOOD.

The evidence in defense was that the note was taken from defendant by a slave belonging to the plaintiff, but for the profit and advantage of the slave; that this slave had been permitted by his master to own and control a jackass, which he carried to Macon County and there sold to the defendant, who gave the negro a horse and the note in (561) question for the ass.

The judge charged the jury that if the master of the slave permitted him to acquire property in the ass as his (the slave's), and to hold the animal as his own, and to trade it as such, and the note was given for property thus held and traded by the slave as his own, the contract was against the policy of the law and void, and the note given to enforce a part of it was also void. Plaintiff excepted.

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

Henry for plaintiff.
A. S. Merrimon for defendant.

BATTLE, J. We approve entirely of the instruction given by his Honor to the jury on the trial in the court below. It is against the policy of our law for a master to permit his slave to own a jackass, horse, or other animal of the like kind, and to have control and management of it as if he were a free person. The obvious and direct tendency of such things is the encouragement, in the slave, of such habits and disposition as is entirely inconsistent with his social position. He will be himself tempted to pilfer and steal, either from his master or others, to procure the means of supporting his animal, and the allowance to him by his master of the time and opportunity necessary to purchase, manage, and sell the beast will have a tendency to make other slaves dissatisfied with their condition, and thereby excite in them a spirit of insubordination. In *Batten v. Faulk,* 49 N. C., 233, we held that a bond given by a slave for $75, with the defendant as surety, was void as to both, for the reason that it must be assumed that the debt was contracted by the slave as a sort of free trader, the allowance of which was contrary to the policy of our law. So in *Barker v. Swain,* 57 N. C., 220, this (562) Court said that a sale by the defendant Swain, of a jackass to a slave was an unlawful dealing, which deprived the vendor of the right to

claim the price for which the slave's agent had sold the animal. The permission given by the master to the slave, in the case now before us, may save the purchaser from an indictment for the unlawful dealing, but it cannot have the effect to change the policy of the law which forbids such transactions, and which, therefore, will not give any remedy upon a contract growing out of them.

White v. Cline, ante, 174, is not opposed to the principle which we think governs the present case, because the money which White lent to Cline was earned in California, and, therefore, could not have been acquired by means of the violation of any law of this State.

PER CURIAM. No error.

WILLIAM ROBINSON v. WESLEY CLARK.

The purchase by a ministerial officer at his own sale, under an execution, passes no property, and the case is not altered by the fact that the sale is conducted by another officer in concert and joint interest with the purchaser.

TROVER for conversion of a wagon, tried before *Bailey, J.,* at the Fall Term, 1858, of HAYWOOD.

One W. W. Battle, as a constable, and Manson Tate, deputy sheriff, had several executions against the plaintiff, and levied them upon the wagon in question. They made their levies on the same day, and agreed to sell on the same day for their joint benefit. Several persons attended the sale, but the plaintiff was from home, and it was agreed between the officers that Tate should cry the sale and Battle bid off the prop-
(563) erty for the plaintiff (the defendant in the executions); that is, Battle was to bid off the property and hold it till the plaintiff returned, when he was to have the liberty of redeeming it by paying the amount bid, with interest. According to this understanding the property in question was sold and bought by the officer, Battle, who afterwards transferred his bid to the defendant, who agreed to take the property on the terms and subject to the trust attaching to it in the hands of Battle. On the return of the plaintiff he tendered to the defendant the sum paid by him for the wagon, with interest, and demanded the wagon; but he refused to surrender it, and this action was then brought.

The court instructed the jury that an officer could not buy at his own sale; that the sale in this case was, therefore, a nullity, and that plaintiff had a right to recover the value of it, the wagon. Defendant excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

J. W. Woodfin for plaintiff.
Merrimon and Henry for defendant.

MANLY, J. It seems to us the view which his Honor took of this case in the Superior Court is correct. It is a well settled principle that an officer (sheriff or constable) cannot buy at his own sale, either directly or indirectly—either by himself or an agent, for himself or another. *McLeod v. McCall,* 48 N. C., 87.

By a reference to the facts of the case as reported, it is manifest that the sale of Officer Tate was made by him in behalf not only of himself, under the executions which he had levied, but also in behalf of the other officer, Battle, who had also levied simultaneously with Tate, and who was present at the sale; and it is in like manner manifest that Battle bought, not upon his own motion alone, or for himself, but on account of a mutual understanding between the two that he was to buy and hold the legal title to the property in trust for the defendant in the execution. It is a sale, then, in substance, by two officers, and a (564) purchase by one, which is, of course, a purchase by the latter at his own sale. This is in contravention of the well established principle as stated above.

The mischief that is intended to be remedied by the disability of an officer to buy at his sale would pertain with increased powers of harm to a case of combination between two officers, like the one before us. The purpose of the officers in question seems to have been fair and benevolent, but such combinations might be converted into schemes of fraud—as this has been, in fact, by the defendant, who is the assignee of the officer. We think, therefore, that concert of action on the part of the officers, so far from taking it out of the rule, makes it more clearly and strongly liable to its operation.

Pitts v. Petway, 34 N. C., 69, to which our attention has been called, establishes no principle in conflict with the rule as here held, for, supposing trustees and ministerial officers of the court to stand upon the same footing, and suppose the plaintiff was willing to regard the sale as good *sub modo,* to the extent and for the purpose held in that case, yet, when the plaintiff found the defendant no longer acknowledged the trust, the plaintiff was at liberty also to repudiate it and regard the sale as a nullity.

PER CURIAM. No error.

Cited: Tayloe v. Tayloe, 108 N. C., 73.

THE STATE ON THE RELATION OF COLUMBUS MILLS v. E. L. ALLEN, ET AL.

Where a sheriff received money from a defendant in a judgment, without process commanding him to make it, it was *Held* that the sureties on his official bond were not liable for its misapplication.

(565) DEBT on the official bond of a sheriff, tried before *Heath, J.*, at Spring Term, 1860, of POLK.

The declaration is against Allen as the principal and the other defendants as sureties on the sheriff's official bond for the year 1856, and the breach alleged was the misapplication of several sums of money paid by the relator, Mills, on a judgment rendered in the Superior Court of Rowan against William F. Jones and others, embracing the relator. The defendants in that judgment lived in Polk County, and several executions of *fi. fa.* had issued, directed to the sheriff of that county, but he had failed to make return thereof. At Spring Term of Rowan Superior Court, on an affidavit as to the delinquency of the sheriff of Polk, the court made an order that a *fi. fa.* should issue, directed specially to the sheriff of Rutherford, commanding him to go into Polk County and make the money called for in the said writ, which *fi. fa.* was accordingly issued, returnable to the Fall Term, 1856, of Rowan Superior Court, and no writ of *fi. fa.* or other process issued on the said judgment directed to the defendant Allen between these terms, nor had he ever levied either of those formerly issued on the property of the defendants in said judgment. Between the Spring and Fall Terms, 1856, of Rowan Superior Court the relator, supposing Allen had the execution, paid the sums in question to him, and took his receipt therefor. Shortly thereafter the sheriff of Rutherford made the whole of the money due on the execution, without allowing these payments, and returned it to Fall Term of Rowan, according to the exigency of his writ. The relator demanded the money thus paid by him, and on payment being refused this suit was brought.

His Honor intimating an opinion that the plaintiff could not recover, he took a nonsuit and appealed.

Edney for plaintiff.
Dickson and W. M. Shipp for defendants.

(566) BATTLE, J. The principle upon which this case must be decided was fully discussed and settled in *S. v. Long,* 30 N. C., 415, and *Ellis v. Long, ibid.,* 513. In the former of those cases it was held that the sureties of a sheriff were not liable on his official bond for a sum of money which had been deposited with him in lieu of bail by a defendant who had been arrested by him on a writ of *capias ad respondendum,* and, in the second, that they were not liable for money which a defend-

ant had, upon being arrested on a *capias ad respondendum,* placed in the hands of the sheriff wherewith to pay the debt, when it did not appear that he still held the money, when, subsequently, a writ of *capias ad satisfaciendum* came to his hands. The ground of the decision in both cases was that when the sheriff received the money, for which it was sought to render his sureties liable on his official bond, he had no authority to receive it in his official capacity, and that consequently there was no covenant in his bond by which his sureties could be made responsible for his faithful accounting for it. In *S. v. Long, ubi supra,* the Court said: "The clause (in the sheriff's bond) for the payment of money received or levied is, obviously, restricted to money thus received or levied under or by virtue of process commanding the sheriff to make the money, because it requires that he shall pay it into the office or to the person to whom by the tenor thereof, that is, of the writ, it ought to be paid, or may be due. Here he had no such writ or process, and the money was received wholly without authority of law, except the authority which was derived from the contract of the parties." These remarks apply directly to the facts of the case now before us. At the time when the relator paid the money to the principal defendant, Allen, he had no process in his hands under or by virtue of which he was authorized to levy or receive it, and, consequently, the defendants, as his sureties, were not responsible for his misapplication of it. Allen, himself, is responsible to the relator, and to him alone can the relator have recourse for the purpose of recovering back the money which he so incautiously paid him. The suit on the bond against Allen's sureties cannot be sustained, and the (567) judgment of nonsuit was proper and must be

PER CURIAM. Affirmed.

Cited: Covington v. Price, 53 N. C., 32; *Bailey v. Hester,* 101 N. C., 540.

JAMES F. E. HARDY v. WILLIAM F. MCKESSON.

1. A covenant to *make a good and sufficient title in fee simple* to a tract of land *in which the metes and boundaries of the said land shall be fully and fairly set out* is not complied with on the part of the vendor by the tender of a deed describing a large tract by metes and bounds, and excepting five small parcels which are not described, except by the number of acres contained and the names of the owners.

2. Upon a covenant, in general terms, that the vendor shall make a good and sufficient title in fee simple at a given day, when the vendor is to pay the purchase money, it was *Held* to be the duty of the vendor to prepare the deed and have it ready when he demands the purchase money.

HARDY *v.* MCKESSON.

COVENANT, tried before *Bailey, J.*, at a Special Term, July, 1860, of BUNCOMBE.

The plaintiff declared on the following covenant, viz.:

"This agreement, made and entered into this 16 September, 1857, between J. F. E. Hardy, of the county of Buncombe and State of North Carolina, and William F. McKesson, of the county of Burke and State aforesaid, witnesseth: That the said J. F. E. Hardy has sold to the said W. F. McKesson a tract of land in the county of Buncombe, on the north bank of Swannanoa River, including the house and improvements where the said James F. E. Hardy now lives, and all the land adjoining thereto owned by the said J. F. E. Hardy, supposed to contain between 400 and 500 acres, for the sum of $13,000, and that 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 and administrators, on or before 1 May next, the said sum of $13,000, and the said (568) 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 $13,000 is paid, a good and sufficient title in fee simple, with general warranty, in which the metes and boundaries of the said land shall be fully and fairly set out." Signed and sealed by both parties.

In an action brought on this covenant it was decided by this Court, 51 N. C., 554, that these covenants were dependent, and in order to entitle himself to recover the purchase money it was necessary for the plaintiff to aver and prove that he was ready and able to perform his part of the covenant. On the part of the plaintiff, in the court below on the trial of this action, it was proved that on 22 October, 1859, previously to the commencement of this suit, the plaintiff caused to be prepared and tendered to the defendant a deed purporting to convey to the said William F. McKesson and his heirs, etc., "all that tract, piece and parcel of land situate, lying and being in the county of Buncombe, on the north bank of Swannanoa River, including the house and improvements where the said James F. E. Hardy formerly lived, supposed to contain between 400 and 500 acres, and which said tract begins at a stooping locust on the south bank of the river, and runs north," etc. (setting out in the same way the external boundaries of the said tract), "containing, according to the title deeds of the said J. F. E. Hardy, 520 acres, and according to the actual measurement 448 acres, *more or less.* From said tract of land the said J. F. E. Hardy excepts 20 acres sold to Dr. John Dickson, now owned by Mr. Wallace; 10 acres sold by Dr. Samuel Dickson to Lindsey, and owned by Marcus Erwin; 20 acres sold to Mrs. Prescott, now owned by Mr. Cheesboro; 8 acres which belong

to the trustees of Newton Academy, and 17 acres sold to Dr. A. M. Foster," with a general warranty of title, and a covenant of seizin. It was proved that the plaintiff had title to all the land described in the bond, except the five parcels contained in the exceptions above stated in the deed, and that defendant took possession imme- (569) diately after the execution of the covenant, and has retained the possession ever since. At the time this deed was tendered to the defendant, the plaintiff demanded the purchase money due on the said covenant, which was refused by the defendant.

The defendant's counsel objected, on the trial below, that the deed offered did not conform to or comply with the conditions in the covenant, and that if the plaintiff was entitled to recover at all, he could not recover interest before the deed was tendered.

The court held that the deed tendered was a sufficient compliance with the conditions of the covenant, and if they believed the evidence, the plaintiff was entitled to recover the sum agreed to be paid as the purchase money, with interest from 1 May, 1858. Defendant's counsel excepted.

A verdict was rendered in favor of the plaintiff according to the instructions of the court, and, on judgment being given thereon, the defendant appealed.

Merrimon and Avery for plaintiff.
Dickson for defendant.

PEARSON, C. J. In a case between the same parties upon the same covenant, which was before us at August Term, 1859, *Hardy v. McKesson,* 51 N. C., 554, it was held that the covenants were dependent, and to entitle the plaintiff to recover the purchase money it was necessary for him to aver and prove readiness and ability to perform the covenant on his part.

Accordingly, in the present action, a formal declaration is filed in which it is alleged that the plaintiff, "in pursuance of the terms of the said writing obligatory, tendered and offered to deliver to the defendant a conveyance, signed by the plaintiff and sealed with his seal, and good and sufficient in law to convey to the defendant a good and perfect title in fee simple for the said land, *in which the metes and* (570) *bounds thereof were fully and fairly set out.*"

In proof of this allegation the defendant, at the trial, offered in evidence a deed which he had tendered and offered to deliver, in which is set out by "metes and bounds" the description of a large tract of land, and then is added "from said tract of land the said Hardy excepts 20 acres sold to Dr. John Dickson, and now owned by Mr. Wallace; 10

acres sold by Dr. Samuel Dickson to Lindsey, and now owned by Marcus Erwin; 20 acres sold to Mrs. Trescott, now owned by Mr. Cheesboro; 8 acres which belong to the trustees of the Newton Academy, and 17 acres sold to Dr. A. M. Foster."

His Honor erred in not holding that this allegation was not proved, and that the plaintiff ought to be nonsuited because of the variance.

One who holds a bond for title, in *general terms,* could not be expected to accept a deed describing a large tract with exceptions in respect to five parcels of land, with no description besides the number of acres and the supposed owner—not even indicating to him in what part of the tract they were situated, and with no metes and bounds; so as to leave him under just apprehension of being liable to be sued for a trespass, no matter at what place he should enter it. In this case the defendant took the precaution to require of the plaintiff a covenant to make a deed in which the "metes and boundaries" of the land *should be fully and fairly set out.* Obviously, the deed offered in evidence does not fulfill this condition. So that the plaintiff ought to have been nonsuited, because the *probata* did not support the *allegata.*

To avoid this objection, it was suggested on the part of the plaintiff that the allegation set out in the declaration of "an offer to deliver a deed" was not necessary, and may be rejected as surplusage, it being sufficient for him to allege an ability and readiness to execute a proper deed, if such a one had been prepared by the defendant and tendered to him for execution. This suggestion is met by the fact that if
(571) the allegation in question be stricken out as surplusage, there would then be no averment of a readiness or ability to perform. But passing by this difficulty, and taking the question to be, Is it the duty of the vendor to prepare the deed? or, Is it enough for him to aver that he has title, and is ready to execute a deed, provided one is prepared by the vendee and tendered to him for execution upon payment of the purchase money? we are of opinion that it is the duty of the vendor to prepare the deed and have it ready to deliver when he demands the payment of the purchase money. The covenant is that "The vendor will *make to the vendee* a good and sufficient title in fee simple for the land, on payment of purchase money." So that, according to the ordinary meaning of the words, the one is to pay the money and the other is to make the title, which, of course, includes the preparation as well as the execution of a deed necessary for the purpose, and there is no room for an implication that the trouble and expense of preparing the deed is, by agreement of the parties, to be borne by the vendee.

This is manifestly the proper construction of contracts of this kind on principle, as is established by many of the cases in England in the

old books of reports. *Callowell v. Briggs,* 1 Salk., 112, and the cases there referred to. Such is assumed to be the law in this State in *Gerrard v. Dollar,* 49 N. C., 175. It is true a different practice now obtains in England, in the absence of an express agreement as to which of the parties to a contract for the sale of a tract of land shall be at the expense of having the proper conveyances prepared, which is usually inserted as a part of the contract—a practice which has arisen out of the length and difficulties of modern titles and the refinements of modern conveyances in that country, where a purchaser very seldom wishes to take a plain conveyance to himself in fee simple, even if it were practicable to do so, by reason of the outstanding terms for years to attend the inheritance, jointures, and other incumbrances and complications of the title.
In consequence of which the practice there is for the solicitor of (572) the vendor to make out an abstract of the title, which he hands to the solicitor of the purchaser, who investigates the title by reference to the original title papers, and being thus in possession of all the details in respect to the title, it is most convenient for him to prepare the deeds with limitations according to the directions of his principal. See Atkins on Titles, 131 (note) (10 Law. Lib., 57). In our State this practice never has obtained. We have but little difficulty growing out of the complication of titles, and the chief matter is the metes and bounds of the land, which lies peculiarly within the knowledge of the vendor; so that, according to principle, and for the sake of convenience, we are of opinion that a vendor who wishes to maintain an action at law for the purchase money should, at the time of making the demand, have a deed prepared in pursuance of the terms of the contract, and have it signed and sealed, and offer to deliver it on payment of the money.

It is not necessary to notice the other points made in the case, as it is clear the plaintiff cannot maintain his present action.

In respect to the question of interest, we are inclined to think that the defendant is liable therefor from the day of payment set out in the contract, as he has had possession, and the plaintiff had title, and was in a condition to have performed his part of the contract at the day, and it would seem the matter has been standing open by mutual forbearance. However, we express no decided opinion, but feel at liberty to suggest that a bill for a specific performance is the remedy usually resorted to in such cases, instead of an action at law; for, in equity, due allowance can be made, and all matters can be properly adjusted in the decree; whereas, at law, judgment is peremptory for the plaintiff or defendant.

PER CURIAM. *Venire de novo.*

Cited: Gwathmey v. Cason, 74 N. C., 9; *Wilson v. Lineberger,* 92 N. C., 551.

(573)

JOHN BROWN v. J. W. TEAGUE.

The liability of the drawer of an order is a conditional one, dependent on presentation and notice of the drawee's failure to pay. A promise by a drawer, therefore, to pay the payee of such order, without his having made such presentation and given such notice, is without consideration and void.

ASSUMPSIT, tried before *Heath, J.*, at last Spring Term of MACON.

The plaintiff produced an order in the following words:

Mr. W. T. Coleman: Please pay John Brown thirteen dollars, 31 cents, and by so doing you will oblige your friend. This 21 February, 1851. J. W. TEAGUE.

The plaintiff declared on this order, and on a new promise to pay the same. The defendant pleaded the "general issue and statute of limitations." To the former plea there was a general replication; to the latter, a special replication that the suit was brought within less than three years after a new promise to pay the order.

The plaintiff proved the order and showed that less than a year before the bringing of this suit the plaintiff asked the defendant to pay him the amount for which the order was drawn; to which the defendant replied: "Produce the order, and I will pay it"; that the plaintiff then took out his pocketbook and produced the order; that then the defendant said, "I will not pay it"; that the plaintiff said, "Then I will sue you," to which the defendant responded, "If you sue me, I will not pay it, and if you do not sue me, I will not pay it," whereupon this action was brought. There was no evidence of presentment, acceptance, or protest of the order, and the defendant insisted that plaintiff was not entitled to recover, and asked his Honor so to instruct the jury, but he declined so to instruct, and told the jury if the evidence was believed, it justified them in giving a verdict for the plaintiff. To which the defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the (574) defendant.

Henry for plaintiff.
Merrimon for defendant.

MANLY, J. We do not think the action can be sustained, either upon the count on the order or the count upon the express promise.

The drawer's liability upon the order is a conditional liability, dependent upon presentation to the drawee and notice of his failure to the drawer. Such a precedent action is indispensable to fix a responsibility

upon the latter. As this has not been done, the count upon the order against the defendant is not supported.

It follows that the express promise, taken in the strictest sense against the defendant, and regarded as an absolute promise to pay, is without consideration, and of no binding force between the parties to it.

It would seem unnecessary, therefore, to consider the questions whether what took place amounted to a promise at all; and, if so, whether it was such as would support the action. It will be perceived the alleged promise and ultimate refusal were one and the same conversation, with no other interruption to the parts than the time necessary to get a paper from the pocketbook; and it would, therefore, seem more consistent with established principles of interpretation to take it altogether as one continued negotiation, and construe it accordingly. Defendant, at one time, says: "I will pay it." In the next moment, for some reason not explained, but which might, probably, grow out of the exhibition of the paper, he reverses his declaration and says: "I will not pay it." The dealings of mankind with one another are not exactly in the nature of a game in which a false move is irrevocable; but rather in the nature of a conference, where a party may, after all lights are thrown upon a matter, readjust his views and modify or reverse promises or undertakings made in the course of it.

But without relying upon this, or upon the lapse of time from the drawing of the order until it was brought back (which last we should feel bound to give consideration to, were it necessary to (575) the decision of the cause), we are of opinion the action cannot be maintained on either count, for the reason that there is no consideration to support the assumpsit in either case—the maker's order, without proof, not importing any. The judgment below should be reversed.

PER CURIAM. *Venire de novo.*

Cited: Wood v. Barber, 90 N. C., 81; *Bank v. Lutterloh,* 95 N. C., 500; *Bank v. Bradley,* 117 N. C., 530.

ELIZABETH SWINDELL v. ANDREW J. WARDEN AND JESSE F. REEVES.

1. The possession of property is not a fact that entitles the party holding it to give his own declarations in evidence, either to establish his title or to contradict the witnesses of the other side.

2. The acts of one purporting to be an officer are evidence of his authority, and such acts, as to third persons, are to be taken as valid, while the incumbent is thus acting.

TRESPASS, tried before *Osborne, J.*, at last Spring Term of ASHE.

The action was brought for taking with force from the plaintiff a quantity of whiskey and a sack of salt.

The defendants justified under a *fi. fa.* on a judgment in favor of the defendant Warden, which was in the hands of the defendant Reeves, who acted on the occasion as an officer. The judgment under which the parties professed to act was against one Eli Swindell, and the property was alleged by the defendants to be his, and that the claim and possession of plaintiff was fraudulent and designed to hinder and delay the creditors of the said Eli. There was evidence tending to show that the latter had bought the whiskey and salt at Wytheville, in Virginia, and hired one Fields to haul it for him. Fields swore to the fraudu-
(576) lent character of the transaction, and among other things stated that just before they arrived at the residence of the plaintiff, who was the mother of the said Eli, he said to the latter that if the defendant Reeves knew he had purchased the salt he would take it for Warden's debt, and thereupon Eli made a transfer of the salt to him, Fields, and he afterwards transferred it to Mrs. Swindell, the plaintiff, without consideration.

Eli Swindell was examined, and testified to the honesty and fairness of the plaintiff's ownership, and that he had no property or interest in the whiskey or salt taken by the defendants.

The plaintiff offered her own declarations in evidence, made while she was in possession of the property, to establish her title and in contradiction of the witnesses of the defendants. This was objected to and ruled out, whereupon plaintiff's counsel excepted.

The court charged the jury that the property, being admitted to have been in possession of the plaintiff, she would be entitled to recover unless, from the testimony of the witnesses of the defendants, they believed the whiskey and salt to have been the property of Eli Swindell. The court further charged that if they believed the testimony of the witness Swindell, the plaintiff was entitled to recover. The court asked the counsel if they wished further instruction on either side, who both answered in the negative. Plaintiff again excepted.

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

Lander and Avery for plaintiff.
Nat. Boyden for defendants.

MANLY, J. The first point raised upon the record of the trial in the Superior Court is the admissibility of the plaintiff's declarations. It is stated the declarations were made while she was in possession of the

property in question, and were offered to prove her title and to contradict the witnesses of the defendant. We agree with the court below that they were not admissible for either of these (577) purposes.

Declarations from any source, as a general rule, are not admissible. Declarations from a party stand on no better footing than those of an indifferent person, except when offered by an adversary. An exception to this general rule is, when an act of possession becomes material and proper to be proved, what the person says explanatory of his possession, as, for instance, whether such possession be in his own right or as the tenant or agent of another, is admissible. It is admitted as a part of the act to give proper significance to it, and for no other purpose or reason. This exception will not justify the evidence offered, which was to prove by the declarations of the party in possession her title to the property, and to contradict the witnesses of the opposite party. This would be introducing the party as a witness at large under shelter of explaining a possession, and might be resorted to by most litigants in the same way to get their testimony before the jury. The declaration of a party in possession is usually resorted to to rebut the common presumption of property in the possessor, and to show that the latter was a tenant or agent. If he claim in his own right, no declaration of his can rightfully be used to prove more than the presumption arising from possession; and if that be a party's position, it would seem that his declaration cannot be used for any legitimate object. However that may be, we are of opinion the declarations of the plaintiff are inadmissible to prove title to the property trespassed upon, or to contradict the witnesses of the defendants.

With respect to the specific instruction asked for, it will be seen by reference to the testimony that there was no evidence to prove a transfer of title of any kind from Eli Swindell or from Fields to plaintiff, except the testimony of Swindell, and the jury were told by the judge, in his charge to them, that if Swindell were believed, the plaintiff was entitled to recover. This seems to embrace the special instructions asked for, and we suppose was so regarded by the plaintiff's counsel at the time, for he expressed himself satisfied.

The court's charge raises another point which has been debated (578) before us, and that is, whether there was evidence proper to be left to the jury as to the official character of Reeves, the constable. The plaintiff's right of recovery by virtue of her possession alone was made to depend upon the want of property in Eli Swindell. This, of course, involves an inquiry into the right of the defendants to interfere with the property of Swindell while in plaintiff's custody, and this again depends

upon the official authority of Reeves. Thus it is seen how the point arises. We concur with the court below, that there was evidence upon this point. He had a *fi. fa.* of the creditor, Warden, in his hands. He acted on that occasion as constable, by seizing the property and selling it; and added to this is the recognition of him as an officer in a conversation between Swindell and Fields on the Virginia line. These matters constituted evidence upon the point in controversy, and we suppose they were properly left to the jury in the absence of exception alleging the contrary.

The point made upon the record is that there was *no evidence,* and this, we think, was against the appellant, and in conformity with the opinion of the court. It was only necessary for the defendant to show, as against the plaintiff, that Reeves was an officer *de facto,* and the evidence was certainly pertinent to that point; whether sufficient to establish it is unnecessary to say.

It is conceded that the law upon the subject of officers *de jure* and *de facto* has fluctuated in North Carolina, and at one time was considered somewhat uncertain; but since the case of *Burke v. Elliott,* 26 N. C., 355, it is, we think, settled that the acts of an officer *de facto* are valid so far as the rights of third persons or the public are concerned.

This principle should be considered as settled, for the affairs of men could hardly be carried on without it. Until by a *quo warranto* or other proceeding the right be directly tested, and the officer put out, the acts of one in the place and performing the functions of the officer (579) are valid.

PER CURIAM. No error.

Cited: Norfleet v. Staton, 73 N. C., 550; *S. v. Lyon,* 89 N. C., 571; *Tatom v. White,* 95 N. C., 458.

STATE v. BENJAMIN BOWLES.

On an issue made up to try the paternity of a bastard child, the defendant has a right to show that the child does not resemble him.

BASTARDY tried before *Osborne, J.,* at last term of ALEXANDER.

The counsel for the State introduced the examination of one Elizabeth Wilson, a single woman, wherein the defendant is charged with being the father of her bastard child.

To rebut the presumption arising from this testimony the defendant, amongst other things, proposed to show that the child in question did

not resemble him, but strongly resembled another man in the neighborhood. This testimony was rejected by his honor, and the defendant excepted.

Verdict for the State. Judgment, and appeal by defendant.

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

MANLY, J. Upon one of the points made on the trial below we think the defendant entitled to a *venire de novo*. The evidence to show a want of resemblance between the child and the alleged father was fit and proper upon the question of paternity, and, therefore, ought to have been admitted.

To rebut the presumptive case, raised under the statute, by the oath of the woman, resort must be had in most cases by the defendant to the inferential proofs, and to these alone; for, from the nature (580) of the negation to be maintained by him, none other, except in rare instances, is within his reach. And in this field of evidence any fact is pertinent, and may be put on proof, provided a natural inference may be drawn from it, bearing upon the issue between the parties, of some appreciable weight.

There are marked distinctions, physical and external, between the races of mankind (as between the Caucasian and African, the Saxon and Milesian), and there are, also, distinctive characteristics pertaining to different families of the same race, which, when noted in detail, will enable men of observation to infer whether an individual belong to one or the other. If the points of similarity or dissimilarity be not of themselves sufficient, they will be entitled at least to some weight in connection with other facts in deciding the matter. That the young will resemble their progenitors, more or less, is an assumption universally acted upon by mankind, and is doubtless founded upon a general experience of its truth. It seems to be an established theory in the physiology of our race, and evidence, we think, may be safely predicated upon a proposition of common or universal acceptance.

Of course, the force of the evidence will depend upon the number of the points of dissimilarity, and upon their nature and kind, and will be of greater or less weight accordingly.

We think, therefore, it was the right of the defendant to show that, in certain respects the child did not resemble him, and to have this considered by the jury for what it was worth, in connection with the other evidence.

PER CURIAM. *Venire de novo.*

Cited: S. v. Britt, 78 N. C., 439.

(581)

JOHN F. GREER v. JOHN JONES.

The guaranty of a promissory note, made by a third person subsequently to its execution, without any new consideration, is not obligatory.

ASSUMPSIT on appeal from a justice of the peace, tried before *Heath, J.*, at Fall Term, 1859, of ASHE.

Franklin Baker gave his promissory note to Morrison, Gaither & Co., as follows:

"$70.87. April 6, 1853.

Ninety days after date, I promise to pay to the order of Morrison, Gaither & Co., $70.87. Value received."

On which is the following:

I endorse the within, payable at Christmas next. This 2 May, 1857.

JOHN JONES.

And afterwards appears this endorsement:

Pay the within to John F. Greer, and no recourse to us.

MORRISON, GAITHER & Co.

Dec. 5, 1857.

The suit was brought by warrant against John Jones, on his guaranty. On the proof of these signatures the plaintiff rested his case, but his Honor intimating that the plaintiff could not recover in this suit against the guarantor, for the want of a consideration, he took a nonsuit and appealed.

Nat Boyden for plaintiff.
Crumpler for defendant.

BATTLE, J. The only ground upon which the liability of the defendant could be placed was that of the guaranty of the promissory note, executed by Franklin Baker to Morrison, Gaither & Co. This guaranty was made about four years after the date of the note, and
(582) after it became due, and no consideration whatever was shown for it. In *Green v. Thornton,* 49 N. C., 230, we said: "It is not and cannot be denied that a guaranty in writing, made at the time of a contract between two or more persons, is binding upon the guarantor, because it is founded upon the consideration which exists between the principle parties. But if it be made afterwards, without any new consideration, then it is not obligatory, and the putting it in writing, if not under seal, will not help." These remarks are directly applicable

to the facts of the case now before us, and are decisive against the claim of the plaintiff. Upon this point, then, without adverting to any other, the judgment of nonsuit was right, and must be

PER CURIAM. Affirmed.

DOE ON THE DEMISE OF HENRY ADDINGTON v. WILLIS JONES.

1. Where course and distance called for in a grant are proposed to be controlled by the proof of marked trees or natural objects, actually run to and marked on the occasion of the original survey, it was *Held* that the substituted description ought to be sufficiently certain of itself to identify the land.

2. Surveys made on the occasion of bringing into market the Cherokee lands, and filed in the office of the Secretary of State, but which are without system, certainty, or consistency, were *Held* not to be sufficient to overrule the calls of a grant as to course and distance.

3. A survey made of Cherokee lands, at the instance of an individual, independently of the action of the commissioners entrusted with the survey and sale of these lands, was *Held* not to be sufficient to control or contradict the calls of a grant as to course and distance.

EJECTMENT, tried before *Bailey, J.*, at Fall Term, 1859, of MACON.

The plaintiff exhibited a grant from the State, bearing date in 1842, which called for a chestnut in the west boundary of No. 122 as the beginning. No. 122 was one of the several tracts of land surveyed and sold under the direction of commissioners appointed to sell (583) the Cherokee lands in 1827, and the main point in controversy was as to its location. If located north of a given east and west line, which was agreed on, the land described in the plaintiff's grant would cover the *locus in quo;* but if south of that line, then the calls of his grant would not cover it. The calls of No. 122 are as follows: "Beginning at a hickory, northwest corner of No. 67, and runs west 39 poles to a hickory; south nine degrees east 275 poles to a stake; thence east 39 poles to a stake; thence N. 9 W. 275 poles to the beginning," referring to a plat which is recited as being annexed. It was insisted that the second call in this grant, "south," etc., was a mistake, and that it should have been "north," etc.; and plaintiff offered a certified copy of a plat, and certificate of survey, taken from the field-books filed in the office of the Secretary of State, as that made for and pertaining to this particular tract, which showed a tract located as contended for by the plaintiff. The plats in question showed several tracts on the one and the other side of the east and west line agreed on. One of

these, No. 66, purported to have been surveyed in 1820; No. 67 in the same year; No. 121 in 1827, and 122 in the same year; Addington's mill entry in 1842, and Jones', in 1855. This evidence was objected to by the defendant, and ruled out by the court. The plaintiff's counsel excepted.

The deposition of one *Henry* was offered by the plaintiff. He stated that in 1827 he surveyed No. 122 for Moses Addington, and in doing so he ran through a field known as Moses Addington's which it was found was north of the east and west line, above mentioned. It was insisted by the plaintiff's counsel that the evidence showed an actual running of No. 122, and that it was north of the east and west line agreed on, and that the survey in question, taken in connection with Mr. Henry's deposition, were sufficient to justify this conclusion.

(584) The court charged the jury that the calls of the grant could only be controlled by lines actually run and marked; that Henry's deposition showed that the survey of which he speaks was made for Moses Addington and not under the direction of the commissioners, and should not, therefore, influence their verdict. It was submitted by the court to the jury to find whether there were any marked lines upon the tract in question, and that if there were any marked lines, that would control courses and distances.

The plaintiff's counsel again excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

J. W. Woodfin and W. M. Shipp for plaintiff.
B. S. Gaither and Henry for defendant.

PEARSON, C. J. If, in addition to the metes and bounds, it had been set out in the grant, as a part of the description, "including a part of Moses Addington's field," an interesting question would have been presented. It is settled that a line of marked trees, or a tree marked as a corner, although not called for in the grant, or any natural object called for in the grant, which can be identified, and has *sufficient certainty* to furnish of itself a description in place of the course and distances set out in the grant, will be allowed the effect of contradicting the course and distance so as to make the line longer or shorter, or even to locate the land *north* of the beginning instead of *south* of it, on the ground that, in regard to course and distance, there is a greater liability to mistake, as by writing "north" instead of "south" or "east" instead of "west," than in regard to natural objects called for, or to line trees or corner trees marked at the time of the survey, although not called for in the grant. This rule, in respect to questions of boundary, presupposes

that the description which is to control, and be put in the place of course and distance, has, of itself, sufficient certainty to locate the land, supposing the "course and distance," which it controls and contradicts, to be stricken out of the grant.

In our case the natural object, if it can be so termed, is "a part (585) of Moses Addington's field." Strike out the course and we have, in place of it, "including a part of Moses Addington's field." What part? So the description is too uncertain to stand alone, and for that reason cannot, on the authority of any adjudicated case, be substituted for or be allowed the effect of striking out the word "south," set out in the grant as the course of the line from the second corner.

So it would seem that if it had been set out in the grant as a part of the description that the tract of land in question "included a part of Moses Addington's field," it would not have controlled the course of the second line so as to make it run *north* instead of *south*. But no reference to Moses Addington's field is made in the grant, and the naked question is, Are the field notes of a surveyor, filed in the office of the Secretary of State, admissible as evidence to contradict the course set out in the grant and locate the land on the *north* instead of the *south* side of the first line, the location of which is agreed on?

If the Cherokee land (as it is called) had been regularly surveyed by authority of law, and marked off into districts, sections, half sections and quarter sections, as is done under the law of the United States in regard to the land in the territories, the field notes of the surveyor would have commended themselves to more consideration. But no order of time, or form, or quantity, seems to have been observed. We have in the plat made by order in the case, survey No. 66 and No. 67, made in 1820; Nos. 122 and 121, made in 1827; No. ..... in 1837; and a survey for Moses Addington's entry in 1842; and all of them, in regard to form and quantity, differing as widely as circumstances or caprice could have suggested.

We therefore concur with his Honor who tried the case in the court below, that the "field notes" of the surveyor, which, it would seem, were originally made and filed in the office of the Secretary of State as a kind of general map or description of the land which the commissioners were to sell, but which, by reason of the very many acts of the Assembly in regard to the sale of the Cherokee lands, were superseded and disregarded, so that the tracts actually sold and conveyed by (586) grant are not at all identical with those originally surveyed, ought not, under any principle of law or under the authority of any adjudicated case in our Court, to have been received as evidence for

the purpose of contradicting the calls of the grant, and in thus substituting "north" instead of "south."

We see no error in the charge of his Honor that the deposition of Mr. Henry should not influence the verdict, for the reason that it was an attempt, by parol evidence, to contradict and control the calls of a grant by the evidence of one who did not make the original survey, but acted under the employment of a private individual and not under the direction and by the employment of the commissioner appointed for and on behalf of the State.

We think, upon the whole evidence, that the fact that his Honor submitted to the jury to find "whether there were any marked lines upon the tract in question, and if there were any marked lines, that would control courses and distances," was fully as much as the plaintiff had a right to ask for, and consequently he has no ground to complain of the charge. There is

PER CURIAM. No error.

Cited: Williams v. Kivett, 82 N. C., 114; *Shaffer v. Hahn,* 11 N. C., 11; *Lumber Co. v. Lumber Co.,* 169 N. C., 103; *Milikin v. Sessoms,* 173 N. C., 725.

(587)

LOVELESS DOGGETT ET AL. v. DAVID MOSELEY.

1. Where a father gave slaves to his daughter by will, adding this phrase, "which I intend for the said N. or her issue," she having illegitimate issue at the date of the will, but no legitimate issue, and died without having had legitimate issue, it was *Held* that such illegitimate offspring could not come in under the term *issue,* there being nothing else to show that they were thereby meant; but that the mother took an absolute estate, which went to her husband, surviving her, *jure mariti.*

2. Time elapsing while a party was a resident in another State, while the act of 1852 was in force, was *Held* not to operate a bar under the statute of limitations, though that act was repealed before the statute of limitations was pleaded.

DETINUE for slaves, tried before *Heath, J.,* at last Fall Term of RUTHERFORD.

The plaintiffs and defendant both claim under the will of Bushrod Doggett, which was made in 1829. The clauses of said will material to the questions considered by the Court are as follows:

1. "In the first place, it is my will that my beloved wife, Susannah Doggett, shall be well provided for. I therefore will and bequeath unto

her, first, the following slaves (mentioning four by name; also a tract of land and other personal property), and at her death the negroes and their increase, together with the land and other effects devised to her, to be equally divided between my children then living, or their issue; at the same time reserving the first child the said Jinney may have for Bushrod Doggett, the son of my son Richard, for him to have and receive when he arrives at mature age."

"Item 2d. I will and bequeath to my daughter, Sarah Wilmoth, one negro girl named Selah, together with a mare and cattle, that she has heretofore received, all of which I estimate at $280, to her sole use or her issue.

"Item 3d. I will to my daughter Nancy Moseley the tract (588) of land whereon she now lives, supposed to be 56 acres; also one negro girl named Harriette, a horse and cattle that she has received. I estimate the whole at $430, which I intend for the said Nancy or her issue.

"Item 4th. It is also my will to give to my daughter Elizabeth one negro girl named Rachel, with my lots and improvements in Rutherfordton, together with 30 acres of land contiguous to the town, on the east side. I estimate the whole at $580, which I intend for her own proper use or her issue.

"Item 5th. I give and bequeath to my daughter Martha Butler one negro girl named Jude, 100 acres of land where she now resides, to be laid off in a square on or joining the lower south line—$20 worth of cattle. I estimate the whole at $520, which I give for her use and her issue, or the use thereof of her issue, which is intended to be distinctly understood as relates to what I have willed to each of my daughters."

The action is brought for the recovery of the female slave Hariette and her six children.

The plaintiffs are the illegitimate children of Nancy Moseley, born in 1820 and 1822, while she was living at her father's house, and were well known to him at the time of the making of the will, in 1829. The legatee, Nancy, was married to the defendant Moseley in 1823, and died in 1854. She always lived near her father, and was a favorite child. She never had any children after her marriage with the defendant, and left no other issue than these illigitimate children (the plaintiffs). The defendant has had possession of the slaves ever since the death of his late wife, and before that had possession with her, from the year 1829 up to the period of her death.

The plaintiffs removed to Tennessee in 1833, and have resided there ever since.

The plaintiffs offered to prove that Bushrod Doggett was himself a bastard, which was ruled out by the court, and plaintiffs' counsel excepted.

(589) It was contended by the plaintiffs that under the third clause of the will the slaves in question are limited to them as the issue of Nancy Moseley.

A verdict was taken for the plaintiffs, subject to the opinion of the court on the plaintiffs' right to recover at all, with leave to set aside the verdict and enter a nonsuit, provided he should be of opinion against the plaintiffs' right.

His Honor afterwards, on consideration of the point of law reserved, ordered the verdict to be set aside and a nonsuit entered.

Edney and J. J. Woodfin for plaintiffs.
W. M. Shipp, Avery, and G. W. Logan for defendant.

BATTLE, J. The claim of the plaintiffs to the slaves in controversy is founded on the following clause in the will of Bushrod Doggett: "I will to my daughter Nancy Moseley the tract of land whereon she now lives, supposed to be 50 acres; also one negro girl named Harriette, and horse and cattle she has received. I estimate the whole at $430, which I intend for the said Nancy or her issue." The plaintiffs are the natural children of the testator's daughter Nancy, born before her intermarriage with the defendant Moseley, and the slaves sued for are the negro girl Harriette and her children; and the question is whether the above recited clause of the testator's will admits of a construction which, on the events that happened, has vested a title in the plaintiffs, so as to enable them to recover in this action.

In the arguments of the counsel several views have been presented as to the meaning of the testator in giving the girl Harriette to his daughter Nancy "or her issue." The counsel for the defendant contends that his intention was to make the bequest to his daughter absolute, provided she survived him, *or* to her issue in the event of her dying in his lifetime, and the counsel insists that as she survived her father, the legacy became absolute, and vested at once in the defendant, as her husband, *jure mariti*. This construction seems plausible, and is

(590) certainly aided by lights derived from other parts of the will.

In the first clause the testator, after giving certain land, negroes, and other property to his wife for life, directs that at her death it shall be divided "between his children then living or their issue." Here it is manifest that the children of the testator living at the death of their mother were intended to take absolute estates in the shares de-

vised and bequeathed to them, but if either of them should be dead, leaving issue, such issue was to take what his, her or their parent would have done had he, she, or they been then living. The word "or" was certainly used in a disjunctive sense, and cannot be supposed to have been used in the sense of "and." In the second and forth clauses of the will the bequests to each of the testator's daughters, Sarah and Elizabeth, is to her "or to her issue," as in the case of the bequest to the plaintiffs' mother, Nancy. From the use of the same terms in the second, third, and fourth clauses, which he had employed in the first clause of his will, the inference is very strong that the testator intended the same thing in each, which was that the issue of either or all of his daughters should take only in the alternative of her or their deaths.

The counsel for the plaintiffs insists strenously this construction is inadmissible, and he contends that the disjunctive conjunction "or" must be taken in the conjunctive sense of "and" and, in support of this argument, he relies strongly upon the phraseology of the bequest to the testator's daughter Martha Butler, in the fifth clause, which is, "for her use *and* her issue or the *use* thereof of her issue, which is intended to be distinctly understood as relates to what I have willed to each of my daughters." Here it will be noticed that the word "and" is used, but it is followed immediately by the expression "*or* the use thereof of her issue," which leaves it doubtful whether the testator meant to vary the meaning in that particular of the bequests to his daughters "or their issue" in the previous clauses of his will. But suppose that he did, and that "or" is to be construed "and" throughout, the inquiry, is at once suggested whether it will help the plaintiffs' case. A bequest to a woman and her issue undoubtedly gives her an absolute (591) estate when she has no children or issue during the life of the testator; but if she has children or issue when the will is made and at the death of the testator, she and her children or issue may take absolute estates as tenants in common, unless there is something in the will indicative of an intention that she shall take as tenant for life, with remainder to her children or issue. See *Moore v. Leach,* 48 N. C., 88, and the cases there cited. Here, there is no expression in the will which can be construed to give the mother a life estate only, and the consequence is that if the plaintiffs can claim at all under the description of issue, they must take as tenants in common with the defendant, who, by his intermarriage with their mother, became the owner of her share of the slaves. If such be their title, they cannot maintain the present action against their cotenant but their remedy will be a proceeding against him for a partition of the slaves thus held in common.

We have thus far considered the case as if the illegitimacy of the

plaintiffs formed no objection to their claim; but we are entirely satisfied, from an examination of the authorities, that the term "issue," as used in the clause of the will now before us, means legitimate issue only, and does not embrace the plaintiffs. Most if not all the English cases on this subject are collected and analyzed with his usual critical acumen by Mr. Jarman in the second volume of his valuable work on Wills. Among these cases is included that of *Wilkinson v. Adams,* 1 Ves, & Beame, 460, in which the judgment was pronounced by the *Lord Chancellor Eldon,* assisted by *Thompson, Baron,* and *LeBlanc* and *Gibbs, JJ.* The result of Mr. Jarman's examination is thus expressed: "They (that is, illegitimate children) are not objects of a gift to *children* or *issue* of any other degree, unless a distinct intention to that effect be manifested upon the face of the will; and if by possibility *legitimate* children could have taken as a class under such gift, illegitimate children *cannot,* though children, legitimate and illegitimate, may take concur-
(592) rently under a *designatio personarum* applicable to both." See 2 Jarman on Wills, 155.

In the will now under consideration there is no designation of persons applicable to both kinds of children, and there is nothing upon the face of it to indicate any intention, much less a distinct intention, that illegitimate issue was meant, and with regard to the testator's daughter Nancy there was not only a possibility, but a strong probability, that at the time when the will was made she might have legitimate issue to take instead of her bastard children. The word issue is used by the testator in connection with his other daughters in precisely the same manner as it is with respect to his daughter Nancy, and since, as to them, it undoubtedly means legitimate issue, it must have the same construction as to her.

The testimony offered by the plaintiff to show that the testator was himself a bastard could not have aided the court in ascertaining his meaning, and was, therefore, properly rejected as immaterial.

The statute of limitations was relied upon by the defendant. It would, of itself, have afforded a complete defense against the action (if the claim of the plaintiffs had been otherwise well founded), but for an act of Assembly which was passed in 1852, and which was in force until 1 January, 1856, when the Revised Code, in which it was omitted, went into operation. By that act it was provided, "that on the trial of any suits before any of the courts of this State the time during which the parties to a suit shall not have been a resident shall not be given in evidence in support of the plea of the statute of limitations." Laws 1852, ch. 51, sec. 2, referred to in *Phillip v. Cameron,* 48 N. C., 390. The defendant's wife died in 1854, and supposing he had no title at that time, his adverse

possession of the slaves for more than three years before the suit was brought would have given him one, but for the interposition of the act to which we have referred. However, the defendant has no need to resort to any other defense than that which is furnished by the will of his wife's father. Under that she took an absolute interest in the slaves sued for, which became his *jure mariti.* (593)

PER CURIAM. Affirmed.

Cited: Harrell v. Hagan, 147 N. C., 116.

AUSTIN CORNELIUS, PROPOUNDER, v. WILLIAM CORNELIUS ET AL.

1. It was held not to be error in a judge to instruct a jury that a testamentary capacity was "a capacity to understand the nature of the act in which the testator was engaged, and its full extents and effects."
2. It was held not to be error in a judge to say that the law gave peculiar importance to the testimony of the attending physician and the subscribing witnesses.
3. Where the script was attested by witnesses in the same room with the decedent, about 8 feet to one side of him, but in a position to be seen by him in the act of attestation if he turned his head half round, and he was able so to turn his head without pain or inconvenience, it was *Held* to be an attestation in the presence of the decedent.

DEVISAVIT VEL NON, tried before *Osborne, J.,* at last Spring Term of CATAWBA.

As there is no point of law arising on the exceptions made on the question whether there was any evidence as to undue influence and as to the testamentary capacity, it is not deemed expedient to state them at large.

The main question debated in this Court was as to the conformity of the attestation to the requirements of the statute. The two subscribing witnesses, Messrs. Little and Barclay, and the attending physician, Dr. Mott, gave substantially the same account of the transaction. The deceased had been badly wounded some two weeks before, and on this day, having got worse, he sent for Dr. Mott and the two witnesses, and having had his will written by the former, the witnesses were called upon to witness it. Before doing so, one of them examined him as to his knowledge of the content of the paper, and being satisfied (594) upon that score, the two witnesses went to a table on the left side of the decedent, who was lying on the floor, seven or eight feet from him,

a little back of a right line to his position; that they there signed as witnesses; that the decedent, by turning his head half over to one side, could see the witnesses, and even the pen and paper, and that he was able thus to turn his head without pain or inconvenience. The physician added that he observed that the decedent did once turn his head while the attestation was going on.

The court instructed the jury "that there was no evidence of undue influence; that on the subject of the testator's mind they would consider the testimony of the subscribing witnesses and the physician, Dr. Mott; that the law gave peculiar importance to these witnesses; that it was the business of a physician to understand the diseases of the mind as well as the body, and his opinion, for that reason, was entitled to higher consideration than ordinary witnesses; that the statements of facts attending the making of the will and its execution would be considered by them, and if they believed from this proof that the deceased understood the nature of the act in which he was engaged, in its full extent and effects, then he would have legal capacity, and if they believed that the attestation was made by the subscribing witnesses in the room in which the deceased was lying, and in such a situation as, by turning his head in the manner described by them, he could see the paper-writing at the time of the attestation, and that he had the ability to do so, there was an attestation in his presence as required by the act of Assembly."

The caveator's counsel excepted. Verdict in favor of propounder. Appeal by caveators.

Boyden, McCorkle, Lander, and Avery for propounder.
W. P. Bynum for caveators.

MANLY, J. We have examined the testimony carefully in this case, and concur with the court below in the conclusion that there was no evidence of undue influence.

(595) The case was properly left to the jury upon the question of capacity. They were charged that the capacity necessary was "to understand the nature of the act in which the testator was engaged, and its full extent and effects." Of this the appellant has no right to complain. It is equally clear that the special importance attributed by the judge to the testimony of the attending physician and the subscribing witnesses is entirely consonant with law and reason. The subscribing witnesses are required by the law, not only for the purpose of attesting the execution of the instrument as to form and freedom from fraud, but also especially to see that the testator is of sound and disposing mind and memory, and is so at the precise point of time to which inquiry is

directed, viz., the execution of the will. They are witnesses, therefore, especially to be looked to for information upon every subject connected with the due execution of the instrument. It may be said of the physician that he is, by the nature of his studies and pursuits, particularly skilled in the mental as well as the physical diseases of men, and with respect to the parties upon whom he is in constant attendance he must be supposed, as well from his superior knowledge as from his better opportunity of observation, to be particularly well informed as to the state of his mind. What, therefore, the judge thought proper to say upon the subject of the witnesses mentioned we do not think liable to any just exception.

The next question is whether the attesting witnesses have subscribed their names in the presence of the testator according to the requirements of the statute. Upon this point the judge instructed the jury "that if they believed the attestation was made by the subscribing witnesses in the room in which the deceased was lying, and in such a situation as by turning his head in the manner described by them he could see the paper-writing at the time of the attestation, and that he had the ability to do so, it was an attestation in the presence of the testator."

After reviewing the authorities upon this point, we think that the strictest interpretation of the law has gone no further than to require that the testator should be in a position, and have power, without a removal of his person, to see what was done. It is not neces- (596) sary for him, in point of fact, to see. In *Bynum v. Bynum,* 33 N. C., 632, where it appeared that the paper was not in the actual sight of the testatrix, but in two or three feet of her, at the time the witnesses signed, and in the same room, the attestation was held to be good. In that case the Court declares "that the attestation being done openly, and without any clandestine appearance about it, in the same room with the testatrix, and within two or three feet of her, when she had her senses, and nothing intervened between her and the witnesses, is good under the statute. It was done, both literally and substantially, in her presence."

There are authorities going to the extent of holding that the transaction being openly done, there can be no question of *presence* where the parties are all in the same room. Best on Presumptions, 83. But, however this may be, it is clear upon authorities if it be affirmatively established that the testator *might* have seen, the attestation is good. Powell on Devises, 96; *Tod v. Earl of Winchelsea,* 12 E. C. L., 227.

We are not disturbing at all *Jones v. Tuck,* 48 N. C., 202, to which our attention has been called. In that case it appeared that the testator could not have turned himself so as to have seen the attesting witnesses

subscribe without danger, and acting contrary to the advice of the physician.

In the case before us the turning of the head would have sufficed to enable the testator to see, and that, according to the testimony, he could do without pain or difficulty. We think the attestation was in the presence of the testator. There was

PER CURIAM. No error.

Cited: Paine v. Roberts, 82 N. C., 453; *Barnhart v. Smith,* 86 N. C., 484; *Burney v. Allen,* 125 N. C., 319, 322; *Cameron v. Power Co.,* 138 N. C., 367; *In re Thorp,* 150 N. C., 492; *In re Bowling, ib.,* 515; *Daniels v. Dixon,* 161 N. C., 382; *Linker v. Linker,* 167 N. C., 653; *In re Craven,* 169 N. C., 567.

(597)

C. L. HARRISS v. S. D. HAMPTON.

The acts of 1844 and 1846 abolishing trials by jury in the county court of Rutherford, etc., embrace an action of assumpsit begun by attachment as well as by a common writ, *ad respondendum.*

MOTION to quash the proceedings on an attachment, returned before the county court and heard on appeal before *Heath, J.,* at the Spring Term of RUTHERFORD.

This action was assumpsit for money due on account for $265. The ground of the motion was that by the special legislation for the county of Rutherford an action of assumpsit, whether begun by a common writ or by an attachment, by the act of 1846, ch. 153, and the act of 1844 (referred to in the former), could only be returned into the Superior Court of Rutherford County. These two acts are sufficiently set out by his Honor in the opinion following.

The judge below was of opinion that the proceeding should be quashed, and from the judgment of the court the plaintiff appealed.

No counsel for plaintiff.
Dickson for defendant.

BATTLE, J. Our opinion concurs with that expressed by his Honor in the court below, that the County Court of Rutherford County had no jurisdiction of the present suit by attachment, which had been returned to it; and the order dismissing it must, therefore, be affirmed. By an act passed in 1846, ch. 153, entitled "An act to abolish jury trials in the

county courts of Rutherford and Cleveland counties," it was enacted, among other things, that an act granting to the Superior Courts of the counties of Yancey, Buncombe, Henderson, Haywood, Macon, and Cherokee original and exclusive jurisdiction in all cases where the intervention of a jury may be necessary, passed by the Legislature in 1844, be extended with all its provisions to the counties of Rutherford (598) and Cleveland. Section 5 of the act of 1844, thus referred to, declared: "From and after the 1st day of March next all suits in said counties, whether civil or criminal, shall originate in the Superior Courts of the said counties, respectively," etc.

It is manifest from these acts that the plaintiff could not have brought an action of assumpsit upon his account against the defendant, returnable to the County Court of Rutherford; and the suit by attachment, for the same cause, differs from the action of assumpsit (so far as the present question is concerned) only in the mode by which the process is to be served for the purpose of bringing the defendant before the court. In either case the suit must, by the express words of the act, originate in the Superior Court of the county of Rutherford.

S. v. Sluder, 30 N. C., 487, and *Fox v. Wood,* 33 N. C., 213, to which we are referred by the plaintiff's counsel, so far from militating against, actually confirms the construction which we put upon the acts. The first was a case of bastardy and the second of a *ca. sa.,* and they were held to be properly returnable to the county court, in the first instance, because they were cases that did not require "the intervention of a jury as a matter of course." They might be, and ordinarily would be, finally disposed of in the county court, without any jury trial at all. It required some action to be taken by the parties after they were in the county court, to wit, the making up of issues before they came within the provision which conferred jurisdiction of them upon the Superior Court. After such jurisdiction shall be acquired by the making up of issues, then the cases must be transferred by appeal or *certiorari* for trial in the Superior Court. It is manifest that an action of assumpsit, whether commenced in the ordinary method by a writ of *capias ad respondendum* or by the extraordinary proceeding by way of attachment, stands upon a very different footing, for in that and similar suits "the intervention of a jury may be regarded *as a matter of course.*"

PER CURIAM. Affirmed.

Cited: Buchanan v. McKenzie, 53 N. C., 97.

(599)

DOE ON THE DEMISE OF DAVID HIPP v. CHAMPION FORESTER.

1. Where a declaration on ejectment included the whole of a tract of land, and the evidence shows that when the suit was brought the lessor of the plaintiff was in possession of all but a small parcel in the possession of the defendant, to which the former failed to show title, it was *Held* that it was not necessary for defendant to have made a disclaimer in order to prevent a judgment against him for the land outside of his possession.
2. The rule in ejectment is that the plaintiff cannot recover, without showing a better title than the defendant to all the land of which the defendant is proved to have been in possession.

EJECTMENT, tried before *Bailey, J.*, at Fall Term, 1859, of POLK.

The land in question was a 200-acre tract, granted in 1802 to one Franks. David Hipp, the lessor of the plaintiff, having cleared a few acres on the eastern part of the tract, remained in possession at that place for a short time. He then made a larger clearing on the northern part of the tract, and having settled there, has continued in possession of it ever since, claiming the whole tract as his own, which has been for about twenty-five years, but without any deed or other paper evidence of title. The clearing on the eastern part of the land remained unoccupied until about fifteen years before this suit was commenced, when it was taken into possession by a son-in-law of David Hipp. He sold his interest in this part to John Hipp, a son of David, who sold to the defendant, who entered and remained in possession down to the time of the bringing of this suit—in all, fifteen years. Neither the son-in-law nor John Hipp nor the defendant during these fifteen years had any written evidence of title for the part thus occupied by them. There was conflicting evidence as to the character of their tenure; some of the witnesses testifying that the first holder entered as the tenant of David, and that they all three held in that capacity, while others stated that he entered and held in his own right, adversely to David's title, and that his successors held in the same way.

The court charged the jury that if David Hipp, the lessor of the plaintiff, had been in possession of the land for twenty years, claiming
(600) title to it, he would have title to all of which he had actual possession, and that if the defendant, and those under whom he claims, went in under him, their possession would be his, and he would be entitled to recover; but if the son-in-law of David Hipp took possession for himself, and held adversely to David, and those claiming under him held also adversely, he could not recover.

The plaintiff's counsel requested the court to charge the jury: If David Hipp had been in possession of the land described in the declara-

tion, or any part of it, for twenty years, claiming the whole, that a deed was presumed from the grantee for all the land embraced in the grant to Franks, and as the defendant had made no disclaimer, the plaintiff was entitled to recover anyhow. The court declined giving this instruction, and plaintiff excepted.

Under the instruction given, the jury found in favor of the defendant, and from a judgment according to the verdict plaintiff appealed.

Edney for plaintiff.
Dickson for defendant.

BATTLE, J. The bill of exceptions does not disclose any error of which the lessor of the plaintiff has any just cause of complaint. His Honor instructed the jury that if those under whom the defendant claimed the land, of which he was in possession, entered as the tenants of the plaintiff's lessor, then the lessor was entitled to recover; but if they entered upon it, claiming it for themselves, the action must fail. The case states that each party gave testimony upon this question of the character of the defendant's possession, and the jury found that those under whom the defendant claimed did not enter as the tenants of the plaintiff's lessor, but, on the contrary, entered upon the land, claiming it as their own. In that state of facts, the plaintiff's lessor, having no deed or other paper evidence of title, could not show any right to recover the possession from the defendant, because, as to him (601) and the part of the land which he occupied, he could not rely upon the presumption of a deed for the want of twenty years possession before the adverse possession of those under whom the defendant claimed commenced. This is manifest from the statement that the plaintiff's lessor was in possession of his clearing and improvements, on the northern part of the land contained in the grant to Franks, twenty-five years before the suit was brought, and that the defendant, and those under whom he claimed, were in possession of the cleared land on the eastern part of it for fifteen years before the commencement of the suit.

It has been suggested that, as the declaration included the whole tract granted to Franks, and as the defendant did not disclaim for the part of which he was not in possession, the lessor was entitled, at least, to a verdict for that part. That proposition cannot be sustained, because as to such part he was already in possession, and could not, therefore, maintain ejectment against another person for it. According to a rule well established in this State, he could not recover without showing a better title than the defendant to the land of which he had shown the defendant

to be in possession. See *Atwell v. McClure,* 49 N. C., 376, where the subject is fully discussed and explained.

PER CURIAM. No error.

Cited: Cowles v. Ferguson, 90 N. C., 313; *Wilson v. Wilson,* 174 N. C., 758.

G. M. LOVINGOOD, ADMINISTRATOR, v. HENRY SMITH.

The act in relation to contracts with Cherokee Indians, Rev. Code, ch. 50, sec. 16, applies as well to contracts made by one Indian with another as to those made by an Indian with a white man.

DEBT on a sealed obligation, tried before *Bailey, J.,* at Fall Term, 1859, of CHEROKEE.

(602) The instrument declared on, which was for the payment of $100, was produced and proved. The plaintiff's intestate and the defendant were Cherokee Indians within the second degree, and the only defense relied on was the act of Assembly requiring contracts, beyond a certain sum with these Indians, to be in writing and witnessed by two subscribing witnesses. Rev. Code, ch. 50, sec. 16.

It was contended on behalf of the plaintiff, and so held by the court, that this act of Assembly does not apply where both the parties are Indians, as in this case. The defendant's counsel excepted to this ruling of his Honor, and, on a verdict and judgment against him, appealed.

No counsel for plaintiff.
B. S. Gaither for defendant.

PEARSON, C. J. His Honor was of opinion that the statute does not apply to contracts made by one Cherokee Indian with another, but was confined to cases where a Cherokee Indian made a contract with others "who were not of that race"—that is, with a white man, or a free negro, or a Creek or Chocktaw Indian, or some one who was not a Cherokee. It may be that such was the intention of the lawmakers; but if so, apt words are not used to express the meaning, and there is no rule of construction by which the general terms used can be so restricted in their operation. Rev. Code, ch. 50, sec. 16: "All contracts of *every description* made with any Cherokee Indian for an amount equal to $10 or more shall be void, unless," etc. These words are as general as they can

be. Here is a contract for an amount over $10, made with a Cherokee Indian, and the requirements of the statute are not observed; so it comes within the words of the statute, and there is nothing to show that it does not come within the meaning; for if the intention was to confine the act to contracts made by *white* men with Cherokee Indians, it could have been easily so expressed; and we cannot put that construction on the statute without imputing to the lawmakers an inability to (603) express their meaning in an intelligible manner.

Judgment reversed, and a *venire de novo awarded.* As the case turns upon a question of law, we regret that it was not made up so as to enable this Court to give a final judgment.

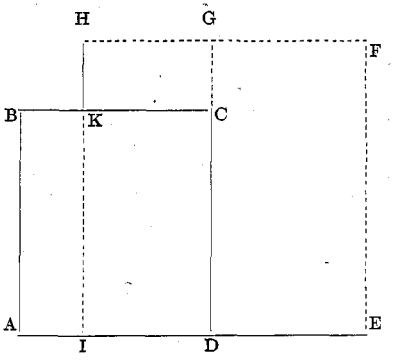
PER CURIAM. Reversed.

Cited: S. v. Ta-cha-na-tah, 64 N. C., 616.

DOE ON THE DEMISE OF NANCY PATTON ET AL. V. J. H. ALEXANDER.

1. In ascertaining the boundaries of a tract of land, one kind of natural objects called for, is not, as a matter of law, entitled to more respect or of more importance than another.
2. The intentions of a grantor in describing a corner or line, cannot be set up by parol in contravention of the plain terms of a deed.

EJECTMENT, tried before *Bailey, J.,* at Fall Term, 1859, of BUNCOMBE.



The plaintiff's lessors derived title by a grant to Robert Patton (604) for the land described in the diagram, A D C B, and by showing that they are the heirs at law of the said Robert Patton.

The defendant was in possession of a part of the land embraced in the area I D C K, and claimed title to the same, by virtue of a deed from Robert Patton to Aaron Patton, dated in 1814, which describes the land as follows: "Beginning on the southeast corner of a 50-acre tract that adjoins the land I now live on, including the head of Aaron Patton's smithshop branch for complement, beginning on a hickory, the corner before mentioned, on the south side of a ridge, including Aaron Patton's line, and runs with the same east 64 poles, *crossing two small drains,* to a red-oak on the southwest side of *a ridge;* thence north 127 poles to a stake; thence west 64 poles to a stake opposite to his (Robert Patton's) own corner; thence passing the same to the beginning." The defendant insisted that the beginning of his deed was at I, and among other circumstances show that between I and D there were two small *drains,* but that by beginning at D, as the plaintiff contended, no such drains could be found. There was, however, a branch or two on the line D E, and there was some uncertainty as to the description of the drains relied on by the defendant.

The counsel for the defendant asked the court to charge the jury that, *prima facie,* they must adopt a line crossing two drains as the first line called for in the defendant's deed. The court declined to give this instruction, and the defendant excepted.

2. The defendant asked his Honor to instruct the jury that the proper inquiry for them was, not where the southeast corner of the 50-acre tract was ascertained to be by actual measurement, but where Robert Patton supposed it to be, and if they should be satisfied that he thought it was at I, there they would begin in ascertaining the defendant's land. The court declined giving this instruction, and the defendant again excepted.

Verdict for plaintiff. Appeal by defendant.

(605) *N. W. Woodfin and J. W. Woodfin for plaintiff.*
Barber for defendant.

MANLY, J. We are not sure we understand the purport of the instruction first requested of his Honor below, but if, as we suppose, it means that two small drains, a running so as to cross them with the first line of the land conveyed to Aaron Patton would be, *prima facie,* the true location of the land, and as a *prima facie* case must be rebutted. We think the giving of it was properly declined.

Supposing a drain to be a natural object (which bye the bye we do not concede), it is no more certain than other natural and permanent objects, and is not entitled to a weight and influence primary in order or superior

in effect. It should stand upon the same footing with other natural objects called for, and should be considered in connection with them in deciding upon the true *termini* of the land in question.

It will be seen, by reference to the statement of the case, that the conveyance to Aaron Patton, under which the defendant claims, calls for a beginning at the southeast corner of a grant for 50 acres to Robert Patton, and the second instruction asked for below was, in substance, no matter where the southeast corner of the 50-acre grant in truth is, if at the time Robert Patton made his conveyance to Aaron he supposed it to be at the letter I (see diagram), that should be regarded as the beginning, and the land laid down accordingly.

Such instruction would imply that the termini of the land, as indicated by the words of the conveyance, might be controlled or varied by the intentions of the bargainor, and as such intentions must, of course, be derived from evidence *dehors* the deed, the implication is that a deed may be varied by parol, and the tenure of land depend upon unassisted memory.

The case seems to be a plain one, the beginning and second corner of the 50-acre grant to Robert Patton, under which plaintiff's claims are established, and its entire location is mathematically certain.
The deed from Robert to Aaron Patton, under whom the defend- (606) ant claims, being at the southeast corner of the 50-acre patent, *according to* the calls of the deed, and in the absence of any proof that it was actually located otherwise, *there* it must begin in fact, and be run according to its calls.

The statement of the case concedes that a beginning at the southeast corner of the 50-acre patent, according to any running, would not enable the defendant to cover the *locus in quo* with his deed, and he would, therefore, be a trespasser.

The judge's charge is in conformity with these general principles.

PER CURIAM. No error.

Cited: Gainey v. Hays, 63 N. C., 498; *Mizell v. Simmons,* 79 N. C., 193; *Deaver v. Jones,* 119 N. C., 600; *Lumber Co. v. Lumber Co.,* 169 N. C., 95.

JAMES P. FOSTER TO THE USE OF H. D. CARRIER v. COLUMBUS MILLS.

Where A. promised, in writing, to pay a sum certain, "after deducting a bill of expenses that B. has against A. & Co.," it was *Held* that the proper inquiry was whether B. had a ground of charge against A. & Co. for expenses and the amount thereof, and not whether B. intended to make a charge against A. (his brother) when the expenses were incurred.

ASSUMPSIT, tried before *Heath, J.*, at last Spring Term of RUTHERFORD.

The plaintiff declared on the following instrument of writing:

Six months after date, I promise to pay James P. Foster, or bearer, $473, for value received of him; after deducting the bill of expenses that Govan Mills has against Columbus Mills and James P. Foster & Co.

20 December, '53. COLUMBUS MILLS.

(607) The plaintiff proved the defendant's signature and rested the case.

The defendant proved by his brother, Govan Mills, that he, witness, was selling slaves in the Southwest in 1852; that he went to Columbus, Mississippi, and there met the defendant with some fifteen slaves, and finding them badly clad he bought and with his own means paid for clothing for them to the amount of $80, at the defendant's request. Witness took charge of the slaves for sale, and sold them—some for cash and some on a credit, and handed over the money and notes to the defendant; and that in further prosecution of the business he incurred a bill of expenses amounting, in all, to $375, including the $80 already stated; that there was no agreement between his brother and himself about these expenditures, but that they were all necessary to the business of making a favorable sale of the slaves; that he supposed at the time he was doing all this for the defendant, against whom he kept no account, and did not intend at the time to charge him for these expenditures and services. Witness admitted (no objection being made) that he told Carrier before he bought the note that he had no bill of expenses to be deducted therefrom, and repeated on this examination that he had no bill of expenses or account. He further proved that the plaintiff Foster was also at Columbus when he furnished the clothing; that he went along and assisted in the sale of the slaves; that he did not then know that Foster had any interest in the slaves, but afterwards learned from him that he had an interest in two of them. There was no other proof of a copartnership.

Upon this state of facts the judge charged the jury that the plaintiff was entitled to recover the principal and interest of his claim against the defendant, less the amount of expenses which Govan Mills had

against Columbus Mills and James P. Foster & Co., provided James P. Foster and the defendant constituted the firm, and there were such expenses incurred and outstanding; that if they believed there was such a firm, and these expenses were made by Govan Mills, and were outstanding at the making of the instrument, the defendant was entitled to a deduction to that amount, and it was for them to ascertain such (608) amount. The plaintiff excepted.

Verdict for the plaintiff for the note and interest, deducting $375 on account of the expenses therein referred to. Judgment, and appeal by plaintiff.

W. M. Shipp and A. S. Merrimon for plaintiff.
B. S. Gaither, Dickson, and Avery for defendant.

MANLY, J. The instrument upon which this action has been brought was rightly construed, as we think, in the court below.

Some such relation as copartners or part owners, of a portion of the negroes at least, subsisted between the parties. But to what property it applied, or in what proportions they were respectively interested, it is not material, as it seems to us, to inquire. The terms of the note are to pay the sum mentioned in its face, "after deducting the bill of expenses that Govan Mills has against Columbus Mills and James P. Foster & Co.," and the proper construction of these terms is that they amount only to a promise to pay the balance after deducting such expenses as may have been incurred by Govan Mills for Columbus Mills and James P. Foster & Co.

We do not think it pertinent to the true issue between the parties to inquire whether a bill or charge of these expenses was made against any one. The expenses were incurred, and the amount is susceptible of proof, and there is no assumpsit to pay a cent beyond the balance.

Upon the supposition that Govan Mills intended to make a present to his brother, as he intended no such thing to the plaintiff, the only way in which his purpose can be carried into effect is by deducting the sum of expenses from the note; otherwise the expenditure would inure to the benefit of Foster as well as Mills. But all this we think immaterial. The parties must stand or fall by the contract, and that is, we have already said, to pay the balance after deducting expenses.

What occurred between Govan and Carrier has, as we conceive, (609) no bearing upon the issue.

The substance of the charge below was in conformity with this view of the case. There is

PER CURIAM. No error.

DOE ON THE DEMISE OF J. M. CARSON v. JEREMIAH RAY.

"My house and lot in the town of Jefferson, in Ashe County, North Carolina," the grantor having a house and lot, and only one, in that town, was *Held* to be a sufficient description of the premises to pass them by deed.

EJECTMENT, tried before *Heath, J.*, at last Fall Term of ASHE.

The lessor of the plaintiff claimed title under a judgment and execution against one Long, and a sheriff's sale and deed made thereon, all of which, with the defendant's possession, were admitted.

The defendant claimed title, and gave in evidence a deed to him from the said Long for the premises, for a full and valuable consideration, in which the premises are described as follows, to wit: "My house and lot in the town of Jefferson, in Ashe County, North Carolina." The deed bore date and was executed prior to the teste of the execution under which the lessor of the plaintiff claimed. At the time the said deed was executed, Long, the bargainor, had a fee-simple right to this house and lot in the said town of Jackson, and there was no evidence that he owned any other house and lot therein, nor was it so alleged.

It was contended that the defendant's deed was void for uncertainty in the description of the premises, and that no title passed thereby, which was the only question debated between the counsel of the parties. A verdict was, by consent, rendered for the plaintiff, subject to the (610) opinion of the court on the question of law raised in the case, with leave for him to set aside and enter a nonsuit in case he should be of opinion against the plaintiff. Subsequently, on consideration of the question reserved, his Honor ordered the plaintiff to be nonsuited.

Nat. Boyden for plaintiff.
Crumpler for defendant.

BATTLE, J. We agree with his Honor who tried the cause, that the description of the house and lot contained in the deed under which the defendant claimed was sufficiently certain to identify and convey the property. The terms, "my house and lot in the town of Jefferson," if contained in a will, would undoubtedly be sufficient to pass the testator's house and lot, in the absence of any proof to show that he had more than one. Thus it was held in a strongly analagous case that a bequest of "my twenty-five shares of bank stock," when the testator had just that number of shares, was a specific legacy, while a designation of them as simply "twenty-five shares of stock," without the prefix of the word "my," was a general legacy. *Kinsey v. Rhem,* 24 N. C., 192. If, then, such a de-

scription would be sufficiently certain in a will, we cannot perceive any reason why it should not be so in a deed, as, in both instruments, the only requisite as to the certainty of the thing described is that there shall be no patent ambiguity in the description by which it is designated.

A house and lot, or *one* house and lot, in a particular town, would not do, because too indefinite on the face of the instrument itself. See *Plummer v. Owens,* 45 N. C., 254; *Murdock v. Anderson,* 57 N. C., 77. But "my house and lot" imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and, upon the face of the instrument, is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good. Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he (611) had more than one; so that there is no patent ambiguity; and if it be shown that he has more than one, it must be by extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof. It is true that in the case of the latter kind of ambiguity the extrinsic proof may turn out to be insufficient to remove the uncertainty thus raised, and the grant or devise may fail on that account; but that is very different from the case of a patent ambiguity, which is always a question for the court, and in which the court must see that the subject-matter of the grant or devise is so uncertain that there is nothing described to which any proof can apply. *Edmundson v. Hooks,* 33 N. C., 373, to which we have been referred by the plaintiff's counsel, furnishes an apt illustration. In that case it appeared that the sheriff held several executions against John Hooks and others: one against John Hooks alone, and one against John Hooks and one Woodard. The sheriff's deed recited all these executions; a levy upon "the defendant's lot at Nahanta Depot"; a sale; and thereupon conveyed "the lots levied on" to the lessor of the plaintiff. The court very properly held it to be a case of patent ambiguity, and that the description of the lots intended to be conveyed was too uncertain to be good. "Were the lots those of John Hooks alone, or one of the other defendants in the execution, or were they the joint property of all?" There was undoubtedly an uncertainty as to whose property the lots were, which was apparent upon the face of the deed itself, and of course the court was obliged to say that the description was void for the uncertainty. Had John Hooks been the only defendant in the execution, then the description of "the defendant's lots at Nahanta" would have pointed to something definite, to wit, John Hook's lots at that place, and the decision would have been different.

PER CURIAM. Affirmed.

Cited: Robeson v. Lewis, 64 N. C., 737; *Henly v. Wilson,* 81 N. C., 409; *Farmer v. Batts,* 83 N. C., 389; *Blow v. Vaughan,* 105 N. C., 205; *Euliss v. McAdams,* 108 N. C., 511; *Lowe v. Harris,* 112 N. C., 478; *Farthing v. Rochelle,* 131 N. C., 564; *Rodman v. Robinson,* 134 N. C., 515; *Janney v. Robbins,* 141 N. C., 403; *Bateman v. Hopkins,* 157 N. C., 472; *Pate v. Lumber Co.,* 165 N. C., 187; *Speed v. Perry,* 167 N. C., 126.

(612)

ELIZABETH JENKINS v. MITCHELL MAXWELL.

1. A codicil should be so construed as only to interfere with the dispositions made in the will, to the extent necessary to give full effect to the codicil.
2. Where, therefore, a testator gave, in the body of his will, a fee simple in a tract of land to A., and by a codicil ordered the land to be sold by his executor and the proceeds divided among other persons than A., it was *Held* that until the exercise of the power of sale by the executor the legal estate remained in A., the legatee mentioned in the body of the will.

TRESPASS Q. C. F., tried before *Osborne, J.,* at last Spring Term of ASHE.

Sidney Maxwell, by his last will and testament, duly executed and admitted to probate, devised the land embracing the *locus in quo,* and some personal property, to his grandson, Calvin J. Jenkins, in full estate. Afterwards he made a codicil in which he devised as follows: "And, inasmuch as my grandson, Calvin J. Jenkins, has left me and no longer attends to my domestic concerns, . . . I do, by this codicil, . . . direct that all my lands, wherever situated, . . . heretofore devised and bequeathed to my grandson, Calvin J. Jenkins, his heirs and assigns; also all my stock, etc., be sold by my executor to the highest bidder, and the proceeds arising from the sale of said lands to be equally divided, share and share alike, between my wife, Catharine, and children (mentioning six by name), instead as heretofore directed."

The testator had also, by the body of his will, given land in fee to one of his sons, Larkin Maxwell, and by the same codicil, which is partly above recited, he continues: "Also that tract of land heretofore devised to my son, Larkin Maxwell, his heirs and assigns, whereupon he now resides, to be sold as above mentioned, and the proceeds to be equally divided, share and share alike, among my wife and children, as above mentioned, instead as heretofore directed."

The plaintiff is one of the heirs at law of Sidney Maxwell, and the act complained of (cutting timber) was done on that part of the land devised in the body of the will to Calvin J. Jenkins, between the death of

Sidney Maxwell and the sale of the premises by the executor—no person being actually living on the land at the time.

The defendant pleaded a license, and proved that Sidney Max- (613) well in his lifetime had given defendant leave to cut timber on this land.

By consent of parties a verdict was rendered for the plaintiff for a penny, subject to the opinion of the court on the whole case, as to the plaintiff's right to recover, with authority to set aside the verdict and enter a nonsuit if the court should be of opinion against the plaintiff.

Afterwards the court gave judgment for the plaintiff, and the defendant appealed.

Lenoir for plaintiff.
Crumpler for defendant.

PEARSON, C. J. The opinion of his Honor is predicated on the idea that the will was revoked *in toto,* in respect to the land devised to Calvin Jenkins, by the codicil. If so, it followed, as the codicil gives to the executor a mere "naked power to sell," that the land descended to the heirs at law as intestate property, subject to be divested by the exercise of the power of sale, and, consequently, one of the heirs at law, there being no plea in abatement, could maintain trespass against a wrong-doer, as the defendant evidently was (for the license to cut timber being merely gratuitous, terminated at the death of Sidney Maxwell), for a trespass committed between the time of the death and the sale made by the executor. So the case turns on the question, Was the will revoked *in toto* in respect to the land devised to Calvin Jenkins? or, Was the effect of the codicil only to revoke the will *sub modo,* and leave the estate in Calvin Jenkins, subject to be divested by the exercise of the power of sale?

Upon this question the opinion of this Court differs from that of his Honor. The definition and effect of a codicil, and the learning on the subject, is so fully set out in an opinion filed at the last term in Raleigh, in *Dalton v. Houston,* 58 N. C., 401, that it is deemed unnecessary to enter upon the subject again. Suffice it that the principle (614) is settled, *i.e.,* a codicil should be so construed as only to interfere with the dispositions made in the will to the extent necessary to give full effect to the codicil. In our case full effect is given to the codicil by allowing the land to pass to the devisee, subject to be divested by the exercise of the power of sale created by the codicil, and there is no occasion or necessity for supposing the intention of the testator was to revoke his will *in toto,* so far as this land was concerned, so as to let is descend to his heirs at law as undisposed of property.

The testator had changed his mind, and instead of giving the land and other property to Calvin Jenkins, *absolutely,* by the codicil he directs that it shall be sold by his executor and the proceeds divided among particular persons. But what is there to show that he intended to die intestate as to his property, and that it should devolve on his heirs at law and next of kin according to the statute of distributions, until the executor should sell, and not pass to the devisee and legatee, Calvin Jenkins, during that *interim?* He gives a reason for changing his mind, and for not making an absolute gift to Calvin Jenkins, as he had done by his will, all of which is comprised in the words, *the property to be sold and the proceeds to be divided* as above mentioned, *instead as heretofore directed*—that is, instead of being given to Calvin Jenkins absolutely; so, *non sequitur,* that it shall be intestate and undisposed of during the interim.

This conclusion is supported by the fact that in the same codicil he directs a tract of land devised to his son, Larkin Maxwell, "whereon he now resides," to be sold "as above mentioned" and the proceeds divided "as above mentioned," "instead as heretofore directed," and there is no motive or occasion or reason for interfering with Larkin's possession until the power of sale should be exercised whereby the title would be divested.

There is error, and on the case agreed the judgment must be reversed, and judgment given for the defendant.

PER CURIAM. Reversed.

(615)

EDWIN C. BARTLETT TO THE USE OF J. PHILLIPS v. JESSE YATES ET AL.

The parol assignment of a judgment constitutes the assignee an agent for the plaintiff, and a payment to such agent is a discharge of the judgment.

SCIRE FACIAS to revive a judgment, tried before *Osborne, J.,* at last Spring Term of ASHE.

. . . Murchison held a note on defendant Yates for $133, and transferred the same by endorsement to the plaintiff Bartlett, as the price of some lots in the town of Jefferson. Bartlett sued both Yates and Murchison, and obtained, in 1852, the judgment sought to be renewed by this *sci. fa.* Shortly after the rendition of this judgment Bartlett and Murchison rescinded the bargain as to the lots, and the plaintiff acknowledged the judgment satisfied to him by Murchison. Plea, payment.

The defendant offered a paper purporting to be a receipt from Murchison to Yates, dated 10 August, 1856, in full satisfaction of the debt.

The evidence was objected to and ruled out, for which the defendant excepted.

Subsequently, to wit, in the fall of 1857, the judgment was transferred to Phillips, and there was evidence that about that time Yates acknowledged that he owed the judgment.

Verdict for plaintiff. Judgment and appeal.

Nat. Boyden and Crumpler for plaintiff.
W. M. Barber for defendant.

BATTLE, J. The ground upon which the testimony which was offered to prove a receipt in full of the judgment by Murchison from the defendant Yates, in August, 1856, was rejected, is not stated, and we cannot perceive any good reason why it was not admissible. At that time Murchison had become the equitable owner of the judgment, and as such had the right to receive payment of it. That he had become the equitable owner of the judgment, and had thereby acquired the right to have payment from the defendant Yates, cannot be questioned. He was the payee of the note, and had passed it to the plaintiff (616) Bartlett by endorsement, as the price of certain lots which he had purchased from Bartlett, and when that trade was canceled, Bartlett assigned to him by parol the judgment which he had obtained against both the maker and endorser of the note. The assignment could not pass the legal title to the judgment, but it is obvious that in equity Murchison was entitled to the benefit of it as against Yates. It is certain, then, that a payment of it to him by Yates would be good, the equitable assignment having, at least, the effect to constitute him the agent of the assignor to receive it. Why, then, could not such payment be alleged and proved in bar of a recovery, either in an action of debt on the judgment or in a *scire facias* to revive it? In the present case the alleged payment, of which proof was offered, was made more than twelve months before the judgment was assigned to Phillips, for whose use the suit was brought. We think that the testimony was competent for the purpose for which it was offered, and that the court erred in rejecting it.

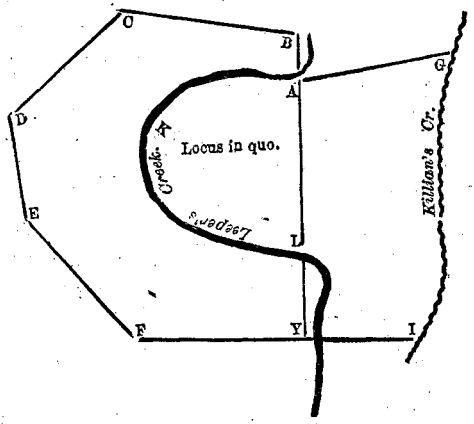
PER CURIAM. *Venire de novo.*

DAVID F. EDDLEMAN v. ANDREW CARPENTER.

Where A. conveyed to B. a parcel of land, to which he had no title, but afterwards obtained a deed in fee for the same, and took actual possession of it, which he held adversely to all the world for seven years, it was *Held* that the right which B. had by estoppel to enter was tolled by this long possession of it under color of title.

TRESPASS Q. C. F., tried before *Manly, J.*, at Fall Term, 1858, of GASTON.

(617) Peter Eddleman was the owner of a parcel of land on the west side of Leeper's Creek (see diagram), which he, in 1832, conveyed to Jacob Forney, and he, in 1835, to the defendant Carpenter. These conveyances described the boundaries of the land as beginning at a point on the creek marked A, then running around and back to the creek at Y, "thence to the beginning." At the time of these conveyances, in 1832 and 1835, Peter Eddleman was not the owner of any portion of the land on the east side of Leeper's Creek, but in 1838 he acquired from one Abernathy a title to the whole of that represented by the figure A, K, L, I, G.



It was proved that after the titles to Forney and Carpenter, in 1832 and 1835, they respectively claimed and used the land only on the west side of the creek, and that Peter Eddleman and the plaintiff, who claimed under him as heir at law, had claimed and used the land on the east side of Leeper's Creek from the date of the deed, in 1838, until 1856, when Carpenter entered and cut a ditch from A to L, for which this suit is brought. It was proved further on the part of the plaintiff that (618) Peter Eddleman had actually cleared the area, A, K, L, and he

and the plaintiff, claiming under him, had cultivated it and held it adversely to all others for more than seven years consecutively before the entry of Carpenter in 1856. The defendant contended that the conveyances of 1832 and 1835 embrace all the lands on the west side of a straight line from A to Y, and although, at the time, no title passed to any land on the east side of the creek, because the vendor had no title to convey, yet, upon the acquisition of title in 1838, it inured to the defendant's benefit as to all that part between the creek and the straight line A, Y, and that Peter Eddleman could not afterwards, by adverse possession under said deed of 1838, obtain a title to the disputed portion.

The court concurred with the defendant in his view of the construction of the conveyances of 1832 and 1835, and, furthermore, was of opinion with him that the title to the disputed land was in the defendant by estoppel against Peter Eddleman and his heirs after he acquired title in 1838.

But his Honor was further of opinion that if Peter Eddleman had occupied the disputed part for more than seven years continuously, cultivating the same under a claim of right to the whole of the land on the east side, through his deed of 1838, he acquired a right by possession. Instructions to this effect were delivered to the jury, and the defendant excepted.

Verdict for plaintiff. Judgment, and appeal by defendant.

Nat. Boyden and W. P. Bynum for plaintiff.
Lander and Avery for defendant.

PEARSON, C. J. We concur with his Honor on both points presented:

1. There is nothing to control the call of the deed executed by Peter Eddleman to Forney in 1832, and by Forney to Carpenter in 1835; that is, "to a stake on the bank of the creek, thence to the beginning," which is a *straight* line, and includes the *locus in quo,* and does (619) not run with the meanders of the creek; consequently those deeds (although such may not have been the intention of the parties) included the bend of the creek, and made an estoppel in respect to Peter Eddleman, although in 1832 he did not own the land. Afterwards, in 1838, when he acquired title by the deed of Abernathy to him, the "estoppel was fed," so as by the *act of law* to vest the title in Carpenter in the same manner as if Eddleman had owned the land in 1832.

2. But there is no principle of law which prevented him from afterwards divesting the title of Carpenter, thus perfected by estoppel, in the same way that any third person could have divested it and acquired the title; that is, by a disseizin and twenty years adverse possession, during

all which time he was exposed to the action of Carpenter; or by a color of title and seven years adverse possession, during which time he was in like manner exposed to the action of Carpenter, which, under our statute, would toll the right of entry and ripen his color of title into a good title; for, although he and all those claiming under him were estopped in respect to Forney and all claiming under him from denying that, in 1832, he owned the land in the bend of the creek, and then passed the title to Forney, yet he might well be heard to say: "I admit that I passed the land to you by my deed in 1832, but I have since acquired a new title by means of a *color of title and seven years adverse possession,* and although by act of law the title which I acquired from Abernathy in 1838 inured to your benefit, and went to feed the estoppel, still his deed to me was *color* of title, and my adverse possession of the land under it for more than seven years divested your title and gave me a new and distinct title, which then had no existence, and which, of course, I did not profess to pass to you by my deed of 1832. So, your right of entry has been tolled, and your title lost by matter *ex post facto.*"

This conclusion is fully sustained by *Johnson v. Fairlow,* 35 N. C., 84; *Reynolds v. Cathey,* 50 N. C., 437. There is

PER CURIAM. No error.

Cited: Weil v. Uzzle, 92 N. C., 518; *Cuthrell v. Hawkins,* 98 N. C., 206; *Zimmerman v. Robinson,* 114 N. C., 48; *Hallyburton v. Slagle,* 132 N. C., 950; *Weston v. Lumber Co.,* 162 N. C., 200; *Olds v. Cedar Works,* 173 N. C., 165.

(620)

SARAH HEAD v. WILLIAM HEAD.

1. A devise to the testator's wife, during her life, and then as follows: "It is my wish, my son W. should live with his mother, and after her death, then the part of my land above described to belong to my son W. and his heirs forever," was *Held* not to convey any present estate in the land to W.
2. Where one occupied land and claimed the right to do so during such occupancy, and when the possession was demanded set up claim to the premises, it was *Held* that he could not be permitted to insist on the privileges of a tenant from year to year.

EJECTMENT, tried before *Osborne, J.,* at last Spring Term, of ALEXANDER.

The lessor of the plaintiff claimed title to the land in controversy under the will of her husband, James Head, of which the following is the only clause material to be recited.

"I will that my beloved wife, Sally, shall have the part of the land on which I live, being the part that formerly belonged to Arnold Bruce, and which I purchased from John Bowles, during her natural life or widowhood. It is my wish and will that my son William should live with his mother, and after her death or marriage, then the part of the land above described to belong to my son William and his heirs forever."

The defendant was living in the dwelling-house with his mother at his father's death, and continued so to reside after that event. After this he married and built him a dwelling on a part of the land described in the above recited clause, and had resided there a year or more before this suit was brought. A demand was made of the defendant for the possession of the premises two months before action brought, to which he replied that "he had lived there and intended to live there as long as he pleased; and that he had a right to be there."

The defendant proved that after this suit was brought he delivered plaintiff some corn, and that at one time before the commencement of the suit he and his wife were seen husking corn in the yard of the plaintiff's lessor, and from this evidence he contended that (621) he was a tenant from year to year and entitled to six months notice to quit, and requested the court so to instruct the jury. His Honor declined giving the instruction asked, but told the jury that if they believed the evidence, the plaintiff was entitled to their verdict. The defendant's counsel excepted.

Verdict for plaintiff. Judgment and appeal by defendant.

No counsel for plaintiff.
M. L. McCorkle and W. P. Caldwell for defendant.

PEARSON, C. J. Under the will of his father no legal right to the land is given to the defendant, and we feel at liberty to say no right *in rem* is given, either at law or *in equity*. So the defendant has no ground to stand on, and must appeal to his mother's sense of justice in regard to the imperfect right growing out of the will, in which the testator expresses a wish that his "son William should live with his mother," which expression implies much, taking into consideration the connection of the parties, but does not confer any right which can be enforced in a court of law or which authorizes the defendant to refuse to give up possession of the part of the land for which he issued.

The ground taken by the counsel of the defendant, that he had become a tenant "from year to year," and was entitled to *six months notice to quit* before he could be sued in ejectment, cannot avail him, because he disavowed the relation of "landlord and tenant" not only at the time

when he built the house and set up exclusive claim to the part he was cultivating, but also at the time of the demand, and one is not allowed to blow *hot and cold* in the same breath; *i. e.*, if he disallows the relation, he cannot afterwards claim the privileges of a tenant.

The evidence in respect to some corn which the defendant delivered to the plaintiff's lessor (on what account does not appear), and
(622) that he and his wife husked some, was not so connected with the relation of the parties as to be entitled to any weight. There is

PER CURIAM. No error.

Cited: Vincent v. Corbin, 85 N. C., 112; *Waddell v. Swann,* 91 N. C., 112; *McQueen v. Smith,* 118 N. C., 571.

J. M. WRIGHT v. J. AND E. B. STOWE.

This court cannot proceed to judgment without an inspection of the whole record. Where, therefore, in a proceeding to recover damages for ponding water back on plaintiff's land, by agreement of counsel only so much of the record was sent up as was "necessary to present the points in issue," this Court refused to give judgment.

PETITION to recover damages for overflowing plaintiff's land, tried before *Heath, J.,* at last term of CATAWBA.

The jury gave for several successive years less than $5, whereupon the judge ordered that no more costs than damages should be recovered, from which the plaintiff appealed.

In the court below it was agreed by the counsel on both sides that "the clerk need not copy the whole record in this case, but only enough to present the points in issue," and he did not make a full record, but only sent a representation of the substance of the petition, etc., and a brief history of the trial.

Boyden and Bynum for plaintiff.
Thompson, Lander, Avery, and McCorkle for defendant.

PEARSON, C. J. There is no error in the order made in the court below on the question of costs. The provision of the statute is in express terms, and the order is in pursuance thereto. So, we presume, the appeal was taken in this case, as has been done in many
(623) other cases of appeal, to the Morganton term, which is only held once a year, merely for the sake of delay.

The *final* judgment which this Court is authorized to render in "civil cases" is to be made "on inspection of the whole record." The transcript filed does not purport to set out the whole record, "but only enough to present the points in issue."

This *shorthand* way of getting the opinion of the Supreme Court on a point of law, without much expense to either party, cannot be tolerated; and as the whole record is not before us, we can give no judgment until a full exemplification of the record is filed.

PER CURIAM. Affirmed.

H. L. F. HENDERSON v. DAVID CROUSE.

1. Declarations of a slave that he is suffering from pain and disease are admissible evidence.
2. Where a party became interested in a covenant of warranty of a slave, by purchasing an interest in the slave, and had such interest at the time the suit was brought, but sold it to the plaintiff previously to the examination, it was *Held* that he was competent as a witness for the plaintiff.
3. It is certainly not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative.

CASE, on a warranty of the soundness of a slave, tried before *Heath, J.*, at last Fall Term of LINCOLN.

To prove that the slave in question was unsound at the time of the warranty (June, 1858), the plaintiff offered evidence of the acts and declarations of the slave before, at, and after the sale, which, if believed, tended to show that he had chronic rheumatism at the time.

The defendant's counsel objected to these declarations as orig- (624) inal evidence of unsoundness. He contended that unsoundness must first be shown by evidence *aliunde*, and the slave's declarations then became evidence as to the extent of the ailment and in no otherwise. The presiding judge overruled the objection, and defendant excepted.

The plaintiff offered the deposition of one Henderson to show that the slave was unsound on the day of the sale. In the deposition the defendant interrogated the witness as to whether he had any interest in the slave, to which he answered that at the time the suit was brought he in part owned the said slave, but that prior to giving his deposition he had sold his interest to the plaintiff, and at that time had no interest in him whatever. The deposition was admitted, and the defendant again excepted.

The judge, in his instructions to the jury, stated that the plaintiff had adduced evidence going to show that the slave had been seen limping on crutches, and was heard to complain, while so on crutches and limping, and at other times, of pains in his limbs; that this evidence was, in its nature, positive; while the defendant had introduced many witnesses who knew the slave, and who swore that they considered him sound and healthy, and had never seen him or known him to be on crutches or to limp, or to be sick, unhealthy or unsound; that this was negative in its character, and that *positive* testimony was entitled to more weight than *negative*. The defendant again excepted.

Verdict for plaintiff. Judgment, and appeal by defendant.

Lander and Avery for plaintiff.
B. S. Gaither for defendant.

MANLY, J. Three exceptions were taken on the trial below to the ruling of the court, no one of which, we think, is sustainable. Declarations of a slave that he is suffering from pain and disease are (625) admissible according to a well established rule in this State. They have been assimilated to the natural cries of distress which proceed from animals when in pain. Both are considered as evidential facts of greater or less weight, according to circumstances. Such matters of evidence would be greatly strengthened by corresponding external appearances, but are not dependent upon them. It is the privilege of the jury to have them and weigh them. The last case that has been before the Court in which this doctrine is propounded is *Wallace v. McIntosh,* 49 N. C., 434, where the previous cases are fully referred to and commented upon. The point in regard to the interest of the witness is clear. The interest which renders a witness incompetent is one in the result of the suit. The case states the witness had an interest at the time of bringing the suit, but none at the time of the trial. And this is conclusive of the question of competency. It is not stated that witness was interested in the original purchase, and we take it for granted he was not. The subsequent purchase of an interest in the slave gave him an interest in the covenant of warranty. Such a covenant is entirely personal, and does not attach to and follow the slave in the hands of a subsequent owner, giving him a right of action upon it. The instructions of the court as to the relative weight of positive and negative testimony is far from error. The rule as laid down has been long established and followed. That there is a difference, and that the positive is entitled to more weight than the negative, is not only an accepted legal maxim, but is founded, as we think, in truth and

justice. The amount of difference the court did undertake to decide, and could not, as it was a question for the jury. In all cases the force of testimony, whether positive or negative, must depend upon a variety of collateral facts and circumstances. For instance, the force of negative testimony must, manifestly, depend upon the opportunities of observation afforded to the witness. These opportunities might be so favorable and frequent as to approach in weight to a positive statement; yet, we take it, when the positive is in conflict with negative, under any ordinary circumstances, the witnesses being equally credible, the former should preponderate. Negative, assuredly, may be (626) accumulated from different quarters and under circumstances countervail entirely positive testimony, but this is not the question. The question made is whether it be correct to declare, as a naked proposition of law, stripped of matter that may affect the *weight* of either, that positive testimony is entitled to *more* weight than negative. There is

PER CURIAM. No error.

Cited: Reeves v. Poindexter, 53 N. C., 311; *S. v. Horan,* 61 N. C., 575; *S. v. Harris,* 63 N. C., 6; *Smith v. McIlwaine,* 70 N. C., 289; *S. v. Cambell,* 76 N. C., 263; *S. v. Gardner,* 94 N. C., 957; *Cawfield v. R. R.,* 111 N. C., 601; *Purnell v. R. R.,* 122 N. C., 837; *S. v. Murray,* 139 N. C., 541.

W. W. AND THOMAS LONG, TRUSTEES, v. GEORGE W. WEAVER.

It is held to be error to admit parol evidence to impeach an entry of a magistrate, allowing ten days for a party to give security for an appeal from his judgment, showing that such entry was made without an affidavit that he was then unprepared with security.

APPEAL from a justice's judgment, which came before *Heath, J.,* at last term of IREDELL, upon a motion to dismiss.

The proceedings of the magistrate showed a regular judgment against the plaintiff, an entry below such judgment that the plaintiff prayed an appeal to the Superior Court, and craved ten days to give security, and a regular appeal on security given within the ten days. The defendant moved in the Superior Court to dismiss the appeal on the ground that when the above entry was made no affidavit was made by the plaintiff that he was not then prepared with his security.

The defendant then introduced the justice of the peace before whom the warrant was tried who stated that the plaintiff and defendant were both present at the trial; that when the ten days were asked for by the

plaintiff nothing was said by him, or either party, about an affidavit, and that he did not himself know that an affidavit was required
(627) by law; that the defendant said nothing about it. This evidence was objected to by the plaintiff, but admitted by the court.

Whereupon his Honor dismissed the appeal, and plaintiff appealed.

W. P. Caldwell for plaintiff.
W. M. Barber for defendant.

MANLY, J. The proceedings by which this case was carried into the Superior Court from the justice's judgment appeared upon their face to have been regular. It is only through the oral testimony, derived from the justice himself, that we learn there was no affidavit made by the appellant to obtain time to put in security for the appeal. The resort to such testimony to impeach the justice's proceedings in respect to a matter of that kind, we think, is irregular. Proof *dehors* the proceedings as recorded may be introduced to contest the genuineness of the justice's signature—to show an interpolation or forgery, or to show that it was done by the justice out of his county, where he had no jurisdiction; but it is inadmissible, we take it, to destroy the effect of the justice's conclusions and judgment by showing that some formality prescribed by law has not been complied with, as, upon a question of judgment or no judgment, that the witnesses were not sworn, or, upon a question of time to appeal, that no affidavit was exacted.

This is in accordance with, and not opposed to, the principle laid down in *Carroll v. McGee,* 25 N. C., 13, in which a well established principle is reaffirmed—that proceedings before a single justice are not records *proper,* proving themselves upon production, but *like* records in the conclusiveness of their effects upon the parties.

Omnia presumuntur rite esse acta, all things are presumed to be done rightly in judicial proceedings, if there be nothing apparent upon the recorded matter to show the contrary. This presumption is not one of *fact* to be rebutted by oral proofs, but is one of *law,* and con-
(628) clusive upon the parties. Any other rule, it seems to us, would cause the proceedings of our justices' courts to be as unstable as the varying memories of men. We conclude, therefore, it was erroneous to go behind the judgment of the justice upon the matter of plaintiff's right of appeal, and show by oral testimony that something was not done which ought to have been done, to justify that judgment. There is nothing on the face of the papers to show the conclusions of the magistrate erroneous, or that they were based upon defective or improper proof, and neither the justice himself nor any one else, can be

heard, in that condition of the record evidence, to impeach the conclusions therein stated.

The judgment dismissing the appeal will be reversed, and the case proceeded in according to law.

PER CURIAM. Reversed.

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C. W. HAMMERSKOLD v. WILLIAM E. ROSE.

The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this State.

MOTION to cancel a bail bond, discharge the bail, and dismiss the suit, heard before *Heath, J.*, at Fall Term, 1859, of LINCOLN.

The plaintiff had sued the defendant to Catawba Superior Court and recovered a judgment at Fall Term, 1859, of that court. During the continuance of that term the plaintiff caused the writ in this case to be issued, and the defendant, on his way to his home in Yorkville, South Carolina, was arrested thereon, and the bail bond, which is returned to this term, was taken. The defendant moved to have the bail bond canceled and the suit dismissed.

The court sustained the motion, and plaintiff appealed.

Boyden, Lander, and Avery for plaintiff.
No counsel for defendant.

PEARSON, C. J. We can see no ground to support the position that the principle of the common law, by which a suitor, while going to, remaining at, and returning from court, is exempted from arrest, is not in force in this State.

The suggestion that our statutes, which, *in express terms,* exempt *witnesses* from arrest, have the effect, by implication, to abrogate the rule of common law in regard to *suitors,* has no force. Those statutes were passed in order to regulate the mileage which witnesses were entitled to charge, and to embrace within the principle of the common law witnesses who were required to attend before *arbitrators* and *commissioners* to take depositions, for the protection of whom the principle of the common law was extended, and the general expression, which embraces all witnesses, so far from showing an in- (630) tention to abrogate the common law in regard to suitors, if implication could be resorted to, shows an intention to extend, instead of abrogating, the principle which had been adopted at the common law in reference to all persons whose presence was required at court.

PER CURIAM. Affirmed.

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